

THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XLII.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS
BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XLII.

*SMALL HOLDINGS, SMALL
DWELLINGS, AND ALLOT-
MENTS.
SOLICITORS.
SPECIFIC PERFORMANCE.
STATUTES.
STOCK EXCHANGE.*

*STREET AND AERIAL TRAFFIC.
TELEGRAPHS AND TELEPHONES.
THEATRES AND OTHER PLACES
OF ENTERTAINMENT.
TIME.
TORT.*

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeal Reports, 27 vols., 1876—1900	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. R. A.	Butterworths' Rating Appeals, 2 vols., 1913—1925	Eng.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Bald. . . . .	... Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. . . . .	... Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—	Ir.
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. . . . .	... Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. . . . .	... Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. . . . .	... Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. . . . .	... Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes . . . . .	... Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. . . . .	... Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. . . . .	... Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav. . . . .	... Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. . . . .	... Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw. . . . .	... Beawes's Lex Mercatoria	Eng.
Bell, C. C. . . . .	... T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—	Scot.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. . . . .	... S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe . . . . .	... Bellewe's Cases temp. Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. . . . .	... Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Benl. . . . .	... Benloc's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Ber. . . . .	... Benloc's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Bing. . . . .	... New Brunswick Reports (Berton)	Can.
Bing. N. C. . . . .	... Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Biss. & Sm. . . . .	... Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Bitt. Prac. Cas.	... Bisset and Smith's Digest	S. Af.
Bitt. Rep. in Ch.	... Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bl. Com. . . . .	... Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. D. & Osb. . . . .	... Blackstone's Commentaries	Eng.
Bli. N. S. . . . .	... Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bluett . . . . .	... Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bom. . . . .	... Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	I. of M.
Bom. A. C. . . . .	... Bluett's Isle of Man Cases	Ind.
Bom. Cr. Ca. . . . .	... Bombay High Court Reports	Ind.
Bom. O. C. . . . .	... Bombay Reports, Appellate Jurisdiction	Ind.
Bos. & P. . . . .	... Bombay Reports, Crown Cases	Ind.
Bos. & P. N. R.	... Bombay Reports, Original Civil Jurisdiction	Eng.
Bott. . . . .	... Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804—1807	Eng.
Bourke . . . . .	... Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Br. & Col. Pr. Cas.	... Bourke's Reports	Ind.
Bract. . . . .	... British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bro. Abr. . . . .	... Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. C. C. . . . .	... Sir R. Brooke's Abridgement	Eng.
Bro. Ecc. Rep. . . . .	... W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. N. C. . . . .	... W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. Parl. Cas. . . . .	... Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Supp. to Mor.	... J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Synop. . . . .	... M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Brod. & Bing. . . . .	... M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & F. . . . .	... Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819	Eng.
Broun . . . . .	... Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Brown. & Lush.	... Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brownl. . . . .	... Browning and Lushington's Reports, Admiralty, 1 vol., 1803—	Eng.
Bruce . . . . .	... Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
	... Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

Buch. ...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1808—1879 ...	S. Af.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape) ...	S. Af.
Buchan. ...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813 ...	Scot.
Buck ...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820 ...	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772) ...	Eng.
Bulst. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741 ...	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772 ...	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell ...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1810	Eng.
C. A. ...	Court of Appeal Reports, 3 vols., 1867—1877 ...	N.Z.
C. & .	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856 ...	Eng.
C. B.	Common Bench Reports, New Series, 20 vols., 1856—1865 ...	Eng.
C. C. Ct. Cas. ...	Canadian Bankruptcy Reports Annotated, 1920—(current) ...	Can.
C. L. Ch. ...	Central Criminal Court Cases (Sessions Papers), 1834—1913 ...	Eng.
C. L. J. ...	Common Law Chambers ...	Can.
C. L. J. N. S. ...	Cape Law Journal ...	S. Af.
C. L. J. O. S.	Canada Law Journal, New Series, 1865—(current) ...	Can.
C. L. R. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
C. L. R. ...	Common Law Reports, 3 vols., 1853—1855 ...	Eng.
C. L. T. ...	Commonwealth Law Reports ...	Aus.
C. L. T. Occ. N.	Calcutta Law Reporter ...	Ind.
C. P. ...	Canadian Law Times ...	Can.
C. P. D. ...	Canadian Law Times, Occasional Notes ...	Can.
C. P. D. ...	Upper Canada Common Pleas ...	Can.
C. R. [date] A. C.	Law Reports, Common Pleas Division, 5 vols., 1875—1880 ...	Eng.
C. T. R. ...	Cape Provincial Division Reports ...	S. Af.
C. W. N....	Canadian Reports, Appeal Cases ...	Can.
Cab. & El. ...	Cape Times Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785 ...	Eng.
Cam. Cas. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618 ...	Eng.
Cam. Prac. ...	Cameron's Supreme Court Cases ...	Can.
Camp. ...	Cameron's Supreme Court Practice ...	Can.
Can. Com. Cas. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816 ...	Eng.
Can. Crim. Cas.	Commercial Law Reports of Canada, 4 vols., 1901—1905 ...	Can.
Can. Gaz. ...	Canadian Criminal Cases, Annotated, 1898—(current) ...	Can.
Can. Ry. Cas. ...	Canadian Gazette ...	Can.
Car. & Kir. ...	Canadian Railway Cases ...	Can.
Car. & M. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. C. L. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—	Eng.
Card. Doc. Ann.	Carrington's Treatise on Criminal Law ...	Can.
Carl. ...	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716 ...	Eng.
Carp. Pat. Cas. ...	New Brunswick Reports (Carleton) ...	Can.
Cart. ...	Carpmael's Patent Cases, 2 vols., 1602—1842 ...	Eng.
Carth. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673 ...	Eng.
Cary ...	Cases on British North America Act (Cartwright) ...	Can.
Cas. in Ch. ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ...	Eng.
Cas. Pract. K. B.	Cary's Reports, Chancery, 1 vol. ...	Eng.
Cas. Sett. ...	Cases in Chancery, fol., 3 parts, 1660—1697 ...	Eng.
Cas. temp. Finch	Cases of Practice, King's Bench, 1 vol., 1655—1775 ...	Eng.
Cas. temp. King	Cases of Settlements and Removals, 1 vol., 1685—1727 ...	Eng.
Cas. temp. Talb.	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680 ...	Eng.
Cass. Dig. ...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733 ...	Eng.
Ch. (preceded by date)	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737 ...	Eng.
Ch. App. ...	Cassells' Digest ...	Can.
Ch. Cas. in Ch. ...	Law Reports, Chancery Division, since 1890 (<i>e.g.</i> , [1891] 1 Ch.)	Eng.
Ch. D. ...	Law Reports, Chancery Appeals, 10 vols., 1865—1875 ...	Eng.
Ch. Rob. ...	Choyce Cases in Chancery, 1557—1606 ...	Eng.
Char. Cham. Cas.	Upper Canada Chancery Chambers Reports ...	Can.
Char. Pr. Cas. ..	Law Reports, Chancery Division, 45 vols., 1875—1890 ...	Eng.
Chip.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
	Charley's Chamber Cases, 2 vols., 1875—1876 ...	Eng.
	Charley's New Practice Reports, 3 vols., 1875—1876 ...	Eng.
	New Brunswick Reports (Chipman) ...	Can.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Chit. ...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	
Cl. & Fin. ...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—	
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases ...	Eng.
Clay. ...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—	Can
	1650 ...	
Clif. & Rick. ...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ...	Cook's Lower Canada Admiralty Court Cases ...	Can.
Co. Ent. ...	Coke's Entries ...	Eng.
Co. Inst. ...	Coke's Institutes ...	Eng.
Co. L. J. ...	Colonial Law Journal ...	N.Z.
Co. Litt. ...	Coke on Littleton (1 Inst.) ...	Eng.
Co. Rep. ...	Coke's Reports, 13 parts, 1572—1616 ...	Eng.
Coch. ...	Nova Scotia Reports (Cochran) ...	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833 ...	Eng.
Coll. ...	Collyer's Reports, Chancery, 2 vols., 1844—1846 ...	Eng.
Coll. Jurid. ...	Collectanea Juridica, 2 vols. ...	Eng.
Colles ...	Colles' Cases in Parliament, 1 vol., 1697—1713 ...	Eng.
Colt. ...	Coltman's Registration Cases, 1 vol., 1879—1885 ...	Eng.
Com. ...	Comyns' Reports, King's Bench, Common Pleas, and Ex-	
	chequer, fol., 2 vols., 1695—1740 ...	Eng.
Com. Cas. ...	Commercial Cases, 1895—(current) ...	Eng.
Com. Dig. ...	Comyns' Digest ...	Eng.
Comb. ...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. ...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols.,	
	1841—1843 ...	Ir.
Cong. Dig. ...	Congdon's Digest ...	Can.
Const ...	Const's edition of Bott's Poor Laws, 3 vols., 1807 ...	
Cooke & Al. ...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol.,	
	1833—1834 ...	Ir
Cooke, Pr. Cas. ...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—	
	1742 ...	Eng.
Coop. G. ...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ...	Eng.
Coop. Pr. Cas. ...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough.	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—	
	1834 ...	Eng.
Coop. temp. Cott.	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—	
	1848 (and miscellaneous earlier cases) ...	Eng.
Cor. ...	Coryton's Reports ...	Ind.
Corb. & D. ...	Corbett and Daniell's Election Cases, 1 vol., 1819 ...	Eng.
Correspondances Jud.	Correspondances Judiciaires ...	Can.
Couper ...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
	Coutlees' Unreported Cases ...	Can.
Cout. Dig.	Coutlees' Digest ...	Can.
Cowp. ...	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ...	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current) ...	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ...	
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals,	
	1 vol., 1846—1852 ...	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current) ...	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols.,	
	—1835 ...	Eng.
Craw. & D. ...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ...	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850... ..	Eng.
Cro. Car. ...	Croke's Reports temp. Charles I., King's Bench and Common	
	Pleas, 1 vol., 1625—1641 ...	Eng.
Cro. Eliz. ...	Croke's Reports temp. Elizabeth, King's Bench and Common	
	Pleas, 1 vol., 1582—1603 ...	Eng.
Cro. Jac. ...	Croke's Reports temp. James I., King's Bench and Common	
	Pleas, 1 vol., 1603—1625 ...	Eng.
Cru. Dig. ...	Cruise's Digest of the Law of Real Property, 7 vols. ...	Eng.
Cunn. ...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt. ...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ...	Eng.
D. ...	Duxbury's Reports of the High Court of the South African	
	Republic ...	S. Af.
D. C. A. ...	Dorion's Queen's Bench Reports ...	Can.
D. L. R. ...	Dominion Law Reports ...	Can.

Dal.	...	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	Eng.
Dalr.	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	Scot.
Dan.	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	Eng.
Dan. & Ll.	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	Eng.
Dav. & Mcr.	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	...	Eng.
Dav. Ir.	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	...	Ir.
Dav. Pat. Cas.	...	Davies' Patent Cases, 1 vol., 1785—1816	...	Eng.
Day	...	Day's Election Cases, 1 vol., 1892—1893	...	Eng.
Dea. & Sw.	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	...	Eng.
Deac.	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	...	Eng.
Deac. & Ch.	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	...	Eng.
Dears. & B.	...	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858	...	Eng.
Dears. C. C.	...	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856	...	Eng.
Deas & And.	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	...	Scot.
De G.	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	...	Eng.
De G. & J.	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	...	Eng.
De G. & Sm.	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	...	Eng.
De G. F. & J.	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	...	Eng.
De G. J. & Sm.	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—	...	Eng.
De G. M. & G.	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	...	Eng.
Delane	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	...	Eng.
Den.	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852	...	Eng.
Dick.	...	Dickens' Reports, Chancery, 2 vols., 1559—1798	...	Eng.
Dirl.	...	Dirlerton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	...	Scot.
Dods.	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822	...	Eng.
Donnelly	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	...	Eng.
Doug. Fl. Cas.	...	Douglas' Election Cases, 4 vols., 1774—1776	...	Eng.
Doug. K. B.	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	...	Eng.
Dow	...	Dow's Reports, House of Lords, 6 vols., 1812—1818	...	Eng.
Dow & Cl.	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	...	Eng.
Dow. & L.	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	...	Eng.
Dow. & Ry. K. B.	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822	...	Eng.
Dow. & Ry. M. C.	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	...	Eng.
Dow. & Ry. N. P.	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	...	Eng.
Dowl.	...	Dowling's Practice Reports, 9 vols., 1830—1841	...	Eng.
Dowl. N. S.	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	...	Eng.
Dr. & Wal.	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	...	Ir.
Dr. & War.	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—	...	Ir.
Dra.	...	Draper's King's Bench Reports	...	Can.
Drew. & Sm.	...	Drewry's Reports, Chancery, 4 vols., 1852—1859	...	Eng.
Drinkwater	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	...	Eng.
Drury temp. Nap.	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	...	Eng.
Drury temp. Sug.	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859	...	Ir.
Dugd. Orig.	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1811—1844	...	Ir.
Dunl. (Ct. of Sess.)	...	Dugdale's Origines Juridicales	...	Eng.
Dunning	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	...	Eng.
Durio	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754	...	Eng.
Dyer	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621	...	Scot.
E. & A.	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581	...	Eng.
E. & B.	...	Upper Canada Error and Appeal	...	Can.
E. &	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	...	Eng.
E. B. & E.	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	...	Eng.
E. D. C.	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	...	Eng.
E. D. L.	...	Reports of the Eastern Districts Court (Cape) from 1880	...	S. Af.
E. L. R.	...	South African Law Reports, Eastern Districts Local Division	...	S. Af.
E. R. (or Eng. Rep.)	...	Eastern Law Reporter	...	Can.
E. R.	...	English Reports	...	Eng.
Eag. & Y.	...	Ontario Election Reports	...	Can.
	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	...	Eng.

xxx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	...	Eng.
East, P. C.	...	...	East's Pleas of the Crown	...	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building	...	...	Eng.
Eng. Pr. Cas.	.	.	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	...	Eng.
Eq. Cas. Abr.	.	.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	...	Eng.
Eq. Rep.	.	.	Equity Reports, 3 vols., 1853—1855	...	...	Eng.
Esp.	...	.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	...	Eng.
Ex. D.	...	.	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	...	Eng.
Exch.	...	.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols.,	...	...	Eng.
Exch. C. R.	.	.	Exchequer Court Reports	...	...	Can.
F. (Ct. of Sess.)			Fraser, Court of Session Cases (Scotland), 5th series, 8 vols., 1898—1906	...	...	Scot.
F.	...	.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	...	S. Af.
F. & F.	...	.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	...	Eng.
F. N. D.	.	.	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	...	S. Af.
Fac. Coll.	.	.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	...	Scot.
Falc.	...	.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	...	Scot.
Falc. & Fitz.	.	.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	...	Eng.
Fenton	...	.	Fenton, Important Judgments	...	...	N.Z.
Ferg.	...	.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	...	Scot.
Fitz. Nat. Brev.	.	.	Fitzherbert's Natura Brevium	...	...	Eng.
Fitz-G.	...	.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	...	Eng.
Fl. & K.	.	.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	...	Ir.
Fonbl.	...	.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	...	Eng.
For.	...	.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	...	Eng.
Forb.	...	.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	...	Scot.
Fort. De Laud.			Fortesque, De Laudibus Legum Angliæ	...	...	Eng.
Fortes. Rep.	.	.	Fortescue's Reports, fol., 1 vol., 1692—1736	...	...	Eng.
Fost.	...	.	Foster's Crown Cases, 1 vol., 1708—1760	...	...	Eng.
Fount.	...	.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	...	Scot.
Fox & S. Ir.	.	.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	...	Ir.
Fox & S. Reg.	.	.	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	...	Eng.
Fras.	...	.	Fraser (Simon), Election Cases, 2 vols., 1793	...	...	Eng.
Freem. Ch.	.	.	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	...	Eng.
Freem. K. B.	.	.	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 170—1704	...	...	Eng.
G.	...	.	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	...	S. Af.
G. & R.	...	..	Nova Scotia Reports (Geldert & Russell)	...	...	Can.
G. I. Dig.	...	..	General Index Digest	...	...	Can.
G. W. D.	...	..	South African Law Reports, Griqualand West Local Division	...	...	S. Af.
G. W. L.	...	..	South African Law Reports, Griqualand West Local Division	...	...	S. Af.
Gale & Dav.	...	..	Gale and Davison's Reports, Queen's Bench, 3 vols., 1811—1843	...	...	Eng.
Gale	...	..	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	...	Eng.
Gaz. L. R.	.	.	New Zealand Gazette Law Reports	...	...	N.Z.
Geld. Dig.	.	.	Geldert's Digest	...	...	Can.
Gib. Cod.	.	.	Gibson's Codex Juris Ecclesiastici Anglicani	...	...	Eng.
Giff.	...	.	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	...	Eng.
Gilb.	...	.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	...	Eng.
Gilb. C. P.	.	.	Gilbert's History and Practice of the Court of Common Pleas	...	...	Eng.
Gilb. Ch.	.	.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	...	Eng.
Gilm. & F.	.	.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	...	Scot.
Gl. & J.	.	.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	...	Eng.
Glanv. El. Cas	.	.	Glanville's Election Cases, 1 vol., 1623—1624	...	...	Eng.
Glascocck	.	.	Glascocck's Reports (Ireland), 1 vol., 1831—1832	Ir.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb.	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Griffin's Patent Cases	Upper Canada Chancery (Grant)	Can.
Gwill.	Griffin's Patent Cases, 1884—1887	Eng.
	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C.	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N.	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw.	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W.	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—	Eng.
H. B. R. (preceded by date)	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C.	Reports of the High Court of Griqualand West	S. Af.
H. E. C.	Hodgin's Election Reports	Can.
H. L. Cas.	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm.	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con.	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc.	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L.	Hale's Common Law	Eng.
Hale, P. C.	Hale's Pleas of the Crown, 2 vols.	Eng.
Han.	New Brunswick Reports (Hannay)	Can.
Har. & Ruth.	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865	Eng.
Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard.	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C.	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay	Hay's Reports	Ind.
Hay & Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo.	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—	Ir.
Hem. & M.	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het.	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob.	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg.	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog.	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm.	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq.	W. Holt's Equity Reports, 2 vols., 1845—	Eng.
Holt, K. B.	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P.	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	Hong Kong Reports	Hong Kong
Hop. & Colt.	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph.	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H.	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp.	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C.	Howard's Chancery Practice	Ir.
How. C. S.	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E.	Howard's Equity Exchequer	Ir.
How. P. L.	Howard on the Popery Laws	Ir.
Hud. & B.	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C.	Hudson on Building Contracts, 2 vols.	Eng.
Hume	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut.	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl.	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde	Hyde's Reports	Ind.
I. C. L. R.	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R.	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R.	Irish Equity Reports, 13 vols., 1838—1851	Ir.

I. L. R. ...	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All.	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Bom.	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc.	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Lah.	Indian Law Reports, Lahore	Ind.
I. L. R. (Vol.) Mad.	Indian Law Reports, Madras	Ind.
I. L. R. (Vol.) Pat.	Indian Law Reports, Patna	Ind.
I. L. R. (Vol.) Ran.	Indian Law Reports, Rangoon	Ind.
I. L. T. ...	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo.	Irish Law Times Journal, 1867,—(current)	Ir.
I. R. (preceded by date)	Irish Reports, since 1893 (<i>e.g.</i> , [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L.	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
I. R. Eq.	Irish Reports, Equity, 11 vols., 1866—1877	Ir.
I. R., R. & L.	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	Ir.
Ind. Awards	Industrial Awards Recommendations	N.Z.
Ind. Jur. N. S.	Indian Jurist, New Series	Ind.
Ind. Jur. O. S.	Indian Jurist, Old Series	Ind.
Ir. Cir. Rep.	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
Ir. Jur.	Irish Jurist, 18 vols., 1849—1866	Ir.
Ir. L. Rec. 1st ser.	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	Ir.
Ir. L. Rec. N. S.	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	Ir.
Irv.	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	Scot.
J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613	Eng.
J. D. R.	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
J. P.	Justice of the Peace, 1837—(current)	Eng.
J. P. Jo.	Justice of the Peace (Weekly Notes of Cases)	Eng.
J. R.	Jurist Reports	N.Z.
J. R. N. S.	Jurist Reports, New Series	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	Scot.
Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	Can.
James	Nova Scotia Reports (James)	Ir.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols.,	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
Jebb, Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases	Ir.
Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Ir.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838	Ir.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	Ir.
John.	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	
Kames, Dict. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol.,	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

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...	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., ...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829	Eng.
Knox	...	Knox's Reports	Aus.
Konst. & W. Rat. App	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909	Eng.
Konst. Rat. App.	...	1912	Eng.
	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	
L. & G. temp. Plunk	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., —1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. M. & P.	...	Leader Law Reports	S. Af.
	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	...	La Themis	Can.
	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733	Eng.

xxxiv REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	Legal Reporter	Ir.
Legge ..	Legge's Reports	Aus.
Leon. ..	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev. ..	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols.,	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
Ley ...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629 ...	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.	Eng.
Lilly ...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol. ...	Eng.
Lloyd, L. R. ...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
Lloyd, Pr. Cas. ...	Lloyd's List Law Reports, 1919—(current)	Eng.
Lofft	Lloyd's Reports of Prize Cases, 10 vols., 1914—1924	Eng.
Long. & T. ...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774 ...	Eng.
Lords Journals ...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	Ir.
Lud. E. C. ...	Journals of the House of Lords	Eng.
Lumley, P. L. C.	Luder's Election Cases, 3 vols., 1784—1787	Eng.
Lush.	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
Lut.	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
Lut. Reg. Cas. ...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	Eng.
Lynd.	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853 ...	Eng.
M.	Lyndwood, Provinciale, fol., 1 vol.	Eng.
M. & S.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
M. & W.	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. C. C.	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. R.	Mining Commissioner's Cases	Can.
M. H. C. R. ...	Montreal Condensed Reports	Can.
M. L. R. (Vol.) K. B. or Q. B.	Madras High Court Reports	Ind.
M. L. R. (Vol.) S. C.	Montreal Law Reports, King's Bench or Queen's Bench ...	Can.
M. M. Cas. ...	Montreal Law Reports, Superior Court	Can.
Mac. & G.	Martin's Reports of Mining Cases	Can.
Mac. & H.	Macassey's New Zealand Reports	N.Z.
M'Cle.	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—	Eng.
M'Cle. & Yo.	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852 ...	Eng.
Macfarlane	M'Clelland's Reports, Exchequer, 1 vol., 1824	Eng.
Macl. & Rob.	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	Eng.
Macph. (Ct. of Sess.)	Macfarlane's Jury Trials. Court of Session (Scotland), 3 parts, 1838—1839	Scot.
Macq.	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Mad.	Macpherson, Court of Session (Scotland), 3rd series, 11 vols.,	Scot.
Madd.	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
Madd. & G. ...	Macrory's Patent Cases, 2 parts, 1847—1856	Eng.
Madox	Madras High Court Reports	Ind.
Madox, Exch. ...	Maddock's Reports, Chancery, 6 vols., 1815—1822	Eng.
Mag.	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Man. & G.	Madox's Formulæ Anglicanum	Eng.
Man. & Ry. K. B.	Madox's History and Antiquities of the Exchequer, 2 vols. ...	Eng.
Man. & Ry. M. C.	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Man. L. J.	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	Eng.
Man. L. R.	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—	Eng.
Man. R. temp. Wood	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	Eng.
Mans.	Manitoba Law Journal	Can.
Mar. L. C.	Manitoba Law Reports	Can.
March	Manitoba Reports temp. Wood	Can.
Marr.	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
Marsh.	Maritime Law Reports (Crockford), 3 vols., 1860—1871 ...	Eng.
Marsh.	March's Reports, King's Bench and Common Pleas, 1 vol.,	Eng.
Mayn.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ...	Eng.
Meg.	Marshall's Reports, Common Pleas, 2 vols., 1813—1816 ...	Eng.
	Marshall's Reports	Ind.
	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326 ...	Eng.
	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.

...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
Mer.	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	Ir.
Mod. Rep.	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	Eng.
Mol.	Modern Reports, 12 vols., 1669—1755	...	Ir.
Mont.	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	...	Eng.
Mont. & A.	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	Eng.
Mont. & B.	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	Eng.
Mont. & Ch.	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	...	Eng.
Mont. & M.	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	...	Eng.
Mont. D. & De G.	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	...	Eng.
	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	...	Eng.
Moo. & P.	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	...	Eng.
Moo. & S.	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	...	Eng.
Moo. Ind. App.	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	...	Eng.
Moo. P. C. C.	Moore's Privy Council Cases, 15 vols., 1836—1863	...	Eng.
Moo. P. C. C. N. S.	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	...	Eng.
Mood. & M.	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	...	Eng.
Mood. & R.	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	...	Eng.
Mood. C. C.	Moody's Crown Cases Reserved, 2 vols., 1824—1844	...	Eng.
Moore, C. P.	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	...	Eng.
Moore, K. B.	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	...	Eng.
Mor. Dict.	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	...	Scot.
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	...	Eng.
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	...	Eng.
Mun. Rep.	Municipal Reports	...	Can.
Murd. Epit.	Murdoch's Epitome	...	Can.
Murp. & H.	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	...	Eng.
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	...	Scot.
My. & Cr.	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	...	Eng.
My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	...	Eng.
N. A. C.	Native Appeal Cases	...	S. Af.
N. & S.	Nichols and Stop's Reports (Tasmania)	...	Tasmania
N. B. Dig.	New Brunswick Digest (Stevens)	...	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	...	Can.
N. B. R.	New Brunswick Reports	...	Can.
N. B. R. (All.)	New Brunswick Reports (Allen)	...	Can.
N. B. R. (Ber.)	New Brunswick Reports (Berton)	...	Can.
N. B. R. (Carl.)	New Brunswick Reports (Carleton)	...	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	...	Can.
N. B. R. (Han.)	New Brunswick Reports (Hannay)	...	Can.
N. B. R. (Kerr)	New Brunswick Reports (Kerr)	...	Can.
N. B. R. (P. & B.)	New Brunswick Reports (Pugsley and Burbidge)	...	Can.
N. B. R. (P. & T.)	New Brunswick Reports (Pugsley and Trueman)	...	Can.
N. B. R. (Pug.)	New Brunswick Reports (Pugsley)	...	Can.
N. B. R. (Tru.)	New Brunswick Reports (Trueman)	...	Can.
N. I. (preceded by date)	Northern Ireland Law Reports, 1925—(current) (e.g., [1925] N. I.)	...	Ir.
N. L. R.	Natal Law Reports	...	S. Af.
N. P. D.	South African Law Reports, Natal Provincial Division	...	S. Af.
N. S. R.	Nova Scotia Reports	...	Can.
N. S. R. (Coch.)	Nova Scotia Reports (Cochran)	...	Can.
N. S. R. (G. & O.)	Nova Scotia Reports (Geldert and Oxley)	...	Can.
N. S. R. (G. & R.)	Nova Scotia Reports (Geldert and Russell)	...	Can.
N. S. R. (James)	Nova Scotia Reports (James)	...	Can.
N. S. R. (Old.)	Nova Scotia Reports (Oldrights)	...	Can.
N. S. R. (R. & C.)	Nova Scotia Reports (Russell and Chesley)	...	Can.
N. S. R. (R. & G.)	Nova Scotia Reports (Russell and Geldert)	...	Can.
N. S. R. (Thom.)	Nova Scotia Reports (Thomson)	...	Can.
N. S. W. Adm. or Ad.	New South Wales Reports, Admiralty	...	Aus.
N. S. W. B.	New South Wales Reports, Bankruptcy	...	Aus.
N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	...	Aus.
N. S. W. Eq.	New South Wales Reports, Equity	...	Aus.
N. S. W. Ind. Arbtrn. Cas.	New South Wales Industrial Arbitration Cases	...	Aus.
N. S. W. L. R.	New South Wales Law Reports	...	Aus.
N. S. W. Land App. Cts.	New South Wales Land Appeal Courts	...	Aus.
N. S. W. S. C. R. (Eq.)	New South Wales Supreme Court Reports (Equity)	...	Aus.
N. S. W. S. C. R. (L.)	New South Wales Supreme Court Reports (Law)	...	Aus.
N. S. W. S. C. R. N. S.	New South Wales Supreme Court Reports, New Series	...	Aus.
N. S. W. W. N.	New South Wales Weekly Notes	...	Aus.
N. W.	North-Western Provinces High Court Reports	...	Ind.
N. W. T. R.	North-West Territories Reports	...	Can.
N. Z. Jur.	New Zealand Jurist	...	N.Z.
N. Z. Jur. Mining Law	New Zealand Jurist Mining Law	...	N.Z.

xxxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current)	
N. Z. L. R. C. A.	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels.	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B. ...	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C. ...	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols.,	
		Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep. ...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas. ...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R. ...	Newfoundland Reports	Nfld.
Nolan	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases ...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P. ...	Old Bailey Session Papers	Eng.
O. Bridg. ...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
O. F. S.	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	Ontario Law Reports	Can.
O'M. & H.	O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D.	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R. ...	Ontario Reports	Can.
O. R. ...	Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	Ontario Weekly Notes	Can.
O. W. R.	Ontario Weekly Reporter	Can.
Old. ...	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen ...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date) ...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.)	Eng.
P. & B.	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas.	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	Prince Edward Island Reports	Can.
P. R.	Ontario Practice	Can.
P. Wms.	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm.	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park.	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App. ...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck.	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	Pelham (S. A.) Reports	Aus.
Per. & Dav. ...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S. ...	Perrault's Conseil Supérieur	Can.
Per. P.	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas. ...	Philipps' Election Cases, 1 vol., 1780	Eng.
Phillim.	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R. ...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd. ...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll. ...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D.	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

Pratt	Pratt's Supplement to Bott's Poor Laws, 1833	...	...	Eng.
Preced. Ch.	Precedents in Chancery, fol., 1 vol., 1689—1722	...	...	Eng.
Price	Price's Reports, Exchequer, 13 vols., 1814—1824	...	...	Eng.
Price	Price's Mining Commissioners' Cases	...	...	Can.
Pug.	New Brunswick Reports (Pugsley)	...	...	Can.
Py. R.	Pykes' Lower Canada Reports	...	...	Can.
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	...	...	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	...	...	Eng.
Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	...	Eng.
Q. J. P.	Queensland Justice of Peace Reports	...	...	Aus.
Q. L. J.	Queensland Law Journal and Reports, 11 vols., 1879—1901	...	...	Aus.
Q. L. R.	Quebec Law Reports	...	...	Can.
Q. L. R. (Beor)	Queensland Law Reports by Beor, 1876—1878	...	...	Aus.
Q. P. R.	Quebec Practice Reports	...	...	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—	...	...	Can.
Q. R. (Vol.) S. C.	Rapports Judiciaires de Québec, Cour Supérieure, 1892—	...	...	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881	...	...	Aus.
Q. S. R.	Queensland State Reports, 6 vols., 1902—1906	...	...	Aus.
Q. W. N.	Weekly Notes, Queensland	...	...	Aus.
	The Reports, 15 vols., 1893—1895	...	...	Eng.
	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	...	S. Af.
R. (Ct. of Sess.)...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	...	...	Scot.
R. A. C.	Ramsay, Appeal Cases	...	...	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	...	...	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	...	...	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	...	...	Can.
R. de J.	Revue de Jurisprudence	...	...	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	...	...	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	...	...	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	...	...	Can.
R. J. R. Q.	Quebec Revised Reports	...	...	Can.
R. L. N. S.	Revue Légale, New Series, 1895—(current)	...	...	Can.
R. L. O. S.	Revue Légale, Old Series, 21 vols., 1869—1892	...	...	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	...	...	Eng.
R. R.	Revised Reports	...	...	Eng.
Rast.	Rastell's Entries	...	...	Eng.
Rayn.	Rayner's Tithe Cases, 3 vols., 1575—1782	...	...	...
Real Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	...	...	Eng.
Rep. Ch.	Reports in Chancery, fol., 3 vols., 1615—1710	...	...	Eng.
Rep. in C. of A.	Reports in Courts of Appeal	...	...	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	...	...	Aus.
Reserv. Cas.	Reserved Cases	...	...	Ir.
Rick. & M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	...	...	Eng.
Rick. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	...	...	Eng.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—	...	...	Ir.
Ridg. Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	...	...	Ir.
Ridg. temp. H.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	...	...	Eng.
Ritch. Eq. Rep.	Ritchie's Equity Reports	...	...	Can.
Rob. Eccl.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	...	...	Eng.
Rob. L. & W.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	...	...	Eng.
Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1707—1727	...	...	Scot.
Robin. App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	...	...	Scot.
Roll. Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.	...	...	Eng.
Roll. Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	...	...	Eng.
Rom.	Romilly's Notes of Cases, 1 part, 1767—1787	...	...	Eng.
Roscoe's B. C.	Roscoe, Digest of Building Cases	...	...	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	...	...	Eng.
Ross, L. C.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	...	...	Eng.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	...	...	Eng.
Rul. Cas.	Campbell's Ruling Cases, 25 vols.	...	...	Eng.
Russ.	Russell's Reports, Chancery, 5 vols., 1824—1829	...	...	Eng.
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	...	...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R. ...	Russell's Election Reports...	Can.
Ry. & Can. Cas.	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ry. & M. ...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S. A. L. J. ...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. R. ...	South African Law Journal ...	S. Af.
S. A. L. R. ...	South Australian Law Reports ...	Aus.
S. A. R. ...	South African Law Reports ...	S. Af.
S. A. S. R. ...	Reports of the High Court of the South African Republic, 1881	S. Af.
S. C. ...	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.) ...	Aus.
S. C. (preceded by date)	Reports of the Supreme Court of the Cape of Good Hope from 1880 ...	S. Af.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (J.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.)) ...	Scot.
S. C. R. ...	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. L. T. ...	Canada, Supreme Court Reports ...	Can.
S. Q. R. ...	Scots Law Times, 1893 (current) ...	Scot.
S. R. ...	Queensland State Reports ...	Aus.
S. R. C. ...	Reports of the High Court of Southern Rhodesia ...	S. Af.
S. R. N. S. W. ...	Stuart's Lower Canada Reports ...	Can.
S. R. Q. ...	New South Wales, State Reports ...	Aus.
S. V. A. R. ...	Queensland Reports, Supreme Court ...	Aus.
S. W. A. ...	Stuart's Vice-Admiralty Reports ...	Can.
Saint ...	South-West Africa Law Reports ...	S.-W. Af.
Sask. L. R.	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Sau. & Sc.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
Saund. ...	Saskatchewan Law Reports ...	Can.
Saund. & A.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ...	Ir.
Saund. & B.	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & C.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & M.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Sav. ...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Say. ...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols.,	
Sc. Jur. ...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Sc. L. R.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. R. R.	Scottish Jurist, 46 vols., 1829—1873 ...	Scot.
Sch. & Lef.	Scottish Law Reporter, 61 vols., 1865—1924 ...	Scot.
Scott ...	Scots Revised Reports ...	Scot.
Scott, N. R.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ...	Ir.
Sea. & Sm.	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ...	Eng.
Sel. Cas. Ch.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Selwyn's N. P.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ...	Eng.
Sess. Cas. K. B.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Sett. & Rem.	Selwyn's Abridgement of the Law of Nisi Prius ...	Eng.
Sh. (Ct. of Sess.)	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sh. & Maccl.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1685—1727 ...	Eng.
Sh. Dig. ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ...	Scot.
Sh. Just.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols.,	Scot.
Sh. Sc. App.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Teind Ct.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Shep. Touch.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Show.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Show. Parl. Cas.	Sheppard's Touchstone of Common Assurances ...	Eng.
Sid.	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ...	Eng.
	Sidersin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol.,	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sw.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw. & Tr.	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Swan.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swin.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Syme	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law Reports, Transvaal Provincial Division	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports <i>temp.</i> Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.

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U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R. ...	Upper Canada Reports, Queen's Bench ...	Can.
Udal ...	Fiji Law Reports (Udal) ...	Fiji.
V. L. R. ...	Victorian Law Reports ...	Aus.
V. R. ...	Victorian Reports ...	Aus.
V. R. (Adm.) ...	Victorian Reports (Admiralty) ...	Aus.
V. R. (Eq.) ...	Victorian Reports (Equity) ...	Aus.
V. R. (Law) ...	Victorian Reports (Law) ...	Aus.
Vaugh. ...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent. ...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691 ...	Eng.
Vern. ...	Vernon's Reports, Chancery, 2 vols., 1680—1719 ...	Eng.
Vern. & Scr. ...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 ...	Ir.
Ves. ...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 ...	Eng.
Ves. & B. ...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 ...	Eng.
Ves. Sen. ...	Vesey Sen.'s Reports, 2 vols., 1747—1756 ...	Eng.
Vin. Abr. ...	Viner's Abridgment of Law and Equity, fol., 22 vols. ...	
Vin. Supp. ...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W. ...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857 ...	S. Af.
W. A. L. R. ...	West Australian Law Reports ...	Aus.
W. A'B. & W. ...	Webb, A'Beckett and Williams' Victorian Reports ...	Aus.
W. & W. ...	Wyatt and Webb ...	Aus.
W. C. C. ...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 ...	Eng.
W. H. C. ...	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. Jo. ...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 ...	Eng.
W. L. D. ...	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. R. ...	Western Law Reporter ...	Can.
W. L. T. ...	Western Law Times ...	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (e.g., [1866] W. N.)	Eng.
W. N. ...	Calcutta Weekly Notes ...	Ind.
W. R. ...	Weekly Reporter, 51 vols., 1852—1906 ...	Eng.
W. R. ...	Sutherland's Weekly Reporter ...	Ind.
W. R. ...	Weekly Reporter, reporting cases in the Cape Provincial Division ...	S.
W. W. & A'B. ...	Wyatt, Webb and A'Beckett ...	Aus.
W. W. R. ...	Western Weekly Reports ...	Can.
Wallis by Lyne ...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas. ...	Webster's Patent Cases, 2 vols., 1602—1855 ...	Eng.
Welsh, Reg. Cas. ...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840 ...	Ir.
Went. Off. Ex. ...	Wentworth's Office and Duty of Executors ...	Eng.
West ...	West's Reports, House of Lords, 1 vol., 1839—1841 ...	
West temp. Hard. ...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740 ...	Eng.
West. Tithe Cas. ...	Western's London Tithe Cases, 1 vol., 1592—1822 ...	Eng.
White ...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	White and Tudor's Leading Cases in Equity, 2 vols. ...	Eng.
Wight ...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811 ...	Eng.
Will. Woll. & Dav. ...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 ...	Eng.
Will. Woll. & H. ...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 ...	Eng.
Willes ...	Willes' Reports, Common Pleas, 1 vol., 1737—1758 ...	Eng.
Wilm. ...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770 ...	Eng.
Wils. ...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774 ...	Eng.
Wils. & S. ...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 ...	Scot.
Wils. Ch. ...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819 ...	Eng.
Wils. Ex. ...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win. ...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl. ...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 ...	Eng.
Wm. Rob. ...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ...	Eng.
Wms. Saund. ...	Williams' Notes to Saunders' Reports, 2 vols. ...	Eng.
Wolf. & B. ...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 ...	Eng.
Wolf. & D. ...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll. ...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841 ...	Eng.
Wood ...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798 ...	Eng.
	Young's Vice-Admiralty Reports	Can.

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Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex.	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1830—1841	Eng.
Y. & J.	...	Younge and Jarvis' Reports, Exchequer, 3 vols., 1826—1830	Eng.
Y. B.	...	Year Books	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	Eng.
Y. B. (Sel. Soc.)	...	Year Books (Selden Society)	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xxv—xli, *ante*.)

A.-G. .	for Attorney-General.
Act. .	„ Actiengesellschaft.
Admlty. .	„ Admiralty.
Affd. .	„ Affirmed.
Affg. .	„ Affirming.
Akt. .	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Alta. .	„ Alberta.
Anon. .	„ Anonymous.
Apld. .	„ Applied.
Appet. .	„ Applicant.
Appln. .	„ Application.
Appln. .	„ Application to Register a Trade Mark.
Applt. .	„ Appellant.
Apprvd .	„ Approved.
Arbn. .	„ Arbitration.
Archbp. .	„ Archbishop.
Art. .	„ Article.
Ass. Tax Case .	„ Assessed Tax Case.
Assce. .	„ Assurance.
Assocn. .	„ Association.
B. C. .	„ Borough Council.
B. C. .	„ British Columbia.
Bkpcy. .	„ Bankruptcy.
Bkpt. .	„ Bankrupt.
Bldg. Soc. .	„ Building Society.
Bp. .	„ Bishop.
C. A. .	„ Court of Appeal.
C. & S. L. Ry. Co. .	„ City & South London Railway Co.
C. C. A. .	„ Court of Criminal Appeal.
C. C. R. .	„ County Court Rules.
C. O. R. .	„ Court of Crown Cases Reserved.
C. L. P. Act. .	„ Common Law Procedure Act.
C. L. Ry. Co. .	„ Central London Railway Co.
C. O. R. .	„ Crown Office Rules.
C. S. U. C. .	„ Consolidated Statutes of Upper Canada.
Ca. sa. .	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co. .	„ Caledonian Railway Co.
Ch. .	„ Chancery.
Ch. Div. .	„ Chancery Division.
Co. .	„ Company.
Co-op. Assocn. .	„ Co-operative Supply Association.
Comrs. .	„ Commissioners.
Consd. .	„ Considered.
Corpn. .	„ Corporation.
Ct. .	„ Court.
Ct. of Ch. .	„ Court of Chancery.
Ct. of Eq. .	„ Court of Equity.
Ct. of R. .	„ Court of Review.
D. C. .	„ Divisional Court.
Dbtd. .	„ Doubted.

Deft. .	for Defendant.
Distd. .	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
<i>Ex p.</i> .	„ <i>Ex parte.</i>
Exch. .	„ Exchequer.
Exor. .	„ Executor.
Exorship.	„ Executorship.
Expld. .	„ Explained.
Extd. .	„ Extended.
Extrix. .	„ Executrix.
<i>Fi. fa.</i> .	„ <i>Fieri facias.</i>
Folld. .	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insce. .	„ Insurance.
Jud. Act .	„ Justices.
	„ Judicature Act.
K. B. Div. .	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L. J.	„ Lord Justice.
L. J. J.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Man.	„ Manitoba.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B.	„ New Brunswick.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed
N. P.	„ Nisi Prius.

ABBREVIATIONS.

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N. S.	for Nova Scotia.
N. W. P.	„ North-West Provinces.
N. W. T.	„ North-West Territories.
Ont.	„ Ontario.
Ord.	„ Order.
Overd.	„ Overruled.
P. C.	„ Privy Council.
P. E. I.	„ Prince Edward Island.
Petn.	„ Petition or Election Petition.
Pltf.	„ Plaintiff.
Q. B. Div.	„ Queen's Bench Division.
Qu.	„ <i>Quære</i> .
Que.	„ Quebec.
R. C.	Rural Council.
R. D. C.	Rural District Council
R. S. A.	Rural Sanitary Authority.
R. S. C.	Revised Statutes of Canada.
R. S. C.	Rules of the Supreme Court, 1883.
Refd.	Referred.
Regn. of Trade Mk.	Registration of Trade Mark.
Regr. of Trade Mks.	„ Registrar of Trade Marks.
Resp.	„ Respondent.
Restg.	„ Restoring.
Revsd.	„ Reversed.
Revsg.	„ Reversing.
Ry. Co.	„ Rail. Co. or Railway Co.
S. C. (name of colony following)	„ Same Case.
S. E. & C. Ry. Co.	„ Supreme Court of a Colony.
S. E. Ry. Co.	„ Settled Estates.
S. P.	„ South Eastern & Chatham Railway Co.
	„ South Eastern Railway Co.
	„ Same Point.
	„ Steamship.
	„ Saskatchewan.
Sched.	„ Schedule.
	„ <i>Scire facias</i> .
Sect.	„ Section.
Set. Land Act	„ Settled Land Act.
Settlmt.	„ Settlement.
Soc.	„ Society
Soc. Anon.	„ Société Anonyme, etc.
Solr.	„ Solicitor.
Trade Mk.	„ Trade Mark.
Tram. Co.	„ Tramways Company.
U. C.	„ Urban Council.
U. D. C.	„ Urban District Council.
U. S. A.	„ United States of America.
Union Assmt. Com.	„ Union Assessment Committee.
Urban S. A.	„ Urban Sanitary Authority.
V.-C.	„ Vice-Chancellor
Workmen's Comp. Act	Workmen's Compensation Act.
Y. T.	„ Yukon Territory.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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Part I.—Small Holdings.

SECT. 1.—IN GENERAL	SECT. 2.—AUTHORITIES FOR PROVISION OF SMALL HOLDINGS.
<i>See Small Holdings & Allotments Acts, 1908–1926 ; Small Holding Colonies Act, 1916 (c. 38) ; Small Holding Colonies (Amendment) Act, 1918 (c. 26), as amended by Land Settlement (Facilities) Act, 1919 (c. 59) ; Ministry of Agriculture & Fisheries Act, 1919 (c. 91).</i>	<i>See Small Holdings & Allotments Act, 1908 (c. 36), ss. 38–53, 57, 59 ; Land Settlement (Facilities) Act, 1919 (c. 59), s. 17 ; Small Holdings & Allotments Act, 1926 (c. 52), ss. 1–15 ; Small Holding Colonies Act, 1916 (c. 38) ; Small Holding</i>

PART I. SECT. 1. a. <i>What is a holding—Whether land with carding mill upon it.]—YOOE v. SHEPHERD, [1914] 1 S. L. T. 478 ; [1914] S. C. 689.—SCOT.</i> b. — <i>Blacksmith's shop, dwelling-house & land.]—The yearly tenant of subjects consisting of a blacksmith's</i> J.—VOL. XLII.	<i>shop, a dwelling-house, & 5½ acres of land, applied to the Land Ct. under Small Landholders (Scotland) Act, 1911, to fix the first equitable rent payable by him as statutory small tenant of the subjects. The house & shop were built & maintained by the landlord, & the shop had always been occupied as a smithy by appct. & the</i>	<i>previous tenants ; but appct. was under no obligation either to use the shop as a smithy or to do blacksmith's work for the tenants of the landlord's estate, nor were these tenants bound to employ him. The value of the smithy to appct. was less than that of the house & lands :—Held : the subjects did not form a</i> B
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SMALL HOLDINGS, SMALL DWELLINGS, AND ALLOTMENTS.

Sect. 2.—Authorities for provision of small holdings. Sects. 3, 4 & 5.]

Colonies (Amendment) Act, 1918 (c. 26), as amended by Land Settlement (Facilities) Act, 1919 (c. 59); Ministry of Agriculture & Fisheries Act, 1919 (c. 91).

SECT. 3.—SCHEMES.

See Small Holdings & Allotments Acts, 1908—

SECT. 4.—ACQUISITION OF LAND.

See Small Holdings & Allotments Act, 1908 (c. 36), ss. 38–47, 61; Land Settlement (Facilities) Act, 1919 (c. 59), ss. 2–9, 16, 28–30, sched. I; Small Holdings & Allotments Act, 1926 (c. 52), ss. 4, 17, 18.

1. *Compulsory purchase—The order—Nature—Whether certiorari to quash granted.]—*The effect of Small Holdings & Allotments Act, 1908 (c. 36), s. 39 (3), is that an order for the compulsory acquisition of land under that Act which has been confirmed by the Board of Agriculture & Fisheries is final, & has the effect of an Act of Parliament. *Certiorari*, therefore, will not be granted to bring up & quash such an order.—*Ex p. RINGER* (1909), 73 J. P. 436; 25 T. L. R. 718; 53 Sol. Jo. 745; 7 L. G. R. 1041, D. C.

2. *— — — — —.]—*Land Settlement (Facilities) Act, 1919 (c. 59), s. 10 (1), does not require that the previous consent of the Board of Agriculture & Fisheries should be obtained before a council make an order for the compulsory acquisition of land under sect. 1, sub-sect. 1 of the Act, but only that that consent be obtained before the council exercise the power conferred upon them by the order by proceeding actually to acquire the land by giving notice to treat or otherwise.

A county council, after holding an inquiry in regard to the matter at which all necessary parties were represented, made an order under the Small Holdings & Allotments Act, 1908 (c. 36), & Land Settlement (Facilities) Act, 1919 (c. 59), for the compulsory acquisition of a farm for the purposes of these Acts. On an application by the owner

of the farm for a writ of *certiorari* to remove the order into the High Ct. on the ground that the council had made it without jurisdiction, inasmuch as they had not obtained the previous consent of the Board of Agriculture:—*Held*: the order was not merely administrative but quasi-judicial in character, it affected appct. personally & not only as one of the public or of a section thereof, & he had not in fact waived any right which he would otherwise have had to the relief which he claimed, & if he made good the ground of his application, he was entitled to the writ *ex debito justitiæ*.—*R. v. BEDFORDSHIRE COUNTY COUNCIL, Ex p. SEAR*, [1920] 2 K. B. 465; 89 L. J. K. B. 425; 123 L. T. 50; 84 J. P. 97; 36 T. L. R. 369; 18 L. G. R. 249, D. C.

3. *— — — — — Making of order—Whether previous consent of Ministry of Agriculture required.]—**R. v. BEDFORDSHIRE COUNTY COUNCIL, Ex p. SEAR*, No. 2, *ante*.

4. *— — — — — Outgoing tenant—Right to remove or sell stock.]—**Re EVANS & GLAMORGAN COUNTY COUNCIL*, No. 7, *post*.

5. *— — — — — Wilful refusal to convey.]—*After an order for compulsory purchase of land had been duly confirmed under Small Holdings & Allotments Act, 1908 (c. 36), s. 39 (3), the solr. for the owner wrote that he was advised by counsel that the order might be bad, & subsequently he wrote again refusing to convey, alleging the same advice:—*Held*: there had been a wilful refusal to convey within Lands Clauses Consolidation Act, 1845 (c. 18), s. 80.—*Re JONES & CARDIGANSHIRE COUNTY COUNCIL* (1913), 57 Sol. Jo. 374.

6. *Compensation—Incorporation of Railways Clauses Consolidation Act, 1845 (c. 20)—Unworked minerals.]—*The N. county council acting under powers conferred by Small Holdings & Allotments Act, 1908 (c. 36), & an order of the Board of Agriculture, gave notice to the owner of a farm that they required to purchase the same for small holdings. The order made under the Act of 1908 incorporated Railways Clauses Consolidation Act, 1845 (c. 20), ss. 77, 78. The arbitrator was of opinion that the true measure of the compensation payable to the owner was the value to him immediately before the giving of the notice to treat of the lands required to be taken by the county council, without taking into consideration as an element tending to reduce this value the risk of the land being injured at some future time by the

holding to which Small Landholders Acts applied.—*STORMONTH DARLING v. YOUNG*, [1915] S. C. 44.—SCOT.

c. *— Land used for fruit growing.]—*The lessee of 10 acres of land on which he had planted raspberry bushes, the fruit from which he sold mainly to jam-makers & sometimes outright to fruit dealers, was not entitled to have himself declared a "landholder," the land being a market garden & excluded from the operation of Small Landholders (Scotland) Act, 1911, by sect. 26 (3) (d).—*YEAMAN v. GREWAR* (1916), 53 Sc. L. R. 596.—SCOT.

d. *— Cottage with garden, arable land & share of common grazing.]—*The subjects consisting of a small thatched cottage in a village in Argyllshire, with a plot of garden ground & a byre, & one rood of potato land situated at a short distance from the cottage, & a one fifteenth share in a common grazing extending to 58 acres for the grazing of one cow, all let to one tenant at a *cumulo* rent of £4 4s. 6d., is a "holding" within Small Landholders (Scotland) Act, 1911.—*MALCOLM v. M'DOUGALL*, [1916] S. C. 283.—SCOT.

e. *— Land & buildings valued*

£30.]—*HAMILTON v. HAMILTON'S (DUKE) TRUSTEES*, [1918] S. C. 282.—SCOT.

f. *— Land & dwelling-house not required for agricultural purposes.]—*Where, at the date of Small Landholders Act, 1911, coming into operation, there existed on land, held on such a tenancy that it would otherwise constitute a "holding," a dwelling-house or other building forming an integral & material part of the subjects of tenancy but not erected or required for agricultural or pastoral purposes, such dwelling-house or other building with the pertinents & site thereof might be excised from the land held on such tenancy, leaving the remainder a statutory "holding" under the Act.—*M'NEILL v. HAMILTON (DUKE)*, [1918] S. C. 221; [1918] 1 S. L. T. 265.—SCOT.

g. *— Agricultural Holdings (Scotland) Act, 1908—House & land—Licence to sell liquor.]—*At the commencement of Small Landholders Act, 1911, the yearly tenant of a dwelling-house & 10½ acres of arable land held a licence for the sale of porter & ale, which he sold to occasional customers, the amount of trade done by him in this way being very small. The house

was not larger than a suitable dwelling-house for the holding; no part of it was fitted up as an inn or public-house; & no travellers were received as lodgers there:—*Held*: the subjects were not prevented, by reason of the trade carried on therein, from being a "holding" within the Acts.—*TAYLOR v. FORDYCE*, [1918] S. C. 824; [1918] 2 S. L. T. 186.—SCOT.

h. *Status of landholder—Who entitled.]—*Small Landholders (Scotland) Act, 1911, s. 2 (1) (iii) (a), enacts that it shall be a condition of a tenant or leaseholder being entitled to the status of a landholder "that such tenant or leaseholder or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding":—*Held*: the words "predecessor in the same family" included predecessors other than the immediate predecessor.—*IRVINE v. FORDYCE*, [1927] S. C. 72.—SCOT.

PART I. SECT. 4.

k. *Compulsory purchase—Right to reconveyance on failure of council to erect dwellings within allotted time.]—*

PART I.—SMALL HOLDINGS.

working of the minerals under the land in the event of their not being required by the county council to be left unworked under the Railways Clauses Consolidation Act, 1845 (c. 20).—*Held*: it must be assumed that the arbitrator had come to the conclusion that there was nothing to prevent the remedy provided by Railway Clauses Consolidation Act, 1845 (c. 20), ss. 77, 78, being a sufficient one for this future risk; & that being so it could not be said he had proceeded on any erroneous principle in making his award.—*CARLISLE (EARL) v. NORTHUMBERLAND COUNTY COUNCIL* (1911), 105 L. T. 797; 75 J. P. 539; 10 L. G. R. 50.

7. — **Outgoing tenant—Cost of refreshment supplied at sale.**—A county council agreed with an outgoing tenant in accordance with Small Holdings Act, 1910 (c. 34), to pay compensation for the loss or expense directly attributable to the quitting which the tenant might unavoidably incur in connection with the sale or removal of his household goods, stock, etc., the amount to be settled by arbn. The tenant on quitting the holding sold his implements & stock by auction. The umpire in his final award disallowed the tenant (a) £34 11s. 8d. costs of refreshments supplied at the sale, but found as a fact that the amount was reasonable, & that it was customary & desirable to supply refreshment at such sales; he allowed the tenant (b) £21 valuation fee, costs of valuing stock before the sale; (c) £181 loss on compulsory sale; (d) £2 2s. costs of preparing agreement with the council. Each party was to bear their or his own costs of the arbn.:—*Held*: (1) (a) was a reasonably necessary expense in connection with the sale & ought to be allowed to the tenant; (b) was not an unavoidable expense of the sale, but rather was part of the costs of the arbn., & as such ought to be disallowed; (c) was a loss directly attributable to the quitting, unavoid-

ably incurred in connection with the sale, & ought to be allowed; (d) was not an expense of the sale & ought to be disallowed; (2) the outgoing tenant was free to choose whether he would remove his stock or sell, & was under no obligation to remove to another farm if he had one or one was available.—*Re EVANS & GLAMORGAN COUNTY COUNCIL* (1912), 76 J. P. 468; 28 T. L. R. 517; 56 Sol. Jo. 668; 10 L. G. R. 805.

8. — **Costs of valuation of stock.**—*Re EVANS & GLAMORGAN COUNTY COUNCIL*, No. 7, *ante*.

9. — **Loss on compulsory sale.**—*Re EVANS & GLAMORGAN COUNTY COUNCIL*, No. 7, *ante*.

10. — **Costs of preparing agreement with Council.**—*Re EVANS & GLAMORGAN COUNTY COUNCIL*, No. 7, *ante*.

SECT. 5.—DEALINGS WITH LAND.

See Small Holdings & Allotments Act, 1908 (c. 36), ss. 47, 61, 62; Small Holdings Act, 1910 (c. 34); Land Settlement (Facilities) Act, 1919 (c. 59), ss. 11–13; Small Holdings & Allotments Act, 1926 (c. 52), ss. 3, 5–8, 11, 12, 19, 20.

11. **Letting—Execution of lease—Refusal of local authority to execute.**—*BERNEY v. RINGLAND PARISH COUNCIL* (1911), 75 J. P. Jo. 616.

12. — **Notice to quit—Validity.**—An agreement for a yearly tenancy of a small holding provided that the tenancy might be determined by a six months' written notice expiring at any Michaelmas. On Mar. 21, 1917, the agent for the landlords sent to deft., who was in arrear with his rent, a written notice to quit on Oct. 11 (old Michaelmas Day), 1917. The notice to quit was enclosed in a letter in which the agent said, "I am instructed

Labourers (Ir.) Act, 1883, s. 15, which enables the former owner of land, compulsorily acquired in fee by a district council for the purpose of the Act, to require the land to be reconveyed to him upon failure by the district council to make arrangements for the erection of the labourers' dwellings within two years after the confirmation of the Provisional Order, are not extended by Labourers (Ir.) Act, 1885, s. 4, so as to apply to lands compulsorily acquired for a term of years under that sect.—*FEE v. BALLYMAHON RURAL DISTRICT COUNCIL*, [1916] 1 I. R. 97.—*IR*.

1. **Compensation—Should be assessed by arbitration & not by Land Court.**—*WHYTE v. STEWART*, [1914] S. C. 675.—*SCOT*.

m. — **Right of arbitrator to include under depreciation head—Depreciation in the value of estate attributable to presence of small holdings.**—*BOARD OF AGRICULTURE FOR SCOTLAND v. PLUMMER*, [1916] 1 A. C. 675, H. L.—*SCOT*.

PART I. SECT. 5.

n. **Right of Farm Board to take possession of land—On failure of purchaser to pay instalments due.**—2 Geo. 5 (1912), c. 28, which created the Farm Settlement Board, provides that when a purchaser of land from the Board fails to pay his instalments as they become due, the Board may "take possession" of such land on giving one month's notice "of its intention so to do," & "on so taking possession" may deal with the land as it might have done in the first instance:—*Held*: before the Board could dispose of land after default in payment by a purchaser it must not

only give notice of its intention to take possession, but actually take possession, & a second agreement of sale purporting to give a second purchaser the right to possession did not convey any right to possession against the first purchaser.—*WILSON v. WILSON* (1920), 47 N. B. R. 220; 52 D. L. R. 296.—*CAN*.

o. **Letting—Of cottages under improvement scheme—Right of agricultural labourers to first preference.**—*MAIRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL*, [1915] 1 I. R. 217; 13 L. G. R. 901, H. L.—*IR*.

p. — **Fixing fair rent for holding—What Land Court should consider.**—Two joint tenants of a holding in the Island of Arran of which defenders were proprietors applied to the Land Ct. for an order fixing a first fair rent to be paid for their holding:—*Held*: in fixing a fair rent for a small holding under Crofters Holdings (Scotland) Act, 1886, s. 6 (1), the Land Ct. were not bound to exclude from consideration as tenant's improvements such improvements as were executed by the tenant or his predecessors in the same family in implement of a specific agreement in writing to execute them.—*MAKINNON v. HAMILTON'S (DUKE) TRUSTEES*, [1918] S. C. 274.—*SCOT*.

q. — **Tenants of a holding presented an application to the Land Ct. for the fixing of a fair rent in the character of landholders, & parties were heard on the application. Thereafter the Land Ct., being of opinion that the greater part of the improvements were not provided by the tenants, amended the application at their own hand so as to make it apply to proceedings at the instance of statutory small tenants, &, without**

hearing parties further, proceeded to fix an equitable rent and the period of renewal of the tenancy:—*Held*: the amendment was competent, but the ct. were bound to give the landlord an opportunity of being heard on any objections he might have to state under Small Landholders (Scotland) Act, 1911, s. 32 (4).—*FULLARTON v. HAMILTON'S (DUKE) TRUSTEES*, [1918] S. C. 292.—*SCOT*.

r. — **An application having been made to the Land Ct. under Crofters Holdings (Scotland) Act, 1886, s. 6 (1), for an order fixing a first fair rent for a holding in the Island of Arran:—Held**: in fixing a fair rent for a holding, the Land Ct. is entitled to take into account the fact that the crops on the holding, by reason of its situation, are exposed to the risk of damage by game.—*McKELVIE v. HAMILTON'S (DUKE) TRUSTEES*, [1918] S. C. 301.—*SCOT*.

t. — **In an order issued by the Board of Agriculture confirming a scheme for the constitution of certain small holdings, the rent of each holding was stated to include rent for the existing buildings. In a special case presented for the determination of questions regarding the compensation due to the landlord:—Held**: in fixing the rent of the holding the Board were not bound to regard the holding as divested of buildings, but were entitled to regard it as including any buildings comprised within it.—*STAIR ESTATES v. BOARD OF AGRICULTURE FOR SCOTLAND*, [1926] S. C. 553.—*SCOT*.

u. — **Termination of tenancy—Effect of Land Court's order for creation of small holdings.**—*GLENDINNING v. BOARD OF AGRICULTURE FOR SCOTLAND*, [1918] S. C. (H. L.) 56.—*SCOT*.

SMALL HOLDINGS, SMALL DWELLINGS, AND ALLOTMENTS.

Sect. 5.—Dealings with land. Sects. 6 & 7. Part II. Sects. 1, 2 & 3. Part III. Sect. 1: Sub-sects. 1, 2, 3, 4 & 5. Sect. 2.]

by the Small Holdings & Allotments Committee to serve upon you the enclosed notice to quit, which is intended to terminate your tenancy at Michaelmas next unless they see sufficient reason in the meantime to change their opinion." The tenant claimed that the notice was a conditional notice & therefore invalid. In Mar. 1916, a notice to quit had also been given to deft., whose rent was in arrear, but this notice was withdrawn at deft.'s request upon his paying the rent due:—*Held*: the covering letter on its true construction, read in the light of what happened in the previous year, did not introduce into the notice to quit a condition or a reservation of right to pl'tfs., & the notice was valid.—*NORFOLK COUNTY COUNCIL v. CHILD*, [1918] 2 K. B. 805; 87 L. J. K. B. 1122;

119 L. T. 639; 34 T. L. R. 592; 16 L. G. R. 738, C. A.

SECT. 6.—MISCELLANEOUS POWERS OF COUNCILS.

See Small Holdings & Allotments Act, 1908 (c. 36), ss. 43, 45; Small Holdings Act, 1910 (c. 34), s. 1; Land Settlement (Facilities) Act, 1919 (c. 59), ss. 17, 19; Small Holdings & Allotments Act, 1926 (c. 52), ss. 9, 10, 13, 14.

SECT. 7.—FINANCE.

See Small Holdings & Allotments Act, 1908 (c. 36), ss. 51, 52, 54; Land Settlement (Facilities) Act, 1919 (c. 59), ss. 14, 15, 31; Small Holdings & Allotments Act, 1926 (c. 52), ss. 2, 13.

Part II.—Small Dwellings.

SECT. 1.—ADVANCES.

See Small Dwellings Acquisition Act, 1899 (c. 44), ss. 1-4, 7-10; Housing, etc. Act, 1923 (c. 24), ss. 22, 23; Housing, Town Planning, etc. Act, 1919 (c. 35), s. 49; Housing Act, 1921 (c. 19), s. 5; Statutory Rules & Orders, 1922, No. 632; Bankruptcy Act, 1914 (c. 59), s. 130.

SECT. 2.—REMEDIES FOR BREACH OF CONDITIONS.

See Small Dwellings Acquisition Act, 1899

(c. 44), ss. 3, 5, 6; Bankruptcy Act, 1914 (c. 59), s. 130.

Recovery of possession under Small Tenements Recovery Act, 1838 (c. 74).—See LANDLORD & TENANT, Vol. XXXI., pp. 548-550, Nos. 6951-6968.

SECT. 3.—FINANCE.

See Small Dwellings Acquisition Act, 1899 (c. 44), s. 9.

Part III.—Allotments.

SECT. 1.—UNDER SMALL HOLDINGS AND ALLOTMENTS ACTS.

SUB-SECT. 1.—IN GENERAL.

See Small Holdings & Allotments Acts, 1908-1926; Ministry of Agriculture & Fisheries Act, 1919 (c. 91); Allotments Act, 1922 (c. 51).

SUB-SECT. 2.—ACQUISITION OF LAND.

See Small Holdings & Allotments Act, 1908 (c. 36), ss. 25, 32, 38-46, sched. I.; Land Settlement (Facilities) Act, 1919 (c. 59), ss. 1-9, 11-17, 19, 21-25, scheds. II. & III.; Allotments Act, 1922 (c. 51), ss. 8-12; Small Holdings & Allotments Act, 1926 (c. 52), scheds. I. & II.

13. Compulsory hiring—Alleged breaches of covenant by local authority—Notice to remedy breaches.]—In 1906 a local authority, under their statutory powers, obtained compulsorily a lease of land & sublet it in allotments to numerous persons. The lease contained covenants by the local authority to keep the land clean & in good heart & condition. In June, 1909, the lessor served the local authority with a notice under Conveyancing Act, 1881 (c. 41), s. 14 (1), directed to the whole of the land, & alleging, generally, breaches of the covenants, & requiring the same to be remedied within a reasonable time. In the following Nov. he issued a writ alleging that the breaches had not been remedied & claiming to re-enter. The local

authority denied the breaches. At the trial of the action the lessor's evidence showed that all the allotments were in a bad condition when the notice was given, that some of them were clean at the date of the writ, but that it would take at least a year from the date of the notice to put the whole of the land in good condition. On this the local authority objected that a reasonable time had not been allowed to remedy the breaches:—*Held*: as the notice was in general terms & directed to the whole of the land it was not divisible, & as a sufficient time had not been allowed to remedy all the breaches, the action was premature & must be dismissed.—*HOPLEY v. TARVIN PARISH COUNCIL* (1910), 74 J. P. 209.

Allowance of reasonable time to remedy breaches—Objection by authority of want of reasonable time.]—*HOPLEY v. TARVIN PARISH COUNCIL*, No. 13, *ante*.

15. — Right to break up pasture.]—Small Holdings & Allotments Act, 1908 (c. 36), sched. I., Part II., clause (2) (b), as amended by Land Settlement (Facilities) Act, 1919 (c. 59), s. 25 (1), sched. II., provides that an order made by the council of a borough, urban district or parish, for the compulsory hiring of land for the purpose of providing allotments "shall not authorise the breaking up of pasture unless the Board" of Agriculture & Fisheries "are satisfied that it can be so broken up without depreciating the value of the land, or that the circumstances are such that small holdings or allotments, as the case may be,

cannot otherwise be successfully cultivated." Where an order had been made under the Acts by a borough council for the compulsory hiring for allotments of a piece of land consisting entirely of pasture:—*Held*: in considering whether the breaking up of the pasture should be authorised, the Board must have regard to the particular piece of land alone, & need not be satisfied that there was no other land in the neighbourhood which could be successfully cultivated as allotments without the breaking up of pasture.—*KNOWLES v. SALFORD CORPN.*, [1922] 1 Ch. 328; 91 L. J. Ch. 406; 126 L. T. 729; 86 J. P. 97; 38 T. L. R. 316; 66 Sol. Jo. 332; 20 L. G. R. 337, C. A.

Injunction to restrain—Matter under consideration by Ministry of Agriculture.]—Where an order, purporting to be made under the Small Holdings & Allotments Acts, 1908–1919, has been made by a county council to enforce its compulsory powers of hiring land, but the council has not complied with the conditions precedent imposed by Small Holdings & Allotments Act, 1908 (c. 36), s. 7 (2), namely, that the council has been unable to acquire suitable land elsewhere on reasonable terms, the ct. will not, in view of the provisions of sect. 39, sub-sect. 3, grant an injunction to restrain the council from proceeding upon the order, if at the time of the application for the injunction the Board of Agriculture already has seisin of the matter & an inquiry by the Board is in progress as to whether the Board should confirm the order.—*REDDAWAY v. LANCASHIRE COUNTY COUNCIL* (1925), 41 T. L. R. 422.

17. Compulsory purchase—Suitability of land—Reasonability of price—Local authority *prima facie* judges.]—(1) An urban district council who, having failed to obtain suitable land for allotments by agreement, seek to acquire land in their district compulsorily, are *prima facie* the judges as to what land is suitable for the purpose & whether they can acquire it at a reasonable price within the ambits of the statute.

(2) "Suitable for allotments *prima facie* means land as to which the council, after having taken into consideration the entire circumstances of each case, came to the conclusion that for their purpose it is suitable, & may reasonably be expected to recoup the purchase-money out of rents to be paid by the allotment holders.

(3) The effect of Land Settlement (Facilities) Act, 1919 (c. 59), s. 1 (1), which provides that an order for compulsory acquisition of land made after the passing of the Act & before the expiration of three years from that date need not be confirmed by the Board of Agriculture & Fisheries, is that the making of the order shall be conclusive evidence that it has been duly made, that the requirements of Small Holdings & Allotments Act, 1908 (c. 36), have been complied with & that the order of the council is *intra vires* that statute.—*WOODFORD LAND & BUILDING CO., LTD. v. WOODFORD URBAN DISTRICT COUNCIL* (1921), 19 L. G. R. 559.

What is suitable land.]—*WOODFORD LAND & BUILDING CO., LTD. v. WOODFORD URBAN DISTRICT COUNCIL*, No. 17, *ante*.

19. — Making of order — Conclusive evidence of compliance with statutory requirements.]—*WOODFORD LAND & BUILDING CO., LTD. v. WOODFORD URBAN DISTRICT COUNCIL*, No. 17, *ante*.

SUB-SECT. 3.—DEALINGS WITH LAND.

See Small Holdings & Allotments Act, 1908 (c. 36), ss. 26–30, 33, 50; Land Settlement (Facilities) Act, 1919 (c. 59), s. 21, sched. II.; Allotments Act, 1922 (c. 51), ss. 14–16; Small Holdings & Allotments Act, 1926 (c. 52), sched. II.

SUB-SECT. 4.—MISCELLANEOUS POWERS OF COUNCILS.

See Small Holdings & Allotments Act, 1908 (c. 36), ss. 23, 24, 26, 32–37, 47, 49, 50; Land Settlement (Facilities) Act, 1919 (c. 59), ss. 19, 21–24, 28, scheds. II. & III.; Allotments Act, 1922 (c. 51), ss. 16, 17, 19, 21.

SUB-SECT. 5.—FINANCE.

See Small Holdings & Allotments Act, 1908 (c. 36), ss. 51–54; Land Settlement (Facilities) Act, 1919 (c. 59), s. 27; Allotments Act, 1922 (c. 51), ss. 17, 18; Small Holdings & Allotments Act, 1926 (c. 52), s. 2.

SECT. 2.—UNDER OTHER STATUTES.

20. Letting of allotment — Under municipal bye-law—Land not held for charitable use or trust—Invalidity of bye-law.]—*A.-G. v. STAFFORD CORPN.*, [1878] W. N. 74.

21. — Under private Act — Extension of borough—Right of residents in added area.]—By a private inclosure Act provision was made for allotments to be held by the deputies of the freemen in trust for freemen, or their widows, resident within the borough. Application had to be made to the deputies for any such allotment, & any person aggrieved with their decision could appeal to the justices of the borough in petty or special sessions, whose determination was "to be final & conclusive, & not removable by *certiorari*, or any other writ or process whatsoever, into any of Her Majesty's cts. of record. By the borough Act, 1891, the borough had been enlarged to include certain areas called "the added areas." Appct., a freeman of the borough, & resident in one of the added areas, applied to the deputies for an allotment, but his application was refused on the ground that he was not resident within the borough as constituted at the time of the enactment of the private inclosure Act. He appealed to the justices who granted his application, but at the request of the deputies they stated a case under Summary Jurisdiction Act, 1879 (c. 49), s. 33:—*Held*: (1) upon a preliminary objection to the appeal, as by Interpretation Act, 1889 (c. 63), s. 13, the words "ct. of summary jurisdiction" include justices sitting under any Acts other than Summary Jurisdiction Acts, the justices here formed a ct. of summary jurisdiction from which an appeal lay by a case stated under Summary Jurisdiction Act, 1879 (c. 49), s. 33; (2) on the merits, the extension of the limits of the borough carried with it the extension of the area of the residential privilege.—*LEICESTER BOROUGH (DEPUTIES OF FREEMEN) v. HEWITT* (1893), 62 L. J. M. C. 51; *sub nom.* *LEICESTER BOROUGH (DEPUTIES OF FREEMEN)*

PART III. SECT. 2.

b. Compensation for improvements—Under Market Gardeners Compensation (Scotland) Act, 1897 — Retrospective

effect.—Sect. 4 of the above Act (which corresponds with sect. 4 of the English Act of 1895) is not retrospective, & does not entitle tenants under leases current at the commencement of

the Act to compensation in respect of market-garden improvements executed prior to the commencement of the Act.—*SMITH v. CALLANDER* (1901), 70 L. J. P. C. 53, H. L.—*SCOT.*

Sect. 2.—Under other statutes.]

v. LEWITT, 68 L. T. 201 ; 57 J. P. 344 ; 5 R. 211, D. C.

22. Sale of allotment land—Right of Charity Commissioners.]—Allotments Extension Act, 1882 (c. 80), has not taken away from the Charity Comrs. the power of authorising a sale of charity lands vested in them under Charitable Trusts Act, 1853 (c. 137), & Charitable Trusts Amendment Act, 1855 (c. 124).—*SUTTON PARISH TO CHURCH* (1884), 26 Ch. D. 173 ; 53 L. J. Ch. 599 ; 50 L. T. 387 ; 32 W. R. 485.

23. Exemption from taxation.]—By a private inclosure Act in 1763, certain spaces of C. common were allotted to the corp'n. of York, in trust for the freemen inhabitants of B. ward in that city, as compensation for previous rights of common. In 1632, by agreement with the lord of the manor, the fourth part of the adjoining common of H., afterwards called the "Intack," was conveyed in fee to the mayor of York, in satisfaction of the common rights of the freemen inhabitants of B. ward. The allotments of C. common & the Intack had ever since been enjoyed by the freemen inhabitants of B. ward, & were under the control of pasture masters, who, after paying the expenses of management, applied the profits of the whole to the benefit of poor freemen, & also for some years past for the benefit of their

widows:—*Held*: the profits of the allotments which were applied under the Act of 1763 were exempt from corp'n. duty under sub-s. 2 of s. 11 of the Inland Revenue Act, 1885 (c. 51), s. 11 (2) ; but the profits of the Intack, not being appropriated & applied under any Act of Parliament, were not exempt under that sub-sect.—*INLAND REVENUE COMRS. v. SCOTT, Re BOOTHAM WARD STRAYS, YORK*, [1892] 2 Q. B. 152 ; 61 L. J. Q. B. 432 ; 67 L. T. 173 ; 56 J. P. 580, 632 ; 40 W. R. 632 ; 8 T. L. R. 347, 458 ; 36 Sol. Jo. 395 ; 3 Tax Cas. 134, C. A.

Annotations:—*Mentd. R. v. Income Tax Special Comrs., Ex p. University College of North Wales* (1909), 78 L. J. K. B. 576 ; *Chesterman v. Taxation Federal Comrs.*, [1926] A. C. 128.

24. What amounts to allotment — Allotments & Cottage Gardens Compensation for Crops Act, 1887 (c. 26).]—By above Act, s. 4, "allotment" means (*inter alia*), "any parcel of land of not more than 2 acres in extent held by a tenant under a landlord & cultivated as a garden":—*Held*: a piece of land less than 2 acres in extent, occupied by a seedsman for the purposes of his business, & having in it vegetables, fruit trees, & flowering plants which he sold, was not "cultivated as a garden," & was, therefore, not an "allotment" within sect. 4.—*COOPER v. PEARSE*, [1896] 1 Q. B. 562 ; 65 L. J. M. C. 95 ; 74 L. T. 495 ; 60 J. P. 282 ; 44 W. R. 494 ; 40 Sol. Jo. 376, D. C.

See, now, Allotments Act, 1922 (c. 51).

SMALLPOX.

See NUISANCE ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

SMOKE.

See NUISANCE ; RAILWAYS AND CANALS.

SMOKING

See INFANTS AND CHILDREN.

SNOW.

See HIGHWAYS, STREETS, AND BRIDGES.

SOCIETIES.

See BUILDING SOCIETIES ; CLUBS ; CRIMINAL LAW AND PROCEDURE ; FRIENDLY SOCIETIES ; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES ; LITERARY AND SCIENTIFIC INSTITUTIONS ; LOAN SOCIETIES ; TRADE AND TRADE UNIONS.

SODOMY.

See CRIMINAL LAW AND PROCEDURE.

SOLD NOTE.

See SALE OF GOODS ; STOCK EXCHANGE.

SOLDIERS.

See ROYAL FORCES.

SOLE CORPORATION.

See CORPORATIONS ; ECCLESIASTICAL LAW.

SOLEMN FORM.

See EXECUTORS AND ADMINISTRATORS.

SOLEMNISATION OF MARRIAGE.

See CRIMINAL LAW AND PROCEDURE ; ECCLESIASTICAL LAW ; HUSBAND AND WIFE.

SOLICITOR-GENERAL.

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Admissions by Solicitors

and Solicitors' Clerks. See EVIDENCE.

Agency „ AGENCY.

Arbitrations „ ARBITRATION.

Attorney-General „ CHARITIES; CON-
STITUTIONAL LAW;
CROWN PRACTICE.

Barristers

Champerty

Maintenance

Notaries

Solicitor-General

Title, Investigation of

See BARRISTERS.

„ ACTION.

„ ACTION.

„ NOTARIES.

„ CONSTITUTIONAL
LAW.

„ SALE OF LAND.

Part I.—The Law Society.

See Solicitors Act, 1860 (c. 127), s. 1; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 99 (4), 215 (1); Charters, 1845, 1872, 1903, 1909.

Part II.—Admission and Registration.

SECT. 1.—CONDITIONS OF ADMISSION.

SUB-SECT. 1.—IN GENERAL.

1. **Age—Minor not admissible.]**—A minor is not admissible as an attorney.—*Ex p. EVANS* (1838), 2 J. P. 39; 2 Jur. 47.

2. ———.]—A person who is under age cannot be examined for admission as an attorney.—*Ex p. CRAGG* (1838), 6 Dowl. 256; 1 Will. Woll. & H. 34.

Annotation:—Reid. Ex p. Tebbs (1840), 4 J. P. 749.

3. ———.]—An articled clerk who is under age, but will become of age a few days after the term, may be examined for the purpose of being admitted the following term.—*Ex p. TEBBS* (1840), Woll. 16; 4 J. P. 749; 4 Jur. 1014.

4. ———.]—An articled clerk who is under age but will become of age shortly after the next term may be examined for the purpose of being admitted as an attorney early in the following term if there are special circumstances which show that it is an object to him to be admitted early.—*Ex p. BOUSFIELD* (1841), Woll. 195; 10 L. J. Q. B. 361; 5 Jur. 772.

5. ———.]—The ct. will not admit a minor as an attorney except in very urgent circumstances.—*Ex p. STEELE* (1864), 33 L. J. Q. B. 326; 10 Jur. N. S. 1254; 12 W. R. 956.

6. **Sex — Disqualification of women.]**—Before the passing of Solicitors Act, 1843 (c. 73), women were by the common law of England under a general disability, by reason of their sex, to become attorneys or solrs. That disability can be, & is, proved by inveterate usage. It could not be removed by a mere interpretation clause, such as Solicitors Act, 1843 (c. 73), s. 48, which provides that words importing the masculine gender shall extend to a female. There is nothing in Solicitors Act, 1843 (c. 73), or any amending statute which can be construed as giving women any new right to become solrs. The disability therefore continues, & the Law Society cannot

admit any woman to their preliminary examination with a view to her becoming a solr.—*BEBB v. LAW SOCIETY*, [1914] 1 Ch. 286; 83 L. J. Ch. 363; 110 L. T. 353; 30 T. L. R. 179; 58 Sol. Jc. 153, C. A.

———.]—*See, now, Sex Disqualification (Removal) Act, 1919* (c. 71).

7. **Conduct—Effect of previous rejection for misconduct.]**—The fact that, five years since, an applicant for admission as an attorney was successfully opposed for misconduct as clerk, will not prevent his being admitted when his subsequent conduct has been irreproachable.—*ANON.* (1845), 1 New Pract. Cas. 300.

8. ——— **Imprisonment during articles—For ill treatment of servant.]**—*Re* ——— (1859), 33 L. T. O. S. 222.

9. ——— **Evidence of misconduct—Use of evidence previously ordered to be destroyed.]**—In 1916 an action in which present defts., a firm of solrs., were pltf. & claimed an injunction to restrain present pltf., who had been a clerk in their employ, from committing an alleged breach of a restrictive clause in his agreement of service with them was settled on terms embodied in an order of the ct. The agreement of service contained an alteration which the firm alleged & the clerk denied was a forgery. The order provided that the agreement of service should be destroyed & that certain affidavits should be taken off the file, but contained no direction as to the destruction of copies of the affidavits or of photographs of the alleged forgery which had been taken by the parties. In 1918 present pltf. applied to the Law Society for admission as a solr., & the firm lodged an objection against his admission & exhibited a photograph of the alleged forgery & copies of the affidavits that had been taken off the file. Thereupon he commenced the present action against the firm, claiming an injunction to restrain them from using any copy or photograph of the documents that had been destroyed, & moved for an

PART I.

a. **Maintenance of Osgoode Hall.]**—*R. v. LAW SOCIETY* (1870), 21 C. P. 229.—CAN.

b. **Exaction of admission fees from Judge of Queen's Bench Division.]**—The Law Society had no power in Jan. 1883, to exact admission fees from a retired Judge of the Court of Queen's Bench.—*Re MILLER* (1886), 3 Man. L. R. 367.—CAN.

c. **Right to move for committal of layman for contempt of court.]**—The Incorporated Law Society has a *locus standi* to move for the committal of a layman on the ground that he has committed a contempt of Ct. by simulating the process of the Ct.—*INCORPORATED LAW SOCIETY v. SAND, KOWARSKY & Co.*, [1910] T. P. D. 1295.—S. AF.

PART II. SECT. 1, SUB-SECT. 1.

6 i. **Sex—Disqualification of women.]**—The Legislature, when framing Legal

Professions Act, had not in mind the probability of women seeking to enter the profession; therefore any remedy for the omission lies with the Legislature & not with the benchers of the Law Society.—*Re FRENCH* (1911), 17 B. C. R. 1.—CAN.

6 ii. ———.]—At Common Law women are not eligible as barristers & solrs.; & there is nothing in British Columbia Legal Professions Act which can be construed as extending to them. The word "person" in the Act was not intended to include a woman.—*Re FRENCH* (1912), 37 N. B. R. 359; 19 W. L. R. 847; 1 W. W. R. 488; 1 D. L. R. 80.—CAN.

6 iii. ———.]—In a petition by a woman for admission as law agent:—*Held*: her apprenticeship was not invalidated by the fact that it was begun prior to the passing of Sex Disqualification (Removal) Act, 1919.—*ANDERSON, PETITIONER* (1920), 58 Sc. L. R. 155.—SCOT.

6 iv. ———.]—A woman cannot

be enrolled as an attorney in the Province of the Cape of Good Hope.—*INCORPORATED LAW SOCIETY v. WOOKKY*, [1912] App. D. 623.—S. AF.

d. **Foreign attorney—Length of service.]**—An attorney from another province who if originally admitted in B. C., would have had to serve five years, must show five years' service before he can be admitted in B. C.—*GWILLIM v. LAW SOCIETY OF BRITISH COLUMBIA* (1898), 6 B. C. R. 147.—CAN.

e. **Apprentice of salaried clerk of six Clerks of Court of Chancery.]**—An apprentice to an attorney who, during the period of his apprenticeship, filled the office of a salaried clerk in the office of one of the six Clerks of the Ct. of Ch.:—*Held*: notwithstanding, to be entitled to be admitted a solr. of the ct.—*Re LYONS* (1838), 1 Dr. & Wal. 327.—IR.

f. **Barrister of five years' standing.]**—The ct. allowed a barrister of five years' standing to be admitted as a solr. without apprenticeship, under special

PART II.—ADMISSION AND

order;—*nunc pro tunc*: (1) it was not an implied term of the settlement embodied in the order that no use whatever was to be made in future of any copy of the documents destroyed; (2) there was no breach of good faith in the use which defts. had made of the copies of the documents in question.—*JONES v. TRINDER, CAPRON & Co.*, [1918] 2 Ch. 7; 87 L. J. Ch. 330; 119 L. T. 100; 62 Sol. Jo. 486, C. A.

Bankruptcy.]—See Solicitors Act, 1922 (c. 57), s. 6.

Barrister must be debarred.]—See BARRISTERS, Vol. III., p. 316, Nos. 20, 21.

SUB-SECT. 2.—SERVICE UNDER ARTICLES.
See Sect. 2, post.

SUB-SECT. 3.—EXAMINATIONS.
See Sect. 3, post.

SECT. 2.—SERVICE UNDER ARTICLES.

SUB-SECT. 1.—IN GENERAL.

10. Whether clerk an apprentice—For purpose of poor law settlement.]—An attorney's clerk, articulated by indenture, is an apprentice within Poor Relief Act, 1690 (c. 11), s. 8.—*ST. PANCRAS PARISH v. CLAPHAM PARISH* (1860), 2 E. & E. 742; 29 L. J. M. C. 141; 2 L. T. 210; 24 J. P. 613; 6 Jur. N. S. 700; 8 W. R. 493; 121 E. R. 278.

—For return of fees on bankruptcy of master.]—*See BANKRUPTCY, Vol. IV., p. 479, No. 4325.*

11. Clerk articulated to more than one partner.]—A clerk may be articulated to more than one member of a firm of attorneys.—*Re HOLLAND* (1872), L. R. 7 Q. B. 297; 26 L. T. 289; 20 W. R. 756; *sub nom. Re AN ARTICLED CLERK*, 41 L. J. Q. B. 141.

12. Necessity for written articles.]—*Ex p. ADAMS*, No. 116, *post*.

SUB-SECT. 2.—RESTRICTIVE COVENANTS IN AND WITH ARTICLES.

See, generally, TRADE & TRADE UNIONS.

SUB-SECT. 3.—REGISTRATION OF ARTICLES.
A. In General.

See Solicitors Act, 1888 (c. 65), ss. 5, 8.

13. Duty of master to register.]—Under Solicitors Act, 1843 (c. 73), s. 8, it is the duty of an attorney to enrol the articles of his articulated clerk.—*DUEFAUR v. SIGEL* (1853), 4 De G. M. & G. 520; 22 L. J. Ch. 678; 43 E. R. 610, L. JJ.

Annotation:—Mentd. *Re Foster v. G. W. Ry.* (1882), 8 Q. B. D. 515.

circumstances, on passing the usual final examination.—*Re BARRINGTON* (1883), 17 L. L. T. Jo. 126.—**IR.**

g. Scottish law agent.]—*Re SMITH*, [1921] N. Z. L. R. 810.—**N.Z.**

h. Aliens.]—There is & always has been a disability on the part of aliens to be admitted as solicitors.—*Re HEYTING*, [1928] N. Z. L. R. 233.—**N.Z.**

PART II. SECT. 2, SUB-SECT. 1.

k. Number of articulated clerks allowed each attorney.]—An attorney

may, subject to the sanction of the ct., have any number of articulated clerks at one & the same time.—*Re CALANOR SOOBRAMANEYAN'S ARTICLES OF CLERKSHIP* (1862), 2 Ind. Jur. O. S. 15.—**IND.**

l. Who may be an apprentice—Clerk of humble origin.]—Neither the humbleness of the origin of appct., nor his having filed the office of a process server of civil bill process; nor his having been dismissed from that office for having violated a rule of the assistant barrister's ct., under the belief that it did not apply to him; nor his having on a particular occasion

14. Time for registration.]—The affidavit of due execution of articles of clerkship is filed in due time if filed within six months after the execution of the articles by either of the parties. Where, therefore, the articles were sent to Bombay to be executed by the master, & were there executed by him, & afterwards returned to England & executed by the clerk, & the affidavit was filed within six months of execution by the latter, but not of the former:—*Held*: it was filed in due time.—*ANON.* (1857), 27 L. J. Q. B. 184; *sub nom. Ex p. LEGGETT*, 30 L. T. O. S. 157; 3 Jur. N. S. 1218.

15. Loss of original articles—Registration of copy.]—*Ex p. CLARK* (1820), 3 B. & Ald. 610; 106 E. R. 784.

16. ———.]—If an original indenture of clerkship is lost, a copy may be enrolled.—*Ex p. CHAPMAN* (1835), 3 Dowl. 562.

17. ———.]—Draft of the articles of clerkship to an attorney allowed to be enrolled, where the original was lost through the misconduct of the person who had them delivered to him to be enrolled.—*Ex p. BECKENDEN* (1835), 1 Har. & W. 193.

—.]—Articles of clerkship having been entered into in Mar. 1829, were subsequently stolen: the ct., in Easter term, 1840, allowed a copy thereof to be enrolled, but not *nunc pro tunc*.—*Ex p. NASH* (1843), 5 Man. & G. 696; 6 Scott, N. R. 695; 134 E. R. 740.

—.]—Articles of clerkship having been destroyed by fire, the ct. allowed a verified copy to be enrolled, & an affidavit of execution to be filed, although more than three months had elapsed since their execution.—*Ex p. BRIGGS* (1843), 1 Dow. & L. 94.

20. ———.]—*Re CULLEY* (1850), 14 L. T. O. S. 355.

———.]—*See Solicitors (Clerks) Act, 1839 (c. 33), s. 9.*

21. Irregular registration — Rectification — After time for registration elapsed.]—Under Solicitors Act, 1843 (c. 73), ss. 8, 9, the ct. has a discretionary power; & therefore where, in the affidavit filed under sect. 8, the attorney filing described himself as "one of the attorneys of her Majesty's Ct. of Common Pleas," but omitted to swear distinctly that he had been duly admitted, the ct. allowed a supplemental affidavit of his admission to be filed, & allowed the service of the clerk to be reckoned from the time of the execution of the articles, although more than six months had elapsed.—*Ex p. FRAZER* (1846), 7 L. T. O. S. 259.

22. ———.]—*Re SMITH* (1850), 15 L. T. O. S. 166.

B. Omission to Register.

See, now, Solicitors Act, 1888 (c. 65), s. 8.

23. Whether clerk admissible as solicitor.]—A person may be examined as an attorney, where, through the fault of his master, his articles of clerkship have not been properly enrolled.—*Ex p. NASH* (1837), Will. Woll. & Dav. 194.

acted as a bailiff in the execution of a *fi. fa.* will disqualify him from becoming apprentice to an attorney, his character & conduct being in other respects unimpeached.—*Re M'COLGAN* (1843), 6 L. Eq. R. 207.—**IR.**

PART II. SECT. 2, SUB-SECT. 3.—A.

m. Whether filing *nunc pro tunc* allowed.]—The ct. refused to allow a law student's articles of clerkship to be filed, *nunc pro tunc*, where they had not been filed at the time of their execution.—*Re WEEKS' APPLICATION* (1877), 11 N. S. R. (2 It. & C.) 383.—**CAN.**

Sect. 2.—Service under articles: Sub-sect. 3, B.; sub-sect. 4, A. & B.]

24. Effect of omission on period of service—Omission by solicitor.]—When a person was in Sept. 1843 articulated to an attorney, & thereupon the attorney handed him his articles, with directions to keep them safely, & never afterwards asked for them, or took any steps to have them enrolled, and the clerk swore that he was ignorant of the necessity for enrolling them, and thought that all was done that was necessary until Nov. 1846, when for the first time he learnt the necessity of their being enrolled, & had since applied in vain to his master to have them enrolled; the ct. made an order, upon the application of the clerk, that he should be at liberty to have them enrolled, & that his service should be computed from the date of the articles.—*Ex p. UNWIN* (1847), 2 New Pract. Cas. 187; 9 L. T. O. S. 83.

25. ———.]—*Ex p. HORREX* (1849), 13 L. T. O. S. 75.

26. ———.]—*p. THORNLEY* (1851), 17 L. T. O. S. 85.

27. ———.]—*Ex p. ALDERTON* (1855), 26 L. T. O. S. 108.

28. ———.]—*Ex p. ELLIS* (1860), 3 L. T. 268.

29. ——— Omission by solicitor's agent.]—Articles of clerkship were duly stamped & executed, & transmitted to agents in town, for the purpose of being enrolled with the proper officer of the ct. It appeared that in the agent's book there was an entry in the handwriting of a clerk, who had left the country, of his having attended the enrolment, & paid a fee on that occasion; but there was no entry of such an enrolment in the book kept at the master's office. The ct. refused to order the counterpart of the articles to be registered *nunc pro tunc*, or to order the party to be admitted an attorney.—*Ex p. PILGRIM* (1823), 1 B. & C. 264; 2 Dow. & Ry. K. B. 429; 1 L. J. O. S. K. B. 114; 107 E. R. 99.

30. ———.]—*Ex p. MORRIS* (1845), 4 L. T. O. S. 320.

31. ———.]—*Re FENN* (1857), 28 L. T. O. S. 232.

32. ———.]—*ANON.* (1857), 28 L. T. O. S. 232.

33. ———.]—*Ex p. INGRAM* (1859), 33 L. T. O. S. 122.

34. ———.]—Where, through the neglect of the clerk of an agent, explained & accounted for by his own affidavit, no neglect or default being imputable to appct. the articles were not filed at the time of execution, the ct. allowed them to take effect from the time of their date.—*Re HARRIS' ARTICLES* (1862), 11 W. R. 36.

35. ——— Omission without default of clerk.]—Where it appeared that the affidavit of the execution of articles of clerkship had not been filed until after six months, but that the delay was accounted for, & was not occasioned by any fault of the clerk, the service was allowed to be computed from the execution of the articles.—*Re PETTIT* (1854), 2 W. R. 417.

36. ———.]—*Ex p. LEE* (1856), 82 L. T. O. S. 89; 5 W. R. 20.

37. ——— Omission by default of clerk.]—Where the articles of an articulated clerk who had taken his degree were not enrolled in due time, in consequence of his neglect in not furnishing the master with an affidavit of his matriculation & degree, the ct., upon motion, permitted his service to be reckoned from the date of his articles.—*Ex p. TRAFFORD* (1858), 32 L. T. O. S. 35.

38. ———.]—An articulated clerk whose articles were dated Jan. 1859, had taken his degree of M.A. in 1849. The affidavit stated that, expecting that a bill would be introduced which would be applicable to such cases as his, the affidavit of the due execution of his articles had not been made within the six months of their date, as required by Solicitors Act, 1843 (c. 73), & they had not been enrolled. The ct. allowed them to be filed *nunc pro tunc*.—*Re McDONALD* (1860), 1 L. T. 326.

Loss of original articles.]—See Sub-sect. 3, A. *ante*.

SUB-SECT. 4.—STAMPING OF ARTICLES.

A. In General.

See, now, Stamp Act, 1891 (c. 39), s. 27, sched. I.

39. Necessity for stamping—Before enrolment.]

—It is the duty of the master to refuse to enrol articles of clerkship to an attorney, unless they are stamped at the time they are produced to him; for to allow the enrolment, which is the act of the ct. by means of its officer, would be to admit unstamped articles to be good, useful, & available in a ct. of law, contrary to the prohibition of 9 Will. 3, c. 25, s. 59.—*Ex p. WILLIAMS* (1857), 26 L. J. Q. B. 167; 29 L. T. O. S. 65; 3 Jur. N. S. 160; 5 W. R. 376; *subsequent proceedings* (1858), 6 W. R. 254.

Annotations:—Reid. Re Welch (1857), 29 L. T. O. S. 75; *Ex p. Welch* (1857), 30 L. T. O. S. 157; *Ex p. Fenton* (1859), 7 W. R. 160; *Ex p. Breden* (1862), 31 L. J. Q. B. 184.

B. Effect of Delay in Stamping.

40. Date of commencement of service—Delay without default of clerk.]—Where articles of clerkship have not been stamped within six months from their execution, but have been subsequently stamped under 19 & 20 Vict. c. 81, & the clerk has served under them from their execution, the ct. will allow a subsequent enrolment of them, to count from the date of the execution, provided there has been no negligence or default on the part of the clerk.—*Ex p. NORTON* (1856), 26 L. J. Q. B. 24; 28 L. T. O. S. 68; 5 W. R. 6.

Annotations:—Reid. Ex p. Fenton (1859), 32 L. T. O. S. 245; *Ex p. Belk* (1863), 9 L. T. 516.

41. ———.]—Where articles of clerkship have not been stamped at the proper time this ct. will not allow the service of the clerk to date from such articles where it is not shown that the clerk was ignorant of the want of a stamp.—*Re HAND* (1857), 29 L. T. O. S. 160; 5 W. R. 622; *subsequent proceedings, sub nom. Ex p. HAND*, 5 W. R. 687.

42. ———.]—A clerk was articulated in 1842 to his father, who died in 1845. Three months after the death it was discovered that the articles had never been stamped. The omission could not be accounted for; but it was not occasioned by any default on the part of the clerk, who, till the discovery referred to was made, believed them to have been stamped. In 1858 they were stamped under 19 & 20 Vict. c. 81, s. 3:—*Held*: the service of the clerk was to be allowed to be computed from the date of the execution of the articles.—*Ex p. FENTON* (1859), 32 L. T. O. S. 243; 7 W. R. 160.

43. ———.]—*Ex p. GREER* (1859), 33 L. T. O. S. 91.

44. ———.]—Where there has been an omission to stamp articles of clerkship within six months from the date of their execution, but they have subsequently been stamped & the penalty

paid, under 19 & 20 Vict. c. 81, s. 3, the ct. will allow the service under them to be computed from the date of their execution, instead of from the date of the filing of the affidavit under Solicitors Act, 1843 (c. 73), ss. 8, 9, provided it is shown to their satisfaction that the non-payment of the duty at the proper time arose from unforeseen emergency, & not from intentional neglect or design.—*Ex p. BISHOP* (1860), 9 C. B. N. S. 150; 30 L. J. C. P. 48; 7 Jur. N. S. 243; 142 E. R. 58; *sub nom. Re BISHOP*, 3 L. T. 323.

Annotations :—*Apld. Ex p. Herbert* (1862), 1 B. & S. 825. *Expld. Ex p. Edwards* (1863), 2 New Rep. 122; *Ex p. Jones* (1863), 14 C. B. N. S. 301. *Refd. Ex p. Wilson* (1864), 4 B. & S. 889; *Ex p. Blades* (1875), 32 L. T. 33.

45. ——— **Master failing to fulfil promise to pay duty.**—Appct. had been for several years managing clerk to an attorney, who died, leaving a widow & son, whose service under articles to his father had not then expired. The business was carried on by C., an attorney, for the benefit of the widow & family; & appct. entered into the service of C. to assist him in managing the business for their benefit until the son should be admitted an attorney. In June, 1858, appct. was articulated to the son, who had been admitted in the same year; & the widow promised to pay the stamp duty as an acknowledgment & recompense for his services. He entered into the articles upon this understanding, & did not discover that the duty had not been paid until after the time allowed by law for stamping & enrolling the articles had expired. In Jan. 1862, he petitioned the Lords of the Treasury, who directed the Comrs. of Inland Revenue to stamp the articles, on payment of the duty & penalty under 19 & 20 Vict. c. 81, s. 3, & the articles were stamped accordingly. The ct. refused to allow the service under the articles to be computed from the date of their execution.—*Ex p. BREDEN* (1862), 2 B. & S. 649; 31 L. J. Q. B. 184; 8 Jur. N. S. 937; 121 E. R. 1213; *sub nom. Re BREDEN*, 6 L. T. 55.

Annotations :—*Refd. Ex p. —* (1863), 1 New Rep. 321; *Ex p. Roth* (1874), 29 L. T. 885.

46. ——— **—**—The ct. will permit the service under unstamped articles of clerkship to be reckoned from their date, where the omission to pay the duty at the proper time was the result of an emergency which may be justly inferred to have been unforeseen by the party, the stamp having been since affixed under the authority of the Commissioners of the Treasury. B. had been managing clerk to an attorney who died, leaving a widow & a son too young to carry on the business. He gave his services to the family & to a friend of the family, an attorney, in order to keep the business together until the son should be admitted. The son, as soon as he was admitted, in June, 1858, gave him his articles, & the widow promised to pay the stamp duty, as a reward for the great service he had rendered the family. Trusting to the widow's promise, he continued to serve under the articles; & he did not discover that the money had not been paid until after the expiration of the six months allowed by Solicitors Act, 1843 (c. 73), s. 8, for filing the affidavit & enrolling the articles. In Jan. 1862, he petitioned the Lords of the Treasury, having then procured the money himself, who allowed the articles to be stamped on payment of the duty & the penalty under 19 & 20 Vict. c. 81, s. 3 :—The ct., under the circumstances, & after conferring with the Ct. of Q. B., permitted the affidavit of the execution of the articles to be filed & the articles to be enrolled *nunc pro tunc*, & the service under the articles to count from the date of their execution.—*Re BREDEN* (1862), 12 C. B. N. S. 351; 142 E. R. 1178; *sub nom. Ex p.*

BREDEN, 31 L. J. C. P. 321; 6 L. T. 494; 9 Jur. N. S. 176.

Annotations :—*Consd. Ex p. Edwards* (1863), 2 New Rep. 122; *Ex p. Jones* (1863), 14 C. B. N. S. 301; *Ex p. Banyard* (1875), L. R. 10 C. P. 638. *Apld. Ex p. Blades* (1875), 44 L. J. C. P. 115; *Re Sayer* (1875), L. R. 10 C. P. 569. *Dbtd. Ex p. Bryan* (1875), 32 L. T. 568. *Refd. Ex p. —* (1863), 1 New Rep. 321.

47. ——— **Delay intentional.**—Although where, from accidental causes or unintentional neglect, articles of clerkship have not been stamped & registered within the six months, the ct. will permit the service of the clerk to be computed from the date of the articles; yet if it appear that the articles were left unstamped intentionally, even though with an improper motive, & so are not registered within six months, the ct. will not interfere on behalf of the clerk.

A. B., who was articulated to his father, was at that time in delicate health, & it being doubtful if he would be able to follow the profession, the articles were left unstamped for a year, when it appearing that the clerk would be able to pursue his profession an application was made to the Treasury for leave to have the articles stamped, which being granted, an application was then made to this ct. that the period of the clerk's service may be computed from the date of the articles, which application was refused.—*Re WELCH* (1857), 27 L. J. Q. B. 213; 6 W. R. 64; *sub nom. Ex p. WELCH*, 30 L. T. O. S. 157; 3 Jur. N. S. 1218.

48. ——— **—**—B., not having sufficient money of his own, entered into articles, under a promise from his father to make up the sum requisite for the stamp duty within six months of the date of execution. The father having failed in so doing, B. continued to serve under the articles, knowing them to be unstamped, & after taking counsel's opinion on the subject. At the close of his service, the clerk, for the first time, was enabled to raise sufficient money for the duty & penalty & upon application to the Lords of the Treasury, they granted permission, under 19 & 20 Vict. c. 81, s. 3, for the articles to be stamped, upon payment of the duty & penalty, which was done. On application to the ct. to permit the articles to be enrolled, & service under them to be computed from the date of their execution, the ct. granted partial relief, & allowed two years of the service to count.—*Ex p. BELK* (1863), 2 H. & C. 737; 3 New Rep. 393; 33 L. J. Ex. 73; 9 L. T. 516; 10 Jur. N. S. 348; 12 W. R. 316; 159 E. R. 305.

Annotation :—*Refd. Ex p. Wilson* (1864), 4 B. & S. 889.

49. ——— **Ill health of clerk.**—*Ex p.* (1857), 29 L. T. O. S. 129.

50. ——— **Delay due to financial circumstances.**—*Ex p. HUGHES* (1858), 32 L. T. O. S. 92.

—Appct. had been articulated as clerk to his father & served the five years required by law without appct.'s knowledge, as he alleged, that the articles were not stamped. The affidavit of the father stated that, having before the articles been subject to much pecuniary loss & pressing expenses, & a diminution of professional income on account of the changes in the law & personal & family affliction, he was at the time of the articles without the means to pay the stamp duty thereon; & that he had not articulated appct. speculatively, but with the intention of ultimately stamping & enrolling the articles. The Lords of the Treasury having, under 19 & 20 Vict. c. 81, s. 3, directed the Comrs. of Inland Revenue to stamp the articles upon payment of the duty & penalty, & the articles having been stamped accordingly :—*Held* : they might be enrolled, & the service under them be computed from the date

Sect. 2.—Service under articles: Sub-sect. 4, B.; sub-sect. 5.]

of their execution.—*Ex p.* HERBERT (1862), 1 B. & S. 825; 31 L. J. Q. B. 33; 8 Jur. N. S. 615; 121 E. R. 920; *sub nom.* ANON., 5 L. T. 579; *sub nom.* *Ex p.* AN ARTICLED CLERK, 10 W. R. 211.

Annotations:—Consd. *Ex p.* Breden (1862), 2 B. & S. 649; *Ex p.* Jones (1863), 14 C. B. N. S. 301. *Dbtd.* *Ex p.* Edwards (1863), 2 New Rep. 122. *Reid.* *Ex p.* Wilson (1864), 4 B. & S. 889; *Ex p.* Roth (1874), 22 W. R. 329.

52. —.]—A person was duly articled to an attorney, who before the period of service expired became bkpt., & finally was struck off the rolls. Before the articles were cancelled, the clerk entered into an agreement in writing with another attorney to procure an assignment of the articles, & in the meantime to serve as his clerk. The former attorney refused to execute an assignment of the original articles. The new articles were not stamped during the service, in consequence, as the clerk deposed on oath, of his poverty, but by permission of the Comrs. of the Treasury, under 19 & 20 Vict. c. 81, s. 1, they were afterwards stamped on payment of the penalty. The ct., under the circumstances, allowed the new articles to be enrolled, & the service under them to count from the date of the clerk's discharge from the original articles.—*Ex p.* WILSON (1864), 4 B. & S. 889; 3 New Rep. 416; 33 L. J. Q. B. 89; 9 L. T. 758; 10 Jur. N. S. 469; 12 W. R. 341; 122 E. R. 693.

53. —.]— Upon the mistaken legal advice that articles of clerkship need not be stamped for six months after execution, appct.'s articles were executed without stamp; & before the first six months elapsed appct.'s father became unable, in consequence of unexpected losses in business, to pay the amount required. The service, however, was continued under the articles, & three years afterwards the father paid the stamp & penalty:—*Held*: upon application to compute the service from the date of the articles under Solicitors Act, 1843 (c. 73), ss. 8, 9, although an articled clerk who has been tricked or misled should have every consideration, the ct. will not accept as an excuse for the ordinary requirements of the law upon admission to the profession of an attorney circumstances which are loosely called an emergency, & which do not show a *bond fide* intention from the commencement to carry out the duties imposed; & the circumstances of this case did not constitute a sufficient excuse.—*Ex p.* ROTH (1874), 29 L. T. 885; 22 W. R. 329.

54. — Delay prolonged through suspension of articles.]—In 1821, P. was articled to his father, an attorney, & served three years & three months, when his father died; at his death P. finding the articles had never been stamped, placed himself at once in a special pleader's chambers & was called to the bar; subsequently, however, P. became managing clerk to a solr. & continued so till 1860.

On an application to this ct. under the provisions of Solicitors (Clerks) Act, 1844 (c. 86), s. 2, to have the articles enrolled *nunc pro tunc*, so as to enable P. to serve the remaining time under the articles of 1821, the ct. refused to grant the application.—*Ex p.* PARKER (1860), 8 W. R. 460.

55. — Delay through accidental omission.]—Where the delay in stamping articles had been caused by some accidental omission, & by the closing of the office on a Holy Day, & the commissioners had allowed the stamping on payment of a penalty, the ct. allowed the time to run from

the day of execution.—*Re* APPLETON'S ARTICLES (1862), 11 W. R. 35.

56. — Delay through mistake of law.]—An attorney's articled clerk applied to stamp his articles within six months of their execution, being misled by the words of 33 & 34 Vict. c. 97, s. 43; but the Inland Revenue refused to affix the stamp except upon payment of a penalty. The clerk subsequently paid the penalty together with the duty, but in consequence of his mistake in the law, he was prevented from enrolling his articles within the time required.

The ct. allowed his service to be reckoned from the date of the articles instead of from the day of filing the affidavit required with the enrolment, under Solicitors Act, 1843 (c. 73), ss. 8, 9.—*Ex p.* HAYWARD (1873), 29 L. T. 422.

57. —.]—*Ex p.* ROTH, No. 53, *ante*.

58. — Delay through unforeseen inability to pay—Where reasonable expectation.]— entered into articles, knowing them to be unstamped; but confiding in the promise of his father to advance him, within six months, the money necessary to get them stamped. The father subsequently became unable to fulfil his promise, & the son continued to serve under the articles, knowing them to be unstamped, until his service under them had expired. Afterwards he obtained permission from the Lords of the Treasury, under 19 & 20 Vict. c. 81, s. 3, that the articles should be stamped upon payment of the duty & £50 penalty, which was done. On application being made to the ct. to permit the articles to be enrolled, & service under them to be computed from the date of their execution, the ct. refused to grant the application.—*Ex p.* — (AN ARTICLED CLERK) (1863), 1 New Rep. 321.

59. —.]—A clerk was articled on being told by a friend that he thought the money for the stamp could be raised in a month or six weeks. He was not able to obtain the money for more than a year, when he memorialised the Treasury, & was allowed to have the articles stamped on the payment of a penalty of £20.

The ct. declined to allow his service to date from the execution of the articles.—*Ex p.* EDWARDS (1863), 2 New Rep. 122; 32 L. J. C. P. 213; 8 L. T. 360; 10 Jur. N. S. 17; 11 W. R. 754.

Annotation:—Reid. *Ex p.* Wilson (1864), 4 B. & S. 889.

60. —.]—The ct. will not allow articles of clerkship to be enrolled *nunc pro tunc*, & the service under them to be reckoned as from their date, where there has been an omission to cause them to be stamped within the time required by law, even though the Treasury has accepted the stamp duty, with a penalty, unless it is shown that the omission has been the result of some unforeseen emergency, or of the failure of some just expectation. The mere disappointment of a vague hope, will not suffice.—*Ex p.* JONES (1863), 14 C. B. N. S. 301; 143 E. R. 461.

61. —.]—The ct. will only permit articles of clerkship to be enrolled *nunc pro tunc*, & the service thereunder to be computed from the date of their execution, the duty & penalty under 19 & 20 Vict. c. 81, s. 3, being paid, where the omission to stamp them at the proper time has been the result of some accident or unforeseen circumstance. The mere disappointment of some vague hope or expectation of obtaining the means of paying the duty in time will not be received as an excuse for a non-compliance with the statute.—*Ex p.* DARVILLE (1867), L. R. 2 C. P. 244; 36 L. J. C. P. 133; 15 L. T. 537; 15 W. R. 352.

Annotation:—Consd. *Ex p.* Banyard (1875), L. R. 10 C. P. 638.

62. —.]—The ct. will only allow articles of clerkship to be enrolled *nunc pro tunc*, & the service under them to be reckoned as from their date when the omission to stamp has been the result of some unforeseen & special occurrence. The mere promise of a brother to pay the stamp duty out of a legacy is insufficient.—*Ex p. BRYAN* (1875), 32 L. T. 568.

63. —.]—The ct. will allow the service under articles of clerkship to be computed from their date, notwithstanding the stamp duty thereon has not been paid within the proper period, provided the failure to pay it has arisen from some unforeseen circumstance over which the party had no control. Therefore, where the failure had arisen from the non-payment of a debt due to the clerk, which he had a reasonable expectation to obtain in time, the excuse was held sufficient.—*Re SAYER* (1875), L. R. 10 C. P. 569; *sub nom. Ex p. SAYER*, 44 L. J. C. P. 307, n.; 32 L. T. 728.

Annotation :—*Distd. Ex p. Banyard* (1875), L. R. 10 C. P. 638.

64. —.]—Articles of clerkship to an attorney may be allowed to date from the execution & not from the enrolment, if the stamping has been delayed by the breach of a promise to provide the money upon which the clerk relied.

Before granting an application that the service of a clerk to an attorney under unstamped articles may be computed from the date thereof, & not from the time of enrolment, the ct. will require that notice of the application shall be given to the Incorporated Law Society, in order that an opportunity may be afforded of investigating the truth of the statements upon which the application is founded.—*Ex p. BLADES* (1875), 44 L. J. C. P. 115; 32 L. T. 33; *sub nom. Ex p. BLAYDES*, 23 W. R. 312.

Annotations :—*Appld. Re Sayer* (1875), L. R. 10 C. P. 569. *Refd. Ex p. Banyard* (1875), L. R. 10 C. P. 638.

65. —.]—The mere failure to obtain payment of a debt due to the clerk at the time of his entering into articles, so as to enable him to pay the stamp duty & enrol the articles & affidavit within the time limited by the statute, is not such a disappointment of a "reasonable expectation" that he would be prepared with the money in due time as will induce the ct. to allow the articles to be enrolled *nunc pro tunc*.—*Ex p. BANYARD* (1875), L. R. 10 C. P. 638; 44 L. J. C. P. 305; 32 L. T. 729.

66. Delay due to application for money in court. —Articled clerk. Omission to stamp & enrol articles within due time. Delay accounted for by application to Ct. of Ch. for increased funds out of a lunatic's estate.—*Ex p. TAYLEURE* (1860), 3 L. T. 267.

67. Notice of application—Service on Law Society.—*Ex p. BLADES*, No. 64, *ante*.

SUB-SECT. 5.—PERIOD OF SERVICE.

See Solicitors Acts, 1843 (c. 73), s. 3; 1860 (c. 127), ss. 2, 3, 4, 15; 1877 (c. 25), s. 12; 1922 (c. 57), s. 3.

68. Commencement of period—From execution

PART II. SECT. 2, SUB-SECT. 5.

70 i. Completion of period.—The time of a clerk articled after July 1, 1858, must expire fourteen days before the term of his admission, for the affidavit of service cannot be accepted at a later period. Where, therefore, M. was articled for a year on Jan. 25, 1860, & Hilary term began on Feb. 4,

1861:—*Held*: he could not be admitted in that term.—*Re MACGACHEN* (1861), 20 U. C. R. 32.—CAN.

72 i. Reduction of period—On passing specified examination.—To come within the exception in Legal Professions Act, s. 37 (5), appot. must have had his term of study or service shortened because he was a graduate.—

of articles.—The service of an articled clerk is reckoned as from the date of the execution, & not from the day of the date of the articles; consequently, he cannot be admitted till he has served five years from the day of the execution.—*Ex p. ANGEL* (1840), 4 Jur. 656.

69. — Form of application for commencement—Irregularity in application.—Where an application for service to be reckoned from the date of articles is granted, & it subsequently appears that such application was not made upon affidavit, the rule cannot be drawn up; but the ct. in such a case granted a second application.—*Ex p. WILLIAMS* (1858), 6 W. R. 254.

Effect of delay in stamping.—See Nos. 40–67, *ante*.

70. Completion of period.—Where B., an articled clerk & M.A., was articled on May 8, 1858, for three years "from the date thereof":—*Held*: such service was not completed until after May 8, 1861.—*Re —*, M.A. (1861), 9 W. R. 639.

71. —.]—Where a clerk was articled on Jan. 31, 1857, to serve "for five years next ensuing the date thereof":—*Held*: he could not be admitted on Jan. 31, 1862, but might be under Solicitors Act, 1860 (c. 127), s. 12, by a judge at chambers on the following day.—*Re ELLIS* (1862), 5 L. T. 686.

72. Reduction of period—On passing specified examination.—In order to enable a graduate of the Universities, named in Solicitors Act, 1843 (c. 73), s. 7, to be admitted an attorney after three years' service, he must have taken his degree before being bound by articles. It is not sufficient that, within the four years preceding such binding, he should have completed the time necessary to enable him to take his degree, but has been prevented by illness from doing so, & has in fact taken his degree within a few months after the binding.—*Ex p. BRADFORD* (1859), 1 E. & E. 417; 28 L. J. Q. B. 138; 32 L. T. O. S. 254; 5 Jur. N. S. 648; 7 W. R. 188; 120 E. R. 966; *subsequent proceedings*, 1 L. T. 61.

Annotation :—*Folld. Ex p. Bradford* (1859), 1 L. T. 61.

73. —.]—Under Solicitors Act, 1843 (c. 73), s. 7, to enable a clerk to be admitted after three years' service only, he must have taken his degree before he was bound a clerk; where, therefore, a clerk was bound by articles in Dec. 1855, & he took his degree in Oct. 1856, & served three years after so taking his degree, & passed a successful examination, the ct. refused a fiat for his admission as an attorney.—*Ex p. BRADFORD* (1859), 1 L. T. 61.

74. —.]—By Solicitors Act, 1843 (c. 73), s. 3, no person is to be capable of being admitted an attorney unless he shall have been bound by contract, in writing, to serve as clerk for & during the term of five years; & by sect. 5 of Solicitors Act, 1860 (c. 127), certain of the judges may by regulations, direct that the person having successfully passed any examination, now or hereafter to be established in any of the universities, & to be specified in such regulations, may be admitted after having been subsequently bound & served under articles for four years.

S. had successfully passed the middle class

R. v. LAW SOCIETY OF BRITISH COLUMBIA (1901), 8 B. C. R. 356.—CAN.

n. In Ontario.—An articled clerk can serve only one year with the agent of the attorney in this Province.—*Re GILKISON* (1837), 3 Ont. Dig. 6524.—CAN.

o. Solicitor in sheriff's court in Scotland—Three years.—A solr. in

Sect. 2.—Service under articles: Sub-sects. 5 & 6, A. & B.]

examinations of Oxford & Cambridge, which, however, were not included in the regulations of the judges, & he was thereupon articulated for a term of four years, which term he duly served:—*Held*: the articles were bad; & the ct. refused to permit him upon entering into fresh articles to have the advantage of his four years' previous service under such former articles.—*Ex p. JONES* (1870), 22 L. T. 300.

75. ———.]—A member of the University of Edinburgh, who has not taken the degree of M.A., but has been enrolled on the General Council by virtue of 21 & 22 Vict. c. 83, s. 6, is not entitled to be admitted an attorney after three years' service under articles.

Qu.: whether this ct. has jurisdiction to compel the examiners to grant a certificate to an articulated clerk that he has passed his intermediate examination.—*Ex p. STEWART* (1872), L. R. 7 Exch. 202; 41 L. J. Ex. 76; 20 W. R. 493.

76. ——— After requisite service as unarticled clerk.]—An attorney's clerk, having served more than ten years, left the service in July, 1853, & was not engaged in any legal employment until Oct. 1860, when he entered into articles for three years with another attorney, & served under them. The ct. directed that he should be examined with a view to his admission as an attorney under Solicitors Act, 1860 (c. 127), s. 4, notwithstanding the interval between the termination of the first service & the date of the articles.—*Ex p. VOSPER* (1864), 4 B. & S. 901; 3 New Rep. 466; 33 L. J. Q. B. 113; 9 L. T. 719; 10 Jur. N. S. 724; 12 W. R. 374; 122 E. R. 697.

77. ———.]—It is not necessary that articulated clerks who are applying to be admitted under Solicitors Act, 1860 (c. 127), s. 4, should produce certificates from their masters that they have served faithfully, honestly & diligently, during the ten years. If the masters refuse to give them, such service may be proved by other means.—*Ex p. RIGBY* (1865), 11 L. T. 671.

78. ———.]—In Mar. 1855, S., then in his fifteenth year, entered the service of W., an attorney & solr., as a salaried clerk, & had since been continuously employed as a general clerk in attorney's & solr.'s business transacted by W. under his superintendence, & had latterly been managing clerk. On Mar. 2, 1864, having then served for nine years, S. entered into articles of clerkship with W. for five years, being unaware of the provisions of Solicitors Act, 1860 (c. 127), s. 4, which enable a person to be admitted an attorney, etc., who shall for the term of ten years have been a *bonâ fide* clerk to an attorney, etc., & during that term shall have been *bonâ fide* engaged in the transaction & performance, under the direction & superintendence of the attorney, etc., of such matters of business as are usually transacted and performed by attorneys, etc., & who, after the expiration of the term of ten years, shall have been bound by, & has duly served under, articles of clerkship to a practising attorney, etc., for the term of three years. In Hilary Term, 1868, S. applied to the ct. under Solicitors Act, 1860 (c. 127), s. 12, to be at liberty to pass his examination, in order to

be admitted an attorney at the termination of the fourth year of his service under the articles in the ensuing Mar., on the ground that he was entitled to the benefit of sect. 4. The ct. granted the application, holding that appct. was within the meaning of sect. 4 though his articles had been executed before the expiration of the ten years' service; & that the requirements as to the ten years' service were satisfied by his having been employed as a clerk from the commencement of the service in the transactions of the business of the attorney's office.—*Re SHERRY* (1868), L. R. 3 Q. B. 164; 9 B. & S. 115; *sub nom. Ex p. SHERRY*, 17 L. T. 471; *sub nom. Re AN ARTICLED CLERK*, 37 L. J. Q. B. 82; 16 W. R. 340.

79. ——— Employed at age of thirteen.]—A solr.'s clerk, claiming the right, under Solicitors Act, 1860 (c. 127), s. 4, to go up for his intermediate examination after having served as general clerk in a solr.'s office for ten years & as an articulated clerk for a year & a half, stated, in answer to questions put to him by the examiners for the Incorporated Law Society, that he had commenced such antecedent service at the age of thirteen. The examiners decided that service at such age was not *bonâ fide* & active employment in the business of a solr.'s office, & refused to admit him to the examination. On an application to the High Ct. to overrule this decision:—*Held*: no appeal would lie.—*Re JAMES* (1885), 33 W. R. 654; 1 T. L. R. 508.

SUB-SECT. 6.—CONTINUITY OF SERVICE.

A. Service under Different Articles.

See, now, Solicitors Acts, 1843 (c. 73), s. 13; 1874 (c. 68), ss. 4, 5; 1877 (c. 25), s. 15.

80. Whether fresh articles may be entered into.]—*Ex p. SMITH*, No. 114, *post*.

81. ———.]—An articulated clerk after four years' service went to the university & remained until he had obtained the degree of B.A. In the meantime his articles expired, but on application to this ct. he was allowed to enter into fresh articles *quantum valeat*.—*Ex p. GARDNER* (1863), 8 L. T. 315.

82. ———.]—Where the time for articles of clerkship had expired & the service under them had not been complete the ct. refused an application for leave to enter into fresh articles & to serve under them to complete the service under the original articles.—*Ex p. KEDDLE* (1865), 4 B. & S. 993; 34 L. J. Q. B. 136; 11 Jur. N. S. 503; 13 W. R. 290; 122 E. R. 731; *sub nom. Ex p. KIDDLE*, 11 L. T. 625.

Annotation:—*Folld. Ex p. Trenchard* (1870), 21 L. T. 638.

83. Previous articles cancelled by mutual consent.]—In Oct. 1856, T. was articulated to his father, an attorney, & duly served for two years; when, becoming out of health, he was recommended by his medical attendants to follow some more active occupation, & his father obtained him a commission in the Army in June, 1859. In 1870, his health being re-established, he sold out of the Army, & entered into fresh articles with his father early in 1871, & duly served up to May, 1874. An application was then made that the two years under the original articles might be allowed to be reckoned as part of the five years' service under the

the sheriff's ct. in Scotland is not entitled to be admitted on proof of service here for three years, under 7 Will. 4, c. 15.—*Re MACARA* (1847), 2 U. C. R. 114.—CAN.

PART II. SECT. 2, SUB-SECT. 6.—A.
p. *Absence of attorney abroad.—Re-articling to another.*]—Appct. in 1847,

articled himself to J. M., an attorney, then in partnership with E. J. In Nov. 1850, J. M. went to England, & did not return; & in Feb. 1852, his partnership with E. J. was dissolved. In Mar. 1852, the clerk articulated himself, of his own accord, to T. G. for the residue of his five years, J. M. not consenting to this arrangement. The ct.

would not allow the time served with the last master.—*Ex p. MCINTYRE* (1854), 10 U. C. R. 294.—CAN.

q. *Service under three different articles.—Whether detached periods reckoned.*]—*Ex p. MORINE* (1892), 7 Nfld. L. R. 721.—NFLD.

r. *Articles served in Transvaal.*]—In

fresh articles:—*Held*: the facts amounted to a virtual cancellation by mutual consent of the first articles; & the case came within Solicitors Act, 1843 (c. 73), s. 13, & the application might be granted.—*Ex p.* TRENCHARD (1874), L. R. 9 Q. B. 406.

Annotations:—*Apld.* *Ex p.* Williamson (1876), 46 L. J. Ch. 624. *Refd.* *Ex p.* Adams (1875), L. R. 10 Q. B. 227.

84. —.]—W. was articled to R. in 1861 for five years & served under these articles one year eleven months & eight days when with R.'s consent the articles were considered as cancelled & W. entered a merchant's office where he remained for eight months. In 1865 W. was re-articled to R. for three years & twenty-three days & served under these articles two years & twelve days when he left R.'s service through ill health. In 1869 R. assigned & re-articled W. to L. for one year & twelve days, which period W. served, making a total service of five years under the three articles. On an application by W. that the three periods of service might be reckoned as continuous service for five years:—*Held*: the first & second articles had been cancelled by mutual consent within Solicitors Act, 1843 (c. 73), s. 13, & the application might be granted.—*Ex p.* WILLIAMSON (1876), 4 Ch. D. 581; 46 L. J. Ch. 624; 35 L. T. 695.

B. Absence through Illness.

See, now, Solicitors Act, 1877 (c. 25), s. 15.

85. Whether period of absence counted.]—An articled clerk who had served under the articles two years & a half, when he was prevented by illness from giving regular attention to business during the rest of the term, but attended as his health permitted, was allowed by the ct. to be admitted an attorney.—*Ex p.* MATTHEWS (1830), 1 B. & Ad. 160; 109 E. R. 747.

Annotations:—*Folld.* Anon. (1863), 9 L. T. 324; *Ex p.* Beddoo (1865), 13 W. R. 871. *Consd.* *Ex p.* Moses (1873), 22 W. R. 57. *Refd.* *Ex p.* Vaughan (1837), Will. Woll. & Dav. 46; *Ex p.* Hodge (1838), 2 Jur. 989.

86. —.]—An articled clerk to an attorney who was prevented by illness from serving the last nine days of his time, which time he made up, after his recovery allowed to be examined for admission.—*Ex p.* VAUGHAN (1837), Will. Woll. & Dav. 46; 1 Jur. 21.

87. —.]—A person may be examined for admission as an attorney, though he has been absent from his master's service above a year, on account of ill health.—*Ex p.* HODGE (1838), 1 Will. Woll. & H. 403; 2 Jur. 989.

Annotations:—*Folld.* Anon. (1863), 9 L. T. 324; *Ex p.* Beddoo (1865), 12 L. T. 711. *Refd.* *Ex p.* Moses (1873), L. R. 9 Q. B. 1.

88. —.]—An articled clerk who had been absent from England, during his clerkship, rather more than a twelvemonth, on account of ill health, was allowed to be examined for admission as an attorney, at the expiration of his clerkship.—*Ex p.* CROSS (1843), 2 Dowl. N. S. 692; 12 L. J. Q. B. 138; 7 Jur. 67.

89. —.]—An articled clerk, whose service was interrupted by illness, & who was absent for a period of two years on account of his health, was nevertheless allowed to be considered as having sufficiently served under his articles.—ANON. (1863), 9 L. T. 324.

Annotation:—*Apld.* *Ex p.* Beddoo (1865), 12 L. T. 711.

the absence of special circumstances the ct. refused to recognise under Rule of Ct. No. 149, articles served in the Transvaal.—TANCRED v. CAPE LAW SOCIETY, [1923] C. P. D. 551.—S. AF.

PART II. SECT. 2, SUB-SECT. 6.—B.

85 i. Whether period of absence counted.]—A clerk, having served four

years, obtained his master's consent to go to Ireland for the benefit of his health, intending to return in six months, but his health still continuing bad, he with his master's permission remained six months longer. The ct. on his return admitted him as an attorney.—*Re* HAGARTY (1841), 6 O. S. 188.—CAN.

90. —.]—Two years, during which an articled clerk had been absent on account of illness, were allowed to count as service under his articles.—*Ex p.* BEDDOE (1865), 12 L. T. 711; 13 W. R. 871.

91. —.]—M. was articled to an attorney in July, 1868, for five years, & served till June, 1871, when, owing to illness, under medical advice, & with consent of his master, he went a voyage to Australia. He returned to England in June, 1872, & at once resumed his service till July, 1873, when his term expired. He passed his final examination in Trinity Term, 1873, & applied for leave to be admitted in Michaelmas Term, 1873:—*Held*: the eleven months, during which the clerk had been absent, could not be counted as service; as he had not been "actually employed" as an attorney or solicitor during the whole of the five years, as required by Solicitors Act, 1843 (c. 73), s. 12.—*Ex p.* MOSES (1873), L. R. 9 Q. B. 1; 43 L. J. Q. B. 13; 29 L. T. 420; 22 W. R. 57.

92. — Absence must be satisfactorily accounted for.]—Where a clerk had, through illness, been unavoidably absent for a period of about two years, & five months during his clerkship, but subsequently served his full term of five years; & at the expiration of his articles lived with his uncle, a drysalter, for five years, & then wished to be admitted an attorney; the ct. refused to grant a motion that he should be admitted after having been examined, as, if the absence through illness be satisfactorily accounted for, the examiners invariably proceed to examine the candidate for admission.—*Ex p.* PEEL (1843), 7 Jur. 724.

93. — Necessity for fresh articles for residue of time.]—An articled clerk who had served under articles for five years all but five months, was then absent for five months & seventeen days on account of ill health. On his return at the end of the five months he passed his final examination & applied for his certificate, but was required to enter into fresh articles for five months:—*Held*: an order for his admission, as if he had served the full period for five years could not be made, nor a prospective order for his admission after service for the remaining period without entering into fresh articles.—*Ex p.* MARSHALL (1874), 22 W. R. 754.

94. — —.]—Where a clerk who had articled himself for three years was absent by reason of illness for sixteen months, & afterwards served thirteen months:—*Held*: he could not be examined, & must enter into fresh articles for six months.—*Ex p.* DIGBY (1876), 45 L. J. Ch. 692.

95. Time of articles not expired—Whether clerk allowed to enter into fresh articles for residue of time—Discharge of old articles.]—Where the time of articles of clerkship had not expired, & there had been a suspension of service under them by reason of illness, the ct. discharged them & allowed the clerk to enter into fresh articles with the same master for the residue of the time necessary to complete the five years' service.—*Ex p.* DE FIVAS (1864), 4 B. & S. 992; 122 E. R. 731; *sub nom.* *Ex p.* DE JIVAS, 34 L. J. Q. B. 7; 11 Jur. N. S. 13.

85 ii. —.]—*Re* DEASE (1842), 1 Long. & T. 654.—IR.

85 iii. —.]—Absence from unavoidable illness was received by the judge as an excuse for short service, there being also an affidavit that appt. had not wholly discontinued his reading in the meantime.—*Ex p.* BUCHANAN (1873), 1 N. Z. Jur. 106.—N.Z.

*Sect. 2.—Service under articles: Sub-sect. 6, C.**C. Service Not under Articles.**See, now, Solicitors Act, 1877 (c. 25), s. 15.*

96. Whether counted—Period of service pending assignment of articles.]—Where a clerk had served part of his time with a master who had left the country, & before his articles were assigned to another master, an interval of ten months had elapsed, during which he was not serving under any articles, but under the assignment he served the remainder of the time specified; the ct. would not allow him to be admitted until he had served out the ten months under new articles.—*Ex p. ROWLE* (1820), 2 Chit. 61.

97. ———.]—A clerk, duly articulated to an attorney, served a portion of his time with his master. It was then agreed that the clerk should be assigned to his father, also an attorney, for the residue of his term. On this understanding, the clerk immediately left his first master with his consent, & served his father as a clerk for the residue of the five years. A dispute having arisen between the first master & the father respecting the amount of premium to be repaid, which was not settled for some months, the assignment of the clerk was not executed until about six months after he had actually commenced to serve his father:—*Held*: the service of the father during the interval before the execution of the assignment, could not be considered as a service with the father under the articles; but as it was by the consent of the original master & for his purposes, it might, under the circumstances, be considered a service with that master.—*Ex p. BRUTTON* (1854), 23 L. J. Q. B. 290; 23 L. T. O. S. 98; 18 Jur. 580; 2 W. R. 456.

Annotations:—Distd. Ex p. Wallis (1862), 2 B. & S. 416; *Ex p. Adams* (1875), L. R. 10 Q. B. 227. *N.F. Ex p. Harrison* (1875), 44 L. J. Q. B. 103. *Refd. Ex p. Moses* (1873), L. R. 11 Q. B. 1.

98. ———.]—A clerk duly articulated to an attorney, served a portion of his time with his master; it was then agreed that he should be assigned to another attorney for the residue of his term. On this understanding the clerk left his first master & went into the service of the second master. From circumstances over which the clerk had no control, the assignment to the second master was not executed for about eight weeks after his entering the second master's service. The clerk served under the assignment for the residue of the term:—*Held*: the interval between entering the second master's service & the execution of the assignment could not be reckoned as service under the articles within Solicitors Act, 1843 (c. 73), s. 12.—*Ex p. HARRISON* (1875), 44 L. J. Q. B. 103; 23 W. R. 635.

99. ——— On death of original master.]—Where a clerk, in consequence of his master's death, had not served during a certain period of the five years, but after the expiration of the five years, served an additional time equal to the period of his non-service, the ct. allowed him to be examined.—*Ex p. TOMKINS* (1837), 6 Dowl. 3; Will. Woll. & Dav. 569.

Annotation:—Refd. Ex p. Johnson (1838), 2 Jur. 966.

100. ———.]—Where a clerk, on the death of his master, continued with the surviving partner for the residue of the five years, & also for nine months in addition, but an interval of nine months had elapsed between the death & the assignment of his articles by the exor., the ct.

allowed him to be examined.—*Ex p. JOHNSON* (1838), 1 Will. Woll. & H. 404; 2 Jur. 966.

101. ———.]—When a clerk has been articulated to one of the members of a firm & he covenants to serve him, a service with a partner, after the decease of the master, is not service under the articles, although the partner was a party to the articles.—*Ex p. DALTON* (1840), 9 Dowl. 110; 4 Jur. 1186.

102. ——— For purpose of admission to examination.]—Under special circumstances the ct. will allow an articulated clerk to be examined before the expiration of his five years' service.—*Ex p. FULCHER* (1840), 8 Dowl. 614; 4 Jur. 435.

Annotation:—Refd. Ex p. Brutton (1854), 23 L. J. Q. B. 290.

103. ———.]—W. was articulated for five years to his father, who was an attorney. After part of the time of service had elapsed the father died, & the articles were shortly afterwards assigned to C., who was also an attorney. In the interval between the death of the father & the assignment of the articles W. attended regularly at the office, & was employed in the business there. The ct. refused to allow that interval to be reckoned as part of the five years.—*Ex p. WALLIS* (1862), 2 B. & S. 416; 31 L. J. Q. B. 176; 6 L. T. 242; 8 Jur. N. S. 913; 10 W. R. 524; 121 E. R. 1128.

104. ——— On insanity of original master.]—When a clerk is discharged from his articles, on the ground of his master's insanity, he must be articulated to another attorney for the residue of the term of five years unelapsed at the time of the insanity commencing, & a portion of the time served after that event with other attorneys carrying on the master's business cannot be reckoned.—*Ex p. BROWN* (1841), 9 Dowl. 526.

105. ———.]—The ct. will allow his articulated clerk to be discharged from his articles & to enter into new ones; but a service during the time that elapses between the attorney becoming insane & the new articles being entered into cannot be reckoned as part of the service under the articles.—*Ex p. TURNER* (1841), Woll. 155; 10 L. J. Q. B. 356; 5 Jur. 842.

106. ——— Service continued to make up time lost—Absence with leave of master.]—If during the five years an articulated clerk has been absent two months, by consent of his master, at his father's house, & at the end of the five years has served two additional months, he will be entitled to admission.—*Ex p. HUBBARD* (1832), 1 Dowl. 438. *Annotations:—Refd. Paget v. Chambers* (1839), 7 Scott, 610; *Ex p. Smith* (1859), 33 L. T. O. S. 135.

107. ———.]—Order made for the examination of a person as an attorney, where he had been absent with leave from his master's service for three months, which time he had afterwards made up.—*Ex p. PETERSON* (1837), Will. Woll. & Dav. 196.

108. ——— Unavoidable absence.]—When a clerk has been unavoidably absent from his master's service for several months during the five years, but has served a similar period at the expiration of his articles, he may be admitted.—*Ex p. FROST* (1835), 3 Dowl. 322; 1 Har. & W. 111. *Annotations:—Dbtd. Ex p. Smith* (1859), 28 L. J. Q. B. 263. *Refd. Ex p. Johnson* (1838), 2 Jur. 966.

109. ——— Service with wrong solicitor by [mistake.]—A young man served three years in the office of an attorney, under the impression that he had been bound an articulated clerk to him. It appeared, that the articles had been made out

PART II. SECT. 2, SUB-SECT. 6.—C.

t Whether counted—Service as clerk to three different solicitors.]—Re MILLIKEN (1870), 18 W. R. 809.—IR.

with the consent of his father in the name of another attorney, who was not a partner with his master, & almost unknown to him. The ct. would not interfere & said, that the Act 22 Geo. 2 was imperative, & that they could not, by any possibility, make the three years' service available.—**SANDY'S CASE** (1823), 1 L. J. O. S. K. B. 152.

Service under assignment.—When made after expiry of articles.]—Where a party had served for two months under articles, & had then left his master, & relinquished the profession, but afterwards, & after the expiration of the original article, caused the same articles to be assigned to another attorney, with whom he served for two years & ten months, being a Bachelor of Arts:—**Held**: as the articles had expired before the assignment, the service under the assignment was not a service under a contract within the statute.—*Ex p.* **UNTHANK** (1828), 2 Moo. & P. 453; 7 L. J. O. S. C. P. 57.

Annotation:—*Re* **Ford v. Draw** (1879), 5 C. P. D. 59.

Service under defective articles.—Articles not duly executed.]—Although the ct. has power to give a clerk the benefit of his service, if the affidavit of the due execution of his articles is not filed in proper time, it cannot give him that benefit if the articles themselves have not been duly executed.—*Re* **RYMER** (1849), 14 L. T. O. S. 184.

112. — Service with master's partner.—After conviction of master for felony.]—The master of an articulated clerk committed felony, of which he was convicted, a point of law being reserved, which was afterwards decided against him. Pending these proceedings, the clerk continued in the office serving his master's partner. Upon an application after the decision of the Ct. of Criminal Appeal, by the clerk, that he might be permitted to enter into fresh articles with his master's partner without an assignment, & that his service under them might be reckoned from the time when his service with his former master, by reason of his felony, terminated:—**Held**: the ct. had no power to grant the last branch of the application.

S. has not been serving his master during the period he seeks to have the advantage of, but he has been serving his partner; & it is not possible, therefore, to say that during this period he has been serving under his articles. This is certainly a misfortune for him, but the ct. cannot interfere (**PATTESON, J.**).—*Ex p.* **STRATTON** (1849), 14 L. T. O. S. 207.

113. — Service with original master.—After period of absence with consent.]—2 Geo. 2, c. 23, requiring as a previous qualification to being admitted as an attorney that the party shall continue in the service of the attorney to whom he is articulated for five years, is not complied with by the clerk serving part of the time with another attorney, with his master's consent, & the rest of the time with his master.—*Ex p.* **HILL** (1798), 7 Term Rep. 456; 101 E. R. 1074.

Annotations:—*Distd.* *Ex p.* **Brutton** (1854), 23 L. J. Q. B. 290. *Re* *Ex p.* **Adams** (1875), L. R. 10 Q. B. 227.

114. — — — — —.]—S. served, under articles, as clerk to an attorney & solr., for four years, six months & twenty-four days. He then, with the consent of his master, was absent for about three years, during part of that time serving as ensign in a militia regiment, &, during the resi-

due, being employed as a surveyor of taxes in the Inland Revenue Office. He then returned to his original master, & served him as clerk, but not under articles, for a period of five months & six days:—**Held**: the latter period of service, as clerk, could not be computed with the former period of such service, so as to make the requisite period of five years' service. But leave was granted to S. to enter into fresh articles, to be stamped with the same duty as was payable on the original articles, & to serve under such fresh articles to complete the period of five years.—*Ex p.* **SMITH** (1859), 1 E. & E. 928; 28 L. J. Q. B. 263; 33 L. T. O. S. 135; 5 Jur. N. S. 515; 7 W. R. 451; 120 E. R. 1158.

Annotations:—*Apld.* *Ex p.* **Gardner** (1863), 8 L. T. 315. *Overd.* *Ex p.* **Kedde** (1865), 4 B. & S. 993. *Distd.* *Ex p.* **Jones** (1870), 22 L. T. 300. *Re* *Ex p.* **Rogers** (1865), 11 Jur. N. S. 504; *Ex p.* **Trenchard** (1870), 21 L. T. 638.

115. — — — — — After period of service under assignment.]—An articulated clerk was at his own request assigned to one D., an attorney, for fifteen months at the expiration of which time he returned to his original master, & continued to serve him up to the end of the term:—**Held**: such period of fifteen months could not be reckoned as a portion of the five years required by the statute.—*Ex p.* **ADAMS** (1875), L. R. 10 Q. B. 227; 44 L. J. Q. B. 102; 32 L. T. 454; 23 W. R. 594; *subsequent proceedings* (1876), 4 Ch. D. 39.

Annotation:—*Folld.* *Ex p.* **Harrison** (1875), 44 L. J. Q. B. 103.

116. — — — — —.]—(1) In Sept. 1870, A. was articulated to his father, an attorney, for five years, & served till Oct. 1873, when his father by an indenture assigned his services to D. for fifteen months, after which A. returned to his father & served under the original articles till Sept. 1875. The Ct. of Q. B. having held that the service under the assignment could not be reckoned as part of the five years' service, A. continued to serve with his father for another fifteen months, but without fresh articles:—**Held**: A. had not duly served under the contract within Solicitors Act, 1843 (c. 73), s. 3, & he must complete his five years' service under fresh articles for fifteen months, but under the circumstances, he might be allowed to go in for his examination.

(2) An articulated clerk must not only be bound for five years & serve five years, but the service itself must be under written articles.—*Ex p.* **ADAMS** (1876), 4 Ch. D. 39; 46 L. J. Ch. 42; 35 L. T. 751; 25 W. R. 54; *previous proceedings* (1875), L. R. 10 Q. B. 227.

Production of fresh articles to registrar.]—*See* Solicitors Act, 1888 (c. 65), s. 9.

D. Applications to Court.

See, now, Solicitors Act, 1877 (c. 25), s. 15.

117. Time for application.—On expiry of articles.]—An articulated clerk having served a part of his time, was compelled by illness to relinquish service for upwards of a year, at the end of which, being recovered, he resumed service, & moved the ct. that the period of his illness should be reckoned as actual service. At the time of the application the full period of five years from the date of the articles had not expired. The ct. refused the application, as premature.—*Ex p.* **ROGERS** (1865), 34 L. J. Q. B. 136; 11 Jur. N. S. 504.

PART II. SECT. 2, SUB-SECT. 6.—D.

a. To sanction military service abroad of articulated clerk.]—A judge has power under Rules for Admission of Barristers & Solicitors of May 1, 1913, r. 2, to sanction military service abroad by

an articulated clerk during the term of his articles.—*Re* **GRAY**, [1915] V. L. R. 226.—**AUS.**

b. For leave to hold another office during term of clerkship.]—When leave is sought by an articulated clerk to hold

any office or to engage in any trade, business, occupation, or employment other than his employment under articles under Rules of the Council of Legal Education, 1921, r. 26, the main, if not the only, question is whether the

Sect. 2.—Service under articles: Sub-sect. 6, D.; sub-sects. 7 & 8, A.]

118. —.—.—.]—Where an articled clerk served two years under his articles, & then ceased to serve any longer, & the articles expired, & he then desired to enter into fresh articles, & obtain the previous consent of the ct. to such two years' service being computed in the period of service under such new articles: the ct. refused such consent, leaving it open, however, to appct. to apply to have such period computed when he shall have served a sufficient time under such new articles.—*Ex p. TRENCHARD* (1870), 21 L. T. 638; *subsequent proceedings* (1874), L. R. 9 Q. B. 406.

SUB-SECT. 7.—SUFFICIENCY OF SERVICE.

See Solicitors Acts, 1843 (c. 73); 1860 (c. 127); 1874 (c. 68), ss. 4, 5; 1877 (c. 25), s. 15.

119. Service must be bonâ fide—Master not acting as solicitor—Acting as scrivener.]—L.'s CASE (1737), Barnes, 39; 94 E. R. 795.

120. ——— Acting as clerk to another solicitor.]—The examiners of attorneys rejected a candidate on the ground of insufficient service, it appearing that, while articled, he had acted as agent to an insurance office, & that the attorney to whom he was articled was himself acting as clerk to another attorney.—*Ex p. CARR* (1842), 3 Q. B. 447; 6 Jur. 194; 114 E. R. 578.

121. Service must be exclusive—Working in spare time for another solicitor.]—Articled clerk performing all his master's business may, at leisure hours, work for wages with another attorney.—*Ex p. BLUNT* (1771), 2 Wm. Bl. 764; 96 E. R. 447. *Annotation:—Refd. R. v. Scriveners' Co.* (1842), 3 Q. B. 939.

122. ——— Engagement in another occupation—Surveyor of taxes.]—A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the Crown:—*Held:*

proposed office, occupation or employment is such as to lead the judge to conclude that the service under articles will be so interfered with or affected that the benefit to be derived by appct. from such service will be appreciably diminished. The burden is on appct. to show clearly that it will not, but it is not necessary to show that the proposed occupation is one which is either directly or indirectly connected with the practice of the law.—*Re GELLALLY, Re ANDERSON*, [1923] V. L. R. 248.—**AUS.**

PART II. SECT. 2, SUB-SECT. 7.

a. Service must be bonâ fide—Six years' service under successive practitioners.]—Where a law student has passed six years of *bonâ fide* service under successive practitioners, but through the default of his first master no articles were entered into in respect of the first two years, whereas the local Act required five years of service:—*Held:* under the local Act actual *bonâ fide* service would suffice; & petitioner might be admitted as an attorney.—*Re W.* (1849), 3 Nfld. L. R.

d. Service must be exclusive—Engagement in another occupation—Pupil at school preparing for University.]—H., having been articled on Nov. 21, 1854, for five years, was permitted to be absent during 1855 for six months, under the belief that that period would be allowed. This he spent at a grammar school preparing for the university. He was afterwards absent for eight & five weeks respectively in 1856, to prepare for his exami-

nation at the university:—*Held:* the six months could not be allowed, but that the other periods might be.—*Re HUME* (1860), 19 U. C. R. 373.—**CAN.**

e. Sufficiency of certificate of master & affidavit of clerk.]—A certificate from the master, & an affidavit of the clerk "that he had during his clerkship done everything required of him," was held not sufficient.—*Ex p. LYONS* (1824), Tay. 171.—**CAN.**

f. Lapse of period—Before payment of stamp duty on indentures.]—As a general rule, from which there will be no deviation, unless under peculiar circumstances, the ct. in computing the period of apprenticeship to an attorney will not allow credit for time elapsed before the payment of the stamp duty upon the indentures.—*Re STERNE* (1840), 2 I. Eq. R. 378.—**IR.**

g. Business carried on other than in place where master resides.]—Where an articled clerk carries on business in a place where the master does not reside, the time so spent will not be computed in his service.—*McINTOSH v. McKENZIE* (1837), 3 Ont. Dig. 6524.—**CAN.**

h. Part of five years on trial.]—The ct. will not swear in an apprentice who had been in an attorney's office for five years, where, for part of the time, he had been upon trial, & was not articled until afterwards.—*Re KIRWAN* (1834), Hayes & Jo. 726.—**IR.**

k. Part of time at University—Original apprenticeship uncompleted.]—A person who was a student of T. C. D. at the time he was bound apprentice to

he could not, within 22 Geo. 2, c. 46, ss. 8, 10, be considered as serving his whole time & term in the proper business of an attorney, & he ought not to be admitted on the roll, & that having been admitted, he ought to be struck off.—*Re TAYLOR* (1822), 5 B. & Ald. 538; 106 E. R. 1287.

Annotations:—Consd. R. v. Scriveners' Co. (1842), 3 Q. B. 939. *Refd. Ex p. Bateman* (1845), 11 Q. B. 853.

123. ———.]—An articled clerk to an attorney held the office of surveyor of taxes during the term of his clerkship. But it appeared upon affidavit, that for more than three of the five years for which he was bound, his service has been given to the attorney to whom he was articled. He afterwards bound himself to another solr., & served him for two years:—*Held:* his service under the first articles could not be coupled with his service under the second.—*Re TAYLOR* (1825), 4 B. & C. 341; 6 Dow. & Ry. K. B. 428; 3 L. J. O. S. K. B. 242; 107 E. R. 1086.

Annotations:—Refd. Ex p. Peppercorn (1866), Har. & Ruth. 487; *Ex p. Austin* (1873), 21 W. R. 390.

124. ——— Insurance agent.]—Ex p. CARR, No. 120, *ante*.

125. ——— Clerk to local authority.]—Ex p. NOTT (1862), 1 New Rep. 107.

126. ———.]—An articled clerk held during the term of his articles the office of vestry clerk. It was shown that the duties of the office had not interfered with the due performance of his duties under his articles or with his legal duties:—*Held:* nevertheless, he had contravened Solicitors Act, 1860 (c. 127), s. 10, by holding an office or employment other than that of clerk to the attorney to whom he was articled.—*Re GREVILLE* (1873), L. R. 9 C. P. 13; *sub nom. Ex p. GREVILLE*, 43 L. J. C. P. 58; 29 L. T. 542; 38 J. P. 232; 22 W. R. 160.

127. ——— Steward of manor—Duties generally performed by deputy.]—An articled clerk is not guilty of an infraction of Solicitors Act, 1860 (c. 127), s. 10, by having during his articles held the appointment of steward of a manor in

an attorney for five years, subsequently graduated & served for three years after he had taken his degree, but without being bound *de novo*:—*Held:* under 1 & 2 Geo. 4, c. 48, he might (with his master's consent) be admitted attorney although the original term of his apprenticeship had not been completed.—*Re COLLUM* (1839), 1 I. Eq. R. 278.—**IR.**

l. Lapse of term—Between death of master and assignment of articles.]—Where an apprentice to an attorney upon the death of his master, entered the office of another attorney for the purpose of completing his apprenticeship, but before his indentures were assigned a term elapsed, he was, in the circumstances of the case, allowed credit for the term which had so elapsed, before the assignment of the indentures, & having served twenty clear terms inclusive of that term was admitted an attorney of the ct.—*Re O'BRIEN* (1839), 1 I. Eq. R. 480.—**IR.**

m. Death of master—Large amount of work left uncompleted—Whether clerk will be admitted before serving requisite period.]—O. who had been for a number of years a clerk in the office of F. a solr., was bound apprentice to him in the year 1854. Before the term of apprenticeship expired F. died suddenly, leaving a large arrear of business in his office. An application by O. to be admitted a solr. notwithstanding that he had not served his full term of five years, was refused, though he undertook to wind up the business for the benefit of the family of deceased, & though the clients joined in the application. Where

which his family & himself were beneficially interested, the duties being performed by a deputy, with whom he divided the fees, & the clerk having thrice only during two or three years, with his principal's consent, absented himself for a day in order to hold courts.—*Re* PEPPERCORN (1866), L. R. 1 C. P. 473; *sub nom.* *Ex p.* PEPPERCORN, 7 B. & S. 361; Har. & Ruth. 487; 35 L. J. C. P. 239; 12 Jur. N. S. 761; 14 W. R. 693.

Annotation :—*Consd.* *Re* Greville (1873), L. R. 9 C. P. 13.

128. Service must be under master's supervision & control.]—*Ex p.* LOVESY (1856), 28 L. T. O. S. 101.

129. — Clerk acting as managing clerk.]—J., an articled clerk with a fixed salary, agreed with S., the solr. whom he was serving, to receive all the profits of the business, & to account to him for them at the expiration of the articles, & if they should go into partnership on J. being admitted, that S. should have the amount of such profits as his share of the capital. The business, most of which was introduced through J.'s connection, was managed by him on this footing, he receiving & paying all moneys, & his name appearing outside the office door. On the completion of his term of service, J., applied to be admitted to the final examination, but the examiners considered that the provisions as to service in Solicitors Act, 1843 (c. 73), had not been complied with :—*Held* : on the evidence in the case, there had been actual service during the term of the articles within the Act, & J. should be admitted to the examination.—*Ex p.* JOYCE (1877), 4 Ch. D. 596; 46 L. J. Ch. 295; 41 J. P. 324; 25 W. R. 340.

130. — Master not continually present at business—Communications sent to clerk from time to time.]—*Re* SMITH (1842), 10 Jur. N. S. 939, n.

131. — No managing clerk appointed to superintend business.]—*Re* SMITH (1842), 10 Jur. N. S. 939, n.

132. — Master frequently visiting office.]—*Re* MILLS (1862), 33 L. J. Q. B. 191, n.; 10 Jur. N. S. 939, n.

133. — What extent of supervision necessary.]—Although in order to constitute good service of an articled clerk under Solicitors Act, 1843 (c. 73), s. 12, supervision & control of the master during the time of service is requisite, this must be understood in a relative, not an absolute sense. A clerk having been a managing clerk for several years previous to entering into articles, & also being a person of mature age, renders the control & supervision of his master less necessary than in the case of a young man just entering on the profession.—*Ex p.* DUNCAN (1864), 5 B. & S. 341; 10 L. T. 337; 122 E. R. 858; *sub nom.* *Re* DUNCAN, 4 New Rep. 97; 33 L. J. Q. B. 190; 10 Jur. N. S. 939.

134. — Illness of master—Business practically suspended.]—A clerk was articled to his father in Apr. 1872, for the term of five years, & attended the office regularly for that time, but

from Michaelmas, 1875, to Michaelmas, 1876, his father was absent from ill health, & business was practically suspended, although the office remained open :—*Held* : the clerk might be allowed to go in for his final examination in Apr. 1877, but must enter into fresh articles for a year & serve under them before he could be admitted.—*Ex p.* FEREDAY (1877), 46 L. J. Ch. 504.

135. Service with barrister—Clerk articled for three years.]—An articled clerk, who had taken an A.B. degree & had been articled for three years to an attorney under Solicitors Act, 1843 (c. 73), s. 7, served two years with the attorney, & eight months with his London agent, after which he went to a special pleader for four months, & was then examined & passed. The examiners having refused to issue their certificate, on the ground that the clerk had not served the attorney or agent for three years, as required by the Act, the ct. gave him liberty to enter into further articles for four months, to complete the three years' service, & authorised the examiners, at the expiration of the time, to issue their certificate without further examination.—*Ex p.* EARLE (1853), 17 Jur. 440; Bail. Ct. Cas. 180; *sub nom.* *Re* EARLE, 21 L. T. O. S. 107.

136. — Subsequent service under assignment of articles.]—A. was articled to his father, an attorney, but on being so, at once became the pupil of a conveyancer, & at the expiration of a year spent in the chambers of the latter, the articles were assigned to other attorneys, whom he served during the remaining four years. The Incorporated Law Society objected to admit him as an attorney, on the ground that he had not actually served his father under the articles for any space of time whatever. On motion to compel the society to admit him :—*Held* : the year spent in the conveyancer's chambers was, by Solicitors Act, 1843 (c. 73), s. 6, made equivalent to a year's service under the articles, & as A. had duly served the attorneys to whom the articles were assigned for the rest of the time prescribed by the Act, he was entitled to admission.—*Re* ARTICLED CLERK (1871), 25 L. T. 161; 19 W. R. 780.

SUB-SECT. 8.—ASSIGNMENT OF ARTICLES.

A. In General.

137. Declaration of assignee's name—In notice of application for admission.]—Where an attorney's clerk served part of his time with one attorney & part with another to whom the articles were assigned, the name of the assignee must be inserted in the notice of intention to apply for admission.—*Ex p.* STOKES (1819), 1 Chit. 556.

Annotations :—*Reid.* *Ex p.* Clarke (1835), 3 Ad. & El. 72; *Re* Bush, *Ex p.* Fussell (1837), 6 L. J. Bey. 34.

138. —]—If during the five years a clerk is assigned for a certain period, & at its conclusion reassigned to his original master, the name of the assignee must be stated in the notice of the

casualties of this kind have occurred the ct. will not exercise its extraordinary jurisdiction unless some family connection exists between appct. & the family of deceased.—*Re* CAREY (1856), 29 L. T. O. S. 16.—*IR.*

n. 30 *Vict.* c. 84, s. 4—*Meaning of words "five years."*—By an indenture of apprenticeship an articled clerk engaged to serve "until the full end & term of five years from Nov. 16, 1863, next ensuing, fully to be completed & ended." Having served twenty terms the clerk applied to be allowed to go in for final examination :—*Held* :

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the words "five years" in the Act mean five years of service & not five years of learning : that is to say, that a clerk cannot shorten his period of service by crowding into less than five years the instruction ordinarily extended over that period.—*Re* MACKAY (1868), 18 L. T. 371.—*IR.*

o. *Service as apprentice while holding appointment as town clerk.]—*SCOTTISH LAW AGENTS SOCIETY v. CAMPBELL, [1927] S. C. 804.—*SCOT.*

p. *Professional examination passed but articles uncompleted.]—*An articled clerk who had not completed his

articles but had passed the professional examination was allowed to take the practical examination as attorney, notary public & conveyancer as no objection had been raised & the Law Society consented to the application.—*Ex p.* CARROLL (1919), O. P. D. 128.—*S. AF.*

q. *War service—Whether full period of articles dispensed with.]—*REID v. INCORPORATED LAW SOCIETY, [1920] C. P. D. 240.—*S. AF.*

r. —.—*Ex p.* VON GERARD, BECKER, FARRER & POYNTON (1923), 44 N. L. R. 188.—*S. AF.*

Sect. 2.—Service under articles: Sub-sect. 8, A. B.; sub-sect. 9, A. & B. Sect. 3: Sub-sect. 1.]
 clerk's intention to apply for admission.—*Ex p. JONES* (1832), 1 Dowl. 439.

139. Master absconding—Assignment dispensed with.]—This ct. permitted an articulated clerk, who had served a portion of his time to an attorney who had left England, & who could not consequently execute an assignment, to serve the remaining portion to another attorney without an assignment.—*Ex p. HANCOCK* (1842), 2 Dowl. N. S. 54; 6 Jur. 949.

140. ———.]—Where an attorney has absconded, his clerk may obtain a discharge from his articles of clerkship, & any further articles may be enrolled without an assignment of the original articles.—*Ex p. CARTLEY* (1842), 12 L. J. Q. B. 98; *subsequent proceedings, sub nom. Ex p. CARNLEY* (1843), 2 Dowl. N. S. 945.

—*]*—An attorney, to whom an articulated clerk had been assigned, having left the country without assigning such clerk, the ct., on the application of the clerk, granted a rule *nisi* that he should be discharged from his articles & from the assignment, & that he should be at liberty to enter into fresh articles with another attorney for the remainder of his term.—*Ex p. WHITFIELD* (1850), 14 L. T. O. S. 355.

142. ——— Assignment ordered.]—Where an attorney had become bkpt. & gone abroad; but before going, gave a power of attorney, authorising an assignment of articles of clerkship, the ct., upon application of the clerk, under Solicitors Act, 1843 (c. 73), s. 5, ordered the assignment to be made.—*Ex p. ELLIS* (1858), 7 W. R. 61.

Bankruptcy of master.]—See Bankruptcy Act, 1914 (c. 59), s. 34 (2).

B. Registration.

143. Omission to register—Accidental omission—Affidavit not sworn within time.]—The ct. permitted an assignment of articles of clerkship to be enrolled after the expiration of six months, as of the last day of such period, where from accidental circumstances the affidavit had not been sworn within that time.—*Ex p. CANN* (1855), 24 L. T. O. S. 224.

144. ——— Computation of service under assignment computed—Date of assignment.]—An articulated clerk, having inadvertently omitted to enrol the assignment of his articles within the period prescribed, this ct., under Solicitors Clerks Act, 1844 (c. 86), s. 2, directed the service under the assignment to be computed from the date of its execution, instead of the period of its enrolment.—*Ex p. CUNNINGHAM* (1844), 4 L. T. O. S. 142; 9 Jur. 109.

145. ———.]—*Ex p. DANIEL* (1855), 26 L. T. O. S. 94.

146. ——— On account of illness.]—*Ex p. TAYLOR* (1845), 5 L. T. O. S. 40.

147. ——— Insufficient excuse.]—Where the assignment of articles of clerkship had not been enrolled in due time, & no sufficient excuse was stated for the omission, the ct. refused to allow the clerk the benefit of his full service under them, but compelled him to serve a portion of his time over again.—*Ex p. BROSTER* (1850), 15 L. T. O. S. 95.

148. ——— Affidavit not sworn owing to death of solicitor.]—A. was articulated to an attorney, & served

two years, when he was assigned over to his own father, an attorney. A.'s father's memory became impaired, & he died within six months of the assignment, never having made the affidavit required by Solicitors Act, 1843 (c. 73), s. 8.

The ct. permitted the assignment to be enrolled, upon satisfactory evidence being given of the facts which should have been contained in the affidavit.—*Ex p. LEE* (1860), 8 W. R. 541.

—**Competency to be examined.]**—See Nos. 170–172,

SUB-SECT. 9.—DISCHARGE OF ARTICLES.

A. In General.

149. Master absconding.]—A rule *nisi* only granted to discharge an articulated clerk, where the attorney has become bkpt. & absconded, & the rule should be served at the last place of abode of the clerk to the commission, & stuck up in the King's Bench Office.—*ANON.* (1815), 2 Chit. 62.

Annotation:—Refd. Re Bush, Ex p. Fussell (1837), 6 L. J. Bey. 34.

150. ———.]—Where an attorney absconds, the ct. will discharge his articulated clerk from his articles on service of a rule for that purpose, by sticking it up in the Queen's Bench Office.—*Ex p. WILLIAMSON* (1841), 5 Jur. 24.

151. ———.]—*Ex p. CARTLEY*, No. 140, *ante*.

152. ———.]—*Ex p. WHITFIELD*, No. 141, *ante*.

153. ———.]—The ct. cannot compel a person who holds a power of attorney from an attorney who has absconded to assign over some articles of clerkship, or to deliver up a bond given for the payment of the premium agreed for, but it will order the articles to be cancelled.—*Ex p. WOODWARD* (1837), Will. Woll. & Dav. 574.

154. Master becoming insane.]—Where an attorney to whom a clerk has been articulated became insane during the clerkship, the ct. allowed fresh articles entered into with another attorney to be enrolled.—*Ex p. DARBELL* (1838), 6 Dowl. 505; 1 Will. Woll. & H. 174.

155. ———.]—Where an attorney become too infirm to conduct his business, & is incapable, from mental disease, of assigning his clerk, the ct. will on application direct the articles of clerkship to be discharged, & the clerk to be assigned to some other attorney.—*Ex p. ALLEN* (1844), 1 New Pract. Cas. 51; 4 L. T. O. S. 141; 8 Jur. 1169.

156. Master dying intestate—Administration not taken out.]—Where the attorney, to whom an articulated clerk had been assigned, died intestate, & no administration was likely to be taken out, the ct. granted a rule, calling on the widow of deceased master to show cause why the clerk should not be at liberty to re-articulate himself during the remainder of the term he ought to serve.—*Ex p. LEWIS* (1844), 2 Dow. & L. 130; 13 L. J. Q. B. 261; 3 L. T. O. S. 185; 8 Jur. 539.

157. Master convicted.]—Where a party was articulated to an attorney, who was subsequently convicted of forgery, & sentenced to transportation for life, the ct. granted a rule absolute in the first instance to discharge the clerk from his articles.—*Ex p. —* (1844), 3 L. T. O. S. 208; 8 Jur. 848.

Bankruptcy of master.]—See Bankruptcy Act, 1914 (c. 59), s. 34 (1).

158. Discharge by agreement.]—Where an articulated clerk under age obtains a writership in India, & his father as well as the attorney join

PART II, SECT. 2, SUB-SECT. 9.—A. (1861), 15 C. P. 54.—CAN.

149 l. Master absconding.]—A clerk articulated to an attorney who absconds will be discharged.—*Re MCGREGOR*

t. Refusal of attorney to release clerk or assign articles.]—The ct. ordered that an attorney's clerk should be dis-

charged from his articles, the attorney refusing to release him or assign the articles, & it being clear that further service was not desirable.—*Re PATTERSON* (1859), 18 U. C. R. 250.—CAN.

with him in an application to vacate the articles, the ct. will grant the motion.—*Ex p.* — (1839), 3 Jur. 652.

B. Return of Premium.

159. Whether part of premium returnable—Death of clerk.]—BURTON'S CASE (1667), 2 Keb. 318; 84 E. R. 198.

160. ———.]—The ct. refused to order an attorney to repay any portion of a premium of two hundred guineas received by him with an articulated clerk, who died within a month after he was articulated.—*Re THOMPSON* (1848), 1 Exch. 864; 154 E. R. 369.

*Annotations:—*Refd. *Ferns v. Carr* (1885), 54 L. J. Ch. 478. *Mentd.* *Whincup v. Hughes* (1871), L. R. 6 C. P. 78.

161. ——— Death of solicitor—Liability of estate.]—A., an attorney, takes B. as his clerk & receives £120, & by articles agrees with the father of B. to return £60 of the money if he died within a year. A. died within three weeks. The exor. of A. decreed to pay back one hundred guineas.—*NEWTON v. ROWSE* (1687), 1 Vern. 460; 1 Eq. Cas. Abr. 308, pl. 3; 23 E. R. 586, L. C.

*Annotations:—*Refd. *Hirst v. Tolson* (1850), 2 H. & Tw. 359. *Mentd.* *Hale v. Webb* (1786), 2 Bro. C. C. 78; *Freeland v. Stansfield* (1854), 24 L. T. O. S. 41; *Whincup v. Hughes* (1871), L. R. 6 C. P. 78.

162. ——— Surviving partner agreeing to finish articles.]—An attorney, to whom a clerk was articulated, died before the articles expired:—*Held*: the ct. had jurisdiction to order part of the premium paid to the attorney to be repaid out of his assets; & although he had covenanted to instruct the clerk "or cause him to be instructed," & his surviving partner had agreed with his exors. to take the clerk for the remainder of his articles.—*HIRST v. TOLSON* (1850), 2 H. & Tw. 359; 2 Mac. & G. 134; 19 L. J. Ch. 441; 14 Jur. 559; 47 E. R. 1721, L. C.

*Annotations:—*Consd. *Whincup v. Hughes* (1871), L. R. 6 C. P. 78; *Ferns v. Carr* (1885), 28 Ch. D. 409. *Refd.* *Jenner v. Morris* (1861), 3 De G. F. & J. 45; *Atwood v. Maude* (1868), 3 Ch. App. 369. *Mentd.* *Freeland v. Stansfield* (1851), 2 Sm. & G. 479; *Lawrie v. Banks* (1858), 4 K. & J. 142; *Webb v. England* (1860), 29 Beav. 41; *Mackenna v. Parkes* (1866), 15 L. T. 500.

163. ———.]—A solr. who had received a premium on taking an articulated clerk, died during the term of the articles:—*Held*: his estate was not liable for the return of any part of the premium.—*FERNES v. CARR* (1885), 28 Ch. D. 409; 54 L. J. Ch. 478; 52 L. T. 348; 49 J. P. 503; 33 W. R. 363; 1 T. L. R. 220.

*Annotation:—*Mentd. *Covell v. Seamell* (1910), 103 L. T. 535.

164. ——— Liability of surviving partner.]—A party was articulated as a clerk to one of two attorneys in partnership, & paid a premium, & acted as clerk to the two partners for two months, when the attorney to whom he had been articulated died; the ct. ordered the surviving partner to refund a portion of the premium, although at the time of the payment of such premium his partner was indebted to him, & the premium had been set off in account between them.—*Re HARPER, Ex p. BAYLEY* (1829), 9 B. & C. 691; 4 Man. & Ry. K. B. 603; 109 E. R. 257.

*Annotations:—*Refd. *Ex p. Bennett* (1837), Will. Woll. & Dav. 210. *Consd.* *Ferns v. Carr* (1885), 28 Ch. D. 409. *Refd.* *Re Drake, Ex p. Haden* (1838), 2 Jur. 873; *Re Holland* (1872), L. R. 7 Q. B. 297; *Ex p. Edwards* (1881), 8 Q. B. D. 262. *Mentd.* *Whincup v. Hughes* (1871), L. R. 6 C. P. 78.

165. ——— Reference to master to determine amount.]—A clerk having been articulated

to an attorney who died, the ct. referred it to the master to ascertain how much of the premium paid should be returned by a surviving partner of the attorney.—*Ex p. BENNETT* (1837), Will. Woll. & Dav. 210.

166. ———.]—A clerk was articulated to an attorney, who afterwards took a partner. The premium was payable by instalments. The clerk served both partners, & a portion of the last instalment of the premium was carried to the partnership account. The attorney to whom he was articulated died. The ct. directed the master to ascertain what part of the premium ought to be refunded by the surviving partner.—*Re DRAKE, Ex p. HADEN* (1838), 2 Jur. 873; *sub nom. Ex p. HAYDEN*, 1 Will. Woll. & II. 321.

167. ——— Misconduct of clerk.]—The ct. in the exercise of its summary jurisdiction over its officers, have authority to order an attorney, who had refused, on the ground of misconduct, to take back an apprentice, who had run away from his service, to return to the parents of such apprentice a reasonable part of the premium received with him.—*Ex p. PRANKERD* (1819), 3 B. & Ald. 257; 106 E. R. 658; *sub nom. Ex p. FISHER*, 1 Chit. 694.

*Annotations:—*Refd. *St. Pancras Parish v. Clapham Parish* (1860), 11 Jur. N. S. 700; *Ferns v. Carr* (1885), 28 Ch. D. 409. *Mentd.* *Whincup v. Hughes* (1871), L. R. 6 C. P. 78.

168. ——— Cancellation of articles—No misconduct by solicitor.]—Under a scheme settled in chambers an infant ward of ct. was articulated to an attorney & a premium of three hundred guineas paid with him. Afterwards the infant was desirous of having the articles cancelled, & upon a summons to vary the scheme, which was attended by the attorney, an order was made at chambers directing the articles to be delivered up to be cancelled, & £100, part of the premium, to be repaid. Upon appeal by the attorney from so much of the order as directed a return of a portion of the premium, it was held, there being no evidence of misconduct on his part, that the ct. had no jurisdiction to make such an order.—*CRAVEN v. STUBBINGS* (1864), 34 L. J. Ch. 126; 11 L. T. 402; 10 Jur. N. S. 1189; 13 W. R. 208, L. C.

*Annotation:—*Mentd. *Whincup v. Hughes* (1871), L. R. 6 C. P. 78.

169. ——— Assignment of articles—By absconding solicitor.]—Where a clerk is articulated to a master who absconds & sails for America, previously making an assignment of his property, & of the articles of appct. to another attorney, his town agent, the ct., though it will grant a rule to show cause why appct. should not be discharged from his articles, yet will not make it a part of the rule that £40 paid to his first master should be paid over to appct. by such town agent.—*Ex p. CARNLEY* (1843), 2 Dowl. N. S. 945; 7 Jur. 767; *previous proceedings, sub nom. Ex p. CARTLEY* (1842), 12 L. J. Q. B. 98.

—— **Bankruptcy of master.]—**See Bankruptcy Act, 1914 (c. 59), s. 34 (1).

SECT. 3.—EXAMINATIONS.

SUB-SECT. 1.—IN GENERAL.

See Solicitors Acts, 1877 (c. 25), ss. 5, 6, 9, 11; 1894 (c. 9), s. 3; 1922 (c. 51), ss. 1, 2, 5, 9.

170. Competency for examination—Assignment of articles not registered in time.]—A person may

PART II. SECT. 3, SUB-SECT. 1.

a. Failure to produce evidence of having passed examination before enter-

ing into articles—Enlargement of time for production of evidence—Court has no power to order.]—The Supreme Ct. has no power under rule 40 to enlarge

the time appointed by Consolidated Rules for the Admission of Barristers & Solrs., r. 19, for the production, by a person about to enter into articles, of

Sect. 3.—Examinations: Sub-sects. 1 2. Sects. 4, 5 & 6: Sub-sects. 1, 2 & 3.]

be examined for admission as an attorney although an assignment of his articles of clerkship has not been registered within the proper time.—*Ex p. ABRAHAM* (1837), Will. Woll. & Dav. 350.

171. *S. P. Ex p. BATES* (1837), Will. Woll. & Dav. 350.

172. ———.]—An articled clerk served his master under articles from Jan. 1849, to June, 1851, when it was agreed that he should be assigned to another master, with whom he served the remainder of his time; but, by some neglect, the assignment was not executed until Jan. 1853. Upon an application that he may give his notices & be examined next term, with the view of his being admitted an attorney on the last day of such term, this ct. granted the application, without, however, expressing any opinion that, after such examination, he would be entitled to be admitted.—*Ex p. BARTON* (1854), 22 L. T. O. S. 262; *subsequent proceedings, sub nom. Ex p. BRUTTON*, 23 L. T. O. S. 98.

173. ——— **Employment in business since expiry of articles.]**—It is no bar to the examination of a person, in order to his admission as an attorney, that he has been fourteen years in business as a grocer, since he served his time as an articled clerk, & has not previously applied to be admitted.—*Ex p. WARING* (1843), 12 L. J. Q. B. 280; 1 L. T. O. S. 168; 7 Jur. 740.

Annotation:—Refd. Ex p. Duke (1857), 30 L. T. O. S. 150.

SUB-SECT. 2.—REFUSAL TO ADMIT TO EXAMINATION.

See Solicitors Act, 1877 (c. 25), s. 9.

174. **No appeal from decision of examiners.]**
Re JAMES, No. 79, *ante*.

evidence of his having passed the required examinations.—*Re KILLEEN*, [1917] V. L. R. 287.—**AUS.**

b. ——— *Filing of nunc pro tunc order.]*
—*Re HILL*, [1918] V. L. R. 259.—**AUS.**

c. *Meaning of "public examination."*—The words "public examination" mean those examinations which are recognised as public examinations or as qualifying entrance examinations by the University of Melbourne, such as the Junior Public, the Senior Public, the School Intermediate or School Leaving examinations in that University, & any examination passed elsewhere recognised by the University as equivalent to a local entrance examination for the purpose of matriculation.—*Re EVA*, [1920] V. L. R. 196.—**AUS.**

d. *Whether theoretical examination dispensed with.]*—*Re PERRY* (1877), 37 L. T. 443.—**IR.**

PART II. SECT. 4.

175 i. *Whether production of articles dispensed with.]*—Where an attorney's clerk had lost his articles of clerkship, he was sworn in on an affidavit of the loss, & producing the usual certificate of service.—*Re LORING* (1839), 1 Ont. Dig. 1886.—**CAN.**

e. *English solicitor.]*—An English solr. is entitled to admission as a practitioner of the Supreme Ct. of Tasmania under Legal Practitioners Act, 1896, s. 16 (111), on evidence of his being still on the roll without any discredit. He is not bound to hold an annual certificate under the English Act for the year in which he applies to be admitted in Tasmania.—*Re WALLIS* (1914), 10 Tas. L. R. 98.—**AUS.**

f. *No notice of new bye-laws of the barristers' society—Whether applicant admitted.]*—*Re BECKWITH* (1881), 21 N. B. R. (5 P. & B.) 194.—**CAN.**

g. *Whether LL.B. degree sufficient qualification for admission.]*—*Re CONGDON* (1892), 21 N. S. R. 92.—**CAN.**

h. ———.]—*Ex p. VAN DER WILLIGEN*, [1920] C. P. D. 302.—**S. AF.**

k. *Whether B.A. degree sufficient qualification—Law subjects included in degree.]*—*Re PARRY* (1928), 49 N. L. R. 85.—**S. AF.**

l. *Whether appeal to Supreme Court lies—Refusal to admit applicant.]*—*Re CAHAN* (1892), 21 S. C. R. 100.—**CAN.**

m. *Legal Professions Act, s. 37 (5)—Scope of exception.]*—To come within the exception of the above sub-sect. it is not necessary that appct. should have been a graduate at the time he commenced to study law, or that his term of study or service was shortened because he was a graduate. Appct. who obtained his degree after call of admission would come within the exception.—*CAIDER v. LAW SOCIETY OF BRITISH COLUMBIA* (1902), 9 B. C. R. 56.—**CAN.**

n. *Right of Supreme Court at Bombay—To admit persons other than persons qualified according to Charter.]*—*MORGAN v. LEECH* (1842), 6 Jur. 225, P. C.—**IND.**

o. *Seal-keeper.]*—A seal-keeper may be admitted as an attorney, but must not practise while he holds office.—*Re CUMMINS* (1840), 2 Jebb & S. 165.—**IR.**

p. *Person not having served ordinary apprenticeship.]*—The ct. has jurisdiction to admit as an attorney a person who has not served the ordinary ap-

SECT. 4.—ADMISSION.

See Solicitors Acts, 1888 (c. 65), s. 10; 1922 (c. 57), s. 7.

Conditions of admission.]—See Sect. 1, ante.

Contents of notice of intention to apply.]—See Rules made by Master of the Rolls, 1922, Part II.

175. **Whether production of articles dispensed with.]**—*Ex p. NICHOLLS* (1841), 6 Jur. 82.

176. **Opposition to admission—Grounds must be clearly stated.]**—Where, upon the opposition by the master of an articled clerk to the clerk being sworn in as an attorney, upon the ground that he had disclosed information obtained as clerk, the charge was indistinctly stated in the affidavit, the clerk was at once allowed to be sworn.—*Re ———, ATTORNEY* (1858), 7 W. R. 62.

SECT. 5.—READMISSION.

Application for readmission.]—See Rules made by Master of the Rolls, 1922, Part III.

177. **General rule.]**—*MOODY'S CASE* (1743), Barnes, 42.

178. ———.]—Attorney struck off the roll may be readmitted.—*R. v. GREENWOOD* (1760), 1 Wm. Bl. 222; 96 E. R. 122.

179. **When application granted—Solicitor called to the bar—Necessity for previous disbarring.]**—If an attorney is struck off the roll on his own application, & afterwards called to the Bar, the ct. will not give him leave to be again put upon the roll of attorneys.—*Ex p. COLE* (1779), 1 Doug. K. B. 114; 99 E. R. 177.

Annotation:—Appld. Ex p. Bateman (1845), 6 Q. B. 853.

180. ———.]—*Semble*: a barrister, who had been originally an attorney, must be disbarred before he can be readmitted as an attorney.—*Ex p. WARNER* (1842), 6 Jur. 1016.

Annotation:—Refd. Ex p. Bateman (1845), 6 Q. B. 853.

prenticeship, on payment of the general fees.—*Re M'NALLY* (1853), 3 I. C. L. R. 518; 6 Ir. Jur. 63.—**IR.**

q. ———.]—The primary consideration which induces the ct. to admit a person to practise as an attorney, who has not served the full time & complied with all the requisites, is the interest of clients.—*Re M'NALLY* (1854), 23 L. T. O. S. 116.—**IR.**

r. ———.]—*Ex p. BOOTH* (1857), 30 L. T. O. S. 55.—**IR.**

t. ———.]—The interests & convenience of the clients, & not those of appct., are the main reasons which influence the cts. in admitting, out of the ordinary course, persons to practise as attorneys.—*Re DOLAN* (1860), 2 L. T. 137.—**IR.**

u. *When court will suspend admission—Attorney practising before admission in colony.]*—*Re TAYLOR*, Mac. 847.—**N.Z.**

a. *Member of native races.]*—The ct. is not justified in refusing to admit appct. as an attorney merely because he belongs to one of the native races.—*MANGENA v. LAW SOCIETY*, [1910] T. P. D. 649.—**S. AF.**

PART II. SECT. 5.

177 i. *General rule.]*—It is a matter of course to restore to the roll an attorney who had been struck off at his own request, if no opposition is made by the Law Society after notice served on them.—*Re WALSH* (1870), T. R. 10; C. L. 165.—**IR.**

b. *Necessity for passing examination.]*—A solr. who had abandoned practice for more than five years was readmitted by the ct. upon passing an examination to the satisfaction of the council of the barristers' society of

181. Disbarred for professional misconduct.]—A barrister disbarred for professional misconduct will not be admitted to practise as an attorney.—*Ex p. PYKE* (1845), 1 New Pract. Cas. 330; *sub nom. Re PYKE*, 6 L. T. O. S. 150; *subsequent proceedings* (1865), 34 L. J. Q. B. 220.

182. ———.]—An attorney whose name was struck off the roll at his own request was called to the bar, & afterwards disbarred on the charges of "participating by previous agreement in the profits of an attorney," & in one particular case of having "acted both as counsel & attorney." After a lapse of twenty years he applied for leave to be readmitted an attorney. The ct. refused, unless he could satisfy them by the testimony of trustworthy persons, especially members of the profession, that his conduct & character had been unimpeached & unimpeachable in the meantime; but afterwards dispensed with this on his showing that he could not obtain such testimony in consequence of his having lived during that period in complete retirement.—*Ex p. PYKE* (1865), 6 B. & S. 703; 122 E. R. 1354; *sub nom. Re PYKE*, 34 L. J. Q. B. 220; 11 Jur. N. S. 860.

183. ——— Solicitor intending to be called to the bar.]—*Ex p. CHANDLER* (1842), 6 Jur. 439.

184. ———.]—*Re MACKINNON* (1856), 27 L. T. O. S. 187.

185. ———.]—*Re SIMPSON* (1857), 1 C. B. N. S. 554; 28 L. T. O. S. 294; 140 E. R. 227.

186. ——— Refusal of call by benchers.]—*Ex p. ———* (1861), 3 L. T. 737.

187. Whether arrears of duty payable—Solicitor struck off at own request.]—*Ex p. CALLAND* (1818), 2 B. & Ald. 315, n.; 106 E. R. 381.

188. Whether rules for readmission relaxed.]—The ct. will under very special circumstances relax the rules required to be observed on the readmission of attorneys.—*Ex p. SMITH* (1839), 7 Scott, 344.

189. ——— Affidavits not procured in time.]—Where by some inadvertence the necessary affidavits could not be procured for the readmission of an attorney on the last day of the term for which he had given notice, the ct., on application the first day of the following term, refused to admit him, but allowed the notices then to be given for the last day of the same term.—*Ex p. MOSLEY* (1835), 1 Har. & W. 331.

190. ——— Readmission before proper time.]—*Ex p. LONGBOURNE* (1861), 4 L. T. 210.

191. Affidavits for readmission—Contents of.]—The affidavit for the readmission of an attorney, must in pursuance of the rule of ct. state the place of abode of the party applying during the last preceding year.—*Re WALDRON* (1845), 4 L. T. O. S. 293.

192. Necessity for re-examination.]—An attorney, who ten years ago was struck off the roll at his own request, & since then has been living a private life, applied to be readmitted an attorney:—*Held*: he must be examined before being

readmitted.—*Ex p. RISING* (1856), 27 L. T. O. S. 111; 4 W. R. 559.

Readmission of solicitor struck off for misconduct.]—*See* Part XIV., Sect. 4, *post*.

SECT. 6.—PRACTISING CERTIFICATE.

SUB-SECT. 1.—IN GENERAL.

See Solicitors Acts, 1843 (c. 73), s. 21; 1860 (c. 127), s. 22.

193. General rule.]—It is the duty of the attorney to cause his name to be enrolled; & if he omits to do so, he is incompetent to obtain costs though otherwise duly qualified as an attorney.—*HUMPHREYS v. HARVEY* (1834), 1 Bing. N. C. 62; 2 Dowl. 827; 4 Moo. & S. 500; 3 L. J. C. P. 300; 131 E. R. 1041.

194. Failure to produce certificate to registrar within statutory period—Relief from when certificate takes effect.]—A solr. who, by a slip, neglected to produce his certificate to the registrar within a month, as required by Solicitors Act, 1860 (c. 127), s. 21, relieved from the consequences, & it was ordered that the certificate should have effect from the time of stamping the same.—*Re SMITH* (1863), 33 Beav. 248; 55 E. R. 362.

SUB-SECT. 2.—APPLICATION FOR CERTIFICATE.

See Solicitors Acts, 1843 (c. 73), s. 23; 1860 (c. 127), s. 19; 1922 (c. 57), s. 6; Stamp Act, 1891 (c. 39), s. 43 (1).

Form of declaration.]—*See* Solicitors Act, 1877 (c. 25), Sched. I., Form B.

SUB-SECT. 3.—ISSUE OF CERTIFICATE.

See Solicitors Acts, 1843 (c. 73), s. 21; 1860 (c. 127), ss. 18, 21, 22; 1922 (c. 51), ss. 6, 8; Stamp Act, 1891 (c. 39), s. 44 (3).

195. Refusal to grant certificate—Right to appeal to the court.]—Where the examiners entertaining a doubt whether the service of an articled clerk was not defective by the space of a fortnight, refused to proceed with the examination, the ct. ordered them to examine *de bene esse*; & if they refused to grant their certificate for the reason above stated, that the party, if dissatisfied, might petition the ct.—*Re ———* (1838), 8 L. J. C. P. 24.

196. ———.]—*NICHOLSON v. INCORPORATED LAW SOCIETY* (1879), 67 L. T. Jo. 80.

197. ——— When discretion may be exercised.]—Under Solicitors Act, 1843 (c. 73), s. 23, the Incorporated Law Society, acting as registrar of solrs., are not bound to issue a certificate to practise as a solr., but have a discretion to refuse to issue the same, & if they decline to grant the certificate upon grounds which seem to them to justify the refusal, as, for instance, that the solr. has

New Brunswick.—*Re DEACON* (1902), 36 N. B. R. 3.—CAN.

c. Sufficient time must be given Law Society for consideration of case.]—*Re HICKS* (Alta.) (1908), 9 W. L. R. 255.—CAN.

PART II. SECT. 6, SUB-SECT. 1.

193 i. General rule.]—A county attorney practising law only so far as required by that office need not take out a certificate.—*Re COLEMAN* (1872), 33 U. C. R. 51.—CAN.

193 ii. ———.]—An attorney of the Supreme Court may practise in the county ct. though he may not have

taken out a certificate under 22 Vict. c. 28 (Consol. Stat. c. 34).—*VOTO v. QUINSLER* (1874), 2 Pug. 432.—CAN.

193 iii. ———.]—A solr. cannot, without paying his annual fees & taking out the certificate of the Law Society, practise as such, even in an isolated instance.—*Re CLARKE* (1900), 21 C. L. T. 30; 32 O. R. 237.—CAN.

d. Right of municipal council to licence barristers & solicitors.]—City Act (Sask.), s. 62, does not authorise a municipal council to licence barristers & solicitors for businesses carried on within the municipality.—*R. v. MACDONALD* (Sask.), [1917] 2 W. W. R.

269.—CAN.

e. Whether Ord. 11, s. 2, of 1919, ultra vires Proclamation 14, s. 13, 1902.]—In terms of Proclamation 14 of 1902, s. 13, every person admitted by the ct. as advocate shall be entitled to practise as such. Ord. 11, s. 2, of 1919 provides *inter alia* that it shall be unlawful for any person to carry on the business as advocate unless he be in possession of a licence, & makes it an offence if he so practises without a licence:—*Held*: these provisions were *ultra vires* Proclamation 14, s. 13, of 1902.—*R. v. TURNER*, [1920] T. P. D. 217.—S. AF.

Sect. 6.—Practising certificate: Sub-sects. 3 & 4, A., B. & C.]

been suspended from practice for misconduct & is at the time of his application for a certificate an undischarged bkpt., & an application is made to the ct. under sect. 24 of the Act, the ct. has power under that sect. to make such order "as shall be just," & is not bound to make an order for the certificate to be granted.—*Re APPLICATION UNDER SOLICITORS ACT, 1843 (1899), 80 L. T. 720; 47 W. R. 575; 15 T. L. R. 314, D. C.*

Annotation:—Dtd. Re A Solicitor, [1902] 1 K. B. 128.

198. ——— Applicant believed not to be on rolls.]—Under Solicitors Act, 1843 (c. 73), s. 23, the registrar of solrs. has no discretion to refuse the certificate therein mentioned to an appct. who has complied with the requirements of the sect., except in a case where he has reason to believe that appct. for the certificate is not on the rolls; & the discretion of a judge on application to him under sect. 24 of the Act by way of appeal from the refusal of a certificate by the registrar is similarly limited.—*Re A SOLICITOR, [1902] 1 K. B. 128; 71 L. J. K. B. 36; 85 L. T. 619; 50 W. R. 196; 18 T. L. R. 114; 46 Sol. Jo. 106, C. A.*

199. ——— Whether action lies against Law Society—Necessity for malice—Erroneous exercise of discretion.]—In the absence of malice no action lies against the Law Society for the refusal of a solr.'s certificate, although such refusal is founded on an erroneous exercise of discretion.—*NEWSON v. LAW SOCIETY (1912), 57 Sol. Jo. 80, C. A.*

SUB-SECT. 4.—EFFECT OF PRACTISING WITHOUT CERTIFICATE.

A. In General.

See Stamp Act, 1891 (c. 39), s. 43.

200. Bill of exchange accepted on consideration of business done by solicitor—No stamp duty paid on admission of solicitor—Whether indorsee of bill has good title.]—In an action against the acceptor of a bill of exchange indorsed to pltf. after it became due, deft. pleaded that the consideration for the bill was business done for him by one W., as his attorney & solr., & alleged that W. in 1810 was admitted an attorney of the K. B. & a solr. in Ch., but took out no certificate till 1813; that from that time he practised & renewed his certificate until 1819, when he took out no certificate for one year & upwards; that he was readmitted in the K. B. in 1823, but neglected for more than a year to obtain a certificate; & that at the time the business in question was done, he had not been readmitted in any of the cts. of law, except as aforesaid. The replication stated, that in 1826 W. was admitted an attorney of the Common Pleas, & was readmitted in Ch., & regularly took out his

certificate for that & the four following years, & that the business, for which the bill of exchange was given, was transacted during those five years. The rejoinder alleged, that the admission in the Common Pleas was by virtue of a contract enrolled in the K. B., & under which W. had been admitted in that ct. in 1810, & readmitted in 1823; & that he "was so admitted in the said Ct. of Common Pleas, without payment of any further duty in that behalf, according to the form of the statute in that behalf"—*Held*: the admission in this ct. must be considered as an original admission, & the non-payment of the stamp duty at the time did not render the admission void, although it may have subjected the party to penalties, & consequently, he might maintain an action for his fees, & might, at any time, give a good title to an indorsee of a bill accepted upon that consideration.—*MIDDLETON v. CHAMBERS (1840), 1 Man. & G. 97; 1 Scott, N. R. 99; 4 Jur. 559; 133 E. R. 262.*

B. On Rights of Solicitor.

See Solicitors Acts, 1843 (c. 73), s. 26; 1874 (c. 68), s. 12; Stamp Act, 1891 (c. 39), s. 43 (1).

201. Whether solicitor may recover costs & disbursements.]—In an action against an attorney, deft. may set off the full amount of his bill of costs as taxed, without deducting from such amount the costs of taxation payable by deft.—*FIELD v. BEZANT (1833), 5 B. & Ad. 357; 2 Nev. & M. K. B. 207; 2 L. J. K. B. 193; 110 E. R. 822.*

Annotations:—Mentd. Courtenay v. Williams (1844), 3 Hare, 539; Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726.

202. ———.]—*HUMPHREYS v. HARVEY, No. 193, ante.*

203. ———.]—Deft. having paid the debt, pltf.'s attorney proceeded for costs. The attorney being uncertificated & therefore not entitled to sue for costs, the ct. stayed execution.—*MEEKIN v. WHALLEY (1834), 1 Bing. N. C. 59; 2 Dowl. 823; 4 Moo. & S. 494; 3 L. J. C. P. 298; 131 E. R. 1040.*

204. ———.]—Proceedings taken on behalf of deft. by a solr. who had not at the time renewed his annual certificate, will not be set aside as irregular; the right of the solr. to recover his fees, & not the interest of the client, who is not bound to ascertain if his solr. is duly qualified to practise, being alone affected by the want of proper qualification.—*SPARLING v. BRERETON (1866), L. R. 2 Eq. 64; 35 L. J. Ch. 461; 14 L. T. 166; 12 Jur. N. S. 330; 14 W. R. 515.*

Annotation:—Apld. Richards v. Bostock (1914), 31 T. L. R. 70.

205. ———.]—An attorney who does not hold a certificate within Solicitors Act, 1843 (c. 73), cannot recover his costs in respect of proceedings in the Probate Ct.—*AUSTIN v. DAVIES (1873), 21 W. R. 885; sub nom. AUSTIN v. DAINES, 28 L. T. 557.*

PART II. SECT. 6, SUB-SECT. 4.—A.

l. Liability to penalties.]—Having regard to Law Society Act, R. S. O., c. 172, & Solicitors Act, R. S. O., c. 174, the taking out of the annual certificate entitling a solr. to practise is voluntary & not compulsory, & practising without it only subjects the solr. to the penalties & consequences imposed by statute; if he practises without taking out the certificate, he does not make himself liable for payment of the fees for such certificate.—*LAW SOCIETY OF UPPER CANADA v. CLARKE, 20 C. L. T. 245.—CAN.*

g. ———.]—*Re LATHAM & LAW SOCIETY (1851), 9 U. C. R. 269.—CAN.*

h. ———.]—*MACDOUGALL v. LAW SOCIETY OF UPPER CANADA (1890),*

18 S. C. R. 203.—CAN.

k. Advocate disqualified.]—*MAXFIELD v. INSKIP (1904), 6 Terr. L. R. 81.—CAN.*

l. Duty to account to client.]—A town agent, who was the attorney on record of the client of his country correspondent, who had not taken out his licence, was ordered, on a petition, to account with the client for money recovered by him in the suit.—*Re FITTON (1853), 6 Ir. Jur. 53.—IR.*

PART II. SECT. 6, SUB-SECT. 4.—B.

201 i. Whether solicitor may recover costs & disbursements.]—Pltf. was deprived of costs on the ground that the solr. employed had failed to take out

a certificate as required by Barristers & Solicitors Act (Acts of 1899, c. 27, s. 27):—*Held*: the procedure to enforce compliance with the provisions of Barristers & Solicitors Act being by fine & suspension, under sects. 31 & 32 of the Act, & there being no provision enacting in express terms that attorneys who failed to take out certificates as required should be debarred from recovering their costs, or that parties employing such attorneys should be debarred from recovering, there was nothing to prevent pltf. from recovering her attorney's costs from the opposite party to the suit.—*WALLACE v. HARRINGTON (1901), 34 N. S. R. 1.—CAN.*

201 ii. ———.]—*Re REYNOLDS (1860), 13 Ir. Jur. 356.—IR.*

206. — Subsequent readmission of solicitor.]—An attorney, who has omitted for one whole year to take out his certificate, & whose admission thereby becomes void, has no claim against a client for business done while he was without a certificate, although he afterwards cause himself to be readmitted. The readmission has not, for this purpose, a retrospective effect.—*THOMPSON v. M'BURNIE* (1830), 8 L. J. O. S. K. B. 332.

207. — Business done after obtaining rule for readmission—Before entry of readmission completed.]—An attorney, who having been disqualified from practising by not taking out a certificate, obtains a rule of ct. for his readmission, may maintain an action for business done after he obtained the rule, but before he caused his readmission to be entered at the master's office.—*COREN v. SHARPE* (1830), 1 B. & Ad. 386; 109 E. R. 830; *sub nom.* — *v. SHARP*, 9 L. J. O. S. K. B. 3.

Annotation:—Reid. Wilton v. Chambers (1837), 7 Ad. & El. 524.

208. Certificate taken out within year after expiration of former certificate.]—An attorney may maintain an action for business done at a time when he was uncertificated, provided a certificate be taken out by him before the end of a year after the expiration of the period to which the preceding certificate extended.—*BOWLER v. BROWN* (1834), 2 Ad. & El. 116; 3 Dowl. 80; 4 Nev. & M. K. B. 17; 111 E. R. 44.

Annotation:—Reid. Eyre v. Shelley (1840), 6 M. & W. 269.

209. Stamp duty not paid on admission.]—*MIDDLETON v. CHAMBERS*, No. 200, *ante*.

210. — Necessity for business being done while certificate is in force.]—Under Solicitors Act, 1843 (c. 73), s. 20, a solr. or attorney cannot recover for business done by him in that character, unless he have obtained a certificate which was in force for the period the work was done.

Where a solicitor applied for & paid for a certificate for the period between Oct. 1847, & Nov. 1848, & the officer by mistake dated it Oct. 1848, & Nov. 1849:—*Held*: the solr. was not entitled to recover for business done in 1849.—*BRUNSWICK (DUKE) v. CROWL* (1849), 4 Exch. 492; 154 E. R. 1307; *sub nom. Re BRUNSWICK (DUKE)*, 19 L. J. Ex. 112; *sub nom. Ex p. BRUNSWICK (DUKE)*, 14 L. T. O. S. 204; *sub nom. Re CROWL'S SURETIES, Ex p. BRUNSWICK (DUKE)*, 13 Jur. 1058.

211. — Money advanced by client.]—Costs incurred by an uncertified attorney are not to be allowed by the master on taxation, unless it appear clearly that the client has actually advanced money to the attorney in the course of the cause, in which case the amount so advanced should be allowed in the taxation between party & party.

But where, after the objection had been taken & the taxation postponed on that account, the attorney procured from his client, pltf. who was an extremely poor man, his acceptance for £150 & stated that he had indorsed it over to a *bond fide* holder, but the name of the indorsee was not given:—*Held*: that was not an advance of money by the client as entitled him to have his costs allowed against debt.

The exemption is limited to advances during the progress of the cause, not extended to payments after the litigation is closed in the ct. in which the taxation takes place.—*WILSON v. ZULUETA* (1850), 15 L. T. O. S. 132.

212. — Effect of Solicitors Act, 1843 (c. 73)—Business not transacted in any of courts mentioned in statute.]—Above Act, s. 26, only disables an uncertificated attorney from suing for fees, rewards or disbursements for any business, matter,

or thing done by him as an attorney or solr. in some suit or proceeding in one of the cts. mentioned in above Act, & not for business done which had no reference to such suits or proceedings.—*RICHARDS v. SUFFIELD* (1848), 2 Exch. 616; 6 Dow. & L. 22; 17 L. J. Ex. 362; 12 Jur. 731; 154 E. R. 637.

213. — — — — —.]—Above Act, s. 26, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solr. in some suit or proceeding in one of the cts. mentioned in above Act.—*GREENE v. REECE* (1849), 8 C. B. 88; 137 E. R. 441.

214. — — — — — Extinction of remedy.]—*Re JONES*, No. 229, *post*.

C. On Rights of Client.

215. General rule.]—*Semble*: if an attorney has been admitted & does not take out his certificate for a year, he need not be readmitted previous to taking it out; but whether he need or not, if he has taken out his certificate in such circumstances, the client's interest will not be affected.—*HILLEARY v. HUNGATE* (1834), 3 Dowl. 56.

Annotation:—Reid. Glyn v. Hutchinson (1835), 2 Ad. & El. 660.

216. Whether client can recover costs from party liable.]—The circumstance that pltf.'s cause has been conducted by one who is not an attorney does not deprive pltf. of his right to full costs against debt.—*REEDER v. BLOOM* (1825), 3 Bing. 9; 10 Moore, C. P. 261; 3 L. J. O. S. C. P. 120; 130 E. R. 416.

Annotations:—Consd. Young v. Dowlman (1829), 3 Y. & J. 24. *Folld. — v. Sexton* (1832), 1 Dowl. 180. *Distd. Meekin v. Whalley* (1834), 1 Bing. N. C. 59. *Consd. Wilson v. Knapp* (1840), 4 Jur. 220; *Browne v. Barker*, [1913] 2 K. B. 553. *Reid. Humphreys v. Harvey* (1834), 1 Bing. N. C. 62.

217. — — — — —.]—*WILSON v. ZULUETA*, No. 211, *ante*.

218. — — — — —.]—*FULLALOVE v. PARKER*, No. 233, *post*.

219. — — — — —.]—*SPARLING v. BRERETON*, No. 204, *ante*.

220. — — — — —.]—A person who has been ordered to pay costs cannot, on the ground that the solr. on the other side was uncertificated, refuse to pay the costs.—*Re HOPE* (1872), 7 Ch. App. 766; 41 L. J. Ch. 797; 27 L. T. 670; 20 W. R. 1026, L. J. J.

Annotations:—Reid. Fowler v. Monmouthshire Ry. & Canal Co. (1879), 48 L. J. Q. B. 457; *Re Sweeting*, [1898] 1 Ch. 268.

221. — — — — —.]—Under Solicitors Act, 1874 (c. 68), s. 12, which enacts that no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solr. without being duly qualified so as to act shall be recoverable in any action, suit, or matter by any person or persons whomsoever—the successful party in a legal proceeding cannot, where the solr. employed by him was uncertificated, recover his costs & disbursement from the party otherwise liable.—*FOWLER v. MONMOUTHSHIRE CANAL CO.* (1879), 4 Q. B. D. 334; 48 L. J. Q. B. 457; 41 L. T. 159; *sub nom. Re FOWLER & MONMOUTHSHIRE CANAL CO.*, 27 W. R. 659, D. C.

Annotations:—Consd. Irvin v. Sanger (1888), 58 L. J. Q. B. 64; *Re Sweeting*, [1898] 1 Ch. 268; *Browne v. Barber*, [1913] 2 K. B. 553. *Reid. Williams v. Vere* (1894), 10 T. L. R. 477.

222. — — — — — When uncertificated solicitor uses name of certificated solicitor.]—*IRVING v. SANGER* (1889), 5 T. L. R. 171, C. A.

223. Money paid to uncertificated solicitor—Whether party to action can recover.]—This ct. refused to order pltf.'s attorney to repay to debt.

Sect. 6.—Practising certificate: Sub-sect. 4, C., D. E.; sub-sect. 5, A. & B. (a), (b) & (c).]

£2 5s. paid for costs indorsed on a writ of summons, on the ground that he had not taken out his certificate, there being no fraud or misrepresentation alleged.—*POWRIE v. FEATHERSTONE* (1855), 24 L. T. O. S. 236; 3 W. R. 184.

224. —.]—*FULLALOVE v. PARKER*, No. 233, *post*.

225. — **Whether client can recover—Sum deposited by client—Direction to pay out of sum costs to be incurred.**—Solicitors Act, 1874 (c. 68), s. 12, provides that "No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solr., without being duly qualified so to act shall be recoverable in any action, suit, or matter by any person or persons whomsoever."

A solr., during a time when he was not duly qualified, because he had not taken out a certificate, acted for a client in certain bkpcy. proceedings, & in anticipation that it would be necessary to deposit £125 in the Bkpcy. Ct. as a result of those proceedings, the client deposited that sum in his solr.'s hands to be used for that purpose. It subsequently became unnecessary to make a deposit in the Bkpcy. Ct., & the client directed the solr. to retain the money for his costs. The solr. did not deliver a bill of costs to his client, & claimed the right to retain the money in his hands to meet his costs & disbursements on behalf of his client;—*Held*: the direction of the client was a direction to make payments proper to be made by the solr. as a solr., therefore both parties must have contemplated that a taxation would be necessary, & Solicitors Act, 1874 (c. 68), s. 12, applied, & that the client was entitled to have repaid to him by the solr. such of the amounts as might be disallowed on taxation.—*BROWNE v. BARBER*, [1913] 2 K. B. 553; 82 L. J. K. B. 1006; 108 L. T. 774, C. A.

D. On Taxation of Costs.

226. **Whether defendant may object to taxation of plaintiff's costs—Costs allowed for period when plaintiff not represented by qualified solicitor.**—Deft. cannot object to the taxation of pltf.'s bill of costs on the ground of costs being allowed for a period of the cause during which it was conducted by a person not an attorney or being an uncertificated attorney.— *v. SEXTON* (1832), 1 Dowl. 180.

227. **Whether costs allowed on taxation.**—An attorney's bill of costs having been referred to taxation, certain items were objected to before the master, on the ground that the attorney at the time those items were incurred was uncertificated, & the master accordingly disallowed them:—*Held*: the master acted rightly in disallowing.—*Re ANGELL* (1848), 6 Dow. & L. 144; 3 New Pract. Cas. 194; 11 L. T. O. S. 247; 12 Jur. 961.

228. —.]—*WILSON v. ZULUETA*, No. 211, *ante*.

229. —.]—Solicitors Act, 1843 (c. 73), s. 26,

does not extinguish the debt of a solr. or attorney for costs in respect of business done while uncertificated, but only his remedy. Where a client had taken out an order of course for taxation of his solr.'s bill of costs, with the usual submission to pay what should be found due, & the taxing master had disallowed certain items for business done while his certificate had not been renewed:—*Held*: the solr. was entitled to be allowed the items in question.—*Re JONES* (1869), L. R. 9 Eq. 63; 30 L. J. Ch. 83; 21 L. T. 482; 18 W. R. 159.

Annotations:—*Folld. Re Hope* (1872), 7 Ch. App. 766. *Overd. Re Sweeting*, [1898] 1 Ch. 268. *Consd. Browne v. Barber*, [1913] 2 K. B. 553.

230. —.]—In taxing a solr.'s bill of costs, items relating to business done while the solr. had not a certificate must be disallowed.—*Re SWEETING*, [1898] 1 Ch. 268; 67 L. J. Ch. 159; 78 L. T. 6; 46 W. R. 242; 14 T. L. R. 171; *sub nom. Re S.*, 42 Sol. Jo. 216.

Annotation:—*Consd. Browne v. Barber*, [1913] 2 K. B. 553.

231. — **Fees in respect of briefs & refreshers—Effect of Solicitors Act, 1874 (c. 68), s. 12.]**

A solr., during a time when he was not duly qualified, because he had not taken out a certificate, delivered briefs to counsel, & the trial took place during that period, & refreshers became payable. After he had taken out his certificate he paid fees in respect of those briefs & refreshers. He sued his client to recover the amount due upon his bill of costs, which included those fees, & judgment was given for the amount appearing to be due upon the bill, the bill to be taxed:—*Held*: these fees were "disbursements on account of or in relation to an act or proceeding done or taken," while the solr. was not duly qualified, & they ought to have been struck out of the bill on taxation.—*KENT v. WARD* (1894), 70 L. T. 612; 38 Sol. Jo. 401; 9 R. 593, C. A.

Annotations:—*Distd. Browne v. Barber*, [1913] 2 K. B. 553. *Refd. Re Sweeting*, [1898] 1 Ch. 268.

232. **How objection to taxation made—By petition.**—A motion on behalf of a person who had obtained an order for the taxation of his solicitor's bills of costs, to discharge that order, & to have it declared that his solr. was incapable of acting as such under 37 Geo. 3, c. 90, & not entitled to claim his bills of costs, was held to be open to objection, if properly taken, for irregularity; the ct. considering that such an application ought to have been made by petition.—*Re WILTON, Ex p. CHAMBERS* (1838), 2 Keen, 497; 48 E. R. 719; *sub nom. DUFFIELD v. ELWES, Re WILTON, Ex p. CHAMBERS*, 9 L. J. Ch. 200; 2 Jur. 489.

Annotation:—*Mentd. Middleton v. Chambers* (1840), 1 Man. & G. 97.

233. **Before master—Useless facts subsequently ascertained.**—(1) An objection that an attorney is not duly certificated should be taken before the master. If made the subject of an application to the ct., it should at least be shown clearly that the party could not by the exercise of reasonable diligence have ascertained the fact in time to bring it to the master's attention.

(2) If money has been paid by a party to an action to an unqualified attorney, he cannot recover it back, & to this extent he may recover his costs

PART II. SECT. 6, SUB-SECT. 4.—D.

227 i. **Whether costs allowed on taxation.**—A solr., employed by a client on special agreements, did some of the work during periods when his licence duty remained unpaid. On an application by the client for delivery of a bill of costs & taxation, the taxing master was directed *inter alia* to certify whether the agreements were fair & reasonable. The master reported that

they were so &, after taxing the costs, certified that he had allowed all costs & expenses incurred during the periods when the licence duty was unpaid:—*Held*: under Solicitors (Ireland) Act, 1898, s. 48, the items relating to business done during these periods should not be allowed.—*MARTIN v. KENNEY* (1920), 54 L. L. T. 141.—*IR.*

m. **Whether plaintiff may object to costs being taxed by defendant.**—Deft. in this action was represented by a

firm purporting to be a firm of solrs., one of the members, however, not being a duly admitted or certificated solr. Pltf. objected to the costs awarded deft. in the action being taxed to him:—*Held*: in the absence of proof that these costs had not been paid by deft. to the persons who acted as his solrs., the objection could not prevail; nor could it even if that proof had been given.—*SCOTT v. DALY* (1888), 12 P. R. 610.—*CAN.*

from his opponent.—*FULLALOVE v. PARKER* (1862), 12 C. B. N. S. 246; 31 L. J. C. P. 239; 6 L. T. 353; 8 Jur. N. S. 1078; 10 W. R. 581; 142 E. R. 1137.

Annotations:—*As to* (2) *Consd. Re Jones* (1869), L. R. 9 Eq. 63; *Browne v. Barber*, [1913] 2 K. B. 553.

E. On Proceedings.

234. Stay of execution—Action upon taxed bill.]

—*MEEKIN v. WHALLEY*, No. 203, *ante*.

235. Proceedings not invalidated against client.]

—*SPARLING v. BRERETON*, No. 204, *ante*.

236. Whether action dismissed — Holder of county certificate using London address on writ.]—In a case in which during the course of the trial it appeared that pltf.'s solr. held a country certificate only, although his address on the writ was given as "Lombard Street, E.C.," the judge, though holding that the solr. was committing an offence, declined to dismiss the action, but ordered the case to stand over so that pltf. might be able to consult another solr.—*RICHARDS v. BOSTOCK* (1914), 31 T. L. R. 70.

SUB-SECT. 5.—RENEWAL OF PRACTISING CERTIFICATE.

A. In General.

Discretion of registrar.]—See Solicitors Act, 1888 (c. 65), s. 16.

B. Particular Instances.

(a) *Solicitor Continuing to Practise Without Certificate.*

See Solicitors Act, 1888 (c. 65), s. 16.

237. Whether certificate renewable.]—Ex p. LOWERTON (1835), 1 Hodg. 77.

238. — Employment as managing clerk — Subsequent practice on own account.]—Ex p. SHERWOOD (1823), 7 Moore, C. P. 493.

239. — Practice continued abroad.]—Ex p. PHILCOX (1834), 2 Dowl. 450.

240. — When penalties remitted.]—Ex p. TUFKIN (1835), 1 Har. & W. 516.

241. — Practice continued by mistake.]—Ex p. KING (1838), 1 Will. Woll. & H. 87.

242. — Gratuitous practice.]—Ex p. FOTHERGILL (1849), 13 L. T. O. S. 256; *previous proceedings, Re FOTHERGILL*, 12 L. T. O. S. 457.

243. — —.]—Re TAYLOR (1852), 16 Jur. 728.

244. Necessity for stating uncertificated practice in affidavit—When applying for renewal.]—Ex p. MILLER (1840), 4 Jur. 556.

Effect of practising without certificate, generally.]—See Sub-sect. 4, *ante*.

(b) *Solicitor Not Continuing to Practise.*

See Solicitors Act, 1888 (c. 65), s. 16.

245. Whether certificate renewable.]—Ex p. DAVIS (1819), 1 Chit. 729.

246. —.]—Ex p. SMITH (1819), 1 Chit. 692.

247. —.]—Ex p. CLARKE (1819), 2 B. & Ald. 314; 106 E. R. 381.

Annotation:—*Folld. Ex p. Matson* (1822), 2 Dow. & Ry. K. B. 238.

248. —.]—Ex p. MURRAY (1822), Turn. & R. 56; 37 E. R. 1015, L. C.

249. —.]—Ex p. MATSON (1822), 2 Dow. & Ry. K. B. 238; 7 Moore, C. P. 412, n.; *sub nom. Ex p. MARSON*, 1 L. J. O. S. K. B. 60.

250. —.]—Ex p. THOMPSON (1833), 2 Dowl. 160.

251. —.]—Ex p. CUNNINGHAM (1822), 1 Bing. 91; 7 Moore, C. P. 410; 130 E. R. 38.

Annotation:—*Reid. Ex p. Sherwood* (1823), 7 Moore, C. P. 493.

252. Discontinuance on account of ill health.]—Ex p. RICHARDS (1819), 1 Chit. 101.

253. — —.]—Ex p. MALIPHANT (1822), 7 Moore, C. P. 495.

254. — Discontinuance for long period — Thirty years.]—Ex p. BILLINGS (1836), 5 Dowl. 395; 2 Har. & W. 327.

Annotations:—*Folld. Ex p. Rudge* (1843), 7 Jur. 581. *Reid. Ex p. Robinson* (1844), 13 L. J. Q. B. 240.

255. — — Twenty-four years.]—Ex p. MARSHAL (1838), 6 Dowl. 526; 1 Will. Woll. & H. 192.

256. — Twenty-seven years — Solicitor subsequently becoming managing clerk in solicitor's office.]—Ex p. BRABANT (1839), 7 Dowl. 622; 2 Will. Woll. & H. 46; 3 Jur. 316.

257. — — Forty years.]—Ex p. RUDGE (1843), 2 Dowl. N. S. 682; 12 L. J. Q. B. 186; 7 Jur. 581.

258. What must be shown when applying for renewal—That solicitor has not practised in interval.]—ANON. (1819), 1 Chit. 316.

259. S. P. ANON. (1819), 1 Chit. 646.

260. — Engagement in trade during period of discontinuance—Necessity for stating reasons for leaving trade.]—Ex p. MAYER (1820), 5 Moore, C. P. 141.

(c) *Agent Neglecting to Renew.*

See Solicitors Act, 1888 (c. 65), s. 16.

261. Whether certificate renewable.]—Ex p. PLATTS (1819), 1 Chit. 692.

262. —.]—Ex p. CHRISTIAN (1819), 3 Moore, C. P. 578.

263. —.]—Ex p. LEACROFT (1820), 4 B. & Ald. 90; 106 E. R. 871.

264. —.]—Ex p. CHALKER (1823), 1 L. J. O. S. K. B. 86.

265. —.]—Ex p. FORD (1835), 1 Har. & W. 192.

266. — —.]—Ex p. THORPE (1835), 3 Dowl. 592.

267. — —.]—Ex p. HARRIS (1841), 5 Jur. 1037.

268. — —.]—Re NEAL (1841), 6 Jur. 106.

269. —.]—Ex p. — (1843), 2 L. T. O. S. 106.

270. —.]—Ex p. GUDE (1843), 1 Dow. & L. 675; 7 Jur. 1016.

271. —.]—Re LUKE (1844), 3 L. T. O. S. 138.

272. — On affidavit of agent—That attorney has not practised on his own meanwhile.]—HAWKIN'S CASE (1823), 1 L. J. O. S. K. B. 160.

273. Conditions of renewal — Payment of penalty.]—Ex p. CHALKER (1823), 1 L. J. O. S. K. B. 86.

274. — Payment of arrears of duty.]—Ex p. GUDE (1843), 1 Dow. & L. 675; 7 Jur. 1016.

— When solicitor continues to practise.]—See Nos. 294–298, 314–316, *post*.

PART II. SECT. 6, SUB-SECT. 4.—E.

n. Whether proceedings set aside.]—Re JACKSON v. CLARK, 20 C. L. T. 42.—CAN.

o. —.]—The proceedings in a suit by an attorney who has not taken out a certificate under 22 Vict. c. 28, are a nullity; & the objection is not waived by deft.'s attorney attending

the trial of the cause, after knowledge of the omission.—*RYAN v. MCINTYRE* (1870), N. B. Dig. 91.—CAN.

PART II. SECT. 6, SUB-SECT. 5.—B. (a).

241 i. Whether certificate renewable—Practice continued by mistake.]—An attorney who practises in trivial cases

without having taken out his licence, although at the time he so practised he was unaware of the provisions of 29 & 30 Vict. c. 84, prohibiting such practice, & on being informed of its existence ceased at once to violate its provisions, will not be permitted to renew his licence without paying arrears of duty & a fine.—*Re CARPENTER* (1870), 18 W. R. 382.—IR.

Sect. 6.—Practising certificate: Sub-sect. 5, B. (d), C. (a) & (b). Part III. Sects. 1 & 2: i. 1 & 2.]

Cases.

See Solicitors Act, 1888 (c. 65), s. 16.

275. Whether certificate renewable—Failure to renew due to misconduct of clerk.]—*Re WINTER* (1817), 8 Taunt. 129; 129 E. R. 332; *sub nom. Ex p. WINTER*, 1 B. & Ald. 190, n.

Annotations:—Appld. Ex p. Christian (1819), 3 Moore, C. P. 578. *Consd. Ex p. Lewis* (1838), 1 Will. Woll. & H. 405.

276. ———.]—Where an attorney's clerk fraudulently took out his master's certificate, some years previously, on a wrong amount of stamp, the ct. allowed the attorney to be re-admitted without giving the usual notices.—*Ex p. LEWIS* (1838), 1 Will. Woll. & H. 405; 2 Jur. 944.

277. ——— Accidental omission to renew within proper time.]—*Ex p. KNIPE* (1840), Woll. 22; 5 J. P. 227; 4 Jur. 1088.

Annotation:—Refd. Ex p. Wybrow (1840), 5 J. P. 113.

278. ———.]—*Re MACMURDO* (1843), 7 Jur. 420.

279. ——— Conviction for crime.]—*Ex p. GREY* (1847), 5 Dow. & L. 275; *sub nom. Ex p. GRAY*, 10 L. T. O. S. 191; 12 Jur. 119; 1 J. P. Jo. 902.

Annotation:—Consd. Re Application under Solicitors Act, 1843 (1899), 80 L. T. 720.

280. ——— Subsequent free pardon.]—*Re BARBER* (1850), 15 L. T. O. S. 500; *subsequent proceedings* (1851), 17 L. T. O. S. 142; (1854), 19 Beav. 378.

Annotation:—Refd. Re Brandreth (1891), 60 L. J. Q. B. 501.

281. ——— Bankruptcy of solicitor.]—*Re APPLICATION UNDER SOLICITORS ACT, 1843, No. 197, ante.*

282. ———.]—*Re A SOLICITOR*, [1902] 1 K. B. 128; 71 L. J. K. B. 36; 85 L. T. 619; 50 W. R. 196; 18 T. L. R. 114; 46 Sol. Jo. 106, C. A.; *revsq.* (1901), 18 T. L. R. 77, D. C.

See, now, Solicitors Act, 1906 (c. 24), s. 1.

283. ———.]—*Re A DEBTOR*, [1917] H. B. R. 84, C. A.

C. Conditions of Renewal.

(a) Payment of Arrears of Duty.

See, now, Solicitors Act, 1888 (c. 65), s. 16.

284. Solicitor not continuing to practise.]—*Ex p. SMITH* (1819), 1 Chit. 692.

285. ———.]—*Ex p. CLARKE* (1819), 2 B. & Ald. 314; 106 E. R. 381.

Annotation:—Appld. Ex p. Matson (1822), 2 Dow. & Ry. K. B. 238.

286. ———.]—*Ex p. MATSON* (1822), 2 Dow. & Ry. K. B. 238; 7 Moore, C. P. 412, n.; *sub nom. Ex p. MARSON*, 1 L. J. O. S. K. B. 60.

287. ———.]—*Ex p. CUNNINGHAM* (1822), 1 Bing. 91; 7 Moore, C. P. 410; 130 E. R. 38.

Annotation:—Appld. Ex p. Sherwood (1823), 7 Moore, C. P. 493.

288. ———.]—*Ex p. MURRAY* (1822), Turn. & R. 56; 37 E. R. 1015, L. C.

289. ———.]—*Ex p. THOMPSON* (1833), 2 Dowl. 160.

290. ——— On account of ill health.]—*Ex p. RICHARDS* (1819), 1 Chit. 101.

291. Solicitor continuing to practise.]—*Ex p. JONES* (1833), 2 Dowl. 199.

292. ———.]—*Ex p. PHILPOT* (1835), 3 Dowl. 339.

293. ———.]—*Ex p. BINNS* (1836), 4 Ad. & El. 1005; 111 E. R. 1061.

294. ——— Agent neglecting to take out certificate.]—*Ex p. CHRISTIAN* (1819), 3 Moore, C. P. 578.

295. ———.]—*Ex p. LEACROFT* (1820), 4 B. & Ald. 90; 106 E. R. 871.

296. ———.]—*Ex p. THORPE* (1835), 3 Dowl. 592.

297. ———.]—*Re NEAL* (1841), 6 Jur. 106.

*——.]—**Ex p. ———* (1843), 2 L. T. O. S. 106.

299. ——— Employment as managing clerk while certificate not taken out—Subsequent practice on own account.]—*Ex p. SHERWOOD* (1823), 7 Moore, C. P. 493.

300. ——— Practice abroad.]—*Ex p. PHILCOX* (1834), 2 Dowl. 450.

301. ——— Gratuitous services.]—*Re TAYLOR* (1852), 16 Jur. 728.

302. Accidental omission to renew within proper time.]—*Ex p. KNIPE* (1840), Woll. 22; 5 J. P. 227; 4 Jur. 1088.

Annotation:—Refd. Ex p. Wybrow (1840), 5 J. P. 113.

(b) Payment of Fine.

See, now, Solicitors Act, 1888 (c. 65), s. 16.

303. Solicitor not continuing to practise.]—*Ex p. DAVIS* (1819), 1 Chit. 729.

304. ———.]—*Ex p. CLARKE* (1819), 2 B. & Ald. 314; 106 E. R. 381.

Annotation:—Folld. Ex p. Matson (1822), 2 Dow. & Ry. K. B. 238.

305. ———.]—*Ex p. MATSON* (1822), 2 Dow. & Ry. K. B. 238; 7 Moore, C. P. 412, n.; *sub nom. Ex p. MARSON*, 1 L. J. O. S. K. B. 60.

306. ———.]—*Ex p. MURRAY* (1822), Turn. & R. 56; 37 E. R. 1015, L. C.

307. ———.]—*Ex p. THOMPSON* (1833), 2 Dowl. 160.

308. ——— On account of ill health.]—*Ex p. RICHARDS* (1819), 1 Chit. 101.

309. ———.]—*Ex p. MALIPHANT* (1822), 7 Moore, C. P. 495.

310. Solicitor continuing to practise.]—*Ex p. JONES* (1833), 2 Dowl. 199.

311. ———.]—*Ex p. PHILPOT* (1835), 3 Dowl. 339.

312. ———.]—*Ex p. WHYBROW* (1840), Woll. 27; *sub nom. Ex p. WYBROW*, 5 J. P. 113; 4 Jur. 1134.

313. ——— Agent neglecting to take out certificate.]—*Ex p. LEACROFT* (1820), 4 B. & Ald. 90; 106 E. R. 871.

314. ———.]—*Ex p. THORPE* (1835), 3 Dowl. 592.

315. ———.]—*Re NEAL* (1841), 6 Jur. 106.

316. ———.]—*Ex p. HARRIS* (1841), 5 Jur. 1037.

317. ——— Employment as managing clerk while certificate not taken out—Subsequent practice on own account.]—*Ex p. SHERWOOD* (1823), 7 Moore, C. P. 493.

318. ——— Practice abroad.]—*Ex p. PHILCOX* (1834), 2 Dowl. 450.

319. ——— Practice continued by mistake.]—*Ex p. KING* (1838), 1 Will. Woll. & H. 87.

320. ——— Gratuitous services.]—*Re TAYLOR* (1852), 16 Jur. 728.

Part III.—Rights and Privileges of Solicitors.

SECT. 1.—RIGHT TO PRACTISE.

High Court of Justice.—See Supreme Court of Judicature Act, 1925 (c. 49), s. 215 (1).

Judicial Committee of Privy Council.—See COURTS, Vol. XVI., p. 150, No. 494.

Ecclesiastical Courts.—See Solicitors Act, 1877 (c. 25), s. 17.

Inferior courts.—See Solicitors Act, 1843 (c. 73), s. 27.

— **Mayor's & City of London Court.**—See MAYOR'S COURT, Vol. XXXIV., p. 527, No. 1.

321. Disqualification to practise—Bankruptcy.—An attorney may practise though bkpt.—*Ex p. BROWN* (1793), 4 Bro. C. C. 210; 2 Ves. 67; 29 E. R. 856.

Annotations:—**Mentd.** *Fowler v. Coster* (1830), 10 B. & C. 427; *Re Bakewell, Ex p. Butler* (1842), 2 Mont. D. & Do G. 731; *Re Hance* (1848), 11 L. T. O. S. 435.

See Solicitors Act, 1906 (c. 24), s. 1.

— **Official receiver.**—See BANKRUPTCY, Vol. IV., p. 195, No. 1798.

— **Clerks to justices.**—See MAGISTRATES, Vol. XXXIII., p. 372, Nos. 804–808.

— **Officers of county courts.**—See COUNTY COURTS, Vol. XIII., p. 455, Nos. 55–58.

322. Proof of right to practise—Certificate.—A certificate is, *prima facie*, evidence of the legal right of an attorney to practise. Where an attorney was admitted to K. B., in 1792, took out his certificate, & practised regularly till 1814; then discontinued his certificate till 1819, when he again took it out regularly, & practised in Common Pleas. In an action by him in K. B., for the costs of defending a suit in Common Pleas:—*Held*: the production of his certificate was *prima facie* evidence of his having been readmitted in some ct. & it lay on deft., in answer to the action, to prove that he had not been readmitted in any ct.—*PEARCE v. WHALE* (1826), 5 B. & C. 38; 7 Dow. & Ry. K. B. 512; 4 L. J. O. S. K. B. 86; 108 E. R. 15.

Annotation:—**Consd.** *Sparling v. Haddon* (1832), 9 Bing. 11.

323. — — — — — The stamp office certificate, countersigned by a master of the Ct. of K. B., is sufficient *prima facie* evidence to satisfy an allegation that the party is an attorney of that ct.—*SPARLING v. HADDON* (1832), 9 Bing. 11; 2 Moo. & S. 14; 1 L. J. C. P. 142; 131 E. R. 518.

Annotation:—**Expld.** *Graham v. Ingleby* (1848), 2 Exch. 442.

— — — — — See EVIDENCE, Vol. XXII., p. 346, Nos. 3500, 3501; LIBEL & SLANDER, Vol. XXXII., p. 25, Nos. 153–156.

Judicial notice of admission.—See EVIDENCE, Vol. XXII., p. 144, Nos. 1195, 1196.

SECT. 2.—RIGHT OF AUDIENCE.

SUB-SECT. 1.—HIGH COURT.

Consent to verdict.—An attorney cannot consent to a verdict on the part of his client; counsel must be instructed to do so.—LONDON

ENGINEERING & IRON SHIPBUILDING CO., LTD. v. COWAN (1867), 16 L. T. 573.

325. Solicitor heard in absence of counsel.—DOXFORD & SONS, LTD. v. SEA SHIPPING CO., LTD. (1897), 14 T. L. R. 111.

326. — — — — — BUTTERWORTH v. BUTTERWORTH & QUEENAN (1913), 57 Sol. Jo. 266.

327. Solicitor heard as to irregularity in order.—I remember a solr. . . . coming into the Rolls Ct. one morning & addressing LORD ROMILLY when he took his seat. LORD ROMILLY told him he could not be heard, but could instruct one of the counsel in ct. His reply was, "I cannot instruct counsel, I have no client; but I wish to call your lordship's attention to the fact that an order has been improperly made." . . . I know that LORD ROMILLY listened to the application & stayed an order (KEKEWICH, J.).—MARSH v. JOSEPH (1896), 74 L. T. 412; 44 W. R. 462; 12 T. L. R. 255; on appeal, [1897] 1 Ch. 213.

Annotations:—**Mentd.** *Hambro v. Burnand*, [1903] 2 K. B. 299; *Re Williams S. E.*, [1910] 2 Ch. 481.

In bankruptcy matters.—See Sub-sect. 2, post.

SUB-SECT. 2.—IN BANKRUPTCY.

See, now, Bankruptcy Act, 1914 (c. 59), s. 152.

328. Right of barrister not exclusive.—The Bar is not entitled to exclusive audience in any proceedings in the Cts. of Bkpcy., but only to precedence. An attorney may conduct a case as agent for another attorney.—ANON. (1852), 20 L. T. O. S. 55.

329. Necessity for direct instruction.—ANON. (1852), No. 328, ante.

330. — — — — — The comrs. in bkpcy. cannot recognise in the advocacy of proceedings before them the professional interference of any legal practitioners, not being members of the Bar, except solrs. directly retained by the parties themselves.—*Re BULL* (1852), 20 L. T. O. S. 24.

331. — — — — — A comr. in bkpcy. is not bound to hear a person who, although a duly admitted solr. of the ct., does not appear as the solr. of the party for whom he appears, but only as the clerk of such solr.—*Re BROADHOUSE, Ex p. BROADHOUSE* (1867), 2 Ch. App. 655; 36 L. J. Bcy. 29; 17 L. T. 126; 15 W. R. 1154, L. JJ.

Annotation:—**Apld.** *R. v. Oxfordshire County Court Judge*, [1894] 2 Q. B. 440.

332. Necessity for instructions in writing.—A solr. appearing for a creditor at the public examination of a bkpt., for the purpose of examining bkpt. as to his affairs, need not be authorised in writing.—*Re LANDROCK* (1884), 1 Morr. 21.

333. — — — — — Bankruptcy Act, 1883 (c. 52), s. 17 (4), enacts with reference to the public examination of debtor under that Act, "that any creditor who has tendered a proof, or his representative authorised in writing, may question debtor concerning his affairs, & the causes of his

PART III. SECT. 1.

p. Supreme Court.—*Re LAND REGISTRY ACT, 1870 & JOHNSON* (1888), 1 B. C. R. pt. 2, 334.—CAN.

q. Division courts.—*Re YORK COUNTY, COUNTY COURT JUDGE* (1871), 31 U. C. R. 267.—CAN.

r. Right to practise while resident abroad.—A solr., residing out of the province, but duly enrolled as a solr.

of the province, is entitled to practise by issuing writs or otherwise doing the acts of a solr. in respect to the business or practice of the ct.—*FRASER v. GRAND TRUNK PACIFIC BRANCH LINES CO.* (1911), 19 W. L. R. 651; 1 W. W. R. 303; 4 Sask. L. R. 311.—CAN.

t. Court of Exchequer—Right of attorney of another court.—An attorney of another ct. held to have no right to

practise in the Ct. of Exchequer through the medium of an attorney of that ct.—*DINNON v. O'BRE* (1833), Hayes & Jo. 170.—IR.

PART III. SECT. 2, SUB-SECT. 1.

a. General rule.—An attorney will not be permitted to act as counsel either in the superior cts., or at *nisi prius*.—*A.-G. v. MARMION* (1841), Arm. M. & O. 98.—IR.

Sect. 2.—Right of audience: Sub-sects. 2, 3, 4, 5

6. *Sect. 3: Sub-sects. 1 & 2, A*

failure":—*Held*: a solr. who appears at a bkpcy. ct. for creditor who has tendered a proof, is creditor's representative within the meaning of that sub-sect., & is therefore not entitled so to question debtor without being authorised in writing & producing his authority if required by the ct. to do so.

Qu.: if such solr. when his right of audience has been so denied to him, is "a party" within County Courts Act, 1856 (c. 108), s. 43, who is entitled to apply to the Superior Ct. for a rule to compel the county ct. judge to give him audience.—*R. v. GREENWICH COUNTY COURT REGISTRAR* (1885), 15 Q. B. D. 54; 54 L. J. Q. B. 392; 53 L. T. 902; 33 W. R. 671; 1 T. L. R. 479; 2 Morr. 175, C. A.

334. On appeal to Divisional Court.]—A solr. has a right of audience on an appeal to the Div. Ct. from a county ct. sitting in bkpcy.—*Re BARNETT, Ex p. REYNOLDS* (1885), 15 Q. B. D. 169; 54 L. J. Q. B. 354; 53 L. T. 448; 33 W. R. 715; 1 T. L. R. 433; 2 Morr. 147, C. A.

Annotations:—*Mentd.* *Sharp v. McHenry, Sharp v. Brown* (1886), 55 L. T. 747; *Re Bassett's Plaster Co., Ex p. Bassett* (1894), 1 Mans. 297; *Re Richardson & Cook, Ex p. Grimes' Exors.* (1902), 86 L. T. 690.

335. On appeal to Court of Appeal.]—The right of audience given to a solr. in bkpcy. matters by Bankruptcy Act, 1883 (c. 52), s. 151, is limited to the High Ct., & does not extend to the Ct. of Appeal.—*Re ELDERTON, Ex p. RUSSELL* (1887), 31 Sol. Jo. 235; 4 Morr. 36; *sub nom. Re ELLERTON*, 3 T. L. R. 324, C. A.

SUB-SECT. 3.—COUNTY COURTS.

See, now, County Court Act, 1888 (c. 43), s. 72.

See COUNTY COURTS, Vol. XIII., pp. 500, 501, Nos. 506–513.

SUB-SECT. 4.—ELECTION PETITIONS.

Elections, generally, See ELECTIONS, Vol. XX., pp. 8 et seq.

336. On behalf of party charged with corruption—Municipal election petition.]—By Corrupt & Illegal Practices Prevention Act, 1883 (c. 51), s. 38, which applies to municipal election petitions, before a person, not being a party to an election petition, nor a candidate on behalf of whom the seat is claimed, is reported by an election ct. to have been guilty of any corrupt or illegal practices, the ct. shall cause notice to be given to him, & if he appears, "shall give him an opportunity of being heard by himself, & of calling evidence in his defence to show why he should not be so reported":—*Held*: this sect. excluded the right of a person charged with any corrupt or illegal practice at a municipal election to be heard by his counsel or solr.—*R. v. MANSEL JONES* (1889), 23 Q. B. D. 29; 60 L. T. 860; 37 W. R. 508; *sub nom. R. v. JONES*, 53 J. P. 739; *sub nom. Re HEREFORD MUNICIPAL ELECTION PETITION, Ex p. GARROLD*, 5 T. L. R. 411, D. C.

Annotations:—*Reid. R. v. Mansel Jones* (1894), 10 T. L. R. 515. *Mentd. R. v. St. Mary Abbot's, Kensington Assmt. Com.* (1891), 60 L. J. M. C. 52.

337. — Parliamentary petition.] — Wor-

CESTER BOROUGH ELECTION CASE, HARBEN & CADBURY v. WILLIAMSON (1906), 5 O'M. & H. 212.

Annotation:—*Mentd. Cheltenham Case, Davies' Case* (1911), 6 O'M. & H. 194.

SUB-SECT. 5.—BEFORE MAGISTRATES.

338. At petty sessions.]—In the investigation of a charge of felony before a magistrate, an attorney is only as a matter of courtesy permitted, but has no right to be present; nor can he comment on the evidence so as to apply the law to it, unless he be requested by the magistrate to give his opinion & advice upon the case.—*R. v. BORRON* (1820), 3 B. & Ald. 432; 106 E. R. 721.

Annotations:—*Consd. Cox v. Coleridge* (1822), 1 B. & C. 37. *Mentd. Ex p. Fentiman* (1834), 2 Ad. & El. 127.

339. —.] — A person under examination before justices of the peace, on a charge of felony, has no right to have a legal adviser attending on his behalf, still less to cross examine the witness for the prosecution, & to examine opposing testimony to prove his innocence. The privilege when allowed, is entirely a matter of discretion in the justices.

Where an attorney of this ct. was retained by a prisoner, charged with felony, & to attend & give him his advice & assistance during his examination before justices, & after notice to the latter that he attended upon such retainer for that purpose:—*Held*: the justices might forcibly turn him out of the justice room, & exclude his presence during the investigation of the case. *Qu.*: whether this rule applies where the decision of the justices is final, as on convictions under penal statutes no appeal being given.—*COX v. COLERIDGE* (1822), 1 B. & C. 37; 2 Dow. & Ry. K. B. 86; 1 Dow. & Ry. M. C. 142; 107 E. R. 15.

Annotations:—*Reid. Daubney v. Cooper* (1829), 5 Man. & Ry. K. B. 314. *Cowdell v. Neale* (1856), 1 C. B. N. S. 332.

340. —.] — *Qu.*: where magistrates are sitting judicially, as in the case of an information for an offence against the game laws, whether an attorney has a right to be present, & in that character, to take a part in the proceedings on behalf of the accused.

But, in general, the ct. in which magistrates are sitting judicially is an open ct., to which the public have a right of access; & supposing there to be room, that a person conducts himself properly, & there be no reason to justify an order for his removal, every one of the public has a right to be present.

Accordingly, where magistrates sitting judicially ordered an attorney, who attended on behalf of the accused, to be turned out of the room:—*Held*: independent of any question as to his right as an attorney, he was entitled to maintain an action of trespass for being thus turned out, on the ground of right, as one of the public, to be present. *DAUBNEY v. COOPER* (1829), 10 B. & C. 237; 5 Man. & Ry. K. B. 314; 3 Man. & Ry. M. C. 23; 8 L. J. O. S. K. B. 21; 109 E. R. 438.

Annotations:—*Reid. Collier v. Hicks* (1831), 9 L. J. O. S. M. C. 138; *R. v. York Sheriffs* (1832), 1 L. J. K. B. 211; *Newton v. Constable* (1841), 6 Jur. 317. *Mentd. Rawlings v. Till* (1837), 7 L. J. Ex. 6.

341. —.]—Certain justices at a preliminary inquiry into an alleged case of highway robbery declined to permit the solr. representing the prisoners to cross examine the witnesses for the

(1892), 26 L. L. T. Jo. 611.—IR.

PART III. SECT. 2, SUB-SECT. 5.

558.—AUS.

338 i. At petty sessions.]—*RITTER v. CHARLTON* (1901), 29 V. L. R.

338 ii. —.]—No agent, except a legal agent, can conduct a case at petty sessions.—*JONES v. O'BRIEN*

338 iii. —.]—*R. v. CORK COUNTY JJ.* (1913), 48 L. Jo. 389.—IR.

prosecution, believing that they possessed a discretionary power in the matter:—*Held*: the justices had no discretion to prohibit the solr. to the prisoners from cross examining the witnesses for the prosecution, & the right to cross examine is absolute both under Summary Jurisdiction Acts & by the common law.—*R. v. GRIFFITHS & WILLIAMS* (1886), 54 L. T. 280; 16 Cox, C. C. 46.

342. At quarter sessions — In absence of counsel.—Magistrates at quarter sessions have full power to regulate the practice of their own ct., this ct., therefore, refused a rule for a *certiorari* to bring up an order of a ct. of quarter sessions directing that attorneys should not have audience, when four barristers were present.—*Ex p. EVANS* (1846), 9 Q. B. 279; *sub nom. Re DENBIGHSHIRE JJ.*, 1 New Mag. Cas. 547; 7 L. T. O. S. 256; *R. v. DENBIGHSHIRE JJ.*, 2 New Sess. Cas. 422; 15 L. J. Q. B. 335; 10 Jur. 542; 10 J. P. Jo. 371.

Annotation:—*Mentd. R. v. L. G. Board, Ex p. Arlidge*, [1914] 1 K. B. 160.

343. ———.] — *BOTT'S CASE* (1889), 24 L. Jo. 28.

SUB-SECT. 6.—OTHER COURTS.

344. University court.—The Vice-Chancellor & Heads of Colleges in the University of Cambridge have authority to make a decree, that every tradesman with whom any person in *statu pupillari* should contract a debt, exceeding £5 should be required to send a notice thereof, at the end of every quarter, to the college tutor of the person so indebted, on pain of being punished by discommuning, or otherwise, as to the Vice-Chancellor & Heads of Colleges should seem fit.

A tradesman resident in Cambridge was summoned before the Vice-Chancellor & Heads of Colleges to answer a complaint of having violated this decree:—*Held*: he was not entitled to appear by counsel or attorney, this not being a judicial proceeding.—*Ex p. DEATH* (1852), 18 Q. B. 647; 21 L. J. Q. B. 337; 19 L. T. O. S. 165; 16 J. P. 615; 17 Jur. 112; 118 E. R. 244.

345. Railway & Canal Commission.—*Re LONDON & NORTH WESTERN & NORTH LONDON RY. COS.* (1888), 4 T. L. R. 332; 6 Ry. & Can. Tr. Cas. 19.

Tribunals of inquiry.—*See* Tribunals of Inquiry (Evidence) Act, 1921 (c. 7), s. 2 (6).

SECT. 3.—PRIVILEGES.

SUB-SECT. 1.—EXEMPTIONS.

346. From office of overseer of poor.—An attorney or practising barrister cannot be appointed a parish officer.—*PROUSE'S CASE* (1634), Cro. Car.

389; 79 E. R. 940; *sub nom. R. v. PROUSE*, 1 Bott, 4.

Annotations:—*Consd. Norwich Corpn. v. Berry* (1767), 4 Burr. 2109. *Refd. R. v. Evindon* (1740), 7 Mod. Rep. 383; *Gerard's Case* (1777), 2 Wm. Bl. 1123. *Mentd. R. v. Pordech* (1669), 1 Sid. 431; *Olive v. Ingram* (1739), 7 Mod. Rep. 263.

347. ———.]—The clerk of the treasury of the Ct. of Common Pleas is bound to a personal attendance on his duties, & therefore is not compellable to serve the office of overseer.—*Ex p. JEFFERIES* (1829), 6 Bing. 195; 3 Moo. & P. 450; 2 Man. & Ry. M. C. 463; 7 L. J. O. S. C. P. 263; 130 E. R. 1255.

348. ———.]—A practising solr. is exempt from serving the office of overseer of the poor, & if he is appointed to the office by a district council he is entitled to appeal to quarter sessions for an order to quash the appointment; but if the district council do not appear on the appeal to oppose the solr.'s claim to exemption, quarter sessions have no power to order the district council to pay the costs of the appeal.—*R. v. DERBYSHIRE JJ.*, *Ex p. NEW MILLS URBAN COUNCIL*, [1909] 1 K. B. 449; 78 L. J. K. B. 288; 100 L. T. 453; 73 J. P. 147; 25 T. L. R. 252; 7 L. G. R. 355, D. C.

See, now, Rating & Valuation Act, 1925 (c. 90), s. 62.

349. From office of rent collector of manor.—*STONE'S CASE* (1669), 1 Vent. 16, 29; Lev. 265; 86 E. R. 12, 21.

Annotations:—*Consd. Norwich Corpn. v. Berry* (1767), 4 Burr. 2109; *Ex p. Jefferies* (1829), 3 Moo. & P. 450. *Refd. R. v. Evindon* (1740), 7 Mod. Rep. 383.

From corporate office.—*See* LOCAL GOVERNMENT, Vol. XXXIII., p. 48, Nos. 279, 280.

From service on special or common jury.—*See* Juries Act, 1870 (c. 77), s. 9, sched.

From service on coroner's jury.—*See* CORONERS, Vol. XIII., p. 243, No. 116.

SUB-SECT. 2.—FREEDOM FROM ARREST.

A. In General.

350. Reason for privilege — Attendance on court.—If an attorney is shown to be about to quit England, he may be arrested pursuant to 1 & 2 Vict. c. 110, s. 3.

The object of protecting the person of an attorney from arrest is, that he may attend in this ct., & not that he may run away from the country (*PATTESON, J.*).—*THOMSON v. MOORE* (1841), 1 Dowl. N. S. 283; 5 Jur. 1009.

Annotation:—*Appld. Flight v. Cooke* (1843), 2 L. T. O. S. 173.

351. Waiver of privilege—Security given.—*MAULE v. GRUBB* (1734), Barnes, 200; 94 E. R. 875; *sub nom. MORLEY v. GRUBB*, Cooke, Pr. Cas. 104.

352. Extent of privilege — Not to solicitor's

(1837), Sau. & Sc. 81.—*IR.*

l. Freedom from arrest for contempt of court.—An attorney has no privilege from arrest on attachment for contempt.—*Re MCINTYRE* (1857), 2 P. R. 74.—*CAN.*

m. Writ of protection—Jurisdiction to grant.—The ct. has no power to grant a writ of protection from arrest to a solr.—*ANON.* (1828), 1 Mol. 76.—*IR.*

n. While going to attend counsel.—Motion to discharge an attorney arrested while going to consult with his counsel, refused.—*ANON.* (1830), 3 Ir. L. Rec. 1st ser. 327.—*IR.*

o. Eundo, morando et redeundo.—A solr. is privileged from arrest *eundo*, *morando et redeundo* from ct., whilst he is in attendance upon a motion or

PART III. SECT. 2, SUB-SECT. 6.

b. Inferior courts—Power of court to restrict right of appearance.—*COURT OF ARBITRATION v. NICHOLSON* (1906), 4 C. L. R. 302.—*AUS.*

c. ———.]—*VFERAPPA CHETTIAR v. SUNDARESA SASTRIGAL* (1925), 1 L. R. 48 Mad. 676.—*IND.*

d. District courts.—Attorneys, not being barristers, cannot, as of right, be heard as advocates in the district cts.—*Re LAPENOTIERE* (1846), 4 U. C. R. 492.—*CAN.*

e. Attorney not on record of court.—An attorney cannot, on any pretence, act in the name of another, in a ct. in which he has not been sworn.—*WILLETT v. CLIFTON* (LORD) (1832), Glascock, 254.—*IR.*

f. ———.]—*MACAULEY v. IRWIN* (1877), 11 I. L. T. Jo. 345.—*IR.*

g. Courts where barristers usually practise.—An attorney will not be allowed to address the jury on behalf of a prisoner in any ct. where counsel practise, such privilege being limited to the prisoner himself or to his counsel.—*R. v. MARTIN* (1843), 1r. Cir. Rep. 740.—*IR.*

h. ———.]—*R. v. CONNELL* (1845), 3 Craw. & D. 316.—*IR.*

PART III. SECT. 3, SUB-SECT. 2.—A.

k. Extent of privilege—Whether confined to cases where personal attendance indispensable.—The privilege of a solr. from arrest is not confined to those cases only in which his personal presence is indispensable.—*Re KEANE*

Sect. 3.—Privileges: Sub-sect. 2, A. & B. (a), (b), (c) & (d); sub-sect. 3, A. & B.; sub-sects. 4 & 5. Part IV. Sect. 1: Sub-sect. 1.]

clerk.]—An attorney's clerk is not privileged from arrest whilst going to a judge's chambers for the purpose of there conducting the attorney's business.—**PHILLIPS v. POUND** (1852), 7 Exch. 881; 21 L. J. Ex. 277; 19 L. T. O. S. 205; 16 J. P. 442; 16 Jur. 645; 155 E. R. 1207.

Freedom from arrest for contempt of court.]—See, generally, **CONTEMPT OF COURT**, Vol. XVI., pp. 79, 80, Nos. 976–987.

B. Attendance on Court.

(a) In General.

353. Solicitor must be in practice.]—ANON. (1830), 4 Moo. & P. 810.

354. Attendance must be on behalf of party to action.]—JONES v. MARSHALL (1857), 2 C. B. N. S. 615; 26 L. J. C. P. 229; 29 L. T. O. S. 161; 3 Jur. N. S. 916; 5 W. R. 623; 140 E. R. 558.

355. Solicitor must be admitted to practise in court.]—PRICE v. CLUTTERBUCK (1858), 1 F. & F. 379.

356. Attachment of punitive nature.]—An order was made directing a solr. to deliver up certain documents, to pay a sum of money & the costs of the order. This being disobeyed, the persons in whose favour the above order was made obtained an order for attachment. Before this order was executed the solr. did all that he was directed to do except paying the costs. He was afterwards arrested while returning to his office from defending a client at a preliminary inquiry before a police magistrate. He then applied to the ct. for his discharge, on the ground that he was at the time privileged from arrest:—**Held:** the attachment, being an attachment for disobedience of an order made on a solr., was punitive & disciplinary in its nature, & that against an arrest under such an order no privilege exists.—**Re FRESTON** (1883), 11 Q. B. D. 545; 52 L. J. Q. B. 545; 49 L. T. 290; 31 W. R. 804, C. A.

Annotations:—**Folld.** *Re Dudley* (1883), 12 Q. B. D. 41. **Apld.** *Re Grey*, [1892] 2 Q. B. 410. **Consd.** *Seldon v. Wilde*, [1911] 1 K. B. 701. **Refd.** *Re Wray* (1887), 36 Ch. D. 138. **Mentd.** *Harvey v. Harvey* (1884), 26 Ch. D. 644; *Re Wickham, Marony v. Taylor* (1887), 35 Ch. D. 272; *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190; *Re Evans, Evans v. Noton*, [1893] 1 Ch. 252; *Seaward v. Paterson* (1897), 66 L. J. Ch. 267; *Haydon v. Haydon* (1911), 104 L. T. 477; *Scott v. Scott*, [1913] A. C. 417.

(b) In respect of What Matters.

357. Attending execution of writ of inquiry.]—PIGOTT v. CHARLEWOOD (1734), Cooke, Pr. Cas. 102; Barnes, 200; 125 E. R. 984.

358. Attending taxation of costs.]—*Re HOPE* (1845), 5 L. T. O. S. 178; 9 Jur. 856.

Annotation:—**Refd.** *Jones v. Marshall* (1857), 2 C. B. N. S. 615.

cause, & if the party arresting is aware of the privilege, he will be ordered to pay any costs incurred.—*Re O'NEILL* (1837), Sau. & Sc. 78.—**IR.**

PART III. SECT. 3, SUB-SECT. 2.— **B. (a).**

p. Attendance on client's business—*Whether necessity for personal attendance material.]—*Where a solr. has been arrested on his way to ct. to attend to his client's business, & sundry detainers have been lodged, the practice is for the ct. to order the sheriff to discharge the solr. from custody in the original action. There is no distinction with respect to privilege, whether the business of the client is such as to require his personal attendance, or that which might be equally performed by his clerk.—**FITZMAU-**

RICE'S CASE (1828), 1 Mol. 512.—**IR.**

q. ———.]—An attorney is not privileged from arrest in execution, where he comes down to ct. to perform an act for his client which a clerk could do as well.—**SALMON v. KIERNAN** (1835), Sau. & Sc. 83, n.—**IR.**

r. Attendance as witness.]—The ct. will grant a protection to an attorney against whom an attachment for not complying with an order of the ct. has been awarded, but not executed, for the purpose of enabling him to attend as a witness at a trial.—**ANON.** (1830), 3 Ir. L. Rec. 1st ser. 164.—**IR.**

PART III. SECT. 3, SUB-SECT. 2.— **B. (b).**

t. Attending on business already dis-
of.]—An attorney coming to ct.

(c) In respect of What Courts.

359. House of Lords.]—*A.-G. v. SKINNER'S CO.* (1837), 8 Sim. 377; Coop. Pr. Cas. 1; 59 E. R. 150; *sub nom. Ex p. WATKINS*, Donnelly, 242; 6 L. J. Ch. 225; 1 Jur. 236.

360. All branches of High Court.]—*Re DICAS* (1831), 9 L. J. O. S. Ch. 183.

361. Attendance on master.]—*Ex p. LEDWICH* (1803), 8 Ves. 598; 32 E. R. 487.

362. Bankruptcy Court.]—*CASTLE'S CASE* (1810), 16 Ves. 412; 33 E. R. 1040.

363. ———.]—*EYRE v. BARROW* (1858), 27 L. J. Ch. 784; *sub nom. EYRE v. BARROW, Re BARROW*, 31 L. T. O. S. 281; 4 Jur. N. S. 652; 6 W. R. 767.

Annotation:—**Refd.** *Re Freston* (1883), 11 Q. B. D. 545.

364. Police court.]—*FLIGHT v. COOK* (1843), 1 Dow. & L. 714; 13 L. J. Q. B. 78; 2 L. T. O. S. 173; 8 Jur. 125.

365. Attendance on arbitrator.]—*WEBB v. TAYLOR* (1843), 1 Dow. & L. 676; 13 L. J. Q. B. 24; 8 Jur. 39.

366. County court.]—*CLUTTERBUCK v. HULLS* (1846), 4 Dow. & L. 80; 1 Saund. & C. 165; 15 L. J. Q. B. 310; 7 L. T. O. S. 212; 10 Jur. 1082.

367. ———.]—*R. v. ROBERTS* (1847), 9 L. T. O. S. 314.

368. ———.]—*Re JEWITT* (1864), 33 Beav. 559; 4 New Rep. 315; 33 L. J. Ch. 730; 10 L. T. 556; 28 J. P. 628; 10 Jur. N. S. 814; 12 W. R. 945; 55 E. R. 486.

Annotation:—**Refd.** *Re Freston* (1883), 11 Q. B. D. 545.

(d) Deviation.

369. Deviation must be substantial.]—*WILLIAMS v. WEBB* (1842), 2 Dowl. N. S. 660; 5 Scott, N. R. 898; 12 L. J. C. P. 89; *subsequent proceedings* (1843), 2 Dowl. N. S. 904.

370. ———.]—*JONES v. ROSE* (1847), 9 L. T. O. S. 330; *sub nom. JONES v. ROSE, Re N.*, 11 Jur. 379, L. C.

371. Solicitor going to court—Deviation to see another client.]—*STRONG v. DICKENSON* (1836), 1 M. & W. 488; 2 Gale, 83; Tyr. & Gr. 683; 5 L. J. Ex. 231; 150 E. R. 527.

372. ——— Not by nearest way.]—*A.-G. v. LEATHERSELLERS' CO.* (1844), 7 Beav. 157; 2 L. T. O. S. 306; 49 E. R. 1023.

Annotation:—**Distd.** *Re Freston* (1883), 11 Q. B. D. 545.

373. Solicitor attending court—Absence for refreshment.]—*GRIFFITH v. BROWN* (1731), Cooke, Pr. Cas. 61; 125 E. R. 960.

374. ———.]—*NEWMAN v. HARRISON* (1737), Cooke, Pr. Cas. 140; 125 E. R. 1010.

375. Solicitor coming from court—In opposite direction to home.]—*JONES v. ROSE* (1847), 9 L. T. O. S. 330; *sub nom. JONES v. ROSE, Re N.*, 11 Jur. 379, L. C.

in term on professional business which has been disposed of, is not privileged from arrest in execution.—*STROUBRIDGE v. DAVIS* (1838), 3 Ont. Dig. 6596.—**CAN.**

a. Attending to defend criminal.]—An attorney engaged to defend a traverser on a criminal charge at quarter sessions, is not debarred of his privilege from arrest, notwithstanding he may not have taken out a certificate under the 56 Geo. 3, c. 56, s. 65.—*SCOTT v. FRAYNE* (1842), 2 Leg. Rep. 111; Long. & T. 487; 5 L. L. R. 41.—**IR.**

PART III. SECT. 3, SUB-SECT. 2.— **B. (d).**

b. Solicitor going to court—Deviation to call at office.]—*SPAIN v. GARDNER* (1868), 1 R. 3 C. L. 150.—**IR.**

Part IV.—Solicitor and Client.

SECT. 1.—RETAINER.

SUB-SECT. 1.—IN GENERAL.

378. Must be warranted by authority—Unauthorised retainer by third party.]—An action on the case lies against a person for procuring an attorney to appear for deft. without his consent.—*ALLELEY v. COLLEY* (1624), Cro. Jac. 695 ; 79 E. R. 603.

379. Whether writing necessary—Unauthorised retainer by third party.]—The retainer of a solr. need not be in writing, but if he neglects taking that precaution, & his retainer being afterwards questioned, there is nothing but assertion against assertion, he must bear the costs of the risk he thus undertakes.—*WIGGINS v. PEPPIN* (1839), 2 Beav. 403 ; 3 Jur. 721 ; 48 E. R. 1237.

*Annotation :—*Reid. *Pinner v. Knights* (1813), 6 Beav. 171.

380. ———.]—*Re HINCKS*, [1867] W. N. 291.

381. ——— Retainer in nature of guarantee.]—Declaration stated that B. had sued deft. in equity, & had retained pltf. as his attorney, & that costs, viz. £30, had become due to pltf. as such attorney for his costs in the suit ; & that pltf. & deft. had agreed, with the consent of B., that the suit should be

discontinued, & deft. pay pltf. the costs which were due. It then stated that, in consideration of the premises, & that B. had consented to discontinue, & pltf. to accept, his costs from deft., the latter promised pltf. to pay him such costs, but did not. Plea, that the promise was an undertaking to pay the debt of another, & was not in writing. On demurrer :—*Held* : such promise was a promise to pay the debt of another, within Stat. Frauds.—*TOMLINSON v. GELL* (1837), 6 Ad. & El. 564 ; 1 Nev. & P. K. B. 588 ; Will. Woll. & Dav. 229 ; 6 L. J. K. B. 139 ; 112 E. R. 216.

*Annotation :—*Reid. *Cripps v. Hartnoll* (1862), 2 B. & S. 697.

— **Arising by implication.]**—*See* Sub-sect. 2, *post*.

— **Onus of proof where no writing.]**—*See* Nos. 403–408, *post*.

382. Effect of—Implied promise to pay costs.]—*BOLDEN v. NICHOLAY*, No. 515, *post*.

— **Authority to bind client.]**—*See* Part IV., Sect. 2, *post*.

383. Extent of—No power to bind third parties.]—*CHIVERS v. FIENN* (1681), 2 Show. 161.

PART III. SECT. 3, SUB-SECT. 5.

c. Right to be sued in Supreme Court.]—*BENNET v. MORSE* (1845), 4 N. B. R. (2 Kerr) 624.—CAN.

d. ———.]—While the privilege of an attorney of the Supreme Ct. to sue & be sued in the ct. in which he so enrolled has by express terms been taken away so far as county cts., justices' civil cts., & parish cts. are concerned, the privilege can still be

claimed in the city ct. of St. John, thereby ousting the jurisdiction of the said ct.—*CURLEY v. ROBERTSON* (1921), 65 D. L. R. 362 ; 49 N. B. R. 174.—CAN.

e. ———.]—A solr. of the Supreme Ct. of New Zealand has not the privilege of insisting upon being sued in the Supreme Ct.—*HUNTER v. MACGREGOR* (1872), Mac. 535.—N.Z.

f. Right to sue in Supreme Court.]

—*SIMONDS v. HALLETT* (1897), 34 N. B. R. 216.—CAN.

PART IV. SECT. 1, SUB-SECT. 1.

380 i. Whether writing necessary.]—*FITCH v. FORT FRANCES PULP & PAPER CO., LTD.*, [1927] 4 D. L. R. 811 ; 61 O. L. R. 252.—CAN.

g. ——— Solicitor acting for both parties.]—*GREENE & MADER v. DILLABOUGH & KNOWLES, HARE & BENSON* (Sask.) (1919), 50 D. L. R. 496.—CAN.

SOLICITORS.

3.—*Privileges: Sub-sect. 2, A. & B. (a), (b), (c) & (d); sub-sect. 3, A. & B.; sub-sects. 4 & 5. Part IV. Sect. 1: Sub-sect. 1.]*

clerk.]—An attorney's clerk is not privileged from arrest whilst going to a judge's chambers for the purpose of there conducting the attorney's business.—*PHILLIPS v. POUND* (1852), 7 Exch. 881; 21 L. J. Ex. 277; 19 L. T. O. S. 205; 16 J. P. 442; 16 Jur. 645; 155 E. R. 1207.

Freedom from arrest for contempt of court.] See, generally, *CONTEMPT OF COURT*, Vol. XVI., pp. 79, 80, Nos. 976-987.

B. Attendance on Court.

(a) In General.

353. Solicitor must be in practice.]—*ANON.* (1830), 4 Moo. & P. 810.

354. Attendance must be on behalf of party to action.]—*JONES v. MARSHALL* (1857), 2 C. B. N. S. 615; 26 L. J. C. P. 229; 29 L. T. O. S. 161; 3 Jur. N. S. 916; 5 W. R. 623; 140 E. R. 558.

355. Solicitor must be admitted to practise in court.]—*PRICE v. CLUTTERBUCK* (1858), 1 F. & F. 379.

356. Attachment of punitive nature.]—An order was made directing a solr. to deliver up certain documents, to pay a sum of money & the costs of the order. This being disobeyed, the persons in whose favour the above order was made obtained an order for attachment. Before this order was executed the solr. did all that he was directed to do except paying the costs. He was afterwards arrested while returning to his office from defending a client at a preliminary inquiry before a police magistrate. He then applied to the ct. for his discharge, on the ground that he was at the time privileged from arrest:—*Held*: the attachment, being an attachment for disobedience of an order made on a solr., was punitive & disciplinary in its nature, & that against an arrest under such an order no privilege exists.—*Re FRESTON* (1883), 11 Q. B. D. 545; 52 L. J. Q. B. 545; 49 L. T. 290; 31 W. R. 804, C. A.

Annotations:—Folld. Re Dudley (1883), 12 Q. B. D. 44. *Appl. Re Grey*, [1892] 2 Q. B. 440. *Consd. Seldon v. Wilde*, [1911] 1 K. B. 701. *Reid. Re Wray* (1887), 36 Ch. D. 138. *Mentd. Harvey v. Harvey* (1884), 26 Ch. D. 644; *Re Wickham, Marony v. Taylor* (1887), 35 Ch. D. 272; *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190; *Re Evans, Evans v. Noton*, [1893] 1 Ch. 252; *Seaward v. Paterson* (1897), 66 L. J. Ch. 267; *Haydon v. Haydon* (1911), 104 L. T. 477; *Scott v. Scott*, [1913] A. C. 417.

(b) In respect of What Matters.

357. Attending execution of writ of inquiry.]—*PIGOTT v. CHARLEWOOD* (1734), Cooke, Pr. Cas. 102; Barnes, 200; 125 E. R. 984.

358. Attending taxation of costs.]—*Re HOPE* (1845), 5 L. T. O. S. 178; 9 Jur. 856.

Annotation:—Reid. Jones v. Marshall (1857), 2 C. B. N. S. 615.

cause, & if the party arresting is aware of the privilege, he will be ordered to pay any costs incurred.—*Re O'NEILL* (1837), Sau. & Sc. 78.—*IR.*

PART III. SECT. 3, SUB-SECT. 2.— B. (a).

p. Attendance on client's business—Whether necessity for personal attendance material.]—Where a solr. has been arrested on his way to ct. to attend to his client's business, & sundry detainers have been lodged, the practice is for the ct. to order the sheriff to charge the solr. from custody in original action. There is no distinction with respect to privilege, whether the business of the client is such as to require his personal attendance, or that which might be equally performed by his clerk.—*I*

RICE'S CASE (1828), 1 Mol. 512.—*IR.*

q. ———.]—An attorney is not privileged from arrest in execution, where he comes down to ct. to perform an act for his client which a clerk could do as well.—*SALMON v. KIERNEAN* (1835), Sau. & Sc. 83, n.—*IR.*

r. Attendance as witness.]—The ct. will grant a protection to an attorney against whom an attachment for not complying with an order of the ct. has been awarded, but not executed, for the purpose of enabling him to attend as a witness at a trial.—*ANON.* (1830), 3 Ir. L. Rec. 1st ser. 164.—*IR.*

PART III. SECT. 3, SUB-SECT. 2.— B. (b).

t. Attending on business already disposed of.]—An attorney coming to ct.

(c) In respect of What Courts.

359. House of Lords.]—*A.-G. v. SKINNER'S CO.* (1837), 8 Sim. 377; Coop. Pr. Cas. 1; 59 E. R. 150; *sub nom. Ex p. WATKINS, Donnelly*, 242; 6 L. J. Ch. 225; 1 Jur. 236.

360. All branches of High Court.]—*Re* (1831), 9 L. J. O. S. Ch. 183.

361. Attendance on master.]—*Ex p.* (1803), 8 Ves. 598; 32 E. R. 487.

362. Bankruptcy Court.]—*CASTLE'S CASE* (1810), 16 Ves. 412; 33 E. R. 1040.

363. ———.]—*EYRE v. BARROW* (1858), 27 L. J. Ch. 784; *sub nom. EYRE v. BARROW, Re BARROW*, 31 L. T. O. S. 281; 4 Jur. N. S. 652; 6 W. R. 767.

Annotation:—Reid. Re Freston (1883), 11 Q. B. D. 545.

364. Police court.]—*FLIGHT v. COOK* (1843), 1 Dow. & L. 714; 13 L. J. Q. B. 78; 2 L. T. O. S. 173; 8 Jur. 125.

365. Attendance on arbitrator.]—*WEBB v. TAYLOR* (1843), 1 Dow. & L. 676; 13 L. J. Q. B. 24; 8 Jur. 39.

366. County court.]—*CLUTTERBUCK v. HULLS* (1846), 4 Dow. & L. 80; 1 Saund. & C. 165; 15 L. J. Q. B. 310; 7 L. T. O. S. 212; 10 Jur. 1082.

367. ———.]—*R. v. ROBERTS* (1847), 9 L. T. O. S. 314.

368. ———.]—*Re JEWITT* (1864), 33 Beav. 559; 4 New Rep. 515; 33 L. J. Ch. 730; 10 L. T. 558; 28 J. P. 628; 10 Jur. N. S. 814; 12 W. R. 945; 55 E. R. 486.

Annotation:—Reid. Re Freston (1883), 11 Q. B. D. 545.

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369. Deviation must be substantial.]—*WILLIAMS v. WEBB* (1842), 2 Dowl. N. S. 660; 5 Scott, N. R. 898; 12 L. J. C. P. 89; *subsequent proceedings* (1843), 2 Dowl. N. S. 904.

370. ———.]—*JONES v. ROSE* (1847), 9 L. T. O. S. 330; *sub nom. JONES v. ROSE, Re N.*, 11 Jur. 379, L. C.

371. Solicitor going to court—Deviation to see another client.]—*STRONG v. DICKENSON* (1836), 1 M. & W. 488; 2 Gale, 83; Tyr. & Gr. 683; 5 L. J. Ex. 231; 150 E. R. 527.

372. ——— Not by nearest way.]—*A.-G. v. LEATHERSELLERS' CO.* (1844), 7 Beav. 157; 2 L. T. O. S. 306; 49 E. R. 1023.

Annotation:—Distd. Re Freston (1883), 11 Q. B. D. 545.

373. Solicitor attending court—Absence for refreshment.]—*GRIFFITH v. BROWN* (1731), Cooke, Pr. Cas. 64; 125 E. R. 960.

374. ———.]—*NEWMAN v. HARRISON* (1737), Cooke, Pr. Cas. 140; 125 E. R. 1010.

375. Solicitor coming from court—In opposite direction to home.]—*JONES v. ROSE* (1847), 9 L. T. O. S. 330; *sub nom. JONES v. ROSE, Re N.*, 11 Jur. 379, L. C.

in term on professional business which has been disposed of, is not privileged from arrest in execution.—*STROUBRIDGE v. DAVIS* (1838), 3 Ont. Dig. 6598.—*CAN.*

a. Attending to defend criminal.]—An attorney engaged to defend a traverser on a criminal charge at quarter sessions, is not debarred of his privilege from arrest, notwithstanding he may not have taken out a certificate under the 56 Geo. 3, c. 56, s. 66.—*SCOTT v. FRAYNE* (1842), 2 Leg. Rep. 111; Long. & T. 487; 6 L. L. R. 41.—*IR.*

PART III. SECT. 3, SUB-SECT. 2.— B. (a).

b. Solicitor going to court—Deviation to call at office.]—*SPAIN v.*, 1 R. 3 C. L

SUB-SECT. 3.—CONFIDENTIAL COMMUNICATIONS.

A. *Discovery and Interrogatories.*

Discovery & interrogatories generally.]—See *DISCOVERY*, Vol. XVIII., pp. 42 *et seq.*

Documents privileged from discovery—Direct communications with client.]—See *DISCOVERY*, Vol. XVIII., pp. 123–128, 131, Nos. 731–779, 820, 821.

Communications through agent.]—See *DISCOVERY*, Vol. XVIII., p. 131, Nos. 814–819.

Documents held for party & others.]—See *DISCOVERY*, Vol. XVIII., p. 159, Nos. 1101–1106.

Documents held as agent.]—See *DISCOVERY*, Vol. XVIII., p. 160, Nos. 1110, 1113–1115.

Answers to interrogatories—Officer of corporation acting as solicitor.]—See *DISCOVERY*, Vol. XVIII., p. 236, Nos. 1803, 1804.

Communications between solicitors or agents & party.]—See *DISCOVERY*, Vol. XVIII., pp. 241–243, Nos. 1847–1859.

Joinder of solicitor as party for purpose of discovery.]—See *DISCOVERY*, Vol. XVIII., p. 44, Nos. 26–31.

B. *Evidence.*

Evidence of legal advisers generally.]—See *EVIDENCE*, Vol. XXII., pp. 406–419, Nos. 4143–4291; *INFANTS*, Vol. XXVIII., p. 340, Nos. 2072–2080.

Competency as witness—Solicitor in proceedings.]—See *EVIDENCE*, Vol. XXII., pp. 390, 391, Nos. 4001, 4002.

Production of documents on subpoena duces tecum.]—See *EVIDENCE*, Vol. XXII., pp. 427,

430–432, Nos. 4411–4418, 4448–4464, 4467, 4473–4479.

Witnesses ordered out of court—Right of solicitor to remain in court & give evidence.]—See *EVIDENCE*, Vol. XXII., p. 456, Nos. 4767–4769.

Statements by accused to solicitor.]—See *CRIMINAL LAW*, Vol. XIV., pp. 427, 428, Nos. 4526–4536.

SUB-SECT. 4.—DEFAMATION.

Privileged statements—Absolute privilege of advocates.]—See *LIBEL & SLANDER*, Vol. XXXII., pp. 105, 106, Nos. 1358–1370.

Qualified privilege of solicitor.]—See *LIBEL & SLANDER*, Vol. XXXII., p. 126, Nos. 1577–1581.

SUB-SECT. 5.—RIGHT TO SUE AND BE SUED IN HIGH COURT.

376. *Right to sue in High Court—Obsolete.*]—*SHARP v. HORROCKS* (1887), 32 Sol. Jo. 93.

377. *Solicitor also on roll of inferior court—Liability to be sued in inferior court.*]—A solr. of the High Ct., who had also been admitted a solr. in the Mayor's Ct., was sued in the latter ct.:—*Held*: he was not entitled to have the action removed into the High Ct. on the ground of the privilege of a solr. of the High Ct. to be sued in that ct. only.—*DAY v. WARD* (1886), 17 Q. B. D. 703; 55 L. J. Q. B. 494; 55 L. T. 518; 35 W. R. 59, D. O.

Part IV.—Solicitor and Client.

SECT. 1.—RETAINER.

SUB-SECT. 1.—IN GENERAL.

378. *Must be warranted by authority—Unauthorised retainer by third party.*]—An action on the case lies against a person for procuring an attorney to appear for deft. without his consent.—*ALLELEY v. COLLEY* (1824), Cro. Jac. 695; 79 E. R. 603.

379. *Whether writing necessary—Unauthorised retainer by third party.*]—The retainer of a solr. need not be in writing, but if he neglects taking that precaution, & his retainer being afterwards questioned, there is nothing but assertion against assertion, he must bear the costs of the risk he thus undertakes.—*WIGGINS v. PEPPIN* (1839), 2 Beav. 403; 3 Jur. 721; 48 E. R. 1237.

Annotation:—*Reid*. *Pinner v. Knights* (1843), 6 Beav. 174.

380. —.]—*Re HINCKS*, [1867] W. N. 291.

381. —. *Retainer in nature of guarantee.*]—Declaration stated that B. had sued deft. in equity, & had retained pltf. as his attorney, & that costs, viz. \$80, had become due to pltf. as such attorney for his costs in the suit; & that pltf. & deft. had agreed, with the consent of B., that the suit should be

discontinued, & deft. pay pltf. the costs which were due. It then stated that, in consideration of the premises, & that B. had consented to discontinue, & pltf. to accept, his costs from deft., the latter promised pltf. to pay him such costs, but did not. Plea, that the promise was an undertaking to pay the debt of another, & was not in writing. On demurrer:—*Held*: such promise was a promise to pay the debt of another, within Stat. Frauds.—*TOMLINSON v. GELL* (1837), 11 Ad. & El. 564; 1 Nev. & P. K. B. 588; Will. Woll. & Dav. 229; 6 L. J. K. B. 139; 112 E. R. 216.

Annotation:—*Reid*. *Cripps v. Hartnoll* (1862), 2 B. & S. 697.

— *Arising by implication.*]—See Sub-sect. 2, *post*.

— *Onus of proof where no writing.*]—See Nos. 403–408, *post*.

382. *Effect of—Implied promise to pay costs.*]—*BOLDEN v. NICHOLAY*, No. 515, *post*.

— *Authority to bind client.*]—See Part IV., Sect. 2, *post*.

383. *Extent of—No power to bind third parties.*]—*CHIVERS v. FENN* (1681), 2 Show. 161.

PART III. SECT. 3, SUB-SECT. 5.

c. *Right to be sued in Supreme Court.*]—*BANNER v. MORAN* (1845), 4 N. B. R. (2 Kerr) 624.—CAN.

d. —.]—While the privilege of an attorney of the Supreme Ct. to sue & be sued in the ct. in which he so enrolled has by express terms been taken away so far as county cts., justices' civil cts., & parish cts. are concerned, the privilege can still be

claimed in the city ct. of St. John, thereby ousting the jurisdiction of the said ct.—*CURLEY v. ROBERTSON* (1921), 55 D. L. R. 362; 49 N. B. R. 174.—CAN.

— solr. of the Supreme of New Zealand has not the privilege of insisting upon being sued in the Supreme Ct.—*HUNTER v. MACGREGOR* (1872), Mac. 535.—N.Z.

i. *Right to sue in Supreme Court.*]—

—*SIMONDS v. HALLETT* (1897), 34 N. B. R. 216.—CAN.

PART IV. SECT. 1, SUB-SECT. 1.

380 i. *Whether writing necessary.*]—*FRITCH v. FORT FRANCES PULP & PAPER CO., LTD.*, [1927] 4 D. L. R. 811; 61 O. L. R. 252.—CAN.

g. —. *Solicitor acting for both parties.*]—*GREENE & MADER v. DILLABOUGH & KNOWLES, HARE & BENSON* (Sask.) (1919), 50 D. L. R. 496.—CAN.

Sect. 1.—Retainer: Sub-sects. 1 & 2.]

384. — Employment of firm of solicitors—Right of client to services of each member.]—
RAWLINSON v. MOSS, No. 479, post.

Particular retainers.]—See Sub-sect. 7, post.
Liability to third parties.]—See Part XI., post

SUB-SECT. 2.—WHAT AMOUNTS TO.

385. General rule.]—(1) An injunction, which had been granted to restrain an action at law, to recover the arrears of an annuity granted to the wife of a person, who, from the nature of his connection with the grantor, was held to have abused his confidence by unduly exercising the influence which he possessed, ordered on the hearing to be continued.

(2) In cases of parent & child, guardian & ward, trustee & *cestui que trust*, etc., cts. of equity, although in general they will not disturb the enjoyment of benefits conferred by acts purely voluntary, will regard the gifts of the latter, made without consideration, with much jealousy; but where the parties stand in the relation of attorney & client, so immediately is the former under the eye of the cts., & so anxiously do they watch the interests of the latter, that although the voluntary gift of the client may be supported, it is so indispensably necessary to show it to be *bonâ fide*, & free from the imputation of any of the above objections, as to render it in some sort essential to its validity & stability, that some other professional man than the donee should have the conduct of it, or at least that some indifferent third person should be privy to the whole transaction. The ct. having ordered an injunction, obtained on the grounds on which the present was granted, to be continued, refused to impose the terms of paying the money into ct. if the parties are attorney & client.

(3) To constitute the connection of attorney & client, it is sufficient that the party has no other solr., to whom he is in the habit of resorting for advice; & it is not necessary that the attorney should be shown to be in any particular manner, or to any extent, employed in law business for him.—**GODDARD v. CARLISLE (1821)**, 9 Price, 169; 147 E. R. 57.

Annotations:—As to (1) *Apld.* Liles v. Terry, [1895] 2 Q. B. 679. **As to (2)** *Apld.* Barron v. Willis, [1899] 2 Ch. 578.

386. Implication from acts of parties—Retainer of clerk to attorney—Application at office where clerk employed.]—A., an attorney, was employed by B., another attorney, as his clerk, & it was agreed between them that A. should have the benefit of the common law business. C. applied at the office of B., & common law & other business was done for him there. In an action brought by A. against C. for the common law business:—**Held**: there was evidence to go to the jury of a retainer of A. by C.—**PINLEY v. BAGNALL (1782)**, 3 Doug. K. B. 155; 99 E. R. 588.

387. — Receiving payment out of court.]—Receiving out of ct. the money produced by a suit is equivalent to evidence of a special retainer, & the solr. will be entitled to recover the amount of his bill of costs.—**GRAY v. WAINMAN (1823)**, 7 Moore, C. P. 467; 1 L. J. O. S. C. P. 21.

Annotation:—Consd. *Re* Beckett, Purnell v. Paine (1918), 87 L. J. Ch. 457.

388. — —.]—CHAPLIN v. MEARS (1891), *Times*, Aug. 3.

389. — Failure to repudiate—Action defended on authority of third party.]—An attorney being employed for a man by his father, to defend an action; if he knew of his retainer, & did not disapprove of it, he is bound by the acts of such attorney, in the same way as if he had himself employed him.—**CAMERON v. BAKER (1824)**, 1 C. & P. 268; 171 E. R. 1190, N. P.

390. — — Action commenced without authority.]—The fact that a party, knowing that his name has, without authority, been introduced as pltf. by the solr. of some of the other pltf. in a suit, does not take any active steps to have his name expunged as pltf. from the record is not, as between that party & the solr., equivalent to a retainer or an adoption of the latter as his solr.—**HALL v. LAVER (1842)**, 1 Hare, 571; 68 E. R. 1158; *previous proceedings* (1840), 4 Y. & C. Ex. 216.

Annotations:—Consd. *Re* Manby & Hawksford, Norton v. Cooper (1856), 26 L. J. Ch. 313. **Reid.** *Burge v. Brutton* (1843), 2 Hare, 373; *M'Gregor v. Derbyshire, Staffordshire & Worcestershire Junction Ry.* (1849), 13 L. T. O. S. 445; *Re* Becket, Purnell v. Paine, [1918] 2 Ch. 72.

391. — — —.]—(1) Where an attorney brings an action without the authority of pltf., pltf. is entitled to have the proceedings stayed without payment of costs.

(2) If pltf. after action brought in his name by an attorney without authority hears of it, & does not repudiate it, he will be supposed to have ratified the attorney's act (**BLACKBURN, J.**).—**REYNOLDS v. HOWELL (1873)**, L. R. 8 Q. B. 398; 42 L. J. Q. B. 181; 29 L. T. 209; 22 W. R. 18.

Annotations:—As to (1) *Apprvd.* *Newbigging-by-the-Sea Gas Co. v. Armstrong* (1879), 49 L. J. Ch. 231. **Folld.** *Nurse v. Durnford* (1879), 13 Ch. D. 764. *Apprvd.* *Fricker v. Van Grutten*, [1896] 2 Ch. 649. **Consd.** *Gellinger v. Gibbs*, [1897] 1 Ch. 479; *Yonge v. Toynbee*, [1910] 1 K. B. 215. **Reid.** *Didlsheim v. London & Westminster Bank*, [1900] 2 Ch. 15. **As to (2)** *Distd.* *Re* Becket, Purnell v. Paine, [1918] 2 Ch. 72.

392. Retainer to commence suit subsequently abated—Whether amounting to retainer to commence second action against same parties.]—A retainer to commence a suit, which suit is afterwards abated by plea for non-joinder, is sufficient evidence of a retainer to commence another action against the parties named in the plea in abatement.—**CROOK v. WRIGHT (1825)**, Ry. & M. 278; 171 E. R. 1020.

393. — Attorney appearing for prisoner on capias ad respondendum.]—Appearing as an attorney before a judge for a prisoner in custody on a *capias ad respondendum* does not constitute him attorney in the suit, so as to entitle pltf. to leave the declaration at his office.—**SPENCER v. NEWTON (1837)**, 6 Ad. & El. 630; 1 Nev. & P. K. B. 823; Will. Woll. & Dav. 232; 6 L. J. K. B. 148; 112 E. R. 242.

394. — Leaving papers with solicitor.]—In an action on an attorney's bill for defending a tithe suit, the retainer in which is disputed by deft., it is enough to show, that deft. called at pltf.'s office, & left his writ & notice of declaration & that he afterwards expressed his determination to go to the bottom of it." It is no defence to the action to show, that long before the date of that action, in the course of which the business was done, deft., with others in the parish of P., entered into articles of agreement, binding themselves to contribute towards the defence of whatever suits might be brought for the recovery of tithes against

PART IV. SECT. 1, SUB-SECT. 2.

390 i. Implication from acts of parties—Failure to repudiate—Action commenced without authority.]—Re MONTEITH, MERCHANTS BANK v. MONTEITH (1887), 12 P. R. 288.—**CAN.**

the subscribers, that pltf. was present at one of the meetings of a committee appointed to conduct the defences, & that at another, a resolution was passed to pay him £200 towards the expenses of defending some of the tithe suits; but deft. is liable to the attorney, unless he can show that he expressly assented to look to the general fund, & not to him for his bill.—*PARROTT v. ECHELLS* (1839), 3 J. P. 771.

395. — Payment into court by one defendant — Whether amounting to retainer by co-defendant.]—In an action on an attorney's bill against two defts., a plea of payment of money into ct. does not admit a retainer by both defts., so as to charge them for anything beyond the amount paid in, although there may be some evidence, as against one of defts., to a further amount.—*ARCHER v. ENGLISH* (1840), 1 Man. & G. 873; *Drinkwater*, 30; 2 Scott, N. R. 156; 10 L. J. C. P. 15; 4 Jur. 1186; 133 E. R. 585.

396. — Payment into court of part of claim.]—Pltf. was partner, as an attorney & solr., with J., town clerk to defts., the corpn. of B. Defts. made an order that the town clerk should defend & prosecute an alleged right of the corpn. At this time, by an accidental omission, J. was off the rolls of the ct., & unable to practise: but this fact was not known to defts. until after the work was done. Certain parties having been charged at the Sessions for the borough, which was a county in itself, with a misdemeanour, arising out of the assertion of this right, pltf. conducted their defence, & removed the bills of *certiorari*, & continued to conduct it until judgment was passed. It was not found in the case in which these facts were stated that the town clerk was also clerk of the peace. In an action by pltf. against defts. for work done as attorney & solr. on their retainer:—*Held*: from these facts no retainer of pltf. could be implied, although part of the amount charged had been paid by defts. into ct.—*STEAVENSON v. BERWICK-UPON-TWEED CORPN.* (1841), 1 Q. B. 154; Arn. & H. 265; 4 Per. & Dav. 546; 10 L. J. Q. B. 95; 5 J. P. 386; 113 E. R. 1089.

Annotation:—*Reid. Hennell v. Davies*, [1893] 1 Q. B. 367.

397. — Consent to consolidation order.]—Where a judge's order is made by consent to consolidate actions against several defts. who have severally employed the same attorney, upon their undertaking to be bound by the event of the trial of one, the order to consolidate operates as a joint retainer by defts. of the attorney, & they are jointly liable to him for the costs of the action which is tried.—*ANDERSON v. BOYNTON* (1849), 13 Q. B. 308; 7 Dow. & L. 25; 19 L. J. Q. B. 42; 12 L. T. O. S. 421; 14 Jur. 14; 116 E. R. 1281.

Annotations:—*Reid. Keene v. Ward* (1849), 13 Q. B. 515; *Cook v. Gillard* (1852), 1 E. & B. 26; *Re Allen, Davies v. Chatwood* (1879), 11 Ch. D. 244.

398. — Authorising attorney to conduct suit — Although not party to suit.]—A person not party to a suit, but who has desired an attorney to conduct it, may be liable to him for his costs, if by his words & acts he has given him grounds for regarding him as his employer, even although he has no legal or equitable interest in the subject-matter

of the suit, & pltf. in the action is referred to for instructions.—*SOUTHALL v. KEDDY* (1858), 1 F. & F. 177.

399. — Authority by letter — To stop proceedings.]—*DUNN v. HALES* (1858), 1 F. & F. 174, N. P.

Annotation:—*Reid. Browne v. Black*, [1912] 1 K. B. 316.

400. — Investment of funds by solicitor trustee.]—Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solrs. F., S., & F., at their bankers. The funds were afterwards advanced on a mtge. of house property in a new neighbourhood, & of inadequate value. At that date there were no trustees of the settlement, & the mtge. was taken in the names of S., & two other persons who were then proposed, & shortly afterwards appointed new trustees, & never repudiated the transaction. S. was the member of his firm who acted for them in all the matters, & for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment for their bill of costs out of the funds. The mtge. proved to be an insufficient security, & in an action against the trustees it was held that they were jointly & severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make the firm of solrs. liable for the loss of the funds on the ground of negligence, though S.'s partners had not had any personal knowledge of the property at the time when the mtge. transaction was completed:—*Held*: though there had not been an express retainer, the relation of solr. & client might be inferred from the acts of the parties; it subsisted between the firm & the trustees, & the firm were liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients.—*BLYTH v. FLADGATE, MORGAN v. BLYTH, SMITH v. BLYTH*, [1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546; 39 W. R. 422; 7 T. L. R. 29.

Annotations:—*Reid. Mara v. Browne*, [1895] 2 Ch. 89; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536.

401. — Delegation to second solicitor by solicitor retained — Whether amounting to retainer of second solicitor by client.]—In 1907 pltf. retained S. as their solr. to conduct an action on their behalf. S. without their authority or knowledge arranged with L., another solr., that L. should conduct the action, not as his agent, but as pltf.'s solr., & L. issued the writ & delivered the statement of claim in his firm's name. L. subsequently entered into negotiations with defts.' solr. with a view to a compromise to the action. Before the compromise was completed pltf., for reasons in no way connected with the action, declined to employ S. any longer as their solr. & entrusted the conduct of the action & compromise to another firm of solrs., & thereupon L. ceased to do any active work in the matter. In 1910 the compromise was completed, one of the terms being that pltf. should bear their own costs. In 1912 pltf. discovered that L. had acted in the action. In 1913 L. claimed payment of his costs by pltf.:—*Held*:

401 i. — Delegation to second solicitor by solicitor retained — Whether amounting to retainer of second solicitor by client.]—*CLARKE v. HEMMING & HEMMING*, [1923] E. D. L. 315.—S. AF.

h. — Accepting benefit of services.]—*LUPTON v. WALSH* (1898), 14 N. S. W. L. R. (B.) 106.—AUS.

k. — —.]—Where a person for whom counsel states he appears, is present in ct. allows him to appear,

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& adopts his advocacy, that adoption renders it impossible for such person to dispute the retainer of counsel & of the solr. instructing him.—*Re McL.* (1903), 3 S. R. N. S. W. 388.—AUS.

l. — —.]—M. was retained as solr. for a prosecution but W., who was in ct., was permitted to act:—*Held*: the prosecutor having permitted W. to act, & having obtained

the benefit of his services, was estopped from denying that W. was his solr.—*R. v. FERGUSON* (1894), 26 N. S. R. 154.—CAN.

m. — —.]—*DUFF v. LANE* (1911), 13 E. L. R. 561.—CAN.

n. — —.]—*LYNCH - STAUNTON v. SOMERVILLE* (1918), 15 O. W. N. 96; 43 D. L. R. 736.—CAN.

o. — Written request to solicitor "to continue his exertion to recover."

Sect. 1.—Retainer: Sub-sects. 2, 3 & 4, A.]

there was no contract for services between L. & pltf's., & L. had no authority for conducting the action as solr. for pltf's., & on neither of those grounds, nor on any ground of adoption, ratification, or recognition of L., or his services by pltf's., was L. entitled to payment of his costs by pltf's.—*Re BECKET, PURNELL v. PAINE*, [1918] 2 Ch. 72; 87 L. J. Ch. 457; 119 L. T. 108; 34 T. L. R. 389, C. A.

402. Newspaper offering to instruct solicitors on behalf of public—Acceptance of offer by members of public.]—*BAILLIE v. NEVILLE, PRESTON v. NEVILLE* (1920), 149 L. T. Jo. 300.

Evidence of retainer.]—See Sub-sect. 3, *post*.

SUB-SECT. 3.—EVIDENCE OF.

403. Onus of proof—Where no written retainer.]

—*ALLEN v. BONE*, No. 551, *post*.

404. ———.]—Where a solr. files a bill without a written authority, the *onus* of proof is cast on him. If there be any doubt on the matter the ct. will hold him liable.—*PINNER v. KNIGHTS* (1843), 6 Beav. 174; 12 L. J. Ch. 230; 49 E. R. 792.

405. ———.]—A., who was an equitable mtgee. by deposit of deeds of property belonging to the estate of B., was paid off by C., on an agreement with the exors. of B., as their solr., stated, that proceedings should be taken in A.'s name to enforce the mtge. security, & thereby to effect a sale of the whole or part of the mortgaged property; & the solr. of the exors. filed a claim for foreclosure in the name of A. against the representatives of B. A. denied that he had given authority to file the claim in his name, & moved that it might be taken off the file:—*Held*: there being only assertion against assertion, & the solr. alone stating that the instructions were given in the presence of A., the case was to be governed by *Allen v. Bone*, No. 551, *post*, & the claim was dismissed, with costs, to be paid by the solr.—*CROSSLEY v. CROWTHER* (1851), 9 Hare, 384; 21 L. J. Ch. 565; 18 L. T. O. S. 181; 68 E. R. 556.

Annotation:—*Folld. Re Paine* (1912), 28 T. L. R. 201.

406. ———.]—A deed prepared by an attorney, & executed by his client, a young man who had applied to him to procure a loan of money, settling the property of the client so as to restrict his power of dealing with it, & appointing the attorney the trustee, recited that the trusts of the deed were created at the desire of his client, & for the purpose of placing the property under the management of the attorney. The client, by his bill to set aside the deed, denied the truth of the recitals, & insisted that the settlement was made without his knowledge or authority. The attorney, by his answer, alleged that the recitals were true, & that the deed was made & executed with the knowledge & authority of the client, & in order to

prevent him from dissipating his property, but gave no evidence of such knowledge or authority. The ct. held that the burden of proof was upon the attorney, & set aside the deed, with costs to be paid by him.—*MOORE v. PRANCE* (1851), 9 Hare, 299; 20 L. J. Ch. 468; 18 L. T. O. S. 51; 15 Jur. 1188; 68 E. R. 517.

407. ———.]—When a solr. has obtained an order giving him leave to attend proceedings under a decree, without any written authority from his client, if the solr.'s authority to obtain such order is subsequently disputed, the *onus* of proof lies on the solr., & if he can produce no written authority, & there is consequently nothing but assertion against assertion, the ct. will treat him as unauthorised.—*BIRD v. HARRIS* (1880), 43 L. T. 434; 29 W. R. 45; *reusd.* on the facts, [1881] W. N. 5, C. A.

408. ———.]—On all questions as to the retainer of a solr. where there is a conflict as to the authority between the solr. & the client, without further evidence, weight must be given to the affidavit against, rather than to the affidavit of, the solr.—*Re PAINE* (1912), 28 T. L. R. 201.

409. ——— Of new retainer—Original retainer revoked in writing.]—*Re HINCKS*, [1867] W. N. 291.

410. How proved—Evidence of clerk to attorney.]—In an action against A. & B. as exors., A. had suffered judgment by default. The probate of the will was produced, & notice had been given to both defts. to produce a receipt which had been given to A. as one of the exors.:—*Held*: the clerk of Mr. S., an attorney, might be asked whether A. & B. did not, as exors., employ Mr. S. as their attorney.—*BECKWITH v. BENNER* (1834), 6 C. & P. 681; 172 E. R. 1417, N. P.

411. ——— Admissibility of parol evidence.]—M. & D. about to advance £400 to A. on mtge. security, the three parties met with their solr. G., who was to act for them all & draw up an agreement & prepare the securities. The written agreement set forth that of the money to be advanced M. was to be liable for only £100 & D. for £300, & M. & D. accordingly drew bills on each other, which were discounted, & the proceeds advanced to A. Afterwards D. became insolvent, & G., being a creditor of D., got the bills indorsed to himself, G., & sued M. for the whole amount:—*Held*: on the trial of an issue whether G. had not been retained by M. as his solr. to prepare proper securities to protect M. against liability beyond the amount of £100, it was competent to prove by parol that at the time the written agreement was made & executed, M. gave directions to G. so to prepare such securities, for this was not an attempt to vary a written instrument by parol evidence.—*GEMMILL v. MACALISTER* (1863), 7 L. T. 841; 9 Jur. N. S. 285; 11 W. R. 486, H. L.

Admissibility of copy of retainer—Retainer in bankruptcy proceedings.]—See EVIDENCE, Vol. XXII., p. 314, No. 3069.

LAING v. SMARTS (1840), 12 Sc. Jur. 377.—SCOT.

PART IV. SECT. 1, SUB-SECT. 3.

4031. Onus of proof—Where no written retainer.]—*Re KERR, AKERS & BULL* (1882), 29 Gr. 188.—CAN.

p. ——— Where services accepted—Special agreement must be pleaded.]—*SEDGEWICK v. FAIRBANKS* (1886), 19 N. S. R. (7 R. & G.) 399; 7 C. L. T. 435.—CAN.

q. How proved—Where no written retainer—Weight of evidence.]—*Re ECCLES & CARROLL* (1865), 1 Ch. Ch. 263.—CAN.

r. ———.]—On all questions as to the retainer of a solr., where there is no written retainer & there is a conflict of evidence as to the authority between the solr. & the client without further circumstances, weight must be given to the denial of the party sought to be charged rather than to the affirmation of the solr.—*MACGILL & GRANT v. CHIN YOW YOW* (1914), 19 B. C. R. 241.—CAN.

t. ———.]—Where there is no written retainer of a solr. to prosecute an action at the expense of a client & his authority is disputed & there is only assertion against

assertion, the ct. will treat him as unauthorised; but when in addition to the solr.'s evidence facts are either admitted or are not contradicted or are otherwise satisfactorily established which so strengthen his evidence as to justify its acceptance it should be given effect to.—*MACDONALD v. BELLHOUSE*, [1920] 1 W. W. R. 597.—CAN.

a. ——— Admissibility of evidence of attorney.]—An attorney is an admissible witness to prove by whom he was employed to sue out a bailable writ.—*BEAMER v. DARLING* (1846), 4 U. C. R. 249.—CAN.

SUB-SECT. 4.—DURATION.

A. In General.

See R. S. C., Ord. 7, r. 3.

412. Retainer entire contract.]—ANON. (1861), 1 Sid. 31; 82 E. R. 952.

*Annotation:—*Expld. & Distd. Vansandau v. Browne (1832), 9 Bing. 402.

413. —.]—HARRIS v. OSBOURN, No. 447, post.

414. —.]—The retainer & employment of a solr. in such a matter as a bkpcy., an administration, or a winding-up, does not constitute an entire contract so as to deprive the solr. of his right to payment, except for costs out of pocket, till the whole matter is completed, & successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery. Accordingly, where solrs. had been retained to act for a trustee in bkpcy., & also to protect the interests of S., a creditor, who subsequently by arrangement with the other creditors took over bkpt.'s estate, & they delivered a bill of costs up to a certain date, with an intimation that there were then, & would still be, some further items, & delivered a second bill of costs, incurred after the date to which the first bill came down, on an application by S. to tax both bills, more than twelve months after the delivery of the first:—*Held*: they must be treated as separate bills, & the second bill only could be taxed.

The doctrine of common law that the retainer of a solr. for an action is a retainer of him for the whole of it, & that, therefore, his bill is not due till the end of it, is based on the principle of such retainer being an entire contract, & must not be extended too broadly to suits & proceedings in equity.—*Re HALL & BARKER* (1878), 9 Ch. D. 538; 47 L. J. Ch. 621; 26 W. R. 501.

*Annotations:—*Apld. *Re Nelson & Hastings* (1885), 30 Ch. D. Distd. *Re Romer & Haslam*, [1893] 2 Q. B. 286. pld. *Underwood & Piper v. Lewis*, [1894] 2 Q. B. 306. Id. *Re Baylis*, [1896] 2 Ch. 107; *Re Pomeroy & Tanner*, [1897] 1 Ch. 284.

415. —.]—The contract of a solr. who accepts a retainer in a common law action is, in the absence of agreement to the contrary, an entire contract to conduct the case of the client until the action is finished. He is not entitled, therefore, without good cause, on giving reasonable notice to his client, to decline to act further in the action for him, & thereupon sue for his costs in respect of the previous conduct of the client's case.—*UNDERWOOD, SON & PIPER v. LEWIS*, [1894] 2 Q. B. 306; 64 L. J. Q. B. 60; 70 L. T. 833; 42 W. R. 517; 10 T. L. R. 465; 38 Sol. Jo. 479; 9 R. 440, C. A.

*Annotations:—*Apld. *Court v. Berlin*, [1897] 2 Q. B. 396. *Consd. Re Wingfield & Blew*, [1904] 2 Ch. 665.

416. — Excepting natural breaks — Where business lengthy.]—Where a solr. is retained to conduct litigation, other than an ordinary action at common law, which may extend over a considerable period of time, & in which breaks may

occur of such a kind as to be equivalent to the conclusion of a definite & distinct part of the proceedings, he may deliver to his client a bill of costs for business done up to the occurrence of any such breaks in the litigation, & demand payment. Where, however, in the course of the proceedings several bills of costs have been sent in at different times by the solr., it is always a question of fact whether they were sent in as final bills for work done up to the occurrence of any such break in the litigation, so as to be separate bills & therefore not liable to taxation after the lapse of twelve months, or whether they were merely statements of account or portions of one entire bill, so as to make the whole liable to taxation if the last part has been delivered within twelve months of the application to tax.

Prima facie a solr., when he is retained by the client, undertakes to finish his client's business. As to business which is not a common law action, but which may be a suit in equity, lengthy either by reason of the number of the parties or by reason of its comprehending a variety of really independent litigation, there may be natural breaks (*BOWEN, L.J.*).—*Re ROMER & HASLAM*, [1893] 2 Q. B. 286; 69 L. T. 547; 42 W. R. 51; 4 R. 486; *sub nom. Re ROMER, Ex p. SNELL*, 62 L. J. Q. B. 610, C. A.

*Annotation:—*Consd. *Underwood & Piper v. Lewis*, [1894] 2 Q. B. 306.

417. Retainer continues until countermanded.]—Where authority was given to an attorney to protect deft. from arrests, & before the authority was countermanded, the attorney gave an undertaking to put in bail for deft.; the ct. would not set aside the proceedings on behalf of deft., although he disclaimed the authority of the attorney.

If a party gives a general authority to an attorney to act for him, that authority continues in force until it is countermanded (*per CUR.*).—*BUCKLE v. ROACH* (1819), 1 Chit. 193.

418. — Notwithstanding subsequent incapacity of party to attend to business.]—A solr. who has been instructed by deft. to defend a suit for him can properly continue to do so, although deft., through an attack of paralysis, has become incapable of attending to matters of business.—*STEEL v. COBB* (1863), 1 New Rep. 302; 11 W. R. 298.

419. —.]—When once a good retainer has been given at the commencement of an action something definite, clear & precise is required to withdraw that retainer & to get rid of the indivisible effect of that retainer (*COZENS-HARDY, L.J.*).—*Re WINGFIELD & BLEW*, [1904] 2 Ch. 665; 73 L. J. Ch. 797; 91 L. T. 783, C. A.

*Annotations:—*Mentd. *Sheppard v. Sheppard*, [1905] P. 185; *Gilroy v. Gilroy* (1914), 58 Sol. Jo. 378.

420. Whether retainer continues beyond judgment.]—*LAWRENCE v. HARRISON* (1654), Sty. 426; 82 E. R. 833.

*Annotations:—*Consd. *Bevins v. Hulme* (1846), 15 M. & W. 88. Apld. *De la Pole v. Dick* (1885), 29 Ch. D. 351. *Reid. Bagley v. Maple* (1911), 27 T. L. R. 284.

PART IV. SECT. 1, SUB-SECT. 4.—A.

412 i. Retainer entire contract.]—The employment of a solr. to conduct a cause forms an entire contract.—*BARTON v. ALLAN* (1877), 3 N. Z. Jur. N. S. 46.—N.Z.

420 i. Whether retainer continues beyond judgment.]—A solr.'s authority to act determines on the conviction being made.—*PENGILLY v. PENGILLY*, [1926] S. A. S. R. 344.—AUS.

420 ii. —.]—*SEARSON v. SMALL* (1848), 5 U. C. R. 259.—CAN.

420 iii. —.]—A retainer to prosecute an action does not terminate when

the judgment is obtained, but makes it the duty of the attorney or solr. without further instruction to proceed after judgment, & endeavour to obtain the fruits of the recovery.—*HERR v. PUN PONG* (1890), 18 S. C. R. 290.—CAN.

420 iv. —.]—The employment of a solr. to bring or defend an action subject possibly to his right to claim payment of his costs on judgment being given, does not terminate on the giving of judgment, so long as anything remains to be done which it is the solr.'s duty under his retainer to do for his client's protection; & even, in the

absence of such duty, where he does not elect to treat the contract as then at an end, but under his client's instructions acts for him thereafter in subsequent proceedings consequent upon the judgment, there is a continuation of such original contract.—*MILLAR v. KANADY* (1903), 5 O. L. R. 412.—CAN.

420 v. —.]—*DUNBRACK v. DUNBRACK* (1903), 40 N. S. R. 623.—CAN.

420 vi. —.]—*SANDFORD v. PORTER & WAINE*, [1912] 2 I. R. 551.—IR.

b. — To receive notice of appeal.]

Sect. 1.—Retainer: Sub-sect. 4, A., B., C. & D. (a).]

421. —.] — Pltf. being charged in execution for costs on a verdict obtained by three several defts., two of them signed a note for his sixpences, & the attorney who conducted the cause signed for the third, who was abroad, but without any authority from him:—*Held*: such note was insufficient, as the authority of the attorney determined on final judgment being signed.—*MACBEATH v. ELLIS* (1828), 4 Bing. 578; 130 E. R. 891; *sub nom. MACBEATH v. COOKE*, 1 Moo. & P. 513; 6 L. J. O. S. C. P. 124.

Annotation:—*Reid. Butler v. Knight* (1867), 15 L. T. 621.

422. —.] — *Qu.*: whether the retainer of a solr. by an official assignee, who was resp. to a petition to the comr., extends to an appeal from his decision.—*Re BOWERS, Ex p. OWEN* (1851), 4 De G. & Sm. 351; 20 L. J. Bcy. 14; 15 Jur. 983; 64 E. R. 865.

423. —.] — So long as any order made in the action is not worked out, or so long as anything remains for working out the judgment, the solr. on the record remains the solr., & the trial of the action does not terminate that relation (*CHITTY, J.*).—*CALLOW v. YOUNG* (1886), 55 L. T. 543.

Annotations:—*Mentd. D. v. A.*, [1900] 1 Ch. 484; *Re Launder, Launder v. Richards* (1908), 98 L. T. 554.

424. —.] — Notice of appeal against an application order was served upon the solr. who had appeared for the mother on the hearing of the application for the order at petty sessions, & such service was accepted by him on her behalf:—*Held*: his retainer as solr. having come to an end upon the making of the order, he had no authority to accept service of the notice of appeal & there was no valid service of such notice.—*R. v. OXFORDSHIRE JJ.*, [1893] 2 Q. B. 149; 62 L. J. M. C. 156; 69 L. T. 368; 57 J. P. 712; 41 W. R. 615; 9 T. L. R. 520; 37 Sol. Jo. 580; 4 R. 482, C. A.

Annotation:—*Reid. Godman v. Crofton*, [1914] 3 K. B. 803.

425. — *Solicitor expressly discharged—& new solicitor appointed.*—By order on further consideration deft. was ordered to pay money into ct. which was then to be carried to the credit of an action for administering the estate of a testator whose extrix. was pltf. in the present action. Deft. went abroad without complying with the order. On appeal the order was varied by ordering deft. to pay the money to pltf. who was then to pay it into ct. in the administration action, such an order being capable of being better enforced against deft.'s property than the order as originally framed. The notice of appeal was served on deft.'s solr. who stated that they had ceased to act for him but they were still his solr. on the record:—*Held*: as the order on further consideration had not been worked out; they still represented him & that service of the notice on them was good service. *Qu.*: whether the solrs. on the record do not continue to represent their client until the expiration of the time allowed for appealing.

—*ARTHUR v. NELSON* (1898), 6 B. C. R. 316.—CAN.

c. —.] — Where there is nothing remaining to be done or worked out in a ct. appealed from, even as to costs, the retainer of the respondent's solicitor is at an end, & service of the notice of appeal on him is entirely unauthorised, because he has no authority to receive it.—*SUNDER SINGH v. MACRAE* (B. C.), [1922] 2 W. W. R. 392; 65 D. L. R. 392.—CAN.

d. —.] — *R. v. LEITHUM JJ.*, [1900] 2 I. R. 397.—IR.

e. — *Where client ordered to pay costs personally to other parties.*—Where the decree in the suit for which

the attorney was retained, directed that the client should personally pay to other parties certain costs to be taxed:—*Held*: the attorney's authority continued after judgment & covered the taxation of these costs, & the retainer was not at an end until the issue of the *allocatur*.—*ATUL CHUNDER GHOSE v. LAKSHMAN CHUNDER SEN* (1909), 1 L. R. 36 Calc. 609.—IND.

f. *Ex parte application for termination—By solicitor.*—Although a solr. may for sufficient cause, by notice to his client, terminate the connection between them, the ct. will not make an order for that purpose upon the *ex parte* application of the

Until the judgment has been worked out, there is a duty imposed on the solr. on the record to defend his client against any improper steps taken for the purpose of enforcing the judgment. Until that time, therefore, the solr. on the record must be taken, as between him & the opposite party, to represent the client, unless the client not only discharges him but substitutes another solr. on the record (*COTTON, L.J.*).—*DE LA POLE (LADY) v. DICK* (1885), 29 Ch. D. 351; 54 L. J. Ch. 940; 52 L. T. 457; 33 W. R. 585, C. A.

Annotations:—*Expld. & Distd. R. v. Oxfordshire JJ.*, [1893] 2 B. 149. *Folld. Bagley v. Maple* (1911), 27 T. L. R. 184. *Mentd. Robinson v. Galland* (1889), 60 L. T. 697. *Re Greer, Napper v. Fanshawe*, [1895] 2 Ch. 217.

426. — *Time for appealing expired.*—At the trial of an action pltf., who was a married woman, did not appear, & judgment was entered for defts. with costs which were to be payable out of her separate estate. The only property to which pltf. was entitled was the income under her marriage settlement, which she was restrained from anticipating. Defts.' solrs. thereafter wrote to pltf.'s solrs. informing them that the taxing master's certificate had been obtained, & inquiring whether they had any instructions as to payment of the costs. Pltf.'s solrs. replied that they had no instructions in the matter, & that they did not know pltf.'s whereabouts. Subsequently, & after the time for appealing from the judgment had expired, defts. served notice on pltf.'s solrs. that they intended to apply for payment of defts.' costs out of the income due to pltf. under her marriage settlement, & for the appointment of a receiver of her income up to the amount of the costs:—*Held*: the notice of motion was properly served on pltf.'s solrs., who were the solrs. on the record.—*BAGLEY v. MAPLE & CO., LTD.* (1911), 27 T. L. R. 284.

427. *Intervening bankruptcy of party retaining—Continuation of retainer by trustees in bankruptcy—Liability for costs.*—If A., having employed an attorney to defend an action, assign his property to trustees for the benefit of his creditors, & the trustees direct the attorney to go on with the defence, they are liable to pay the attorney for what he does after they directed him to go on, but are not liable for the bygone business, unless there be an agreement in writing to make them so.—*BECKE v. PENN* (1835), 7 C. & P. 397, N. P.

428. *Whether retainer continues until expiration of time for appeal.*—*DE LA POLE (LADY) v. DICK*, No. 425, *ante*.

429. *Agreement that costs to be payable out of fund in suit—Retainer continues until fund in court available.*—An agreement with an attorney, that he shall get his costs out of the fund in the suit, implies the condition that he is continued in the conduct of the suit until there is a fund in ct. available for costs.—*HOLLINGS v. BOOTH* (1860), 2 F. & F. 220, N. P.

solr.—*BICKER v. ANSELL* (1859), 1 Ch. Ch. 367.—CAN.

g. *Grounds for termination—Solicitor acting contrary to interests of client.*—*GWILLIM v. DAWSON ELECTRIC LIGHT & POWER CO. (Y. T.)* (1907), 6 W. L. R. 800.—CAN.

h. *Right of client to terminate retainer without notice.*—When a solicitor is retained he may be discharged by the client at any time without notice, & the fact that there has been an agreement as to the mode of his remuneration does not take away this right from the client.—*FITCH v. FORT FRANCES PULP & PAPER CO., LTD.*, [1927] 4 D. L. R. 811; 61 O. L. R. 252.—CAN.

430. Removal of name as solicitor on record—Whether court may order.]—DE MORA v. CONCHA, *Re* WARD, MILLS, WITHAM & LAMBERT, [1887] W. N. 194.

431. ———.]—*Re* SEYMOUR, SEYMOUR v. SEYMOUR (1888), 34 Sol. Jo. 361.

432. Litigation conducted in name of third party—Retainer by nominal litigant—Injunction to prevent withdrawal.]—A nominal deft. agreed to allow the person really interested in the litigation to conduct the defence in his name upon being indemnified against costs, & in pursuance of such agreement gave a retainer to the solr. of the person so interested to act as solr. in the action & any appeals therefrom:—*Held*: he was not entitled to withdraw the retainer at any stage of the proceedings, & an injunction was granted to restrain him from so doing.—MONTFORTS v. MARSDEN, [1895] 1 Ch. 11; 64 L. J. Ch. 52; 71 L. T. 620; 12 R. 193.

B. Effect of Death.

433. Death of client—Whether retainer terminated.]—WHITEHEAD v. LORD, No. 457, *post*.

434. ——— Great delay in prosecution of suit.]—After considerable delay in the prosecution of a suit, the solr. of a deceased party was served with a notice of motion:—*Held*: his duty to the ct. rendered it proper for him to appear on the motion.—CHALIE v. GWYNNE (1846), 1 Beav. 319; 50 E. R. 367.

435. ——— Delay in receipt of notice of death.]—In the course of divorce proceedings the husband died, but his solrs. had no notice of his death for three weeks. The registrar on taxation disallowed all items of costs incurred subsequent to his death:—*Held*: the registrar was right in disallowing such costs, as the retainer ceased on the death of the client, notwithstanding the fact that the solrs. received no notice of such death for three weeks after.—POOL v. POOL (1889), 58 L. J. P. 67; 61 L. T. 401.

436. ——— Action continued by executors.]—*Re* BENTINCK, BENTINCK v. BENTINCK (1893), 37 Sol. Jo. 233.

437. Death of solicitor—Appointment of new solicitor—Necessity for notice to opposite party.]—Upon the death of the attorney in the cause, notice must be given to the opposite party of the appointment of the new attorney, before he can proceed in the cause.—RYLAND v. NOAKES (1808), 1 Taunt. 342; 127 E. R. 865.

C. Effect of Lunacy.

438. Insanity of client—Terminates retainer—Although solicitor without notice of insanity.]—Where an authority given to an agent has without his knowledge, been determined by the death or lunacy of the principal, & subsequently, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business with another person, representing that, in so doing, he was acting on behalf of the principal, the agent is liable, as having impliedly warranted the existence of the authority which he assumed to exercise, to that other person, in respect of damage occasioned to him by reason of the non-existence of that authority.

Solrs. were instructed by a client to conduct his defence to an action which was then threatened & was afterwards commenced against him. Before

the commencement of the action the client became, & was certified as being, of unsound mind. In ignorance of his unsoundness of mind, & of his having been so certified, the solrs. entered an appearance for him in the action, & delivered a defence, to which pltf. replied, & other interlocutory proceedings took place in the action. Subsequently, the action not then having come to trial, pltf.'s solr. was informed that deft. had been certified as being of unsound mind; & an application was made on behalf of the pltf. at chambers for an order that the appearance & all subsequent proceedings in the action should be struck out, & that the solrs. who had assumed to act for deft. should be ordered personally to pay pltf.'s costs of the action up to date, on the ground that they had so acted without authority. The master made an order that the appearance & subsequent proceedings in the action should be struck out, but refused to make an order for payment of pltf.'s costs by the solrs. personally, which refusal was on appeal affirmed by the judge at chambers:—*Held*: the solrs. who had taken on themselves to act for deft. in the action had thereby impliedly warranted that they had authority to do so, & therefore were liable personally to pay pltf.'s costs of the action.—YONGE v. TOYNBEE, [1910] 1 K. B. 215; 79 L. J. K. B. 208; 102 L. T. 57; 26 T. L. R. 211, O. A.

Annotations:—*Reid*. Simmons v. Liberal Opinion, *Re* Dunn, [1911] 1 K. B. 966; Fernée v. Gorlitz, [1915] 1 Ch. 177; Edwards v. Porter, [1925] A. C. 1. *Mentd.* Haxby v. Wood Advertising Agency (1913), 109 L. T. 946; *Re* Wingfields, [1923] 2 K. B. 112.

439. ——— Except as to matters consequent on lunacy.]—Deft., who carried on business in the name of a firm apparently consisting of more than one person, was sued in her firm name; the writ was served at her place of business upon the manager according to R. S. C., Ord. 9, r. 6a; & judgment signed in default of appearance. At the time of the service of the writ she was of unsound mind & confined in an asylum, but this was unknown to pltf.:—*Held*: the judgment must be set aside, as the writ ought to have & had not been served under R. S. C., Ord. 13, r. 1.

As for the objection that the solrs. are not qualified to appear for the lunatic, there is no doubt that they were authorised to act when she was first taken ill, & I think that the retainer would extend to enable them to take such steps as became necessary in consequence of her lunacy (GROVE, J.).—FORE STREET WAREHOUSE CO. v. DURRANT (1883), 10 Q. B. D. 471; 52 L. J. Q. B. 287; 48 L. T. 531; 31 W. R. 765, D. C.

D. Abandonment.

(a) In General.

440. Right of solicitor to abandon.]—ANON. (1661), 1 Sid. 31; 82 E. R. 952.

Annotation:—*Consd.* Vansandau v. Browne (1832), 9 Bing. 402.

441. ———.]—A solr. cannot on his own suggestion withdraw himself from his client.]—*— v. —* (1843), 2 L. T. O. S. 116.

442. ——— Necessity for reasonable cause.]—An attorney is not compelled to proceed to the end of a suit in order to be entitled to his costs, but may, upon reasonable cause & reasonable notice, abandon the conduct of the suit, & in such case may recover his costs for the period during which he was employed.—VANSANDAU v. BROWNE

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438 i. Insanity of client—Terminates retainer—Although solicitor without notice of insanity.]—GROSE v. BANK OF NEW SOUTH WALES (1910), 11 S. R. N. S. W. 24; 27 N. S. W. W. N. 145.—AUS.

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(1832), 9 Bing. 402; 1 Dowl. 715; 2 Moo. & S. 543; 2 L. J. C. P. 34; 131 E. R. 667.

Annotations:—Consd. *Harris v. Osbourn* (1834), 2 Cr. & M. 629. **Apld.** *Underwood & Piper v. Lewis*, [1894] 2 Q. B. 306. **Refd.** *Re Westrop & Cockridge, Ex p. Moore* (1845), De G. 173; *Llakey v. Lucas* (1863), 14 C. B. N. S. 491.

443. ———.]—(1) A solr. may refuse to continue in the conduct of a suit upon sufficient grounds, & upon his giving up the suit before it is concluded, upon good grounds, he may sue his client for the costs incurred during the time being employed.

(2) Counsel's opinion is not necessarily a justification of a solr. for the course he adopts in the conduct of a suit.—*BRYAN v. TWIGG* (1834), 3 L. J. Ch. 114.

444. ———.]—UNDERWOOD, SON & PIPER *v. LEWIS*, No. 415, *ante*.

445. ———.]—What amounts to reasonable cause.]—*LAWRENCE v. POTTS*, No. 456, *post*.

446. ———.]—Necessity for reasonable notice.]—*VANSANDAU v. BROWNE*, No. 442, *ante*.

447. ———.]—Where a client employs an attorney to conduct a suit, it is an entire contract to carry on the suit to its termination, & determinable by the attorney only on reasonable notice; & where no such notice has been given, Stat. Limitations is no bar to that part of the demand which is for business done more than six years before the commencement of the action by the attorney for business done in the suit, which was not brought to a termination till within six years of the commencement of the action.—*HARRIS v. OSBOURN* (1834), 2 Cr. & M. 629; 4 Tyr. 445; 3 L. J. Ex. 182; 149 E. R. 912.

Annotations:—**Apld.** *Nicholls v. Wilson* (1843), 2 Dowl. N. S. 1031; *Whitehead v. Lord* (1852), 7 Exch. 691. **Consd.** *Re Hall & Barker* (1878), 9 Ch. D. 538; *Re Romer & Haslam*, [1893] 2 Q. B. 286. **Apld.** *Underwood & Piper v. Lewis*, [1894] 2 Q. B. 306. **Refd.** *Robins v. Bridge* (1837), 6 Dowl. 140; *Harris v. Quine* (1869), L. R. 4 Q. B. 653.

448. ———.]—As a general rule an attorney cannot abandon a suit before its determination without giving his client reasonable notice, though particular circumstances may justify him in so doing.—*NICHOLLS v. WILSON* (1843), 2 Dowl. N. S. 1031; 11 M. & W. 106; 12 L. J. Ex. 266; 152 E. R. 734.

Annotation:—**Refd.** *Whitehead v. Lord* (1852), 7 Exch. 691.

449. ———.]—UNDERWOOD, SON & PIPER *v. LEWIS*, No. 415, *ante*.

amounts to reasonable notice.]—An attorney is bound to carry on a suit to its termination, unless he give reasonable notice to his client of his intention to retire from the further conduct of it.

An attorney who had been retained to conduct the defence of an action brought against a party, obtained a verdict for his client; a rule for a new trial was subsequently obtained, but two assizes having passed without any further step being taken by pltf. to proceed to a second trial, the attorney sent in his bill of costs, which deft. promised to pay:—**Held:** this was reasonable notice to his client of his intention to determine the contract between them & to retire from the further conduct of the suit, & the promise to pay the bill was a concurrence by deft. to the termination of the relation of attorney & client which had subsisted between them.—*SMITH v. ROCKE* (1845), 5 L. T. O. S. 243.

PART IV. SECT. 1, SUB-SECT. 4.— D. (b).

451 i. Right of solicitor to abandon—*Unless funds provided.]—*Having once undertaken the conduct of a case, an attorney is bound, whether the client

is rich or poor, to prosecute the case with due diligence; & he cannot say that, unless a large sum is paid to him, he will not continue to conduct the case.—*ATUL CHUNDER MOOKERJEE v. SOSHI BHUSHAN MULLICK* (1901),

I. L. R. 29 Calc. 63; 6 C. W. N. 215.—**IND.**

451 ii. ———.]—A firm of attorneys refused to proceed further in the conduct of a suit, unless their clients paid them as promised a certain sum

Where no funds provided.]—See Sub-sect. 4, D. (b), *post*.

Effect on action for costs.]—See Part X., Sect. 8, sub-sect. 1, *post*.

Effect on lien for costs.]—See Part X., Sect. 9, *post*.

(b) Provision of Funds.

451. Right of solicitor to abandon—*Unless funds provided.]—*A clerk in ct. & solr. refusing to continue the conduct of a cause until his fees are paid, ordered to produce an office copy of the bill to be marked.—*MAYNE v. HAWKEY* (1818), 3 Swan. 93; 36 E. R. 786, L. C.

452. ———.]—An attorney who has undertaken a cause, is not bound to proceed without adequate advances from time to time by his client, for expenses out of pocket; & therefore, the ct. will not compel an attorney, even after notice of trial, to carry the cause into ct., unless the client supply him with sufficient funds to pay the expenses out of pocket thereby incurred.—*WADSWORTH v. MARSHALL* (1832), 2 Cr. & J. 665; 1 L. J. Ex. 250; 149 E. R. 279.

Annotation:—**Refd.** *Harris v. Quine* (1869), L. R. 4 Q. B. 653.

453. ———.]—Where a solr. applied to his client for funds to carry on a suit, & upon the client not furnishing any, declined to continue to conduct the litigation, & the client appointed fresh solrs.:—**Held:** this was a discharge by the solr., & he might be called upon to deliver to the new solrs. the papers relating to the matters in question in the suit, on their undertaking to hold them without prejudice to his lien, & to return them undefaced within twelve days after the conclusion of the suit, & to allow the former solr. access to them for the purpose of carrying on an action for his costs.—*ROBINS v. GOLDINGHAM* (1872), L. R. 13 Eq. 440; 41 L. J. Ch. 813; *sub nom.* *ROBINS v. GOLDINGHAM, Re SUCKLING*, 25 L. T. 900; 20 W. R. 277.

Annotations:—**Folld.** *Bluck v. Lovering* (1886), 35 W. R. 232. **Refd.** *Re Marie Rose Gold Mining Co.* (1896), 40 Sol. Jo. 637; *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.

454. ———.]—Where a solr. applied to his client for funds to carry on a suit under a special stipulation in the retainer that such funds should be supplied, & on the client refusing to pay, declined to continue the suit or deliver up the papers until his taxed cost were paid:—**Held:** this was a discharge by the solr., & he might be called upon to deliver to new solr. the papers relating to the matters in question in the suit.—*BLUCK v. LOVERING & Co.* (1886), 35 W. R. 232.

455. ———.]—Necessity for reasonable notice.]—An attorney who has given notice that he will not go on with a cause in the Ct. of Ch. without being supplied with money, has a right to desist from it, & may recover for the work done up to that time.—*ROWSON v. EARLE* (1829), Mood. & M. 538, N. P.

Annotation:—Consd. *Vansandau v. Browne* (1832), 9 Bing. 402.

456. ———.]—(1) An attorney, who has commenced an action for his client, has a right to refuse to go on without an advance of money on account, provided he gives his client sufficient notice of his intention to enable him to make the required provision.

(2) If an attorney has reasonable & probable grounds for commencing an action, & desists from prosecuting it, because he afterwards discovers that the cause cannot be successfully proceeded with, he is entitled to recover his costs from his client.—*LAWRENCE v. POTTS* (1834), 11 C. & P. 428; 172 E. R. 1306, N. P.

457. ———.]—As a general rule, an attorney or solr., retained to conduct a suit, is under the obligation to carry it on to its termination, & he cannot sue for his bill of costs until that period has arrived. He may, however, give a reasonable notice to his client to supply him with adequate funds; & in case of refusal, he may sue him for his costs. The retainer is also determined by the death of the client.

A solr. was retained in a Chancery suit in which his client was a deft., & an order was made by the ct. that a supplemental bill should be filed, to make certain persons, next of kin, parties to the suit; no decree was ever made, nor was there any further step taken in the suit. Upwards of ten years after this order had been made, the solr.'s client died:—*Held*: in an action by the solr. against the representative of the client for his bill of costs up to the time when the order was made, the debt was not barred by Stat. Limitations.—*WHITEHEAD v. LORD* (1852), 7 Exch. 691; 21 L. J. Ex. 239; 19 L. T. O. S. 113; 155 E. R. 1126.

Annotations:—*Consd.* Underwood & Piper v. Lewis, [1894] 2 Q. B. 306. *Reid.* Stokes v. Trumper (1855), 2 K. & J. 232; *Re* Cartwright (1873), L. R. 16 Eq. 469; *Re* Hall & Barker (1878), 11 Ch. D. 538; *Beck v. Pierce* (1889), 23 Q. B. D. 316.

458. ———.]—*WARD v. DAVIS* (1882), 73 L. T. Jo. 180.

459. ———.]—What amounts to reasonable notice.]—An attorney may refuse to proceed with a cause, unless he be supplied with funds; but he must give reasonable notice to that effect. Therefore, where on the commission day of the assizes, he said that he should not deliver briefs till pltf. gave him money to fee counsel, that was held not to be sufficiently reasonable notice to entitle him to abandon the case, because he had received no money; although pltf. promised to return & bring the money, but did not, before the cause was called on.—*Hoby v. BUILT* (1832), 3 B. & Ad. 350; 1 L. J. K. B. 121; 110 E. R. 131.

460. ———.]—*LEWIS v. KNOX* (1850), 15 L. T. O. S. 141.

461. ———.]—Question of fact for jury.]—Generally, the attorney who commences an action for a client must conduct it to its termination; but he may refuse to proceed with it unless provided with funds.

If he so refuses, he must give his client reasonable notice of his intention to do so. Whether the notice is reasonable is a question for the jury.

An attorney is not responsible for the conduct of the cause at the trial; he cannot control the discretion of counsel.—*KINGDON v. WILTON* (1852), 18 L. T. O. S. 228.

462. ———.]—Agreement not to require funds.]—(1) Where a solr. agrees with his client to carry on a suit without requiring to be supplied with funds up to hearing, that means the original

hearing; & subsequently to that period he has a right to refuse to proceed without funds; but he has no right to withhold the papers from another solr. to conduct an appeal.

(2) An order to change solrs. is the discharge of the solr. by the client.—*WEBSTER v. LE HUNT* (1861), 25 J. P. 661; 9 W. R. 804.

463. ———.]—Dispute as to mode of remuneration.]—A dispute having arisen as to the mode & extent of a solr.'s remuneration, he refused to proceed in the cause until it had been settled. The solr. was ordered to deliver up the papers in the cause to the new solr., upon his undertaking to proceed with due diligence & to hold them subject to the existing lien thereon.

A client, when he retained a solr., expressed himself dissatisfied with the usual mode of remunerating solrs., but no definite arrangement was made as to any other mode of remuneration. Subsequently the solr., in a letter to the client, stated that "until I have the pleasure of seeing you, & of finally making some general & well understood arrangement with you on the subject of costs, it shall be understood on my part, that beyond costs out of pocket, I have no claim upon you personally." No arrangement was ever made, though the subject was often alluded to by the solr.:—*Held*: this did not amount to a concluded agreement by the solr. to claim nothing as of right but costs out of pocket.—*WILSON v. EMMETT* (1854), 19 Beav. 233; 52 E. R. 338.

E. Change of Solicitor.

See R. S. C., Ord. 7, r. 3.

464. Application by solicitor—Without consent of client—Application granted.]—*DE MORA v. CONCHA, Re WARD, MILLS, WITHAM & LAMBERT*, [1887] W. N. 194.

465. ———.]—Application refused.]—*Re SEYMOUR, SEYMOUR v. SEYMOUR* (1888), 34 Sol. Jo. 361.

466. Change must be regular—Necessity for notice.]—*RUSH v. RIGGS* (1729), 1 Barn. K. B. 187; 94 E. R. 128.

467. ———.]—Except where party called on to show cause.]—A party called on to show cause may oppose the rule in person, or by a new attorney, without notice to the other party of the order to change his attorney.—*LOVEGROVE v. DYMOND* (1812), 4 Taunt. 669; 128 E. R. 493.

Annotation:—*Reid.* Doe d. Bloomer v. Bransom (1838), 1 Will. Woll. & H. 193.

468. ———.]—Necessity for strict proof of irregularity.]—The objection that the attorney, from whom a notice has been received, is not the attorney who commenced an action, & that there has been no order for a change of attorney, is of the strictest nature, & must be clearly made out. Upon a trial, a verdict had been found for deft. Pltf. obtained a rule for a new trial, upon payment of costs. The costs were not paid for ten years. In the interim pltf.'s attorney died, & a new attorney took his place. A term's notice was given of an application to the ct. to discharge the rule for a new trial; the notice being given by an attorney, & named in the record, who described

on account of costs incurred:—*Held*: by so doing the attorneys discharged themselves.—*MAHESHPUR COAL CO., LTD. v. JATINDRA NATH GUPTA* (1912), 1 L. R. 40 Cal. 386.—IND.

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k. Application by solicitor—Without consent of client—On ground of non-payment of court fees.]—An order for a change of attorney ought not to be

made on the mere application of the attorney, on the ground that he is unable to proceed in the suit in consequence of non-payment of ct. fees. Where such an order had been made & acted upon, & it did not appear that the client was aware of the disability of the attorney at the time he commenced the suit, the ct. refused to set it aside.—*KELLY v. DOW* (1858), 4 All. 256.—CAN.

1. Change must be regular—Necessity for order of court.]—On an appeal from a master's report it was objected that the solrs. appealing were not the solrs. who proved the claims before the master:—*Held*: the solr. might be changed without order, that being an English practice in 1837, & there being in this province no order to the contrary.—*BAILEY v. BAILEY* (1866), 2 Ch. Ch. 57.—CAN.

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himself as agent for the above-named deft. :—*Held*: pltf. could not object to the sufficiency of the notice, unless he could prove distinctly that no change in deft.'s attorney had been duly made, either in the lifetime of pltf.'s original attorney, or since his decease.—*LORD v. WARDLE* (1846), 3 C. B. 295; 15 L. J. C. P. 259; 7 L. T. O. S. 229; 136 E. R. 119.

Annotation:—*Mentd.* *Newton v. Boodle* (1847), 3 C. B. 795.

469. Necessity for order of court—Solicitor to assignee in bankruptcy.]—Where, at a first meeting, a creditor's assignee is chosen, who thereupon appoints a solr. to act for him, & such solr. accordingly acts in the conduct of the proceedings, the assignee cannot afterwards displace the solr., except by order of the ct., & upon payment of costs so incurred up to that period.—*Re DAVISON* (1865), 13 W. R. 846.

470. —.]—Pltf. is not at liberty to treat a rule nisi for a new trial as a nullity, & to sign judgment because it has been obtained by a new attorney, without an order to change the attorney having been previously had.—*DOE d. BLOOMER v. BRANSOM* (1838), 1 Will. Woll. & H. 193; 2 Jur. 700.

471. —.]—A rule nisi for a new trial, obtained by a new attorney without an order to change the attorney is irregular, & will be discharged, though a motion for that purpose is not made until two terms have elapsed.—*DOE d. BLOOMER v. BRANSOM* (1838), 1 Will. Woll. & H. 314; 2 Jur. 808.

472. Omission to file notice of change—Right to recover subsequent costs.]—A party to an action changed his solr. before the trial, but by a slip no notice of such change was filed under R. S. C., Ord. 7, r. 3:—*Held*: this did not prevent such party from recovering from the other side the costs incurred after such change.—*NORRIS v. BAILEY* (1893), 62 L. J. Q. B. 338; 37 Sol. Jo. 288; 5 R. 313, D. C.

Annotation:—*Reid.* *Mason v. Grigg*, [1909] 2 K. B. 341.

473. Amounts to termination of retainer.]—*WEBSTER v. LE HUNT*, No. 462, *ante*.

474. Whether change conditional on payment of costs of first solicitor.]—An order for changing a solr. in an action is not to be conditional on payment of the costs of the original solr., unless under exceptional circumstances, as the rule in equity before Jud. Act, 1873 (c. 66), did not require such payment as a condition precedent to the change, & now, in accordance with Jud. Act, 1873 (c. 66), s. 25 (11), the rule in equity must prevail.—*GRANT v. HOLLAND* (1878), 3 C. P. D. 180; 26 W. R. 742; *sub nom.* *GRANT v. HOLLAND, Re NOCTON*, 47 L. J. Q. B. 518.

Annotation:—*Mentd.* *Morton v. Palmer* (1882), 9 Q. B. D. 89.

475. Change after cause set down for trial—Duty to inform associate.]—Where a change of solrs. has taken place after a cause has been set down for trial, it is the duty of the new solr. to inform the associate of the change, in order that the name of the solr. responsible for the conduct of the cause may appear on the record.—*HUNT v. FINEBURG* (1889), 22 Q. B. D. 259; 58 L. J. Q. B. 167; 60 L. T. 855; 37 W. R. 314; 5 T. L. R. 188, C. A.

474 I. Whether change conditional on payment of costs of first solicitor.]—The ct. will order a party's solicitor to be changed without any condition as to paying the solicitor his costs.—*MEYERS v. ROBERTSON* (1850), 1 Gr. 439.—*CAN.*

474 II. —.]—*GHASSEK JEMADAR v. NASSIRUDDIN MISTRY* (1899), 1 L. R.

26 Calc. 769.—*IND.*

474 III. —.]—*O'DEA v. O'DEA* (1804), 1 Sch. & Lef. 315.—*IR.*

m. — *Change to one partner after dissolution of partnership.]*—Pltf. had paid costs of a suit to A., of the firm of A. & B., his attorneys. A. & B. dissolved, B. retaining the suit. Ap-

476. Costs received by first solicitor—Duty to pay over proportionate part to new solicitor.]—By an order of the ct. the costs to be incurred by a married woman suing by her next friend in a future proceeding, were ordered to be paid to A. B., her solr. Pending the proceedings, A. B. was discharged, & C. D. appointed solr. A. B. received the whole costs:—*Held*: the ct. had jurisdiction, on petition, to order A. B. to pay over to C. D. his share of such costs.—*Re BARNARD, Ex p. BAILEY & HOPE* (1851), 14 Beav. 18; 18 L. T. O. S. 37; 51 E. R. 193.

477. Right of new solicitor to documents.]—The solr. of a party, to whom the conduct of a cause has been committed by the master, is entitled to the use of the papers relating to the cause, which are in the possession of the solr. of the party from whom the conduct of the cause has been taken.—*BENNETT v. BAXTER* (1840), 10 Sim. 417; 9 L. J. Ch. 137; 4 Jur. 50; 59 E. R. 676.

Annotations:—*Consd.* *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Reid.* *Simmonds v. G. E. Ry.* (1868), 3 Ch. App. 797.

478. — Subject to lien of former solicitor.]—P., solr. for pltf. in a cause, agreed with pltf. not to sue him personally for the costs, but to rely on the fund sought to be recovered. P. was also mtgee. of three-fourths of the fund. P. having been arrested & lying in prison, an order was made upon a petition presented by pltf., that P. should deliver up the papers in the cause to pltf.'s new solr., the new solr. giving an undertaking to hold them, subject to the lien of P., & the new solr. & pltf. undertaking to abide by any order of the ct. respecting it.—*SCOTT v. FENNING* (1845), 15 L. J. Ch. 88; *sub nom.* *SCOTT v. FLEMING*, 9 Jur. 1085.

479. — —.]—A client employing a firm of solrs. is entitled to the services of all the members of the firm, & a dissolution of partnership amounts to a discharge of the client. For the purpose of completing any business in hand at the time of discharging a client, the papers must be given up to his new solr., the lien of the former solr. reviving on the completion of the business. The former solr. is entitled to have a schedule of the documents so handed over, & the expense of preparing such schedule must fall upon the person requiring the papers.—*RAWLINSON v. MOSS* (1861), 30 L. J. Ch. 797; 4 L. T. 619; 25 J. P. 661; 7 Jur. N. S. 1053; 9 W. R. 733.

480. — —.]—Where the assigned solr. of a pauper pltf. delayed to prosecute the suit, the ct. appointed new solrs. in his place, & ordered him to deliver up to them, subject to his lien for costs upon taxation, all the papers in the suit.—*HANNAFORD v. HANNAFORD* (1871), 24 L. T. 86; 19 W. R. 429.

481. — What documents may be retained.]—A solr. is entitled to retain as his own property letters addressed to him by his client, & copies in his letter book of his own letters to the client, after the client has transferred the business to which such letters related to other solrs.—*Re WHEATCROFT* (1877), 6 Ch. D. 97; 46 L. J. Ch. 669; 26 W. R. 69.

482. — Charge by former solicitor for preparing schedule of documents.]—*RAWLINSON v. MOSS*, No. 479, *ante*.

plication to change attorney to A. granted, without any condition as to payment of costs.—*SLATER v. STODDARD* (1876), 6 P. R. 299.—*CAN.*

n. *Obtainable as of course on praecipe.]*—The common order to change the solr. is obtainable as of course on praecipe.—*Re MYLNE* (1864), 1 Ch. Ch. 109.—*CAN.*

483. ———.]—A solr. whose retainer is withdrawn & who prepares a schedule of the documents to be handed over to the new solr., which is accepted by the latter, is entitled to charge for preparing the same.—*Re MORGAN (R. P.) & Co.*, [1915] 1 Ch. 182; 84 L. J. Ch. 249; 112 L. T. 239; 59 Sol. Jo. 289.

Dissolution of solicitor partnership.]—See Nos. 484–487, *post*.

Notice to produce served before change—No fresh notice required after change.]—See EVIDENCE, Vol. XXII., p. 245, No. 2230.

Change of solicitor to infant—After attainment of majority.]—See INFANTS, Vol. XXVIII., p. 307, Nos. 1683, 1684.

Effect on lien for costs.]—See Part VIII., Sect. 5, *post*.

F. Solicitors in Partnership.

484. Dissolution of solicitor partnership—Client discharged.]—Where a party has employed, as his solrs. in a cause, a firm of two solrs. in partnership, the retirement from the business of one of such partners, under an arrangement with the other, operates as a discharge of the client by the solrs., & the client is thereupon entitled to require that the papers in the cause necessary for its prosecution shall be delivered up to his new solr., upon the usual undertaking for saving the lien of the discharged solrs.—*GRIFFITHS v. GRIFFITHS* (1843), 2 Hare, 587; 12 L. J. Ch. 397; 1 L. T. O. S. 12, 56; 7 Jur. 573; 67 E. R. 242.

Annotations:—*Consd. Re Faithfull, Re L. B. & S. C. Ry.* (1868), L. R. 6 Eq. 325; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96. *Reid. Wilson v. Emmett* (1854), 19 Beav. 233; *Rawlinson v. Moss* (1861), 25 J. P. 661.

485. ———.]—*RAWLINSON v. MOSS*, No. 479, *ante*.

486. ———.]—A solr. was also a partner in a mercantile firm which became bkpt.:—*Held*: the bkpcy. of the mercantile firm operated as a discharge of the solr.'s clients so as to entitle them to the delivery of their papers upon terms before the satisfaction of the lien.—*Re Moss* (1866), L. R. 2 Eq. 345; 35 Beav. 526; 35 L. J. Ch. 554; 14 L. T. 536; 12 Jur. N. S. 557; 14 W. R. 814; 55 E. R. 1000.

Annotation:—*Consd. Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

487. — **Evidence of cessation of joint retainer.]**—A. & B., attorneys, dissolve partnership. A client, with means of knowledge of that fact, continues to instruct B. in a matter originally undertaken by the firm. B., in an action against him by the client, may set off his subsequent bill of costs without proof of a fresh individual retainer in writing. The dissolution is evidence that the joint retainer has ceased.—*PERRINS v. HILL* (1838), 2 Jur. 858.

488. — **Continued employment of one partner—No necessity for fresh retainer.]**—*PERRINS v. HILL*, No. 487, *ante*.

489. Solicitor partner in mercantile firm—Dissolution of firm—Discharge of solicitor's clients.]—*Re Moss*, No. 486, *ante*.

SUB-SECT. 5.—SOLICITOR ACTING FOR BOTH PARTIES.

490. Whether solicitor entitled to act for both parties.]—Attorney committed & removed from the roll for being ambidexter.—*MASON'S CASE* (1673), Freem. K. B. 74; 89 E. R. 55.

491. ———.]—*ANON.* (1702), 7 Mod. Rep. 47; 87 E. R. 1085.

492. ———.]—It is extremely undesirable that the same solr. should appear for both parties, but the fact of another solr. being appointed by arrangement is not, *per se* a ground for assuming collusion.—*S— v. S—* (1863), 1 New Rep. 384; 8 L. T. 194; *sub nom. SANDFORD v. SANDFORD*, 9 Jur. N. S. 398; 11 W. R. 336.

493. — **Conflicting interests arising.]**—*HOWE v. ROBINSON* (1890), *Times*, July 7.

494. — **Quo warranto proceedings.]**—If the relator of a *quo warranto* information & debt. employ the same attorney, the ct. will make a rule absolute to change the attorney for the prosecution, although there be no collusion between the parties, & the attorney intended to proceed *bona fide* to obtain the judgment of the ct.—*R. v. ALDERSON* (1839), 11 Ad. & El. 3; 3 Per. & Dav. 2; 113 E. R. 312.

495. — **Sale of land.]**—If a solr., who is employed by a vendor to sell his estate, act also for the purchaser, he is to be considered his solr. in the transaction, though generally he employs another.—*YOUNG v. WHITE* (1844), 7 Beav. 506; 13 L. J. Ch. 418; 3 L. T. O. S. 339; 8 Jur. 654; 49 E. R. 1162.

Annotation:—*Mentd. Wrouth v. Dawes* (1858), 25 Beav. 369.

496. ———.]—H. & B. were clients of the same solr. M., to whom B. gave an authority in writing to sell certain property. Acting on this authority M. entered into an agreement with H. to sell the property to him:—*Held*: this was a transaction in which there was a necessity for the utmost openness of dealing & the ct. not being satisfied that this existed in the case before it, refused specific performance of the agreement entered into.—*HESSE v. BRIANT* (1856), 6 De G. M. & G. 623; 28 L. T. O. S. 297; 5 W. R. 108; 43 E. R. 1375, L. C.

497. — **Bankruptcy proceedings.]**—I find one solr. appearing here for the assignee & bkpt. & the object of the assignee throughout the argument has been as much the protection of bkpt. as it has been the vindication of himself. These are not proceedings which ought to be encouraged (*LORD WESTBURY, C.*).—*Re RAWLINGS, Ex p. RAWLINGS* (1863), 9 L. T. 275; 9 Jur. N. S. 1183; 12 W. R. 3, L. C.

498. — **Lunacy proceedings.]**—*Re WILSON* (1877), 21 Sol. Jo. 770, L. JJ.

— **Representation of infants—Where conflicting interests.]**—See INFANTS, Vol. XXVIII., p. 331, No. 1997.

499. Solicitor acting for both parties—Whether collusion presumed.]—*S— v. S—*, No. 492, *ante*.

500. — **Solicitor member of firm interested in transaction.]**—*TAYLOR & Co. v. WAY* (1904), 49 Sol. Jo. 135, C. A.

PART IV. SECT. 1, SUB-SECT. 5.

493 i. Whether solicitor entitled to act for both parties—Conflicting interests arising.]—An attorney is not justified in acting professionally for several parties, where their interests clash.—*Ex p. PHILIP* (1887), 26 N. B. R. 178. —CAN.

493 ii. ———.]—Where the interests of two or more debtors to the one action, though diverse, are not

conflicting, they may employ the same solicitor, at least up to the trial.—*MITCHELL v. MARTIN & ROSE (Man.)*, [1925] 1 D. L. R. 260; [1925] 1 W. W. R. 500.—CAN.

497 i. — **Bankruptcy proceedings.]**—*Re WEST HOPETOWN TEA CO., LTD.* (1886), 1 L. R. 9 All. 180.—IND.

o. Solicitor acting for both parties—Onus of proof of bona fides.]—When

the same solr. is employed to act for both mtgor. & mtgee., there is imposed on the parties concerned in such transactions the onus of proving, & upon the ct. which has to investigate them the duty of ascertaining with closer scrutiny that the transaction has been a failure & that no advantage has been taken of one party by the other.—*CRAMPTON v. WALKER* (1893), 31 L. R. Ir. 437.—IR.

Sect. 1.—Retainer: Sub-sects. 5, 6 & 7, A., B., C., D., E., F., G. & H.]

501. — Solicitor trustee—Duty to disclose all material matters.]—Pltf. contracted to purchase from H. & O. who were trustees, a portion of their trust property. H. was a solr. & O. was his managing clerk. Throughout the transaction H. acted, through O., as solr. both for vendors & purchasers C. failed to disclose to pltf. certain valuations previously obtained showing that the property was not worth the price which pltf. agreed to pay. Pltf. knew that the vendors were trustees. In the course of the negotiations pltf. offered & C. accepted a bribe. In an action by pltf. for rescission of the contract deft. counter-claimed for specific performance:—*Held*: H., as pltf.'s solr. was bound to disclose to him all material facts relating to the matter & he was not relieved of that obligation by the fact that he owed a conflicting duty to his *cestuis que trust*. By the claim for specific performance the contract, which might have been repudiated on the ground of the bribe, was affirmed, & pltf. was not deprived of his equitable right to rescission on the independent ground of the non-disclosure by his solr. of material facts.—*MOODY v. COX & HATT*, [1917] 2 Ch. 71; 86 L. J. Ch. 424; 116 L. T. 740; 61 Sol. Jo. 398, C. A.

—.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., p. 272, Nos. 961–964.

— **Preparation of bill of sale—Retention of sum in payment of costs—Effect on statement of consideration.]—***See* BILLS OF SALE, Vol. VII., p. 48, No. 248.

502. What amounts to acting for both parties—One solicitor acting in transaction—Effect on notice.]—(1) The circumstance of only one solr. acting in a transaction does not constitute him the solr. of both parties, so as to affect one with notice of facts known to the other.—*PERRY v. HOLL* (1860), 2 De G. F. & J. 38; 29 L. J. Ch. 677; 2 L. T. 585; 11 Jur. N. S. 661; 8 W. R. 570; 45 E. R. 536, L. C.

Annotations:—Reid. Wall v. Cockerell (1860), 3 De G. F. & J. 737; *Lewis v. Rainsdale* (1886), 55 L. T. 179; *Dixon v. Winch* (1900), 69 L. J. Ch. 465. *Mentd. Parish v. Poole* (1884), 53 L. T. 35.

SUB-SECT. 6.—REMUNERATION.

See Part V., *post*.

SUB-SECT. 7.—PARTICULAR RETAINERS.

A. Agents.

503. Authority to retain—General authority to act during absence of principal.]—Where a person on leaving this country has authorised another, either in writing or verbally, to act for him generally

in his absence, the latter has authority to instruct a solr. to appear on behalf of the former to show cause against an adjudication of bkpcy. against him.—*Re FRAMPTON, Ex p. FRAMPTON* (1859), 1 De G. F. & J. 263; 28 L. J. Bcy. 21; 33 L. T. O. S. 341; 5 Jur. N. S. 970; 7 W. R. 690; 45 E. R. 359, L. JJ.

Annotation:—Reid. Re Wallace, Ex p. Wallace (1884), 14 Q. B. D. 22.

504. Liability of agent retaining.]—If one man retain an attorney for another & promise to pay him, *indebitatus assumpsit* lies against the person retaining on this express promise.—*AMBROSE v. ROWE* (1684), 2 Show. 421; Skin. 217; 89 E. R. 1018.

505. —.]—When one man employs another to do work for a third party, for whose benefit it is known the work is to be, & such third party gives instructions about it; there is not even *prima facie* an implied contract in the first employer to pay; but the question is whether, on the whole, he led the person employed to understand that he, & not the third party, was to pay for the work.—*CHIDLEY v. NORRIS* (1862), 3 F. & F. 228.

506. Liability of principal.]—*MAY v. SHERWIN* (1883), 27 Sol. Jo. 278, C. A.

B. Bankruptcy Proceedings.

507. Appointment of solicitor—Necessity for authority.]—In practice both in bkpcy. & in the winding-up of cos. there is a tendency to talk of solrs. as being “solrs. to the trustees” or “solrs. to the liquidators” but really there is no such office. In such cases there should be an authority to employ a solr. (*VAUGHAM WILLIAMS, J.*).—*Re LONDON METALLURGICAL CO.*, [1897] 2 Ch. 262; 66 L. J. Ch. 635; 76 L. T. 829; 45 W. R. 601; 13 T. L. R. 384; 4 Mans. 172.

— **Authority of Board of Trade.]—***See* BANKRUPTCY, Vol. IV., p. 229, No. 2146.

— **Consent of committee of inspection.]—***See* BANKRUPTCY, Vol. IV., pp. 242, 243, Nos. 2297–2299.

— **Powers of official receiver.]—***See* BANKRUPTCY, Vol. IV., p. 198, Nos. 1827, 1828.

What amounts to retainer.]—*See* BANKRUPTCY, Vol. IV., pp. 230, 231, No. 2161.

Sale of bankrupt's property—Independent solicitor must manage sale.]—*See* BANKRUPTCY, Vol. IV., p. 223, Nos. 2092–2094.

C. Companies.

See COMPANIES, Vol. IX., pp. 547–553, Nos. 3613–3655.

Retainer by liquidator.]—*See* COMPANIES, Vol. X., pp. 879, 880, Nos. 5971–5981.

D. Corporations.

508. Necessity for seal.]—If a person were to say that he was appointed solr. to a corpn. & were to bring an action against them for employing

PART IV. SECT. 1, SUB-SECT. 7.—A.

p. Agent to retain solicitor in another jurisdiction.]—Where a solr. is retained with respect to work in another jurisdiction & the solr. is not entitled under the law thereof to act in the matter but has to employ a solr. practising in that jurisdiction, & there is no express agreement between the client & his home solr. or between the latter & the outside solr. as to the relationship between the client & the outside solr. & no established custom or special circumstances governing the relationship, it will be held that the client has merely appointed his home solr. his agent for the purpose of

finding the outside solr. & giving him the necessary instructions, & to be continuing the relationship of client with the home solr. merely with respect to the transmitting of instructions & such co-operation as it is necessary for the home solr. to give the other solr.—*Re EGERTSON v. GARLAND, BAGSHAW v. CANADIAN NORTHERN PRAIRIE LANDS CO., LTD.*, [1926] 2 W. W. R. 37; [1926] 2 D. L. R. 466; 35 Man. L. R. 521.—CAN.

PART IV. SECT. 1, SUB-SECT. 7.—B.

q. Appointment of solicitor—How far creditors bound.]—Where a solr. had been appointed by the master to represent certain creditors as a class:—

Held: one of such creditors, who repudiated the act of such solr., was bound by the solr.'s proceedings & the solr. was not only authorised to act for such creditors in the proceedings in the master's office, but also in proceedings arising out of or connected with these, such, for instance, as a motion in chambers on their behalf.—*Re MCCONNELL* (1871), 3 Ch. Ch. 423.—CAN.

PART IV. SECT. 1, SUB-SECT. 7.—D.

508 i. Necessity for seal.]—*BARRIE CORPN. v. WEAYMOUTH* (1892), 15 P. R. 95.—CAN.

508 ii. —.]—*BARRIE PUBLIC*

PART IV.—SOLICITOR AND CLIENT.

some one else, I suppose he would have to show his appointment under seal. But if he had conducted a suit for them as their attorney & brought an action for his costs, would it be necessary to prove an appointment under seal? (BRETT, L.J.).—NEWINGTON LOCAL BOARD *v.* ELDRIDGE (1879), 12 Ch. D. 349, C. A.

—See CORPORATIONS, Vol. XIII., pp. 364, 383, 384, 387, 388, 390, Nos. 983, 984, 1116–1122, 1145, 1146, 1165.

509. — Presumption that appointment made under seal.—The declaration, which was in the form given by the act [incorporating the co.], stated that pl'ts. appeared by G. S., their attorney; deft. having pleaded over:—*Held*: that the appointment of the attorney might be presumed to be under seal.—THAMES HAVEN DOCK & RY. CO. *v.* HALL (1843), 5 Man. & G. 274; 3 Ry. & Can. Cas. 441; ■ Scott, N. R. 342; 134 E. R. 568; *sub nom.* THAMES HAVEN DOCK CO. *v.* HALL, THAMES HAVEN DOCK CO. *v.* PRICE, 7 Jur. 238.

Annotation:—*Reid*. Kinnell *v.* Harding, Wace, [1918] 1 K. B. 405.

—**Submission to arbitration.**—See CORPORATIONS, Vol. XIII., p. 412, No. 1318.

510. Appointment as sole attorney—Effect on partner of attorney—Administration of oaths.—A. was appointed sole attorney for a corp'n. by power of attorney, & he carried on general business as an attorney in partnership with B. An affidavit on behalf of the corp'n. was sworn before B.:—*Held*: the relation of attorney & client did not subsist between B. & the corp'n. so as to invalidate the affidavit.—TURNER *v.* BATES (1844), 2 L. T. O. S. 386.

Evidence of retainer—Inspection of corporation books by solicitor burgess.—See CORPORATIONS, Vol. XIII., p. 303, No. 343.

Liability of individual members—Church warden.—See ECCLESIASTICAL LAW, Vol. XIX., p. 292, No. 832.

E. Infants.

Capacity to appoint attorney.—See INFANTS, Vol. XXVIII., pp. 143–145, 170, Nos. 40–42, 58, 286, 287.

F. Joint Retainers.

511. Employment must be for joint benefit.—In an action on an attorney's bill against two defts., it is not sufficient to prove a joint employment, & a joint promise to pay, after the delivery of the bill, but it must be shown that the business was done for the joint benefit.—HELLINGS *v.* GREGORY (1825), 1 C. & P. 627; 171 E. R. 1344, N. P.; *subsequent proceedings*, 10 Moore, C. P. 337.

512. Presumption of joint retainer—Action by & against several persons—One attorney employed.—Where an action is brought by or against several persons who employ one attorney *prima facie* he is jointly employed by them.—STARVING *v.* COUSINS (1835), 1 Gale, 159.

513. Action on joint retainer—Retainer in fact separate—Judgment by default against one defendant—Amendment of record.—In an action upon a joint retainer, one of defts. having suffered judgment by default, it appeared that the retainer was separate:—*Held*: the judge might amend the record by striking out the name of deft. who had suffered judgment by default.—GREAVES *v.* HUMFRIES (1855), 4 E. & B. 851; 3 C. L. R. 971; 24

L. J. Q. B. 190; 25 L. T. O. S. 52; 1 Jur. N. S. 473; 3 W. R. 371; 119 E. R. 316.

Annotations:—*Reid*. Johnson *v.* Goslett (1856), 18 C. B. 728; Holden *v.* Ballantine (1860), 2 L. T. 149.

514. Solicitors abandoning retainer as to one party—Right to continue to act for others.—*Re* FLINT, COPPOCK *v.* VAUGHAN, [1885] W. N. 163.

Liability of parties to joint retainer for costs.—See Part VI., Sect. 5, sub-sect. 1, D. (a) ii., *post*.

Retainer by partners.—See Sub-sect. 8, J., *post*.

G. Lunatics.

Capacity to appoint attorney—Inquiry as to capacity.—See LUNATICS, Vol. XXXIII., p. 236, Nos. 1524, 1525.

Liability of solicitor for costs.—See LUNATICS, Vol. XXXIII., pp. 245, 246, Nos. 1663, 1664.

Whether same solicitor may act for lunatic & asylum authorities.—See No. 498, *ante*.

H. Married Women.

515. Retainer in respect of part of separate estate—Retainer operating in respect of all separate estate.—Real property belonging to a female was upon her marriage conveyed to such uses as she should by deed or will, notwithstanding coverture, appoint: & subject thereto, to the separate use of herself during the joint lives of herself & husband: remainder to the use of herself for life: remainder over. She employed a solr., during her husband's life, first to mortgage the lands, & then to sell the equity of redemption. The sale was not completed during his life, although the mtge. was:—*Held*: the solr. was entitled to be paid his costs out of the purchase-money, which according to the contract, was to come to her separate use, when the same was paid after her husband's decease, although she could then have no separate estate.

A retainer implies a promise to pay all costs rightly & properly incurred upon the retainer.

A retainer by a married woman to a solr. to act in respect to one portion of her separate estate operates as a charge upon all property settled to her separate use, & is not confined to the particular property upon which the solr. is called upon to act.—BOLDEN *v.* NICHOLAY (1857), 3 Jur. N. S. 884.

516. Liability of separate estate for costs.—BOLDEN *v.* NICHOLAY, No. 515, *ante*.

517. ——A., a married woman entitled to separate estate, & her husband, verbally retained a firm of solrs. consisting of R. & P. to act for A. & her trustee in litigation concerning A.'s separate estate. The husband of A. was at the time, & was known to R. & P. to be, an undischarged bkpt. R. & P. required & obtained a written retainer from A.'s trustee, who had not previously been a client of theirs. Pending the litigation R. retired from the firm P. took G. into partnership, & P. & G. continued the business, under the name of R., P., & G. The new firm delivered a bill of costs for the whole litigation, signed R., P., & G., & brought an action to obtain payment out of the separate estate of A.:—*Held*: A. must be taken to have retained R. & P. on behalf of her separate estate, & made it liable for costs, & the bill of costs was sufficiently signed under Solicitors Act, 1843 (c. 73), s. 36, as well for the work done by R. & P. as for that done by P. & G. the new firm being entitled to such costs as assignees of the

SCHOOL BOARD *v.* BARRIE CORPN. (1899), 19 P. R. 33.—CAN.

508 ill. —.—EMERSON CORPN. & UNSWORTH *v.* WRIGHT (1904), 14

Man. L. R. 636.—CAN.

r. Retainer as commissioner of inquiry on conduct of civil servant.—TUCKER *v.* R. (1902), 32 S. C. R. 722.—CAN.

PART IV. SECT. 1, SUB-SECT. 7.—H.

Liability of husband.—BECK *v.* LANG (1914), 26 O. W. R. 413; 6 O. W. N. 253; 16 D. L. R. 878.—CAN.

Sect. 1.—Retainer: Sub-sect. 7, H., J., K. & L.; sub-sect. 8. Sect. 2: Sub-sects. 1 & 2, A. (a).]

old.—PENLEY v. ANSTRUTHER (1883), 52 L. J. Ch. 367; 48 L. T. 664.

*Annotations:—*Apld. Ingle v. M'Cutchan (1884), 12 Q. B. D. 518; McLean v. Weaver (1924), 40 T. L. R. 663.

— **Removal of restraint on anticipation.**—*See* HUSBAND & WIFE, Vol. XXVII., pp. 128–132.

Authority to pledge husband's credit for costs.—*See* HUSBAND & WIFE, Vol. XXVII., pp. 206–209, Nos. 1787–1819.

Costs generally.—*See* Part 6, *post*.

J. Partnerships.

Liability of firm for acts of partner—Authority to retain solicitor.—*See* PARTNERSHIP, Vol. XXXVI., pp. 365, 366, Nos. 428–430.

K. Trustees.

See TRUSTS & TRUSTEES.

L. Other Cases.

518. Retainer by assignee of debt—Authority to commence proceedings in name of assignor.—An assignee of a debt has a right to use the assignor's name in suing for it, & it is a sufficient authority for the attorney if he is instructed by the former to commence proceedings.—PICKFORD v. EWINGTON (1835), 4 Dowl. 453.

519. Unincorporated bodies—Volunteer corps—Liability of individual members.—JONES v. HOPE (1880), 3 T. L. R. 247, n., C. A.

*Annotations:—*Reid. Overton v. Hewett (1886), 3 T. L. R. 246; Samuel v. Whetherley (1907), 98 L. T. 169.

— **Churchwardens—Estoppel.**—*See* ESTOPPEL, Vol. XXI., p. 396, No. 1577.

520. Retainer by highway authority—Diverting highway at instance of private persons—Recovery of solicitor's costs.—The expenses authorised to be charged by Highways Act, 1835 (c. 50), s. 84, only apply to the purposes mentioned in that sect., & no expenses incurred for other than those purposes are recoverable as penalties under that Act. The employment of a solr. is not such an authorised expense, nor does Public Health Act, 1875 (c. 55), ss. 144 & 189, authorise the employment of a solr. in the discharge of ministerial acts by officers of a highway board.—UNITED LAND CO. v. TOTTENHAM LOCAL BOARD (1884), 13 Q. B. D. 640; 53 L. J. M. C. 136; 51 L. T. 364; 48 J. P. 726; 32 W. R. 798.

Solicitor rendering services to estate—Before administration taken out—Retainer by relative of deceased.—*See* EXECUTORS, Vol. XXIV., p. 614, No. 6445.

SUB-SECT. 8.—OWNERSHIP OF DOCUMENTS.

521. Ownership in client—Solicitors in partnership—Bankruptcy of one partner—Assignees not compellable to give up papers without consent of clients.—One of two solrs., who were partners, became bkpt.; the assignees excluded the other from interfering with the affairs of the partnership; the ct. nevertheless, refused to order the assignees to deliver to him the papers belonging to the clients of the firm.—DAVIDSON v. NAPIER (1827), 1 Sim. 297; 57 E. R. 588.

PART IV. SECT. 2, SUB-SECT. 1.

a. How far solicitor subject to control of client.—A client is not to be regarded as having a right to govern the conduct of his attorney, as to the degree of liberality he shall observe

in his practice.—SHAW v. NICKERSON, GILLESPIE v. NICKERSON (1850), 7 U. C. R. 541.—CAN.

b. Whether client protected by court against negligence of solicitor.—DEVLIN v. DEVLIN (1871), 3 Ch. Ch. 491.—CAN

— **Right to order for delivery up.**—*See* Part X., Sect. 2, sub-sect. 4, *post*.

— **Whether solicitor compellable to produce documents.**—*See* DISCOVERY, Vol. XVIII., p. 108, Nos. 585–588; EVIDENCE, Vol. XXII., pp. 430, 431, Nos. 4448–4464.

522. Ownership in solicitor—Letters sent to solicitor by client.—*Re* WHEATCROFT, No. 481, *ante*.

523. ——— Injunction to restrain publication by third party.—It is no answer to an action brought for an injunction to restrain publication of copies of privileged documents to say that the copies, although improperly obtained, will be wanted in pending proceedings to prove the contents of the original documents, which, owing to the privilege, cannot be produced.

P. was a bkpt. & his discharge was opposed by, amongst others, pltf. P. obtained by a trick letters which had been written by pltf. to his solr. & were therefore privileged. P. had these letters copied & proposed to use them in the bkpcy. proceedings as secondary evidence of the contents of the letters which, owing to privilege, he could not produce. Pltf. brought an action for an injunction to restrain P. from disclosing the letters or the copies, & the judge made an order restraining him from doing so except in the bkpcy. proceedings:—*Held*: the fact that the copies, although improperly obtained, might be admissible as secondary evidence in the bkpcy. proceedings, was no answer to the action, & pltf. was entitled to an absolute injunction without any exception.—ASHBURTON (LORD) v. PAPE, [1913] 2 Ch. 469; 82 L. J. Ch. 527; 109 L. T. 381; 29 T. L. R. 623; 57 Sol. Jo. 644, C. A.

524. ——— Copies of letters sent to client.—*Re* WHEATCROFT, No. 481, *ante*.

— **Letter sent on behalf of client—Whether property amounting to copyright in solicitor.**—*See* COPYRIGHT, Vol. XIII., p. 201, No. 368.

SECT. 2.—AUTHORITY OF SOLICITOR TO BIND CLIENT.

SUB-SECT. 1.—IN GENERAL.

Retainer of solicitor.—*See* Sect. 1, *ante*.

525. Presumption of authority.—The course of this ct. is, where an attorney takes upon him to appear, the ct. looks no farther, but proceeds as if the attorney had sufficient authority, & leaves the party to his action against him (HOLT, C.J.).—ANON. (1698), 1 Salk. 86; 91 E. R. 81.

*Annotations:—*Apld. Stanhope v. Kirmin (1837), 4 Scott. 39. N.F. Bayley v. Buckland (1847), 1 Exch. 1. Reid. Reynolds v. Howell (1873), L. R. 8 Q. B. 398; Yonge v. Toynbee, [1910] 1 K. B. 215.

526. ————Judgment shall not be set aside because attorney appeared without warrant, if he is sufficient.

An attorney appeared, & judgment was entered against his client, & he had no warrant of attorney; & now the question was, if the ct. could set aside the judgment?

If the attorney be able & responsible we will not set aside the judgment. The reason is, because the judgment is regular, & pltf. ought not to suffer, for there is no fault in him; but if the attorney be not responsible or suspicious, we will set aside the judgment; for otherwise deft. has no remedy,

c. Extent of authority.—NORQUAY v. BROGGIO (Y. T.) (1905), 2 W. L. R. 108.—CAN.

d. ————A solr. acting for his client to the knowledge of the other contracting party is in the same position as an agent in a commercial

& any one may be undone by that means (*per* CUR.).—ANON. (1703), 1 Salk. 88; 91 E. R. 83.

Annotations:—*Apld.* Stanhope v. Firman & Eavery (1836), 2 Hodg. 253. *Reid.* Reynolds v. Howell (1873), L. R. 8 Q. B. 398; Bayley v. Buckland (1847), 1 Exch. 1.

527. —.]—Where a party has been improperly made a co-deft. in a cause, & the defence has been conducted in his name without his authority or knowledge, the ct. will relieve him from execution, where it appears, from the circumstances of the attorney, that he could have no remedy over against him.—STANHOPE v. FIRMIN (1836), 3 Bing. N. C. 301; 4 Scott, 39; 2 Hodg. 253; 6 L. J. C. P. 12; 132 E. R. 426; *sub nom.* STANHOPE v. EAVERY, 5 Dowl. 357; *subsequent proceedings* (1837), 6 L. J. C. P. 175.

Annotations:—*Reid.* Hambidge v. De La Cruet & Francois (1846), 10 Jur. 1096; Reynolds v. Howell (1873), L. R. 8 Q. B. 398; Younge v. Toynbee, [1910] 1 K. B. 215.

528. Uncertificated solicitor.]—SPARLING v. BRERETON, No. 204, *ante*.

529. Authority to render client liable for barrister's fees.]—A solr. has no implied authority to pledge his client's credit to his counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the counsel to sue the client for them.—MOSTYN v. MOSTYN (1870), 5 Ch. App. 457; *sub nom.* MOSTYN v. MOSTYN, *Ex p.* BARRY, 39 L. J. Ch. 780; 22 L. T. 461; 18 W. R. 657, C. A.

530. —.]—The rules of etiquette as between members of the legal profession have no effect beyond their relations *inter se*, & do not in any way affect the legal relations between solr. & client. If such rules are enforceable, it is only because the members of the profession choose to govern their conduct by reference to them. A solr. cannot therefore brief a counsel whom his client has instructed him not to brief, & charge the client with the fees & other expenses incurred in delivering the brief, merely because the counsel is entitled to a brief under the rules of professional etiquette. The solr.'s proper course in such circumstances is either to explain the rule to the client & say that he must state the facts to any other counsel whom he briefs, & that such counsel may probably return the brief, or to say that he is himself so clearly governed by the rules & etiquette of the profession that if he is not allowed to brief the counsel in question he must throw up his retainer.—*Re* HARRISON, [1908] 1 Ch. 282; 77 L. J. Ch. 143; 97 L. T. 902; 24 T. L. R. 118; 52 Sol. Jo. 79.

Admissions by solicitor.]—See AGENCY, Vol. I., p. 608, Nos. 2368–2372.

Liability for wrongful seizure.]—See EXECUTION, Vol. XXI., pp. 548–549, Nos. 1234–1242.

SUB-SECT. 2.—CONTENTIOUS BUSINESS.

A. Necessity for Special Authority.

(a) To Commence Proceedings.

531. General rule.]—Order to dismiss a bill, with costs to be paid by pltf.'s solr., the bill having

been filed without special authority from pltf. A solr. may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without a special authority for the purpose.—WRIGHT v. CASTLE (1817), 3 Mer. 12; 36 E. R. 5.

Annotation:—*Reid.* Norton v. Cooper, *Re Manby, Ex p.* Bittleston (1856), 3 Sm. & G. 375.

532. —.]—PARSONS v. MUNTZ (1846), 7 L. T. O. S. 3.

533. Whether writing necessary.]—Though it is not absolutely necessary, yet in correct practice, an attorney ought, before he commences an action, to take a written direction from his client for so doing.—OWEN v. ORD (1828), 3 C. & P. 349; 172 E. R. 451, N. P.

534. —.]—A solr. ought to have a special authority from his client for instituting a suit, but such authority need not be in writing.—LORD v. KELLETT (1833), 2 My. & K. 1; 39 E. R. 845.

535. —.]—Motion to take bill off the file, as filed without authority. There being assertion against assertion, the solr. must abide by the consequences of having omitted to take a written authority.—MARTINDALE v. LAWSON (1838), Coop. Pr. Cas. 83; 47 E. R. 411.

536. —.]—No solr. ought to commence a suit without being armed with an express retainer in writing (LANGDALE, M.R.).—ROWE v. WARD (1844), 4 L. T. O. S. 191.

537. —Imminent risk to client's interest.]—The general rule is that a solr. should have a written authority before instituting an action, & the contrary course is only excusable in cases of imminent danger & risk to the interests of the party; but even then the sanction of the party should be obtained at the earliest possible moment, or the action dropped.—TREVANION v. TREVANION (1844), 1 New Pract. Cas. 82; 4 L. T. O. S. 211.

538. Sufficiency of authority.]—A solr. received authority in 1831 to file a bill in an administration suit on behalf of a woman then unmarried. In 1836 he informed her that she & her husband would be co-pltfs. to a bill in the same suit. In 1849 he wrote to her as a widow, for information, to which she replied, hoping that there might be an immediate distribution. The solr. afterwards filed bills of supplement & revival in the suit, making her a co-pltf.:—*Held*: he had sufficient authority.—BEWLEY v. SEYMOUR (1850), 14 Jur. 213.

539. —.]—SWAN v. MELLEN (1892), 36 Sol. Jo. 668.

540. —Direction to recover estate—Ejectment proceedings commenced & discontinued.]—A. delivered papers to B., an attorney, telling him, "that she was entitled to an estate, & that she would pay him if she recovered it." B. took the papers, saying, "that he would do what he could for her," & without further communication, commenced an action of ejectment, which he afterwards abandoned under the conviction that A. had no title:—*Held*: B. acted without due

transaction; he speaks for his client, binds his client, but not himself.—SHAW, SALTER & PLOMMER v. PHIPPS & COSGROVE (1926), 37 B. C. R. 184.—CAN.

g. —.]—WILLIAMSON v. MORIARTY (1871), 19 W. R. 818.—IR.

f. Admissions of items in account.]—MCBEAN v. MCBEAN (1886), 11 P. R. 429.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.

A. (a).

533 i. Whether writing necessary.

12 Vict. c. 40, s. 15, requiring attorneys to have written authority to sue is not limited to summary actions.—JAMES v. MCLEAN (1855), 3 All. 164.—CAN.

g. —Where implied sanction by conduct.]—Where parties moved to have their names struck out of the record on the ground that they had been used by the solicitor without their authority, & the solicitor could not produce any written authority from them, the ct. refused the motion, the facts & documents in the case showing that the parties had been

aware of the use of their names & had allowed a long space of time to elapse without taking any steps.—MCNALLY v. KNOX (1861), 5 L. T. 186.—IR.

h. Sufficiency of authority—Retainer to protect assets on insolvency of company's debtors—Authority to originate proceedings in bankruptcy.]—*Re* PROVINCIAL & SUBURBAN BANK, LTD. (1879), 5 V. L. R. 169.—AUS.

k. —Onus of proof.]—Where a solr.'s right to issue a writ in the name of a co. is questioned, the onus is on the said solr. to show his authority.—STANDARD CONSTRUCTION CO. v.

Sect. 2.—Authority of solicitor to bind client: Sub-sect. 2, A. (a), (b) & (c).]

authority, both in commencing & discontinuing the ejectment, & was not entitled to recover the costs thus incurred.—*TABRAM v. HORN* (1827), 1 Man. & Ry. K. B. 228; 6 L. J. O. S. K. B. 24.
Annotation:—Distd. Fray v. Voules (1859), 33 L. T. O. S. 133.

541. — Retainer to proceed against dilatory executors—Insufficient account obtained in probate action—Subsequent bill for account.]—A solr. obtained a retainer to proceed against exors. who had, after a long lapse of time, neglected to prove the will, & had rendered no account, to compel probate of the will, & to take such other proceedings for obtaining an account as might be necessary. He instituted a suit to compel probate, & obtained in it an account which was insufficient. He took then no other steps for three years, & then, without further consulting the client, filed a bill for an account; he had no other authority than that retainer, & the client denied any parol authority to file a bill:—*Held*: the retainer did not justify the solr., & the bill was dismissed with costs, to be paid by the solr.—*ATKINSON v. ABBOTT* (1855), 3 Drew. 251; 25 L. T. O. S. 314; 61 E. R. 899.

Annotation:—Consd. Wray v. Kemp (1884), 26 Ch. D. 169.

542. — Authority to country solicitor to act in administration of estate—Issue of writ by London agents.]—A retainer to a country solr. does not justify an action in which his London agents are the solrs. on the record.

A., an illiterate woman, being desirous of knowing whether there was any balance coming to her, as administratrix of C., her deceased husband, out of the proceeds of a sale by the mtgee. of property mortgaged by C., gave to B., a country solr., who had recovered judgment in an action against her, as administratrix, for a debt due to him from her deceased husband, this written retainer: "I hereby authorise you to act as my solr. in the administration of my late husband's estate, & authorise you to investigate the accounts of the mtgee., & take such steps as you may think proper in the matter on my behalf." A writ was subsequently issued by a London firm of solrs. in the names of A. & B., as plffs., claiming an account of the proceeds of sale of the mtged. property & payment of the balance, the claim by A. being "as legal representative of C.," by B. "as a creditor of C. who had obtained judgment against A., & had obtained execution by the appointment of a receiver of the balance due from C." Upon motion by A. that her name might be struck out of the writ, as having been issued without her knowledge & without any authority on her part:—*Held*: the retainer was not sufficient to justify the issue of the writ; but whether sufficient or not it was a retainer to B., & did not authorise the London firm to issue the writ in the name of A. as her solrs.—*WRAY v. KEMP* (1884), 26 Ch. D. 169; 53 L. J. Ch. 1020; 50 L. T. 552; 32 W. R. 334.

Annotations:—Apld. Re Scholes (1886), 34 W. R. 515.
Reid. Re Becket, Purnell v. Paine, [1918] 2 Ch. 72.

543. — Retainer to protect assets of trust—Authority to take proceedings for dissolution.]—

A retainer to solrs. "to take such steps as you may be advised against T. & his co-trustees, in order to protect the assets of the N. Trust," is a retainer to bring an action that the trust may be dissolved & its affairs wound up by the ct.—*Re NATIONAL OLD AGE PENSIONS TRUST, STEVENS v. TAVENER* (1912), 57 Sol. Jo. 114.

544. Application for habeas corpus.]—The relation of attorney & client on a special retainer for a specific purpose, or business not necessarily involving or importing a retainer to apply for a writ of *habeas corpus*, does not give an authority to the attorney to make such an application on behalf of his client.

In the case of an alleged lunatic, his retainer of an attorney to prosecute a petition of lunacy does not give such an authority, even although the attorney be denied access to him.—*Re FITZGERALD, Ex p. CHILD* (1854), 2 C. L. R. 1801; *sub nom. Ex p. CHILD*, 15 C. B. 238; 139 E. R. 413.

545. Communication of authority—Necessity for express communication by client to solicitor—Without intermediate agency.]—If there be not a written retainer, there must unquestionably be an authority to institute a suit communicated expressly by the client to the solr. without any intermediate agency.—*Re GRAY, Ex p. INCORPORATED LAW SOCIETY* (1869), 20 L. T. 730.

546. Judgment recovered under ordinary retainer—Authority to take proceedings in interpleader.]—A solr. who has recovered judgment for a client under an ordinary retainer has no authority, without special instructions, to engage in proceedings in interpleader.—*JAMES v. RICKNELL* (1887), 20 Q. B. D. 164; 57 L. J. Q. B. 113; 58 L. T. 278; 36 W. R. 280; 4 T. L. R. 169, D. C.

Annotation:—Reid. Bagley v. Maple (1911), 27 T. L. R. 284.

(b) To Defend Proceedings.

547. General authority sufficient.]—*WRIGHT v. CASTLE*, No. 531, *ante*.

548. Sufficiency of authority—Solicitor employed to put in bail—Authority to accept delivery of declaration.]—If deft. in custody employ an attorney merely for the purpose of putting in bail, delivery of declaration to that attorney is not sufficient.—*DENT v. HALLIFAX* (1809), 1 Taunt. 493; 127 E. R. 926.

549. — Solicitor acting in matters connected with trust—Authority to enter appearance on behalf of trustees—In action for account.]—C. & D. were trustees of a will, under which the funds became divisible on the death of the tenant for life in June, 1890. The greater part of the trust funds were distributed during the autumn of 1890. D. died in Dec. 1890, & C. was left sole surviving trustee. The trust funds then consisted of £3,000 invested on mtge. & a small amount of railway shares. The firm of B. & G., of which G. was the sole surviving member, had always acted for the trustees. Notice had been given to pay off the mtge., & C., repeatedly wrote to G., who also acted for the mtgor., asking when the mtge. money would be paid. G. answered with plausible excuses that the mtgor. was selling other property to pay off the mtge., & delays had arisen in completion. On Oct. 23, 1891, some of the beneficiaries under the will, who had been constantly

CRABB (1914), 30 W. L. R. 151; 7 W. W. R. 719.—*CAN.*

1. — Authority of solicitor of company to "sue & recover" moneys—Whether authorised to petition for winding-up of another company.]—An attorney of a company who has power to "sue & recover" moneys is sufficiently authorised to petition for the winding-

up of another company.—*Re GILBERT MACHINERY Co.* (No. 1) (1906), 26 N. Z. L. R. 67.—*N.Z.*

m. Right of defendant to call for production of authority.]—A deft. in equity has no right to call upon plff.'s solr. to produce his authority for using plff.'s name; & particularly where no improper conduct in using such name

is positively alleged & verified.—*CHISHOLM v. SHELDON* (1850), 1 Gr. 294.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 2.—A. (b).

n. Sufficiency of authority—To enter appearance for infant.]—A solr. must be taken, in the absence of proof to the

applying to G. as C.'s solr., for accounts, took out an originating summons against C. for an account. G. entered an appearance for C. without authority & without any communication with C. C. having discovered this, moved to set aside the appearance & all subsequent proceedings. G. had meanwhile absconded, & it was found that he had received & retained the mtge. money:—*Held*: the fact that G. had acted as solr. for C. in all matters connected with the trust did not authorise him to enter an appearance for him as deft.—*Re GRAY, GRAY v. COLES* (1891), 65 L. T. 743.

Annotation:—*Reid*. *Dillon v. Dillon*, *Lester & Chamberlain* (1920), 36 T. L. R. 250.

550. — Solicitor employed by committee of company—Authority to enter appearance for individual member—Acts of majority of committee binding.]—Where by the constitution of the committee, the acts of the majority of the managing committee of a co. bound the whole:—*Held*: a solr., employed by the committee in a suit instituted against the committee by some of the shareholders for misconduct, was authorised to enter an appearance for any one of the members of the committee.—*GOODMAN v. DE BEAUVOIR* (1848), 12 L. T. O. S. 266; 12 Jur. 989.

Annotation:—*Apld.* *Tomlinson v. Broadsmith*, [1896] 1 Q. B. 386.

(c) *Effect of Acting without Authority.*

551. Action commenced without authority—Action dismissed.]—(1) A suit instituted by a solr. without authority, dismissed on motion, with costs of the suit & of the motion, as between solr. & client.

(2) If the solr.'s authority is disputed it is for him to prove it, & if he has no written authority, & there is nothing but assertion against assertion, the ct. will treat him as unauthorised (*LORD LANGDALE, M.R.*).—*ALLEN v. BONE* (1841), 4 Beav. 493; 49 E. R. 429.

Annotations:—*As to* (1) *Folld.* *Atkinson v. Abbott* (1855), 3 Drew. 251. *Reid.* *Norton v. Cooper* (1856), 3 Sm. & G. 375. *As to* (2) *Folld.* *Crossley v. Crowther* (1851), 9 Hare, 384. *Generally, Reid.* *Pinner v. Knights* (1843), 6 Beav. 174; *Malins v. Greenway, Re Kirk* (1847), 2 New Pract. Cas. 487.

552. ——A bill had been filed by one of the directors of an incorporated co., in the name of the co., praying an injunction against the other alleged directors of the co., to restrain them from allotting or pretending to allot any shares from affixing their present seal, or otherwise acting or pretending to act in the name of the directors of the co. On motion to take this bill off the file, on the ground that the solr. had not the authority of the co., it appearing that one director alone had authorised such bill to be filed, without the consent of the other directors:—*Held*: such bill should be taken off the file, & the costs of the application & of the suit should be paid by the solr. filing such bill.—*FERGUS NAVIGATION & EMBANKMENT CO. v. KINGDON* (1861), 4 L. T. 262.

contrary, to have authority from his client, though an infant, to enter an appearance for him.—*LLOYD v. ROSS-MORE* (1875), 9 L. R. Eq. 488.—*IR.*

PART IV. SECT. 2, SUB-SECT. 2.—
A. (c).

551 i. Action commenced without authority—Action dismissed.]—*HAWKINS HILL GOLD MINING CO. v. BRISCOE* (1887), 8 N. S. W. Eq. 123; 4 N. S. W. W. N. 132.—*AUS.*

551 ii. ——*FORESTREET WAREHOUSE CO. v. VAN DE LINDER*, [1919] 3 W. W. R. 1056; 50 D. L. R. 55; 15 Alta. L. R. 168.—*CAN.*

o. ——*Unless proceedings sub-*

sequently ratified.]—*NEW PINNACLE GROUP SILVER MINING CO. v. LUHRIG COAL & ORE DRESSING APPLIANCES CO.* (1900), 21 N. S. W. L. R. (L.) 297; 17 N. S. W. W. N. 206.—*AUS.*

p. ——*Where an action has been commenced without authority, a subsequent ratification of the proceedings by a properly executed retainer will be a sufficient answer to an application by deft. to dismiss the action, subject to the question of costs.*—*EMERSON CORPN. & UNSWORTH v. WRIGHT* (1904), 14 Man. L. R. 636.—*CAN.*

q. ——*Motion by defendant to stay proceedings—Necessity for notice to*

553. Co-plaintiff added without authority—Name struck out.]—The names of persons made pltf's. in a bill without their authority, ordered to be struck out with costs to be paid by the solr., their application, after they were apprised by the fact, having been made without delay.

Semble: where persons who have been made pltf's. without their consent, having after the fact has come to their knowledge acquiesced for a considerable period, their names will not, on their application, be struck out of the bill.—*WILSON v. WILSON* (1820), 1 Jac. & W. 457; 37 E. R. 442, L. C.

Annotations:—*Consd.* *Norton v. Cooper* (1856), 3 Sm. & G. 375. *Reid.* *Malins v. Greenway, Re Kirk* (1847), 2 New Pract. Cas. 487.

554. ——*When a solr. makes a person a co-pltf. in a suit without a retainer or sufficient authority, he does so at his own peril; but if the evidence of want of authority be doubtful:—Held*: on motion on behalf of such co-pltf. to strike out his name as co-pltf., & to make the solr. pay the costs of the motion, he was entitled to have his name as co-pltf. struck out, but he must pay the costs of the motion himself.—*EVANS v. KINSEY* (1853), 21 L. T. O. S. 178.

555. Appearance entered without authority—Pleading withdrawn.]—*ROE v. DOE* (1736), Barnes, 39; 94 E. R. 795.

556. Liability of solicitor.]—The reason wherefore the certain name of the attorney ought to be put, is, because if one appear as my attorney without my authority, I may have my action of the case against him (*CIENCHE, J.*).—*BILFORD & DODDINGTON'S CASE* (1586), Godb. 73; 78 E. R. 45.

557. ——*If an attorney exceed his authority, & his client be thereby prejudiced, the attorney is liable to make satisfaction to the client (per CUR.).—R. v. ADDINGTON* (1755), Say. 259; 96 E. R. 873.

Annotations:—*Reid.* *Stanhope v. Firmin* (1837), 4 Scott, 39; *Hambidge v. De La Cruet & Francois* (1846), 10 Jur. 1096.

558. ——*As between the client & the solr., the ct. will take care that the client shall not be a sufferer in respect of unnecessary proceedings instituted by the solr. A solr. in a cause, who improperly assumes the character of receiver, is responsible for rents lost by his neglect.*—*WOOD v. WOOD* (1828), 4 Russ. 558; 38 E. R. 916, L. C.

559. — Unauthorised appearance for plaintiff—Payment of debt to solicitor—Remedy of defendant.]—If A. be indebted to B. & pay such debt to the attorney of a person suing A. in B.'s name, but without his authority A. is notwithstanding obliged to pay B. again & A.'s remedy is against the attorney though such attorney conceived he was acting under the real authority of B.—*ROBSON v. EATON* (1785), 1 Term Rep. 62; 99 E. R. 973.

Annotations:—*Consd.* *Stanhope v. Firmin* (1837), 4 Scott, 39. *Distd.* *Doe d. Bloomer v. Bransom* (1838), 1 Will. Woll. & H. 193. *Apld.* *Hubbart v. Phillips* (1845), 13

plaintiff.]—*ROSS v. WEBB* (1912), 21 W. L. R. 254; 22 Man. L. R. 257; 2 D. L. R. 416.—*CAN.*

r. Appearance entered without authority—Proceedings set aside.]—*MCMARTIN v. MCKINNON* (1836), 5 O. S. 72.—*CAN.*

t. ——*WEIR v. HERVEY* (1840), U. C. R. 430.—*CAN.*

a. Liability of solicitor—Issue of writ without authority.]—*KESTEVIR v. M'CARTHY* (1828), 1 Ir. L. Rec. 1st ser. 271.—*IR.*

b. Continuation of proceedings after action settled—Proceedings set aside.]—When, after process served, the parties settled, & pltf. agreed to pay his own

Sect. 2.—Authority of solicitor to bind client: Sub-sect. 2, A. (c), & B. (a) & (b).]

M. & W. 702; Reynolds v. Howell (1873), L. R. 8 Q. B. 398. **Apprd.** Fricker v. Van Grutten, [1896] 2 Ch. 649. **Apld.** Gellinger v. Gibbs, [1897] 1 Ch. 479. **Refd.** Chambers v. Mason (1858), 5 C. B. N. S. 59; Yonge v. Toynbee, [1910] 1 K. B. 215.

560. — Unauthorised appearance for defendant—Remedy of defendant.]—Where a deft. has been served with process, & an attorney without authority appears for him, the ct. will not interfere to set aside the proceedings, if the attorney be solvent, but will leave deft. to his remedy by summary application against the attorney. If the attorney be insolvent, the ct. will relieve deft. on equitable terms, if he has a defence on the merits.

But where a pltf., without serving a deft., accepts the appearance of an unauthorised attorney for deft., the ct. will set aside the judgment as irregular, with costs, & leave pltf. to recover those costs, & the expense to which he has been put, from the delinquent attorney by summary proceedings.—**BAYLEY v. BUCKLAND** (1847), 1 Exch. 1; 2 New Pract. Cas. 318; 16 L. J. Ex. 204; 11 Jur. 564; 154 E. R. 1.

Annotations:—Apld. Faviell v. Eastern Counties Ry. (1848), 2 Exch. 344. **Refd.** Collins v. Johnson (1855), 3 C. L. R. 1285; Davis v. Bowen (1863), 11 W. R. 282; *Re Commonwealth Land, Building, Estate & Auction Co., Ex p. Hollington* (1873), 29 L. T. 502; Reynolds v. Howell (1873), 42 L. J. Q. B. 181; Yonge v. Toynbee, [1910] 1 K. B. 215.

561. — Remedy of plaintiff.]—BAYLEY v. BUCKLAND, No. 560, *ante*.

562. — Removal from Rolls—Solicitor instructing counsel to consent to payment out of funds in court.]—A solr., who, without authority, instructed counsel to appear for parties interested in money in ct., & to consent to its payment out of ct., was ordered to be struck off the Rolls.—**WHEATLEY v. BASTOW**, *Re COLLINS* (1855), 7 De G. M. & G. 558; 3 Eq. Rep. 865; 24 L. J. Ch. 732; 26 L. T. O. S. 25; 1 Jur. N. S. 1125; 44 E. R. 218, L. JJ.

563. — Procedure.]—The names of two of the petitioners having been made use of without their knowledge, this circumstance must be made the subject of a distinct application against the solr., & cannot be insisted on upon the hearing of the petition.—*Ex p. STUCKEY* (1791), 2 Cox, Eq. Cas. 283; 30 E. R. 131, L. C.

564. —]—REYNOLDS v. HOWELL, No. 391, *ante*.

565. —]—The name of a pltf. having been inserted on the record without his knowledge, consent, or authority, on motion by defts. to dismiss for want of prosecution, & on motion by pltf. to have his name struck out from the record:—**Held**: the solrs. to the record who had purported to act for pltf. were liable to pay his costs of the motion as between solr. & client, & also to pay the costs of defts. of the action & all the motions therein.—**NURSE v. DURNFORD** (1879), 13 Ch. D.

costs, but, notwithstanding, the attorney went on, thinking that deft. should pay the costs, the proceedings were set aside for irregularity.—**PARENT v. M'MAHON** (1835), 4 O. S. 120.—**CAN.**

c.]—LEE v. STILES, *Ex p. MORSE* (1847), 5 N. B. R. (3 Kerr) 366.—**CAN.**

d. Agreement without authority for action to abide event of another action.]—An agreement by a solicitor that his client's suit should abide the event of another suit by same pltf. against another party, made without instructions from the client, who afterwards repudiated it:—**Held**: not binding on the client.—**DEWAR v. ORR**, **DEWAR**

v. SPARLING (1871), 3 Ch. Ch. 224.—**CAN.**

e. Settlement of action without authority—Verdict & judgment set aside.]—After the trial of an action had been postponed at the assizes & deft. had left the assize town, his solicitor & counsel affected a settlement with pltf., which was given effect to by the entry of a verdict & judgment by consent. The solicitor admitted that he was not instructed, but relied on his client adopting the settlement, which was, in the solicitor's opinion, a favourable one. The client said that he had instructed the solicitor not to settle in the way he did:—

764; 49 L. J. Ch. 229; 41 L. T. 611; 28 W. R. 145.

Annotations:—Apld. Fricker v. Van Grutten, [1896] 2 Ch. 649. **Refd.** Newbiggin-by-the-Sea Gas Co. v. Armstrong (1879), 49 L. J. Ch. 231; Williams v. Preston (1882), 30 W. R. 555; Gellinger v. Gibbs, [1897] 1 Ch. 479; Didisheim v. London & Westminster Bank (1900), 69 L. J. Ch. 443. **Mentd.** Boswell v. Coaks (1887), 57 L. J. Ch. 101.

566. —]—Where a solr. has commenced an action in the name of a pltf. without authority, the proper course is for pltf. to serve notice of motion on deft., as well as on the solr., that the action may be dismissed, & that the solr. may pay the costs of pltf. as between solr. & client, & the costs of deft. as between party & party.—**NEWBIGGIN-BY-THE-SEA GAS CO. v. ARMSTRONG** (1879), 13 Ch. D. 310; 49 L. J. Ch. 231; 41 L. T. 637; 28 W. R. 217, C. A.

Annotations:—Apld. John Morley Building Co. v. Barras, [1891] 2 Ch. 386; Fricker v. Van Grutten, [1896] 2 Ch. 649. **Refd.** Williams v. Preston (1882), 30 W. R. 555; Gellinger v. Gibbs, [1897] 1 Ch. 479; Gold Reefs of Western Australia v. Dawson, [1897] 1 Ch. 115; Didisheim v. London & Westminster Bank, [1900] 2 Ch. 15; Yonge v. Toynbee, [1910] 1 K. B. 215. **Mentd.** Smith v. Day (1881), 50 L. J. Ch. 333; London Scottish Permanent Benefit Soc. v. Chorley (1884), 50 L. T. 265; Boswell v. Coaks (1887), 57 L. J. Ch. 101; Puddephatt v. Leith (No. 2), [1916] 2 Ch. 168.

567. —]—Where a person has been made a pltf., in an action without proper authority & orders have without his knowledge been made against him under which he is liable to pay costs to deft. the practice is, in accordance with the rule laid down in *Reynolds v. Howell*, No. 391, *ante*, & followed in *Nurse v. Durnford*, No. 565, *ante*, & *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, No. 566, *ante*, to direct a stay of proceedings in the name of the person named as pltf. & all proceedings against him in the action since he was added as pltf. & to strike out his name for the purpose of future proceedings. The solr. who wrongly made him a party will be ordered to pay all his costs & all the costs which he has been ordered to pay & also all deft.'s costs, the costs of the person named as pltf., as between solr. & client, & the costs of deft., as between party & party, & such costs will include the costs of the application by the person named as pltf. to be dismissed from the proceedings.—**FRICKER v. VAN GRUTTEN**, [1896] 2 Ch. 649; 65 L. J. Ch. 823; 75 L. T. 117; 45 W. R. 53; 40 Sol. Jo. 701, C. A.

Annotations:—Consd. Gellinger v. Gibbs, [1897] 1 Ch. 479. **Refd.** Yonge v. Toynbee, [1901] 1 K. B. 215.

— **Payment of costs.]—Sec Part VI., post.**

B. Acts Covered by Authority.

(a) In General.

568. Acts of London agent.]—Pltf. is bound by the acts of his attorney's agent in town.—**GRIFFITHS v. WILLIAMS** (1787), 1 Term Rep. 710; 99 E. R. 1335.

Annotation:—Mentd. Stevenson v. Yorke (1790), 4 Term Rep. 10.

569. Authority to recover debt due—Opposition to defendant's discharge in bankruptcy.]—An

Held: deft. was entitled to have the verdict & judgment set aside & a new trial, on payment of costs.—**WATT v. CLARK** (1887), 12 P. R. 359.—**CAN.**

f. — Right of client to continue.] **MCDONALD v. FIELD** (1882), 12 P. R. 213.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 2.—B. (a).

g. General rule.]—The attorney is the agent of the client for all purposes connected with the suit.—**LEE v. MELBOURNE & SUBURBAN RY. CO.** (1861), 1 W. & W. (L.) 34.—**AUS.**

h. Retainer to act generally—Authority

authority to proceed in an action to recover a debt due from a party, does not sanction opposing his discharge in the insolvent debtors' ct.—*DRAKE v. LEWIN* (1834), 4 Tyr. 730.

(b) *Compromise of Action.*

570. Authority to compromise—Solicitor acting for nominal defendant—Compromise on behalf of party really interested.]—In an action of trespass, A. was pltf., & B., C.'s land agent, was the nominal deft., C. being the party really interested. H. who acted as deft.'s attorney upon the employment of C., & who also acted as C.'s attorney in certain actions & suits depending between C. & A., consented to an order of *Nisi Prius*, on the terms that A. should give up to C. possession of the farm on which the trespass had been committed, & that all proceedings should be stayed in the actions & suits between A. & B., & C., & that C. should pay the taxed costs in the present action, & the further sum of £10 to A. On motion to set aside the order of *Nisi Prius*, & a rule of ct. made thereon, upon the ground that H. had no authority to bind C. by any such arrangement, the ct. refused to interfere in a summary way.—*THOMAS v. HEWES* (1834), 2 Cr. & M. 519; 4 Tyr. 335; 3 L. J. Ex. 158; 149 E. R. 866.

Annotations:—*Consd.* *Swinfen v. Swinfen* (1857), 24 Beav. 549. *Mentd.* *Lewis v. Nicholson* (1852), 18 Q. B. 503; *Collen v. Wright* (1857), 8 E. & B. 647.

571. — Solicitor for defendant — Defendant paying sum for damages & costs.]—*Qu.*: whether the attorney for deft. in an action has authority to settle it upon the terms of deft. paying a sum of money for damages & costs.—*CROWTHER v. FARRER* (1850), as reported in 14 L. T. O. S. 131; 15 Jur. 535.

Annotations:—*Mentd.* *Bridgman v. Dean* (1852), 18 L. T. O. S. 245; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266.

572. On obtaining certain sum—Solicitor compromising for larger sum—Evidence of agreement to accept surplus in satisfaction of costs.]—If an attorney have express authority from his client to compromise the case only on condition of securing for him a certain net sum, that, coupled with the fact that he afterwards compromised the suit on payment of a larger sum, & professed to have compromised it in pursuance of that authority, may be evidence of an agreement upon his part to accept the surplus of the money paid over the amount of the net sum his client expected to receive, in satisfaction of his costs, not only as between party & party, but between attorney &

to oppose bankruptcy petition.]—A solicitor was instructed by his client to attend to the latter's interest during his absence & to act for him generally as his solicitor. During his client's absence from the state, a bankruptcy petition was presented against him:—*Held*: the solicitor had authority to oppose the petition.—*Re HARVIE, Ex p. BROCKHOFF* (1902), 2 S. R. N. S. W. (B.) 1; 19 N. S. W. W. N. 23.—AUS.

k. Signing cognovit.]—An attorney has no authority to sign a *cognovit* in a suit without the authority of his client, but his client will be bound by a *cognovit* given without his consent, if he makes no objection when informed of it.—*MCMANEE v. O'BRIEN* (1860), 9 N. B. R. (4 All.) 548.—CAN.

l. Giving of power of attorney.]—The attorney in the cause has no authority to give a power of attorney for that purpose.—*ROBICHEAU v. TURNER* (1871), N. B. Dig. 85.—CAN.

m. Indemnity to sheriff.]—A promise of indemnity to the sheriff by an attorney is binding on his client where
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client.—*CHURCHYARD v. WATKINS* (1857), 27 L. J. Ex. 13; 30 L. T. O. S. 154.

Annotation:—*Reid. Collins v. Brook* (1859), 28 L. J. Ex. 143.

573. — Necessity for client's consent.]—A compromise of a trial at law, made by counsel, upon the suggestion of an attorney that it would be desirable, was held by the judge not to be binding upon the client who was not aware of it, had not sanctioned it, & would not acquiesce in it; & a bill to enforce the specific performance of the compromise was dismissed by the same judge but without costs, the ct. being of opinion that the compromise arose from the mistake of parties acting for their respective clients, & a new trial of the issue was directed in the original suit. On appeal by pltf. in the suit for specific performance:—*Held*: an attorney has no authority to compromise a suit without the sanction & consent of the client.—*SWINFEN v. SWINFEN* (1858), 2 De G. & J. 381; 27 L. J. Ch. 491; 31 L. T. O. S. 157; 22 J. P. 306; 4 Jur. N. S. 774; 6 W. R. 480; 44 E. R. 1037, L. JJ.

Annotations:—*Expld.* *Prestwich v. Poley* (1865), 18 C. B. N. S. 806. *Distd.* *Re Wood, Ex p. Wenham* (1872), 21 W. R. 104. *Reid.* *Chown v. Parrott* (1863), 14 C. B. N. S. 74; *Harding v. Chowne* (1863), 1 New Rep. 284; *Kennedy v. Brown* (1863), 1 New Rep. 275; *Strauss v. Francis* (1866), L. R. 1 Q. B. 379; *Holt v. Jesse* (1876), 3 Ch. D. 177; *Stretton v. Thompson* (1881), 72 L. T. Jo. 136; *Mathews v. Munster* (1887), 51 J. P. 615.

574. — Solicitor suing on unstamped document—Or document of doubtful construction.]—Where an attorney is retained to do his best to obtain redress for a client, who claims a tenancy or any other right of small value under a written document, on which, whether because it requires to be, but is not, stamped, or because it is of doubtful & difficult construction, it may be perilous to sue, he has authority to compromise the claim & give up the document; but in an action by the client against him for negligence in not obtaining sufficient compensation & for giving up the document, it may nevertheless be a question for the jury, upon all the circumstances, whether there was a want of due care in coming to the compromise, provided there is any evidence of a want of such due care, but his not having ascertained the amount of the damage, before agreeing to the compromise:—*Held*: insufficient evidence of negligence.—*WRIGHT v. JOHNSTON* (1858), 1 F. & F. 128, N. P.

575. — Compromise announced in open court —In presence of client.]—Where a cause is compromised by the counsel & attorneys, in ct. in the presence of the client, & after conference had

licitor for defendant—Defendant paying sum for damages & costs.]—*R. v. SWIFTE* (1913), 47 I. L. T. 63.—IR.

573 i. — Necessity for client's consent.]—An attorney has no power to compromise an action against his clients by an adjustment varying rights of property unless expressly authorised.—*SHIEL v. COLONIAL BANK OF AUSTRALIA* (1870), 1 V. R. 40.—AUS.

573 ii. —.]—*ARMOUR v. JEFFREY* (1862), 21 U. C. R. 513.—CAN.

573 iii. —.]—*KING v. PINSONEAULT* (1875), 44 L. J. P. C. 42, P. C.—CAN.

573 iv. —.]—*CONNATTY v. IR.* (1847), 11 I. Eq. R. 333.—

q. — Notice of withdrawal of consent to other party direct.]—If parties to an action authorise their solrs. to enter into negotiations for a settlement, & while the negotiations are proceeding, one party, unknown to his own or to the opposite

the attorney had the conduct of the suit in the course of which such promise was made & the subsequent acts of the client showed that he had adopted the attorney's proceedings.—*MUIRHEAD v. SHIRREFF* (1886), 14 S. C. R. 735.—CAN.

n. Signing notice of appeal.]—*SCOTT v. DALPHIN* (1907), 7 Terr. L. R. 401; 6 W. L. R. 371.—CAN.

o. Payment of judgments.]—*MC-LAWS v. WELLBAND (Man.)* (1912), 21 W. L. R. 592; 4 D. L. R. 24.—CAN.

p. To arrest under execution.]—A solr. has no authority, against the will of his client, to take in execution the body of a deft., against whom the client has, through the agency of his solr., recovered a judgment; & this is so even where the client has not paid his solr.'s bill of costs.—*RUSSELL v. BARTON* (1872), Mac. 679.—N.Z.

PART IV. SECT. 2, SUB-SECT. 2.—
B. (b).

571 i. *Authority to compromise—So-*

Sect. 2.—Authority of solicitor to bind client:
sect. 2, B. (b).]

with him with a view to an arrangement, & the client do not dissent, & the terms of the compromise have been embodied in an order of *Nisi Prius*, subsequently made a rule of ct., the arrangement will not be disturbed, upon a suggestion by the client, that, though present when it was made, he did not understand what was going on.—**CHAMBERS v. MASON** (1858), 5 C. B. N. S. 59; 28 L. J. C. P. 10; 5 Jur. N. S. 148; 141 E. R. 23.

Annotations:—**Reid.** Chown v. Parrott (1863), 14 C. B. N. S. 74; Wytcherley v. Andrews (1871), 35 J. P. 552.

576. ————.]—The general authority, both of counsel & solr. extends to the entering of a *stet processus*, & a compromise by *stet processus* announced by counsel in open ct. in the presence of his client must be repudiated openly & at once by the client, or it cannot be set aside.—**RUMSEY v. KING** (1876), 33 L. T. 728.

Annotations:—**Consd.** Holt v. Jesse (1876), 3 Ch. D. 177. **Reid.** Neale v. Gordon Lennox, [1902] 1 K. B. 838.

577. ————.]—Where the counsel & solrs. of deft., being aware of all the facts on which an order was to be made, consented in ct., in deft's presence, to an order against him, he was not allowed to withdraw his consent, on the grounds that his advisers mistook their instructions, & had no sufficient authority to bind him.—**HOLT v. JESSE** (1876), 3 Ch. D. 177; 46 L. J. Ch. 254; 24 W. R. 879.

Annotations:—**Expld.** Scully v. Dundonald (1878), 8 Ch. D. 658. **Consd.** Davis v. Davis (1880), 13 Ch. D. 861; Hickman v. Bereno, [1895] 2 Ch. 638. **Appld.** Shepherd v. Robinson, [1919] 1 K. B. 474. **Reid.** Harvey v. Croydon Union R. S. A. (1884), 26 Ch. D. 249; Neale v. Gordon Lennox, [1902] 1 K. B. 838.

578. ———— Solicitor acting bonâ fide & reasonably—Not against client's express instructions.]—An attorney retained to conduct a cause, & having express directions from the client not to enter into a compromise, has no power, under such retainer, to enter into any compromise, even though it be reasonable & *bonâ fide*, & for the benefit of the client, & if he do so, is liable to an action for damages, though the damage actually sustained be nominal. It is no defence to such action that the compromise was entered into by the advice of counsel retained & employed by the attorney, under his retainer, for the conduct of the cause.—**FRAY v. VOULES** (1859), 1 E. & E. 839; 28 L. J. Q. B. 232; 33 L. T. O. S. 133; 5 Jur. N. S. 1253; 7 W. R. 446; 120 E. R. 1125.

Annotations:—**Distd.** Chown v. Parrott (1863), 14 C. B. N. S. 74. **Consd.** Prestwick v. Poley (1865), 18 C. B. N. S. 806; Welsh v. Roe (1918), 87 L. J. K. B. 520. **Reid.** Brady v. Curran (1868), 18 W. R. 514.

579. ————.]—A compromise will not be set aside on motion, where the attorney enters into it, not against the express directions of his client, but *bonâ fide*, believing that he had authority to enter into it.—**HARDING v. CHOWNE** (1863), 1 New Rep. 284.

580. ————.]—**STRETTON v. THOMPSON** (1881), 72 L. T. Jo. 136, D. C.

solrs., writes to the other party personally withdrawing from the negotiations, & the respective solrs., not knowing what has taken place, between their clients meanwhile, conclude the terms of a settlement, such settlement will not be binding on the party who had thus withdrawn from the negotiations, because the other party had direct notice of his withdrawal.—**VARDON v. VARDON** (1884), 6 O. R. 719.—**CAN.**

1. ———— Solicitor acting bonâ fide & reasonably—Not against client's express

instructions.]—**JAGANNATH DAS GURUBAKSHDAS v. RAMDAS GURUBAKSHDAS** (1870), 7 Bom. O. C. 79.—**IND.**

578 II. ————.]—**A v. KLITZKE**, [1918] E. D. L. 87.—**S. AF.**

r. ————.]—Where a solr. in good faith gives his consent & enters into an arrangement, even without instructions, the client cannot be relieved. Where the solr. has acted fraudulently the case is different.—**BAILEY v. BAILEY** (1866), 2 Ch. Ch. 58.—**CAN.**

Authority of managing

clerk.]—An attorney has a general authority to compromise an action on behalf his client, provided he act *bonâ fide* & reasonably, & not in defiance of the direct & positive instructions of the client, & this authority, it seems, extends to a managing clerk having the general conduct of the business.

Pltfs. employed A., an attorney, to sue B. for the price of a pianoforte sold & delivered. The cause having proceeded as far as the joinder of issue, A. finding B. unable to pay, agreed with him, by his managing clerk, that pltfs. should take back the pianoforte, & that the costs should be paid by certain instalments. Pltfs. on being informed of this arrangement, repudiated it, & A. gave notice of trial:—Held: upon a motion to stay the proceedings on the ground that the action was settled, this compromise was within the general scope of the attorney's authority, & binding as between pltfs. & B.—**PRESTWICH v. POLEY** (1865), 18 C. B. N. S. 806; 6 New Rep. 175; 12 L. T. 390; 144 E. R. 662; *sub nom.* **PRISTWICK v. POLEY**, 34 L. J. C. P. 189; 11 Jur. N. S. 583; 13 W. R. 753.

Annotations:—**Consd.** Strauss v. Francis (1866), L. R. 1 Q. B. 379. **Appld.** *Re* Newen, Carruthers v. Newen, [1903] 1 Ch. 812. **Consd.** Welsh v. Roe (1918), 87 L. J. K. B. 520. **Reid.** Neale v. Gordon Lennox, [1902] 1 K. B. 838.

582. ———— Authority of London or other agent.]—The solr. on the record, whether in London as agent for a country solr. or in a district registry as agent for a London solr., has a general authority to compromise an action on behalf of his client, provided he acts *bonâ fide* & reasonably, & not in defiance of his direct & positive instructions; & in either case the lay client will be bound although there is no privity between him & the agent on the record.—**Re NEWEN, CARRUTHERS v. NEWEN**, [1903] 1 Ch. 812; 72 L. J. Ch. 356; 88 L. T. 264; 51 W. R. 297; 19 T. L. R. 247; 47 Sol. Jo. 300.

Annotation:—**Reid.** Welsh v. Roe (1918), 87 L. J. K. B. 520.

583. ———— Instructions by client not to compromise.]—An action for debt being called on for hearing, counsel for deft. consented to judgment against his client for part only of the claim, pltf. abandoning the balance. Without the knowledge of counsel on either side, or of solrs. for pltfs., deft. had given instructions to her solrs. that the case was not to be settled. Upon an application made before the judgment was drawn up:—**Held:** the case must be restored to the list for hearing.—**SHEPHERD v. ROBINSON**, [1919] 1 K. B. 474; 88 L. J. K. B. 873; 120 L. T. 492; 35 T. L. R. 220, C. A.

584. ———— Solicitor consenting to leave matter to third parties—Client repudiating minutes of compromise.]—Where a cause had been ordered to stand over, with a view if possible to arrange a compromise by the leading counsel, & the London agent of deft.'s solrs. wrote to the agent of pltf.'s solrs. as follows, "Without prejudice. It is the wish of C., deft., that this matter be left to M. & J. to say what course shall be adopted for the termination of the suits minutes of a decree for com-

t. ———— Within scope of authority.]—An attorney has a general authority to compromise an action on behalf of his client, provided he acts *bonâ fide*, & reasonably & within the scope of his authority as an agent to compromise.—**BANK OF NOVA SCOTIA v. MORROW** (1877), 17 N. B. R. (1 P. & B.) 343.—**CAN.**

a. ————.]—A barrister & solr. acting under a general retainer has, in the absence of any restriction therein, full charge of the conduct of the action & of all things incidental

promise which were arranged by M. & J., on behalf of either party in consultation, were afterwards repudiated by deft.:—*Held*: the ct. had no jurisdiction, if deft. withheld his consent, to make an order in conformity with the minutes as arranged in consultation.—*GREEN v. CROCKETT, CROCKETT v. GREEN* (1865), 6 New Rep. 368; 34 L. J. Ch. 606; 12 L. T. 749; 13 W. R. 1052, L. C.

585. — *After judgment obtained.*]—If pltf. in an action continues the authority of his attorney after judgment, by allowing him to proceed to obtain satisfaction, the attorney retains the power to bind his client by a compromise.—*BUTLER v. KNIGHT* (1867), L. R. 2 Exch. 109; 36 L. J. Ex. 66; 15 L. T. 621; 15 W. R. 407.

Annotation:—*Consd. Welsh v. Roe* (1918), 87 L. J. K. B. 520.

586. — *—*].—A retainer to a solr. to conduct an action does not include an authority to compromise it after judgment by assenting to the execution by deft., of a deed of assignment of his property to a trustee for the benefit of his creditors.—*Re A DEBTOR, Ex p. DEBTOR v. PETITIONING CREDITOR*, [1914] 2 K. B. 758; 83 L. J. K. B. 1176; 58 Sol. Jo. 416; 21 Mans. 155; *sub nom. Re STREET, Ex p. THE DEBTOR*, 110 L. T. 944, D. C.

587. — *Matter within scope of suit.*]—A solr. or a counsel has full authority either to compromise or abandon the claims of his client, provided it be in a matter within the scope of the suit.

Secus, in a collateral matter.—*Re WOOD, Ex p. WENHAM* (1872), 21 W. R. 104.

588. — *Compromise enforceable on motion.*]—*ALLIANCE PURE WHITE LEAD SYNDICATE, LTD. v. MACIVOR'S PATENTS, LTD.* (1891), 7 T. L. R. 599.

589. — *Before action brought.*]—A solr. employed to act for a client in regard to his claim against a third person has, before action brought, no implied authority to effect a compromise.—*MACAULAY v. POLLEY*, [1897] 2 Q. B. 122; 66 L. J. Q. B. 665; 76 L. T. 643; 45 W. R. 681, C. A.
Annotation:—*Consd. Welsh v. Roe* (1918), 87 L. J. K. B. 520.

590. — *Compromise by solicitor's clerk.*]—A. having suffered personal injuries through the negligence of the servants of H. & co., applied to an attorney, & the attorney's clerk agreed with H. & co. to accept a certain sum "in full satisfaction of all demands for the injuries" sustained by A., & gave a written undertaking to that effect. A. having repudiated the transaction, & brought an action:—*Held*: the agreement entered into by the attorney's clerk, as it took place before the issuing of any writ, was not binding upon A.—*DUFFY v. HANSON* (1867), 16 L. T. 332.

Annotation:—*Apprvd. Macaulay v. Polley*, [1897] 2 Q. B. 122.

591. — *Parties consulting family solicitor—Agreement not quite in accordance with rights of parties—Compromise to avoid litigation.*]—Generally the ct. will support an agreement of compromise entered into after the parties have jointly consulted the family solr., even though the agree-

ment may not be quite in accordance with their rights, the very object of the compromise being to avoid the necessity of having the exact relative rights determined by litigation; but the family solr. is not entitled to keep those consulting him in the dark as to their rights because he thinks it is for the advantage of all parties to compromise & that if they know their exact rights there would be no chance of a compromise.

Where one party entered into a compromise relating to her interests under a will under a false impression as to her legal rights, arising from a wrong interpretation placed upon counsel's opinion by a common solr. acting for all parties:—*Held*: the compromise was not binding upon her.—*Re ROBERTS, ROBERTS v. ROBERTS*, [1905] 1 Ch. 704; 74 L. J. Ch. 483; 93 L. T. 253, C. A.

592. — *Client's mistake as to legal rights—Solicitor's erroneous interpretation of counsel's opinion.*]—*Re ROBERTS, ROBERTS v. ROBERTS*, No. 591, *ante*.

593. — *Client's conduct inducing belief in authority—Effect of client's misunderstanding.*]—If a client by his conduct induces his solr. to believe that he is authorised to make a certain compromise in an action which the solr. is conducting on behalf of the client, & the solr., reasonably relying on that conduct & believing that he has the authority of the client, makes the compromise, the client is bound whether he intended to give that authority or not, & whether he in fact understood or did not understand the terms of the compromise.

Before a county ct. action was tried a settlement was arrived at between the solr. for the respective parties, & a memorandum embodying its terms was signed by the solrs. This memorandum was not read by deft., but it was read over to her by her solr. or his son, & she seemed to assent to its terms. The action was thereupon, by consent of the county ct. judge & the solr. on both sides, struck out. Although deft. seemed to assent to the terms of the compromise, she did not in fact understand them & did not mean to assent to them. Subsequently an agreement in writing, signed by the solrs. for both parties, containing the terms of the memorandum, was sent to deft., who repudiated it upon the ground that the terms of the compromise which she authorised her solr. to effect were not contained either in the memorandum or in the written agreement:—*Held*: deft. was bound by the compromise made by her solr., & was liable in damages for the breach of it.—*LITTLE v. SPREADBURY*, [1910] 2 K. B. 658; 79 L. J. K. B. 1119; 102 L. T. 829; 26 T. L. R. 552; 54 Sol. Jo. 618, D. C.

Annotations:—*Consd. Welsh v. Roe* (1918), 87 L. J. K. B. 520; *Shepherd v. Robinson*, [1919] 1 K. B. 474.

594. — *Unless limitation of authority notified to other party.*]—After issue of the writ the solr. of a party to the action has an implied general authority to compromise & settle the action, & the client cannot avail himself of any limitation by him of the implied general authority unless it has been

thereto, especially on the trial. This authority includes the right to compromise the action & to consent to its dismissal on terms or otherwise, provided he does so in the honest belief that he is acting in the best interests of his client.—*ROGAN v. PRUD'HOMME*, [1925] 1 D. L. R. 347; [1925] 1 W. W. R. 479.—*CAN.*

b. — *Compromise by clerk in anticipated default of appearance of client at trial.*]—*MFASWE v. MILLER* (1901), 18 S. C. 172.—*S. AF.*

c. — *After judgment obtained—*

Consent to variation of interpleader order.]—*HACKETT v. BIBLE* (1888), 12 P. R. 482.—*CAN.*

597 i. — *Matter within scope of suit.*]—A consent by the vakil of a party to a decree being made binding on property other than what the parties to the suit may have an interest in, is a consent to what is beyond the scope of the suit, & can neither be binding on the party nor acted upon by the ct.—*AVUL KHADAR v. ANDHU SET* (1865), 2 Mad. 423.—*IND.*

d. — *Express prohibition—Neces-*

sity for notice of prohibition to site party.]—A client is bound by a compromise entered into by the attorney in the case, though in violation of express directions not to compromise, if the other party have acted *bona fide*, & without notice of such prohibition.—*BRADY v. CURRAN* (1868), 1 R. 2 C. L. 314.—*IR.*

e. — *—*].—*BERRY v. MULLEN* (1871), 1 R. 5 Eq. 368.—*IR.*

f. — *Mistaken belief in authority.*]—*DE VOS v. CALITZ & DE VILLIERS*, [1916] C. P. D. 465.—*S. AF.*

SOLICITORS.

Sect. 2.—Authority of solicitor to bind client:
sect. 2, B. (b), (c) & (d), & C.]

brought to the notice of the other side.—WELSH v. ROE (1918), 87 L. J. K. B. 520; 118 L. T. 520; 34 T. L. R. 187; 62 Sol. Jo. 269.

Annotation :—*Distd. Shepherd v. Robinson*, [1919] 1 K. B. 474.

(c) Authority to Refer Action.

595. Whether solicitor has authority to refer action.]—An attorney authorised to appear for a party in a suit has incidentally authority to refer it without any fresh authority to that effect, & the attorney having appeared for the corpⁿ., to the knowledge of the directors, the corpⁿ. were bound by his acts as attorney, though he was not authorised to appear by any authority under seal.—*FAVIELL v. EASTERN COUNTIES RY. CO.* (1848), 2 Exch. 344; 6 Dow. & L. 54; 17 L. J. Ex. 297; 154 E. R. 525; *sub nom.* *FARRILL v. EASTERN COUNTIES RY. CO.*, 11 L. T. O. S. 204.

Annotations:—*Reid*, *Smith v. Troup* (1849), 7 C. B. 757; *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189; *Chambers v. Mason* (1858), 5 C. B. N. S. 59; *Neale v. Gordon-Lennox* (1902), 71 L. J. K. B. 530. **Mentd.** *Kirk & Randall v. East & West India Dock Co.* (1886), 55 L. T. 245; *May v. Mills* (1914), 30 T. L. R. 287.

596. —.] — The attorney on the record has authority to consent to a reference on behalf of his client.—**SMITH v. TROUP** (1849), 7 C. B. 757; 6 Dow. & L. 679; 18 L. J. C. P. 209; 13 L. T. O. S. 73; 137 E. R. 300.

Annotations:—**Raid**. *Neale v. Gordon Lennox*, [1902] 1 K. B. 838; *Welsh v. Roe* (1918), 87 L. J. K. B. 520.

597. — **Against client's express instructions.** — Where, at the trial of a cause, the attorney refers it to arbitration, this binds his client as against the other party, although the client has given express directions to his attorney not to refer.—**HOLMES v. CARDEN** (1840), 6 L. T. O. S. 324.

598. — **Solicitor acting under pressure.** — **COLWALL v. CHILD** (1860), 1 Rep. Ch. 195; 1 Cas. in Ch. 86; 21 E. R. 548; *sub nom.* **COLLWELL v. CHILD**, Freem. Ch. 154.

Annotation :—**Mentd.** Hide v. Petit (1670), *Freem. Ch.* 133.

(d) *Conduct of Proceedings.*

599. Consent to set aside judgments — Against express instructions.]—Attorney's consent binds the client though contrary to his express orders.—LATUCH v. PASHERANTE (1696), 1 Salk. 86; 91 E. R. 81.

Annotations :—*Consd.* Stanhope v. Eavery (1836), 5 Dowl. 357. *Appld.* *Re* Newen, Carruthers v. Newen, [1903] 1 Ch. 812. *Refd.* Welsh v. Roe (1918), 87 L. J. K. B. 520. *Mentd.* Hatton v. Walker (1729), 1 Barn. K. B. 213.

600. Agreement not to enforce judgment.]—An attorney employed to sue for a debt, in a county ct., has no implied authority, after he has obtained judgment in such ct. for the debt, to enter into an agreement with debtor not to enforce such judgment for a time.—**LOVEGROVE v. WHITE** (1871), L. R. 6 C. P. 440; 40 L. J. C. P. 253; 24 L. T. 554; 19 W. R. 823.

Annotation:—*Reid. Re Commonwealth Land, Building Estate & Auction Co., Ex p. Hollington* (1873), 43 L. J. Ch. 99.

601. Carrying out of award.]—If an attorney is employed by a person to act for him, after an

award has been made against him, & he is desired to do what is needful, he shall be thereby warranted to carry the whole award, as far as respects his client, into effect, though his immediate business was to do but part of it.—*DAWSON v. LAWLEY* (1801), 4 Esp. 65; 170 E. R. 643, N. P.

602. **Solicitor acting for infant**—Infant bound by solicitor's conduct.—Infants are bound by the conduct of their solr. in a cause.—**TILLOTSON v. HARGRAVE** (1818). 3 Madd. 494; 56 E. R. 586.

Annotation :—*Mentd. Morison v. Morison* (1838), 4 My. & Cr. 215.

608. Order made by consent of counsel—No instructions to consent—Failure of solicitor to make immediate objection—Solicitor or client not present in court.]—A party is bound by the consent of his counsel given in ct., though they had no instructions to consent, if they were at the time apprised of all those facts, of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances. How far a party will be affected by the remissness of his solr. in not immediately objecting to an order made by the consent of counsel in ct., when neither the party nor his solicitor was present, & instructions to consent had not been given by either.—*FURNIVAL v. BOGLE* (1827), as reported in 4 Russ. 142; 38 E. R. 758, L. C.

Annotations :—*Apld. Clifford v. Turnell* (1848), 11 L. T. O. S. 197. **Consd.** *Swinfen v. Swinfen* (1857), 24 Beav. 549. **Refd.** *Chambers v. Mason* (1858), 5 C. B. N. S. 59. **Mentd.** *Thomas v. Hewes* (1834), 4 Tyr. 335; *Wright v. Sorsby* (1834), 4 Tyr. 434; *Brown v. Newall* (1837), 2 My. & Cr. 558; *Re Keyworth, Ex p. Tate* (1874), 43 L. J. Boy. 55; *Holt v. Jesse* (1876), 3 Ch. D. 177; *Harvey v. Croydon Union R. S. A.* (1884), 28 Ch. D. 249; *Wiedegemann v. Walpole* (1889), 53 J. P. 614; *Huddersfield Banking Co. v. Lister* (1895), 72 L. T. 703; *Neale v. Gordon Lennox*, [1902] 1 K. B. 838.

604. Assent to appointment of umpire.] — An umpire was appointed by lot, in consequence of an agreement by the arbitrators. This was not known or assented to by the parties, but was known to the attorney of the party applying to set aside the award. When, however, the umpire was so appointed he was specially objected to by the arbitrator appointed by that party; & that fact was not known to the attorney:—*Held*: there was not a sufficient assent to the mode of appointment, because the whole facts were not within the knowledge of the party assenting; & an award made by an umpire so appointed was bad.

Qu.: whether the attorney had power to bind his client by such an assent.—*Re JAMIESON* (1836), 4 Ad. & El. 945; 2 Har. & W. 35; 5 L. J. K. B. 187; 111 E. R. 1039.

Annotations :—*Reid, Hodson v. Drewry* (1839), 7 Dowl. 569 ; *European Steam Shipping Co. v. Crosskey* (1860), 8 C. B. N. S. 397.

605. Negligence of solicitor — Failure to subpoena necessary witness.]—When deft.'s attorney neglected to subpoena the attesting witness, to prove the execution of a deed at the trial, which deed was material to make out deft.'s case, the ct. refused a new trial on payment of costs, although the attorney swore that he had expected that the execution would have been admitted by pltf.—**CLARKE v. MARTIN** (1838), 1 Will. Woll. & H. 586.

PART IV. SECT. 2, SUB-SECT. 2.—
B. (c).

595 II. *Whether solicitor has authority to refer action.*—RAMJIAWAN RAM v. KALI CHARAN SINGH (1907), I. L. R. 29 All. 429.—IND.

g. Authority to consent to alteration of terms of reference.]—WILSON v. HUBON & BRUCE COUNTIES CORPN. (1852), 11 C. P. 548.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—
B. (d).

b. Plea of guilty in absence of defendant.]—Instructions to an attorney to appear & defend a deft., charged with an offence under Summary Convictions Act, do not authorise him to plead guilty to the charge in the deft.'s absence.—*Ex p. ERICKSON* (1892), 31 N. B. R. 296.—CAN.

**k. —.j—R. v. THOMPSON (1915),
48 N. S. R. 515.—CAN.**

1. *Right to continue proceedings in own interest—After withdrawal of retainer.*—*SOLER v. SOLER* (No. 2) (1897), 16 N. Z. L. R. 625.—N.Z.

m. *Authority to note appeal.*]—
HOWE v. CHURCH, [1914] T. P. D. 611.
—S. AF.

n. —.]—A power given to an

PART IV.—SOLICITOR AND CLIENT.

606. — In setting down demurrer.]—Where pltf., under 34 New Ord. Aug. 26, 1841, is entitled to set down the demurrer, but has been prevented from so doing through the negligence of his solr., the neglect of such solr. must be regarded as that of the client, & any misconduct of an attorney cannot be allowed to damnify the other party.—*KNIGHT v. MARJORIBANKS* (1844), 14 Sim. 198; 13 L. J. Ch. 473; 3 L. T. O. S. 278; 60 E. R. 333.

607. Consent to other side pleading certain matters.]—Where pltf.'s attorney consents to an application on the part of deft., to plead several matters, the abstract of which is submitted to his consideration, pltf. is bound by such consent.—*PISANI v. LAWSON* (1838), 7 L. J. C. P. 144; 2 Jur. 304.

608. Consent to release of defendant—Without receipt of money claimed.]—The authority of an attorney to conduct a suit does not extend to giving a discharge to a prisoner, in execution on judgment in the suit, without receiving the amount of the debt.

In an action against a public officer for the escape of a prisoner, it is not sufficient for the deft. to aver, that the attorney who prosecuted the action, & procured the commitment, required, & gave him licence to discharge prisoner, without also stating either payment, or a special authority from pltf. to the attorney to consent to the discharge.—*SAVORY v. CHAPMAN* (1840), 11 Ad. & El. 829; 8 Dowl. 656; 3 Per. & Dav. 604; 11 L. J. Q. B. 186; 4 Jur. 410; 113 E. R. 629.

*Annotations:—*Dctd. *Connop v. Challis* (1848), 11 L. T. O. S. 245. *Consd.* *Butler v. Knight* (1867), 15 L. T. 621. *Refd.* *Levi v. Abbott* (1849), 4 Exch. 588.

609. — — —.]—An attorney is not authorised to receive part of the debt & a security for the remainder from a deft. in execution & to discharge him from custody.—*CONNOP v. CHALLIS* (1848), 2 Exch. 484; 6 Dow. & L. 48; 17 L. J. Ex. 319; 11 L. T. O. S. 245; 154 E. R. 582.

*Annotation:—**Refd.* *Lovegrove v. White* (1871), 40 L. J. C. P. 253.

610. Entry of fraudulent defence — Admissions made against client—Jurisdiction to set aside judgment & order fresh defence.]—Where a solr. has put in a fraudulent defence for his client without the knowledge of the client, making admissions on which judgment was obtained against the client:—*Held*: the ct. had jurisdiction to set aside the judgment & permit the client to withdraw the defence, & put in a fresh defence.—*WILLIAMS v. PRESTON* (1882), 20 Ch. D. 672; 51 L. J. Ch. 927; 47 L. T. 265; 30 W. R. 555, C. A.

*Annotation:—**Refd.* *Re Youngs, Doggett v. Revett, Re Youngs, Vollum v. Revett* (1885), 30 Ch. D. 421.

611. Employment of shorthand writer to take note.]—Where a solr. employs a shorthand writer to take shorthand notes of a case in which the solr. is acting for a client, in the absence of a special arrangement the solr. is personally liable to the shorthand writer for the costs of the notes.—*COCKS v. BRUCE, SEARL & GOOD* (1904), 21 T. L. R. 62; *sub nom.* *COCKS v. B. S. & G.*, 49 Sol. Jo. 69.

*Annotation:—**Refd.* *Wakefield v. Duckworth* (1914), 84 L. J. K. B. 335.

C. Solicitor on Record.

612. Duty of solicitor to enter name on record.]—A deft., who had appeared in an action in person,

attorney "to proceed to the final end & determination" of a suit in a magistrate's court is a sufficient authority to him to note an appeal if judgment is given against his client.—*D. & D. H. FRASER, LTD. v. WALLER*, [1916] App. D. 494.—S. AF.

PART IV. SECT. 2, SUB-SECT. 2.—C.

o. Partnership — One attorney only allowed as attorney on record.]—The ct. consider it irregular for the name of more than one attorney of firm to appear as attorney on record.—*GIL-*

subsequently employed a solr. to conduct his defence, but failed to give notice thereof at the Central Office & consequently no solr. appeared on the record as acting for deft. Pltf.'s solrs. were, however, aware that deft.'s solr. was acting for deft. & had dealt with him as deft.'s solr. in the action. The action being subsequently dismissed with costs for want of prosecution:—*Held*: though the failure to get deft.'s solr.'s name placed on the record was an irregularity, it ought not, under the circumstances, to be treated as fatal to deft.'s right to recover his solr.'s charges.—*MASON v. GRIGG*, [1909] 2 K. B. 341; 78 L. J. K. B. 819; 101 L. T. 217, C. A.

613. Effect of authority — Power to receive debt.]—Payment of the debt to an agent employed to sue deft. by pltf.'s attorney, is not payment to pltf., though payment to the attorney himself is.—*YATES v. FRECKLETON* (1781), 2 Doug. K. B. 623; 99 E. R. 394.

*Annotations:—*Dctd. *Hanley v. Cassan* (1847), 11 Jur. 1088. *Refd.* *Robbins v. Fennell* (1847), 2 New Pract. Cas. 426. *Mentd.* *De Moranda v. Dunkin* (1790), 4 Term Rep. 119.

614. — — — Receipt by London agent.]—Payment made by a deft. to the London agent of pltf.'s attorney is a payment to pltf. S., the London agent of W., attorney to pltf. in a suit between A. & B. received the sum sued for from deft., & at the request of W. set it off against advances in an account between them. The ct. compelled S. to pay pltf. *de novo*, he not showing that there was an account between pltf. & W. with a balance in favour of the latter.—*HANLEY v. CASSAM* (1847), 2 New Pract. Cas. 431; 10 L. T. O. S. 189; 11 Jur. 1088.

*Annotations:—**Consd.* *Robbins v. Fennell* (1847), 11 Q. B. 248. *Apld.* *Ex p. Edwards* (1881), 8 Q. B. D. 262. *Refd.* *Robbins v. Heath* (1848), 2 New Pract. Cas. 433.

615. — — — Power to demand & receive costs due.]—Where costs are ordered to be paid to a deft. his attorney is competent to demand & receive them, without an express power of attorney.—*MASON v. WHITEHOUSE* (1838), 4 Bing. N. C. 692; 1 Arn. 261; 6 Scott, 575; 7 L. J. C. P. 295; 2 Jur. 545; 132 E. R. 955.

616. — — — Validity of service on solicitor.]—A party had some time since left home, & had not been heard of, & it was not known whether he was living or dead. His solr. ceased to act for him, but no order had been made for changing solrs.:—*Held*: notices served on such solr. were regular.—*WRIGHT v. KING* (1846), 9 Beav. 161; 15 L. J. Ch. 178; 6 L. T. O. S. 498; 50 E. R. 305.

617. — — —.]—Where deft. has appeared by attorney, & has not regularly displaced him, notice to such attorney, after an intimation from him that he has no instructions to defend the action, that it will be taken as an undefended case, will, if there is time for counter notice of an intention to defend, warrant pltf. in taking the case as undefended, although out of its order, on the morning of the day after the opening of the commission.—*LETT v. WATKINS* (1858), 27 L. J. Ex. 319.

*Annotation:—**Refd.* *Wolff v. Goldring* (1875), 44 L. J. C. P. 214.

618. — — —.]—A winding-up petition having been presented by a creditor, the solr. of petitioner informed the secretary & one of the directors of the fact. The whole of the directors then met,

MORE v. BULL (1840), 1 Kerr. 94.—CAN.

p. — — — Notice of trial signed by partner not the attorney on record.]—*GAMBLE v. REES* (1851), 7 U. C. R. 406.—CAN.

Sect. 2.—Authority of solicitor to bind client: .
sect. 2, C.; sub-sect. 3, A. & B. (a) & (b).]

petitioner's solr. being present, & passed resolutions assenting to the appointment of their secretary as provisional liquidator without prejudice to the right of the co. to assent to or dissent from the proceedings of petitioner, & that C., the solr. of a mtgee. of the share capital, should be instructed to take such steps as might be necessary in the interest of the co. in relation to the foregoing resolution. C. accepted service of the petition, & appeared for the co. on the motion for the appointment of an interim liquidator. The petition was not served at the office of the co. Some days after this a meeting of the co. was held at which resolutions were passed that the co. should be wound up voluntarily, & that P., the solr. to the co., should be instructed to carry out the negotiations as to the winding up. There was no previous resolution appointing P. the solr. The petition came on to be heard before the Vice-Chancellor & counsel instructed by P. opposed on behalf of the co. A winding-up order having been made, notice of appeal was given by P. on behalf of the co.:—**Held:** (1) as service of the petition had been accepted on behalf of the co. by a solr. duly appointed for that purpose, service at the office of the co. was not necessary; (2) P. had no authority to represent the co. on the appeal.—*Re REGENT UNITED SERVICE STORES* (1878), 8 Ch. D. 75; 38 L. T. 84; 26 W. R. 425, C. A.

619. ———.] — *DE MORA v. CONCHA, Re WARD, MILLS, WITHAM & LAMBERT*, [1887] W. N. 194.

620. ———.] — *BAGLEY v. MAPLE & Co., LTD.*, No. 426, *ante*.

———.] — *See CONTEMPT OF COURT*, Vol. XVI., p. 64, Nos. 730–733.

621. ——— **Notice of discontinuance.**] — A written notice by pltf.'s solrs., "we are instructed to proceed no further with the action" is a sufficient notice of discontinuance within R. S. C., Ord. 23, r. 1.

Foreign shipowners commenced an action in this country in respect of a collision at sea, & then discontinued the action. An order was made afterwards for leave to serve a writ, in an action respecting the same collision, issued against them at the suit of defts. in the former action, by way of substituted service upon the solrs. who acted in the former action as the solrs. for the foreign shipowners. Upon its appearing that the solrs. had ceased to act for the foreign shipowners, the order was set aside.—*THE POMMERANIA* (1879), 4 P. D. 195; 48 L. J. P. 55; *sub nom.* *THE POMERANIA*, 39 L. T. 642.

Annotation:—*Reid. Spincer v. Watts* (1889), 5 T. L. R. 570.

Duration of authority.] — *See Sect. 1, sub-sect. 4, E., ante.*

SUB-SECT. 3.—NON-CONTENTIOUS BUSINESS.

A. In General.

622. **Extent of authority — To allow abatement of purchase-money.**] — *Re GOLDSACK & SPRINGALL*, [1876] W. N. 44.

623. ——— **Admissions by solicitors.**] — A benefit building society which had no power to borrow

money, were permitted by their bankers to overdraw their account to a large amount; & in 1876 a memorandum of agreement was signed by the officers of the society & confirmed by the directors stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody but as a security for the balance from time to time due. In 1881 an order for winding up the society was made, & the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the application of the money which was advanced by the bankers; but the solrs. on both sides signed an admission that some part was applied in payment of members withdrawing from the society & the remainder in payment of salaries, legal expenses, & expenses of mtged. property:—**Held:** the admission by the solrs. of the society that some part of the money had been applied in payment of lawful expenses was sufficient to entitle the bankers to a declaration & an inquiry as to the amount so applied.—*BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS & Co.* (1882), 22 Ch. D. 61; 52 L. J. Ch. 92; 48 L. T. 33; 31 W. R. 98, C. A.; *on appeal, sub nom.* *BROOKS & Co. v. BLACKBURN BENEFIT SOCIETY* (1884), 9 App. Cas. 857, H. L.

Annotations:—*Reid. Lloyds Bank v. Chartered Bank of India, Australia & China* (1928), 97 L. J. K. B. 609. **Mentd.** *Re Guardian Permanent Benefit Bldg. Soc.* (1882), 23 Ch. D. 444, n.; *Wenlock v. River Dee Co.* (1883), 36 Ch. D. 675, n.; *Small v. Smith* (1884), 10 App. Cas. 119; *Walton v. Edge* (1884), 10 App. Cas. 33; *Wenlock v. River Dee Co.* (1887), 36 Ch. D. 474; *Wenlock v. River Dee Co.* (1887), 19 Q. B. D. 155; *Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301; *Neath Bldg. Soc. v. Luce* (1889), 43 Ch. D. 158; *Redman v. Rymer* (1889), 60 L. T. 385; *Re East & West India Dock Co.* (1891), 7 T. L. R. 623; *General Auction Estate & Monetary Co. v. Smith*, [1891] 3 Ch. 432; *Portsea Island Bldg. Soc. v. Barclay*, [1895] 2 Ch. 298; *Re Wrexham, Mold & Connah's Quay Ry.*, [1899] 1 Ch. 440; *Re Johnston Foreign Patents Co., Re Johnston Die Press Co., Re Johnston Engraving Co., J. P. Trust v. The Above Cos.*, [1904] 2 Ch. 234; *A.-G. v. De Winton*, [1906] 2 Ch. 106; *Bannatyne v. MacIver*, [1906] 1 K. B. 103; *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183; *Reversion Fund & Insee. v. Maison Cosway*, [1913] 1 K. B. 364; *Sinclair v. Brougham*, [1914] A. C. 398; *Liggett (Liverpool) v. Barclays Bank*, [1928] 1 K. B. 48.

624. ——— **Acceptance of bad counter notice.**] — A railway co. served pltf. with notice to treat for the purchase of certain property, & pltf. served the co. with a counter notice requiring them to take certain other property as well as that comprised in the notice to treat. The solrs. of the co. wrote accepting the counter notice but the co. afterwards insisted on their right to take only the property comprised in the notice to treat. It having been found as a fact that the properties were separate & distinct, & that therefore the counter notice was bad:—**Held:** the acceptance of the bad counter notice by the solrs. could not bind the co. to take land which they were not otherwise compellable to take.—*TREADWELL v. LONDON & SOUTH WESTERN RY. Co.* (1884), 54 L. J. Ch. 565; 51 L. T. 894; 33 W. R. 272.

625. ——— **Delegation of authority.**] — *DEW v. METROPOLITAN RY. Co.* (1885), 1 T. L. R. 358, C. A.

——— **Direction to sheriff to seize goods in execution.**] — *See EXECUTION*, Vol. XXI., pp. 548, 549, Nos. 1234–1242.

626. **Acts of omission by solicitor.**] — A patentee,

PART IV. SECT. 2, SUB-SECT. 3.—A.
a. Extent of authority — Whether to authorise departure from limits.] — *WHITTIER v. HANDS* (1860), 19 U. C. R. 172.—**CAN.**

r. — Contract for sale of land.] — The solr. of a party has not, as such, any authority to contract for the sale

of his client's lands.—*CAMERON v. BROOKE* (1869), 15 Gr. 693.—**CAN.**

t. — — — — —] — *PAW v. MOPHEE* (1917), 50 N. S. R. 448; 33 D. L. R. 781.—**CAN.**

a. — To instruct sheriff to seize goods.] — An attorney has no implied authority to give instructions to a

sheriff to seize any particular goods.—*WALLBRIDGE v. HALL, WALLBRIDGE v. YEOMANS* (1887), 4 Man. L. R. 341.—**CAN.**

b. — Whether to grant leases.] — A law-agent, even though he may be employed to collect the rents & attend to the repairs of a property, has no

acting through his solr., assigned the sole benefit of his patent. The solr. neglected to register the assignment, & the patentee proceeded to assign the benefit of his patent to other persons. After bill filed the deed was registered:—*Held*: he was bound by the act of his solr., & could not take advantage of his omission.—*HASSALL v. WRIGHT* (1870), L. R. 10 Eq. 509; 40 L. J. Ch. 145; 18 W. R. 821.

Annotations:—*Mentd.* *Ihlee v. Henshaw* (1886), 55 L. J. Ch. 273; *New Ixion Tyre & Cycle Co. v. Spilsbury*, [1898] 2 Ch. 137.

B. Authority to Receive Payment for Client.

(a) In General.

627. General rule.—It is well settled that it is not within the ordinary business of a solr. to receive purchase-money belonging to his client or money due to him on mtge. nor to receive money from him for the purpose of investment generally, & one partner is not liable for the misapplication of money so received by another without his privity. *Secus*, when the money is received for the purpose of being invested on a particular security.—*BOURDILLON v. ROCHE* (1858), 27 L. J. Ch. 681; 31 L. T. O. S. 264; 6 W. R. 618.

Annotations:—*Expld.* *Eager v. Barnes & Bridger* (1862), 7 L. T. 408. *Distd.* *St. Aubyns v. Smart* (1868), 3 Ch. App. 646. *Appld.* *Plumer v. Gregory* (1874), L. R. 18 Eq. 621. *Distd.* *Biggs v. Bree* (1881), 51 L. J. Ch. 64.

628. Receipt of solicitor receipt of client.—*STROWBRIDGE & ARCHER'S CASE* (1613), Godb. 217; 78 E. R. 132.

629. Necessity for express authority.—*R. v. SAVAGE* (1729), 1 Barn. K. B. 147; 94 E. R. 102.

630. —Where a pltf.'s attorney receives a sum of money from deft. it is incumbent on pltf. to show that the receipt was without his authority; otherwise it is money paid to his use.—*VORLEY v. GARRAD* (1834), 2 Dowl. 490.

631. Whether general authority to take proceedings sufficient.—A general written authority by a foreigner & his wife resident abroad, to a solr. in this country, to take all necessary measures for obtaining payment to the wife of a legacy, which had been paid into ct. under Legacy Duty Act, 1796 (c. 52):—*Held*: upon the petition of the husband & wife, to authorise payment to the solr.—*Ex p. DE BEAUMONT* (1849), 13 Jur. 354.

632. —A general authority from a party out of the jurisdiction to his solrs., to take any necessary proceedings for obtaining payment of his share of the fund in the suit out of ct.:—*Held*: on petition, not to authorise payment of it to the solrs.—*WADDILOVE v. TAYLOR* (1849), 18 L. J. Ch. 406; 14 L. T. O. S. 127; 13 Jur. 1023.

Delegation of authority.—*See AGENCY*, Vol. I., p. 390, No. 936.

general authority to grant leases on behalf of his employer. The existence of such an authority must be proved by the person who requires to found upon it.—*DANISH DAIRY CO., LTD. v. GILLESPIE*, [1922] S. C. 656; 59 So. L. R. 530; [1922] S. L. T. 487.—*SCOT*.

PART IV. SECT. 2, SUB-SECT. 3.—B. (a).

629 i. Necessity for express authority.—A power of attorney or other written authority is necessary to authorise the payment of money out of ct. to the solr. even though the parties to whom it is coming are numerous, & not resident in America.—*SWAN v. MARMORA IRON WORKS CO.* (1867), 2 Ch. Ch. 155.—*CAN*.

629 ii. —The retainer of an attorney or solr. to collect a demand, & to take such proceedings as he may

deem proper to effect this object, gives him authority to receive the amount before or after suit, & to discharge effectually the party making the payment, unless the client restricts or terminates the authority given to his attorney or solr.—*MOODY v. TYRRELL* (1875), 6 P. R. 313.—*CAN*.

629 iii. —*McMULLEN v. POLLEY* (1886), 11 O. R. 702.—*CAN*.

629 iv. —*Re H.* (1900), 20 C. L. T. 140.—*CAN*.

629 v. —In the absence of legal proceedings to enforce a mtge. security, there is nothing in the mere relation of solr. & client from which an authority may be implied to the solr. to receive interest or principal due the client on the mtge., even though the solr. arranged the mtge. loan. The solr. must have either express authority for the purpose, or the course of dealing between the

Receipt of mortgage debt.—*See MORTGAGE*, Vol. XXXV., pp. 384, 604, 605, Nos. 1272, 3431–3436. **Authority to receive tender.**—*See AGENCY*, Vol. I., pp. 324, 325, Nos. 415–420.

(b) Evidence of Authority—Production of Deed.

See, now, Law of Property Act, 1925 (c. 20), s. 69.

633. General rule.—The possession of the executed conveyance, with the signed receipt for the consideration money indorsed is not in itself an authority to the solr. of the vendor to receive the purchase-money (*LORD CHELMSFORD, C.*).

A solr. is not by virtue of his office entitled to receive purchase-moneys, even though he may have possession of the deed of conveyance (*TURNER, L.J.*).—*VINEY v. CHAPLIN* (1858), 2 De G. & J. 468; 27 L. J. Ch. 434; 31 L. T. O. S. 143; 4 Jur. N. S. 619; 6 W. R. 562; 44 E. R. 1071, L. C. & L. JJ.

Annotations:—*Appld.* *Bourdillon v. Roche* (1858), 27 L. J. Ch. 681. *Expld.* *Dundonald v. Masterman* (1869), L. R. 7 Eq. 504. *Consd.* *Essex v. Daniell*, *Daniell v. Essex* (1875), L. R. 10 C. P. 538. *Follid.* *Re Shanks, Ex p. Swinbanks* (1879), 11 Ch. D. 525. *Consd.* *Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387. *Reid.* *St. Aubyns v. Smart* (1867), L. R. 5 Eq. 183; *Plumer v. Gregory* (1874), L. R. 18 Eq. 621; *Re Hetling & Merton's Contract*, [1893] 3 Ch. 269; *A.-G. v. Odell* (1905), 92 L. T. 621. *Mentd.* *Gordon v. James* (1885), 53 L. T. 641.

634. Purchaser not obliged to pay solicitor.—*Conveyancing Act*, 1881 (c. 41), s. 56, does not authorise vendors who are trustees with a power of sale to require the purchaser to pay the purchase-money to their solr. on production of the deed of conveyance duly executed in cases where before the Act they could not have required the purchaser to pay the purchase-money to their solr. under a special authority.

Trustees of real estate with a power to sell & give receipts, sold the estate. The purchasers required that the vendors should attend in person to receive the purchase-money, or should authorise the purchasers to pay it into a bank to the joint account of the vendors. The vendors insisted that the money should be paid to their solr. on his producing the conveyance duly executed. They gave no special reason why the money should be paid to the solr., but relied on *Conveyancing Act*, 1881 (c. 41), s. 56:—*Held*: sect. 56 had no application, & the purchasers had a right to insist on their requisition.—*Re BELLAMY & METROPOLITAN BOARD OF WORKS* (1883), 24 Ch. D. 387; 52 L. J. Ch. 870; 48 L. T. 801; 47 J. P. 550; 31 W. R. 900, C. A.

Annotations:—*Appld.* *Re Flower & Metropolitan Board of Works, Re Flower & Same* (1884), 27 Ch. D. 592. *Consd.* *Re Hetling & Merton's Contract*, [1893] 3 Ch. 269. *Reid.* *Day v. Woolwich Equitable Bldg. Soc.* (1888), 40 Ch. D. 491. *Mentd.* *Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259.

parties must have been such as to necessarily imply such an authority; & the onus of establishing that is upon the mtgor.—*FOREMAN v. SREELY* (1902), 2 N. B. Eq. Rep. 341; 22 C. L. T. 67.—*CAN*.

629 vi. —*OUTHBERT v. McALEER* (1915), 34 N. Z. L. R. 942.—*N.Z.*

c. Receipt of mortgage loan from mortgagee—On behalf of mortgagor.—*BROCKBANK v. HOLMES* (1900), 20 C. L. T. 98.—*CAN*.

d. Right to insist on receiving judgment money.—When a solr. has recovered a judgment on behalf of a client, he has a right to insist on payment of the amount thereof to himself, & to issue execution in default of payment, & this although tendered a cheque payable to the client for the amount.—*KNOWLTON v. FAUQUIER*, 11 C. L. T. Occ. N. 327; 12 C. L. T. Occ. N. 32.—*CAN*.

Sect. 2.—Authority of solicitor to bind client: Sub-sect. 3, B. (b), (c) & (d), C. & D.]

635. Solicitor must be acting for party to be charged.]—A solr. producing a deed containing a receipt must in order to discharge a person paying him be acting for the person sought to be charged & having the deed in his office is not equivalent to production of it.—*DAY v. WOOLWICH EQUITABLE BUILDING SOCIETY* (1888), 40 Ch. D. 491; 58 L. J. Ch. 280; 60 L. T. 752; 37 W. R. 461.

*Annotations:—*Consd. *Re Hetling & Merton's Contract*, [1893] 3 Ch. 269. *Distd. King v. Smith*, [1900] 2 Ch. 425.

636. —.]—The production by vendor's solr. of a conveyance executed by the attorney of a trustee, acting under a general power, & not specially empowered to receive the money, is not a sufficient authority to the purchaser, under Conveyancing Act, 1881 (c. 41), s. 56 (1) & Trustee Act, 1888 (c. 59), s. 2 (1), to pay to the solr. the portion of his purchase-money which is payable to the trustee in question. The solr. for that purpose must be authorised by the trustee himself to produce the deed.—*Re HETLING & MERTON'S CONTRACT*, [1893] 3 Ch. 269; 62 L. J. Ch. 783; 69 L. T. 266; 42 W. R. 19; 9 T. L. R. 553; 37 Sol. Jo. 617; 2 R. 543, C. A.

*Annotations:—**Reid. Bennett v. Stone*, [1903] 1 Ch. 509; *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648. *Mentd. Re London Corp'n. & Tubb's Contract*, [1894] 2 Ch. 524; *Re Wilsons & Stevens' Contract*, [1894] 3 Ch. 546; *Re Strafford & Maples*, [1896] 1 Ch. 235; *Re Woods & Lewis' Contract*, [1898] 1 Ch. 433; *Re Pelly & Jacob's Contract* (1899), 80 L. T. 45.

637. —.]—Two trustees advanced money on a mtge. of realty. S., one of the trustees, paid the money to E., a solr., who produced to him the mtge. deed executed by K. as the mtgor. The deed, which contained the usual receipt for the money in the body of it, was handed over by E. to S., who retained it. K., who was not a man of much education, & employed E. from time to time in relation to his property, & had implicit confidence in E., had signed the deed on his advice but did not know that it was a mtge. & had not instructed E. to obtain a mtge. E. misappropriated the money & absconded. On discovery of the fraud K. brought an action against the trustees to set aside the mtge.:—*Held*: in the circumstances K. was estopped by his conduct from denying that the mtge. was valid, & that E. had authority to receive the mtge. money.—*KING v. SMITH*, [1900] 2 Ch. 425; 69 L. J. Ch. 598; 82 L. T. 815; 16 T. L. R. 410.

*Annotation:—**Mentd. Howatson v. Webb*, [1907] 1 Ch. 537.

638. What amounts to production of deed — Possession of deed in office.]—*DAY v. WOOLWICH EQUITABLE BUILDING SOCIETY*, No. 635, *ante*.

(c) Payment by Cheque, etc.

639. Payment by cheque—Necessity for special authority.]—A solr. who is authorised to accept a tender of mtge. money on behalf of his client is not at liberty to accept a banker's cheque, & tender of a cheque by the mtgor. to the solr. is accordingly insufficient.—*BLUMBERG v. LIFE INTERESTS & REVERSIONARY SECURITIES CORPN.*, [1897] 1 Ch. 171; 66 L. J. Ch. 127; 75 L. T. 627; 45 W. R. 246; 41 Sol. Jo. 130; *affd.*, [1898] 1 Ch. 27; 67 L. J. Ch. 118; 77 L. T. 506, C. A.

*Annotations:—**Reid. Johnston v. Boyes*, [1899] 2 Ch. 73; *Bradford v. Price* (1923), 92 L. J. K. B. 871.

640. — Good payment when cheque honoured.]

PART IV. SECT. 2, SUB-SECT. 3.— B. (c).

e. Authority to receive repayment of mortgage principal.]—*MCM POLLEY* (1887), 13 O. R. 299.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 3.— B. (d).

f. Authority of managing clerk to withdraw writ of execution.]—Although an execution creditor or his solr.,

—Deft. purchased copyhold land in pltf.'s manor, & was admitted by O., who had been appointed by the steward of the manor as his deputy to admit deft. O. also acted as deft.'s attorney in completing the purchase. Nine days afterwards deft. gave O. a cheque for £87 10s. 8d., viz., £78 15s. for the lord's fine, £4 11s. 8d. steward's fees, & £4 4s. O.'s own charges as deft.'s solr. This cheque was crossed by deft., at the request of O. to O.'s bankers. The cheque was duly paid by deft.'s bankers to O.'s bankers, & they retained the money in discharge of a debt due to them by O., who had overdrawn his account. In an action by pltf. against deft. to obtain payment of the fine due:—*Held*: there was evidence for the jury to support a finding that the payment of the fine to O. was a valid payment to the lord.—*BRIDGES v. GARRETT* (1870), L. R. 5 C. P. 451; 39 L. J. C. P. 251; 22 L. T. 448; 18 W. R. 815, Ex. Ch.

*Annotations:—**Expld. Pearson v. Scott* (1878), 9 Ch. D. 198. *Consd. Papè v. Westacott*, [1894] 1 Q. B. 272. *Distd. Re Heath, Parker & Brett* (1898), 43 Sol. Jo. 98. *Reid. Crossley v. Magniac*, [1893] 1 Ch. 594; *Hine v. Steamship Ince. Syndicate, The Netherholme, Glen Holme & Rydal Holme* (1895), 72 L. T. 79; *Walker v. Barker* (1900), 16 T. L. R. 393; *Robinson v. Marsh*, [1921] 2 K. B. 640; *Bradford v. Price* (1923), 92 L. J. K. B. 871.

641. Payment by settlement in account — Settlement not binding on client.]—Four exors. holding stock in their name directed their solr. to sell the stock. The solr., in the name of his firm, gave to a stockbroker whom the solr. had employed in Stock Exchange speculations directions to sell the stock. The stock was sold by the broker, & the solr. returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four exors. The sale was completed, & the stockbroker sent to the solr. a cheque for part of the purchase-money for the shares, & carried the balance on the transaction to the credit of the solr. in the account between them, which account was afterwards settled by a payment made to the stockbroker:—*Held*: under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solr., & though the solr. had from the exors. authority to receive the purchase-money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the exors. for the balance.—*PEARSON v. SCOTT* (1878), 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796; *sub nom. PIERSON v. SCOTT*, 47 L. J. Ch. 705.

*Annotations:—**Consd. Papè v. Westacott*, [1894] 1 Q. B. 272. *Reid. Hine v. Steamship Ince. Syndicate, The Netherholme, Glen Holme & Rydal Holme* (1895), 72 L. T. 79; *Walker v. Barker* (1900), 16 T. L. R. 393; *Bradford v. Price* (1923), 92 L. J. K. B. 871. *Mentd. Blackburn v. Mason* (1893), 68 L. T. 510; *Anderson v. Sutherland* (1897), 13 T. L. R. 163.

(d) Other Cases.

642. Solicitor with conduct of sale by court— Authority to receive purchase-money for payment in.]—It is the duty of the solrs. of the party having the conduct of the sale to pay the deposit into ct. for the auctioneer.—*BIGGS v. BREE* (1881), 51 L. J. Ch. 64; 45 L. T. 648; 30 W. R. 132; *affd.* (1882), 51 L. J. Ch. 203; 46 L. T. 8; 30 W. R. 278, C. A.

*Annotations:—**Appld. Brown v. Farebrother* (1888), 58 L. J. Ch. 3. *Reid. Re Mitchell, Mitchell v. Mitchell* (1884), 54 L. J. Ch. 342.

643. —.]—By a judgment in a partition action it was ordered that hereditaments

after delivery of the writ to the sheriff, may withdraw the execution, or postpone the sale of the chattels seized under it, there is no implied power in the managing clerk of the

should be sold by pltf. by public auction in such way as he should think fit, & the purchase-money be paid into ct. The sale took place under conditions of sale which provided for the payment of the purchase-money at the office of the solrs. of the vendors, & which also contained a reference to a certificate in the partition action. The required deposit was paid by the purchaser to the auctioneers, who acknowledged the receipt & signed the memorandum of sale as "agents for the vendors." The auctioneers subsequently paid the balance of the deposit after deductions for costs to the solrs. for the vendors. The vendors now sought to recover this amount in an action against the auctioneers:—*Held*: inasmuch as the sale was under an order of the ct., the auctioneers had authority to pay the deposit to the solrs. of the vendors, & were not liable to refund.—*BROWN v. FAREBROTHER* (1888), 58 L. J. Ch. 3; 59 L. T. 822.

644. Payment by receiver to solicitor of plaintiff.]—A receiver held liable for money which he had paid pltf.'s solr. directing him to pay it into ct., which was never done.—*DELFOSE v. CRAWSHAY* (1834), 4 L. J. Ch. 32, L. C.

645. —.]—A judgment having been obtained against deft., & other actions having been commenced against her, a receiver of her property was appointed. The order appointing the receiver directed him to receive an annuity to which deft. was entitled, & in the first place to pay the sum of £1 per week to deft., & then to pay to pltf's. the amount of their judgment debt, & after satisfaction of such judgment debt to pay *pari passu* any debts owing by deft. to other creditors. The receiver paid the weekly sum to deft., but handed over the balance of the amount received by him to the solr. who had acted for pltf's. in the actions against deft., & who also acted as private solr. to the receiver himself. The solr. appropriated the money so paid to his own use:—*Held*: the receiver must refund the money paid to the solr., as he had not complied with the order directing him to pay the amounts received by him to pltf's.—*IND, COOPE & Co. v. KIDD* (1894), 63 L. J. Q. B. 726; 10 T. L. R. 603; 38 Sol. Jo. 651; 10 R. 528; *sub nom.* *IND, COOPE & Co., LTD. v. KIDD, AITCHESON & Co. v. SAME*, 71 L. T. 203.

C. Signature of Memorandum as Agent.

See CONTRACT, Vol. XII., pp. 156, 157, Nos. 1104–1114.

D. Receipt of Purchase-Money or Deposit on Sale.

646. Receipt of deposit as agent for vendor—Money held at vendor's disposition.]—On sale of premises by auction, the memorandum of agreement to purchase & sell was signed by the auctioneer as agent for the purchaser, & by the vendor's attorney, subscribing himself as "agent for S.S.," the vendor. Purchaser paid his deposit to the attorney, who gave a receipt, signed by himself as "agent for S.S." The sale going off through the vendor's default, & the deposit money not being returned:—*Held*: the purchaser could not bring an action of money had & received against the attorney, for he was not a stakeholder, but merely the vendor's agent, & payment of the deposit to him was payment to the vendor.—*BAMFORD v. SHUTTLEWORTH* (1840), 11 Ad. & El. 926; 118 E. R. 666.

Annotations:—*Distd. Wakefield v. Newton* (1844), 6 Q. B. 276. *Apld. Edgell v. Day* (1865), L. R. 1 C. P. 80. *Apprvd. Ellis v. Goulton*, [1893] 1 Q. B. 350.

solr. to do so, notwithstanding that the clerk is left in charge of the solr.'s office & professional business during the temporary absence of his em-

647. —.]—(1) Where a solr. acting for a vendor receives the deposit on the sale of an estate, the law will not imply, as in the case of an auctioneer, that he receives it as stakeholder. If he professes to receive it as agent for the vendor he is bound to pay it over to him on demand.

(2) In cases in which the solr. is acting for both parties . . . it is possible that he may hold the deposit as agent for both of them, & then he will be a stakeholder (*ERLE, C.J.*).—*EDGELL v. DAY* (1865), L. R. 1 C. P. 80; Har. & Ruth. 8; 35 L. J. C. P. 7; 13 L. T. 328; 12 Jur. N. S. 27; 14 W. R. 87.

Annotation:—As to (1) *Apprvd. Ellis v. Goulton*, [1893] 1 Q. B. 350.

648. —.]—On the sale of premises by auction the purchaser paid a deposit to the vendor's solr. as agent for the vendor. The sale went off through the default of the vendor, & the purchaser brought an action to recover the deposit from the solr.:—*Held*: the payment of the deposit to the solr. was equivalent to payment to the vendor, & the action could not be maintained.

When a deposit is paid by a purchaser under a contract for the sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor & purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the money to the person who paid it (*BOWEN, L.J.*).—*ELLIS v. GOULTON*, [1893] 1 Q. B. 350; 62 L. J. Q. B. 232; 68 L. T. 144; 41 W. R. 411; 9 T. L. R. 223; 4 R. 267, C. A.

Annotation:—*Refd. Archangel Saw Mills v. Baring & A.-G., Steam Saw Mills v. Baring & A.-G.* (1921), 37 T. L. R. 857.

649. Receipt of deposit as stakeholder—Liability to make good loss if parted with.]—On a contract for purchase a part of the purchase-money was paid as a "deposit" to the vendors' solr. who paid it away at the desire of the vendor without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mtgee. of the estate would not join in the conveyance without payment to him of the deposit. In a suit of the purchaser for specific performance the solrs. were declared liable to make good the money.—*WIGGINS v. LORD* (1841), 4 Beav. 30; 49 E. R. 248; *previous proceedings* (1838), 2 Jur. 786.

Annotation:—*Consd. Edgell v. Day* (1865), L. R. 1 C. P. 80.

650. —.]—*EDGELL v. DAY*, No. 647, *ante*.

651. —.]—*ELLIS v. GOULTON*, No. 648, *ante*.

652. Receipt of purchase-money as agent for vendor—Solicitor acting for both parties.]—A. purchased an estate from B., & on the completion, one solr. acted for both parties, & the purchase-money was paid into his hands. Afterwards, the purchaser was defeated by C., who had a paramount mtge. The purchaser presented a petition against the solr., asking payment by the solr. out of the purchase-money of the losses occasioned, or that he might indemnify petitioner. The petition was dismissed with costs, the ct. holding, first, that it had no jurisdiction to award compensation or damages in such a case, & secondly, that the money having come to the hands of the solr. as agent of the vendor, & not of petitioner, it could not interfere.—*Re HINTON, TYLEE v. WEBB* (1851), 14 Beav. 14; 18 L. T. O. S. 37; 15 Jur. 1023; 51 E. R. 192.

Solicitor with conduct of sale by court.]—See Nos. 642, 643, *ante*.

—*WHYTE v. NUTTING*, [1897] L. R. 241.—*IR.*

Sect. 2.—Authority of solicitor to bind client: Sub-sect. 4.]

SUB-SECT. 4.—NOTICE TO SOLICITOR IMPUTED TO CLIENT.

See, now, Law of Property Act, 1925 (c. 20), s. 119. Notice generally, see AGENCY, Vol. I., pp. 610 et seq.; BANKRUPTCY, Vol. V., pp. 776, 778, 779, 782, 920, Nos. 6669, 6684–6689, 6710, 6714, 7524–7528; CHANCES IN ACTION, Vol. VIII., pp. 463, 464, Nos. 343–346; EQUITY, Vol. XX., pp. 310 et seq.; MORTGAGE, Vol. XXXV., p. 470, Nos. 2049–2053.

653. General rule.]—Notice to a solicitor is actual notice to the client.—TUNSTALL v. TRAPPES, TUNSTALL v. TASBURGH, RAWSON v. TASBURGH, GOSLING'S CASE (1830), 3 Sim. 301; 57 E. R. 1011.

Annotations:—Mentd. Barnes v. Raoster (1842), 1 Y. & C. Ch. Cas. 401; Bonham v. Keane (1861), 3 De G. F. & J. 318; Doswell v. Reece (1865), 13 L. T. 156.

654. —.]—Notice to a solr. is actual notice to his client.—ESPIN v. PEMBERTON (1859), 3 De G. & J. 547; 28 L. J. Ch. 311; 32 L. T. O. S. 345; 5 Jur. N. S. 157; 7 W. R. 221; 44 E. R. 1380, L. C.

Annotations:—Distd. Austin v. Tawney (1867), 15 W. R. 463. Follid. Bradley v. Riches (1878), 9 Ch. D. 189. Consd. Cave v. Cave (1880), 15 Ch. D. 639. Rejd. Eastham v. Wilkinson (1859), 33 L. T. O. S. 234; Mannors v. Mew (1885), 11 Ch. D. 725; Brown v. Stedman (1896), 40 Sol. Jo. 457; Davis v. Hutchings (1907), 96 L. T. 293.

655. —.]—The rule that a purchaser can rescind a contract of sale entered into by his agent on his behalf on the ground that the agent has received a secret commission from the vendor only applies where the agent has by reason of the receipt of the commission an interest conflicting with his duty to his principal.

Therefore, where one of the purchasers of land who acted as agent for all the purchasers in negotiating the purchase received a commission on the amount of the purchase-money from the vendor but his interest was to obtain the land as cheaply as possible:—*Held*: the purchasers were not entitled to rescind.

Knowledge of the solrs. acting for the purchasers in the matter, of the commission, such knowledge having been acquired by them while acting in the

matter binds the purchasers.—ROWLAND v. CHAPMAN, ROWLAND v. CORRIE, ROWLAND v. BRANDRETH (1901), 17 T. L. R. 669; 45 Sol. Jo. 691.

656. Rule restricted to hostile parties.]—The rule that notice to a solr. is notice to the client applies only as between parties dealing hostilely with each other.—AUSTIN v. TAWNEY (1867), 2 Ch. App. 143; 36 L. J. Ch. 339; 15 W. R. 463, L. C.

657. Whether restricted to same transaction.]—Whether notice to an attorney in one transaction shall be notice to him in another transaction must in all cases depend upon the circumstances.—MOUNTFORD v. SCOTT (1823), Turn. & R. 274; 37 E. R. 1105, L. C.

Annotations:—Expld. Hargreaves v. Rothwell (1836), Donnelly, 38. Consd. Perkins v. Bradley (1842), 1 Hare, 219; Fuller v. Benett (1843), 2 Hare, 394. Rejd. Kennedy v. Green (1834), 3 My. & K. 699; Bulpett v. Sturges (1870), 22 L. T. 739.

658. —.]—B., a solr., not having delivered his bill of costs, represents to his client that he is indebted to him in a certain sum, for which he induces him to execute a bond to W., to whom B. is indebted in the same amount, B. having acted as W.'s solr.; W. held to be affected with B.'s knowledge in the transaction.—HARRISON v. WILTSHIRE (1835), 4 L. J. Ch. 260.

659. —.]—Where one transaction is closely followed by, & connected with another, or where it is clear that a previous transaction was present to the mind of a solr., when engaged in another transaction, there is no ground for the distinction, by which the rule, that notice to the solr. is notice to the client, has been restricted to the same transaction.—HARGREAVES v. ROTHWELL (1836), 1 Keen, 154; Donnelly, 38; 5 L. J. Ch. 118; 48 E. R. 265.

Annotations:—Apld. Clough v. French (1812), 6 Jur. 636. Consd. Re Cousins (1886), 31 Ch. D. 671. Rejd. Fuller v. Benett (1843), 2 Hare, 394; Bulpett v. Sturges (1870), 22 L. T. 739.

660. —.]—When various transactions are wound up by an absolute conveyance of the property to which they relate, a subsequent mtgee. of the property is not fixed with constructive notice of transactions anterior to & ending with the sale, by the fact of his having employed, as solr., the

PART IV. SECT. 2, SUB-SECT. 4.

653 i. General rule.]—It is settled law that notice to a solr. in the transaction is notice to those for whom he is acting.—COMMERCIAL BANK OF CANADA v. COOKE (1862), 9 Gr. 524.—CAN.

653 ii. —.]—Where such motives exist in the mind of a solr. as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is, that it was withheld; & the uncommunicated knowledge of the solr. is not imputed to the client as notice.—CAMERON v. HUTCHISON (1869), 16 Gr. 526.—CAN.

653 iii. —.]—GIBBONS v. WILSON (1889), 17 O. R. 290; 17 A. R. 1.—CAN.

653 iv. —.]—Knowledge of the solicitor is knowledge of client.—CLARK v. KENDALL (1896), 4 B. C. R. 503.—CAN.

653 v. —.]—BARTRAM v. GRICE (1912), 22 O. W. R. 191; 3 O. W. N. 1296; 4 D. L. R. 682.—CAN.

653 vi. —.]—Notice to the solr. is notice to the client, but the rule does not extend to cases in which the solr. acts for third parties.—GERRARD v. O'REILLY (1843), 2 Con. & Law. 165; 3 Dr. & War. 414.—IR.

653 vii. —.]—RICHARDS v. BRERETON (1853), 5 Ir. Jur. 336.—IR.

653 viii. —.]—TUCKER v. HENZILL (1854), 4 I. Ch. R. 513.—IR.

653 ix. —.]—On A.'s marriage, her settlement, of which B. was a trustee, was prepared by K., a solr., who afterwards, on B.'s marriage with C., prepared their settlement, whereby C.'s property was not settled; but it was stated that K. had been consulted by her:—*Held*: C. had notice of A.'s settlement.—MOORE v. MAHON (1857), 9 Ir. Jur. 277.—IR.

653 x. —.]—SANKY v. ALEXANDER (1874), 9 I. R. Eq. 259.—IR.

653 xi. —.]—Where a solr. acts for a client under a power of attorney, the knowledge of the solr. is not mere constructive notice to the client, which, under Land Transfer Act, 1885, s. 189, has not the effect of actual fraud, but the rule applies that the principal cannot retain a benefit obtained for him by the fraud of the agent.—LOCHER v. HOWLETT (1895), 13 N. Z. L. R. 584.—N.Z.

g. Exception to rule.]—Though the rule of the ct. is, that notice to the solr. of a purchaser is notice to the client of any question affecting the validity of the title, this does not apply where the information he obtains from the vendor is such as it may be said shows that the vendor & solr. were conspiring together to effect a fraud.—DRIFFILL v. GOODWIN (1876), 23 Gr. 431.—CAN.

h. —.]—The knowledge of a solr. that a vendor of lands holds it only as trustee will not be imputed to his client, the purchaser, merely because the client employs a clerk in the solr.'s office to prepare the necessary transfer & search the title, when the solr. is not actually informed of the transaction, & the clerk knows nothing of the trust.—NORTH WEST CONSTRUCTION CO. v. VALLE (1906), 16 Man. L. R. 201.—CAN.

k. —.]—The ct. will not presume notice to have been given to his client by an attorney where such notice would involve a confession by the attorney of a fraud practised by himself.—HORMASJI TEMULJI v. MANKUARBHAI (1875), 12 Bom. 262.—IND.

l. —.]—NIXON v. HAMILTON (1838), 1 I. Eq. R. 46; 2 Dr. & Wal. 364.—IR.

657 i. Whether restricted to same transaction.]—GREEN v. FLETCHER (1887), 8 N. S. W. Eq. 58.—AUS.

657 ii. —.]—Re HALL'S ESTATE, HALL, ETC., PETITIONERS (1893), 31 L. R. Ir. 416.—IR.

657 iii. —.]—SMITH v. ESSERY & BROWN (1891), 9 N. Z. L. R. 449.—N.Z.

m. Mortgage prepared by partner of trustee-solicitor.—Whether notice imputed to trustees.]—BROWN v. SWEET (1882), 7 A. R. 725.—CAN.

person who acted as solr. & trustee in those transactions.—*EDGEUMBE v. STRANGER* (1837), 1 Jur. 400.

661. —.]—A party employed the same solr. to bring an action for an alleged debt against the personal representatives of an intestate as another creditor had employed to obtain the usual decree in a creditor's suit against the same parties. The ct. held that the party bringing the action must be considered as having received notice of such decree & granted an injunction without costs to restrain him from proceeding with his action.—*CLOUGH v. FRENCH* (1842), 6 Jur. 636.

662. —.]—The employment of a solr. to do a mere ministerial act, such as the procuring the execution of a deed, does not so constitute him an agent as to affect his client with constructive notice of matters within the knowledge of the solr.

W. being about to take a transfer of a mtge., employed P. & L. as his solrs. to investigate the title & conduct the negotiation; but C., who was the solr. to the mtgors., was employed to procure the execution by W. of the deeds of transfer. C. was aware of a judgment debt registered against the mtgors., but did not communicate the fact to W. W. afterwards advanced a further sum of money, & took a further charge. In a suit for foreclosure:—*Held*: the employment of C. did not constitute him the agent of W. so as to affect W. with constructive notice of the judgment debt.—*WYLLIE v. POLLEN* (1863), 3 De G. J. & Sm. 596; 2 New Rep. 500; 32 L. J. Ch. 782; 9 L. T. 71; 11 W. R. 1081; 46 E. R. 767, L. C.

Annotation:—*Mentd.* *Blackburn, Low v. Vigors* (1887), 57 L. J. Q. B. 114.

663. —.]—N., a solr., in 1864, acted for M., one of the *cestuis que trust*, under a settlement on the occasion of certain shares, subject to the settlement trusts being transferred to him, & then knew that the shares were affected by the trusts. Between 1864 & 1871, N. on several occasions lent money to M. on the security of the shares, which were transferred & retransferred from one to the other on the occasion of loans & repayments. In 1871 N. acted as solr. to the trustees of the settlement, on their wishing to reinvest their trust fund, & he then read a part of the deed relating to the powers of investment, but no other part. He subsequently, & as he swore, without knowledge that the trusts of the settlement affected the shares, advanced money to M. on them, & obtained a transfer to himself:—*Held*: he was not affected with constructive notice of the trusts.—*BRIGGS v. MASSEY* (1880), 42 L. T. 49.

—Mortgage transactions.]—*See* MORTGAGE, Vol. XXXV., p. 470, Nos. 2049–2053.

664. Must be given on pending matter.]—Communications to a solr., to make them notice to a client, must be made in respect of some pending matter, & be such that the solr. was bound to communicate them to the client; the mere circumstance of being the ordinary solr. of a party amounts to nothing (*LORD CRANWORTH, C.*).—*HOOPER v. COOKE* (1856), 25 L. J. Ch. 467; 27 L. T. O. S. 178; 2 Jur. N. S. 527, L. C.

665. Solicitor acting for both parties—Knowledge of intentions of borrower not imputed to lender.]—Where a solr. acts for both parties to a loan, although knowledge of important facts known to him must be imputed to both such parties, knowledge of the intentions of the borrower, as to the disposal of the money, cannot be so imputed.—*Re COLEMERIE* (1865), 1 Ch. App. 128; 14 W. R. 318; *sub nom.* *Re COLEMERIE, Ex p. COLEMERIE*, 35 L. J. Boy. 8; 13 L. T. 621; 12 Jur. N. S. 38, L. C.

Annotations:—*Reid.* *Re A Disputed Adjudication, Ex p. Royce* (1866), 14 L. T. 418; *Re Middleton, Ex p. Allen &*

Page (1870), 19 W. R. 274. *Mentd.* *Re Nurse, Ex p. Foxley* (1868), 3 Ch. App. 515; *Re Sinclair, Ex p. Chaplin* (1884), 26 Ch. D. 319.

—.]—*See* EQUITY, Vol. XX., pp. 312–316, Nos. 626–647.

666. Solicitor stating intention not to communicate with client.]—Though notice to a solr. will in general be binding on his client, yet, if the solr. express to the person giving the notice his intention of concealing the notice from his client, the client will not be bound by the notice.—*SHARPE v. FOY* (1868), 4 Ch. App. 35; 19 L. T. 541; 17 W. R. 65, L. JJ.

Annotations:—*Reid.* *Rolland v. Hart* (1871), 40 L. J. Ch. 701; *Cave v. Cave, Chaplin v. Cave* (1880), 42 L. T. 730. *Mentd.* *Bateman v. Faber* (1897), 77 L. T. 576.

667. Signature of order by solicitors—Whether notice of contents of order to client.]—*UNITED TELEPHONE CO. v. DALE* (1884), 25 Ch. D. 778; 53 L. J. Ch. 295; 50 L. T. 85; 32 W. R. 428.

Annotations:—*Reid.* *D. v. A.*, [1900] 1 Ch. 484; *Re Launder, Launder v. Richards* (1908), 98 L. T. 554. *Mentd.* *Dunlop Pneumatic Tyre Co. v. Moseley*, [1904] 1 Ch. 612.

668. Disclosure of material fact to solicitor of underwriter—Not notice to underwriter.]—A mere disclosure of the existence of such arrangement [no recourse against lightermen] to deft.'s solr. is not notice of it to deft.—*TATE v. HYSLOP* (1885), 15 Q. B. D. 368; 54 L. J. Q. B. 592; 53 L. T. 581; 1 T. L. R. 532; 5 Asp. M. L. C. 487, C. A.

Annotations:—*Reid.* *The Bedouin*, [1894] P. 1. *Mentd.* *Price v. Union Lighterage Co.* (1903), 8 Com. Cas. 155.

669. Insertion of advertisement for creditors—Whether knowledge of solicitor notice to executors.]

—This was an action by a legatee under the will of F., who died in 1870, asking for payment of her legacy, which was directed to be raised out of real estate, & the non-raising of which she alleged to be a breach of trust, & the execution of the trusts of F.'s will. There had originally been three exors. & trustees of F.'s will; one of these, J., still survived, & was a party to the action. O., another of the exors., had died in 1878. The exors. of O. were made defts., but claimed to be dismissed on the ground that in Oct. 1879, they had issued advertisements for claims under Law of Property Amendment Act, 1859 (c. 35), s. 29, that no claim had been made for the legacy, & they had distributed the whole of O.'s estate. Pltf. insisted that they ought to be retained as defts.: (a) because J., the surviving trustee, had acted as solr. for the exors. of O., & had committed a breach of trust in not seeing that pltf.'s legacy was raised, & that the exors. of O. had constructive notice of this breach of trust when they distributed the estate; (b) because pltf. had a right to follow O.'s estate in the hands of the beneficiaries, & his exors. ought to be defts. in order that an account might be had against his estate:—*Held*: under the circumstances no notice of pltf.'s claim could be brought home to the exors. of O.—*Re FREWEN, FREWEN v. FREWEN* (1889), 60 L. T. 953.

670. Notice by incumbrancer to solicitor of trustees—Not notice to trustees—Unless solicitor expressly authorised to receive notice.]—Notice by an incumbrancer upon a fund to the solr. for the trustee of that fund is not notice to the trustee unless the solr. is expressly authorised to receive such notice.—*SAFFRON WALDEN SECOND BENEFIT BUILDING SOCIETY v. RAYNER* (1880), 14 Ch. D. 406; 49 L. J. Ch. 465; 43 L. T. 3; 28 W. R. 681, C. A.

Annotations:—*Distd.* *Re Kellock* (1887), 56 L. T. 887; *Rowland v. Chapman, Rowland v. Corrie, Rowland v. Corrie, Rowland v. Brandreth* (1901), 17 T. L. R. 669. *Reid.* *Whittingstall v. King* (1882), 46 L. T. 520; *Hester v. Hester* (1887), 34 Ch. D. 607; *Lloyds Bank v. Pearson*, [1901] 1 Ch. 866.

Sect. 2.—Authority of solicitor to bind client: Sub-sect. 4. Sect. 3: Sub-sects. 1 & 2, A. (a).]

671. ———.]—Appcts. claimed priority for their charge on the ground of notice, the alleged notice consisting of a letter not from them or their solrs., but from the solrs. of pltf. in the action to the solrs. of the trustees of the will under which A. took, in which appcts. were mentioned as incumbancers, & also of a correspondence between their solrs. & one of the firm of solrs. acting for the trustees, in which their solrs. mentioned that they were instructed for mtgees. of A., but did not say who those mtgees. were, or give any further information. These statements appeared never to have come to the knowledge of the trustees themselves:—*Held*: the solrs. of the trustees were not their agents for receiving notice of incumbrances.—*ARDEN v. ARDEN* (1885), 29 Ch. D. 702; 54 L. J. Ch. 655; 52 L. T. 610; 33 W. R. 593.

Annotations:—*Reid. Re Dallas*, [1904] 2 Ch. 385; *Ipswich Permanent Money Club v. Arthy*, [1920] 2 Ch. 257. *Mentd. Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727; *Gresham Life Assce. Soc. v. Crowther*, [1915] 1 Ch. 214.

Notice to solicitor as affecting priorities of mortgages.]—See MORTGAGE, Vol. XXXV., pp. 461 *et seq.*

SECT. 3.—TRANSACTIONS BETWEEN SOLICITOR AND CLIENT.

SUB-SECT. 1.—IN GENERAL.

672. General rule.]—Solrs., who were retained by O. to act for him in negotiating the purchase of a patent had previously obtained from the vendor of the patent a commission note under which they were to receive certain payments in the event of a purchaser being found by them; this note was shown to O. by the solrs. & remained in his possession some days previously to the contract for sale being entered into. O. purchased the patent, & the solrs. with his knowledge recovered payment from the vendor of £210 for commission. O. died, & the solrs. delivered their bill of costs to his exors., who on taxation sought to surcharge the solrs. with the £210 so received by them; the taxing master allowed the surcharge. On a summons to review this finding:—*Held*: (1) O.'s exors. were not entitled to treat the £210 paid by the vendor to the solrs. as money received to O.'s use, or in any way to surcharge them; (2) the rule applied in *O'Brien v. Lewis*, No. 691, *post*, did not govern the present case, as the commission was paid, not by the client, but by the vendor; but the solrs., had made a bargain which was not merely improper, but such as to place them in a position in which it was impossible for them to fulfil the duties which they had undertaken to both vendor & purchaser of the patent.

All transactions between solr. & client which result in the solr.'s obtaining a benefit for himself are subjected by cts. of law to strict scrutiny when called in question by the client & are treated as imposing obligations on the solr. of greater or less stringency (*STIRLING, L.J.*).—*Re HASLAM & HIER-*

EVANS, [1902] 1 Ch. 765; 71 L. J. Ch. 374; 86 L. T. 663; 50 W. R. 444; 18 T. L. R. 461; 46 Sol. Jo. 381, C. A.

673. Nature of relationship—Not that of trustee & cestui que trust.]—The relationship of solr. & client is not of the fiduciary nature of that of trustee & cestui que trust.—*Re HINDMARSH* (1860), 1 Drew. & Sm. 129; 1 L. T. 475; 8 W. R. 203; 62 E. R. 327.

Annotations:—*Consd. Watson v. Woodman* (1875), L. R. 20 Eq. 721. *Reid. Burdick v. Garrick* (1870), 5 Ch. App. 233; *Bean v. Wade* (1885), 2 T. L. R. 157; *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242; *Cheese v. Keen*, [1908] 1 Ch. 245. *Mentd. Re Friend, Friend v. Friend* (1897), 66 L. J. Ch. 737; *Henry v. Hammond* (1913), 108 L. T. 729.

674. Profits must be confined to professional remuneration.]—*TYRRELL v. BANK OF LONDON*, No. 1109, *post*.

675. Duty to make complete disclosure.]—In some cases, such as contracts between solr. & client, there is a duty to make entire disclosure.—*DAVIES v. LONDON & PROVINCIAL MARINE INSURANCE CO.* (1878), 8 Ch. D. 469; 38 L. T. 478; 26 W. R. 794; *sub nom. LONDON & PROVINCIAL MARINE INSURANCE CO. v. DAVIES, DAVIES v. LONDON & PROVINCIAL MARINE INSURANCE CO.*, 47 L. J. Ch. 511.

Annotations:—*Apld. Moody v. Cox & Hatt*, [1917] 2 Ch. 71. *Reid. Seaton v. Heath, Seaton v. Burnand* (1899), 68 L. J. K. B. 631; *National Provincial Bank of England v. Glanusk*, [1913] 3 K. B. 335. *Mentd. Whitmore v. Farley* (1880), 43 L. T. 192; *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72.

676. ———.]—*MOODY v. COX & HATT*, No. 501, *ante*.

677. Right of client to knowledge of solicitor's position.]—*Re HILL* (1893), 96 L. T. Jo. 35; *sub nom Re HILL, Ex p. INCORPORATED LAW SOCIETY*, 10 T. L. R. 33, D. C.

678. Undue influence—Meaning of as between solicitor & client.]—*CASBORNE v. BARSHAM* (1839), 2 Beav. 76; 48 E. R. 1108.

Annotation:—*Mentd. Aylesford v. Morris* (1872), 37 J. P. 72.

679. ——— Transactions set aside.]—*RHODES v. BATE*, No. 700, *post*.

680. ———.]—On Mar. 13, 1888, a client instructed a solr. to act on his behalf in the completion of the purchase of a tea & coffee business for £500. A number of letters were written, & according to the solr.'s statement, between twenty & thirty interviews held, & other business done. On Mar. 31, 1888, the client & his solr. signed a memorandum of agreement that the bill of costs, without being made up to date, should be £42. The client was a gentleman's valet, & alleged that he acted in ignorance & under pressure in coming to the agreement:—*Held*: under the circumstances, the bargain was unfair & unreasonable, & must be set aside.—*MEARNS v. KNAPP* (1889), 37 W. R. 585.

681. Rules of evidence applicable.]—*JUDD v. OLLARD* (1859), 33 L. T. O. S. 268; 5 Jur. N. S. 755.

682. Duty of solicitor to keep diary.]—*Re SHANKS, Ex p. SWINBANKS* (1879), 11 Ch. D. 525; 40 L. T. 825; 27 W. R. 898, C. A.

Annotations:—*Reid. Gordon v. James* (1885), 30 Ch. D. 249. *Mentd. Re Cliffe, Ex p. Eatough* (1880), 42 L. T. 95; *Re Harrison, Ex p. Butters* (1880), 14 Ch. D. 265.

679 i. ——— Transactions set aside.]—*DEWAR v. SPARLING* (1871), 18 Gr. 633.—CAN.

681 i. Rules of evidence applicable.]—*Re AN ATTORNEY* (1879), 8 P. R. 102.—CAN.

n. Loan by solicitor.]—*REES v. WITROCK* (1858), 6 Gr. 418.—CAN.

o. Duty to account.]—The attorney must account for all the money received & the client pay his costs.—*Re ATTORNEYS* (1877), 41 U. C. R. 372.—CAN.

PART IV. SECT. 3, SUB-SECT. 1.

675 i. Duty to make complete disclosure.]—Where under the terms of an agreement drafted by a solr. for a client a benefit may arise to the solr. himself, it is his duty to point out clearly to the client all the legal consequences from which such benefit may result & if he fails to do so, the ct. will not allow him to hold the benefit.—*O'CONNOR v. RENTIER*, [1925] 1 D. L. R. 398; [1925] 1 W. W. R.

38.—CAN.

675 ii. ———.]—*HIGGINS v. JOYCE* (1845), 2 Jo. & Lat. 282.—IR.

678 i. Undue influence—Meaning of as between solicitor & client.]—All dealings between attorney & client, are anxiously scrutinised in equity, in order to protect the client from his own acts, done under the influence or ascendancy which an attorney acquires over him.—*BELLEW v. RUSSEL* (1890), 1 Ball. & B. 96, 107.—IR.

688. Attestation of warrant of attorney—Independent solicitor.]—Where a warrant of attorney has been attested on behalf of deft. by an attorney originally suggested by pltf. in order to render it valid it is necessary that deft. should be distinctly aware that he had the option of calling in another attorney.

Semble: in such a case it is not sufficient for pltf. to inform deft. that he must have an attorney present on his part, but he ought to inform him that such an attorney ought to be named & chosen by himself.—CAMERON v. BICKNELL (1841), Woll. 129.

SUB-SECT. 2.—GIFTS.

A. Made During Subsistence of Relationship.

(a) In General.

684. What constitutes relationship.]—GODDARD v. CARLISLE, No. 385, *ante*.

685. — Gratuitous service of solicitor—Resort to independent professional advice.]—In order to bring a case within the rule that a solr. can receive no gift or reward from his client, there must be clear & unequivocal evidence of the relationship between the parties, that advantage was taken of that relationship, & that what was given was a reward to the solr. for his services.

Where a bill was filed by the legal personal representative of a lady to set aside certain deeds executed by her in favour of her brother-in-law, a solr., & it appeared that he had never done or charged for anything in the course of the transactions as her solr.; that he had when necessary, resorted to other professional advice on her behalf, & that he had exercised no undue influence over her:—*Held:* the relationship between the parties was not sufficient to invalidate the deeds, & the bill must be dismissed with costs.—RICHARDS v. FRENCH (1870), 22 L. T. 327; 18 W. R. 636.

686. Presumption of undue influence—Ignorance of dower.]—It is an established rule in cts. of equity, that no gift or gratuity to an attorney, beyond his fair professional demands, made during the time that he continues to conduct or manage the affairs of the donor, shall be permitted to stand; & more especially if such gift or gratuity arises immediately out of the subject then under the attorney's conduct or management, & if the donor is at the time ignorant of the nature & value of the property so given.—MIDDLETON v. WELLES (1785), 4 Bro. Parl. Cas. 245; 2 E. R. 166, H. L.; *affg.* S. C. *sub nom.* WELLES v. MIDDLETON (1784), 1 Cox, Eq. Cas. 112, L. C.

Annotations:—*Apld.* Wood v. Downes (1811), 18 Ves. 120. *Consd.* Cheslyn v. Dalby, Dalby v. Cheslyn (1836), 2 Y. & C. Ex. 170; Jones v. Thomas (1837), 2 Y. & C. Ex. 498. *Apld.* Tomson v. Judge (1855), 3 Drew. 306. *Consd.* Morgan v. Higgins (1859), 1 Giff. 270. *Refd.* Hatch v. Hatch (1804), 9 Ves. 292; Morse v. Royal (1806), 12 Ves. 355; Ormond v. Hutchinson (1806), 13 Ves. 47; Edwards v. Meyrick (1842), 2 Hare, 60; Gibson v. Russell (1843), 2 Y. & C. Ch. Cas. 104; Durnell v. Corfield (1844), 1 Rob. Eccl. 51. *Mentd.* Wright v. Proud (1806), 13 Ves. 136; Hindson v. Weatherill (1854), 5 De G. M. & G. 301.

687. —.]—Difficulty in sustaining a transaction of bounty in the cases of guardian & ward, attorney & client, trustee & *cestui que trust*.—HATCH v. HATCH (1804), 9 Ves. 292; 1 Smith, K. B. 226; 32 E. R. 615, L. C.

Annotations:—*Apld.* Wood v. Downes (1811), 18 Ves. 120. *Consd.* Hunter v. Atkins (1834), 3 My. & K. 113; Cheslyn v. Dalby, Dalby v. Cheslyn (1836), 2 Y. & C. Ex. 170. *Apld.* Tomson v. Judge (1855), 3 Drew. 306. *Consd.*

Liles v. Terry, [1895] 2 Q. B. 679. *Apld.* Wright v. Carter, [1903] 1 Ch. 27. *Refd.* Edwards v. Meyrick (1842), 3 Hare, 60; Archer v. Hudson (1846), 15 L. J. Ch. 211; Hindson v. Weatherill (1853), 1 Sm. & G. 604; Wright v. Vanderplank (1856), 8 De G. M. & G. 133; Davies v. Davies (1863), 4 Giff. 417; Lyon v. Home (1868), L. R. 6 Eq. 655; Turner v. Collins (1871), 7 Ch. App. 329.

688. —.]—Bill to set aside leases, obtained by an agent & attorney from his principal, dismissed as to voluntary leases, being pure gifts; & no fraud, misrepresentation, etc., with costs as to some, intended as a provision upon & inducement to the marriage of pltf. without costs as to others the relation of the parties & circumstances upon general principles of public policy & utility justifying inquiry. Another lease was decreed to be delivered up, the verdict in an issue establishing that a full consideration was not paid.—HARRIS v. TREMENHEERE (1808), 15 Ves. 34; 33 E. R. 668, L. C.

Annotations:—*Consd.* Hunter v. Atkins (1834), 3 My. & K. 113; Tomson v. Judge (1855), 3 Drew. 306; Morgan v. Minett (1877), 6 Ch. D. 638. *Refd.* Nicol v. Vaughan (1834), 7 Bl. N. S. 395; Hindson v. Weatherill (1853), 1 Sm. & G. 604; O'Brien v. Lewis (1862), 4 Giff. 221; Re Coomber, Coomber v. Coomber, [1911] 1 Ch. 723.

689. —.]—By an indenture made between a client & his solr., the client, in consideration of £100 conveyed certain land to his solr. The solr., who had himself prepared the conveyance, alleged that it was a voluntary deed, & that no consideration had passed, the £100 being introduced to save the amount of stamp duty upon a voluntary instrument:—*Held:* the transaction could not be maintained; & solr. was declared a trustee for the representatives of the client.

There is certainly no rule in this ct. that a solr. may not purchase his client's property even while the relation subsists between them; but then such transactions are to be viewed with the utmost jealousy, & the *onus* is thrown upon the solr. to show that everything is perfectly fair, & that the vendor knew what he was doing, & that the full price was given, & of course, that no advantage was taken of the character of solr. (KINDERSLEY, V.-C.).—TOMSON v. JUDGE (1855), 3 Drew. 306; 3 Eq. Rep. 850; 24 L. J. Ch. 785; 25 L. T. O. S. 233; 1 Jur. N. S. 583; 3 W. R. 561; 61 E. R. 920.

Annotations:—*Consd.* Morgan v. Minett (1877), 6 Ch. D. 638. *Apld.* Wright v. Carter, [1903] 1 Ch. 27.

690. —.]—Influence arising from the professional relation between solr. & client will vitiate a gift from the latter to the former, but the effect of that influence may be removed by evidence.—*Re HOLMES' ESTATE*, WOODWARD v. HUMPAGE (1861), 3 Giff. 337; 5 L. T. 378; 8 Jur. N. S. 252; 66 E. R. 439.

Annotation:—*Refd.* Mitchell v. Homfray (1881), 8 Q. B. D. 587.

691. —.]—The law has laid down certain rules & scales of charges by which the services of a solr. are to be remunerated, & it is therefore imperative on the solr. not to bargain or permit his client to promise that any additional benefit should be given beyond the legal remuneration. A gift by the client to a solr. for services rendered during the existence of that relation between them is against public policy & therefore invalid.

A suit was instituted to recover a sum of £300 which had been retained by a firm of solrs. on the ground that the same was a gift in addition to their costs for services performed:—*Held:* notwithstanding the lapse of nine years, the gift was invalid, & therefore pltf. was entitled to recover.—O'BRIEN v. LEWIS (1863), 32 L. J. Ch. 569; 8

PART IV. SECT. 3, SUB-SECT. 2.—A. (a).

p. General rule.]—A solr. cannot accept a gift from his client while the relationship of solr. & client subsists between them.—O'HEA v. BLACK (1894), 20 V. L. R. 505.—AUS.

Sect. 3.—Transactions between solicitor and client:
Sub-sect. 2, A. (a) & (b), B. & C.; sub-sect. 3, A.]

L. T. 179; 27 J. P. 244; 9 Jur. N. S. 528; 11 W. R. 318, L. C.

Annotations:—*Distd.* Haslam v. Hier-Evans, [1902] 1 Ch. 765. *Refd.* Tyars v. Alsop (1889), 37 W. R. 339.

692. —.]—Transactions between solr. & client, by which the former obtained gifts, & an undue advantage, set aside & the securities ordered to stand good only to the extent of what might be found justly due to the solr.

Though this ct. holds that it is highly improper for a solr. to derive a personal advantage in the shape of gifts from his clients, or in the shape of the liquidation of his bills untaxed & undelivered, still the ct. cannot approve of clients entering into transactions with their solr., whereby they obtain from him present relief, & at the same time indulge the expectation that the ct. will afterwards, at their instance, annul the whole transaction on the ground of the relation subsisting between them.—*GARDENER v. ENNAR, HUMBY v. MOODY* (1866), 35 Beav. 549; 55 E. R. 1009.

Annotation:—*Refd.* Watson v. Rodwell (1879), 39 L. T. 614.

693. —.]—*MORGAN v. MINETT*, No. 706, *post*.

694. —.]—*WRIGHT v. CARTER*, No. 702, *post*.

695. —.]—Deft., a solr., acted for pltf., a widow in the administration of her husband's estate, of which she was the extrix. The husband had for many years had dealings with deft. & had employed him as solr. in a number of matters, but deft. had never delivered any bills of costs to the husband. After his death deft. delivered to pltf. an account of his dealings with her husband showing a balance of £563 due to deft. from the husband's estate. The account contained a number of items for costs which were statute barred. Pltf., in ignorance of Stat. Limitations, & without having any independent advice gave to deft. at his request acknowledgments in writing of the indebtedness of the estate to deft.

In an action by pltf. for an account:—*Held*: deft. by receiving these acknowledgments had obtained a benefit from his client within the meaning of the well settled rule of equity with regard to a person who is in a fiduciary position & deft. was, therefore, not entitled to rely on the acknowledgments for the purpose of taking the statute barred items in the account out of Stat. Limitations.—*LLOYD v. COOTE & BALL*, [1915] 1 K. B. 242; 84 L. J. K. B. 567; 112 L. T. 344, D. C.

696. — *Excludes presumption of gift—From relationship of mother & son.*—A son acted as his mother's solr., & with her consent, lent £2,500 belonging to her, with other money, upon a bond conditioned for payment to himself absolutely, of the amount thereby secured, without any declaration of trust, except a memorandum, whereby the son acknowledged that he held £2,500, & undertook to pay the interest thereof to the mother during life. The son died in his mother's lifetime, & his exors. claimed the principal sum, subject to a life interest in the mother, as a gift from her to the son:—*Held*: the relation of solr. & client, subsisting between the son & mother, excluded the ordinary presumption in favour of the transaction being a gift, & threw the burden of proof upon the exors.; & the evidence being insufficient to establish their case, the ct. declared the son's exors. to be merely trustees for the mother.—*GARRETT v. WILKINSON* (1848), 2 De G. & Sm. 244; 64 E. R. 110.

Annotations:—*Refd.* Hepworth v. Hepworth (1870), L. R. 11 Eq. 10; Lovesy v. Smith (1880), 49 L. J. Ch. 809.

PART IV. SECT. 3, SUB-SECT. 2.—

A. (b).

a. Necessity for.]—It is not neces-

sary in order to establish the validity of a gift to a solr. contained in a will made by his client to show

(b) Independent Advice.

697. Necessity for—Gift to wife of solicitor.]—*GODDARD v. CARLISLE*, No. 385, *ante*.

698. —.]—The client of a solr. without independent advice, made a voluntary conveyance to him of leasehold premises in trust for herself for life, & after her death in trust for his wife, who was her niece, for her separate use absolutely:—*Held*: the well settled rule of equity being that such a gift could not be supported, unless the donor had competent & independent advice in making it, the conveyance must be declared void.—*LILES v. TERRY*, [1895] 2 Q. B. 679; 65 L. J. Q. B. 34; 73 L. T. 428; 44 W. R. 116; 12 T. L. R. 26; 40 Sol. Jo. 53, C. A.

Annotations:—*Consd.* Barron v. Willis, [1900] 2 Ch. 121. *Appld.* Lloyd v. Coote & Ball, [1915] 1 K. B. 242. *Refd.* Wright v. Carter, [1903] 1 Ch. 27. *Mentd.* Watkins v. Watkins (1896), 12 T. L. R. 165.

699. — *Gift to son of solicitor.*—A solr. who was a trustee for a married woman under a settlement & also her husband's solr. prepared a deed by which she conferred a benefit on a son of the solr. & renounced rights she had under the settlement. After hearing the solr.'s explanation of the deed she executed it:—*Held*: she was not bound by the deed, on the ground that the real effect of it on her rights & position was not in fact explained to her, & also on the ground that it was the duty of the solr. to take care that she did not execute the deed without having independent advice.—*WILLIS v. BARRON*, [1902] A. C. 271; 71 L. J. Ch. 609; 86 L. T. 805; 18 T. L. R. 602, H. L.; *affg.* S. C. *sub nom.* *BARRON v. WILLIS*, [1900] 2 Ch. 121, C. A.

Annotations:—*Refd.* Wright v. Carter, [1903] 1 Ch. 27; Bank of Africa v. Cohen, [1909] 2 Ch. 129; Howes v. Bishop, [1909] 2 K. B. 390; Bank of Montreal v. Stuart, [1911] A. C. 120; Moody v. Cox & Hatt (1917), 116 L. T. 740; Westen v. Fairbridge, [1923] 1 K. B. 667.

700. — *Gift of trifling benefit.*—It is incumbent upon persons who receive benefits from others, towards whom they stand in a confidential relation, to show that they had competent & independent advice, & this general principle is not affected by the age or capacity of the persons conferring the benefits, or the nature of the benefits conferred, but this principle does not extend to interfere with mere trifling gifts, without proof not only of influence derived from the confidential relation, but of *mala fides*, or of undue or unfair exercise of the influence.—*RHODES v. BATE* (1866), 1 Ch. App. 252; 13 L. T. 778; 12 Jur. N. S. 178; 14 W. R. 292, L. JJ.

Annotations:—*Consd.* Mitchell v. Homfray (1881), 8 Q. B. D. 587. *Fold.* Liles v. Terry, [1895] 2 Q. B. 679. *Appld.* Wright v. Carter (1902), 86 L. T. 110; Cavendish v. Strutt (1903), 19 T. L. R. 483. *Refd.* King v. Anderson (1874), 23 W. R. 196; Bainbridge v. Browne (1881), 44 L. T. 705; Taylor v. Johnston (1882), 19 Ch. D. 603; Allcard v. Skinner (1887), 38 Ch. D. 145; Barron v. Willis, [1900] 2 Ch. 121; *Re* Coomber, Coomber v. Coomber (1911), 80 L. J. Ch. 399; Inche Noriah Binte Mohamed Tahir v. Shaik Aille Bin Omar Bin Abdullah Bahashuan (1928), 45 T. L. R. 1.

701. Duty of independent adviser—To decline to act on refusal of advice.]—Where a young person is minded to make a voluntary settlement in favour of a parent, it is not enough that he should have independent advice unless he acts on that advice; it is the duty of a solr. independently advising an intending settlor to protect him against himself, & not merely against the personal influence of the donee in the particular transaction; & if his advice is not accepted he should decline to act further for the intending settlor.—*POWELL v. POWELL*, [1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84; 44 Sol. Jo. 134.

Annotations:—*Apprvd.* Wright v. Carter, [1903] 1 Ch. 27.

that the client had independent advice.—*Re* NICKSON, [1916] V. L. R. 274.—AUS.

Reid. Cavendish v. Strutt (1903), 19 T. L. R. 483; *Howes v. Bishop*, [1909] 2 K. B. 390; *Inche Noriah Binte Mohamed Tahir v. Shaik Allie Bin Omar Bin Abdullah Bahashuan* (1928), 45 T. L. R. 1.

702. Independent advice insufficient.]—A gift by a client to a solr. raises *prima facie* the presumption that it was unduly influenced by the fiduciary relation subsisting between them; & the *onus* is on the solr. to prove that the gift was uninfluenced by that relation. The presumption is, however, not irrebuttable, but it is not sufficiently rebutted by the mere fact of the client having employed a separate & independent solr., even though without any fraud or collusion on the part of the two solrs., to advise him in the matter of the gift; for the presumption will continue so long as the relation of solr. & client continues for other purposes outside the gift, or at all events until it can be clearly inferred that the influence arising from the relation no longer exists. On the other hand, there is no objection to a sale by a client to his solr., provided the solr. can prove (a) that the client was fully informed, (b) that he had competent independent advice, & (c) that the price given was a fair one.—*WRIGHT v. CARTER*, [1903] 1 Ch. 27; 72 L. J. Ch. 138; 87 L. T. 624; 51 W. R. 196; 19 T. L. R. 29, C. A.

Annotations:—*Reid. Allison v. Clayhills* (1907), 97 L. T. 709; *Re Coomber, Coomber v. Coomber* (1911), 80 L. J. Ch. 399.

B. Made After Termination of Relationship.

703. Gift after cause determined.]—Gift to an attorney after the cause was over, without proof of anything improper, not set aside. It would have been otherwise, if before the cause, as in contemplation of it; or during its progress.—*OLDHAM v. HAND* (1751), 2 Ves. Sen. 259; 28 E. R. 167, L. C.

Annotations:—*Reid. Wood v. Downes* (1811), 18 Ves. 120; *Ingram v. Wyatt* (1828), 1 Hag. Ecc. 384.

704. Necessity for complete severance of relationship.]—*Re CHAMBERS* (1844), 3 L. T. O. S. 237, L. C.

705. —.]—*HOLMAN v. LOYNES*, No. 745, *post*.

706. —.]—To prevent the operation of the rule that a solr. shall not take a gift from his client while the relation subsists, there must not only be a total absence of fraud, misrepresentation, or even suspicion, but there must be a severance of the confidential relation.—*MORGAN v. MINETT* (1877), 6 Ch. D. 638; 36 L. T. 948; 25 W. R. 744.

Annotations:—*Consd. Wright v. Carter* (1902), 86 L. T. 110. *Reid. Tyars v. Alsop, Mann* (1888), 59 L. T. 367.

C. Affirmed After Termination of Relationship.

707. Confirmation must be subsequent to termination of relationship.]—A solr. had in the year 1880 acted as the solr. of G. in an action against B. The action was compromised by the payment by B. of £5,000. The solr.'s costs were paid, & in consideration of his exertions G. on June 7, 1880, made him a special gift of £1,000 out of the money recovered. The gift was made without independent advice. The relationship of solr. & client closed shortly after the gift. There was subsequently another business transaction between G. & the solr., & the relationship of solr. & client was severed in Mar. 1882. In Apr. 1883, G. called upon the solr. There was some evidence that on that occasion he told G. that she was entitled to demand back her gift, but that she stated in effect that she intended to adhere to it. G. died in June, 1883:—*Held*: the evidence did not show

that, after the relationship of solr. & client had come to an end, G. had, with full knowledge of her rights, confirmed the gift, & her personal representative was therefore entitled to repayment of the £1,000 with interest at 4 per cent. *per annum* from the date of the gift.—*TYARS v. ALSOP* (1889), 61 L. T. 8; 53 J. P. 212; 37 W. R. 339; 5 T. L. R. 242, C. A.

708. Validity of ratification by will.]—Pltf. claimed, as heir-at-law of A., who, as the bill alleged, when in very embarrassed circumstances, had executed a voidable conveyance to his solr. The bill after stating a pretence on the part of defts., who claimed under the solr., that A. had confirmed the conveyance by his will, charged that he had died intestate as to the premises in question, & prayed that the conveyance & any testamentary disposition by him in confirmation thereof might be declared null & void. Plea, that A. by will, after reciting the probability of the conveyance being disputed, had ratified & confirmed it, allowed.—*STUMP v. GABY* (1852), 2 De G. M. & G. 623; 22 L. J. Ch. 352; 20 L. T. O. S. 213; 17 Jur. 5; 1 W. R. 85; 42 E. R. 1015, L. C.

Annotations:—*Distd. Waters v. Thorn* (1856), 22 Beav. 547. *Reid. Hindson v. Weatherill* (1854), 5 De G. M. & G. 301; *Gresley v. Mousley* (1859), 4 De G. & J. 78.

709. — Confirming sale—Sale held invalid.]—A solr. purchased a property from his client, who, by a codicil, confirmed the sale & devised the property to the solr. The ct., having, on the evidence, held the sale invalid, also decided that the codicil was inoperative in equity.—*WATERS v. THORN* (1856), 22 Beav. 547; 52 E. R. 1219.

SUB-SECT. 3.—PURCHASES AND SALES.

A. In General.

710. Power of solicitor to contract with client.]—An attorney may contract with his client, provided no advantage be taken of the confidential relation. If he be employed to sell, & chooses to deal for the estate to be sold, he must withdraw from the connection, or put himself completely at arm's length, & show, if the contract be questioned, that he has given the same advice for the benefit of his client as he would have done if the sale had been to a third party. If employed as a general land agent, he is bound, if he purchases any of the estates in respect of which he is agent, to communicate to his principal all the knowledge acquired by him as agent, of the real value of the estate. But the mere circumstance of his being attorney does not prevent his entering into a valid contract with his client.—*CANE v. ALLEN* (LORD) (1814), 2 Dow. 289; 3 E. R. 869, H. L.

Annotations:—*Distd. Holman v. Loynes* (1854), 4 De G. M. & G. 270. *Consd. Gresley v. Mousley* (1858), 1 Giff. 450. *Reid. Morgan v. Lewes* (1816), 4 Dow. 29; *Edwards v. Meyrick* (1842), 2 Hare, 60.

711. —.]—A solr. is not incapacitated from purchasing from his client, but he will be bound to show that he paid a full consideration.—*CHAMPION v. RIGBY* (1840), 9 L. J. Ch. 211, L. C.; *affg.* (1830), 1 Russ. & M. 539.

Annotations:—*Reid. Wedderburn v. Wedderburn* (1836), 2 Keen, 722; *Roberts v. Tunstall* (1845), 4 Hare, 257; *Baker v. Read* (1854), 18 Beav. 398; *Edwards v. Williams* (1860), 2 L. T. 421; *Clanricarde v. Henning* (1861), 30 Beav. 175; *Browne v. McClintock* (1873), L. R. 6 H. L. 456. *Mentd. Re Agriculturists' Insee., Brotherhoods' Case* (1862), 31 Beav. 365.

PART IV. SECT. 3, SUB-SECT. 3.—A.

710 i. Power of solicitor to contract with client.]—A solr. selling to his client cannot support the sale, unless

he can show that his diligence to do the best for his client was as great as if he were only a solr. dealing for his client with a vendor.—*ROBINSON v.*

ABBOTT (1894), 20 V. L. R. 346.—*AUS.*

710 ii. —.]—*CUNNINGHAM v. LEE* (1874), 2 R. (Ct. of Sess.) 83; 11 Sc. L. R. 58.—*SCOT.*

Sect. 8.—Transactions between solicitor and client:
Sub-sect. 3, A., B. & C.]

712 ———.]—DEPTFORD PIER CO. v. TYRRELL (1843), 1 L. T. O. S. 226.

713. ———.]—STUMP v. GABY, No. 708, *ante*.

714. ———.]—TOMSON v. JUDGE, No. 689, *ante*.

715. ———.]—PISANI v. A.-G. FOR GIBRALTAR, No. 733, *post*.

716. ———.]—McPHERSON v. WATT, No. 734, *post*.

717. ———.]—WRIGHT v. CARTER, No. 702, *ante*.

718. **Effect of invalid purchase—Obligation to account on footing of wilful default.]**—A purchase was set aside on the ground that the purchaser was at the time solr. for the vendor, & the judgment directed the usual accounts of his receipts during his possession:—*Held*: upon the balance of authority the decree must order him to account for such sums as, but for his wilful default, he might have received, though the bill did not charge wilful default, nor pray relief in respect thereof.—ADAMS v. SWORDER (1864), 3 New Rep. 623; 33 L. J. Ch. 318; 10 L. T. 49; 10 Jur. N. S. 223; 12 W. R. 615, L. JJ.

719. **Evidence of payment of consideration.]**—Where an attorney takes a security or makes a purchase from his client, it is incumbent on him to prove the advance or payment of the money by some evidence other than the instrument creating the security or the conveyance.

A purchase by a solr. from a client having been set aside on the ground that the sufficiency of the consideration was not established, an inquiry was directed with a view to ascertain whether the purchase-money was paid. No evidence was adduced on the inquiry to prove the payment, except the acknowledgment in the body of the deed & the usual indorsed receipt. It appeared that no further evidence could be had, & that there was no reason to suppose that any evidence had been destroyed:—*Held*: the acknowledgment & receipt were not sufficient evidence as against parties claiming under the client, & the purchase-money must be considered not to have been paid.—GRESLEY v. MOUSLEY (1862), 3 De G. F. & J. 433; 31 L. J. Ch. 537; 6 L. T. 86; 8 Jur. N. S. 320; 10 W. R. 222; 45 E. R. 946, L. JJ.

Annotations:—*Appld.* Powell v. Browne (1907), 97 L. T. 167. *Refd.* Bateman v. Hunt, [1904] 2 K. B. 530.

720. **Right to object to title of client—Solicitor employed in original purchase.]**—A., having purchased land, left the investigation of the title to C. & D., solrs., in partnership. They advise that a good title can be made, & the purchase is thereupon completed. D., the solr., was a trustee in the conveyance to bar dower. A. dies, & his devisee sells the property to D., one of the solrs. D. did not object to the title until eight months afterwards; in his answer he said he had no recollection of the title:—*Held*: a solr., who has been employed to advise on a title, could not, on purchasing it himself of his client, set up an objection to it, which he did not think of any importance when advising his principal.—BEEVOR v. SIMPSON (1829), Tambl. 69; 48 E. R. 28.

721. **Purchase by solicitor from creditors in bankruptcy.]**—A common agent or solr. in ct. employed on behalf of the creditors of the estate of a bkpt. in Scotland, may be considered in the nature of a trustee; a purchase therefore by him of any part of the bkpt.'s estate may be set aside; & at all events will be so if there appear any circumstances of improper or negligent conduct in

such agent.—YORK BUILDINGS CO. v. MACKENZIE (1795), 8 Bro. Parl. Cas. 42; 3 E. R. 432, H. L.

Annotations:—*Consd.* Aberdeen Ry. v. Blaikie (1854), 2 Eq. Rep. 1281. *Refd.* Mill v. Hill (1852), 3 H. L. Cas. 828; Armstrong v. Jackson, [1917] 2 K. B. 822; Wright v. Morgan, [1926] A. C. 788.

722. **Purchase from trustee in bankruptcy of client.]**—The obligation on a solr. dealing with his client extend to the case of a dealing between a solr. & the trustee in bkpcy. of his client. L. was, under the will of his mother, entitled to an interest in real estate, but whether for life or absolute was doubtful. He became bkpt., & a trustee in bkpcy. was appointed. P., the solr. of the bkpt., had as solr., & having acted for some years as receiver, acquired an intimate knowledge of the nature & value of the estate. He had in negotiating mtges. for L. to consider the extent of his interest under the will; had obtained the opinion of counsel that it was for life only; but had himself formed an opinion that it was, probably, absolute, & not as he had described in his correspondence with the parties concerned merely for life; & he also formed an opinion that the estate was more valuable than the rental showed. He did not disclose his opinion to L., or to the trustee in bkpcy., or to his solr. He was employed by the bkpt. to negotiate with the trustee for the purchase of his interest for the benefit of his wife & children. In the negotiation, as solr. & agent for the bkpt. he found that the trustee could be induced to sell the interest for a very small sum, £77, & he availed himself of his knowledge, & contracted to purchase, secretly, for himself, but in the name of his brother, an interest which, as the ct. afterwards, in an action for administration, held, was absolute, & was worth some thousands of pounds. He never suggested to the trustee that he intended to purchase for himself, but gave him & his solr. to believe that the purchase was on behalf of the bkpt.'s family. In an action by a subsequent trustee in bkpcy. to set aside the sale:—*Held*: the trustee in bkpcy. stood in the place of the bkpt. for the purpose, the solr. for the bkpt. could not be allowed to hold as against the trustee an advantage obtained by him in the purchase from him by means of the knowledge which he had gained whilst acting as solr. for the bkpt., & P. & his brother were trustees for the trustee in bkpcy. & must give up to him every advantage of the purchase.—LUDDY'S TRUSTEE v. PEARD (1886), 33 Ch. D. 500; 55 L. J. Ch. 884; 55 L. T. 137; 35 W. R. 44; 2 T. L. R. 841.

723. **Setting aside sale—Effect of delay.]**—Lapse of time is a ground for not setting aside a purchase though the contract was to be kept secret & the purchase was made by a solr. from his client, & the question may be determined independently of the question of value.—CLANRICARDE (MARQUIS) v. HENNING (1861), 30 Beav. 175; 30 L. J. Ch. 865; 5 L. T. 168; 7 Jur. N. S. 1113; 9 W. R. 912; 54 E. R. 855.

Annotation:—*Mentd.* Molloy v. Mutual Reserve Life Insce. (1906), 94 L. T. 756.

Purchase by mortgagee's solicitor of mortgaged property.]—See MORTGAGE, Vol. XXXV., p. 500, Nos. 2312–2314.

B. Necessity for Good Faith.

724. **Sale by solicitor to client—Onus on solicitor.]**—Sale of an annuity by an attorney to his client set aside under the circumstances.

This clear duty results from the rule of this ct. & throws upon him [the solr.] the whole *onus* of the case; that if he will mix with the character of attorney that of vendor he shall if the propriety of the contract comes in question manifest that he has given her all that reasonable advice against

himself that he would have given her against a third person (LORD ELDON, C.).—GIBSON v. JEVES (1801), 6 Ves. 266; 31 E. R. 1044, L. C.

Morse v. Royal (1806), 12 Ves. 355; k (1842), 3 Hare, 60. *Appld.* Holman v. Loynes (1854), 4 De G. M. & G. 270. *Consd.* Plowright v. Lambert (1865), 52 L. T. 646; Moody v. Cox & Hatt, [1917] 2 Ch. 71. *Reid.* Cane v. Allen (1814), 2 Dow, 289; Adamson v. Evitt (1830), 1 L. J. O. S. Ch. 1; Hunter v. Atkins (1834), Coop. temp. Brough. 464; Dent v. Bennett (1839), 4 My. & Cr. 269; Cooke v. Lamotte (1851), 15 Beav. 234; Hoghton v. Hoghton (1852), 15 Beav. 278; Barnard v. Hunter (1856), 28 L. T. O. S. 152; Savery v. King (1856), 5 H. L. Cas. 627; Waters v. Thorn (1856), 22 Beav. 547; Johnson v. Fesemeyer (1858), 3 De G. & J. 13; Gresley v. Mousley (1859), 4 De G. & J. 78; Smith v. Kay (1859), 7 H. L. Cas. 750; King v. Anderson (1874), 23 W. R. 196; Pisani v. A.-G. for Gibraltar (1874), L. R. 5 P. C. 516; Widgery v. Tepper (1877), 38 L. T. 434; Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Lovesy v. Smith (1880), 49 L. J. Ch. 8; Ward v. Sharp (1884), 53 L. J. Ch. 313; Luddy's Trustee v. Peard (1886), 33 Ch. D. 500; Readdy v. Pendergast (1886), 55 L. T. 767; Liles v. Terry (1895), 12 T. L. R. 26; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Bischoff's Trustee v. Frank (1903), 89 L. T. 188; Re Rogerstone Brick & Stone Co., Southall v. Wescomb, [1919] 1 Ch. 110.

725. Sale by client to solicitor.]—When a solr. purchases or obtains a benefit from a client, he must show that he has taken no advantage of his professional position, but has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger.—SAVERY v. KING (1856), 5 H. L. Cas. 627; 25 L. J. Ch. 482; 27 L. T. O. S. 145; 2 Jur. N. S. 503; 4 W. R. 571; 10 E. R. 1046, H. L.; *varying* S. C. *sub nom.* KING v. SAVERY (1853), 1 Sm. & G. 271.

Annotations:—*Reid.* Barnard v. Hunter (1856), 28 L. T. O. S. 152; Turner v. Collins (1871), 7 Ch. App. 334, n.; Pisani v. A.-G. for Gibraltar (1874), L. R. 5 P. C. 516; Hoblyn v. Hoblyn (1889), 60 L. T. 499; De Witte v. Addison (1899), 80 L. T. 207; Moody v. Cox & Hatt (1917), 116 L. T. 740. *Mentd.* Allcard v. Skinner (1887), 36 Ch. D. 145.

726. Purchase after ineffectual efforts to sell.]—Purchase from his client by a solr., who was also trustee for the sale of the estate for payment of debts confirmed, upon the ground of his having attempted ineffectually to sell, of there being no fraud in the transaction, & of the purchase having been recognised & approved of by the *cestui que trust*.—CLARKE v. SWAILE (1762), 2 Eden, 134; 28 E. R. 847, L. C.

727. — Purchase whilst client a minor.]—Bill by a solr. against his client for specific performance of a contract for sale by auction dismissed, with costs; the purchase being made by the solr., who had the conduct of the sale, whilst his client was a minor, & the sale not having been conducted with due regard to the interests of the client or the protection of the estate.—CUTTS v. SALMON (1852), 21 L. J. Ch. 750; 19 L. T. O. S. 53; 16 Jur. 623; *affg.* S. C. *sub nom.* SALMON v. CUTTS, CUTTS v. SALMON (1850), 4 De G. & Sm. 125.

728. — Onus on solicitor.]—PISANI v. A.-G. FOR GIBRALTAR, No. 733, *post*.

729. Sale to client at price in excess of market value.]—In July, 1892, the trustees of an indenture of settlement, dated Sept. 3, 1890, had a fund of £1,100 for investment. By an indenture dated Feb. 15, 1877, a sum of £2,100 had been secured, but part of the mtged. premises had been sold for £1,000. The balance consisted of three brick & stucco houses, held for ninety-nine years at a ground rent of £9 2s. 6d. S., the solr. of the

trustees, transferred this mtge. to the trustees & received the £1,100, without explaining what he was doing. It was alleged that at this time the property, which was in one of the worst districts in the town, was only worth £200, & the evidence for the defence did not prove that it was worth more than £600 in 1892. S. paid interest until his death, & this action was brought by the trustees claiming that the security should be realised & the balance made good by S.'s exor. Trustee Act, 1888 (c. 59), did not apply, it was said, as S. retained the money & converted it to his own use. For debt. it was said the claim was one for negligence, & was barred by Stat. Limitations. The money was not still held by a trustee. Even if S. ought to have had a valuation made, his omission to do so was a mere common law tort:—*Held:* the property was now, & also at the date of the transfer, an insufficient security for £1,100, & the solr. had transferred a security belonging to himself with knowledge that to take the security involved a breach of trust; the trustees never knew the facts, & S. had received the £1,100 as cash, & debt., admitting assets, an order must be made for the realisation of the security, & debt. must make up the deficiency & pay the costs of the action.—MITCHINSON v. SPENCER (1902), 86 L. T. 618.

C. Necessity for Independent Advice.

730. General rule — Independent advice advisable.]—If a solr. purchase from his client, the purchaser should take care that the vendor has the advice of another solr.

A solr. who conducts the sale of property cannot become the purchaser without full explanation to the vendor, & informing him of his, the solr.'s, intention to purchase.—JONES v. PRICE (1852), 20 L. T. O. S. 49, L. C.

731. — — —.]—If persons standing in a certain relation to one another deal as vendor & purchaser, the ct. expects the purchaser, if the purchase is complained of by the vendor, to show that the vendor had due protection afforded him—thus, if a guardian purchases of his ward, though that relation may have ceased only for a short time, so that the influence of the guardian may be supposed to exist, the burden of proof is upon him to show that his *quondam* ward was protected—it is no answer to a bill seeking to impeach the transaction to say, "I have obtained the conveyance, now prove that it was obtained wrongfully."

The same doctrine applies to an attorney buying of or selling to his client.—HARRISON v. GUEST (1856), 6 De G. M. & G. 424; 25 L. J. Ch. 544; 27 L. T. O. S. 208; 2 Jur. N. S. 911; 4 W. R. 585; 43 E. R. 1298, L. C.; *on appeal* (1860), 8 H. L. Cas. 481, H. L.

Annotations:—*Consd.* Denton v. Donner (1856), 23 Beav. 285. *Reid.* Clark v. Malpas (1862), 31 Beav. 80; Baker v. Monk (1864), 33 Beav. 419; Summers v. Griffiths (1866), 35 Beav. 27; Baker v. Loader (1872), L. R. 16 Eq. 49; Rosher v. Williams (1875), L. R. 20 Eq. 210; Fry v. Lane, *Re* Fry, Whittet v. Bush (1888), 40 Ch. D. 312. *Mentd.* Hilliard v. Elffo (1874), L. R. 7 H. L. 39.

732. — — —.]—Where there is the relation of solr. & client, the solr., if he deal with the client in reference to his property, must, whether that client was more or less a man of business, prove that the client had due professional advice & assistance in & for the purpose of explaining the

PART IV. SECT. 3, SUB-SECT. 3.—B.

r. General rule.]—Where any person acting as an attorney, or as a legal adviser, enters into contract with his client in respect of the subject of litigation or advice, undue influence is presumed to have been exerted until the contrary is proved, & the purchaser is bound to show that all the terms & conditions of the contract are fair, adequate, & reasonable.—PUSHONG v. MUNIA HALWANI (1868), 1 B. L. R. A. C. 95; 10 W. R. 128.—IND.

t. Consideration costs already incurred.]—UPPINGTON v. BULLEN (1842), 2 Dr. & War. 184.—IR.

s. Purchase whilst client a minor.]—MCDUGALL v. BELL (1863), 10 Gr. 283.—CAN.

SOLICITORS.

Sect. 3.—Transactions between solicitor and client: Sub-sect. 3, C. & D.]

matters to him, otherwise the transaction will be set aside.—*BARNARD v. HUNTER* (1856), 28 L. T. O. S. 152; 2 Jur. N. S. 1213; 5 W. R. 92, L. C.

733. ———.]—The ct. does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, & throws on the attorney the *onus* of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser. The circumstances of the employment may be considered, & the amount of influence estimated. *Semble*: an attorney purchasing from his client ought to insist on the intervention of another professional adviser.—*PISANI v. A.-G. FOR GIBRALTAR* (1874), as reported in L. R. 5 P. C. 516, P. C.

Annotations:—*Reid. Readdy v. Pendergast* (1886), 55 L. T. 767; *Moody v. Cox & Hatt* (1917), 116 L. T. 740. *Mentd. Ware v. Whitlock*, [1923] 2 K. B. 418.

734. ———.]—An advocate in Aberdeen is the same as an attorney or solr. elsewhere. Hence when an Aberdeen advocate purchased, nominally for his brother, but really for himself, certain houses, the property of two ladies for whom he was agent, concealing from them the fact that he was buying for himself:—*Held*: the purchase could not be enforced.

Assuming that in every respect this was a sale which might have been supported had the ladies been told that their agent was himself the purchaser, it cannot be supported, that fact not being disclosed.

An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show . . . that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have apposed. . . . There must be *uberrimæ fides* between the attorney & the client (LORD O'HAGAN).—*MCPHERSON v. WATT* (1877), 3 App. Cas. 254, H. L.

Annotations:—*Consd. Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500. *Reid. Re Cape Breton Co.* (1884), 26 Ch. D. 321; *Ward v. Sharp* (1884), 53 L. J. Ch. 313; *Richards v. Whitham* (1892), 66 L. T. 695; *Moody v. Cox & Hatt*, [1917] 2 Ch. 71.

735. Independent advice must be adequate.]—Where a purchase by a solr. from a client is defended on the ground of the intervention of other professional assistance, it must be shown that the new adviser had a proper opportunity of discharging his duty. But the intervention of a solr. who is known by the purchaser to neglect his duty is no protection; or if it appears that a solr., purchasing from his late client, is aware of neglect of duty in the new adviser, & especially if the purchaser withholds or suppresses from him any information of importance, the transaction is vitiated.—*GIBBS v. DANIEL* (1862), 4 Giff. 1; 7 L. T. 27; 9 Jur. N. S. 636; 10 W. R. 688; 66 E. R. 595.

736. Independent advice dispensed with — Transaction manifestly fair.]—*WRIGHT v. CARTER*, No. 702, *ante*.

737. ———.]—A transaction, such as the purchase of property under an option, where the vendor & purchaser are client & solr., or where a similar confidential relationship exists, & the

vendor has not had independent advice, cannot be upheld unless it is proved affirmatively that the purchaser disclosed, without reservation, all the information in his possession, & that the transaction was a fair one in all the circumstances. To fulfil those conditions it must be shown that the solr. advised his client as diligently, & that the transaction was as advantageous, as if the client had been dealing with a stranger. This principle is of wide application, & should not be regarded as a technical rule of English law. Although the relationship of solr. & client, in a strict sense, has terminated, the same principle applies so long as the confidence naturally arising from that relationship is proved, or may be presumed, to continue.—*DEMERARA BAUXITE CO. v. HUBBARD*, [1923] A. C. 673; 92 L. J. P. C. 148; 129 L. T. 517, P. C.

738. Duty of solicitor to give all reasonable advice against himself—Where no independent advice.]—On a question of the propriety of a purchase by a solr. from his client, the solr., in order to sustain the transaction must, if he was solr. *in hac re*, show that he gave his client all that reasonable advice against himself which his office of solr. would have made it his duty to have given him against a third person; but the nature of the proof varies according to the subject of the purchase, the relative situation of the parties, & the equality of the footing upon which they stand, in reference to the subject of the contract; & although the relationship of attorney & client may exist, yet if it has no existence *in hac re*, the rule with regard to the *onus* of proof may no longer be applicable.

It appeared by the evidence, although it was not stated on the pleadings, that the value of the minerals in an estate purchased by the solr. from his client was considerably increased after the purchase, owing to a railroad then contemplated having been afterwards formed through the immediate neighbourhood. *Semble*: this was a merely speculative advantage, the communication of which to his client the solr. would not be bound to prove, the parties being in the same situation with reference to the means of forming an opinion upon it.—*EDWARDS v. MEYRICK* (1842), 2 Hare, 60; 12 L. J. Ch. 49; 6 Jur. 924; 67 E. R. 25.

Annotations:—*Expld. Holman v. Loynes* (1854), 4 De G. M. & G. 270. *Consd. Edwards v. Williams* (1860), 2 L. T. 421. *Appld. Re Haslam & Hier-Evans*, [1902] 1 Ch. 765. *Consd. Wright v. Carter*, [1903] 1 Ch. 27. *Reid. Allison v. Clayhills* (1907), 97 L. T. 709; *Moody v. Cox & Hatt* (1917), 116 L. T. 740. *Mentd. Roberts v. Tunstall* (1845), 4 Hare, 257; *Richards v. Morgan* (1863), 4 B. & S. 641.

739. ———.]—*DEMERARA BAUXITE CO. v. HUBBARD*, No. 737, *ante*.

D. Inadequacy of Price.

740. General rule.]—Agreements entered into between an attorney & his client for the purchase by the attorney at an under price of estates to which the client had good title but of which he was not in possession set aside for fraud & maintenance.—*JONES v. THOMAS* (1837), 3 Y. & C. Ex. 498; 160 E. R. 493.

Annotations:—*Reid. Edwards v. Meyrick* (1842), 2 Hare, 60; *Holman v. Loynes* (1854), 2 Eq. Rep. 715.

741. Inadequacy alone not sufficient to avoid sale.]—A. B., being desirous of raising money to enable him to prosecute his claim to a fund in ct., applied to a solr. for that purpose. An agreement was executed, by which the solr. agreed to lend £1,000, & A. B. agreed to purchase from him some

PART IV. SECT. 3, SUB-SECT. 3.—C.

735 I. Independent advice must be adequate.]—*Low v. HOLMES* (1858), 8 I. Ch. R. 53; *Drury temp. Nap.*

290.—IR.

735 II. ———.]—*ARMITAGE TRUSTEES v. ALLISON* (1911), 32 N. L. R. 88.—S. AF.

PART IV. SECT. 3, SUB-SECT. 3.—D.

b. Inadequacy alone not sufficient.]—*MCLENNAN v. McDONALD* (1867), 14 Gr. 61.—CAN.

PART IV.—SOLICITOR AND CLIENT.

land for £8,000, ten times its value. The land was conveyed, & the funds in ct. mtgd. by A. B. for the £8,000; but the £1,000 was not advanced at the time. The ct., on the ground of the gross inadequacy of value, coupled with the other circumstances of the case, set aside the whole transaction with costs.

Inadequacy of value, though it is not by itself a sufficient ground for avoiding a sale, is yet of great weight when coupled with circumstances of oppression.—*COCKELL v. TAYLOR, COLLETT v. PRESTON, PRESTON v. COLLETT* (1851), 15 Beav. 103; 21 L. J. Ch. 545; 51 E. R. 475.

Annotations:—*Reid. Barnard v. Hunter* (1856), 28 L. T. O. S. 152; *Radcliffe v. Anderson* (1860), E. B. & E. 819; *James v. Kerr* (1889), 40 Ch. D. 449. *Mentd. Dickinson v. Burrell, Stourton v. Burrell* (1866), L. R. 1 Eq. 337; *Re Cambrian Mining Co.* (1882), 48 L. T. 114.

742. Inadequacy coupled with financial difficulties of client.—G., a tenant for life in a marriage settlement, was thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine, & a power was also given, with the consent of trustees, to raise any sum of money. The trustees, in pursuance of the power, consented that G. should, by mortgaging all or any part of the lands, or in any other manner he should think fit, raise any sum of money not exceeding £5,000.

Under this power & consent G., in consideration of £300 & a rent, granted to V. part of the lands in settlement upon a lease for lives. The grant & a receipt expressing that the £300 was raised under the power & consent as part of the £5,000 were duly registered. Before, & at the date of this grant, V. was the solr. of G., who was involved in litigation, & in distress.

The rent, with the premium calculated at 6 per cent. was considerably short of the annual value of the lands.

Upon a bill, by a tenant in remainder under the settlement, to set aside the lease, & on appeal:—*Held*: the lease was a good execution of the power to raise money; but void, as obtained by a solr. from his client, in circumstances of embarrassment, & at an under value.—*WARD v. HARTPOLE* (1776), 3 Bli. 470; 4 E. R. 671, H. L.

743. Burden on solicitor to show that full value given.—*CHAMPION v. RIGBY*, No. 711, *ante*.

744. —.]—A solr., having agreed to purchase of his client a certain property, filed a bill for specific performance:—*Held*: under the circumstances of the case, the burden of supporting the contract lay on pltf.; & whatever the rule might be in other cases, this was one in which demonstration of the full value having been given was part of the burden thrown on him who supported the contract; & he not having proved that full value was given, the contract could not be enforced.—*THOMAS v. PHILIPPS* (1846), 8 L. T. O. S. 272; 11 Jur. 80.

745. —.]—(1) An attorney was engaged in the sale of his client's property by auction, on which occasion a small portion only of the property was sold. He was subsequently employed in making out abstracts of title of the portion unsold, & sixteen months after the completion of the abstracts during which term there had been no employment of the attorney professionally by the client, the attorney bought a portion of the unsold property & debited the client in his books for drawing the

agreement for sale. The consideration which was on the face of the purchase deed stated to have been paid was in fact composed partly of a previous debt for costs & partly of such an annuity as the balance of the purchase-money would according to the Govt. Tables obtain for a healthy life. The client died three years & a half after the sale. It was in evidence that the client was of intemperate habits for many years previously & up to the transaction in question. It did not appear that the attorney had made any special inquiries as to the state of health of the client or endeavoured in any other quarter to obtain a higher annuity, which from the intemperate habits of the client might in all probability have been procured.

On a bill filed by the heir-at-law of the client to set aside the transaction:—*Held*: the relation of attorney & client subsisted at the time of the sale & the attorney had failed to show that no industry he was bound to exert would have got a better bargain for his client, & the sale was accordingly set aside.

(2) Gifts from clients to their attorneys can be maintained only, when not only the relation has ceased but the influence may rationally be supposed to have ceased also (*TURNER, L.J.*).—*HOLMAN v. LOYNES* (1854), 4 De G. M. & G. 270; 2 Eq. Rep. 715; 23 L. J. Ch. 529; 22 L. T. O. S. 296; 18 Jur. 839; 2 W. R. 205; 43 E. R. 510, L. C. & L. J.

Annotations:—As to (1) *Appl. Wright v. Carter*, [1903] 1 Ch. 27. *Consd. Moody v. Cox & Hatt*, [1917] 2 Ch. 71. *Reid. Barnard v. Hunter* (1856), 2 Jur. N. S. 1213; *Pisani v. A.-G. for Gibraltar* (1874), L. R. 5 P. O. 516; *McPherson v. Watt* (1877), 3 App. Cas. 254; *Haslam v. Hier-Evans*, [1902] 1 Ch. 765. As to (2) *Consd. Wright v. Carter*, [1903] 1 Ch. 27. *Reid. Tomson v. Judge* (1855), 3 Drew. 306; *Moody v. Cox & Hatt*, [1917] 2 Ch. 71.

746. —.]—A solr. who purchases from his client is bound to establish that the sale was as advantageous to the client as it could have been if the solr. had used his utmost to sell the property to a stranger.

Purchase by a solr. from his client for £1,820 upheld, though he had given about £100 less than the value, & had two years afterwards sold part of the property at a fancy price, making a profit of £970.—*SPENCER v. TOPHAM* (1856), 22 Beav. 573; 28 L. T. O. S. 56; 2 Jur. N. S. 865; 52 E. R. 1229.

Annotation:—*Reid. Powell v. Browne* (1907), 97 L. T. 167.

747. —.]—An absolute conveyance of a reversionary interest to a solr. reduced, by decree, to a mtge., the solr. standing in a quasi though not absolute relationship of trustee & solr., & failing to prove that the transaction was clearly understood & that full value was given.—*DENTON v. DONNER* (1856), 23 Beav. 285; 53 E. R. 112.

Annotations:—*Consd. Plowright v. Lambert* (1885), 52 L. T. 646; *Readdy v. Prendergast* (1886), 55 L. T. 767.

748. —.]—A solr. purchasing from his client must be able to prove that he gave the price he would professionally have advised his client to accept from another person.—*WIDGERY v. TEPPER* (1877), as reported in 38 L. T. 434; 26 W. R. 546, C. A.

749. Resale at profit. — *RUDD v. SEWELL* (1840), 4 Jur. 882, L. C.

750. —.]—*SPENCER v. TOPHAM*, No. 746, *ante*.

743 i. Burden on solicitor to show that value given.—Conveyances obtained by a solr. from his client must state the transaction correctly; & the solr. must preserve evidence that an adequate price was paid, & that the transaction was in all respects fair,

& such as a competent & independent adviser of the client would have approved of.—*OAKES v. SMITH* (1870), 17 Gr. 660.—*CAN.*

749 i. Resale at profit.—*GILLESPIE & SONS v. GARDNER*, [1909] S. C. 1053;

46 So. L. R. 771; [1909] 2 S. L. T. 39.—*SCOT.*

s. When action for rescission may be brought.—*MOLONY v. L'ESTRANGE* (1829), Beav. 407; 3 Ir. L. Rec. 1st ser. 69.—*IR.*

*Sect. 3.—Transactions between solicitor and client:
Sub-sect. 3, E., F., G. & H.]*

E. Concealment of Facts.

751. Non-disclosure that solicitor vendor—Sale of ground rents.]—DRISCOLL *v.* BROMLEY (1837), 1 Jur. 238, 306.

752. —.]—TYRRELL *v.* BANK OF LONDON, No. 1109, *post*.

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768. — — — — ——*Re* SEDGWICK, *Ex p.* WATTS (1846), De G. 265; 15 L. J. Bcy. 13; 6 L. T. O. S. 499; 10 Jur. 256.

769. — — — — ——The ct. will not, except under very special circumstances, give leave to solr. a fiat to bid at sale.—*Re* BROWN, *Ex p.* TOWNE (1834), 4 Deac. & Ch. 519; 2 Mont. & A. 29; 4 L. J. Bcy. 2, Ct. of R.

770. Effect of leave to bid—Solicitor relieved of fiduciary character.—Leave to bid at a sale by the ct. granted to a solr. on the record relieves him from his fiduciary character, & places him in the same position as an ordinary purchaser.—COAKS v. BOSWELL (1886), 11 App. Cas. 232; 55 L. J. Ch. 761; 55 L. T. 32, H. L.; *reversg.* S. C. *sub nom.* BOSWELL v. COAKS (1884), 27 Ch. D. 424, C. A.

Annotation:—**Refd.** Davis v. Ohrlly (1898), 14 T. L. R. 260.

771. Purchase by solicitor mortgagee.—The solr. to the fiat was allowed, with the consent of assignees, to bid at the sale of part of the bkpt.'s property, of which he was mtgee.—*Re* MORTIN, *Ex p.* RICKIES (1842), 11 L. J. Bcy. 48.

772. Purchase in foreclosure suit—Solicitor to creditor of mortgagee.—Property sold in a foreclosure suit was purchased by W., a solr. whose name appeared on the particulars of sale as one of several solrs. from whom particulars of sale could be obtained. He was not solr. to any of the parties to the suit, but was solr. to some creditors of the mtgee., one of whom had obtained a decree for administration of the mtgee.'s estate. W. had two days before the sale taken out a summons to obtain leave for pltf. in the administration suit to attend proceedings in the foreclosure suit, such summons being returnable on the day after the sale. He had never been consulted about the sale, & did not know what was the amount of the reserved bidding:—**Held**: W. was not disqualified from purchasing, for his client was at liberty to purchase, & therefore his being her solr. did not disqualify him, & the mere fact of his own name appearing on the particulars of sale as a person

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769 1. Necessity for leave of court to bid.—POPHAM v. EXHAM (1860), 10

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g. Solicitor having conduct of sale.—A solr. having the conduct of a sale

under a decree is under an absolute incapacity to purchase at it.—ATKINS v. DELEMEGE (1847), 12 I. Eq. R. 1.—IR.

*Sect. 3.—Transactions between solicitor and client:
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766. Necessity for leave of court to bid — Partner of solicitor.—PRICE v. MOXON (1754) cited in 2 Ves. at p. 54; 30 E. R. 519, L. C.

767. — Consent of interested parties.—Purchase of a bkpt.'s estate by the solr. to the Commission set aside. The Lord Chancellor would not permit him to bid upon the resale, discharging himself from the character of solr., without the previous consent of the persons interested, freely given, upon full information.—*Ex p.* JAMES (1803), 8 Ves. 337; 32 E. R. 385, L. C.

Annotations:—*Consd.* Austin v. Chambers (1838), 6 Cl. & Fin. 1. *Refd.* Oliver v. Court (1820), Dan. 301; Carter v. Palmer (1842), 8 Cl. & Fin. 657; Aberdeen Ry. v. Blaikie (1854), 23 L. T. O. S. 315; Imperial Mercantile Credit Assocn. v. Coleman (1871), 6 Ch. App. 562, n.; Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 515; Hickley v. Hickley (1876), 11 Ch. D. 190; Luddy's Trustee v. Peard (1886), 33 Ch. D. 500; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130; Nugent v. Nugent, [1908] 1 Ch. 546; Christoforides v. Terry, [1924] A. C. 566.

768. — — — — ——*Re* SEDGWICK, *Ex p.* WATTS (1846), De G. 265; 15 L. J. Bcy. 13; 6 L. T. O. S. 499; 10 Jur. 256.

769. — — — — ——The ct. will not, except under very special circumstances, give leave to solr. a fiat to bid at sale.—*Re* BROWN, *Ex p.* TOWNE (1834), 4 Deac. & Ch. 519; 2 Mont. & A. 29; 4 L. J. Bcy. 2, Ct. of R.

770. Effect of leave to bid—Solicitor relieved of fiduciary character.—Leave to bid at a sale by the ct. granted to a solr. on the record relieves him from his fiduciary character, & places him in the same position as an ordinary purchaser.—COAKS v. BOSWELL (1886), 11 App. Cas. 232; 55 L. J. Ch. 761; 55 L. T. 32, H. L.; *revg.* S. C. *sub nom.* BOSWELL v. COAKS (1884), 27 Ch. D. 424, C. A.

Annotation:—*Refd.* Davis v. Ohrlly (1898), 14 T. L. R. 260.

771. Purchase by solicitor mortgagee.—The solr. to the fiat was allowed, with the consent of assignees, to bid at the sale of part of the bkpt.'s property, of which he was mtgee.—*Re* MORTIN, *Ex p.* RICKES (1842), 11 L. J. Bcy. 48.

772. Purchase in foreclosure suit—Solicitor to creditor of mortgagee.—Property sold in a foreclosure suit was purchased by W., a solr. whose name appeared on the particulars of sale as one of several solrs. from whom particulars of sale could be obtained. He was not solr. to any of the parties to the suit, but was solr. to some creditors of the mtgee., one of whom had obtained a decree for administration of the mtgee.'s estate. W. had two days before the sale taken out a summons to obtain leave for pltf. in the administration suit to attend proceedings in the foreclosure suit, such summons being returnable on the day after the sale. He had never been consulted about the sale, & did not know what was the amount of the reserved bidding:—*Held*: W. was not disqualified from purchasing, for his client was at liberty to purchase, & therefore his being her solr. did not disqualify him, & the mere fact of his own name appearing on the particulars of sale as a person

PART IV. SECT. 3, SUB-SECT. 3.—H.

769 i. Necessity for leave of court to bid.—POPHAM v. EXHAM (1860), 10

I. Ch. R. 440.—IR.

g. Solicitor having conduct of sale.—A solr. having the conduct of a sale

under a decree is under an absolute incapacity to purchase at it.—ATKINS v. DELEMEGE (1847), 12 I. Eq. R. 1.—IR.

Sect. 3.—Transactions between solicitor and client:
Sub-sect. 3, H.; sub-sect. 4, A. (a), (b) & (c).]

from whom copies of them might be obtained was not a disqualification.—*GUEST v. SMYTHE* (1870), 5 Ch. App. 551; 39 L. J. Ch. 536; 22 L. T. 563; 84 J. P. 676; 18 W. R. 742, L. J.

Annotation:—*Refd.* *Farrar v. Farrars* (1888), 40 Ch. D. 395.

SUB-SECT. 4.—MORTGAGES.

A. Mortgage to Solicitor.

(a) In General.

Mortgage generally.]—See *MORTGAGE*, Vol. XXXV., pp. 239 *et seq.*

773. General rule—Solicitor entitled to security.]—Where a solr. has lent money to his client, & taken a mtge. for the balance appearing to be due to him by certain accounts, in which the items of his demand are specified, the ct. will not, merely because the parties stood in the relation of solr. & client, deprive the mortgagee of any part of the benefit of his security.—*HAMPSON v. NICOLL, NICOLL v. HAMPSON* (1827), 6 L. J. O. S. Ch. 22; *sub nom.* *HANSON v. NICHOLL*, Coop. Pr. Cas. 493; 47 E. R. 614.

774. ———.]—Principles on which the ct. acts in sustaining securities given by a client to his solr. for bills of costs & moneys advanced.—*HILES v. MOORE* (1848), 17 L. J. Ch. 385.

775. ———.]—*NELSON v. BOOTH*, No. 794, *post.*

776. ———.]—A beneficial purchase by a solr. from his client pending that relation cannot be supported; but the solr. may insist on & obtain a mtge. from his client for whatever is justly due to him.—*PEARSON v. BENSON* (1860), 28 Beav. 598; 54 E. R. 496.

777. Power of court to reopen accounts—Where bill extortionate.]—Even if a client has given an attorney a bond or mtge. to secure the payment of what was charged to be due to him on account of a law suit the cts. of equity have relieved the client & ordered the bill to be taxed (*LORD HARDWICKE, C.*).—*WALMESLEY v. BOOTH* (1741), 2 Atk. 25; Barn. Ch. 475; 26 E. R. 412, L. C.

Annotations:—*Consd.* *Gilbert v. Chudleigh* (1748), 2 Hov. Supp. 372. *Apld.* *Bridgeman v. Green* (1757), Wilm. 58. *Consd.* *Plenderleath v. Fraser* (1814), 3 Ves. & B. 174; *Ingram v. Wyatt* (1828), 1 Hag. Eco. 384. *Refd.* *Saunderson v. Glass* (1742), 2 Atk. 296; *Oldham v. Hand* (1751), 1 Ves. Sen. 259; *Ward v. Hartpole* (1776), 3 Bll. 470; *Newman v. Payne* (1793), 4 Bro. C. C. 350; *Morse v. Royal* (1806), 12 Ves. 355; *Langstaffe v. Taylor* (1807), 14 Ves. 262; *Wood v. Downes* (1811), 18 Ves. 120; *Lewes v. Morgan* (1817), 5 Price, 42; *Crossley v. Parker* (1820), 1 Jac. & W. 460; *Cheslyn v. Dalby* (1836), 2 Y. & C. Ex. 170.

778. ——— Money advanced during minority of client.]—H., a solr., advanced moneys for subsistence to R., an infant, who, upon attaining his full age, was entitled to certain property; R. shortly after he reached the age of twenty-one years, signed a memorandum, by which he acknowledged himself indebted to H. in respect of those advances, in the sum of £1,218; & upon this memorandum H. recovered a verdict against him:

—*Held*: even though the memorandum could not be impeached as obtained by fraud, yet in consequence of the relation in which H. placed himself towards R., it will not prevent R. from having an account taken in a ct. of equity of the sums really advanced to him by H.—*REVERT v. HARVEY* (1823), 1 Sim. & St. 502; 2 L. J. O. S. Ch. 39; 57 E. R. 199.

—*See* *MORTGAGE*, Vol. XXXV., pp. 641, 642, Nos. 3722–3729.

779. Onus on solicitor to show that full consideration passed.]—*VAUGHAN v. LLOYD* (1781), cited 5 Ves. at p. 48; 31 E. R. 465.

Annotations:—*Refd.* *Morgan v. Lewes* (1816), 4 Dow, 29; *Gresley v. Mousley* (1861), 3 De G. F. & J. 433.

780. Onus on solicitor to prove bona fides where no independent advice.]—Where a solr. & mtgee. took a conveyance from the mtgor., a day labourer, who had no independent legal advice:—*Held*: the deed was not valid unless the circumstances were all explained to the mtgor., & the onus of showing that this was done lay on the solr.—*PREES v. COKE* (1871), 6 Ch. App. 645, L. C.

781. ———.]—A transaction between solr. & client in which the former takes a benefit cannot be supported unless the solr. has taken care that his client is fully acquainted with the facts & properly advised upon them & the onus of proving this is upon the solr. (*NORTH, J.*).—*WARD v. SHARP* (1884), 53 L. J. Ch. 313; 50 L. T. 557; 32 W. R. 584.

782. ———.]—There is no rule that, where an unprofessional person deals as vendor or mtgor. with a solr., he must be separately advised. The onus of proving the equity of the transaction is *prima facie* on the solr., but the requisite proof may be afforded by the vendor or mtgor. himself or by documentary evidence.—*READDY v. PENDERGAST* (1886), 55 L. T. 767; *varied* (1887), 56 L. T. 790, C. A.

783. Security for gross amount in respect of costs—Only valid to extent of actual bill.]—A solr. is not justified in accepting from his client a gross sum as a remuneration for his professional services, in lieu of delivery of bill of costs, without the intervention of a third party, or adopting some other mode of extricating his client from the effect of that pressure which the law assumes while the relation of solr. & client exists between them.

When a mtge. has been executed by a client in favour of his solr., who prepared it, & who had the sole management of his property, for the purpose of securing, amongst other things, the payment of a gross amount instead of the delivery of a bill of costs, & the evidence shows that the solr. took no proper steps to relieve his client from his incapacity to enter into such an agreement, such a mtge. can only stand as a security for the amount to be found due in respect thereof.—*MORGAN v. HIGGINS* (1859), 1 Giff. 270; 82 L. T. O. S. 290; 5 Jur. N. S. 236; 7 W. R. 273; 65 E. R. 915.

Annotations:—*Refd.* *Davies v. Parry* (1859), 33 L. T. O. S. 197; *Watson v. Rodwell* (1879), 39 L. T. 614.

(b) Insertion of Unusual Clauses.

784. Postponement of redemption.]—The ct. will not give effect to a stipulation contained in a

PART IV. SECT. 3, SUB-SECT. 4.—
A. (a).

773 i. General rule—Solicitor entitled to security.]—*BELL v. COCHRANE* (1897), 5 B. C. R. 211.—CAN.

777 i. Power of court to reopen accounts—Where bill extortionate.]—The mere existence of fiduciary relationship between attorney & client will not entitle the client to have a

settled account, concluded by mtge., reopened unless sufficient cause be shown, i.e., a *prima facie* case is made out that the bills are extortionate, or at any rate incorrect.—*SHAMALDHONE DUTT v. LAKSHIMANI DEBI* (1908), 1 L. R. 36 Cal. 493.—IND.

h. Power of court to order account.]—*GRANTHAM v. HAWKE* (1854), 4 Gr. 582.—CAN.

k. Effect of fraud.]—*DAVIS v.*

HAWKE (1854), 4 Gr. 394.—CAN.

l. Solicitor acting for client in indigent circumstances.]—*MCILROY v. HAWKE* (1856), 5 Gr. 516.—CAN.

m. To secure future costs.]—The clear rule of law is, that a mtge. given by a client to his solr. to secure costs to be incurred in the future, is absolutely void as being against public policy.—*ATKINSON v. GALLAGHER* (1876), 23 Gr. 201.—CAN.

mtge. by a client to his solr., whereby the client is restricted from paying off the mtge. money for so long a period as twenty years.—*COWDRY v. DAY* (1859), 1 Giff. 316; 29 L. J. Ch. 39; 1 L. T. 88; 5 Jur. N. S. 1199; 8 W. R. 55; 65 E. R. 936.

—.]—See MORTGAGE, Vol. XXXV., p. 356, Nos. 988–995.

785. Commission on receipt of rents.]—Stipulations for commission on receipt of rents & conversion of arrears of interest into principal inserted by a solr. mtgee. in a mtge. deed prepared by himself, & insisted upon by him as the condition of any further advance to his client, will not be allowed in taking the account between the solr., as mtgee. in possession, & his client in a foreclosure suit. Upon a proper case for opening signed accounts made by a mtgor. by his answer & evidence in a foreclosure suit in issue before Nov. 2, 1875, the ct. has power, under Jud. Act, 1873 (c. 66), s. 24 (2) (3), to entertain this equitable defence in the same manner as if a cross bill, or, under the new procedure, a counterclaim, had been filed for the purpose.—*EYRE v. HUGHES* (1876), 2 Ch. D. 148; 45 L. J. Ch. 395; 34 L. T. 211; 21 W. R. 597; 2 Char. Pr. Cas. 33.

Annotation:—*Distd. Jones v. Linton* (1881), 44 L. T. 601.

786. Arrears of interest as principal.]—*EYRE v. HUGHES*, No. 785, *ante*.

787. Power of sale exercisable without notice.]—A solr. advanced money to his client on a second mtge., in which was inserted a power of sale exercisable at any time without the usual proviso requiring that notice should be given, or some interest should be three months in arrear; & it was not shown that he explained to the client that the power was not in the usual form. The solr. afterwards took possession, & for several years received the rents, which, together with some payments made by the mtgor., exceeded the interest on both mortgages. He then sold the property without notice:—*Held*: the omission from the power of sale of the usual qualifying clause was a breach of duty, & the mtgee. was liable in damages as for an improper sale, unless it could be shown that some interest was three months in arrear.

Qu.: whether the absence of explanation did not make it improper even if there was interest in arrear.—*COCKBURN v. EDWARDS* (1881), 18 Ch. D. 449; 51 L. J. Ch. 46; 45 L. T. 500; 30 W. R. 446, C. A.

Annotations:—*Apld. Craddock v. Rogers* (1884), 53 L. J. Ch. 968. *Distd. Pooley's Trustee v. Whetham* (1886), 33 Ch. D. 111. *Refd. Andrews v. Barnes* (1888), 39 Ch. D. 133; *Simmons v. London Joint Stock Bank*, *Little v. London Joint Stock Bank*, [1891] 1 Ch. 270; *Stokes v. Prance*, [1898] 1 Ch. 212; *Nocton v. Ashburton*, [1914] A. C. 932. *Mentd. Bright v. Campbell* (1889), 41 Ch. D. 388; *The Swiftsure* (1900), 16 T. L. R. 275; *Wrigley v. Gill*, [1906] 1 Ch. 165.

788. Power of sale exercisable with less than six months' notice.]—*DUNSTON v. PATERSON* (1846), 8 L. T. O. S. 313; 11 Jur. 96; *on appeal* (1847), 2 Ph. 341, L. C.

Annotation:—*Refd. Teovan v. Smith* (1882), 47 L. T. 208.

789. —.]—Where a solr. takes a mtge. from a client to himself which contains an unusual power of sale without explaining to the client the nature of the same, & the solr. exercises the power, he is liable for damage caused to the client by the sale being made at an under value.—*CRADOCK v. ROGERS* (1885), 1 T. L. R. 556, C. A.

790. Consolidation clause.]—*CLIMPSON v. COLES* (1889), as reported in 23 Q. B. D. 465, D. C.

Annotations:—*Mentd. Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292; *Church v. Sage* (1892), 67 L. T. 800.

791. Full explanation of unusual powers to mortgagor.]—The owner of leasehold property,

part of which were subject to six mtges., was threatened with an immediate sale by the third mtgee. of the greater part of it, who had bought in the second mtge., & was in treaty for the purchase of the first.

Deft., a solr., advanced the money needful to pay off the mtgee. & prevent a sale, stipulating that the whole of the mtges. should be paid off, & that he should have a mtge. for the total sum paid by him, including costs of the different mtgees., to bear interest at the rate of 6 per cent., the first & second mtges. having previously been at 5 per cent.

He also stipulated that the mtge. should include a separate property which was in mtge. at 5 per cent., & that he should be entitled to costs as if a client had been mtgee. All these stipulations were distinctly explained to the mtgor., & were carried into effect by the mtge. deed.

In an action for redemption brought by the mtgor.:—*Held*: as the unusual provisions had been fully explained to the mtgor., they were binding upon him, except that, as to the additional property, which had been included solely for the mtgee.'s own protection, the additional rate of interest must be disallowed.—*JONES v. LINTON* (1881), 44 L. T. 601.

792. Validity where parties at arm's length—Client purchasing an indulgence.]—The principle which throws on a solr. who has dealt with his clients the burthen of showing the fairness of the transaction applies to cases of voluntary agreement, but not to a case where the solr. is in the hostile attitude of an urgent creditor.—*JOHNSON v. FESEMEYER* (1858), 3 De G. & J. 13; 44 E. R. 1174, L. C.

Annotations:—*Distd. Ward v. Sharp* (1884), 53 L. J. Ch. 313. *Refd. Pearson v. Benson* (1860), 28 Beav. 598. *Mentd. Re Nurse, Ex p. Foxley* (1868), 3 Ch. App. 515; *The Heart of Oak* (1869), 39 L. J. Adm. 15; *Smith v. Pilgrim* (1876), 2 Ch. D. 127; *National Bank of Australasia v. United Hand in Hand & Band of Hope Co.* (1879), 4 App. Cas. 391.

793. —.]—The rule of *Cockburn v. Edwards*, No. 787, *ante*, that a solr. taking a mtge. from his client is bound to take it on the ordinary terms, or, if not, is bound fully to explain to him everything that may be of an unusual character in the form of the security he proposes to take, does not apply to a case where a client indebted to his solr. is purchasing from him an indulgence, *e.g.* further time for payment of the debt, in which case the solr. may make his own terms.—*POOLEY'S TRUSTEE v. WHETHAM* (1886), 33 Ch. D. 111; 55 L. J. Ch. 899; 55 L. T. 333; 34 W. R. 689; 2 T. L. R. 808, C. A.

(c) Exercise of Power of Sale.

794. Solicitor may retain only amount advanced.]—S. having paid off a debt secured by mtge. upon real estates, in the equity of redemption of which his wife was, at the date of their marriage, entitled to a life interest to her separate use, afterwards, without her privity, assigned the mtge. to the solr. of himself & wife, as security for a debt due to such solr. for costs principally incurred in a suit in which he acted, first for the wife before her marriage, & afterwards for both the husband & wife:—*Held*: such assignment was a valid security as against the wife's life interest in the hereditaments assigned.

The solr., having subsequently purchased from the original mtgee., for £40, a debt for costs, of £175, which the latter would have been entitled to have added to his mtge. debt, was held entitled, as against the wife, to the benefit of such purchase, but to the extent only of securing himself in respect

SOLICITORS.

Sect. 3.—Transactions between solicitor and client:
Sub-sect. 4, A. (c) & (d), & B.; sub-sects. 5 & 6.]

of the debt due to him from the husband.—*NELSON v. BOOTH* (1857), 27 L. J. Ch. 110; 3 Jur. N. S. 951; 5 W. R. 722.

795. ———.] — The ordinary rule that the ct. will not grant an interlocutory injunction restraining a mtgee. from exercising his power of sale except on the terms of the mtgor. paying into ct. the sum sworn by the mtgee. to be due for principal, interest & costs, does not apply to a case where the mtgee. at the time of taking the mtge. was the solr. of the mtgor. In such a case the ct. will look at all the circumstances of the case, & will make such order as will save the mtgor. from oppression without injuring the security of the mtgee.

Pltf. was a lady who was entitled to a life interest in leasehold property which she had mortgaged to various persons. Deft. acted as her solr. & with her sanction in order to release her from embarrassment bought up several of the incumbrances with his own money & took a transfer of them to himself; having previously taken a mtge. of the life interest to secure his past costs & the costs which he might incur in paying off the incumbrances. Afterwards pltf. discharged deft., & employed another solr., who applied to deft. for information respecting the securities transferred. Deft. refused to give this information unless the payment of what was due to him was guaranteed, & threatened to proceed to a sale of the property. Pltf. then brought an action to impeach the securities & to restrain the sale of the property, & moved for an injunction till the hearing:—*Held*: considering all the circumstances, an injunction ought to be granted, on pltf. paying into ct. such a sum as the ct. considered would cover the amount actually advanced by deft., & amending the writ so as to make it a simple action for redemption & injunction.—*MACLEOD v. JONES* (1883), 24 Ch. D. 289; 53 L. J. Ch. 145; 49 L. T. 321; 32 W. R. 43, C. A.

(d) *Costs of Solicitor Mortgagee.*

Costs of mortgage transactions generally.]—See MORTGAGE, Vol. XXXV., pp. 670, 671, Nos. 4065, 4067–4075.

Costs of asserting or defending title.]—See MORTGAGE, Vol. XXXV., p. 689, No. 4319.

Costs of foreclosure, sale & redemption.]—See MORTGAGE, Vol. XXXV., pp. 358, 694, 695, Nos. 1010, 4374, 4380, 4381, 4383–4385.

Costs in administration action.]—See EXECUTORS, Vol. XXIV., pp. 842, 843, No. 8764.

B. Mortgage to Client.

796. Borrowing from client—Absence of independent advice.]—The report of the Committee of the Incorporated Law Society having found that a solr. was guilty of professional misconduct, in having accepted as a loan large sums of money from a client, who had just attained his majority:—*Held*: it was a case for the exercise of the disciplinary powers of the ct.—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY*, [1894] 1 Q. B. 254; 63 L. J. Q. B. 313; 70 L. T. 27; 42 W. R. 237; 10 T. L. R. 121; 38 Sol. Jo. 100; 10 R. 34, D. C.

How far notice of mortgagee solicitor notice to client.]—See MORTGAGE, Vol. XXXV., pp. 472, 473, Nos. 2063–2067, 2073.

SUB-SECT. 5.—WILLS.

797. Solicitor may accept benefit under will drawn by himself.]—The circumstance, that one residuary devisee was the attorney, who drew the will, not decisive evidence of fraud.—*PAINE v. HALL* (1812), 18 Ves. 475; 34 E. R. 397, L. C.

*Annotations:—***Refd.** *Hindson v. Weatherill* (1854), 2 Eq. Rep. 733. **Mentd.** *Lomax v. Ripley* (1855), 3 Sm. & G. 48; *Sweeting v. Sweeting* (1863), 3 New Rep. 240.

798. ——— Necessity for proof of knowledge of testator.]—An attorney had advanced to a client in humble circumstances the necessary funds to prosecute actions of ejectment, which were conducted by the attorney, & terminated in a compromise, on which the client received a large sum of money. During the proceedings the widow of the client's brother wrote a letter to the client saying that she had little money to spare, but wished to do all she could so that justice might be done to every branch of the family. The attorney wrote an answer to this letter by the client's direction, saying, that if the client succeeded, substantial justice should be done to all to whom the client was related. Neither the brother's widow, nor any of the client's relatives, gave him any assistance in prosecuting the actions. The attorney, by his directions, prepared a will, which the client executed, & under which the attorney took large benefits, but in which benefits were also given to relatives of testator. It did not appear that the letter of the brother's widow, or the answer to it, was referred to in the course of the preparation of the will either by the attorney or the client:—*Held*: (1) the will was not made under any mistake or misapprehension caused by the attorney; (2) the circumstance of a solr. preparing for a client a will containing dispositions in his own favour, does not of itself take away the right of the solr. to be for his own benefit a devisee or legatee.—*HINDSON v. WEATHERILL* (1854), 5 De G. M. & G. 301; 2 Eq. Rep. 733; 23 L. J. Ch. 820; 23 L. T. O. S. 149; 18 Jur. 499; 2 W. R. 507; 43 E. R. 886, L. J.J.

*Annotations:—***As to (2) Consd.** *Nanney v. Williams* (1856), 22 Beav. 452; *Walker v. Smith* (1861), 29 Beav. 394. **Generally, Refd.** *Beanland v. Bradley* (1854), 5 W. R. 602.

799. ———.]—BARTON v. ROBINS (1769), 3 Phillim. 455, n.; 161 E. R. 1382.

*Annotations:—***Refd.** *Fawcett v. Jones* (1810), 3 Phillim. 431; *Fincham v. Edwards* (1842), 3 Curt. 63. **Mentd.** *Thorne v. Rooke* (1841), 2 Curt. 799; *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191.

800. ———.]—In a case of perfectly sound mind & free from any suspicion of imposition evidence of bare execution is sufficient, but where deceased's attorney is the drawer of the will & the person principally benefited the jealousy of the ct. is excited & demands more than proof of bare execution.—*WHEELER & BATSFORD v. ALDERSON* (1831), 3 Hag. Ecc. 574; 162 E. R. 1268.

*Annotation:—***Mentd.** *Wright v. Doe d. Tatham* (1838), 4 Bing. N. C. 489.

801. ———.]—Where a will is impeached on the ground of fraud the parties who seek to establish the will must remove & explain & so neutralise the facts out of which suspicion arose. The relation of client & attorney between testator & the person benefited by his will excites suspicion.—*WYATT v. INGRAM* (1832), 3 Hag. Ecc. 466; 1 L. J. Ch. 135; 162 E. R. 1228, L. C.; *previous proceedings, sub nom. INGRAM v. WYATT* (1828), Hag. Ecc. 384.

*Annotations:—***Consd.** *Hindson v. Weatherill* (1854), 5 De G. M. & G. 301. **Refd.** *Barry v. Butlin* (1838), 2 Moo.

PART IV. SECT. 3, SUB-SECT. 5.

798 i. Solicitor may accept benefit under will drawn by himself—Necessity for proof of knowledge of testator.]—*STEWART v. MACLAREN*, [1920] S. C. 146.—**SCOT.**

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P. C. C. 480; *Cockraft v. Rawles* (1845), 4 Notes of Cases, 237. **Mentd.** *Rickets v. Bodenham* (1834), *Coop. temp. Brough*, 361; *Waters v. Waters* (1848), 2 De G. & Sm. 591; *Hastlow v. Stoble* (1865), L. R. 1 P. & D. 64; *Fulton v. Andrew* (1875), L. R. 7 H. L. 448; *Hampson v. Guy* (1891), 64 L. T. 778.

802. —.]—Where an attorney who draws the will of testator takes a benefit under it, the case is to be considered with peculiar jealousy, & the jury who try the validity of the will must be satisfied that testator knew its contents.—*RAWORTH v. MARRIOTT* (1833), 1 My. & K. 643; 39 E. R. 824.

Annotation:—**Mentd.** *Mitchell v. Thomas* (1847), 6 Moo. P. C. C. 137.

803. —.]—A will & five codicils being propounded the will & four codicils established. The fifth being prepared by a solr. in his own favour, deceased being at the time of fluctuating capacity was pronounced against the ct. not being satisfied that deceased understood the contents of the instrument & intended it to operate although no fraud was imputed to the solr.—*CROFT v. DAY* (1838), 1 Curt. 782; 163 E. R. 271.

804. —.]—The fact of a party preparing a will with a legacy to himself is at most only one of suspicion, of more or less weight according to the circumstances, demanding, however, the vigilant care of the ct. in investigating the case before granting probate; & though evidence of the instructions given by deceased & the reading over of the instrument are the most satisfactory proofs of testator's knowledge of the contents, they are not the only description of proof by which the cognisance of the contents of the will may be brought home to deceased, even in a case of doubtful capacity. A will prepared by deceased's solr. under which he took a considerable benefit, the only son of deceased being excluded; deceased being of weak, though of testable capacity, under the circumstances pronounced for.—*BARRY v. BUTLIN* (1838), 2 Moo. P. C. C. 480; 1 Curt. 637; 12 E. R. 1089, P. C.

Annotations:—**Expld.** *Durling & Parker v. Loveland* (1839), 1 Curt. 225. **Consd.** *Mitchell v. Thomas* (1847), 6 Moo. P. C. C. 137; *Browning v. Budd* (1848), 6 Moo. P. C. C. 430; *Finny v. Govett* (1908), 25 T. L. R. 186. **Refd.** *Greville v. Tylee* (1851), 7 Moo. P. C. C. 320; *Scouler v. Plowright* (1856), 10 Moo. P. C. C. 440; *Sutton v. Sadler* (1857), 3 C. B. N. S. 87; *Mitchell v. Gard* (1863), 2 New Rep. 337; *Guardhouse v. Blackburn* (1866), L. R. 1 P. & D. 109; *Fulton v. Andrew* (1875), L. R. 7 H. L. 448; *Brown v. Fisher* (1890), 63 L. T. 465; *Tyrrell v. Palnton*, [1894] P. 151; *Farrelly v. Corrigan*, [1899] A. C. 563; *Baudains v. Richardson*, [1906] A. C. 169; *Low v. Guthrie*, [1909] A. C. 278. *In the Estate of Musgrove*, *Davis v. Mayhew*, [1927] P. 264. **Mentd.** *Broadbent v. Hughes* (1860), 29 L. J. P. M. & A. 134; *Hastlow v. Stoble* (1865), 11 Jur. N. S. 1039; *Goodacre v. Smith* (1867), L. R. 1 P. & D. 359; *Robins v. National Trust Co.*, [1927] A. C. 515.

805. —.]—The will of an aged person of doubtful capacity prepared by a solr., who was appointed an exor. & one of the residuary legatees, pronounced against, & the parties propounding it condemned in costs.

Bare execution in such a case is not sufficient.—*DURLING & PARKER v. LOVELAND* (1839), 2 Curt. 225; 163 E. R. 393.

Annotation:—**Refd.** *Scouler v. Plowright* (1856), 10 Moo. P. C. C. 440.

806. —.]—Where a will is obtained from an old & infirm testatrix largely benefiting

the drawer, an attorney, the ct. requires strong evidence either as to instructions or execution; & in this case, where there is no proof of instructions from deceased, or even of a knowledge of contents, & only weak evidence as to a bare act of execution, probate is refused.—*TUCKWELL v. CORNICK* (1844), 3 L. T. O. S. 21.

807. —.]—B. had promised to benefit to the utmost of her power the family of C. shortly before his death; notwithstanding such promise she made a codicil giving a third of the only sum of money at her disposal to T., her solr., who drew such codicil; she also revoked the appointment of A. & E., two of those whom she had promised to benefit, as exors., making T. sole exor. instead. A. & E. prayed probate of the will, without the words giving T. the legacy, & appointing him exor. T. on the contrary, prayed probate for the will as it stood:—**Held:** the evidence showed that testatrix was aware of the contents & effect of the codicil, & her capacity being unimpeached, the codicil was therefore entitled to probate.

The ct. must be careful in setting its face against a solr. obtaining a will from an aged person to guard itself against carrying the principle so far as to operate against that which is proved to be the undoubted intention of deceased herself (*SIR H. JENNER FUST*).—*CLEARSON v. TEAGUE* (1851), 18 L. T. O. S. 175; 15 Jur. 1016.

808. —.]—Gift by a client to a solr. while that relation subsisted between them declared invalid at the instance of the residuary legatees of the donor; but legacies to the solr., his wife & children, supported.—*WALKER v. SMITH* (1861), 29 Beav. 394; 54 E. R. 680.

809. Preparation of will—Duty to take instructions from testator direct.—A will made by a person of weak intellect, prepared by an attorney from instructions given by one of the parties, without seeing deceased, refused probate. Such proceeding by an attorney dangerous & improper. A dangerous proceeding for an attorney to take instructions from one of the parties without communication with testator.—*WALLIS v. MAUGHAN* (1842), 1 Notes of Cases 534, P. C.

810. — Presumption that will explained to testator.—B., a solr., drew the will of R., his father-in-law, which bequeathed a share of residue amounting to £45,000, to B.'s wife, & appointed B. sole exor. The will contained no direction that this sum should be for the separate use of B.'s wife. There was no evidence as to what had passed between B. & R. at the time of the execution of the will:—**Held:** in the absence of evidence, the ct. could not assume such a dereliction of duty on B.'s part, in not informing R. of the effect of the will, as to make B. a trustee for his wife.—*Re BIRCHALL, WILSON v. BIRCHALL* (1881), 44 L. T. 243; 29 W. R. 461.

Solicitor as executor.—See Part V., Sect. 3, *post*.

SUB-SECT. 6.—ACCOUNTS.

811. Duty to keep clear & distinct accounts.—It is the duty of a solicitor to keep clear & distinct accounts.—*Re CLARK* (1851), 13 Beav. 173; 51

809 i. Preparation of will—Duty to take instructions from testator direct.—*WILSON v. KINNEAR*, [1925] 2 D. L. R. 641.—CAN.

to give effect to intentions of testator—Where testator's

language ineffectual.]—Where a solr. is made aware of the object testator has in view, but the language used will not effectuate that end, it is the duty of the solr. to call testator's attention to the fact. It is erroneous to suppose that the solr. properly discharges his

duty by simply taking down the directions given by testator, without reference to their effect upon the provisions it was alleged testator desired to make with regard to his family & estate.—*WILSON v. WILSON* (1875), 22 Gr. 39.—CAN.

. 3.—*Transactions between solicitor and client:*
Sub-sects. 6 & 7. Sect. 4: Sub-sects. 1 & 2, A.]

E. R. 67; *affd.* on other grounds, 1 De G. M. & G. 43, L. JJ.

Annotations:—Refd. Re Browne (1852), 21 L. J. Ch. 442; *Re Barrow* (1853), 17 Beav. 547; *Re Atkinson & Pilgrim* (1858), 26 Beav. 151.

812. Duty to keep strict accounts of moneys received.]—L. acted as solr. for N. in various matters, & particularly in raising money for him on mtges. & bills of exchange. He also acted as receiver of N.'s rents. The course as to the transactions for raising money appeared to have been, that on each occasion L. received the money, retained out of it a sum agreed upon for his costs of that transaction, & handed over the balance. The rents which he received were all duly accounted for, & accounts settled, not including any items for costs. After the death of the solr. a large bill of costs was sent in, which was referred for taxation. The taxing master required a cash account, but no sufficient materials existed for making it out, & the taxing master certified that nothing was due to the solr., inasmuch as he had received large sums of money, of his disposal of which no account was furnished:—*Held*: the bill of costs as taxed must be paid, for the principle of *White v. Lincoln (Lady)*, *Newcastle (Duke) v. Kinderley* (1803), 8 Ves. 363, did not apply where the solr. was not the general agent of the client, so as to be able to receive the client's moneys at all times without his knowledge, but only received money for him in respect of separate transactions of which the client was aware at the time, & knew what was to be received.

Though it is very reprehensible in a solr. not to keep strict accounts of all moneys received by him for his client, yet the omission to do so is not a reason why he should be deprived of his costs altogether.—*Re LEE, Ex p. NEVILLE* (1868), 4 Ch. App. 43; 19 L. T. 435; 17 W. R. 108, L. JJ. *Annotation:—Refd. Cheese v. Keen*, [1908] 1 Ch. 245.

813. — Not to allow unauthorised payments out.]—A., pltf. assocn., was formed to amalgamate a number of firms & cos. controlled by F., & money was obtained by a debenture issue to the public for the purposes of working capital. Pltfs. alleged, & the ct. found (a) that F. drew a number of cheques on the accounts of the constituent firms & cos., the property of pltfs., payable to T. & C., his solrs., who were also solrs. to pltf. assocn., & having paid them to his own account with T. & C., subsequently drew on these moneys for his own purposes; & (b) that F. drew for his own purposes on moneys standing to the credit of pltf. assocn. in the books of T. & C. In an action against T., who was at the material time the senior partner of T. & C. & a director of pltf. assocn., damages were claimed for conversion, breach of duty, & negligence. It was not alleged that T. had misappropriated these moneys which had passed through the books of his firm or had converted them to his own use. It was alleged that he had knowledge by himself or his partner of what had occurred & that he was liable as a director of, & solr. to, pltf. assocn. & as holding money for pltf. assocn. F. had assigned his estate for the benefit of his creditors, & pltf. assocn. had sent in a proof against his estate for all the moneys in respect of which a claim was made against T. in this action. It was contended (*inter alia*) for deft. that by doing so pltf. assocn. had

affirmed & ratified the acts by which F. had obtained these moneys, which were the acts complained of, against deft. T., & that this was a defence to the action:—*Held*: (1) on the claim against T. as a member of a firm of solrs. in respect of the second group of transactions as to moneys credited to pltfs. in the firm's books T. was liable, as where solrs. kept an account of a client, in this case A., they were under a duty as solrs. to use proper diligence & proper skill to see that sums were not improperly paid out of that account to the debit of the client; (2) as to the first group of transactions where F. had paid moneys of the constituent cos. into & out of the accounts of the firm of solrs., these T. must account for, unless F. was authorised to make these payments in fact or by general acquiescence or by holding out. His Lordship found that F. was not so authorised.—*FENTON TEXTILE ASSOCN., LTD. v. THOMAS & CLARK* (1928), 45 T. L. R. 113.

814. Re-opening settled accounts—As to specific items impeached.]—Account between attorney & client, although long since settled & signed, will not be considered conclusive as against the latter; & if any items of charge can be impeached, the accounts will be so far re-opened by the ct., on a bill filed for that purpose, as that pltf. will be allowed to surcharge & falsify. A case made out by the suit, will entitle pltf. to an issue at law to try the fairness of the impugned charges, although founded on bonds set up; & if he succeed in the issue, the ct. will proceed with the investigation by reference to the master. A bond given by a client to his attorney, for the difference between a sum received by the latter, as a composition for a debt due to him from a debtor of both of them, for the purpose of indemnifying the attorney from loss by the transaction in having signed the general composition deed, held to be impeached by establishing that fact, & the amount intended to be secured by it falsified thereby, & disallowed by the master on the reference to him of the charges set up by the accounts, & confirmed by the ct. on exceptions to his report. The ct. on such a suit, will not re-open or disturb settled accounts, further than as to the particular charges that can be impeached.—*JOHNS v. LLOYD, SMITH v. LLOYD* (1822), 10 Price, 62; 147 E. R. 242.

815. — After long period—Fraud not suggested.]—Where more than seven years had elapsed after the settlement of transactions between an attorney & his client, the ct. refused to interfere to have them re-opened, in the absence of any suggestion of fraud or misconduct.—*Ex p. SHIPDEM* (1825), 6 Dow. & Ry. K. B. 339.

816. —.]—B. having had various pecuniary dealings with A., who had been a solr. during his lifetime, on his death filed a bill against his extrix., disputing a charge of £3,000, which had been made by her against him, B., & praying to have all accounts between A. & himself opened; but evidence being adduced that B. had been in the habit of paying moneys on account of interest to A., & that he had, soon after A.'s death, admitted that £3,000 was due from him to A., & that a verdict at law for that amount had been obtained against him by the extrix.:—*Held*: it could not allow the fact of the sum of £3,000 being an item against B. to be disputed.—*ABBEY v. PETCH* (1842), 1 Y. & C. Ch. Cas. 258; 11 L. J. Ch. 124; 1 Jur. 433; 62 E. R. 880.

—.]—*See EQUITY*, Vol. XX., pp. 273-276,

PART IV. SECT. 3, SUB-SECT. 6.

- a. Duty to keep strict account of moneys received.]—TUDEHOPE v. CARNELL*, [1917] N. Z. L. R. 628.—N.Z.
p. Re-opening settled account.]—HICKSON v. AYLWARD (1828), 3 Mol. 1.—IR.

Nos. 326, 327, 340, 349, 351-353; MORTGAGE, Vol. XXXV., pp. 641, 642, Nos. 3722-3728.

817. Advances must be strictly proved—Production of bond not sufficient.]—In taking an account of the pecuniary transactions between a client & his attorney, the latter also filling other confidential situations, the production of a bond executed by the client to the solr. is not alone sufficient evidence of a debt to that amount, but the obligee or his representatives are bound to prove the actual payment of the money secured by the bond.—*LEWES v. MORGAN* (1829), 3 Y. & J. 230; 148 E. R. 1164, Ex. Ch.; *subsequent proceedings*, 3 Y. & J. 394; *on appeal, sub nom. MORGAN v. EVANS* (1834), 5 Cl. & Fin. 159, II. L.

Annotations:—*Reid. Blagrove v. Routh* (1856), 2 K. & J. 509. *Mentd. Booth v. Leicester* (1838), 3 My. & Cr. 459; *Birch v. Joy* (1852), 3 H. L. Cas. 565.

818. —.]—*GRESLEY v. MOUSLEY*, No. 719, *ante*.

819. Client in distress at time of advances—General account ordered.]—Where advances have been made by a solr. to his client, by way of loan, the client being in distress, a general account will be ordered of such transactions.—*HICKS v. MORLAND* (1833), 2 L. J. Ch. 206.

820. Large payments on both sides—Method of taking accounts.]—A solr. had a great number of money dealings with a client in addition to usual legal business. From time to time prior to 1825 they settled their accounts, but there was no regular or understood time for such settlement. From 1825 to 1846, when the solr. died, the client placed considerable sums in the hands of the solr., who gave his bond for one sum & promissory notes for others. He also paid the client, as he was asked to do so, gross sums without any arrangement as to their appropriation. Upon a bill filed against the exors. of the solr. for an account:—*Held*: in taking the account, regard being had to the course of dealing previous to 1825, when the account began, no balance was to be struck until the end of the account; & every payment on either side was to bear simple interest from the time when it was made, except where there had been an obvious appropriation.—*NAPPER v. DENDY* (1856), 28 L. T. O. S. 93; 5 W. R. 4, L. C.

821. Right of client to claim in county court.]—Pltf. retained deft. to act for him as his solr. in four matters. In one only were proceedings taken in the county ct.; in none of the others was process issued. As deft. delayed to deliver a cash account & bill of costs, pltf. issued a plaint in the county ct. claiming an account:—*Held*: pltf. was entitled to claim this relief in the county ct.—*CHAMBERS v. TABRUM*, [1920] 1 K. B. 840; 89 L. J. K. B. 606; 122 L. T. 779, D. C.

SUB-SECT. 7.—SOLICITOR AS TRUSTEE, RECEIVER OR EXECUTOR.

See Part V., *post*.

PART IV. SECT. 4, SUB-SECT. 1.

p. Duty to obey instructions of client.]—*O'BEIRNE v. WILSON* (1857), 6 C. P. 366.—CAN.

q. Duty not to take advantage of information obtained through fiduciary relationship.]—*KILBOURN v. ARNOLD* (1881), 6 A. R. 158.—CAN.

r. Duty to explain deed to client—Before execution.]—It is reprehensible in an attorney to obtain a power of attorney from his client without giving him an opportunity of fully acquainting himself with its contents.—*Ex p.*

PHILIP (1887), 26 N. B. R. 178.—CAN.
t. —.]—*SEGRAVE v. KIRWAN* (1828), Beat. 157.—IR.

a. Interest conflicting with duty.]—A trustee for creditors who is also employed as solr. to manage an insolvent estate is a person whose interest conflicts with his duty to the creditors as trustee.—*Re DICKENSON* (1892), 2 B. C. R. 262.—CAN.

b. Duty to point out all consequences to client.]—*Re BURTON, Ex p. SCALLAN, Ex p. JONES* (1827), 1 Mol. 63.—IR.

SECT. 4.—OBLIGATIONS OF SOLICITOR TOWARDS CLIENT.

SUB-SECT. 1.—IN GENERAL.

822. Fulfilment of obligations within purview of court.]—*ALLISON v. RAYNER*, No. 865, *post*.

823. Duty to obey instructions of client—To delay proceedings.]—An attorney retained to defend an action is not bound to follow the instructions of his client, to do what is meant merely for delay.—*JOHNSON v. ALSTON* (1808), 1 Camp. 176; 170 E. R. 918, N. P.

Duty to keep accounts.]—See Nos. 811, 812, *ante*, & *AGENCY*, Vol. I., pp. 437, 438, Nos. 1276-1278.

824. Duty to protect affairs of client from publication.]—The ownership of a solr. in the books relating to his business is subject to his client's right to have them protected from publication.

Hence, the books of a solr. who has been adjudicated a bkpt. cannot be sold, as they may be in the case of a trader, under Bankruptcy Act, 1861 (c. 134), s. 137.—*Re HOLDEN, Ex p. ROBERTS* (1863), 3 New Rep. 230; 33 L. J. Bcy. 8; 9 L. T. 469; 10 Jur. N. S. 28; 12 W. R. 183, L. C.

825. Duty to warn trustee client—Of consequence of omission to tax.]—Taxation of solr.'s bill more than a year after delivery. It is the duty of a solr. to tell his client, when a trustee, that if he does not tax his, the solr.'s, bill, the items not properly chargeable will be disallowed in passing his account.—*Ex p. FLOWER* (1868), 18 L. T. 457; *sub nom. Re F—*, 16 W. R. 749.

Annotations:—*Distd. Re Elmstic, Ex p. Tower Subway Co.* (1873), L. R. 16 Eq. 326; *Re Layton, Steele* (1890), 38 W. R. 652.

Right to withdraw.]—See Sect. 1, sub-sect. 4, D. (a), *ante*.

SUB-SECT. 2.—EXERCISE OF SKILL AND CARE—LIABILITY FOR NEGLIGENCE.

A. In General.

826. Duty to exercise skill & care.]—*WILSON v. TUCKER*, No. 967, *post*.

827. —.]—It is not every mistake or misapprehension of an attorney that will make him liable to an action for negligence. The question in such an action is, whether the attorney has used reasonable skill & reasonable care.—*SHILCOCK v. PASSMAN* (1836), 7 C. & P. 289.

828. —.]—*HART v. FRAME*, No. 875, *post*.

829. —.]—Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care & skill; he does not, if he is an attorney, undertake at all events to gain the cause.—*LANPHIER v. PHIPPS* (1838), 8 C. & P. 475.

Annotation:—*Mentd. Steljes v. Ingram* (1903), 19 T. L. R. 534.

830. —.]—*ALDIS v. GARDNER* (1844), 1 Car. & Kir. 564.

831. —.]—*PARKER v. ROLLS*, No. 956, *post*.

PART IV. SECT. 4, SUB-SECT. 2.—A.

826 i. Duty to exercise skill & care.]—*CARRIGAN v. ANDREWS* (1849), 1 All. 485.—CAN.

826 ii. —.]—*MACDONALD v. CORRODI* (1858), 1 Ch. Ch. 145.—CAN.

826 iii. —.]—*HARRINGTON v. FALL* (1865), 15 C. P. 541.—CAN.

826 iv. —.]—*RONALDSON v. DRUMMOND & REID* (1881), 8 R. (Ct. of Sess.) 767; 18 Sc. L. R. 551.—SCOT.

826 v. —.]—*MCALPINE v. ANDERSON'S EXECUTORS* (1926), 47 N. L. R. 377.—S. AF.

Sect. 4.—Obligations of solicitor towards client: Subsect. 2, A. & B. (a) & (b) i.]

832. —.]—LAVANCHY v. LEVERSON (1859), 1 F. & F. 615.

833. —.]—SCLATER v. WATT (1894), *Times*, May 1.

834. Duty to use reasonable care.]—LEE v. DIXON, No. 888, *post*.

835. No duty to know all the law.]—No attorney is bound to know all the law. God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into (ABBOTT, C.J.).—MONTRIOU v. JEFFERYS (1825), 2 C. & P. 113; Ry. & M. 317; 172 E. R. 51, N. P.

Annotation:—*Refd.* Edwards v. Cooper (1828), 3 C. & P. 277.

836. Liability for mere mistake.]—MONTRIOU v. JEFFERYS, No. 835, *ante*.

837. —.]—SHILCOCK v. PASSMAN, No. 827, *ante*.

838. —.]—An attorney or law agent is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional services.

It would be monstrous to say that he is responsible for even falling into what must be considered a mistake (LORD CAMPBELL).—PURVES v. LANDELL (1845), 12 Cl. & Fin. 91; 8 E. R. 1332, II. L.

Annotation:—*Refd.* Stokes v. Trumper (1855), 2 K. & J. 232.

839. —.]—In an action by an attorney against one of the creditors of an insolvent, to recover the costs of preparing a deed of assignment for the benefit of creditors, the defence set up was, that pltf., when he prepared the deed, was aware that the insolvent's property had been taken possession of by the official assignee on a petition for protection under Bankrupt Law Consolidation Act, 1839 (c. 106), ss. 211, 213, but it appeared that deft. had informed pltf. that it was believed all the creditors would execute the deed. It turned out that none of the creditors executed it:—*Held*: the defence failed, & pltf. was not bound to ascertain if they would execute it. An error of law on these questions would not show such negligence or ignorance as should preclude pltf. from recovering his costs.—LEWIS v. COLLARD (1853), 14 C. B. 208; 2 C. L. R. 1345; 23 L. J. C. P. 32; 22 L. T. O. S. 135; 2 W. R. 105; 139 E. R. 86.

Annotation:—*Mentd.* Williams v. Dray (1860), 1 L. T. 513.

840. Liability for mere error of judgment—Doubtful point of law.]—GODEFROY v. DALTON, No. 854, *post*.

841. —.]—STEVENSON v. ROWAND, No. 988, *post*.

842. —.]—KEMP v. BURT, No. 891, *post*.

835 i. No duty to know all the law.]—HEINRICHS v. WEINS (Sask.) (1916), 34 W. L. R. 394; 10 W. W. R. 414.—CAN.

835 ii. —.]—FREE CHURCH OF SCOTLAND v. MACKNIGHT'S TRUSTEES, [1916] S. C. 349.—SCOT.

844 i. Liability for mere error of judgment.]—Before deft. can complain of the conduct of pltf.'s solr. in continuing an action on a case that has been shown to be weak & after an opportunity of accepting a fair offer of settlement, there should be clear evidence of misconduct or default on the part of the solr., going further than error of judgment or miscalculation as to the chances of success.—*Re* MARTIN, BELL v. GREEN, [1920] 3 W. W. R. 900.—CAN.

844 ii. —.]—A mere error of judgment, as a mistake upon a point of law, or in the construction of a difficult

Act of Parliament, is not such negligence as renders an attorney liable to his client for a loss sustained in consequence of such error or mistake.—CROSBIE v. MURPHY (1858), 8 I. C. L. R. 301.—IR.

846 i. Ignorance or negligence must be gross.]—CHAPMAN v. BOULTBEE (1863), 13 C. P. 372.—CAN.

846 ii. —.]—FARQUHARSON v. WEEKS (P. E. L.) (1910), 7 E. L. R. 547.—CAN.

846 iii. —.]—URQUHART v. GRIGOR (1857), 19 Dunl. (Ct. of Sess.) 853; 29 Sc. Jur. 399.—SCOT.

c. Duty to act without instructions.]—MOWSE v. SHAW (1913), 24 O. W. R. 283; 4 O. W. N. 971; 9 D. L. R. 642.—CAN.

d. Liability for negligence.]—If a

843. —.]—If an attorney make a mistake upon a point, on which persons of reasonable skill may fairly entertain a doubt, & in consequence of such mistake, his client derive no benefit from his services, this is not such negligence as will deprive him of his right to recover the amount of his bill.—BULMER v. GILMAN (1842), 4 Man. & G. 108; 3 Scott, N. R. 781; 11 L. J. C. P. 174; 6 Jur. 761; 134 E. R. 45.

Annotation:—*Refd.* Hunter v. Caldwell (1847), 11 Jur. 770.

844. —.]—HART v. FRAME, No. 875, *post*.

845. —.]—It is not sufficient for a client to allege & prove that the solr. acting on his behalf gave him wrong advice on a doubtful point. Something more than an error of judgment is necessary in order to constitute actionable negligence, for the solr. is not liable unless *crassa negligentia* can be established, whereby the client has suffered damage.—FAITHFULL v. KESTIVEN (1910), 103 L. T. 56, C. A.

846. Ignorance or negligence must be gross.]—BAIKIE v. CHANDLESS, No. 966, *post*.

847. —.]—An attorney is not liable to an action for negligence in misconstruing an obscure rule of ct.

In an action against an attorney, it is not sufficient that he should have made a slip or mistake. There must be *crassa negligentia* (BAYLEY, J.).—LAIDLER v. ELLIOTT (1825), 3 B. & C. 738; 5 Dow. & Ry. K. B. 635; 3 L. J. O. S. K. B. 96; 107 E. R. 907.

Annotations:—*Distd.* Frankland v. Cole (1832), 2 Cr. & J. 590. *Consd.* Hunter v. Caldwell (1847), 10 Q. B. 69.

848. —.]—The negligence charged against an attorney, to subject him to action at the suit of his client, must be gross negligence.

Preparing a warrant of attorney from two, without inserting words to guard against the possibility of one of them dying before judgment:—*Held*: not to be gross negligence.—KETTLE v. WOOD (1827), 5 L. J. O. S. K. B. 173.

849. —.]—MEGGS v. BINNS, No. 1083, *post*.

850. —.]—ELKINGTON v. HOLLAND, No. 942, *post*.

851. —.]—PURVES v. LANDELL, No. 838, *ante*.

852. —.]—FAITHFULL v. KESTIVEN, No. 845, *ante*.

853. Liability for counsel's conduct of cause.]—KINGDON v. WILTON, No. 461, *ante*.

B. In Contentious Matters.

(a) In General.

854. Duty to know practice of court.]—An attorney, with the advice of counsel, produced, in an action against J. for negligence in the conduct of pltf.'s defence to another action, the prothonotary's book to prove an allegation, "that

client places himself in the hands of an attorney, he places himself in his hands in regard to all matters having connection with the suit, & the attorney must be held liable for any negligence, even though his client do not take prompt action in the matter.—ALLY NUCKEE KHAN v. ANLEY (1862), 1 Hyde, 134.—IND.

c. Duty to carry cause to conclusion.]—It is the duty of a solr. who has once undertaken a cause to carry it to a conclusion.—*Re* A SOLICITOR (1870), 4 B. L. R. P. C. 29.—IND.

PART IV. SECT. 4, SUB-SECT. 2.—
B. (a).

f. Neglect to plead unmeritorious defence.]—*Semble*: an attorney would not be liable for culpable negligence, in not urging for his client the defence that the agreement sued upon was made

in consequence of the negligence of J. judgment by default had been signed, & such further proceedings had, that final judgment was afterwards signed & execution issued"; whereupon, pltf. was nonsuited for not producing the record of that judgment or a proper copy:—*Held*: this was not such negligence as rendered the attorney liable to an action.

The cases . . . appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this ct.; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: & for the mismanagement of so much of the conduct of a cause as is usually & ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law (TINDAL, C.J.).—*GODEFROY v. DALTON* (1830), 6 Bing. 460; 4 Moo. & P. 149; 8 L. J. O. S. C. P. 79; 130 E. R. 1357.

Annotations:—*Consd.* *Fletcher v. Jubb, Booth & Hellwell*, [1920] 1 K. B. 275. *Reid.* *Hart & Hodge v. Frame* (1839), 3 Jur. 547; *Chapman v. Van Toll* (1857), 30 L. T. O. S. 116. *Mentd.* *Tapp v. Jones* (1874), L. R. 9 C. P. 418.

855. —.]—It is the duty of solrs. to know what is the practice of the ct.; & I wish the profession to understand, that whatever may be the consequence to their clients, an error in practice can furnish no claim to the indulgence of the ct. (LORD COTTENHAM, C.).—*HEMMING v. DINGWALL* (1846), 1 Coop. temp. Cott. 14; 7 L. T. O. S. 365; 10 Jur. 531; 47 E. R. 720, L. C.

856. —.]—*LAIDLER v. ELLIOTT*, No. 847, ante.

857. *Duty to call for payment of trust money into court.*—*Qu.*: whether a solr. acting for both sides, if he omits to call for the payment of the trust moneys into ct., may not be made answerable for any loss occasioned thereby.—*GRESLEY v. HEATHCOTE* (1825), 3 L. J. O. S. Ch. 107, L. C.

858. *Duty to carry cause to trial.*—An attorney, who had been consulted by his client, told the client he had no case, but he would commence a suit if it were desired, as it might lead to a compromise, or the defence upon the pleas pleaded may not be available. The suit was commenced & continued towards the time for trial, when the attorney declined to continue it further unless £25 were advanced for the purpose; the advance was made, but he did not carry the cause to trial:—*Held*: he was liable to his client for negligence in an action brought for damages.—*JEFFERY v. DAVIES* (1850), 15 L. T. O. S. 185.

859. *Duty to explain legal effect of steps taken.*—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1895), 39 Sol. Jo. 219, D. C.

860. *Duty to report result of proceedings—Firm instructing solicitor—Report to managing partner only.*—It is not the ordinary duty of a solr. instructed by the managing partner to act for a partnership in an action brought against the firm to communicate to each of the partners the result of the proceedings. A communication to the managing partner is sufficient.—*TOMLINSON v. BROADSMITH*, [1896] 1 Q. B. 386; 65 L. J. Q. B. 308; 74 L. T. 265; 44 W. R. 471; 12 T. L. R. 216; 40 Sol. Jo. 318, C. A.

Annotation:—*Mentd.* *Rodriguez v. Speyer*, [1919] A. C. 59.

Action for negligence.—*See Sub-sect. 2, E., post.*

on a Sunday, as it is not part of his professional duty to take all dishonest

E. Failure to obtain confession of

judgment.—*BENNER v. BURTON* (1856), 13 U. C. R. 387.—CAN.

h. Solicitor acting as barrister.—*WATT & COHEN v. WILLIS* (1909), 2 N. Z. L. R. 58.—N.Z.

(b) Before Trial.

i. In General.

861. *Duty to appear.*—ANON. (1661), 1 Sid. 31; 82 E. R. 952.

Annotation:—*Consd.* *Vansandau v. Browne* (1832), 9 Bing. 402.

862. —.]—Motion was made to compel an attorney to appear for J. S. The ct. held he was not compellable to appear for any one, unless he takes his fee, or backs the warrant; & then they will compel him.—ANON. (1699), 1 Salk. 87; 91 E. R. 81.

863. —.]—If an attorney undertake to appear, he shall be compelled to file appearance.—ANON. (1703), 6 Mod. Rep. 42; 87 E. R. 804.

864. *Duty to plead—Where plea false or unconscionable.*—ANON. (1480), Jenk. 52; 145 E. R. 39.

865. *Duty to point out client's liability for expenses.*—An attorney cannot recover from the assignee of an insolvent debtor, the amount of a bill of costs incurred in proceedings requiring the consent of a meeting of creditors, without proving that such consent was obtained, or that the client was informed he was proceeding at his own risk.

It is an important part of the jurisdiction of the ct., to see that their officers perform their duty towards their clients (LORD TENTERDEN, C.J.).

It was the duty of the attorney to see that his client proceeded in such a way as to be able to reimburse himself out of the estate (HOLROYD, J.).—*ALLISON v. RAYNER* (1827), 7 B. & C. 441; 1 Man. & Ry. K. B. 241; 6 L. J. O. S. K. B. 85; 108 E. R. 788.

Annotation:—*Distd.* *Gill v. Lougher* (1830), 1 Tyr. 121.

866. —.]—When unusual expenses are about to be incurred in the course of an action, it is the duty of the solr. not only to obtain his client's authority for the purpose, but also to point out to the latter that, even if he succeeds in the action, he may have to bear such expenses himself. If the solr. fails to advise his client of this, & the expenses are disallowed in taxation between party & party, they will not be allowed as between solr. & client.—*Re BLYTH & FANSHAW, Ex p. WELLS* (1882), 10 Q. B. D. 207; 52 L. J. Q. B. 186; 47 L. T. 610; 31 W. R. 283.

Annotations:—*Appld.* *Re Broad & Broad* (1885), 15 Q. B. D. 420. *Consd.* *Re Nation, Nation v. Hamilton* (1887), 57 L. T. 648. *Distd.* *Osmond v. Mutual Cycle & Manufacturing Supply Co.*, [1899] 1 Q. B. 488. *Appld.* *Re Roney*, [1914] 2 K. B. 529. *Reid.* *Re Cohen & Cohen*, [1905] 2 Ch. 137.

867. *Duty to check useless litigation.*—A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, & has succeeded in it, & received from the Treasury a portion of the fine imposed upon deft., is not entitled, in an action against the same deft., to recover more than nominal damages. It is the duty of an attorney when applied to to bring such an action, to dissuade the party from persevering in his intention.—*JACKS v. BELL* (1828), 3 C. & P. 316; 172 E. R. 437, N. P.

Annotation:—*Reid.* *Gill v. Lougher* (1830), 1 Tyr. 121.

868. —.]—It is a duty of solrs. to their clients, & to their own characters, to prevent litigation which cannot be beneficial to any parties in the result.—*OTTLEY v. GILBY* (1845), 8 Beav. 602; 14 L. J. Ch. 177; 4 L. T. O. S. 411; 50 E. R. 237.

Annotation:—*Reid.* *Springett v. Dashwood* (1860), 3 L. T. 542.

PART IV. SECT. 4, SUB-SECT. 2.— B. (b) i.

861 i. *Duty to appear.*—BOYNE v. ELSTON (1861), 10 N. B. R. (5 All.) 164.—CAN.

Sect. 4.—Obligations of solicitor towards client: Subsect. 2, B. (b) i. & ii.]

869. Duty to investigate cause of action.]—Preparatory to commencing an action, it is the duty of an attorney to inform himself correctly of the nature of his client's demand, & of the proof which can be adduced in its support. Thus, in an action brought by an attorney against his client for the costs of a writ & subsequent proceedings, which had apparently been abandoned for want of evidence, & the jury had found a verdict for the amount of the costs; on the argument upon a rule nisi obtained for entering a nonsuit on grounds reserved at the trial, but which grounds failed on such argument, it appeared, from the judge's notes at the trial, that the attorney received his instructions through the medium of a third party, a collector of debts, & without any personal interview with deft., who had, through such third party, forwarded a written retainer & authority to the attorney:—*Held*: in the exercise of their duty for the protection of suitors, they were called upon to interpose between the attorney & his client, & suggested a *stet processus*, or, at the attorney's option, a reference to the master to report whether proper inquiries had been made by him before action brought, with a condition annexed for payment of all costs by him, if the report should be in the negative; or, failing the attorney's concurrence in either of those proposals, a new trial to be had between the parties.—*GILL v. LOUGHER* (1830), 1 Cr. & J. 170; 1 Tyr. 121; 9 L. J. O. S. Ex. 24; 148 E. R. 1379.

Annotation:—Apld. Barker v. Fleetwood Improvement Comrs. (1890), 62 L. T. 831.

870. —.]—An attorney received from O. & A., agents of C. L. & co., of Paris, instructions to sue the acceptors upon five foreign bills of exchange, which they, O. & A., alleged to be "unpaid & duly protested in their hands." A copy of one of the bills was sent to the attorney, with a note stating them to be all indorsed to C. L. & co. The attorney thereupon brought the action in the names of O. & A., & discovering afterwards, when the bills were for the first time shown to him, that there was no special indorsement to O. & A., as required by the law of France, he discontinued, & brought another action in the names of C. L. & co.:—*Held*: the suing in the names of O. & A. without having first ascertained that they were in a position to maintain an action on the bills, was such gross negligence as to disable the attorney from recovering the costs of the abortive action.—*LONG v. ORSI* (1856), 18 C. B. 610; 26 L. J. C. P. 127; 27 L. T. O. S. 158. 187; 139 E. R. 1509.

Annotation:—Refd. Chapman v. Van Toll, Van Toll v. Chapman (1857), 8 E. & B. 396.

871. Duty to see that admissions in writing.]—It is the duty of an attorney in an action to see that all admissions are in writing; & where there has been an express admission made in the usual formal way, the ct. will not extend it on oral evidence, nor imply any further admission from previous correspondence; nor will they grant a new trial on the ground of surprise, merely because the attorneys on each side have misunderstood each other as to the extent or effect of some supposed agreement for admissions.—*HOLFORD v. HUGHES* (1861), 10 W. R. 60.

869 i. Duty to investigate cause of action.]—*ROE v. STANTON* (1870), 17 Gr. 389.—*CAN.*

k. Liability for negligence—Failure to give necessary notice.]—*SCOTT v. MCCARTER* (B. C.) (1908), 8 W. L. R. 228.—*CAN.*

875 i. — Proceeding under wrong

section of statute.]—*HART & HODGE v. FRAME & Co.* (1839), Macl. & Rob. 595.—*SCOT.*

l. — Delay in obeying instructions.]—*SCHUTTE v. BUKES*, [1904] O. R. C. 68.—*S. AF.*

m. Duty to explain all consequences of defence.]—It is the duty of deft.'s

872. Duty to draw pleadings—As specified by client.]—*IBBOTSON v. SHIPPEY* (1879), 23 Sol. Jo. 388.

873. Liability for negligence—Want of care in preparation of case for trial.]—*GODEFROY v. DALTON*, No. 354, *ante*.

874. — Indorsement of return to writ.]—*MASTERS v. LEWIS* (1837), 2 Mood. & R. 59, N. P.

875. — Proceeding under wrong section of statute.]—In undertaking a client's business, an attorney or agent in England or Scotland undertakes on his own part for the existence & the due employment of skill & diligence. Where an injury is sustained by his client in consequence of the absence of either, he is responsible to his client for such injury.

Where, therefore, masters employed an attorney to take proceedings against their apprentices for misconduct, & the attorney specifically proceeded on the sect. of the statute which related to servants & not to apprentices:—*Held*: this was an instance of such want of skill or diligence as to render the attorney liable to repay to his clients the damages & costs occasioned by his error.

Professional men possessed of a reasonable portion of information & skill, according to the duties they undertake to perform, & exercising what they so possess with reasonable care & diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matter of law or discretion (*LORD COTTENHAM, C.*).—*HART v. FRAME* (1839), 6 Cl. & Fin. 193; Macl. & Rob. 595; 3 Jur. 547; 7 E. R. 670, H. L.

Annotations:—Consd. Fletcher v. Jubb, Booth & Helliwell, [1920] 1 K. B. 275. *Refd. Purves v. Landell* (1845), 12 Cl. & Fin. 91.

876. — Instituting action without authority.]—They [the solrs.] were guilty of negligence in bringing an action for a man they never saw, without first ascertaining that they had his authority (*LORD DENMAN, C.J.*).—*CARMAN v. EDWARDS* (1840), 9 C. & P. 596, N. P.; *subsequent proceedings* (1841), 5 Jur. 24.

877. — Defective indictment.]—Pltf., an attorney, undertook a prosecution for perjury on deft.'s behalf, & agreed not to charge him full costs, except money out of pocket. He disbursed £105 towards carrying on the proceedings, but, by negligence, preferred a defective indictment, & in consequence, the prosecution failed:—*Held*: he could not recover against deft. for the disbursements.—*LEWIS v. SAMUEL* (1846), 8 Q. B. 685; 1 New Pract. Cas. 424; 15 L. J. Q. B. 218; 7 L. T. O. S. 60; 10 Jur. 429; 115 E. R. 1031.

878. — Advising wrong remedy.]—The taxing master has, under Solicitors Act, 1843 (c. 73), a discretion to disallow costs he may think unduly claimed.

The disallowance of the whole costs of an action of replevin, where replevin was clearly the wrong remedy, is a proper exercise of that discretion.

An attorney is clearly responsible, unless acting on the opinion of counsel.—*Re CLARK* (1851), 1 De G. M. & G. 43; 21 L. J. Ch. 20; 18 L. T. O. S. 130; 15 Jur. 1047; 42 E. R. 467, L. JJ.

Annotations:—Consd. Re Barrow (1853), 17 Beav. 547. *Refd. Re Atkinson & Pilgrim* (1858), 26 Beav. 151. *Mentd. Re Browne* (1852), 21 L. J. Ch. 442.

legal advisor before placing on the record a defence based upon Stat. Frauds to explain fully such defence to his client, & point out its full meaning & effect, & the probable consequences of the defence in case the event turns upon a question of credibility.—*CHARLICK v. FOLEY BROTHERS, LTD.* (1916), 21 C. L. R. 249.—*AUS.*

879. — Instituting action where success doubtful—Through own fault.]—It is not negligence in an attorney to institute an action on a contract, in the preparation & carrying out of which he has himself been concerned; & as to which, even through an act or default of his own in carrying it out, it is doubtful, in law, whether his client can recover; & he does not in fact recover. Thus, where an attorney, on the part of his client, an execution creditor, had effected an arrangement with a third party to release him, on such party undertaking that debtor should give certain bills, & execute a warrant of attorney to secure their payment; the undertaking to be void if the bills, etc., were not sent to the guarantor by a certain time; the attorney sent notes instead of bills; & guarantor sent them to debtor, & debtor signed them, but declined to execute the warrant of attorney; creditor suing on the guarantee having averred in his declaration the giving of the notes as performance; & the declaration having been deemed bad on demurrer; in an action by creditor against the attorney for negligence in not sending bills; whereby the guarantor was discharged, the debt lost, & the costs of the former action thrown away:—*Held*: the suing on the guarantee was not *per se* evidence of negligence; but the sending notes instead of bills was negligence, for which the attorney was answerable; because though there might be no substantial difference between bills & notes in such a case, it raised a doubt, & involved his client in difficulty, which might have been avoided.—*LEVY v. SPYERS* (1856), 1 F. & F. 3, N. P.; *subsequent proceedings*, 1 F. & F. 5, n.

880. — Failure to apply for order of reference—Action on money bond.]—After the issuing of a writ in an action on a common money bond, debt. wrote, stating that he had paid a part & could prove this, & that he was ready to pay the rest. The attorney for claimant did not apply for an order of reference under C. L. P. Act, 1854 (c. 125), s. 3, but delivered a declaration, to which debt. pleaded payment. When the cause, after a considerable lapse of time, was in the paper for trial, a judge's order was obtained by consent to refer the matter to the master to take the account; & he made his *allocatur* in favour of the pltf. for debt & costs. After the letter was written, & before the *allocatur* was made, debt. became bkpt. In an action brought by the attorney for pltf., against pltf., on his bill, & in a cross action for negligence, the attorney admitted in evidence that the sect. did not occur to his mind on reading the letter, & that he could not say that the sect. ever came to his memory:—*Held*: there was no evidence of negligence on the part of the attorney in not applying for an order under the sect.; for that it could not fairly be said that it would have clearly appeared to any reasonable person that the matter in dispute consisted either wholly or in part of matters of mere account which could not conveniently be tried by a jury.—*CHAPMAN v. VAN TOLL, VAN TOLL v. CHAPMAN* (1857), 8 E. & B. 396; 27 L. J. Q. B. 1; 30 L. T. O. S. 116; 3 Jur. N. S. 1126; 6 W. R. 17; 120 E. R. 148.

Annotation:—*Mentd. Cummins v. Birkett* (1858), 3 H. & N. 156.

881. — Advising client not to defend action.]—In an action against an attorney, the declaration alleging that pltf.'s wife had filed a petition against him in the Divorce Ct. for a judicial separation on the ground of cruelty; that he had employed debt. as his attorney in the suit, & that he had a good defence in it; but was willing to consent to a decree for a judicial separation, provided that if he did so no evidence upon the charges contained in the

petition should be taken; & that debt., knowing the premises, negligently advised him not to defend the suit, & induced him to give such consent, & not to attend the hearing with any evidence in support of his defence; but that evidence was taken whereby, it being unanswered, his character had been greatly injured; debt., pleading not guilty, a traverse of his knowledge of the premises alleged, & a traverse that pltf. had a good defence to the suit, pltf.'s case being that he was induced not to defend, on the assurance that evidence would not be taken:—*Held*: he could not complain of the advice given, unless it was given upon that specific ground, which it was not disputed would have involved gross ignorance on the part of debt., & even had his case been that the advice itself was wrong, *semble*, the action could not have been sustained, if the evidence showed that it was given honestly, & in the full & reasonable belief that the defence could not be sustained upon the facts.—*HILL v. FINNEY* (1865), 4 F. & F. 616, N. P. *Annotation*:—*Refd. Davies v. Hood* (1903), 19 T. L. R. 158.

882. — Failure to register *lis pendens*.]—In an action against a solr. for negligence, the declaration stated that pltf. was equitably interested in four-tenth parts of the lease of a colliery, that the lessee had entered into negotiations for the sale of the lease to a co., & that pltf. retained debt., as solr., to file a bill in Chancery against the lessee & the co. for the purpose of enforcing the pltf.'s claim in respect of his shares, & praying that the lessee might convey & secure to pltf. four-tenths of the purchase-money, & that the co. might be decreed to do all things necessary to confirm such conveyance & security & might be enjoined from paying pltf.'s proportion of the purchase-money to the lessee. Breach, that debt. did not register the bill as a *lis pendens* according to Judgments Act, 1839 (c. 11), s. 7, whereby the lessee was enabled to dispose of the lease to another co. & to receive the purchase-money, & pltf. was deprived of his share in it:—*Held*: the declaration was good, as the bill in Chancery which prayed for an equitable lien against the intended purchasers of the lease was a *lis pendens*, which ought to have been registered under the statute, & having regard to the terms of the bill it was the duty of debt. as a solr. to have registered it, without any express request on the part of pltf.—*PLANT v. PEARMAN* (1872), 41 L. J. Q. B. 169; 26 L. T. 313; 20 W. R. 314.

883. — Alleged wrong advice as to defence.]—*IBBOTSON v. SHIPPEY* (1879), 23 Sol. Jo. 388.

884. — Failure to insert statement in defence—After instructions to insert.]—*IBBOTSON v. SHIPPEY* (1879), 23 Sol. Jo. 388.

885. — Failure to take proof of witnesses.]—Where the claim on a counterclaim is below the appealable amount, an appeal will nevertheless lie if the whole amount of the claim in the action exceeds that amount.

In an action against a solr. for negligence in not taking the proofs of the witnesses before the trial, it was proposed to call the witnesses to show what evidence they would have given if proofs had been taken:—*Held*: the evidence was admissible.—*MANLEY v. PALACKE* (1895), 73 L. T. 98; 11 R. 566, P. C.

ii. Suing in Wrong Court.

886. Whether amounts to negligence—Suing in inferior court—Where court has no jurisdiction.]—If an attorney brings an action with a ct. of limited jurisdiction, knowing that the circumstances which gave the right of action arose out

Sect. 4.—Obligations of solicitor towards client: Sub-sect. 2, B. (b) ii. & iii., & (c) i.]

of the jurisdiction of such ct. he is guilty of negligence.—*WILLIAMS v. GIBBS* (1836), 5 Ad. & El. 208; 2 Har. & W. 241; 6 Nev. & M. K. B. 788; 111 E. R. 1144.

Annotations:—Mentd. London Corpn. v. Cox (1867), L. R. 2 H. L. 239; *Byrne v. Guano Consignment Co., Weguelin, etc., Garnishees* (1872), 25 L. T. 935.

887. ———.]—An attorney received instructions to sue forty-five underwriters for particular average loss on certain policies on goods which had been shipped to Calcutta, & there sold. Having written ineffectually to each of them, demanding payment, he, under an impression that the only defence to be set up was a supposed set-off against the broker in whose name the policies were effected, sued out writs in the Lord Mayor's Ct., though he knew that that ct. had no power to issue a commission for the examination of witnesses abroad. The actions, after consolidation, being defended, & a commission to examine witnesses at Calcutta being found necessary, the proceedings in the Lord Mayor's Ct. were necessarily abandoned:—*Held*: the attorney was guilty of *crassa negligentia*, & disentitled to sue his client for the costs of such abortive proceedings, & it was no answer for him to say, upon the argument of a rule to set aside a verdict which had been found against him, that the difficulty might have been got over by the removal of the causes by *certiorari* to one of the superior cts.—*COX v. LEECH* (1857), 1 C. B. N. S. 617; 26 L. J. C. P. 125; 28 L. T. O. S. 370; 3 Jur. N. S. 442; 5 W. R. 199; 140 E. R. 254.

888. ——— **Suing in High Court—Where action maintainable in county court.]**—Though, when an attorney is employed to recover a small debt, he is liable to his client for unnecessarily & improperly suing in a superior ct., unless, with a knowledge of the consequences, his client instructs him so to do, yet his liability will depend upon whether, from his client's instructions to him, he might reasonably suppose that he would recover, & desired to sue for, a sum which would carry costs; or that from the circumstances & the nature of the question, a judge would certify for costs, & if he might reasonably so have supposed he will not be liable, even though his client, failing to recover in the superior ct., became subject to the costs of suit in that ct.

An attorney is only bound to use reasonable care (*WIGHTMAN, J.*).—*LEE v. DIXON* (1863), 3 F. & F. 744, N. P.; *subsequent proceedings*, 3 F. & F. 749, n.

Annotation:—Consd. Barker v. Fleetwood Improvement Comrs. (1890), 62 L. T. 831.

889. ———.]—Pltf., who was acting as solr. for defts., was instructed by them to commence proceedings against the owner of certain premises to recover the amount due from him as the frontager in respect of the expense of repairing a road upon which his premises abutted. The proceedings might have been instituted in the county ct., but pltf. commenced them in the Ch. Ct. of the County Palatine of Lancaster. The action was dismissed by the Vice-Chancellor, & the present defts. refused to pay pltf.'s costs upon the ground that he had been guilty of negligence in not commencing the action in the county ct.:—*Held*: as the Vice-Chancellor of the County Palatine had no jurisdiction to inflict any penalty as to costs upon a pltf. for bringing in the County Palatine Ct. an

action which might have been brought in the county ct., pltf. had not been guilty of actionable negligence in not advising that the proceedings should be commenced in the county ct.—*BARKER v. FLEETWOOD IMPROVEMENT COMRS.* (1890), 62 L. T. 831; 54 J. P. 711; 6 T. L. R. 323; *affd.*, 6 T. L. R. 430, C. A.

iii. Acting out of Time.

890. Whether amounts to negligence—Failure to move to vacate irregular order.]—A., a complainant in chancery, employed B. as his solr., during whose employment an irregular order to dismiss the bill on a certain day, unless publication passed, was obtained; before that day arrived C. was appointed the solr. of A., & the bill having been dismissed because no step was taken by C., an action was commenced against him for negligence, which was held to be maintainable, because he should have conformed with the order, or should within the time have moved to vacate it.—*FRANKLAND v. COLE* (1832), 2 Cr. & J. 590; 1 L. J. Ex. 189; 149 E. R. 248.

891. ——— **Action against local or public authority.]**—In an action against attorneys for negligence it appeared that pltf. employed defts. to conduct an action for him against a surveyor of turnpike roads, for alleged trespasses. The surveyor had seized & impounded pltf.'s sheep, as having been found straying on the road: pltf. regained possession of them, by promising the pound keeper to pay the proper charges, & drove them home; on the same day the surveyor retook the sheep in pltf.'s field, & again impounded them. The first & second taking were in Surrey, but on an intermediate day the sheep had escaped & been impounded in Sussex. Turnpike Act, 1823 (c. 95), s. 75, only authorises surveyors to impound sheep found on a turnpike road. Turnpike Roads Act, 1822 (c. 126), s. 147, incorporated in the above statute by reference, requires that actions against any person for anything done in pursuance of the Act, shall be commenced within three months, & the venue laid in the county where the cause of action arose. The attorneys commenced the action within three months, & had a declaration drawn by counsel, who returned it with an observation indorsed, that it would have been prudent to join two other parties. The attorneys thereupon, with pltf.'s assent, discontinued the action & brought another after the expiration of the three months laying the venue in Sussex. The declaration was settled by counsel & the case afterwards submitted to a special pleader who gave as his opinion, that the protecting clause of Turnpike Roads Act, 1822 (c. 126), did not apply to the trespass in seizing the sheep in pltf.'s field. Pltf. went to trial & was nonsuited on account of the action being out of time & the venue improper, with leave to move which was done without success:—*Held*: (1) this was not a case of actionable negligence in the attorneys; (2) at all events, there was so much doubt on this point, that the attorneys, if mistaken upon it, were not therefore culpably negligent.—*KEMP v. BURT* (1833), 4 B. & Ad. 424; 1 Nev. & M. K. B. 262; 2 L. J. K. B. 69; 110 E. R. 515.

892. ——— **Police constable.]**—If an attorney delays to sue out a writ in an action against a constable until after the expiration of the time within which the action must be brought, or if he omits the words "by statute" in entering

PART IV. SECT. 4, SUB-SECT. 2.—B. (b) iii.

n. Whether amounts to negligence—Delay in issuing execution.]—*SWEETMAN v. LEMON & PETERSON* (1863), 13 C. P. 534.—CAN.

defts.' plea upon the record, in consequence of which omission a verdict given for pltf. is subsequently set aside; these are such instances of negligence as will afford a good defence to an action brought for the recovery of his bill of costs.—ANON. (1845), 4 L. T. O. S. 454.

893. ———.]—Pltf. had been retained by deft. to bring an action for a false imprisonment against a constable & a person who had acted as a magistrate. The action was brought against the constable only, & not within the time limited by the statute. The constable pleaded not guilty, by statute, but the record was made up without the words "by statute" being inserted in the margin. The then pltf. in consequence obtained a verdict at the trial, but which was subsequently set aside by the ct., as it appeared that the plea had contained the words "by statute" in the margin. Pltf.'s attorney, the now pltf., had thereupon consented to a nonsuit, & a moiety of the costs had been levied upon the now deft.

In an action by the attorney for his costs in that action:—*Held*: he was not entitled to recover, on the ground of the gross negligence in the matter.—SAFFERY v. WRAY (1846), 7 L. T. O. S. 183.

894. ——— Public Authorities Protection Act, 1893 (c. 61).]—A solr. instructed by a client to make a claim against a corpn. for a neglect or default in the execution of a public duty or authority is bound to know the provisions of above Act, s. 1, & to bear them in mind at all material times, & to inform his client if the period is running out during which an action may be commenced. If he loses sight, & allows his client to lose sight, of the provisions of that sect. so that the claim is barred, the solr. is guilty of negligence.—FLETCHER & SON v. JUBB, BOOTH & HELLIWELL, [1920] 1 K. B. 275; 89 L. J. K. B. 236; 122 L. T. 258; 36 T. L. R. 19, C. A.

895. ——— Late delivery of particulars of set-off.]—In an action for a compensation for a contract, & for a proportion of salary due to pltf., deft. may give in evidence, accounts of receipts by pltf. upon the general issue, without notice of set-off. Therefore, an action will not lie against an attorney for negligence, for not delivering, in such a case, particulars of deft.'s set-off in time.—HEATHCOTE v. WILKINSON (1832), 1 L. J. K. B. 96.

Annotation:—Distd. Frankland v. Cole (1832), 2 Cr. & J. 590.

896. ——— Late amendment of bill.]—Upon motion for further time to amend, on account of pltf. having been obliged to dismiss his solr. for negligence & misconduct, & the new solr. not having had time to investigate the proceedings in the suit:—*Held*: pltf. was not entitled to relief, although he might have his remedy by action against the solr.—CLARKE v. DERBY CORPN. (1846), 16 L. J. Ch. 69; 8 L. T. O. S. 442; 10 Jur. 978.

897. ——— Filing writ out of time—Statute of Limitations.]—HUNTER v. CALDWELL, No. 1039, *post*.

898. ——— Omission to order caveat release by telegraph.]—The omission of pltf.'s country solr. to order by electric telegraph a caveat release to be entered, held, in the circumstances not to amount to negligence.—THE CORNER (1863), Brown. & Lush. 161; 3 New Rep. 94; 167 E. R. 324.

Annotations:—*Refd.* The Crimdon, [1900] P. 171. *Mentd.* The Don Ricardo (1880), 5 P. D. 121.

(c) During Trial.

i. In General.

899. Liability for negligence—Misconducting case.]—GODEFROY v. DALTON, No. 854, *ante*.

900. ——— Failure to give counsel proper in-
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structions.]—HAWKINS v. HARWOOD, No. 913, *post*.

901. ——— Matters within province of counsel.]—FRAY v. FOSTER, No. 937, *post*.

902. ——— Allowing judgment to go by default.]—Deft., an attorney, was sued for negligence in allowing judgment to go by default in an action which pltf. had retained him to defend; the negligence being proved:—*Held*: it was for the attorney to defend himself by showing, if he could, that pltf. had no defence in that action, & not for pltf. to begin by showing he had a good defence, & so had been damaged by the judgment by default.—GODEFROY v. JAY (1831), 7 Bing. 413; 5 Moo. & P. 284; 9 L. J. O. S. C. P. 122; 131 E. R. 159.

Annotations:—*Mentd.* Boorman v. Brown (1842), 3 Q. B. 511; Thomson v. Clanmorris, [1900] 1 Ch. 718.

903. ———.]—The ct. will not grant a new trial upon an affidavit by deft., stating that he was kept in ignorance by his late attorney of the state of the action, that he had a good defence upon the merits, & that the verdict passed against him by reason of the negligence of such late attorney. *Semble*: deft.'s remedy was by action against the attorney for negligence.—MOODY v. DICK (1835), 4 Nev. & M. K. B. 348.

904. ———.]—Deft. was not represented at the trial of an action, because his solr. was ignorant of the fact that, in pursuance of an order of the Lord Chancellor, the action had, with others, been transferred from one judge of the Ch. Div. to another, & had therefore only watched the list before the former judge:—*Held*: the solr. had been guilty of gross negligence.—BURGOINE v. TAYLOR (1878), 9 Ch. D. 1; 47 L. J. Ch. 542; 38 L. T. 438; 26 W. R. 568, C. A.

Annotations:—*Refd.* Canadian Oil Works Corpn. v. Hay (1878), 38 L. T. 145; Highton v. Treherne (1878), 48 L. J. Q. B. 167; Bracken v. Gilpin, [1921] W. N. 274.

905. ——— Failure to watch court list.]—BURGOINE v. TAYLOR, No. 904, *ante*.

906. ——— Failure to inform client of offer of compromise.]—If an attorney who is conducting a cause do not communicate to his client an offer of compromise made by the other party, but go on with the action to put costs in his own pocket, he cannot after that charge his client with the costs incurred; but as it is the duty of an attorney to communicate such an offer to his client, it must be presumed that he did so till the contrary is shown.—SILL v. THOMAS (1839), 8 C. & P. 762, N. P.

907. ——— Compromising action—Failure to ascertain amount of damage.]—WRAIGHT v. JOHNSTON, No. 574, *ante*.

908. ——— Without consent of client—Where for benefit of client.]—An attorney retained to defend an action is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts *bona fide* & with reasonable care & skill, & the compromise is for the benefit of the client, & is not made in defiance of his express prohibition.—CHOWN v. PARROTT (1863), 14 C. B. N. S. 74; 2 New Rep. 127; 32 L. J. C. P. 197; 9 Jur. N. S. 1290; 11 W. R. 668; 143 E. R. 372; *sub nom.* CHOWN v. PARROTT, 8 L. T. 391.

Annotations:—*Apld.* Prestwick v. Poley (1865), 18 C. B. N. S. 806. *Consd.* *Ite* Newen, Carruthers v. Newen, [1903] 1 Ch. 812. *Apld.* Welsh v. Roe (1918), 87 L. J. K. B. 520.

909. ———.]—It does seem rather extravagant that a Scottish law agent should be accused of negligence & want of skill, because in advising the liquidators as to the terms of a compromise, he accepted the law laid down by the same judges who had the control of the liquidation & whose sanction to the compromise was requisite

Sect. 4.—Obligations of solicitor towards client: Sub-sect. 2, B. (c) i., ii., iii. & iv. & (d).]

(LORD WATSON).—*BLAIR v. ASSETS CO.*, [1896] A. C. 409; 12 T. L. R. 409, H. L.

910. — *Failure to inform client's partners of state of action.*—*TOMLINSON v. BROADSMITH*, No. 860, *ante*.

ii. *Instructing Counsel.*

911. *Liability for failure to instruct counsel.*—*R. v. TEW* (1752), Say. 50; 96 E. R. 800.

Annotations:—*Refd. Re Jones* (1819), 1 Chit. 651; *Dixon v. Wilkinson* (1859), 4 Drew. 614.

912. — *]*—If a cause, which is meant to be defended, is called on, & tried, as an undefended cause, in consequence of deft.'s attorney neglecting to deliver his briefs the ct. will grant a new trial, compelling deft.'s attorney to pay the costs, as between attorney & client, out of his own pocket.—*DE ROUFGNY v. PEALE* (1811), 3 Taunt. 484; 128 E. R. 192.

Annotation:—*Distd. Watson v. Reeve* (1838), 6 Scott, 783.

913. — *]*—In an action against an attorney for negligently conducting a cause, by neglecting to instruct any counsel to appear before the action was called on for trial, it appeared that pltf.'s counsel appeared at the trial, of the cause with a brief, & called the attorney & the witnesses, & upon receiving no answer withdrew the record:—*Held*: the evidence established the alleged complaint, that deft. had not instructed counsel; for, by the term "instructing counsel" was to be understood properly instructing him, so as to enable him efficiently to discharge his duty.—*HAWKINS v. HARWOOD* (1849), 4 Exch. 503; 7 Dow. & L. 181; 19 L. J. Ex. 33; 14 L. T. O. S. 273.

914. — *Brief delivered too late.*—*CULMER v. HOPKINSON* (1850), 15 L. T. O. S. 205.

915. — *]*—*NICHOLSON v. MORGAN* (1854), 23 L. T. O. S. 176.

916. — *]*—Where a cause was called on in its turn for trial, & no attorney being present, & no counsel instructed, on behalf of pltf., he was non-suited, the ct. granted a new trial, on payment of the costs of the day by the attorney for pltf. out of his own pocket, together with the costs of the application, to deft.—*TOWNLEY v. JONES* (1860), 8 C. B. N. S. 289; 29 L. J. C. P. 290; 6 Jur. N. S. 1159; 141 E. R. 1177.

Annotation:—*Refd. Holden v. Holden & Pearson* (1910), 26 T. L. R. 307.

iii. *Attendance at Trial.*

917. *Duty to attend trial.*—*R. v. TEW* (1752), Say. 50; 96 E. R. 800.

Annotations:—*Refd. Re Jones* (1819), 1 Chit. 651; *Dixon v. Wilkinson* (1859), 4 Drew. 614.

918. — *]*—*LEVY v. WHITE* (1846), 8 L. T. O. S. 123.

919. — *]*—Every cause in the list of the day ought to be considered by the parties as the first cause, & they should be prepared accordingly. A cause was called on as undefended, whereupon deft.'s counsel interposed, & stated that it was defended, & the case was accordingly ordered to keep its place. It being in the list for trial on the 14th inst. it could not have been reached on that day in the ordinary course of things, but on its

being intimated by the judge, shortly before the rising of the ct., that he would take two short cases, the counsel for pltf. applied to have this case taken, on the ground that it was a short cause, whereupon it was called on, & deft.'s counsel not being in ct., pltf. obtained a verdict. Upon an application subsequently to set aside the trial, on the ground that it was improperly taken out of its turn in the absence of deft., the ct. refused to interfere, holding that it was competent to the judge to take the causes in any order he thought most convenient, & it was the duty of the legal advisers of the deft. to have been present.—*COTTAM v. BANKS* (1847), 2 New Pract. Cas. 13; 1 Saund. & C. 302; 8 L. T. O. S. 347; 11 Jur. 148.

920. — *With witnesses.*—*GODEFROY v.*

ante.

—*HAWKINS v. HARWOOD*, No.

913, *ante*.

922. — *]*—In an action by attorneys for the costs of a defence, which failed, they having been absent on the day of trial, & some of the witnesses consequently not being in ct.:—*Held*: they were entitled to recover, notwithstanding the verdict had passed against their clients, defts., unless the jury thought that the absence of the witnesses had caused the loss of the verdict, & so made pltf.'s services wholly valueless.

It was the duty of pltf's. to have been present in ct., either in person or by their clerk, to marshal the witnesses, & answer the questions of counsel. But the question is, what was the real consequence of their absence, & whether it made all their services valueless? If not, it merely disentitled them to the costs of that day's attendance, to be disallowed on taxation. In that case find for pltf's., subject of course to taxation (*BRAMWELL v. B.*).—*DUNN v. HALL* (1861), 2 F. & F. 642, N. P.

923. — *& hear verdict delivered.*—When a jury retire to consider of their verdict, the attorneys of the parties ought to remain in ct. to hear it delivered.—*DAUNTLEY v. HYDE* (1841), 6 Jur. 133.

924. — *Before arbitrator.*—*SWANNELL v. ELLIS*, No. 1059, *post*.

iv. *Matters relating to Evidence.*

925. *Duty to have original documents in court.*

—It is the duty of solrs. to have the original documents in ct. at the hearing.—*GALLIMORE v. GILL* (1856), 27 L. T. O. S. 279; 4 W. R. 773, L. JJ.

926. *Duty to use care in selection of witnesses.*

—An attorney employed to conduct an action is bound to use due & proper care in the employment of persons whose evidence is material in the cause to prepare themselves to give such evidence (*MARTIN, B.*).—*MERCER v. KING* (1859), 1 F. & F. 290, N. P.

927. *Liability for negligence—Failure to procure attendance of witnesses.*—Where an attorney for pltf. suffered the case to be called on without previously ascertaining whether a material witness, whom pltf. had undertaken to bring into ct., had arrived, in consequence of which pltf. was non-suited. In an action against him for negligence:—*Held*: it was properly left to the jury to say whether he had used reasonable care in conducting the cause; & the jury having found in the negative,

PART IV. SECT. 4, SUB-SECT. 2.—
B. (c) ii.

911 i. *Liability for failure to instruct counsel.*—*KENNY v. ARMSTRONG* (1846), 4 U. C. R. 196.—CAN.

911 ii. — *]*—*LESLIE v. BALL* (1863), 22 U. C. R. 512.—CAN.

PART IV. SECT. 4, SUB-SECT. 2.—
B. (c) iii.

917 i. *Duty to attend trial.*—It is the duty of the attorney & counsel in a cause to attend until the case is disposed of.—*BOWES v. SUTHERLAND* (1842), 4 N. B. R. (2 Kerr) 1.—CAN.

917 ii. — *]*—*JONES v. BOTSFORD*

(1877), 1 P. & B. 581.—CAN.

PART IV. SECT. 4, SUB-SECT. 2.—
B. (c) iv.

o. *Liability for negligence—Failure to procure attendance of witnesses.*—*WADE v. BALL* (1870), 20 C. P. 302.—CAN.

the ct. refused to disturb the verdict.—*REECE v. RIGBY* (1821), 4 B. & Ald. 202; 106 E. R. 912.

Annotation.—*Reid. Doorman v. Jenkins* (1834), 2 Ad. & El. 256.

928. ———.]—The father of a party to a cause was a material witness. The attorney did not serve him with a *subpoena*, but he was told that he must attend the trial on the following day. The verdict was lost in consequence of his non-attendance. The ct. held that the attorney had not been guilty of such negligence as that an action would lie against him.—*PRICE v. BULLEN* (1824), 3 L. J. O. S. K. B. 39.

929. ——— **Failure to produce proper record of judgment.**]—*GODEFROY v. DALTON*, No. 854, *ante*.

930. ——— **Omission to examine documents received from judge's clerk.**]—The depositions of foreign witnesses were handed to deft.'s attorney's clerk, by the judge's clerk, for the purpose of being used at the trial. A material document, however, was omitted. This was not found out until at the trial:—*Held*: the attorney's clerk was not bound to examine the papers given to him by the judge's clerk, & therefore, the omission was not occasioned by his negligence.—*POWLES v. HARGREAVES* (1850), 15 L. T. O. S. 207.

931. ——— **Mistake in examination of witnesses.**]—In a cause, commenced by information, relator's solr. intending to cross-examine two defts., who had previously been examined in chief on behalf of a co-deft., such defts. were, by mistake, examined upon interrogatories for the examination of witnesses in chief on the part of the informant & by reason of this mistake, the information was dismissed with costs:—*Held*: the mistake was *crassa negligentia* on the part of the solr. & disentitled him to recover any portion of his bill of costs.—*STOKES v. TRUMPER* (1855), 2 K. & J. 232; 25 L. T. O. S. 140; 3 W. R. 503; 69 E. R. 766; *compromised on appeal*, 3 W. R. 615, L. J.

Annotations.—*Consd. Re Nelson & Hastings* (1885), 30 Ch. D. 1. *Reid. Re Cartwright* (1873), L. R. 16 Eq. 469. *Re Hall & Barker* (1878), 47 L. J. Ch. 621; *Re Romer & Haslam*, [1893] 2 Q. B. 286.

932. ——— **Failure to call witness.**]—(1) In an action against an attorney, alleging that he was retained to conduct the defence of pltf. on a criminal charge, & that through his negligence pltf. was convicted, not alleging that he was innocent:—*Held*: pltf. to recover more than nominal damages must prove that he was convicted mainly through deft.'s negligence, & the negligence charged being, not taking the proofs of witnesses who were in ct. ready to be examined, but whom the counsel, on pltf.'s own statement, did not wish to call, & whom pltf. did not insist on calling.

In all cases counsel are responsible for the calling or not calling witnesses (*POLLOCK, C.B.*).

(2) An attorney is liable to an action for any misconduct, or miscarriage, which arises from his negligence (*POLLOCK, C.B.*).

(3) Negligence is nothing without damage (*POLLOCK, C.B.*).—*HATCH v. LEWIS* (1861), 2 F. & F. 467, N. P.; *subsequent proceedings*, 7 H. & N. 367.

(d) After Trial.

933. Duty as to judgment.]—It is the duty of pltf.'s attorney to see that the judgment is properly docketed.—*DOE d. BARRON v. PURCHAS* (1836), 2 Har. & W. 50; 5 L. J. K. B. 148.

934. Duty as to drawing up rule.]—It is the duty of the attorney to see that the rule is properly drawn up (*per CUR.*).—*BELLIS v. WRIGHT* (1843), 1 L. T. O. S. 168.

935. Liability for negligence—Failure to pay over amount received as damages.]—A declaration in *assumpsit* stated, that deft. was an attorney, & that, in consideration that pltf. would retain him as such attorney to conduct an action of tort at the suit of B. against L., deft. promised to fulfil his duty as such attorney, in & about prosecuting the action, & recovering damages; that deft. did, under the retainer, commence an action against L., in which judgment was recovered against him for £56; that deft. afterwards, as such attorney as aforesaid, for obtaining satisfaction of the damages, sued out a *fi. fa.* against L., to which the sheriff returned that he had levied £9, part of the damages, & *nulla bona* as to the residue; that deft., as such attorney as aforesaid, for obtaining satisfaction of the said residue, issued a *ca. sa.* under which L. was imprisoned, & paid the residue of the damages to the gaoler, who paid the same to deft., as such attorney as aforesaid; & that, before he received same, he sent, as such attorney as aforesaid, to the gaoler a discharge of L. out of custody, by virtue whereof he was discharged. Breach, that, although deft. received the damages, & pltf. paid to him, as such attorney as aforesaid, his costs of prosecuting the action, he did not pay over to B. or pltf., the residue of the damages:—*Held*: this declaration was bad, on special demurrer, for not showing distinctly that the money was received by deft., under his original retainer by pltf., in the action against L.—*BEVINS v. HULME* (1846), 15 M. & W. 88; 3 Dow. & L. 722; 15 L. J. Ex. 226; 5 L. T. O. S. 97; 153 E. R. 773.

Annotation.—*Reid. Butler v. Knight* (1867), 15 L. T. 621.

936. ——— **Failure to attend before master.**]—Where the master reported that he had summoned the parties to proceed before him, & that they had neglected to do so, & that he was unable to prosecute a reference; & it appeared that the default was occasioned solely by negligence of the solr. His Honour directed the reference to proceed in chambers, & ordered the solr. personally to pay the costs occasioned thereby.—*RIPLEY v. TIPLADY* (1855), 24 L. T. O. S. 296; 3 W. R. 276.

937. ——— **Omission to move for new trial—Without instructions.**]—No action lies against an attorney for negligence in the conduct of a case at *Nisi Prius* upon matters within the province of counsel, nor for omitting to move for a new trial without instructions so to do.—*FRAY v. FOSTER* (1859), 1 F. & F. 681.

938. ——— **Failure to issue execution.**]—*Primâ facie*, it is the duty of an attorney who has recovered a verdict for a client, pltf. in an action, to issue execution; & at all events, if desired to do so. If told at the time when retained, that his client has no money for costs, he cannot demand payment of costs incurred before issuing execution; nor, it should seem, in any case, can he demand more than the costs of issuing execution. But to maintain an action for negligence against him, for his not issuing execution, he deeming it not desirable to do so, there must be some evidence that it was desirable or for the benefit of pltf. to do so: as that he did not make due inquiries that debtor could pay, etc. In such a case the

PART IV. SECT. 4, SUB-SECT. 2.— B. (d).

933 i. Duty as to judgment.]—

33), 22 U. C. R.

933 ii. ———.]—A solr. is liable in to his client for neglecting to obey instructions to register a judgment & thereby precluding the client from recovering the amount of his

judgment debt.—*HETT v. PUN PONG* (1890), 18 S. C. R. 290.—CAN.

933 i. Liability for negligence—Failure to issue execution.]—*PHILLIPS v. DEMPSEY* (1859), 18 U. C. R. 177.—CAN.

Sect. 4.—Obligations of solicitor towards client: Subsect. 2, B. (d), & C. (a).]

attorney is liable for the amount, if any, which the jury think execution would have realised for his client.—*HARRINGTON v. BINNS* (1863), 3 F. & F. 942.

Annotation :—*Refd.* *Butler v. Knight* (1867), 15 W. R. 407.

939. — Omission to provide for continuance of receiver.]—*CRUSE v. SMITH* (1879), 24 Sol. Jo. 121, C. A.

C. In Non-Contentious Matters.

(a) In General.

940. Liability for acts consequential on obscure order of court.]—*LAIDLER v. ELLIOTT*, No. 847, *ante*.

941. Preparation of warrant of attorney—Failure to provide for risk of death of one of parties.]—*KETTLE v. WOOD*, No. 848, *ante*.

942. — Defect in attestation.]—A warrant of attorney was attested in the following form "Signed, sealed, & delivered by J. A., in my presence, & I subscribe myself as attorney for the said J. A., expressly named by him to attest his execution of these presents":—*Held*: insufficient; but, assuming such attestation to be bad, it was not such gross negligence as to preclude the attorney of the creditor from recovering his charges in respect of the warrant of attorney, it having been set aside as defective.—*ELKINGTON v. HOLLAND* (1842), 1 Dowl. N. S. 643; 9 M. & W. 659; 11 L. J. Ex. 273; 6 Jur. 374; 152 E. R. 278.

Annotations :—*Refd.* *Everard v. Poppleton* (1843), 5 Q. B. 181; *Knight v. Hasty* (1843), 12 L. J. Q. B. 293; *Lewis v. Kensington* (1846), 2 C. B. 463; *Hunter v. Caldwell* (1847), 9 L. T. O. S. 73; *Stokes v. Trumper* (1855), 1 K. & J. 232.

943. Liability for loss of client's deed.]—An attorney with whom deeds are deposited in order to enable him to obtain money for the party depositing, is bound upon inquiry by his client to inform him where such deeds are.

An attorney with whom deeds are deposited places them without his client's knowledge in the hands of a party from whom he has borrowed money for his client. The attorney is afterwards unable to inform his client where the deeds are. He is chargeable with having mislaid such deeds.—*WILMOTT v. ELKINGTON* (1833), 1 Nev. & M. K. B. 749; 2 L. J. K. B. 103.

944. —.]—If an attorney who has received his client's deed to keep for him, loses it, & nothing appears respecting the cause of the loss, he is liable to an action of detinue on the part of his client.—*REEVE v. PALMER* (1859), 5 C. B. N. S. 84; 28 L. J. C. P. 168; 5 Jur. N. S. 916; 7 W. R. 325; 141 E. R. 33, Ex. Ch.

Annotations :—*Mentd.* *Goodman v. Boycutt* (1862), 2 B. & S. 1; *Wilkinson v. Verity* (1871), L. R. 6 C. P. 206; *Bullon v. Swan Electric Engraving Co.* (1907), 23 T. L. R. 258; *Coldman v. Hill*, [1919] 1 K. B. 443; *City of Baroda v. Hall Line* (1926), 42 T. L. R. 717.

945. Duty to explain documents to be executed by client—Purport of covenants—Assignment of leaseholds.]—Pltf. being the assignee of a term of years determinable as to one moiety on the death of A., & as to the other moiety on the death of B., employed defts. as his attorneys on the assignment of his interest in the premises to one J. Defts. permitted pltf. on that occasion to execute an assignment containing an absolute & un-

qualified covenant for title, & a covenant for quiet enjoyment for the whole term if A. & B. should so long live, "without any lawful let, suit, hindrance, interruption, or denial of pltf., his exors. or administrators, or of any other person or persons whomsoever"; notwithstanding that they were at the time aware that B., one of the *cestuis que vie*, had been dead some years, unknown to the assignee:—*Held*: defts. were bound to explain to pltf. the consequences that might result to him from entering into such covenants; & the fact of pltf. himself being at the time aware of the death of B. afforded no answer to an action against them for negligence.—*STANNARD v. ULLITHORNE* (1834), 10 Bing. 491; 4 Moo. & S. 359; 3 L. J. C. P. 307; 131 E. R. 985.

946. — Levying fine.]—*BULKLEY v. WILFORD*, No. 1009, *post*.

947. — Composition deed.]—A debtor entered into a compromise with certain creditors, among whom was his solr., who called the meeting of creditors, attended the same, & prepared the deed of composition. The creditors, & among them the solr., executed the deed. In the deed was contained a covenant by debtor to assure his life forthwith, & keep it assured during three consecutive years for £1,500, a sum equal to which was covenanted by debtor to be paid to the trustees for division among the creditors, by monthly payments, or otherwise as the trustees might require. It was also provided, that, if debtor should fail in any payment covenanted to be made, or in assuring or keeping assured his life according to his covenant the deed should be void. There was a private agreement between debtor & the solr., that, notwithstanding the deed, the latter should be paid his debt in full. Debtor did not assure his life till a year after the deed, when he paid £500, the amount covenanted to be paid within that period, & assured his life for £1,000, all that was then due. The policy was deposited with one of the trustees. Two other instalments were subsequently paid to the trustees, according to the terms of the deed. The solr. subsequently brought an action against debtor for his whole demand. On a bill, filed by debtor, for an injunction to stay all proceedings in the action:—*Held*: it was the duty of the solr. to explain to debtor, or to ascertain whether he understood the legal & equitable obligations imposed by the deed, & the solr. would not be allowed, in a ct. of justice, to say, that he had believed that an assurance for £1,500 had been effected.—*WATTS v. HYDE* (1846), 2 Coll. 368; 6 L. T. O. S. 410; 10 Jur. 127; 63 E. R. 774; *subsequent proceedings* (1847), 2 Ph. 406.

Annotations :—*Mentd.* *King v. Corke* (1875), 1 Ch. D. 57; *Roe v. Davies* (1876), 2 Ch. D. 729; *Nobel's Explosive Co. v. Jones* (1880), 49 L. J. Ch. 726.

948. — Deed of gift.]—Voluntary deed by which an aged woman conveyed away all her property absolutely & at once, set aside after her death at the instance of volunteers, because the solr. who prepared it had not sufficiently explained the distinction between a deed & a will, nor had pointed out to her that she might reserve a life estate, or dispose of her property by will, thereby reserving the benefit of it during her life.—*ANDERSON v. ELSWORTH* (1861), 3 Giff. 154; 30 L. J. Ch. 922; 4 L. T. 822; 7 Jur. N. S. 1047; 9 W. R. 888; 66 E. R. 363.

Annotation :—*Refd.* *Coutts v. Acworth* (1869), L. R. 8 Eq. 558.

PART IV. SECT. 4, SUB-SECT. 2.—C. (a).

948 i. Duty
JEE (1912), 1.

by client—Deed of gift.]—*KAMINI*

v. KRISHNA CHANDRA MUKER-

949. — Will.]—I should say it is the practice of solrs. either to read over the whole instrument or to read & explain clause by clause the effect that each clause would have (SIR J. HANNEN).—*MORRELL v. MORRELL* (1882), as reported in 7 P. D. 68; 51 L. J. P. 49; 46 L. T. 485.

Annotations:—Mentd. In the Goods of Boehm, [1891] P. 247; *Collins v. Elstone*, [1893] P. 1; *Garnett-Botfield v. Garnett-Botfield*, [1901] P. 335; *Karunaratne v. Ferdinandus*, [1902] A. C. 405; *Gregson v. Taylor*, [1917] P. 256; *In the Estate of Beech*, *Beech v. Public Trustee*, [1923] P. 46.

—*See Sect. 3, sub-sect. 5, ante.*

950. — Bill of sale—Liability for false statement in document.]—*Semble*: a solr. who stated in the attestation clause to a bill of sale that he had explained the effect of it to the grantor when he had not in fact done so, would be liable to civil & penal consequences.—*Re HAYNES, Ex p. NATIONAL MERCANTILE BANK* (1880), 15 Ch. D. 42; 49 L. J. Bcy. 62; 43 L. T. 36; 44 J. P. 780; 28 W. R. 848, C. A.

Annotations:—Refd. Re Roper, Ex p. Bolland (1882), 21 Ch. D. 543. *Mentd. Credit v. Potts* (1880), 11 Q. B. 295; *Re Parker, Ex p. Charing Cross Advance & Deposit Bank* (1880), 16 Ch. D. 35; *Re Rogers, Ex p. Challinor* (1880), 16 Ch. D. 260; *Hamilton v. Chaine* (1881), 7 Q. B. D. 319; *Seal v. Claridge* (1881), 7 Q. B. D. 516; *Re Spindler, Ex p. Rolph* (1881), 19 Ch. D. 98; *Re Cowburn, Ex p. Firth* (1882), 19 Ch. D. 419; *Re Chapman, Ex p. Johnson* (1884), 26 Ch. D. 338; *Throssell v. Marsh* (1885), 53 L. T. 321; *Richardson v. Harris* (1889), 22 Q. B. D. 268; *Re Smith, Ex p. Tarbuck* (1894), 72 L. T. 59; *Barron v. Potter*, *Potter v. Berry* (1914), 84 L. J. K. B. 751; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

Liability for costs on neglect of duty.]—*See Part X, Sect. 4, post.*

951. Duty to investigate suspicious transactions.]—It is to be assumed that legal advisers, in discharge of their duty to their client, investigate suspicious transactions, & satisfy themselves before they approve them that it is for the client's benefit to confirm them.—*DE MONTMORENCY v. DEVEREUX* (1840), 7 Cl. & Fin. 188; West, 64; 4 Jur. 403; 7 E. R. 1039, H. L.

952. Duty on taking instructions—Drawing up will—Duty to see client.]—*WRENCH v. MURRAY* (1843), 3 Curt. 623; 1 L. T. O. S. 412; 7 Jur. 705; 163 E. R. 846.

953. ——*WALLIS v. MAUGHAN*, No. 809, *ante*.

954. — Duty to explain effect of proposed transaction.]—*ANDERSON v. ELSWORTH*, No. 948, *ante*.

955. Liability for transacting business in doubtful manner—Where right manner obvious—Notes sent instead of bills.]—*LEVY v. SPYERS*, No. 879, *ante*.

956. Failure to make agreement under seal—Payment of annuity.]—*Semble*: an attorney who receives instructions to prepare a security for the payment of an annuity to a woman in consideration of past cohabitation, is guilty of actionable negligence if he do it by a mere agreement only, not under seal. In such a case, the judge told the jury that every attorney is bound, under pain of being made responsible in an action, to bring a fair & reasonable amount of care & skill to the performance of his professional duty, without

defining what is a fair & reasonable amount of skill:—*Held*: no misdirection.—*PARKER v. ROLLS* (1854), 14 C. B. 691; 139 E. R. 284.

957. Duty in dealing with public company.]—*Semble*: it is a breach of duty in a solr., for which he may justly be blamed, if, in dealing with a public co., he places the smallest reliance on any representation of any agent of the co. as to its future acts. A solr. dealing with a public co., ought never to be satisfied with anything than the most solemnly executed agreement of the company.—*LEOMINSTER CANAL NAVIGATION CO. v. SHREWSBURY & HEREFORD RY. CO.* (1857), 3 K. & J. 654; 26 L. J. Ch. 764; 29 L. T. O. S. 342; 3 Jur. N. S. 930; 5 W. R. 868; 69 E. R. 1272.

Annotation:—Mentd. Bateman v. Mid-Wales Ry., National Discount Co. v. Same, Overend, Gurney v. Same (1866), 14 W. R. 672.

958. Duty as to drawing up settlement—Insertion of power of revocation.]—*Semble*: it is the duty of a solr. preparing voluntary deed to insert a power of revocation, unless the donor deliberately, & with full knowledge of the consequences, refuses to have such a power inserted.—*COUTTS v. ACWORTH* (1869), L. R. 8 Eq. 558; 38 L. J. Ch. 694; 21 L. T. 224; 17 W. R. 1121.

Annotations:—Refd. Phillips v. Mullings (1871), 7 Ch. App. 244; *Baker v. Loader* (1872), L. R. 16 Eq. 49; *Welman v. Welman* (1880), 15 Ch. D. 570.

959. — Negligence causing rectification.]—Pltf., a widow with children, being possessed of property left by her first husband, married, & marriage articles were prepared upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life. The bill was filed by the wife to rectify the settlement against the husband & the solr. who prepared the settlement. The Vice-Chancellor held that upon the evidence, the limitations were contrary to the intention of pltf., & that the husband, having undertaken as agent for the wife to have a settlement prepared, was bound to have such a contract prepared as the ct. would sanction, & such contract would give the wife the first life estate in her own property. A decree was therefore made to rectify the settlement. The husband, & the solr. who prepared the settlement, who in the view of the Vice-Chancellor had failed in his professional duty, & had by his neglect & misconduct caused the litigation, were ordered to pay the costs of the suit:—*Held*: as he had not been guilty of participation in a fraud, but at most only of a blunder for which the remedy was an action for professional negligence, there was no jurisdiction to order him to pay the costs of the suit.—*CLARK v. GIRDWOOD* (1877), 7 Ch. D. 9; 47 L. J. Ch. 116; 37 L. T. 614; 26 W. R. 90, C. A.

Annotation:—Refd. Lovesy v. Smith (1880), 15 Ch. D. 655.

960. — Retention of sufficient assets to pay debts.]—I do not wish to cast any reflection on the solr.; solrs. are not necessarily very good business men. But I must say that, if that statement had been made to me, I should have said that the settlor had not kept out of the settlement assets

949 i. — Will.]—Solr. called in to prepare a will does not discharge his duty by simply taking down & giving expression to the words of testator, without being satisfied by all available means the testamentary capacity exists & is being freely & intelligently exercised.—*MURPHY v. LAMPHIER* (1914), 31 O. L. R. 287; 6 O. W. N. 238; 32 O. L. R. 19; 7 O. W. N. 45; 20 D. L. R. 906.—CAN.

949 ii. ——*LYSAGHT v. McGRASH* (1882), 11 L. R. Ir. 142.—IR.

949 iii. ——*CLERY v. BARRY* (1887), 21 L. R. Ir. 152.—IR.

p. — Voluntary settlement.]—*HORAN v. MACMAHON* (1886), 15 L. R. Ir. 471; 17 L. R. Ir. 641.—IR.

957 i. Duty in dealing with public company.]—*Re DUBLIN BREWERY CO., Ex p. COX* (1884), 13 L. R. Ir. 174.—IR.

q. Failure to register deed of assignment.]—*Re KIRCHNER'S TRUSTEES* (1865), 5 N. S. W. S. C. R. (L.) 346.—AUS.

r. Erroneous opinion.]—An attorney is not responsible, as for a fraudulent breach of duty, for an erroneous opinion on a will.—*ALEXANDER v. SMALL & GOWAN* (1846), 2 U. C. R. 298.—CAN.

t. Liability for wrongful arrest.]—Pltf.'s attorney, acting as pltf.'s agent, & arresting deft. on his own affidavit, on a verdict being rendered against him for a malicious arrest, cannot deduct the amount of the verdict against himself from the amount received by him from pltf.—*Re*

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sufficient to enable him to pay all his debts without the aid of the property comprised in the settlement (JESSEL, M.R.).—*Re BUTTERWORTH, Ex p. RUSSELL* (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; 46 L. T. 113; 30 W. R. 584, C. A.

Annotations:—*Mentd. Re Ridler, Ridler v. Ridler* (1882), 52 L. J. Ch. 343; *Re Holden, Ex p. Official Receiver* (1887), 20 Q. B. D. 43; *Re Briggs & Spicer*, [1891] 2 Ch. 127; *In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

961. Liability for acting on information given by client.]—A solr. was consulted by a lessee of premises with reference to the building of a wall, to the erection of which on the demised premises his lessor objected. The lease was shown to the solr. The solr. made no inquiries as to whether there was any objection to building the wall, other than what might be contained in the lease. The land was subject to a restrictive covenant against any such erection in favour of the original vendors of the freehold, & the wall, after erection, had to be pulled down:—*Held*: the solr. had been guilty of no negligence.—*PITMAN v. FRANCIS* (1884), 1 Cab. & El. 355.

962. Failure to give notice of appointment of new trustees—New trustees of settlement of reversionary interest—Notice to original trustees of fund.]—In order to perfect the title of an assignee of an equitable interest in trust funds notice of the assignment must be given to the trustees of those funds. Therefore, if new trustees have been appointed in a settlement of a reversionary interest of funds bequeathed in trust under a will, & the person who has acted as solr. to the new trustees from the date of their appointment fails to give notice of the appointment to the trustees of the will, & loss is thereby caused to the settlement fund, the solr. is liable to an action of negligence at the suit of the new trustees. In such a case the right of action arises from a breach of contract, & therefore, Stat. Limitations runs in favour of deft. from the date of the breach of duty, i.e. from the time when the notice should have been given.—*BEAN v. WADE* (1885), 2 T. L. R. 157, C. A.

Annotation:—*Refd. Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337.

Action for negligence.]—*See* Sub-sect. 2, E., *post*.

(b) Investments.

963. Knowingly taking worthless security.]—*R. v. BENNET* (1754), Say. 169; 96 E. R. 841.

Annotations:—*Refd. Re Jones* (1819), 1 Chit. 651; *Dixon v. Wilkinson* (1859), 7 W. R. 351.

964. Recommending purchase of invalid security—Annuity—Recovery by solicitor over against grantor.]—Where an annuity has been made void by reason of a defect in the memorial, & the attorney who prepared the conveyances is sued by the grantee for negligence, & a verdict recovered

against him to the amount of the consideration money paid for the annuity, which he pays, he cannot recover it over against the grantor, in an action of *assumpsit*.—*BURDON v. WEBB* (1797), 2 Esp. 527; 170 E. R. 443, N. P.

965. ——— Invalidity due to subsequent ruling of court.]—*COMPTON v. CHANDLESS* (1802), cited in 3 Camp. at p. 19; 170 E. R. at p. 1292.

Annotation:—*Folld. Baikie v. Chandless* (1811), 3 Camp. 17.

966. ———.]—An attorney employed to purchase & prepare the assignment of an annuity before the decisions holding that the trusts in the annuity deeds must be particularly set forth in the memorial, is not liable for negligence in not having pointed out to his employer that the annuity purchased was void because the memorial omitted particularly to specify the trusts of the annuity deeds.

An attorney is only liable for *crassa negligentia*; & it is impossible to impute that to deft. for not discovering a defect in the memorial of an annuity which was subsequently held to be a defect upon a very doubtful construction of the statute.—*BAIKIE v. CHANDLESS* (1811), 3 Camp. 17; 170 E. R. 1291, N. P.

Annotation:—*Consd. Purves v. Landell* (1845), 12 Cl. & Fin. 91.

967. ——— Persuasion of client.]—The extrix. of an attorney is liable in case for the negligence of her testator, in not making due inquiry into the validity of a security upon which his client proposes to advance money. It seems, however, that the duty of an attorney is not so strict, but that if he is lulled by the assurance of his client into a persuasion that the security is good, so as to abate his vigilance in the inquiry into its validity, his liability for negligence is discharged.

They should be strong facts which are held sufficient to absolve an attorney from those duties & liabilities which the law imposes on him, & the benefit of which it is the very object of his employer to secure (*ABBOTT, C.J.*).—*WILSON v. TUCKER* (1822), 3 Stark. 154; Dow. & Ry. N. P. 30; 171 E. R. 805, N. P.

Annotations:—*Folld. Davies v. Hood* (1903), 88 L. T. 19. *Refd. Re Keeping & Gloag* (1888), 58 L. T. 679.

968. Recommending investment in inadequate security—Special & general retainer distinguished.]—The attorney for a trader in insolvent circumstances, being introduced by him to pltf., a young woman entitled to a reversionary interest, with the view of obtaining from her an advance of money; & having obtained for her an advance upon the security of her reversionary interest, upon high interest, & upon improvident terms, was then a party to the loan of it to his client, the trader, without any security. The money having been lost:—*Held*: if he was employed by pltf. only to obtain her an advance of the money, he was not liable; but if he was employed by her generally, to look after her interests in the entire transaction,

BOULTON, RENAUD v. BROWN (1851), 1 P. R. 68.—CAN.

a. Acting without instructions.]—*PARSONS v. WOOTTON* (B. C.) (1910), 13 W. L. R. 321.—CAN.

b. Solicitor liable for loss.]—*SCHOEN v. MACDONELL* (B. C.) (1911), 18 W. L. R. 329.—CAN.

c. Failure to register deed.]—*O'HANLON v. MURRAY* (1860), 12 I. C. L. R. 161.—IR.

d. Failure to obtain counsel's opinion.]—*WATT & COHEN v. WILLIS* (1909), 29 N. Z. L. R. 58.—N.Z.

e. Ineffectual completion of deed.]—*LANG v. STRUTHERS* (1827), 1 Wils. & S. 563.—SCOT.

f. Ineffectual security for payment of debt.]—*CARRUTHERS v. LITTLE* (1829), 7 Sh. (Ct. of Sess.) 712.—SCOT.

PART IV. SECT. 4, SUB-SECT. 2.—C. (b).

g. Recommending investment in inadequate security.]—Where an attorney received money to invest in real estate security:—*Held*: he was liable for the want of reasonable care as regarded the value of the security, not merely in the examination of the title.—*PETERS v. WELLER* (1870), 30 U. C. R. 4.—CAN.

h. ———.]—*HAMILTON v. LANE* (1890), 25 L. R. Ir. 188.—IR.

k. ———.]—*HANLON v. FIELD* (1902), 22 N. Z. L. R. 191.—N.Z.

l. ———.]—*STEWART v. M'LEAN, BAIRD & NELSON*, [1915] S. C. 13.—SCOT.

m. Recommending unauthorised investment.]—*WARD v. LEWIS* (1896), 22 V. L. R. 410.—AUS.

n. Investing money on inadequate security—Evidence of instructions.]—*PHELPS v. WILSON* (1863), 13 C. P. 38.—CAN.

o. Failure to invest—Liability to pay interest.]—*Re AN ATTORNEY* (1878), 7 P. R. 321.—CAN.

p. Duty to investigate title.]—*SANCTON v. MORSE* (1888), 20 N. S. R. (8 It. & G.) 542.—CAN.

q. Investment in valueless security.]

& to advise her as to her advance of the money, he was liable for negligence in reference to his advice such as to advance.—*LANGDON v. GODFREY* (1865), 4 F. & F. 445.

969. — Shares liable to calls.]—In 1881 N. acted as solr. in the formation of a limited co. founded for the purpose of purchasing the business of H., the price to be payable in fully paid up shares, & he prepared the memorandum & articles. The shares were allotted to H., but the contract for the sale of the business was not registered. Three months later, upon the marriage of Dr. & Mrs. F., H. deposited with N. & two other persons, the trustees of the marriage settlement, the certificates for fully paid-up shares, being shares received by H. for the sale of his business, to secure a debt due to Mrs. F. The certificates stated that the shares were fully paid up. In 1885 the shares were transferred into the names of the trustees. The trustees had no actual notice that the shares held by them were shares paid to H. in consideration of the sale of his business. Upon an application by the liquidator in the winding-up of the co. to make the trustees liable for calls:—*Held*: N. had not been guilty of gross & culpable negligence in not ascertaining the truth of the representation contained in the certificates.—*Re HALL (A. W.) & Co.* (1887), 37 Ch. D. 712; 57 L. J. Ch. 288; 58 L. T. 156; 4 T. L. R. 227.

Annotation:—*Reid. Re New Chile Gold Mining Co.* (1892), 68 L. T. 15.

970. — Wife assisting husband's business.]—*LEAROYD v. ALSTON*, [1913] A. C. 529; 57 Sol. Jo. 684, II. L.

971. Advising trustees as to investment of trust funds—Duty to advise as to scope of trust.]—*NEIL v. HAYWARD* (1890), 25 L. Jo. 357, N. P.

972. Loss on non-investment.]—*BATTEN v. WEDGWOOD COAL & IRON CO.*, No. 1033, *post*.
Mortgages.]—*See* Sub-sect. 2, C. (c), *post*.

(c) Mortgages.

973. Duty to inquire into value of security—Solicitor acting according to directions.]—If the attorney was directed only to draw a mtge., it would certainly not be a part of his duty to inquire into the value of the premises; but, if he is entrusted with a sum of money by his client to invest on security, he is bound to use diligence in inquiring into the value of it; the case might be different if he gave his client means of forming a judgment for himself, & acted by his directions (*LORD ABINGER, C.B.*).—*GREEN v. DIXON* (1837), 1 Jur. 137.

974. — Where entrusted with investment of client's money.]—*GREEN v. DIXON*, No. 973, *ante*.

975. — Investment of trust money.]—They [his solrs.] were the legal advisers of the trustees in the matter & as such it was their duty to see that the security was adequate in point of value

& proper in point of form (*STIRLING, J.*).—*STOKES v. PRANCE*, [1898] 1 Ch. 212; 67 L. J. Ch. 69; 77 L. T. 505; 46 W. R. 183; 42 Sol. Jo. 68.

976. Duty to see trust mortgage in proper form.]—*STOKES v. PRANCE*, No. 975, *ante*.

977. Wrongful delivery up of title deeds.]—W. holding title deeds as an equitable security for a debt due to him from N., & being also solr. of S., to whom N. owed a sum of money, for which S. held other securities; N. wrote a letter, which was left at the office of W., stating that he, W., out of the proceeds of the sale of the property, of which he held the title deeds, was to receive the amount both of his own debt & of the debt due to S.; afterwards W. received from N. the amount of his own debt, & without the sanction of S. delivered up the title deeds in his possession to N., who sold the property, received the purchase-money, & did not pay any part of it to S. *Seem*: W. is in point of law liable to S. for any loss which S. may thus sustain.—*ATTWOOD v. —* (1828), 5 Russ. 149; 38 E. R. 984, L. C.

Annotations:—*Mentd. Taylor v. Tabrum* (1833), 6 Sim. 281; *Nelthorpe v. Holgate* (1844), 1 Coll. 203; *Watts v. Hyde* (1846), 1 Coll. 368; *Lawton v. Campion* (1854), 23 L. J. Ch. 505; *Lang v. Purves* (1862), 15 Moo. P. C. C. 389.

978. Liability for inadequate security.]—Declaration stated that pltf. had contracted with B. to lend him the sum of £3,000 at interest; the repayment, with interest, to be secured by a warrant of attorney & certain mtges. of freehold & leasehold premises, provided they should be found to be a sufficient security for the same; that pltf. retained deft. as an attorney, to ascertain whether they would be a sufficient security; that deft. accepted such retainer, & that it became his duty to use due care & diligence to ascertain whether the warrant of attorney & mtges. would be a sufficient security for the repayment of the £3,000 & interest. Breach, that deft. did not use due care & diligence in that behalf, but wholly neglected so to do, & on the contrary falsely represented to pltf., that the warrant of attorney & mtges. would be a sufficient security for the repayment of the £3,000 with interest, whereupon pltf. lent the £3,000 to B.; that they were not a sufficient security, by reason whereof pltf. had wholly lost the interest due & payable on the said sum of £3,000 amounting to a large sum, to wit, the sum of £1,000 & was likely wholly to lose the said principal sum of £3,000. At the trial it appeared, that in the year 1814 deft. had been retained by pltf. to ascertain whether the warrant of attorney & mortgages were a sufficient security for the £3,000 & interest, & that at that time he represented they were so. In the year 1820, the interest to that time having been regularly paid, it was discovered that the warrant of attorney & mtges. were not a sufficient security:—*Held*: the misconduct or negligence of the attorney constituted the cause of action.—*HOWELL v.*

v. LEWIS (1869), 4 I. R. Eq. 219.—*IR.*

r. Depositing money in bank—Failure of bank.]—*BLAIR'S TRUSTEES v. PAYNE* (1884), 12 R. (Ct. of Sess.) 104; 22 Sc. L. R. 54.—*SCOT.*

to investigate patent intended as security.]—*M'CLURE, NAISMITH, BRODIE & M'FARLANE v. STEWART* (1887), 15 R. (Ct. of Sess.) (H. L.) 1; 25 Sc. L. R. 153.—*SCOT.*

a. Law agent to trustees—Duty to advise on investment.]—It is no part of the duty of a law agent appointed to be factor & law agent to the trustees

under a trust disposition & settlement to volunteer his advice to the trustees that a loan made by testator on personal security was not such an investment of the trust funds as they were entitled to retain, & therefore he was not liable for loss resulting from their retaining the investment.—*CURRORS v. WALKER'S TRUSTEES* (1889), 16 R. (Ct. of Sess.) 355; 26 Sc. L. R. 245.—*SCOT.*

b. — JOHNSTONE v. THORBURN (1901), 3 F. (Ct. of Sess.) 497; 38 Sc. L. R. 343; 8 S. L. T. 422.—*SCOT.*

c. Conflict of interest with client—Non-disclosure.]—*WERNHAM v. M'LEAN*,

BAIRD & NEILSON, [1925] S. C. 407.—*SCOT.*

PART IV. SECT. 4, SUB-SECT. 2.—C. (c).

d. Duty to inquire into value of security.]—*HALDANE v. DONALDSON* (1840), 1 Robin. App. 226.—*SCOT.*

e. — STIRLING v. MACKENZIE, GARDNER & ALEXANDER (1886), 14 R. (Ct. of Sess.) 170; 24 Sc. L. R. 133.—*SCOT.*

978 i. Liability for inadequate security.]—*OASTLER v. DILL, SMILLIE & WILSON* (1886), 14 R. (Ct. of Sess.) 12; 24 Sc. L. R. 18.—*SCOT.*

978 ii. — CLELAND v. BROWNLEE,

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YOUNG (1826), 5 B. & C. 259; 8 Dow. & Ry. K. B. 14; 4 L. J. O. S. K. B. 160; 108 E. R. 97.

Annotations:—Consd. Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337. **Refd.** Re Manby & Hawksford, Norton v. Cooper (1856), 26 L. J. Ch. 313; Hughes v. Twisden (1886), 55 L. J. Ch. 481; Conquer v. Boot, [1928] 1 K. B. 336. **Mentd.** Philpott v. Kelley (1835), 3 Ad. & El. 106; Smith v. Fox (1848), 6 Harc. 386; Re Triston (1850), 1 L. M. & P. 74; Violet v. Sympson (1857), 27 L. J. Q. B. 138; Gibbs v. Guild (1881), 8 Q. B. D. 296; Bean v. Wade (1885), 2 T. L. R. 157; Re Somerset, Somerset v. Poulett, [1894] 1 Ch. 231.

979. — Nature of transaction combined agency & trust.]—A solr. took an insufficient security for his client, & the nature of the transaction was such, as in the opinion of the ct., to create a case of combined agency & trust. He was held personally responsible for the deficiency, & for the costs of suit.—CRAIG v. WATSON (1845), 8 Beav. 427; 50 E. R. 167.

Annotations:—Distd. Chapman v. Chapman (1870), L. R. 9 Eq. 276; British Mutual Investment Co. v. Cobbold (1875), L. R. 19 Eq. 627. **Consd.** Dooby v. Watson (1888), 39 Ch. D. 178. **Refd.** Crawford v. Crawford (1867), 16 W. R. 411; Banbury v. Bank of Montreal, [1918] A. C. 626.

980. Special retainer.]—Declaration alleged that pltf., at request of defts., retained & employed them as attorneys, for fees, etc., to use due care in ascertaining the title of R. to lands, which were to be charged as security for payment of £600 by R. to pltf., & to take due care that the same should be a sufficient security for payment of the £600 by R. to pltf.; & in consideration, etc., defts. promised pltf. to use due care & diligence in & about ascertaining the title of R. to the lands, & to take due care that the same should be a sufficient security for such repayment of the £600 by R. to pltf.:—**Held:** the undertaking of defts., as laid, did not comprehend any inquiry into the value of the lands.—HAYNE v. RHODES (1846), 8 Q. B. 342; 15 L. J. Q. B. 137; 6 L. T. O. S. 295; 10 Jur. 71; 115 E. R. 905.

Annotation:—Refd. Cooper v. Stephenson (1852), 16 Jur. 424.

981. Trustee acting independently of solicitor.]—An attorney having been retained by two trustees about to advance trust money upon the security of property already mtged., to see that the security was sufficient & that the proper deeds were executed, one of the trustees advanced the moneys on the execution of the mtge. without receiving an assignment of the first mtge. It having turned out that there was another previous mtge. & the security proved insufficient:—**Held:** there was no evidence of negligence on the part of the attorney, although, by the agreement which he had prepared, part of the money advanced was to be applied to the redemption of the prior mtge.; it not appearing that deft. was aware of the trustee's intention to act as he did.—BRUMBRIDGE v. MASSEY (1858), 28 L. J. Ex. 59; 32 L. T. O. S. 108.

982. — Misrepresentation.]—On the faith of certain representations made by his solr., pltf. advanced money on a mtge. After the death of the solr., pltf. discovered that these representations were untrue to the knowledge of his solr.:—**Held:** no claim having been made against the solr. during his life, his exors. were not liable to make good the loss incurred by pltf. from the mtge.—YOUNG v. WALLINGFORD (1883), 52 L. J. Ch. 590; 48 L. T. 756; 31 W. R. 838.

WATSON & BECKET (1892), 20 R. (Ct. of Sess.) 152; 30 Sc. L. R. 149.—SCOT.

982 f. — Misrepresentation.]—A

who makes to his client untrue representations, respecting a property on which the client is about to advance money, may be compelled to

make good those representations, even though he may have been himself misled.—CLELAND v. LEECH (1856), 5 L. Ch. R. 478; 8 Ir. Jur. 193.—IR.

983.]—NOCTON v. ASHBURTON (LORD), No. 1017, *post*.

984. — Extent of client's reliance on solicitor.]

—A solr. in advancing money on mtge. may be employed to invest in a particular mortgage, to find securities to be approved by the client & then invest the money; to find securities & invest the money, the client taking little or no part in the business.—DOOBY v. WATSON (1888), 39 Ch. D. 178; 57 L. J. Ch. 865; 58 L. T. 943; 36 W. R. 704; 4 T. L. R. 584.

Annotation:—Refd. Hackney v. Knight (1891), 7 T. L. R. 254.

985. — Erroneous valuation by valuer.]—

A mtgee.'s solrs. noticed on the title very considerable difference in the prices previously paid for the property, & pointed this out to the valuers, who, notwithstanding, adhered to their valuation on behalf of the mtgee. The solrs., knowing that the mtgee. would rely on the opinion of the valuers, did not point out to the mtgee. the variation in prices:—**Held:** the solrs. had not failed in their duty to the mtgee.—SCHOLLES v. BROOK (1891), 63 L. T. 837; 7 T. L. R. 214; *affd.* on other grounds, 64 L. T. 674, C. A.

Annotations:—Refd. Le Lievre v. Gould, [1893] 1 Q. B. 491; Earl v. Lubbock (1904), 74 L. J. K. B. 121; Blacker v. Lake & Elliot (1912), 106 L. T. 533. **Mentd.** Dennis v. Gould (1892), 9 T. L. R. 19.

986. — Investment according to direction of client.]—HALL v. TOMPSON (1892), 36 Sol. Jo. 543.

987. — Solicitor acting for both parties.]—

In a mtge. transaction in which the same firm of solrs. acted for both parties, but in which the mtgees., who were trustees, acted on their own responsibility, with full knowledge of the value of the security, a member of the firm received the money intended to be advanced, which he paid into the firm's banking account. Two days later he presented a cheque of his firm to the same amount at a bank at which the title deeds were deposited as security for the mtgors.' overdraft, & received the deeds. The security having proved insufficient, it was sought to make the solr., who was then the sole surviving member of his firm, responsible, on the ground that he had advised the mtge., & that the money had passed through his firm's bank:—**Held:** the trustees having acted on their responsibility, the solrs. were not responsible; & the fact of the solr. being employed as agent, & the money having been paid through his firm, did not make him liable to make up the deficiency.—BRINDEN v. WILLIAMS, [1894] 3 Ch. 185; 63 L. J. Ch. 713; 71 L. T. 177; 42 W. R. 700; 10 T. L. R. 571; 38 Sol. Jo. 603; 8 R. 574.

988. Failure to give notice to secure priority.]—

A law agent employed to prepare an heritable bond stated the manner of holding in this way: the grantor was taken bound "to infest & seize the said H. & his foresaids, on our own expenses, in the lands, & others above disposed, to be holden from me, of & under my immediate lawful superiors thereof, in the same manner as I hold the same myself, & for payment of the same feu duties as I pay or am bound to pay therefor."

The agent neglected to procure confirmation from the superior, in consequence of which his employer, the grantee, lost his money:—**Held:** this was a public holding, & invalid for want of confirmation; & the agent, having chosen to depart from the usual practice of introducing the double manner of holding, & having neglected to procure confirmation, was bound to make good the loss.

Secus, if it had been a mistake in a nice & difficult point of law.—**STEVENSON v. ROWAND** (1830), 2 Dow. & Cl. 104; 4 Wils. & S. 177; 6 E. R. 668, H. L.

Annotations:—**Consd. Purves v. Landell** (1845), 12 Cl. & Fin. 91. **Refd. Hart & Hodge v. Frame** (1839), 3 Jur. 547.

989. —.—.]—**DONALDSON v. HALDANE**, No. 1014, *post*.

990. Failure to detect undisclosed claim — Material deed concealed.]—In an action against an attorney for negligence in advancing money, £120, of a client upon insufficient security, it appeared that the mtge. deed did not contain a power of sale, & that a third person claimed a portion of the property under a deed, which had been kept secret from deft. :—**Held**: deft. was not liable, although some evidence was given of a custom to insert such a power in deeds of mtge. for small amounts.

We see no reason for imputing want of skill or negligence to deft. in his character of an attorney in taking a mtge. without a power of sale, or for not suspecting that a claim would arise to part of the land founded on a deed that had been kept secret, & of which there was no trace in the title of the mtgor. as shown to deft. when the deeds disclosed a valid one (**COLERIDGE, J.**).—**BAILEY v. ABRAHAM** (1849), 14 L. T. O. S. 219.

991. Taking mortgage without power of sale.]—**BAILEY v. ABRAHAM**, No. 990, *ante*.

992. Failure to make inquiries—As to solvency of mortgagor.]—**ALDIS v. GARDNER** (1844), 1 Car. & Kir. 564.

993. —.— — **Searches in bankruptcy.**]—It is the duty of an attorney for an intended mtgee. to search at the Insolvent Ct. for the purpose of learning whether the intended mtgor. has taken the benefit of Insolvent Acts, if there is reason to suspect that he has been insolvent, or is or has been in embarrassed circumstances.—**COOPER v. STEPHENSON** (1852), Cox, M. & H. 627; 21 L. J. Q. B. 292; 19 L. T. O. S. 155; 16 Jur. 424.

994. —.—.]—**PRETTY v. FOWKE** (1887), 3 T. L. R. 845.

995. Matters relating to title — Non-production of deeds.]—The non-production, in Ireland, of title deeds to the solr. instructed to prepare a mtge., upon an estate there, will not of itself be deemed a proof that the solr. has acted fraudulently, or even negligently, so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case.—**AGRA BANK, LTD. v. BARRY** (1874), L. R. 7 H. L. 135, H. L.

Annotations:—**Appld. Lee v. Clutton** (1876), 46 L. J. Ch. 48; **Northern Counties of England Fire Insce. v. Whipp** (1884),

995 i. Matters relating to title—Non-production of deeds.]—It is the duty of a solr. to inquire for the title deeds, & to insist upon their production unless their non-production is satisfactorily accounted for.—**FREEHOLD LOAN CO. v. MCARTHUR** (1880), 5 Man. L. R. 207.—**CAN.**

f. Failure to register.]—**CROWDER v. HOSGAN** (1901), 3 W. A. L. R. 31.—**AUS.**

g. Duty to see mortgage in proper form.]—**FINKBEINER v. YEO** (1915), 33 W. L. R. 195; 9 W. W. R. 891.—**CAN.**

h. —.—.]—**DOUGLAS v. PEACOCK & SKENE** (Alta.), [1923] 1 D. L. R. 753; [1923] 1 W. W. R. 584.—**CAN.**

k. Liability for opinion.]—A solr. who writes a letter giving an opinion as to the validity of a bond mtge. containing a reference to the original mtge. is not liable for negligence to a purchaser of bonds to whom an

alleged copy of the mtge. is exhibited from which all reference to prior liens has been fraudulently omitted.—**JONES v. CLARKE BROTHERS, LTD.**, [1924] 2 D. L. R. 594; 57 N. S. R. 142.—**CAN.**

l. Purchase by attorney from client.]—**MACKINTOSH v. NOBINMONEY DOSSE** (1867), 2 Ind. Jur. N. S. 160.—**IND.**

m. Duty to explain power.]—An immediate power of sale without notice upon default is not an unusual power in a mtge., but under ordinary circumstances such a power ought to be fully explained by a solr. mtgee. to the mtgor. if he is his client.—**MILLS v. HUSSEY** (1909), 28 N. Z. L. R. 382.—**N.Z.**

n. Failure to complete effectually.]—A law agent is liable for loss arising from an heritable security being ineffectually completed, although drawn on the employment of the granter of

26 Ch. D. 482. **Consd. Kettlewell v. Watson** (1884), 26 Ch. D. 501. **Refd. Garnham v. Skipper** (1885), 53 L. T. 940; **Manners v. Mew** (1885), 29 Ch. D. 725. **Oliver v. Hinton**, [1899] 2 Ch. 264. **Mentd. Bradley v. Ritches** (1878), 38 L. T. 810; **Re Mackay, Mackay v. Gould**, [1906] 1 Ch. 25.

996. —.— **Failure to examine deeds.**]—A., having mortgaged his property to B., desired a further advance, which B. agreed to make. B., instructed his solr. to include in the security for the fresh advance a small additional piece of land, which had been acquired by the mtgor. since the first mtge. The solr. neglected to examine the title deeds of this small piece of land, & when B. desired to sell under the powers contained in the mtge. deed, it was discovered that they had been deposited as security with a prior incumbrancer for the sum of £46. B. had subsequently to pay this sum to get rid of the charge. In an action by B. against his solr. :—**Held**: the solr. had rendered himself liable to an action for negligence, & in the absence of evidence on his part to reduce the damages, the measure of damages was the sum of £46, which B. had paid; the mere possibility that B. might ultimately be recouped this sum being immaterial.—**WHITEMAN v. HAWKINS** (1878), 4 C. P. D. 13; 39 L. T. 629; 43 J. P. 272; 27 W. R. 262.

Mortgages to or by client.]—*See* Sect. 3, subsect. 4, *ante*.

(d) Purchases and Sales.

997. Investigation of, or advice on title—Advice to disregard equitable mortgage.]—**FARMER v. TURNER & SON** (1899), 15 T. L. R. 522.

998. —.— **Investigation.**]—Pltf., as administrator, declared in *assumpsit* that deft., for certain fees to be paid him by intestate, undertook as attorney to investigate & see that a title about to be conveyed to intestate was a good one; breach, that he omitted to do so, & that intestate in consequence took an insufficient title, whereby his personal estate was injured. Deft. having demurred, the demurrer was overruled.—**KNIGHTS v. QUARLES** (1820), 2 Brod. & Bing. 102; 4 Moore, C. P. 532; 129 E. R. 896.

Annotations:—**Refd. Orme v. Broughton** (1834), 10 Bing. 533; **Alton v. Mid. Ry.** (1865), 19 C. B. N. S. 213. **Mentd. Bradshaw v. L. & Y. Ry.** (1875), L. R. 10 C. P. 189; **Potter v. Met. Dist. Ry.** (1875), 32 L. T. 36; No. 7 Steam Sand Pump Dredger v. S.S. Greta Holme, The Greta Holme, [1897] A. C. 596; **Jackson v. Watson**, [1909] 2 K. B. 193; **Quirk v. Thomas**, [1916] 1 K. B. 516.

999. —.— **Condition against requiring proof of lessor's title.**]—**PARKER v. DINGWELL** (1857), 28 L. T. O. S. 232.

Annotation:—**Distd. Allen v. Clark** (1863), 1 New Rep. 358.

1000. —.— **"No abstract of vendor's title" to be required.**]—Pltf. entered into a contract for

the deed, & not of the lender of the money.—**LANG v. STRUTHERS** (1827), 2 Wils. & S. 563.—**SCOT.**

PART IV. SECT. 4, SUB-SECT. 2. — C. (d).

998 i. Investigation of, or advice on title—Investigation.]—**HARRIS v. CAR-RUTHERS** (1902), 2 S. R. N. S. W. 100.—**AUS.**

998 ii. —.—.]—**ROSS v. STRATHY** (1856), 16 U. C. R. 430.—**CAN.**

998 iii. —.—.]—**TAYLOR v. GOR-MAN** (1842), Fl. & K. 567.—**IR.**

o. Duty to advise client of restrictive covenant.]—**POWYS v. BROWN** (1924), 25 S. R. N. S. W. 65; 42 N. S. W. W. N. 10.—**AUS.**

p. Solicitor exceeding instructions.]—**SCALES v. GRAYSON, EMERSON & McTAGGART** (Sask.), [1922] 2 W. W. R. 1225; 68 D. L. R. 194.—**CAN.**

Sect. 4.—Obligations of solicitor towards client: Subsect. 2, C. (d), D. & E. (a).]

the purchase of certain leasehold property under certain conditions of sale, one of which was, that the purchaser should take an underlease "according to the draft underlease already prepared, which will be produced at the time of sale, & may in the meantime be inspected at the office of H.; but no abstract of the vendor's title thereto shall be required, nor the lessor's title objected to or gone into." He afterwards employed deft.'s testator, an attorney, to complete the purchase, who failed to make the requisite search, or to investigate the vendor's title, or to require the production of the original lease. It subsequently appeared that the premises had been previously mortgaged, pltf. was turned out of possession by the mtgee. — *Held*: this amounted to negligence on the part of the attorney sufficient to maintain an action against his estate, & pltf. was entitled to recover, in addition to the amount he had paid to obtain a good title, interest on same during the time he held possession, as he had been obliged to pay the mtgee. mesne profits during that period. — *ALLEN v. CLARK* (1863), 1 New Rep. 358; 7 L. T. 781; 11 W. R. 304.

1001. — — — — —.]—A bill will not lie against a solr. for negligence in investigating a title. — *BRITISH MUTUAL INVESTMENT CO. v. COBBOLD* (1875), L. R. 19 Eq. 627; 23 W. R. 487; *sub nom.* *BRITISH MUTUAL INVESTMENT CO., LTD. v. —*, 44 L. J. Ch. 332; 32 L. T. 251.

Annotations: — *Consd.* *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394. *Reid.* *Dooby v. Watson* (1888), 39 Ch. D. 178; *Tendring Hundred Waterworks Co. v. Jones*, [1903] 2 Ch. 615; *Nocton v. Ashburton*, [1914] A. C. 932.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 36.

1002. — — — *Case incorrectly laid before counsel.*] — An attorney for a vendee received an abstract of the vendor's title, containing sixty-five sheets. He assumed, that a party named in it had an estate in fee, & then laid a part of that abstract, containing eight sheets, before a counsel, who advised that the vendor could make a good title. It appeared that that party was not seized in fee, in consequence of a person, who was only an equitable tenant in tail, having suffered a recovery without the concurrence of the legal tenant for life. The jury found a verdict against the attorney: — *Held*: there was evidence enough to warrant that verdict. — *IRESON v. PEARMAN* (1825), 3 B. & C. 799; 5 Dow. & Ry. K. B. 687; 3 L. J. O. S. K. B. 119; 107 E. R. 930.

1003. — — — *Concealment of former fraud.*] — A solr. for a purchaser has a duty to perform in investigating the title, & he having notice of fraud in a former dealing with the estate is affected with such notice, in his character of agent for the purchaser. — *PINNING v. RUSHWORTH* (1833), 2 L. J. Ch. 176.

1004. — — — *Burden of proof that diligence would have been ineffectual.*] — *BOURNE v. DIGGLES*, No. 1068, *post*.

1005. *Failure to require production of head lease.*] — *ALLEN v. CLARK*, No. 1000, *ante*.

1006. *Duty to take usual & necessary precautions.*] — An attorney, employed to advise the proposed purchase, of farming produce which it is desired to leave on the ground for some time, is *prima facie* bound to inquire as to the payment of the past rent; but if the client himself has made inquiries about the matter, & leads his attorney to believe that he is satisfied about it, it is not negligence in the attorney to omit to call for the receipts, or take the other precautions which other-

wise would be usual & necessary. — *WAINE v. KEMPSTER* (1859), 1 F. & F. 695.

1007. *Duty to call for receipts for past rent.*] — *WAINE v. KEMPSTER*, No. 1006, *ante*.

1008. *Duty to explain effect of transaction—Effect of unusual covenant—To be executed by vendor.*] — *STANNARD v. ULLITHORNE*, No. 945, *ante*.

1009. — — — *Fine.*] — On a contract for the sale of part of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, & had been professionally employed by him on previous occasions, to levy the fine & complete the contract. The attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effect of it; such fine was accordingly levied, & the vendor died without declaring its uses, & without re-publishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, & he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief; & on an issue directed by that ct., a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The Ct. of Ch., upon that verdict, decreed the attorney to be a trustee for the devisee of the lands & hereditaments which so descended to him as heir-at-law. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, & his omission to inquire whether the conusor, his client, had made a will, were such professional ignorance & neglect as afforded a principle by which a ct. of equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person. — *BULKLEY v. WILFORD* (1834), 2 Cl. & Fin. 102; 8 Bli. N. S. 111; 6 E. R. 1094.

Annotations: — *Consd.* *Re Birchall*, *Wilson v. Birchall* (1881), 44 L. T. 243. *Reid.* *Watts v. Hyde* (1846), 2 Coll. 368; *Allen v. McPherson* (1847), 1 H. L. Cas. 191; *Hindson v. Weatherill* (1854), 5 De G. M. & G. 301; *Stokes v. France*, [1898] 1 Ch. 212; *Nocton v. Ashburton*, [1914] A. C. 932. *Mentd.* *Scottish Marine Insce. v. Turner* (1853), 17 Jur. 631, n.

1010. *Agreement for sale—Duty to prepare agreement in writing.*] — A. verbally agreed with B., his solr., for the sale of land to B. This agreement, which was never reduced to writing, provided that B. should bear all expenses of making out the title, that possession should be at once given, & that the purchase-money should be paid at a fixed future date with interest in the meantime. B. entered into possession, but took no further steps in completion of the purchase, & before the purchase-money became due, died. In a suit by A. for specific performance against the exor. of B.: — *Held*: B., as A.'s solr., ought to have had an agreement in writing prepared & the exor. was bound to complete the purchase & pay the costs of the suit. — *BRAFIELD v. SCRIVEN* (1873), 22 W. R. 202.

1011. *Sale without regard to existing settlement—Sufficiency of notice of settlement.*] — A settlement of land in Wales, the property of the husband, was executed shortly after a marriage, which took place in India. The husband & wife went to reside in Wales, & the husband employed a solr. there to make his will & to sell part of the land, the solr.,

concluding from the statement of the husband that there had not been any marriage settlement. The husband died leaving his widow trustee & extrix., & directing his debts to be paid out of his estate. The widow employed the same solr. to sell other part of the land, & the solr. received the purchase-moneys & applied them in payment of the debts of the husband. The deed of settlement had been in the possession of the wife, but had been by her given to the husband. There was no evidence as to what had become of it, but after the sales had been made a copy was found. The solr. had concluded from what he was told by the husband that there had been no settlement, & though, before all the sales were completed, his clerk had been told by the wife that there had been a settlement, the solr. continued to believe that there had been none. An action was brought by the children of the marriage, entitled under the settlement, claiming to recover from the solr. the money which had so passed through his hands:—*Held*: under the circumstances, although the solr. might have been negligent in that character, he could not be held to have had such notice of the settlement as to be treated as constructively a trustee, & therefore liable for the money which had passed through his hands.—*WILLIAMS v. WILLIAMS* (1881), 17 Ch. D. 437; 44 L. T. 573.

1012. — Liability for erroneous clauses.—Statement of amount of tithe rentcharge.—Defts., solrs., drew up an agreement for sale of land dated July 15, 1926, in which a tithe rentcharge of £8 9s. was stipulated. On July 7, 1926, the vendor received a demand note for a tithe rent of £10 17s. 9d. Defts. were not aware of this when the agreement was drawn up; the purchaser deducted the sum of £74 2s. 10d. from the purchase-money as a result of this increased tithe, & the vendor, pltf., claimed damages for negligence from deft. solrs.:—*Held*: defts. had not acted negligently in any way.—*ELLIS v. SAMPSON* (1927), 71 Sol. Jo. 621.

Purchase or sale from or to client.—See Sect. 3, sub-sect. 3, *ante*.

D. Effect of Counsel's Advice.

See Sect. 4, sub-sect. 2, E. (f), *post*.

E. Action for Negligence.

(a) In General.

See, generally, NEGLIGENCE, Vol. XXXVI., pp. 1 *et seq*.

1013. Client's right of action.—*TAYLOR v. BLACKLOW*, No. 1092, *post*.

1014. ——(1) An attorney, who was the ordinary attorney for a borrower, also acted in the matter of a particular loan for the lender, but did not make any charge against the lender for his services. The security he took was not sufficient:—*Held*: he was properly charged as an attorney acting on the retainer & employment of the lender, & was in that character liable to an action for damages for the loss suffered through the insufficiency of the security.

(2) After the death of the lender, two of his sisters, by an arrangement with the rest of the family, who were the legatees of the lender, became possessed of the security, & applied to the

attorney to do what was necessary. The means taken to secure the repayment of the loan, on this continuation of it, were insufficient:—*Held*: as representing the interest of deceased, & on their own account, the sisters were entitled to compensation from the attorney.—*DONALDSON v. HALDANE* (1840), 7 Cl. & Fin. 762; 7 E. R. 1258, H. L.

1015. ——*CLARKE v. DERBY CORPN.*, No. 896, *ante*.

1016. ——*HATCH v. LEWIS*, No. 932, *ante*.

1017. ——Nothing short of proof of a fraudulent intention in the strict sense will suffice to maintain an action of deceit, but an action for damages for negligence may lie, without evidence of an actual intention to deceive, where a confidential relationship exists, such as that of solr. & client, so that the person to whom a representation was made was entitled to rely, & did in fact rely, upon it, & sustained damage in consequence.—*NOCTON v. ASHBURTON* (LORD), [1914] A. C. 932; 83 L. J. Ch. 784; 111 L. T. 641; 30 T. L. R. 602, H. L.

1018. — Whether sole remedy.—*ANON.* (1774), Lofft, 545; 98 E. R. 791.

1019. ——*BROOKS v. DAY* (1780), 2 Dick. 572; 21 E. R. 393, L. C.

1020. ——The ct. will not interfere on motion against an attorney for negligence in the discharge of his professional duty, if there be no fraud; therefore where an attorney who was retained to defend an action allowed judgment to go by default & afterwards desired his client not to attend to endeavour to mitigate the damages, because the proceedings might be set aside for irregularity, when in fact they could not, & in the event execution was sued out, & the client paid the sum claimed & costs:—*Held*: the only remedy against the attorney was by action.—*Re JONES* (1819), 1 Chit. 651.

1021. ——Petition, that pltf. might be reimbursed costs, which they had incurred through the alleged negligence of their solr. dismissed, because there was a remedy by action.—*FRANKLAND v. LUCAS* (1831), 4 Sim. 586; 58 E. R. 219; *sub nom. Re C—*, *FRANKLAND v. LUCAS*, 1 L. J. Ch. 124.

Annotations:—*Appld.* *Dixon v. Wilkinson* (1859), 4 Drew. 614. *Refd.* *Chapman v. Chapman* (1870), L. R. 9 Eq. 276; *Re Dangar's Trusts* (1889), 41 Ch. D. 178.

1022. ——In considering an attorney's bill, a charge for work entirely useless may be rejected by the jury; *contra*, as to a charge for work partly useless, or in respect of which there has been any negligence; the client's remedy in that case being by a cross action only.—*SHAW v. ARDEN* (1832), 9 Bing. 287; 1 Dowl. 705; 2 Moo. & S. 341; 2 L. J. C. P. 1; 131 E. R. 623.

1023. ——*Re SOUTHALL, Ex p. SOUTHALL* (1839), as reported in 4 Deac. 91, Ct. of R.

Annotation:—*Expld.* *Re Billinton, Ex p. Billinton* (1840), 10 L. J. Bey. 13.

1024. ——The Taxing Master in taxing a bill of costs between a solr. & his client has power to disallow the costs of proceedings in an action conducted by the solr. which were occasioned by the negligence or ignorance of the solr. But if the negligence goes to the loss of the whole action, he ought not to disallow them, but to leave the client to bring an action for negligence against the

PART IV. SECT. 4, SUB-SECT. 2.—E. (a).

1013 i. Client's right of action.—*v. WILSON* (1850), 1 All. 704.

1013 iii. ——*LAIDLAW v. O'CONNOR* (1892), 23 O. R. 696.—CAN.

q. — Loss of promissory note.—*GOULD v. BLANCHARD* (1897), 29 N. S. R. 361.—CAN.

r. — Solicitor acting gratuitously.—It is not relevant to discharge the responsibility of a law agent in

a professional matter that he acted gratuitously, seeing that he is entitled to make a charge.—*CURRIE v. COLQUHOUN* (1823), 2 Sh. (Ct. of Sess.) 407.—SCOT.

t. Solicitor having conflicting interest.—*ALISON v. WELDON* (1860), 9 N. B. R. (4 All.) 631.—CAN.

Sect. 4.—Obligations of solicitor towards client: Sub-sect. 2, E. (a), (b), (c), (d) & (e).]

solr.—Re MASSEY & CAREY (1884), 26 Ch. D. 459; 53 L. J. Ch. 705; 51 L. T. 390; 32 W. R. 1008, C. A.

1025. — Only if reasonable.]—Where, in an action on attorney's bills amounting to £80, commenced in Oct. 1875, debt. sought to set up a counterclaim for negligence in a case involving £12 tried in 1871, the application was refused.—*TENNANT v. WALTON (1875), 1 Char. Cham. Cas. 72.*

1026. — —.]—Pltf. alleged that, being temporarily in want of money, & desirous of getting his creditors to postpone payment of their claims, he instructed debts., his solrs., to call a meeting of his creditors, & to ask for time: that debts. advised him that he ought first to file his petition in bkpcy.: that they procured him to sign such petition, & forwarded a circular to his creditors which was never, he said, approved of or authorised by him, stating untruly that he was compelled to suspend payment; that they attended the meeting by their clerk, who purporting to act upon pltf.'s instructions, told his creditors that his estate would not pay more than 2s. in the pound; & that that information was wholly untrue to the knowledge of debts., or was made recklessly & negligently, & without any sufficient grounds.

Pltf. also alleged that afterwards he instructed debts. to submit a scheme to avoid his being made a bkpt., but that they advised him not to do so, & eventually he was adjudicated a bkpt.; that debts. also prepared a statement of pltf.'s affairs, & persuaded & advised him to swear to a statement that he was hopelessly insolvent, & in that statement debts. intentionally or recklessly & negligently overstated the liabilities & underestimated the assets, & debts. were well aware during the whole time that pltf.'s estate was sufficient to pay 20s. in the pound, & did those acts knowing that they were acting contrary to the interests of pltf., & with a view of benefiting themselves, they, or one of them, having a large interest as pltf.'s mtgees.:—*Held: pltf.'s statement of claim & affidavits disclosed no reasonable cause of action, & the proceedings ought to be stayed as frivolous & vexatious.—KELLAWAY v. BURY (1892), 66 L. T. 599; 8 T. L. R. 433, C. A.*

1027. Whether arising in contract or tort.]—*Semle: an action against attorneys for negligence in discharge of their duties, in pursuance of their retainer, though purporting to be in case, is in reality ex contractu, & a verdict must be found against all debts. or none.—DAVIES v. LOCK (1844), 3 L. T. O. S. 125.*

1028. —.]—*BEAN v. WADE, No. 962, ante.*

(b) *Who may Sue.*

1029. General rule—Necessity for strict relation of solicitor & client.]—*BARKER v. LAMBERT (1849), 13 L. T. O. S. 139.*

1030. — —.]—The holder of a bill, putting it into the hands of an attorney to sue upon it in the name of another person, who was really trusted by the attorney for the costs, & regarded as his client, held not entitled to sue the attorney for negligence in the action.—*MOSS v. SOLOMON (1858), 1 F. & F. 342.*

1031. — —.]—By the law of England, the right of action depends entirely upon the question,

between whom the relation of principal & agent, client & attorney, subsists.—*ROBERTSON v. FLEMING (1861), 4 Macq. 167, H. L.*

1032. — — Answer to casual inquiry.]—An attorney is not liable to an action for negligence at the suit of one between whom & himself the relation of attorney & client does not exist, for giving, in answer to a casual inquiry erroneous information as to the contents of a deed.

A., B., & C. were employed in a manufacture in which secrecy was essential; & to insure their fidelity, they were required to execute deeds under which a portion of their wages was to be invested in the name of a trustee, with a stipulation for determining the engagement on giving two months' notice, at the expiration of which, in the cases of B. & C., the money so invested was to be paid over to them, but, in the case of A., the deed was so framed as to make it payable only to his exors. upon his death. D., the attorney for the employers, being upon the premises, was asked by A. if he would receive his money if he gave notice to quit the service; whereupon D., not recollecting that A.'s deed differed in this respect from those of B. & C., though he himself drew them all, & had them in his custody, answered in the affirmative. Upon receiving this information, A. gave notice, but afterwards discovered that the money invested for him could only be paid to his exors.:—*Held: A. could not maintain an action for the loss & disappointment sustained by him in consequence of his acting upon this mistake on the part of D.—FISH v. KELLY (1864), 17 C. B. N. S. 194; 144 E. R. 78.*

Annotation:—Refd. Bean v. Wade (1885), 1 T. L. R. 404.

1033. Receiver of insolvent company.]—An order was made in a suit that the purchaser of certain property sold in the suit should pay the purchase-money into ct., & that the sum so paid in should be invested in Consols.

The sum was duly paid into ct., but, through the inadvertence of pltf.'s solr. who had the conduct of the order, the request then necessary under r. 37 of the Chancery Funds Consolidated Rules of 1874 was not left with the Paymaster-General, & consequently no investment was made.

In Nov. 1884, the suit came on for further consideration, & it was then discovered that the investment had not been made. Under the order then made the liquidator of debt. co. was entitled to the balance of the fund in ct. A summons was taken out by him to make pltf.'s solr. liable for the loss occasioned by the non-investment:—*Held: the solr. having the conduct of the order, was pro hac vice acting as solr. for all parties to the suit; & he was liable to the liquidator for any loss occasioned by the non-investment between Jan. 1884, & Nov. 1884, after allowing for what had been preserved on account of the fall in the price of Consols which took place in that period.—BATTEN v. WEDGWOOD COAL & IRON CO. (1886), 31 Ch. D. 346; 55 L. J. Ch. 396; 54 L. T. 245; 34 W. R. 228; 2 T. L. R. 238.*

Annotations:—Consd. MacDougall v. Knight, [1887] W. N. 68; Re Dangar's Trusts (1889), 41 Ch. D. 178.

1034. Cestui que trust.]—Trustees paid into ct., under the Trustee Relief Act, a legacy of £500 bequeathed to D., an infant, to the credit of an account in the matter of the trusts of the will of testator. Two years afterwards they transferred into ct. to the same account a sum of Consols, representing a legacy of £7,000 bequeathed to M.,

PART IV. SECT. 4, SUB-SECT. 2.—
E. (b).

1029 i. General rule—Necessity for

strict relation of solicitor & client.]—
PERRY v. PERRY (Man.), [1917] 1
W. W. R. 174.—CAN.

a. Assignee in bankruptcy.]—ALEX-
ANDER v. A. B. & C. D. (1849), 5
U. C. R. 329.—CAN.

& after her death to her children, & on both occasions the trustees in the petitions stated that the office of N., their solr., was to be the place for the service of any notice in reference to the funds. A year after the transfer of the Consols a petition was presented by M., by her next friend, a solr., & by the trustees, for the purpose of dealing with the Consols, & the solrs. on the record for petitioners were the firm of whom N. was a member, & the office of N. was to be the place where any notice was to be served relating to the trust fund. The petition set forth what had been done in respect of the Consols & other matters. An order was made in reference to the Consols, & dividends; but in drawing it up an error occurred by including in it the whole of the fund standing to the credit of the account, & the future dividends were, as ordered paid to M. during her life.

D. had suffered loss by payments wrongly made to M., now deceased, & she, on attaining majority, presented a petition asking that the estate of M. might be made primarily liable for the loss which she had suffered, & that N. might be made liable for any deficiency:—*Held*: N. as officer of the ct., had been guilty of negligence in not seeing that all the facts relating to the funds were brought before the ct. when the order was made, & he must, after D. had exhausted the estate of M., make good any deficiency.—*Re DANGAR'S TRUSTS* (1889), 41 Ch. D. 178; 58 L. J. Ch. 315; 60 L. T. 491; 37 W. R. 651; 5 T. L. R. 266.

Annotations:—*Consd.* Marsh v. Joseph, [1897] 1 Ch. 213. *Refd.* *Re Williams S. E.*, [1910] 2 Ch. 481.

1035. —.—.]—*HALL v. TOMPSON* (1892), 36 Sol. Jo. 543.

Trustee in bankruptcy.—*See* BANKRUPTCY, Vol. V., p. 973, Nos. 7967–7970.

(c) *Who may be Sued.*

Representatives of deceased solicitor.—*See* EXECUTORS, Vol. XXIV., pp. 636, 650, Nos. 6623–6625, 6765.

(d) *Question for Judge or Jury.*

1036. *General rule—Question for jury.*—*REECE v. RICHY*, No. 927, *ante*.

1037. —.—.]—If an attorney, conducting a suit, commits an act of negligence by which all the previous steps became useless in the result, he cannot recover for any part of the business done.

Whether or not, in such a case, the work became wholly useless by pltf.'s fault is a question for the jury.—*BRACEY v. CARTER* (1840), 12 Ad. & El. 373; 113 E. R. 853.

1038. —.—.]—The issue in a case was, whether an attorney had been guilty of negligence; the judge left it to the jury upon all the facts of the case, to say, whether there was negligence or not. On moving for a rule for a new trial, it was insisted that the judge should have found the facts, & left it to the jury to say, whether those facts amounted to negligence:—*Held*: there was no misdirection.—*HALES v. PADDOCK* (1843), 7 J. P. 290.

1039. —.—.]—Declaration stated that pltf. employed deft. as attorney to sue H., for the re-

covery of a sum of money; & thereupon it was the duty of deft. to use proper care in conducting the suit; yet deft. did not use proper care, in this, that, having as such attorney sued out writs for the recovery of the money & for the purpose of saving Stat. Limitations he did not upon H., not being found so as to be served with such writs, "duly file" the writs with the proper officer according to the necessary & accustomed practice of the Ct. of Q. B.; whereby the action was barred by the statute:—*Held*: (1) under 2 & 3 Will. 4, c. 39, s. 10, which enacts, that to save Stat. Limitations every writ issued in continuation of a preceding writ shall be "returned *non est investus* & entered of record" within one month after its expiration; although 2 & 3 Will. 4 did not in terms require such writs to be "filed" yet the word "file" in the declaration might have the sense of bringing the writs to the office & in that sense would be included in the word "returned" in the statute, & such filing would therefore be a necessary part of the practice in saving Stat. Limitations & a part of the attorney's duty; (2) the question of negligence in not complying with the practice of the ct. was a question of fact for the jury, under the judge's direction as to the law.—*HUNTER v. CALDWELL* (1847), 10 Q. B. 69; 2 New Pract. Cas. 160; 16 L. J. Q. B. 274; 9 L. T. O. S. 73; 11 Jur. 770; 116 E. R. 28; *on appeal, sub nom.* *CALDWELL v. HUNTER* (1848), 10 Q. B. 83, Ex. Ch. *Annotations*:—*As to* (2) *Consd.* *Faithfull v. Kesteven* (1910), 103 L. T. 56. *Refd.* *Parker v. Rolls* (1854), 14 C. B. 691. *Generally, Mntd.* *Pritchard v. Bagshawe* (1851) 11 C. B. 459.

1040. —.—.]—*WRAIGHT v. JOHNSTON*, No. 574, *ante*.

(e) *What must be Proved.*

Gross negligence.—*See* Nos. 845, 966, *ante*.

1041. *Damage.*—*BARNES'S CASE* (1736), Barnes, 38; 94 E. R. 795.

1042. —.—.]—A declaration in case against an attorney stated that an action had been commenced against pltf., which he would not have defended, but that deft., without his authority or retainer, entered an appearance for him, & took upon himself the management of the defence; & thereupon such proceedings were had that judgment was obtained & execution issued against pltf.; whereby he was damaged in his character, & compelled to pay the amount of the judgment & costs:—*Held*: bad, in arrest of judgment, for not showing any damage.—*WESTAWAY v. FROST* (1848), 17 L. J. Q. B. 286; 12 L. T. O. S. 290; 12 Jur. 698; *subsequent proceedings* (1849), 14 L. T. O. S. 251.

1043. —.—.]—Mere delay in issuing a writ, not shown to have resulted in any damages, will not sustain an action against the attorney for negligence, especially if he might fairly suppose that the action would be fruitless, except for collateral purposes; & an attorney is justified by the advice of counsel in acting contrary to his client's wish in the conduct of the case.—*CATES v. INDERMAUR* (1858), 1 F. & F. 259, N. P.

1044. —.—.]—*HATCH v. LEWIS*, No. 932, *ante*.

1045. —.—.]—*FAITHFULL v. KESTIVEN*, No. 845, *ante*.

PART IV. SECT. 4, SUB-SECT. 2.—
E. (d).

1036 i. *General rule—Question for jury.*—*DRENNAN v. BOULTON* (1846), 3 U. C. R. 72.—CAN.

1036 ii. —.—.]—*MAHONEY v. DAVOREN* (1892), 36 Sol. Jo. 309.—IR.

PART IV. SECT. 4, SUB-SECT. 2.—
E. (e).

1041 i. *Damage.*—An attorney having been employed to register a mtge. of £250, withheld the mtge. until he recovered a judgment of £16 against the mtgor., under which the land mtged. was subsequently sold:—*Held*: an action, for such neglect, being

substantially for breach of contract, was maintainable without showing actual damage.—*DOAN v. WARREN* (1862), 11 C. P. 423.—CAN.

b. *Negligence.*—The ct. will not, on a summary application, hold an attorney liable for costs for negligence, unless such negligence is clearly & unequivocally proved.—*ELLIOTT v. LADDS* (1866), 2 Old. 170.—CAN.

Sect. 4.—*Obligations of solicitor towards client: Sub-*(f) *Defences to Action.*

1046. Acting on opinion of counsel.]—CODEFROY v. DALTON, No. 854, *ante*.

1047. —.]—An agreement was entered into between A. & B. B. died, & administration of his effects was granted to C., his daughter. D., who was a friend of C., employed the same attorney who had prepared the original agreement to prepare another between him & C., by which he was authorised to bring an action against A. on the original agreement in C.'s name, & also instructed the attorney to bring such action. The action was brought, & after argument on demurrer, the original agreement was declared void, on the ground of champerty. But it appeared that the attorney, in preparing such original agreement, had consulted a conveyancer, who gave it as his opinion that the agreement was valid:—*Held*: the attorney was entitled, under the circumstances, to recover from D., his employer, the costs of preparing the second agreement, & also those of bringing the action upon the first.—PORTS v. SPARROW (1834), 6 C. & P. 749; 172 E. R. 1447, N. P.; *subsequent proceedings* (1835), 1 Bing. N. C. 594.

Annotation:—*Mentd.* Wagstaffe v. Sharpe (1838), 3 M. & W. 521.

1048. —.]—BRYAN v. TWIGG, No. 443, *ante*.

1049. —.]—*Re* CLARK, No. 878, *ante*.

1050. —.]—In an action against an attorney, or any other party, for a malicious or fraudulent proceeding, it is not enough to excuse deft. that he acted on counsel's opinion, unless he also shows a case fairly stated & advice obtained *bonâ fide* & properly pursued; & in an action against an attorney for fraudulently obtaining, on behalf of a third party pretending to be pltf.'s partner, debts due to pltf., it was held no answer on the part of deft. to show that he had, upon oral statements, suppressing material facts known to himself, obtained counsel's opinion that there was a partnership, & that the proper course was to write to the customers on behalf of the firm warning them not to pay pltf., he having written letters to them on behalf of pltf. & the pretended partner requesting payment.—ANDREWS v. HAWLEY (1857), 26 L. J. Ex. 323.

1051. —.]—CATES v. INDERMAUR, No. 1043, *ante*.

1052. Acts of counsel—Defect in drawing pleadings.]—An attorney is not guilty of negligence for proceeding with an action in which he was ultimately defeated by reason of a variance

between the declaration & an agreement upon which the action was based, such declaration having been drawn by a pleader.—MANNING v. WILKIN (1848), 12 L. T. O. S. 249, N. P.; *subsequent proceedings* (1849), 13 L. T. O. S. 215.

1053. —.]—Conduct of case.]—An attorney in a cause is not answerable for the absence, neglect or want of attention in the counsel engaged in it.—LOWRY v. GUILFORD (1832), 5 C. & P. 234; 172 E. R. 953, N. P.

1054. —.]—KINGDON v. WILTON, No. 461, *ante*.

1055. —.]—FRAY v. FOSTER, No. 937, *ante*.

1056. —.]—Calling witnesses.]—HATCH v. LEWIS, No. 932, *ante*.

1057. Effect of negligence no longer operative—Defective deed cured by lapse of time.]—A solr. was retained by a debtor to prepare a composition deed, the first trust of which was the payment of the costs of preparing the deed. The trustees accepted the trusts, & acted upon the deed. It was afterwards discovered, according to a case decided before the deed was prepared, that the deed was invalid, as not binding non-assenting creditors. Debtor was subsequently made bkpt. The trustees refused to pay the solr.'s bill of costs, first, on the ground of non-retainer, secondly, on the ground of gross negligence; but both objections were overruled.—*Re* SADD (1865), 34 Beav. 650; 34 L. J. Ch. 562; 12 L. T. 817; 11 Jur. N. S. 774; 13 W. R. 1009; 55 E. R. 786.

Annotation:—*Re* Mason & Taylor (1878), 10 Ch. D. 729.

1058. Estoppel from disputing negligence—Previous action by defendant for costs—Acceptance by defendant of sum in satisfaction—After deduction by plaintiff on account of negligence.]—Appls. employed resp. as their solr. in legal proceedings which proved abortive, in consequence, as they alleged, of the negligence of the resp. Resp. took proceedings in the High Ct. to recover payment from applts. for professional services, & applts. deducted from the amount claimed the costs of the abortive litigation & paid the balance into ct. under Rule 376 of the Rules of Civil Procedure, "in satisfaction in full of the claim." Resp. took the money out of ct. under Rule 377 "in full satisfaction of his claim." Appls. afterwards commenced an action against resp. for damages for his alleged negligence in the conduct of the legal proceedings above mentioned:—*Held*: resp. was not estopped by the former proceedings from disputing the alleged negligence.—STEPHENS & CO. v. ALLEN (1921), 91 L. J. P. C. 32; 126 L. T. 458, P. C.

PART IV. SECT. 4, SUB-SECT. 2.—*E. (f).*

1046 i. Acting on opinion of counsel.]—Where an attorney, being employed to get a judgment of *non pros*, signed against pltf. set aside, applied through his town agent for an order for that purpose, which was granted on June 16, but the agent neglected to take out the order until Oct. 22, following, in consequence of which delay the order was set aside & the judgment allowed to stand:—*Held*: this was negligence for which the attorney was responsible, & it was no defence that he acted under the advice of counsel.—HERR v. TOMS (1872), 32 U. C. R. 423.—CAN.

1046 ii. —.]—MEGUET v. THOMSON (1827), 5 Sh. (Ct. of Sess.) 275.—SCOT.

1046 iii. —.]—Although generally, an agent is bound to follow the instructions of his client, when the conduct of a cause is in the hands of counsel the agent is bound to act according

to the directions of counsel, & will not be answerable to his client for what he does *bonâ fide* in obedience to such directions.—BACHELOR v. PARRISON & MACKINAY (1876), 3 R. (Ct. of Sess.) 914; 13 Sc. L. R. 589.—SCOT.

c. Statute of Limitations.]—*Scmble*: the ct. has authority to prevent an attorney pleading Stat. Limitations to defeat a client's just claim, but this power does not extend to his exors.—DOUGALL v. CLINE (1850), 6 U. C. R. 546.—CAN.

d. Accord & satisfaction by stranger.]—LYNCH v. WILSON (1862), 22 U. C. R. 226.—CAN.

e. Delay.]—WHITE v. CURRIE, 22 C. L. J. N. S. 17.—CAN.

f. Client refusing reasonable offer.]—O'CALLAGHAN v. BERGIN (1885), 11 A. R. 594.—CAN.

g. Client instructing solicitor contrary to advice.]—KENEN v. HILL (1907), 38 N. B. R. 342; 4 E. L. R. 180.—CAN.

h. No cause of action.]—In an action by a client against an attorney for not having sued certain parties as directed, it is a good defence to prove that at the time there was no good cause of action.—THOMPSON v. ARMSTRONG (1850), 2 Ir. Jur. 132.—IR.

k. Estoppel by client's conduct.]—Relief by a client against his agent for alleged negligence barred by the client granting a discharge of the claim said to have been so lost.—WALLACE v. DONALD (1825), 3 Sh. (Ct. of Sess.) 433.—SCOT.

l. —.]—Circumstances in which a party held not entitled to insist for reparation for alleged professional negligence on the part of his agent, he having been aware of the alleged neglect & its consequences for eight years, without intimating any intention of making the agent liable.—HUNTER v. FLEMING (1829), 8 Sh. (Ct. of Sess.) 234; 5 Fac. Coll. 206.—SCOT.

Action brought out of time.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 343, 494, 505-508, Nos. 252-255, 1553, 1656-1662, 1675-1677.

(g) *Measure of Damages.*

1059. Sale of premises—Loss on sale.]—Declaration, that pltf. had employed defts. to conduct an action of ejectment for the recovery of premises forfeited to pltf. by the tenant's neglect of his covenant to repair, that when the cause came on for trial, it was referred to an arbitrator, who was to decide what repairs should be done, the costs of the action to abide the event; that the arbitrator was ready to proceed, but defts. neglected to attend him, whereby pltf. was obliged to pay defts. £60 for his costs incurred in the action of ejectment, which otherwise the tenant would have been obliged to pay, & sold the premises for much less, to wit, £100 less than he would otherwise have done. Verdict for pltf., damages £160. On motion for a new trial:—*Held*: (1) it was not necessary in the action against defts. to produce the lease on which the ejectment was brought; (2) the jury were not confined to £100 as the damages for loss on the sale of the premises; & the declaration was not bad in arrest of judgment.—*SWANNELL v. ELLIS* (1823), 1 Bing. 347; 8 Moore, C. P. 340; 2 L. J. O. S. C. P. 8; 130 E. R. 140.

1060. — Sum paid to redeem charge.]—WHITE-MAN v. HAWKINS, No. 996, ante.

1061. Plaintiff "forced to pay" certain sums—Amount confined to such sums.]—In an action against a solr. for negligence the declaration alleged for damage that pltf. was in consequence forced to pay a sum of money for debt & costs recovered against him & that he paid & became subject to divers costs:—*Held*: (1) pltf. could not, under this averment, recover an amount for which he was liable, but had not actually paid; (2) an amount levied under an execution against him was a payment & could therefore be recovered.—*JONES v. LEWIS* (1841), 9 Dowl. 143; Woll. 94; 5 Jur. 194.

Annotation:—As to (1) Reidd. Richardson v. Chasen (1847), 16 L. J. Q. B. 341.

1062. Costs for which plaintiff liable—Costs not in fact paid.]—*JONES v. LEWIS*, No. 1061, ante.

1063. Amount levied in execution.]—*JONES v. LEWIS*, No. 1061, ante.

1064. — With compensation for injury.]—In an action against an attorney for appearing to an action, & defending it without authority, whereby the expenses of a judgment were incurred & execution issued, the proper measure of damages is the amount levied, deducting the actual debt, with reasonable compensation for the injury sustained.—*WESTOWAY v. FROST* (1849), 14 L. T. O. S. 251.

1065. Sum paid to obtain good title—With interest.]—*ALLEN v. CLARK*, No. 1000, ante.

1066. Deficiency on mortgage security—Loss sustained.]—*STEVENSON v. ROWAND*, No. 988, ante.

1067. — Difference between value of security obtained & sum advanced—With sum for arrears of interest.]—*PRETTY v. FOWKE* (1887), 3 T. L. R. 845.

(h) *Practice.*

1068. Pleadings—Allegation of retainer—Statement of consideration unnecessary.]—(1) In an action against an attorney for non-feasance in not looking sufficiently into a title, it is sufficient to state that he was retained as attorney, without stating the consideration.

(2) If diligence would have been ineffectual, deft. must prove it.—*BOURNE v. DIGGLES* (1814), 3 Chit. 311.

1069. — Negligence must be pleaded.]—When it is sought to make a solr. liable for negligence, that issue must be raised clearly upon the pleadings.—*BETTYES v. MAYNARD* (1883), 49 L. T. 389; 31 W. R. 461, C. A.

Annotation:—Mentd. Belton v. Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449.

1070. What defendant must prove—That plaintiff without defence—Where judgment negligently allowed to go by default.]—*GODEFROY v. JAY*, No. 902, ante.

1071. — That diligence would have been ineffectual.]—*BOURNE v. DIGGLES*, No. 1068, ante.

1072. Evidence—Negligence in action of ejectment — Necessity for production of lease.]—*SWANNELL v. ELLIS*, No. 1059, ante.

1073. — Presumption against negligence—Compromise of action.]—*SILL v. THOMAS*, No. 906, ante.

1074. — Cross-examination of plaintiff.]—*DELL v. EMMETT* (1859), 1 F. & F. 441, N. P.

1075. — Statements by defendant's clerks—Admissions of breach of duty.]—*DELL v. EMMETT* (1859), 1 F. & F. 441, N. P.

1076. Production of solicitor's books.]—The ct. will not, in an action against an attorney for negligence, make an order for the production of his books, upon a mere suggestion of the client's belief that they contain entries relating to the matters complained of.—*EVANS v. LOUIS* (1866), L. R. 1 C. P. 656.

1077. Compulsory reference.]—*ANON.*, [1875] W. N. 200; 1 Char. Cham. Cas. 26; Bitt. Prac. Cas. 6.

F. Other Remedies.

1078. Summary jurisdiction.]—Where a solr. has been negligent in managing a client's business, this ct. can grant an attachment against him, & cts. of law exercise the same summary jurisdiction over attorneys.—*FLOYD v. NANGLE* (1747), 3 Atk. 568; 26 E. R. 1127, L. C.

1079. —.]—*R. v. TEW* (1752), Say. 50; 96 E. R. 800.

Annotations:—Distd. Re Jones (1819), 1 Chit. 651. *N.F. Dixon v. Wilkinson* (1859), 4 Drew. 614.

v. WIGHT (1833), 11 Sh. (Ct. of Sess.) 804.—SCOT.

PART IV. SECT. 4, SUB-SECT. 2.—
E. (h).

1068 i. Pleadings—Allegation of retainer — Statement of consideration unnecessary.]—It is sufficient in the declaration to allege that deft. was retained as a solr., without stating that he was retained for reward.—*CLARK v. BAIRD* (1889), 29 N. B. R. 620.—CAN.

r. — Particulars.]—*KINGSTON v. CORKER* (1892), 29 L. R. 1r. 364.—IR.

t. In what court action brought.]—*Re BRADY* (1850), 15 L. T. O. S. 457.—IR.

PART IV. SECT. 4, SUB-SECT. 2.—
E. (g).

m. General rule.]—A client who has suffered damage from the professional negligence of his solr. is entitled to be placed in the same position as if the solr. had done his duty.—*MARRIOTT v. MARTIN* (B. C.) (1915), 30 W. L. R. 899; 21 D. L. R. 463; 7 W. W. R. 1291.—CAN.

n. Costs for which plaintiff liable.]—*GROVER v. GAMBLE* (1843), 6 O. S. 561.—CAN.

o. Question for jury.]—*BRADBURY v. JARVIS* (1844), 1 U. C. R. 301.—CAN.

p. Nominal damages—Where special

damages not proved.]—Where an attorney was retained to apply to release a sheriff from an attachment, & the jury found him in fault in conducting the application:—*Held*: he was liable to nominal damages, although the special damage laid was not proved.—*MCLEOD v. BOULTON* (1846), 3 U. C. R. 84.—CAN.

q. Recourse lost against bankrupt.]—Where recourse lost was against a bkpt. party: *Qu.*: whether the amount of the reparation should be the whole sum in the bill, or the dividend which would have been yielded by the bkpt. estate had the bill been duly ranked on it.—*PENTLAND*

Sect. 4.—Obligations of solicitor towards client: Sub-sect. 2, F.; sub-sects. 3 & 4.]

1080. —.]—The ct. will not upon motion compel an attorney, who has made a fatal mistake, to indemnify his client.—*BARKER v. BUTLER* (1771), 2 Wm. Bl. 780; 96 E. R. 458.

1081. —.]—Where an attorney was charged with oppression towards his client, but the application was not made till after three terms had nearly elapsed, & no attempt was made to explain the delay:—*Held*: the motion was too late.—*GARRY v. WILKS* (1834), 2 Dowl. 649.

Annotations:—*Distd. Re Swan* (1846), 15 L. J. Q. B. 402; *Re Thompson* (1862), 13 C. B. N. S. 288.

1082. —.]—Where solrs. have been guilty of even gross negligence in the conduct of a cause the ct. has no summary jurisdiction to give relief or petition.—*DIXON v. WILKINSON* (1859), 4 Drew. 614; 33 L. T. O. S. 39; 7 W. R. 351; 62 E. R. 235; *on appeal*, 4 De G. & J. 508, L. J. J.

Annotations:—*Consd. Re Dangar's Trusts* (1889), 41 Ch. D. 178. *Refd. British Mutual Investment Co. v. —* (1875), 44 L. J. Ch. 332; *British Mutual Investment Co. v. Cobbold* (1875), L. R. 19 Eq. 627.

1083. — **Negligence must be clear & unequivocal.**—The ct. will not exercise its summary jurisdiction over an attorney by compelling him to refund a sum of money paid by his client in consequence of his alleged negligence, unless such negligence be clear & unequivocal, & of such a nature that the attorney could not, in the estimation of the ct., have a defence if an action were brought against him.—*MEGGS v. BINNS* (1836), 2 Bing. N. C. 625; 2 Hodg. 10; 3 Scott, 52; 5 L. J. C. P. 225; 132 E. R. 241.

Annotation:—*Expld. Dickenson v. Jacobs* (1862), 10 W. R. 303.

— **Exercise of summary jurisdiction generally.]**

—*See Part VII., post.*

Refusal to pay bill of costs—Plea of negligence to action by solicitor for costs.]—See Part IX., Sect. 1, sub-sect. 5, C., post.

SUB-SECT. 3.—PERSONAL ATTENTION AND PROTECTION OF CLIENT.

1084. Procuring execution against client—Breach of trust.]—LAWRENCE v. HARRISON (1654), Sty. 426; 82 E. R. 833.

Annotations:—*Consd. De La Pole v. Dick* (1885), 29 Ch. D. 351. *Refd. Bevins v. Hulme* (1846), 15 M. & W. 88. *Bagley v. Maple* (1911), 27 T. L. R. 284.

1085. Duty to maintain secrecy.]—GOODLIGHT v. BRIDGE (1772), Loft, 27; 98 E. R. 515.

1086. — After retainer terminated.]—Semble: a solr. who has been discharged, may upon proof of misconduct be restrained from communicating information that come to him confidentially from his client.—*BEER v. WARD, WARD v. BEER* (1821), Jac. 77; 37 E. R. 779.

Annotations:—*Refd. Ramsbotham v. Senior* (1869), L. R. 8 Eq. 575; *Re Holmes, Re Electric Power Co.* (1877), 25 W. R. 603; *Rakusen v. Ellis, Munday & Clarke*, [1912] 1 Ch. 831.

1087. — Disclosure of client's address.]—A bill was filed against A., B., & C. All defts. appeared by the same solr., & put in a joint answer. The bill was amended. The solr. accepted service for A. & B. who answered the interrogatories to the amended bill, but declined

to accept service for C., or to disclose his address, on the ground that pltf.'s object was to ascertain C.'s address, in order to serve process upon him, in an action at law in an independent matter. The ct. ordered the time for filing replication or giving notice of motion for decree to be enlarged till C. should put in his answer, but made no order for the solr. to disclose C.'s address.—*CLARK v. COMPTON* (1864), 4 New Rep. 15.

1088. Production of documents belonging to client.]—A. solr. to a third person, is bound to produce his client's lease, executed by deft., provided the production will not operate to the prejudice of his client.—COPELAND v. GUBBINS' EXECUTORS (1815), 1 Stark. 95; 171 E. R. 412.

— **Admissibility of secondary evidence.]—See EVIDENCE, Vol. XXII., pp. 219, 239, Nos. 1915–1923, 2149–2155.**

1089. —.]—PARIS v. LEVY (1860), 2 F. & F. 71, N. P.; *subsequent proceedings*, 9 C. B. N. S. 342.

Annotation:—*Mentd. Campbell v. Spottiswoode* (1863), 3 B. & S. 769.

— **Claim of legal professional privilege.]—See DISCOVERY, Vol. XVIII., pp. 123–132, 160, Nos. 731–830, 1113–1115.**

Liability for negligence.]—See Sub-sect. 2, E., ante.

1090. Duty to give personal attention.]—It is the duty of an attorney to communicate personally with his clients, & give his attentions to their concerns, so that they may reap the benefit of his advice & judgment.

Where an attorney had an office at a distance from his own residence, at which he carried on business by a clerk, to whom he allowed one-third of the profits:—*Held*: that the former could not recover the amount of a bill of costs, delivered by him to deft. for business done by his clerk, in carrying on a suit, as deft. had never seen or communicated with pltf. on the subject.—*HOPKINSON v. SMITH* (1822), 1 Bing. 13; 7 Moore, C. P. 237; 130 E. R. 6.

Annotations:—*Refd. Gill v. Lougher* (1830), 1 Cr. & J. 170; *Noel v. Hart* (1837), 8 C. & P. 230. *Mentd. Armstrong v. Lewis* (1834), 2 Cr. & M. 274.

1091. Duty to act in sole interest of client.]—The ct. discountenances the practice of one solr., either in person or by agent, acting for more than one party to a suit.—CHARD v. CHARD (1852), 19 L. T. O. S. 173, L. C.

1092. — Retainer to raise money on mortgage—Disclosure to lender of defects in client's title.]—Deft., an attorney, being employed to raise money on mtge. for pltf., disclosed to the proposed lender certain defects in pltf.'s title, *per quod* pltf. was subjected to divers actions at the suit of the proposed lender, was delayed in obtaining the money he wanted, & compelled to give a higher rate of interest:—*Held*: this was a breach of duty for which an action lay against deft., notwithstanding he had been the attorney of the proposed lender before his retainer by pltf.—*TAYLOR v. BLACKLOW* (1836), 3 Bing. N. C. 235; 2 Hodg. 224; 3 Scott, 614; 6 L. J. C. P. 14; 132 E. R. 401.

Annotations:—*Fold. Doe d. Peter v. Watkins* (1837), 3 Bing. N. C. 421. *Apld. Barber v. Stone* (1881), 50 L. J. Q. B. 297. *Refd. Tournier v. National Provincial & Union Bank of England*, [1924], 1 K. B. 461.

1093. —.]—An attorney who, being resorted to by a borrower to raise money for him,

PART IV. SECT. 4, SUB-SECT. 3.

1085 i. Duty to maintain secrecy.]—The former agent of a party is bound not to disclose confidential information.—WIGHT v. EWING (1828), 4 Murr. 584.—*SCOT*.

1090 i. Duty to give personal attention.]—Where money by an award is to be

paid to pltf., or to pltf.'s attorney, the attorney cannot substitute another attorney under him to receive the money.—*MASECAR v. CHAMBERS* (1847), 4 U. C. R. 171.—*CAN*.

a. Duty to inform client of offer for settlement.]—JONES v. STEEVES (1868), 12 N. B. R. (1 Han.) 260.—*CAN*.

b. Duty to act in sole interest of client—Impropriety of acting for lender & borrower.]—It is improper for a solr. to act at the same time for the lender & borrower.—ALLEN v. D'ARCY (1853), 22 L. T. O. S. 147.—*IR*.

c. — Partnership—Acting only in interest of one partner.]—Where an

peruses on the part of the proposed lender the abstracts of the borrower, is not allowed to give evidence concerning them against the borrower.—*DOE d. PETER v. WATKINS* (1837), 3 Bing. N. C. 421; 4 Scott, 155; 6 L. J. C. P. 107; 1 Jur. 41; 132 E. R. 472; *sub nom.* *DOE d. THOMAS v. WATKINS*, 3 Hodg. 25.

Annotations:—*Distd.* *Perry v. Smith* (1842), 9 M. & W. 681. *Refd.* *Doe d. Egremont v. Langdon* (1848), 13 Jur. 96.

1094. — Partner acting in other capacity.]—Solrs. for pltf. in an administration action impliedly undertake to protect their client's interests, & if they act to his detriment, cannot justify their conduct by alleging that such acts were done by an individual member of the firm acting within his powers in another capacity.—*Re BIRT, BIRT v. BURT* (1883), 22 Ch. D. 604; 52 L. J. Ch. 397; 48 L. T. 67; 31 W. R. 334.

1095. Duty to make full disclosure of facts—Before taking security to defeat client's interests.]—In 1889 certain beneficiaries under a will deposited with a bank the title deeds of an estate in Yorkshire to secure an overdraft by the trustees in order that the trustees might be guaranteed against loss in carrying on testator's business. This was done with the knowledge & approval of J., a solr., who represented one of the trustees in the matter. The charge was never registered. J. subsequently took a mtge. of the same property & registered it, & he claimed priority over the bank. The bank, being satisfied with the personal security of the trustees, did not contest the claim:—*Held*: J. was guilty of actual fraud in taking advantage of a defect in the bank's security to defeat the interests of his client.—*BATTISON v. HOBSON*, [1896] 2 Ch. 403; 65 L. J. Ch. 695; 74 L. T. 689; *sub nom.* *Re HOBSON, BALLISON v. HOBSON*, 44 W. R. 615.

Annotation:—*Refd.* *Manks v. Whiteley*, [1912] 1 Ch. 735.

1096. — Transactions with company in which solicitor interested.]—A married woman living with her husband, at her husband's request, & with the knowledge of her husband's solr., who was also the solr. of applt. bank, in a long series of transactions surrendered to the bank her whole fortune as guarantee for a co. of which the solr. was a director & shareholder, but was himself unwilling to guarantee the liabilities:—*Held*: the transactions must be set aside; the solr. ought to have plainly informed the lady of the whole situation & the risks which she was incurring & ought to have insisted on her taking independent advice.—*BANK OF MONTREAL v. STUART*, [1911] A. C. 120; 80 L. J. P. C. 75; 103 L. T. 641; 27 T. L. R. 117, P. C.

Annotations:—*Distd.* *Westen v. Fairbridge's Exors.*, [1923] 1 K. B. 667. *Refd.* *Nocton v. Ashburton*, [1914] A. C. 932.

1097. Duty to employ one set of counsel—When acting for parties with same interests.]—A solr. who acts for two parties in the same interest should employ one set of counsel for both, although he act directly for one, & as agent for the solrs. of the other.—*WALTERS v. WEBB* (1869), L. R. 9 Eq. 83; 39 L. J. Ch. 414; 21 L. T. 657; 18 W. R. 86; *affd.* on other grounds (1870), 5 Ch. App. 531, L. C. & L. J.

Annotations:—*Mentd.* *Chetham v. Hoare* (1870), L. R. 9 Eq. 571; *Re Liddard & Jackson's & Broadley's Contract* (1889), 42 Ch. D. 254.

1098. Duty to recommend independent advice—Transactions with company in which solicitor is

attorney, while acting as legal adviser to a partnership, entered into a secret contract with one member to protect him against, & to watch in his interest the acts of, the other member in con-

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noction with partnership business:—*Held*: such a contract was *contra bonos mores*, & could not be sustained by the ct.—*HUTTON v. STEINWEISS*, [1905] T. S. 43.—S. AF.

interested.]—BANK OF MONTREAL v. STUART, No. 1096, *ante*.

— **Family arrangements.]—See FAMILY ARRANGEMENTS**, Vol. XXIV., pp. 959–960, Nos. 127–135.

SUB-SECT. 4.—LIABILITY FOR ACTS OF AGENTS.

1099. Legal agent.]—Attorney, who gives another leave to practise in his name, is answerable for what is so done.—*ANON.* (1702), 12 Mod. Rep. 666; 88 E. R. 1589.

1100. — Process server.]—The attorney retained to prosecute an action, & not the person employed as process server, is liable to be sued by the client for damage caused through neglect in omitting to make the indorsement of service.—*CURLEWIS v. BROAD* (1862), 1 H. & C. 322; 31 L. J. Ex. 473; 10 W. R. 797; 158 E. R. 908.

1101. — London agent.]—A receiver was appointed by the ct., upon the representation of pltf.'s solr. that the receiver had entered into the usual recognisances, which he had not in fact done. A loss occurred, in consequence of the receiver's liability being only in the nature of a simple contract debt. The solr. was, at the instance of a deft., made personally liable for the loss occasioned by his neglect:—*Held*: also the country solr. was liable, though the representations were made by his London agents.—*Re WARD* (1862), 31 Beav. 1; 54 E. R. 1037.

Annotations:—*Consd.* *Re Dangar's Trusts* (1889), 41 Ch. D. 178. *Appl.* *Re Coolgardie Goldfields, Re Cannon & Morten*, [1900] 1 Ch. 475. *Refd.* *Marsh v. Joseph*, [1897] 1 Ch. 213.

Sec. further, Part XIII., post.

1102. — Clerk.]—HACKNEY v. KNIGHT (1891), 7 T. L. R. 254.

1103. — .]—A widow who owned two cottages & a sum of money secured on a mtge., being dissatisfied with the income derived therefrom, consulted a firm of solrs. & saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm he induced her to give him instructions to sell the cottages & to call in the mtge. money, & for that purpose to give him her deeds, for which he gave a receipt in the firm's name; & also to sign two documents, which were neither read over nor explained to her, & which she believed she had to sign in order to effect the sale of the cottages. These documents were in fact a conveyance to him of the cottages & a transfer to him of the mtge. He then dishonestly disposed of the property for his own benefit:—*Held*: the firm were responsible for the fraud committed by their representative in the course of his employment.—*LLOYD v. GRACE, SMITH & Co.*, [1912] A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 28 T. L. R. 547; 56 Sol. Jo. 723, H. L.; *revsg.*, [1911] 2 K. B. 489, C. A.

Annotations:—*Distd.* *Radley v. L. C. C.* (1913), 109 L. T. 162. *Appl.* *Armstrong v. Jackson*, [1917] 2 K. B. 822. *Distd.* *Rand v. Craig*, [1919] 1 Ch. 1. *Consd.* *Kreditbank Cassel G.m.b.H. v. Schenkers*, [1927] 1 K. B. 826. *Refd.* *Smith v. Martin & Kingston-upon-Hull Corpn.*, [1911] 2 K. B. 775; *Malr v. Rio Grande Rubber Estates*, [1913] A. C. 853; *Janvier v. Sweeney* (1919), 35 T. L. R. 226; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *Mintz v. Silverton* (1920), 36 T. L. R. 399; *Percy v. Glasgow Corpn.*, [1922] 2 A. C. 299; *Underwood v. Bank of Liverpool, Same v. Barclay's Bank*, [1924] 1 K. B. 775; *Britt v. Galmoye & Nevill* (1928), 44 T. L. R. 294; *Lloyds Bank v. Chartered Bank of India, Australia & China* (1928), 97 L. J. K. B. 609; *Reckitt v. Barnett, Pembroke & Slater*, [1928] 2 K. B. 244.

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11021. Legal agent—Clerk.]—FERGUSON v. SAVOY (1883), 23 N. B. R. 97.—CAN.

Sect. 4.—Obligations of solicitor towards client: Sub-sects. 4, 5 & 6. Sects. 5 & 6.]

1104. —.]—*TERRILL v. PARKER & THOMAS* (1915), 32 T. L. R. 48.

1105. ——— *Admissions on taxation of costs.* —Where an attorney's clerk admitted, on the taxation of costs before the master, that the suit in which the costs were taxed was conducted by his employer from motives of charity, on behalf of pltf.:—*Held*: the clerk was such an agent as to bind his master by such admission.—*ASHBOURNE v. PRICE* (1823), Dow. & Ry. N. P. 48, N. P.

1106. *Non-legal agent—Bank—Money of client paid into private account—Failure of bank.* —If an attorney has the money of a client in his hands, & pays such money to the credit of his own private account at his banker's, & that banker fail, he will be liable for the amount to the client, although he does so *bonâ fide*, & have a large sum of money of his own at that banker's. His proper mode would be to open a new account with a banker, & to pay it in, in his own name, but "to the credit of A. B.'s estate."—*ROBINSON v. WARD* (1825), 2 C. & P. 59; Ry. & M. 274; 172 E. R. 27, N. P.

1107. — *Surveyor of property—Opinion submitted to client.* —Although relief may be given at the suit of a client against his solr. for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solr. was founded on the opinions of competent surveyors as to the value of the property, & those opinions submitted to the judgment of the client, the ct. dismissed the bill.—*CHAPMAN v. CHAPMAN* (1870), L. R. 9 Eq. 276; 22 L. T. 145; 18 W. R. 533.

Annotations:—Consd. British Mutual Investment Co. v. Cobbold (1875), L. R. 19 Eq. 627. *Refd. Whiteman v. Hawkins* (1878), 4 C. P. D. 13.

1108. — *Stockbroker—Solicitor's knowledge of want of reliability.* —*CARRUTHERS v. HODGSON* (1896), 100 L. T. Jo. 395.

London agents. —*See Part XIII., post.*

SUB-SECT. 5.—SECRET PROFITS AND COMMISSION.

1109. *Acceptance of secret commission—Prohibition against.* —It is an established rule that a solr. shall not, in any way whatever, in respect of any transactions in the relation between him & his client, make gain to himself, at the expense of his client, beyond the amount of his just & fair professional remuneration.

T., a solr., had a private arrangement with R., by which he was to receive from R. a share in certain property then belonging to R., & to share the profit to be obtained from the sale of that property. In his character of solr., T. acted for clients, a banking co., in the purchase of the larger portion of that property, never communicating to his clients the fact of his having an interest in it:—*Held*: T. was to be treated as a trustee for his clients in respect of his share of so much of the property as they had actually purchased; but a part of the decree, which had declared him to hold the unsold property also in trust for his clients, was varied; &, instead thereof, the value of T.'s half of that property was directed to be taken into account in ascertaining which was due from him to his clients.

T., having made a large profit on the sale, was ordered to pay back the amount of this profit with the full amount of interest given in cases of a breach of trust, namely, 5 per cent.—*TYRRELL v. BANK OF LONDON* (1862), 10 H. L. Cas. 26; 31 L. J. Ch. 369; 6 L. T. 1; 3 Jur. N. S. 849; 10 W. R. 359; 11 E. R. 934, H. L.; *affg. S. C. sub nom. BANK OF LONDON v. TYRRELL* (1859), 27 Beav. 273.

Annotations:—Distd. Masons' Hall Tavern Co. v. Nokes (1870), 22 L. T. 503. *Consd. Re Cape Breton Co.* (1885), 29 Ch. D. 795. *Refd. Re Masons' Hall Tavern Co., Orgill's Case* (1869), 21 L. T. 221; *Imperial Mercantile Credit Assocn. v. Coleman* (1870), 6 Ch. App. 562, n.; *Kimber v. Barber* (1872), 8 Ch. App. 56; *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221; *Albion Steel & Wire Co. v. Martin* (1875), 24 W. R. 134; *Re Western of Canada Oil, Lands & Works Co., Carling's Case* (1875), L. R. 20 Eq. 580; *New Sombrero Phosphate Co. v. Erlanger* (1877), 5 Ch. D. 73; *Re Haslam & Hier-Evans* (1902), 46 Sol. Jo. 233; *Omnium Electric Palaces v. Baines*, [1914] 1 Ch. 332.

1110. — *Misconduct.* —*Re A SOLICITOR, Ex p. LAW SOCIETY* (1909), 26 T. L. R. 22.

1111. — *Commission on life insurance.* —*COPP v. LYNCH & LAW LIFE ASSURANCE CO.* (1882), 26 Sol. Jo. 348.

Annotation:—Apld. Jordy v. Vanderpump (1920), 64 Sol. Jo. 324.

1112. — — —.]—*Re BERWICK (LORD), BERWICK (LORD) v. LANE*, No. 1117, *post*.

1113. — *Onus of proof as to knowledge & consent of client.* —The *onus* is on a solr. to show by some evidence in writing that his client knew of & consented to his receiving & retaining for his own use commissions paid by an insurance co. to him in respect of annual premiums payable on a policy taken out on the life of his client.—*JORDY v. VANDERPUMP* (1920), 64 Sol. Jo. 324.

1114. *Commission on fire insurance.* —*WORKMAN & ARMY & NAVY AUXILIARY CO-OPERATIVE SUPPLY, LTD. v. LONDON & LANCASHIRE FIRE INSURANCE CO.*, No. 1119, *post*.

1115. *Liability to refund secret commission.* —*TYRRELL v. BANK OF LONDON*, No. 1109, *ante*.

1116. —.]—*BURRELL v. MOSSOP* (1888), 4 T. L. R. 270, C. A.

1117. —.]—Under the will of B., deceased, persons entitled to possession of the B. estates might sell the heirlooms, but were to replace them out of the proceeds of sale by articles of a similar character. F. was co-trustee with C., the tenant for life of the B. estates, & C. with the consent of F. sold the heirlooms, & received the purchase-money, but did not purchase other articles in their place. The purchaser paid F. £200 in connection with the sale. Before F., who was a solr., was appointed a trustee he received £200 from an insurance co. as commission on policies effected through him on C.'s life as security for trust money lent to C. On the death of C. the B. estates passed to A., who commenced an action for the administration of the estate of C., & an order was made directing F. to pay pltf. the £200 received in connection with the sale of the heirlooms, & also the £200 received from the insurance co. F. failed to comply with that order, & A. applied for leave to issue a writ of attachment against him:—*Held*: the payment of the £200 received as commission from the insurance co. ought not to be enforced by attachment as the matter was not within the exception in Debtors Act, 1869 (c. 62), s. 4, but attachment ought to issue in respect of the £200 paid by the purchaser of the heirlooms.—*Re*

PART IV. SECT. 4, SUB-SECT. 5.

1115 i. *Liability to refund secret commission.* —*AMPHLETT v. BLAYLOCK* (1910), 13 W. L. R. 515; 3 Alta. L. R.

61.—CAN.

1115 ii. —.]—When a law agent employs an auctioneer or other person to do work on behalf of a client he is bound to credit the client with any

discount or donation he may receive from the person so employed.—*RONALDSON v. DRUMMOND & REID* (1881), 8 R. (Ct. of Sess.) 956; 18 Sc. L. R. 690.—SCOT.

BERWICK (LORD), BERWICK (LORD) v. LANE (1900), 81 L. T. 797, C. A.

Annotation:—**Appld.** *Jordy v. Vanderpump* (1920), 64 Sol. Jo. 324.

1118. —.].—*Re HASLAM & HIER-EVANS*, No. 672, *ante*.

1119. —.].—If one employed an insurance broker it might be fairly inferred that he was to have the commission. On the other hand, if one employed a solr. it was not his business, & the solr. was accountable to his client (*KEKEWICH, J.*).—*WORKMAN & ARMY & NAVY AUXILIARY CO-OPERATIVE SUPPLY, LTD. v. LONDON & LANCASHIRE FIRE INSURANCE CO.* (1903), 19 T. L. R. 360; 47 Sol. Jo. 405.

Annotation:—**Appld.** *Jordy v. Vanderpump* (1920), 64 Sol. Jo. 324.

1120. Effect of disclosure to client.]—*Re HASLAM & HIER-EVANS*, No. 672, *ante*.

SUB-SECT. 6.—LIABILITY FOR ACTS OF PARTNER.

See Part XII., Sect. 4, *post*.

SECT. 5.—SOLICITOR TO COMPANY

See COMPANIES, Vol. IX., pp. 547-553, Nos. 3613-3655.

SECT. 6.—SOLICITOR ACTING AGAINST FORMER CLIENT.

1121. Whether solicitor will be restrained—*Grounds for exercise of jurisdiction.*]—The jurisdiction of the ct. to restrain a solr. who has acted in one proceeding from acting in a subsequent proceeding for the party opposed to his former client is not confined to the case where the solr. has discharged himself, but extends to the case where he has been discharged by the client. *Semble*: the true test to be applied in such cases is to consider whether the second proceeding so flows out of or is connected with the first, as that the solr. must be presumed to be in possession of information bearing upon the matter in dispute.—*LITTLE v. KINGSWOOD COLLIERIES CO.* (1882), 20 Ch. D. 733; 51 L. J. Ch. 498; 47 L. T. 323; 31 W. R. 178; *on appeal*, 20 Ch. D., p. 741, C. A.

Annotation:—**Overd.** *Rakusen v. Ellis, Munday & Clarke*, [1912] 1 Ch. 831.

1122. —.].—*SAUNDERS v. GREENFIELD* (1902), 47 Sol. Jo. 111.

1123. —.].—M. & C. were the only partners in a firm of solrs. named E. M. & C. & were in the habit of doing business separately & without any knowledge of each other's clients. R. consulted M. with reference to an action for wrongful dismissal which he desired to commence against a co. He then changed his solrs. & issued his writ, & the matter was referred to arbn., the proceedings in which were still in progress. C. was away at the time & knew nothing of the consultations between R. & M., & whilst the arbn. was going on, he was appointed under the name of E. M. & C. to act as solr. for the co. in the arbn. R. applied for an injunction to restrain E. M. & C. from acting for the co.:—*Held*: there was no general rule that a solr. who had acted for some person either before

or after the litigation began could in no case act for the opposite side; the ct. must be satisfied in each case that mischief would result from his so acting; there could be no danger of any breach of confidence, if C. acted for the co.; & the injunction must be refused.—*RAKUSEN v. ELLIS, MUNDAY & CLARKE*, [1912] 1 Ch. 831; 81 L. J. Ch. 409; 106 L. T. 556; 28 T. L. R. 326, C. A.

1124. —.].—*Former partner acting against former client.*]—A solr. for one of the parties in a suit cannot become the solr. for the opposite party, though he is separated from the partnership which jointly were so employed on the other side, & the remaining partner still continues so employed, & the deed of dissolution stipulated that he should not act as solr. for that party.—*CHOLMONDELEY (EARL) & DAMER v. CLINTON (LORD)* (1815), Coop. G. 80; 19 Ves. 261; 35 E. R. 484, L. C.

Annotations:—**Expld.** *Bricheno v. Thorp* (1821), Jac. 300. **Consd.** *Beer v. Ward* (1821), Jac. 77; *Johnson v. Marriott* (1834), 2 Cr. & M. 183; *Griffiths v. Griffiths* (1843), 2 Haro. 587; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; *Parratt v. Parratt* (1848), 2 De G. & Sm. 258. **Distd.** *Hutchinson v. Newark* (1850), 3 De G. & Sm. 727. **Consd.** *Re Holmes, Re Electric Power Co.* (1877), 25 W. R. 603. **Appld.** *Little v. Kingswood Collieries Co.* (1882), 20 Ch. D. 733. **Expld.** *Rakusen v. Ellis, Munday & Clarke*, [1912] 1 Ch. 831. **Refd.** *Turquand v. Knight* (1836), 2 M. & W. 98; *Mansor v. Dix* (1855), 1 K. & J. 451; *Horsley v. Cox* (1869), L. R. 7 Eq. 464. **Mentd.** *Dietrichsen v. Oabburn* (1846), 1 Coop. temp. Cott. 72; *Campbell v. A.-G.* (1867), 2 Ch. App. 571.

1125. —.].—*No proof that confidential information obtained.*]—A solr. who has acted to a certain extent only for parties defts. in an amicable suit in Chancery will not be restrained from acting in a cause by bill filed by some of those defts. on behalf of themselves, against others of them, the solr. making affidavit that he is not confidentially possessed of any secrets which might be used to the prejudice of such other defts. or has knowledge of any facts unknown to his clients. It appears to be necessary that a solr. in such a case should be shown to be possessed of knowledge of matters which might give him undue advantage, to found such a motion.—*ROBINSON v. MULLETT* (1817), 1 Price, 353; 146 E. R. 488.

1126. —.].—*Information acquired as clerk in firm.*]—A clerk to a solr. commencing practice for himself, not to be restrained from acting as solr. for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master.—*BRICHENO v. THORP* (1821), Jac. 300; 37 E. R. 864, L. C.

Annotations:—**Consd.** *Johnson v. Marriott* (1833), 2 Cr. & M. 183. **Refd.** *Little v. Kingswood Collieries Co.* (1882), 20 Ch. D. 733; *Rakusen v. Ellis, Munday & Clarke*, [1912] 1 Ch. 831.

1127. —.].—*Though notice of action given.*]—Where an attorney who, having been employed for pltf's. in a cause, had gone on as far as the issue & giving notice of trial, & had laid the facts of the case before counsel for his opinion, was afterwards discharged by his then clients, but not for misconduct, the ct. refused to restrain him from acting for deft. in the cause, there being no affidavit by pltf's. or their solr. that the attorney had, while in their employment, obtained a confidential knowledge of particular facts, which it would be prejudicial to their case to communicate to the deft., or that the case which had been laid by him before counsel contained facts, the disclosure of

PART IV. SECT. 6.

d. Whether solicitor will be restrained.]—An attorney who has acted for a party to a suit & has discharged himself cannot afterwards act for the opposite party, & the ct. will restrain

him from doing so on an application made for that purpose.—*RAM LALL AGARWALLAH v. MOONIA BIBEE* (1880), L. L. R. 6 Calc. 79.—**IND.**

e. —.].—*HORHOUSE v. HAMILTON* (1821), Sau. & Sc. 359, n.—**IR.**

f. —.].—*HUTCHINS v. HUTCHINS* (1825), 1 Hog. 315.—**IR.**

g. —.].—The solr. of a deceased client, who acted as such for that client's extrix. & devisee, was, at their instance, restrained from acting as

Sect. 6.—Solicitor acting against former client. Part V. Sect. 1: Sub-sects. 1 & 2, A.]

which by him to deft. would have a similar effect.—*JOHNSON v. MARRIOTT* (1833), 2 Cr. & M. 183; 2 Dowl. 343; 4 Tyr. 78; 3 L. J. Ex. 40.

Annotation:—Refd. Rakusen v. Ellis, Munday & Clarke, [1912] 1 Ch. 831.

1128. — Solicitor acting in former cause for both parties.]—The ct. refused to restrain deft.'s attorneys from acting in the cause, on the ground that they had obtained a knowledge of pltf.'s case in the course of a Chancery suit, in which they had been acting in conjunction with pltf., & in which deft. had no interest; deft.'s attorneys deposing, that, in that suit, they acted also for deft.—*GRISSELL v. PETO* (1832), 9 Bing. 1; 2 Moo. & S. 2; 1 L. J. C. P. 139; 131 E. R. 514.

Annotation:—Consd. Johnson v. Marriott (1833), 2 Cr. & M. 183.

1129. — Communication of confidential information.]—A., a solr., had been employed by B. to negotiate & conclude an agreement on her behalf. Disputes then arose between them as to A.'s bills of costs, which B. procured to be taxed & reduced. A suit was subsequently commenced by C. against B., the object of which was to set aside the agreement, & in which A. & D., who had lately become his partner, were solrs. for C. The ct. restrained A. & D. from acting as the solrs. of C. in the suit, & restrained A. from communicating to C. any information relating to the agreement that had come to his knowledge, confidentially, as the solr. of B.—*DAVIES v. CLOUGH* (1837), 8 Sim. 262; 6 L. J. Ch. 113; 1 Jur. 5; 59 E. R. 105; *affd.*, 8 Sim. p. 269, L. C.

Annotations:—Consd. Parratt v. Parratt (1848), 2 De G. & Sm. 258; *Re Holmes, Re Electric Power Co.* (1877), 25 W. R. 603. *Refd. Little v. Kingswood & Parkhurst Colliery Co.* (1882), 47 L. T. 323.

1130. —]—Parties who obtain knowledge of transactions in respect of which proceedings are afterwards had in this ct., from their situation of solrs., or as clerk to a solr., will be restrained from acting as the solr. of, & from communicating information or producing documents to parties having adverse interests to those of their former clients.—*DARBY v. COTTEE, Re H. D. F.* (1848), 12 L. T. O. S. 171.

1131. —]—Injunction decreed to restrain a solr. from communicating to a party who was suing a former client documents or matters of evidence which had come to the possession or knowledge of the solr. in respect of his employment for such client, & to restrain the party suing from using in his action, or otherwise, any documents or matters of evidence which he had so obtained.—*LEWIS v. SMITH* (1849), 1 Mac. & G. 417; 41 E. R. 1326, L. C.

1132. — Solicitor formerly acting for personal representative—Acting for legatee.]—A bill was filed by the residuary legatees under a will against the exors., of whom one was also beneficially interested as a legatee, & had undertaken the sole management of its affairs. The bill charged particular acts of mismanagement, & the appropri-

tion by the managing exor. to his own purposes of part of the trust funds. The solr. for pltf., having been for several years the friend & solr. of the managing exor., had become well acquainted with the circumstances of the trust; he had been engaged in recovering money from a debtor to the estate, & had been consulted by the managing exor. when one of the residuary legatees, the present pltf., had applied for the executorship accounts, which had been delivered under the solr.'s advice. The solr.'s bill for the matters was made out against the managing exor., not as exor., but personally. The bill was taxed, & an action brought for the amount, which was paid, & the character of solr. & client thus ceased in 1817. A motion by the managing exor., the former client, for an injunction to restrain the solr. from acting as the solr. for pltf. in the cause against him was dismissed.—*PARRATT v. PARRATT* (1848), 2 De G. & Sm. 258; 17 L. J. Ch. 346; 12 Jur. 740; 64 E. R. 116.

Annotation:—Refd. Re Holmes, Re Electric Power Co. (1877), 25 W. R. 603.

1133. — Acting for next of kin.]—The ct. refused to restrain, at the instance of an administratrix, a solr. who had acted on behalf of the administratrix in the affairs of her intestate's estate, from acting as the solr. of some of the next of kin in a suit for the administration of the estate.—*HUTCHINSON v. NEWARK* (1850), 3 De G. & Sm. 727; 64 E. R. 679.

1134. — Where all facts ascertainable by new client.]—Notwithstanding the rule that a solr. must not use information acquired in his professional capacity in any subsequent proceedings against his former client, a solr., who has acted in the formation of a co. & been discharged, may act for a petitioner to wind up the same co., when all the facts upon which the petition is based might have been ascertained by any person in the position of the petitioner.—*Re HOLMES, Re ELECTRIC POWER CO., LTD.* (1877), 25 W. R. 603.

Annotation:—Refd. Little v. Kingswood Collieries Co. (1882), 20 Ch. D. 733.

1135. Action for damages.]—A. employed B. as his solr. in an action against C. The learned judge on the trial reserved his judgment, intimating that there would be certainly a verdict for A. as regarded part of his claim, but as to the balance he would consider the matter. In the interval & before judgment actually given, D., a former client of B.'s, consulted him professionally whether he could safely leave in C.'s possession property bought by him of C., which was nearly all C.'s property, & on B.'s advice a bill of sale was executed by C. in D.'s favour. When judgment was given, C. filed a petition for liquidation of his affairs, & in consequence of the bill of sale A. only received a dividend under the liquidation proceedings on his judgment:—*Held*: there was a right of action on the ground of negligence if B. acted in ignorance of his duty; or on the ground of misconduct & breach of duty if he were aware of it.—*BARBER v. STONE* (1881), 50 L. J. Q. B. 297, D. C.

solr. for a creditor in whose name he had filed a bill to raise the amount of a judgment debt out of the estate of the deceased, though that creditor had been a client of the solr. before he became concerned for the deceased; & though the solr. contended that he

had been discharged.—*BIGGS v. HEAD* (1837), Sau. & Sc. 335.—**IR.**

h. —] — BRADY v. LAWLESS (1837), Sau. & Sc. 365, n.—**IR.**

k. Duty to maintain secrecy.]—

PALLONJI MERWANJI v. KALLABHAI LALLUBHAI (1887), I. L. R. 12 Bom. 85.—**IND.**

l. —] — SRINIVASA RAU v. PICHAI (1913), I. L. R. 38 Mad. 650.—**IND.**

Part V.—Solicitor as Trustee, Receiver, or Executor.

SECT. 1.—SOLICITOR AS TRUSTEE.

SUB-SECT. 1.—IN GENERAL.

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 505-508, Nos. 1656-1662, 1675-1677.

1136. Entitled to protection in execution of duties.]—Sols. acting as trustees are to be protected as any other person acting in the execution of an onerous duty.—HAMOND v. WALKER (1857), 3 Jur. N. S. 686.

Solicitor as constructive trustee.]—See TRUSTS & TRUSTEES.

Appointment as trustee.]—See TRUSTS & TRUSTEES.

SUB-SECT. 2.—REMUNERATION.

A. What Costs Chargeable.

1137. General rule—Profit costs not recoverable.]

—A solr., who accepts a trust under a will or settlement, is not entitled to charge for work & labour done by him as a solr., in executing the trust.—NEW v. JONES (1833), 1 Mac. & G. 668, n.; 1 H. & Tw. 632; 41 E. R. 1429.

Annotations:—Folld. Moore v. Frowd (1837), 3 My. & Cr. 45. Consd. Burge v. Brutton (1843), 7 Jur. 988. Distd. York v. Brown (1844), 1 Coll. 260. Apld. Bainbrigg v. Blair (1845), 8 Beav. 588. Consd. Cradock v. Piper (1850), 1 Mac. & G. 661. Folld. Broughton v. Broughton (1855), 5 De G. M. & G. 160.

1138. ———.]—Where a solr. is appointed trustee, & acts professionally in the matters of the trust, he is not entitled to his usual costs as a solr., but merely to the costs out of pocket.—MOORE v. FROWD (1837), 3 My. & Cr. 45; 6 L. J. Ch. 372; 1 Jur. 653; 40 E. R. 811, L. C.

Annotations:—Distd. Re Sherwood (1840), 3 Beav. 338. Apld. Fraser v. Palmer (1841), 4 Y. & C. Ex. 515. Consd. Burge v. Brutton (1843), 7 Jur. 988. Distd. York v. Brown (1844), 1 Coll. 260. Folld. Bainbrigg v. Blair (1845), 8 Beav. 588. Expld. Cradock v. Piper (1850), 1 Mac. & G. 664. Consd. Broughton v. Broughton, Broughton v. White (1854), 1 Sm. & G. 422.

1139. ———.]—Business relating to a trust estate was transacted by two solrs. in partnership, one of whom was a trustee of the estate:—Held: in passing his accounts, costs out of pocket could alone be allowed.—COLLINS v. CAREY (1839), 2 Beav. 128; 48 E. R. 1128.

Annotations:—Folld. Burge v. Brutton (1843), 12 L. J. Ch. 368. Distd. York v. Brown (1844), 1 Coll. 260.

1140. ———.]—The trustee of the separate property of a married woman acted as her attorney in three several suits instituted in relation to the trust property. In the first of these suits he was not a party, in the others he was:—Held: in the first suit he was entitled to his costs as between solr. & client, but in the two others only to costs out of pocket.

In the first suit the solr. was not acting in the character of trustee though he was Mrs. P.'s solr. (ALDERSON, B.).—FRASER v. PALMER (1841), 4 Y. & C. Ex. 515; 160 E. R. 1111.

Annotations:—Apld. Bainbrigg v. Blair (1845), 8 Beav. 588; Cradock v. Piper (1850), 1 Mac. & G. 664. Refd. Re Doody, Fisher v. Doody, Hibbert v. Lloyd (1892), 67 L. T. 650.

PART V. SECT. 1, SUB-SECT. 1.

m. Acting as pro-curator.]—DUNLOP'S TRUSTEE (Sess.) 210; 25

PART V. SECT. 1, SUB-SECT. 2.—A.

1137 i. General rule—Profit costs not

1137 ii. ———.]—The rule that a trustee acting as a solr. of the trust is entitled to costs out of pocket merely, applies only when the costs are payable out of the trust funds, not when payable by an adverse party.—COLONIAL TRUST CO. v. CAMERON (1877), 24 Gr. 548.—CAN.

1137 iii. ———.]—TAYLOR v. MAGRATH (1886), 10 O. R. 669.—CAN.

1137 iv. ———.]—Held: not-

1141. ———.]—A trustee acting as solr. in the trust matters is merely entitled to costs out of pocket. The rule is not inflexible, & compensation may, in special cases, be made him, under the authority of the ct., by a fixed allowance, & not by allowing him to make the usual professional charges.—BAINBRIGGE v. BLAIR (1845), 8 Beav. 588; 1 New Pract. Cas. 283; 5 L. T. O. S. 454; 9 Jur. 765; 50 E. R. 231; sub nom. BLAIR v. BAINBRIGGE, 14 L. J. Ch. 405.

Annotations:—Distd. Cradock v. Piper (1850), 19 L. J. Ch. 107. Refd. Broughton v. Broughton (1855), 5 De G. M. & G. 160; Re Barber, Burgess v. Vinicombe (1886), 34 Ch. D. 77; Re Corsellis, Lawton v. Elwes (1886), 33 Ch. D. 160.

1142. ———.]—STANES v. PARKER, No. 1163, post.

1143. ———.]—Testator having given a legacy to a person, payable at a future day, when the day came the legatee was believed to be dead, but it was not known whether he had died intestate or not. The legacy was invested, & a solr., not the exor. of testator, became the obligee of the bond to secure it. The solr. took all necessary steps to obtain the necessary information, & being unsuccessful he demanded a bond of indemnity before paying over the legacy; & then, saying his bill of costs amounted to a certain sum, but not delivering any bill of particulars, he deducted that sum from the legacy & handed over the balance to the next of kin of the deceased legatee, who had taken out administration to him:—Held: no particulars being stated, & the solr., who had constituted himself a trustee, having made professional charges for his trouble in making the inquiries, the bill was taxable notwithstanding payment or retainer of moneys in payment.

A trustee cannot charge for professional trouble.—Re FOULKES & PARKER (1847), 2 New Pract. Cas. 491; 10 L. T. O. S. 221.

1144. ———.]—(1) Where a solr., being a trustee, acts as a solr. for himself & his co-trustees, or for himself & other parties, in a suit relating to trust property, & the costs are ordered to be taxed as between solr. & client, all the costs so incurred are to be allowed, except by so much as they may have been increased by the solr. trustee being himself a party; the rule of law, that a trustee cannot be allowed to make a profit of his trust, only applying to a trustee acting for himself qua trustee.

(2) Under an order to tax costs as between solr. & client, or to tax generally, the taxing master is at liberty to look to the circumstance of the solr. being a trustee, & to disallow his particular costs, other than costs out of pocket.

By an order in the suit, costs had been ordered to be taxed as between solr. & client, which was done, & no objection taken that the master ought to have disallowed all but costs out of pocket, on the ground that the solr. was a trustee. By a subsequent order, the master was directed to tax the subsequent costs of all parties as between solr.

withstanding Manitoba Trustee Act, R. S. M. c. 146, s. 40, the rule of English law that a sole trustee who is a solr. cannot charge against the trust estate profit costs for acting as solr. for the estate, still prevails to the extent that he is not entitled as of right to have such costs taxed to him as a solr.—TURRIFF v. McDONALD (1901), 13 Man. L. R. 577.—CAN.

1137 v. —

FINDLAY'S

Sect. 1.—Solicitor as trustee: Sub-sect. 2, A., B. & C. (a).]

& client, & to add them to the previous amounts:—*Held*: the taxing master was not bound to follow the same course of taxation that had been adopted on the previous occasion, but might look to the circumstance of the solr. being a trustee.—*CRADOCK v. PIPER* (1850), 1 Mac. & G. 664; 1 H. & Tw. 617; 19 L. J. Ch. 107; 15 L. T. O. S. 61; 14 Jur. 97; 41 E. R. 1422, L. C.; *affg.* S. C. *sub nom.* *CRADOCK v. PIPER, PARKINSON v. PIPER* (1849), 17 Sim. 41.

Annotations:—*As to* (1) *Distd.* *Lincoln v. Windsor* (1851), 9 Hare, 158; *Broughton v. Broughton* (1855), 5 De G. M. & G. 160. *Dbtd.* *Manson v. Baillie* (1855), 26 L. T. O. S. 24. *Apld.* *Re Barber, Burgess v. Vincome* (1886), 34 Ch. D. 77. *Folld.* *Re Correllis, Lawton v. Elwes* (1887), 34 Ch. D. 675. *Dbtd. & Distd.* *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129. *Refd.* *Vipont v. Butler*, [1893] W. N. 64; *Re White, Pennell v. Franklin* (1898), 78 L. T. 770. *As to* (2) *Apld.* *Stone v. Lickorish*, [1891] 2 Ch. 363.

1145. ———.]—In a suit by a trustee against his co-trustee, a solr., & the parties beneficially interested under a will, some of them being infants, the costs of all parties had been ordered to be taxed & paid. It appeared that deft. trustee, the solr., had conducted his defence by his partner. The taxing master allowed the solr. trustee costs out of pocket only:—*Held*: the rule which had allowed to solr. trustee costs out of pocket only being well established, the ct. would not, with reference to the question of costs, inquire whether the conduct of the suit by the partner of the solr. trustee was beneficial for all parties, though no party objected to such inquiry, but all costs beyond those out of pocket must be disallowed.—*LYON v. BAKER* (1852), 5 De G. & Sm. 622; 64 E. R. 1271.

1146. ———.]—An extrix. & trustee under a will employed her co-trustee who was a solr. to transact the necessary legal business of the trust:—*Held*: the solr. was only entitled to costs out of pocket.—*BROUGHTON v. BROUGHTON* (1855), 5 De G. M. & G. 160; 25 L. J. Ch. 250; 1 Jur. N. S. 965; 43 E. R. 831; *sub nom.* *BROUGHTON v. WHITE, BROUGHTON v. BROUGHTON*, 26 L. T. O. S. 54; 3 W. R. 602, L. C.

Annotations:—*Apld.* *Nicholson v. Tutin* (1857), 3 Jur. N. S. 235; *Pollard v. Doyle* (1860), 3 L. T. 432. *Consd.* *Re Barber, Burgess v. Vincome* (1886), 34 Ch. D. 77. *Re Correllis, Lawton v. Elwes* (1887), 34 Ch. D. 675; *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129. *Folld.* *Re Andrew, Mellor v. Smith* (1895), 39 Sol. Jo. 363. *Refd.* *Crosskill v. Bower, Bower v. Turner* (1863), 32 Beav. 86; *Fild v. Hopkins* (1890), 44 Ch. D. 524; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618.

1147. ———.]—The rule that a solr. trustee acting in the trust shall not be allowed profit costs is not restricted to cases of express trust; but applies to the case of an exor. or trustee, though there be no express trust.—*POLLARD v. DOYLE, KEARNS v. DOYLE* (1860), 1 Drew. & Sm. 319; 3 L. T. 432; 6 Jur. N. S. 1139; 9 W. R. 28; 62 E. R. 401.

1148. ———.]—(1) E., a partner in a firm of country solrs., was one of two trustees of a will which contained no power to charge for professional services. E. & his co-trustee were resps. to an application for maintenance by a next friend on behalf of an infant under the summary procedure

of the ct. & E.'s firm, through their London agents, acted as solrs. for E. & his co-trustee & made profit costs:—*Held*: E.'s firm were entitled to receive those profit costs as coming within the exception laid down in *Cradock v. Piper*, No. 1144, *ante*.

(2) After the death of E.'s co-trustee, E. was made deft. to an administration action in which a receiver was appointed, & E.'s firm, through their London agents, acted for the receiver & made profit costs:—*Held*: these profit costs could not be retained by the firm; on the principle that a trustee must not place himself in a position in which his interest conflicts with his duty.

(3) E. & his firm made profit costs by preparing leases & agreements for leases of portions of the trust estate, which costs were paid by the lessees:—*Held*: although the costs were paid by the lessees, the solrs. were employed on behalf of the trust estate, & E. & his firm must account to the estate for the costs.

(4) E. & his co-trustee appointed E.'s partner steward of a manor which formed part of the trust estate, & fees for manorial business were paid to the steward by the tenants & brought into the partnership accounts:—*Held*: the fees, not being received by the steward in his character of solr., were not liable to be accounted for to the trust estate.—*Re CORSELLIS, LAWTON v. ELWES* (1887), 34 Ch. D. 675; 56 L. J. Ch. 291; 56 L. T. 411; 51 J. P. 597; 35 W. R. 309; 3 T. L. R. 355, C. A.

Annotation:—*As to* (1) *Consd.* *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129.

1149. *Solicitor not acting in capacity of trustee.*—*FRASER v. PALMER*, No. 1140, *ante*.

1150. *Solicitor trustee sued as defendant.*—The costs of a deft. trustee notwithstanding he was a solr. ordered to be taxed as between solr. & client.—*YORK v. BROWN* (1844), 1 Coll. 260; 3 L. T. O. S. 240; 8 Jur. 567; 63 E. R. 410.

Annotation:—*Refd.* *Cradock v. Piper* (1850), 1 Mac. & G. 664.

1151. *Employment of partner as solicitor—Partner alone entitled to profits.*—The rule that a trustee shall make no profit of his trust does not extend to his partner. Therefore, where a trustee, being a solr., employed his partner professionally in the matter of the trust, upon the terms of such partner being alone entitled to the profits, the ct. allowed the professional charges.—*CLACK v. CARLON* (1861), 30 L. J. Ch. 639; 7 Jur. N. S. 441; 9 W. R. 568; *sub nom.* *CLARK v. CARLON*, 4 L. T. 361.

Annotation:—*Consd.* *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129.

1152. *Costs of defending trust deed.*—A trustee, acting as solr. for himself, is entitled to costs generally against persons attempting unsuccessfully to impeach the trust deed.—*PINCE v. BEATTIE* (1863), as reported in 2 New Rep. 546; 9 L. T. 315; 9 Jur. N. S. 1119; 11 W. R. 979.

1153. *Solicitor trustee acting for mortgagor—Costs paid by mortgagor.*—A trustee, who was a solr., sold out stock forming part of the trust estate & invested it on a mtge. He acted in the transaction as solr. for mtgor. as well as for the trust estate, but made no charge against the trust

TRUSTEES v. M'COMIE (1852), 14 Dunl. (Ct. of Sess.) 621; 24 Sc. Jur. 311; 1 Stuart, 583.—*SCOT*.

1137 vi. ———.]—*FEGAN v. THOMSON* (1855), 17 Dunl. (Ct. of Sess.) 1146; 27 Sc. Jur. 599.—*SCOT*.

1137 vii. ———.]—*GRAY (LORD) v. DUNDAS & WILSON* (1856), 19 Dunl. (Ct. of Sess.) 1; 28 Sc. Jur. 522.—*SCOT*.

1137 viii. ———.]—*WELLWOOD'S TRUSTEES v. HILL* (1856), 19 Dunl. (Ct. of Sess.) 187; 29 Sc. Jur. 86.—*SCOT*.

1137 ix. ———.]—*MILARS* (1859), 21 Dunl. (Ct. of Sess.) 1353; 31 Sc. Jur. 740.—*SCOT*.

1137 x. ———.]—*AFRICAN MUTUAL TRUST & ASSURANCE CO., LTD. v. RAUBENHEIMER'S TRUSTEES*, [1912]

C. P. D. 439.—*S. AF*.

n. Sum paid as commission.—In an action by a creditor against trustees of a deceased debtor, the accounts given in by the trustees were objected to, in respect that credit was therein taken for a sum paid as commission to two of their number, who had acted as law agents & factors for the trust. The ct. disallowed the

estate for his services, being paid for them by the mtgor. He also derived some profit as a solr. in consequence of the employment of part of the mtged. estate for building purposes:—*Held*: pltf. could not charge him with the profit thus made, as having been made by the employment of the trust estate in his business.—*WHITNEY v. SMITH* (1869), 4 Ch. App. 513; 20 L. T. 468; 17 W. R. 579,

L. J. Ch. 274.

1154. Employment of agent by trustee solicitor.]

—An exor. who acts as solr. in a cause in which he is a party in his representative character, though he is only allowed personally, as against the estate, such costs as he actually pays:—*Held*: entitled to be allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive.—*BURGE v. BRUTTON* (1843), 2 Hare, 373; 12 L. J. Ch. 368; 7 Jur. 988; 67 E. R. 153.

Annotations:—*Mentd.* *Walters v. Walters* (1881), 44 L. T. 769; *Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B. 317.

1155. — Right of estate to share of profit.]

A., a solr., being one of three mtgees., arranged with another solr., B., to “act as his agent” in the matter of the mtge., on agency terms. B. accordingly acted, & sent in his bill prepared as between solr. & client, which was paid by the mtgees. B. allowed A. £100 as his share of the profits. After this, on the application of second incumbrances the bill was taxed:—*Held*: the taxing master was right in taxing it on the principle of solr. & agent, for the agreement between A. & B. was valid, though it enured to the benefit of the mtgees.; & the bill was properly taxable, at the instance of the second incumbrancers, as between them & B.—*Re TAYLOR* (1854), 18 Beav. 165; 23 L. J. Ch. 857; 23 L. T. O. S. 72; 18 Jur. 666; 2 W. R. 249; 52 E. R. 65.

Annotations:—*Distd.* *Re Donaldson* (1884), 27 Ch. D. 544. *Consd.* *Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129. *Refd.* *Stedman v. Collett* (1854), 17 Beav. 608.

1156. Agreement to allow solicitor trustee agency terms.]—*Re ANDREW, MELLOR & SMITH* (1895), 39 Sol. Jo. 363.

B. When Acting for Co-Trustees.

1157. Right to profit costs of action.]—*CRADOCK v. PIPER*, No. 1144. *ante*.

1158. — Not of non-contentious business.]

The rule which allows a solr., being also a trustee & a party to a cause, to charge full costs where he acts in the suit for a body of trustees, of which he himself is one, does not apply to the case of a solr. being a trustee & acting as solr. for himself & his co-trustees in the administration of the trust estate out of ct.—*LINCOLN v. WINDSOR* (1851), 9 Hare, 158; 20 L. J. Ch. 531; 18 L. T. O. S. 39; 15 Jur. 765; 68 E. R. 456.

Annotations:—*Consd.* *Broughton v. Broughton* (1855), 5 De G. M. & G. 160. *Expld.* *Re Corsellis, Lawton v. Elwes* (1887), 34 Ch. D. 675.

1159. — — —.]—A testatrix, after appointing V. & H., who was a solr. & also one of the attesting

witnesses to the will, exors. & trustees of her will, declared that H. should be entitled to charge & to receive payment for all professional business to be transacted by him under the will in the same manner as he might have done if he had not been an exor. V. proved the will, & a creditor's action was instituted against her. V. employed the firm of solrs. in which H. was a partner as her solrs. in the action. H. afterwards proved the will, & was made a deft., to the action. When the action came on for further consideration, a question arose whether H. was entitled to his profit costs, & an order was made declaring that he was not entitled to claim payment of profit costs by virtue of the declaration in the will, he being one of the attesting witnesses thereto, such declaration to be without prejudice to any of his rights apart from the clause in the will. The taxing master disallowed H.'s profit costs of action, on the ground that he was a solr.-trustee, & as such not entitled to make a profit out of his trust. On a summons to review the taxation:—*Held*: H. was entitled to profit costs of action, but that he was not entitled to profit costs for business not done in the action, & the rule applied as well to costs incurred before as after he proved the will.—*Re BARBER, BURGESS v. VINICOME* (1886), 34 Ch. D. 77; 56 L. J. Ch. 216; 55 L. T. 882; 35 W. R. 326.

Annotation:—*Refd.* *Re Corsellis, Lawton v. Elwes* (1887), 34 Ch. D. 675.

1160. — If solicitor on record.]—*VIPONT v. BUTLER*, [1893] W. N. 64.

1161. Costs of defending action to set aside trust deed.]—*PINCE v. BEATTIE*, No. 1152, *ante*.

C. Express Provision for Payment.

(a) By Agreement.

1162. Profits costs chargeable by agreement.]

A solr., who is trustee, is not entitled to charge for his professional services, which must be assumed to have been rendered in his character of trustee; but under a contract properly entered into, he may be entitled to his professional charges.—*Re SHERWOOD* (1840), 3 Beav. 338; 10 L. J. Ch. 2; 4 Jur. 982; 49 E. R. 133.

1163. — Release by cestui que trust—Necessity for independent advice.]—A trustee who was a solr., came to a final settlement of accounts with his *cestui que trust*, & thereupon a general release was executed. In the accounts, the trustee had taken credit for bills of costs for professional services, to which, under the general rule, he was not entitled. The *cestui que trust* were assisted on the occasion by an independent solr., who perused the bills, & settled & attested the release:—*Held*: under the circumstances, the trustee was entitled to the benefit of the release.

The safety of the public has been justly thought to require the rule now clearly established, that, although a trustee, being a solr., may appoint another solr. to execute the professional business relating to the trust, yet if he does it himself, he shall not be allowed to charge for his professional services (*LORD LANGDALE, M.R.*).—*STANES v.*

charge.—*BON-ACCORD MARINE INSURANCE CO. v. SOUTER'S TRUSTEES* (1850), 12 Dunl. (Ct. of Sess.) 1010; 22 Sc. Jur. 446.—*SCOT*.

o. — —.]—A. B.'s CURATOR BONIS; C. D.'s CURATOR BONIS, [1927] S. C. 902.—*SCOT*.

PART V. SECT. 1, SUB-SECT. 2.—B.

1157 i. Right to profit costs of action.]—A solr. trustee acting on behalf of himself & his co-trustee is entitled to profit costs for preparing the accounts

of the trustees & attending the audit thereof before the surrogate judge.—*Re McNAB*, 19 C. L. T. Occ. N. 74.—*CAN*.

1157 ii. — —.]—One of several trustees who is a barrister & solr., & acts for himself & his co-trustees as solr. & counsel in an action, may tax against the opposite party his full costs, including instructions & counsel fees.—*STRACHAN v. RUTTAN* (1892), 15 P. R. 109.—*CAN*.

1157 iii. — —.]—*GOODSIR v. CARRU-*

TERS (1858), 20 Dunl. (Ct. of Sess.) 1141.—*SCOT*.

1157 iv. — —.]—*AITKEN v. HUNTER* (1871), 9 Macph. (Ct. of Sess.) 756; 43 Sc. Jur. 413.—*SCOT*.

PART V. SECT. 1, SUB-SECT. 2.—C. (a).

1162 i. Profit costs chargeable by agreement.]—Where the terms of a correspondence between the beneficiaries under a trust & a trustee, who also

Sect. 1.—Solicitor as trustee: Sub-sect. 2, C. (a) & (b).]

PARKER (1846), 9 Beav. 385; 10 Jur. 603; 50 E. R. 392; *sub nom.* STAINES v. PARKER, 1 New Pract. Cas. 459; 8 L. T. O. S. 86.

Annotation:—Distd. Todd v. Wilson (1846), 9 Beav. 486.

1164. ————.]—A trustee, who was also a solr., after delivery of his trust accounts, obtained a settlement thereof & release from his *cestui que trust*. Several bills of costs, in respect of professional business transacted by the solr. touching the trust affairs, were comprised in the accounts. The *cestui que trust* was not informed by the solr. that he was not obliged to pay the professional charges, nor was any other solr. consulted at the time of the settlement by the *cestui que trust*:—*Held*: on a bill filed several years after the settlement of the accounts by the *cestui que trust* against the trustee, containing charges of fraud, & seeking relief in respect of the bills of costs, & praying that the release executed by him to the trustee might be declared void, the *cestui que trust*, not having proved a case of fraud against the trustee, was not entitled to have the release declared void, & the bill must be dismissed against the trustee with costs, as to that part of the relief prayed; but pltf. was entitled to relief in respect of the professional charges made by the trustee, & included in the accounts settled, & a reference to the master to tax the bills of costs, was accordingly directed by the ct.—TODD v. WILSON (1846), 9 Beav. 486; 1 New Pract. Cas. 489; 15 L. J. Ch. 450; 10 Jur. 626; 50 E. R. 431.

1165. ———— **Re-opening settled account.**]—S. & S., the trustees & exors. of a will, who were solrs. carrying on business in partnership & were authorised by the will to charge for professional business done by them for the estate wound up the estate & sent an account to the five residuary legatees with a letter saying that, if they would call at the office of the exors. on a day named, the exors. would give them any explanations they might require, & would hand them over cheques for their shares of the residue. The account was not a complicated one, & among the items was, "paid Messrs. S. & co. costs relating to executorship & counsel's fees & payments made by them, £116 17s. 2d." The ultimate balance shown was £331 3s. 4d., the bulk of testator's property having been disposed of by specific bequests. The residuary legatees attended, signed at the foot of the account a memorandum, "We have examined & approve of the foregoing accounts," received cheques for their shares, & executed a release to the trustees & exors. The trustees & exors. never informed the residuary legatees that they were entitled to have a bill of costs delivered, & to have it taxed if they thought fit. Nine years afterwards three of the residuary legatees brought an action to have it declared that the release was not binding on them, & to have a bill of costs delivered & taxed. On production of documents there were found in the costs ledger of the solrs. items which came to more than the amount charged for costs in their account, there was no evidence of excessive charge beyond a deposition by an experienced solr.'s clerk that in his opinion at least one-sixth would be

taxed off the amount of costs appearing in the ledger, & there was no proof of error in the rest of the account:—*Held*: although it was the duty of the solr. trustees to have informed the residuary legatees that they were entitled to have a bill of costs, & if they thought fit to have it taxed or moderated, the omission to do so was not by itself a sufficient ground for opening a settled account; in order to do so it was necessary to show that injustice would be done by allowing the settled account to stand; that if excessive charges had been shown the account must have been opened; but as no error had been shown the action had rightly been dismissed.—*Re* WEBB, LAMBERT v. STILL, [1894] 1 Ch. 73; 63 L. J. Ch. 145; 70 L. T. 318. C. A.

Annotation:—*Re*fd. Yourell v. Hibernian Bank, [1918] A. C. 372.

1166. Appointment by co-trustees as acting trustee.]—M., a solr., & five others, were appointed & acted as exors. & trustees under the will of C., whose assets consisted chiefly of lawsuits in which C. was personally interested. M. was also the principal legatee. The trustees, by letter of attorney, appointed M. as acting trustee to manage the trust, & account to them for the funds after deducting his reasonable charges & costs. M. thereupon kept on all the lawsuits, conducting them at his own discretion, & resenting all interference of his co-trustees, & refusing for seven years to give them any account of the trust funds. At length, after exhausting all those funds, he delivered his bill of costs showing a balance of £2,000 for which he claimed to hold them personally liable:—*Held*: there being no express contract, any such inference from the circumstances, as that he was to be remunerated in the ordinary way by his co-trustees, was extravagant.—MANSON v. BAILLIE (1855), 2 Macq. 80; 26 L. T. O. S. 24. H. L.

Annotations:—*Consd.* Broughton v. White, Broughton v. Broughton (1855), 26 L. T. O. S. 54; *Re* Barler, Burgess v. Vinicombe (1886), 34 Ch. D. 77. *Re*fd. *Re* Corsellis, Lawton v. Elwes (1886), 33 Ch. D. 160.

Liability to income tax in respect of remuneration.]—*See* INCOME TAX, Supp. III., No. 313a.

1167. Work done at request of cestui que trust.]—*Qu.*: whether a trustee, an attorney, is entitled to charge his *cestui que trust* for business in connection with the trust, done at the request of the *cestui que trust* & for his advantage, anything more than costs out of pocket.—*Re* OVERBURY & PEAKE (1859), 1 L. T. 103.

(b) In Instrument appointing Solicitor Trustee.

1168. Power to charge for costs already incurred—Voluntary deed subsequently set aside.]—A deed made without any consideration was executed by a husband, by which property was conveyed by him to trustees, upon trusts for the benefit of his wife, one of the provisions being an annuity for her in case she & her husband should cease to cohabit together. The deed also contained a covenant by the husband to pay some costs which had been incurred by a solr., who prepared the deed & who was one of the trustees, for the wife,

acted as professional agent of the trust, showed that it was their understanding that he was to receive professional remuneration for the work done by him as agent:—*Held*: such a case did not fall within the rule of law that a trustee is not entitled to make profit from his management of the estate, or of business or affairs connected with it.—OMMANEY v. SMITH (1854), 19

Dunl. (Ct. of Sess.) 721; 26 Sc. Jur. 314.—SCOT.

1162 H. ————.]—DIXON v. RUTHERFORD (1863), 2 Macph. (Ct. of Sess.) 61; 36 Sc. Jur. 30.—SCOT.

PART V. SECT. 1, SUB-SECT. 2.—C. (b).

p. Power to charge for professional

business.]—*Re* SMITH (1916), 16 S. R. N. S. W. 422; 33 N. S. W. W. N. 134.—AUS.

q. ———.]—LEWIS'S TRUSTEES v. PIRIE, [1912] S. C. 574; 49 Sc. L. R. 439; [1912] 1 S. L. T. 208.—SCOT.

r. Where estate insufficient.]—Where an estate is solvent but insufficient to

those costs including the costs of certain proceedings in the Ecclesiastical Ct., which had been instituted by the wife for the purpose of obtaining a separation from her husband. It did not appear that any definite instructions for the preparation of this deed were ever given by the husband, or that its effect was ever properly explained to him by the solr. :—*Held* : this deed must be set aside, & a reconveyance of the property must be made by the trustees ; the solr., however, having been in possession, as trustees under the deed, of some property of the wife, an account was directed of the rents received by him, & of the sums properly expended by him thereout ; he, however, not being allowed any costs secured to him under or by virtue of the trusts of the deed.—*PROCTER v. ROBINSON* (1866), 15 L. T. 431 ; 15 W. R. 138, L. JJ.

1169. Power to charge for business other than of a strictly professional nature.]—A testator by his will authorised any trustee thereof who might be a solr. to make the usual professional, or other proper & reasonable charges, for all business done & time expended in relation to the trusts of the will, whether such business was usually within the business of a solr. or not. On the further consideration of an action for the administration of testator's estate an order was made for the taxation of the costs, charges, & expenses of the trustees, & it was directed that the taxing master should have regard to the terms of the will as to the costs of the trustees :—*Held* : the taxing master had power to allow to a trustee who was a solr. the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate.—*Re AMES, AMES v. TAYLOR* (1883) 25 Ch. D. 72 ; 32 W. R. 287.

Annotations :—*Distd. Re Chapple, Newton v. Chapman* (1884), 27 Ch. D. 584 ; *Re Chalinder & Herington*, [1907] 1 Ch. 58. *Refd. Re Fish, Bennett v. Bennett*, [1893] 2 Ch. 413.

1170. —.]—Testator appointed B. & C. his exors. & trustees, bequeathed to G. if he should accept the offices of trustee & exor. £200, & declared that G. & every future trustee of his will who might be a solr., should be entitled to receive out of the estate his usual professional costs & charges for business transacted by him, including business not strictly professional, but which might or would have been performed in person by a trustee not being a solr. Considerable sums were charged by C. against the estate for business done by him, including charges for his trouble in matters not strictly professional :—*Held* : C. although a legacy was given to him in his capacity of trustee, was entitled under the above clause to charge for his trouble as well as to make professional charges for business done by him as solr.—*Re FISH, BENNETT v. BENNETT*, [1893] 2 Ch. 413 ; 62 L. J. Ch. 977 ; 2 R. 467 ; *sub nom. Re FISH, FISH v. BENNETT*, 69 L. T. 233, C. A.

Annotations :—*Distd. Clarkson v. Robinson*, [1900] 2 Ch. 722 ; *Re Chalinder & Herington*, [1907] 1 Ch. 58.

1171. —.]—*Re DEVEREUX, Re GARROD* (1902), 46 Sol. Jo. 320.

1172. — Confined to professional business.]—Testator directed that “any trustee or exor. hereunder being a solr. or other person engaged in any profession or business shall be entitled to charge, & be paid all usual professional or other charges for any business done by him or his firm in relation to the management & administration of my estate . . . whether in the ordinary course of his profession or business or not & although not

of a nature strictly requiring the employment of a solr. or other professional person” :—*Held* : under this clause, a trustee could not charge for his time & trouble except in the course, whether ordinary or not, of his profession or business.—*CLARKSON v. ROBINSON*, [1900] 2 Ch. 722 ; 69 L. J. Ch. 859 ; *sub nom. Re ROBINSON, CLARKSON v. DIXON*, 83 L. T. 164 ; 48 W. R. 698.

Annotation :—*Distd. Re Devereux, Re Garrood* (1902), 46 Sol. Jo. 320.

1173. — —.]—To entitle a solr. trustee, acting as solr. to the trust estate under a direction to that effect in a will to charge against the estate for work done by him which although not professional work, he could have charged for without any special bargain against a client who was not a trustee there must be express words in the will showing that such was testator's intention. Testator appointed exors. & trustees, & directed that one of them should be the solr. to his trust property & should be allowed “all professional & other charges for his time & trouble” notwithstanding his being an exor. & trustee :—*Held* : this clause did not authorise the solr. trustee to charge for work which was not professional work, although it was such work as he might have charged for against a client who was not a trustee.—*Re CHALINDER & HERINGTON*, [1907] 1 Ch. 58 ; 76 L. J. Ch. 71 ; 96 L. T. 196 ; 23 T. L. R. 71 ; 51 Sol. Jo. 69.

1174. Power to charge for professional business —Work must be within scope of profession.]—Testatrix by her will appointed her solr., who prepared her will, one of her two exors. & trustees, & stating that it was her desire that he should continue to act as solr. in relation to her property & affairs, & should “make the usual professional charges” expressly directed that notwithstanding his acceptance of the office of trustee & exor. he should be entitled to make the same professional charges & to receive the same pecuniary emoluments & remuneration for all business done by him, & all attendances, time, & trouble given & bestowed by him in or about the execution of the trusts & powers of the will, & the management & administration of the trust estate, real or personal, as if he, not being himself a trustee or exor., were employed by the trustees or exor. Under this direction the solr. exor. delivered bills of costs which included charges for all business done by him, whether such business was strictly professional or could have been transacted by a lay exor. without the assistance of a solr. :—*Held* : all items which were not of a strictly professional character ought to be disallowed.—*Re CHAPPLE, NEWTON v. CHAPMAN* (1884), 27 Ch. D. 584 ; 51 L. T. 748 ; 33 W. R. 336.

Annotation :—*Refd. Re Fish, Bennett v. Bennett*, [1893] 2 Ch. 413.

1175. — —.]—Where estates were devised to a near relative & a family solr. until B. attained the age of twenty-eight years, upon trust to receive the rents & manage the estate, & the will empowered any trustee being a solr. to charge & be paid for all business done by him as a solr. or attorney in respect of such estate, & a legacy of £100 was given to each trustee, & the trustees managed the estates consisting of 2,000 acres partly unlet for fifteen years, paying themselves a salary of £100 a year each for the trouble of such management, amounting in all to £3,000. On originating summons on behalf of the tenant for life & infant remainderman :—*Held* : such payments of £200 a year were unauthorised by the

pay all legacies in full, the profit costs of a solr. given to him by the will of testatrix, of which he is appointed exor. & trustee, do not take priority over other legacies.—*O'HIGGINS v. WALSH*, [1918] 1 L. R. 126.—IR.

Sect. 1.—Solicitor as trustee: Sub-sect. 2, C. (b) & D.; sub-sect. 3, A. & B.]

will; the trustees might at any time have applied to the ct., but they neglected to do so.—*Re BEDINGFIELD, BEDINGFIELD v. D'EYE* (1887), 57 L. T. 332.

1176. ———. ———.]—Testator declared that any exor. or trustee of his will who was a solr., or a person engaged in any profession or business, might individually, or through his firm, act in the course of his profession or business on behalf of the exors. & trustees, & charge for so doing:—*Held*: any exor. or trustee of the will who was a solr. or a person engaged in a profession or business was entitled under the will to charge for work or business done in the execution of the statutory trusts, because such work or business would be done on behalf of the exors. & trustees.—*Re PEDLEY, WALLACE v. WALLACE*, [1927] 2 Ch. 168; 96 L. J. Ch. 438; 137 L. T. 636.

1177. Nature of authority to charge—Beneficial interest—Lost by attestation of will.]—By a deed, dated in 1871, B. in consideration of the advance to her by pltf. of the sum of £350, covenanted with him for payment to him of the sum of £1,250 at her death, & to exercise in his favour a power of appointment by will reserved to her in a settlement. B. died in 1884, having made her will, appointing exors., & declaring that one of them, H., a solr., should be entitled to charge for his professional services as if he had not been an exor. H. was an attesting witness to the will. B.'s estate being insolvent, pltf. commenced an action for its administration on behalf of himself & all other creditors. Pltf. was cross-examined by the exors. on his claim:—*Held*: the exor., H., was not entitled to charge for his professional services in connection with B.'s estate, not only because the authority to make such charges operated by way of bounty, & could not take effect, as the estate was insolvent, but also because it was a beneficial gift or interest within Wills Act, 1837 (c. 26), s. 15, & the exor., H., was an attesting witness.—*Re BARBER, BURGESS v. VINNICOME* (1886), 31 Ch. D. 605; 55 L. J. Ch. 373; 54 L. T. 375; 34 W. R. 395.

Annotations:—Apprvd. Re Pooley (1888), 40 Ch. D. 1. *Refd. Re White, Pennell v. Franklin* (1898), 78 L. T. 770.

1178. ———. ———.]—Testatrix appointed B., & P., a solr., exors. & trustees of her will & declared that any trustee of her will who should be a solr. should be entitled to charge for all business done in relation to the estate as if he had been a solr. employed by the trustee. P. was one of the attesting witnesses:—*Held*: P. was not entitled to any profit costs for business done by him in relation to the estate for that the right to make professional charges could only be claimed under the will & was a beneficial interest under it, from claiming which he, being an attesting witness, was precluded by Wills Act, 1837 (c. 26), s. 15.—*Re POOLEY* (1888), 40 Ch. D. 1; 58 L. J. Ch. 1; 60 L. T. 73; 37 W. R. 17; 5 T. L. R. 21, C. A.

Annotations:—Refd. Re Thorley, Thorley v. Massam, Re Thorley, Thorley v. Massam, [1891] 2 Ch. 613; *Re White, Pennell v. Franklin* (1898), 78 L. T. 770.

1179. ———. ———.]—*Estate insolvent.*—A solr. who is the sole exor. & trustee of a will is not entitled to his profit costs of acting as solr. to the estate if it turns out to be insolvent, even though the will contains a clause declaring that he should be the solr. to the estate, & should be allowed to charge for work done as such solr.; for the clause is in effect a legacy of profit costs to the solr., & being bounty he cannot claim it as against creditors.—*Re WHITE, PENNELL v. FRANKLIN*, [1898] 2 Ch.

217; 67 L. J. Ch. 502; 78 L. T. 770; 46 W. R. 676; 14 T. L. R. 503; 42 Sol. Jo. 635, C. A.

Annotations:—Consd. Re Salmen, Salmen v. Bernstein (1912), 107 L. T. 108. *Apld. Re Brown, Wace v. Smith* (1918), 62 Sol. Jo. 487. *Distd. Jones v. Wright* (1927), 44 T. L. R. 128.

—A solr. who is sole exor. & trustee of a will is not entitled, if the estate is found to be insolvent, to his costs of defending an administration action in person, nor to any other costs, except his out-of-pocket expenses, even though the will contained a clause empowering him to make professional charges, & the order in the action on further consideration directed the costs of deft. to be taxed as between solr. & client, & retained by him out of the balance due from him.—*Re SHUTTLEWORTH, LILLEY v. MOORE* (1911), 55 Sol. Jo. 366.

1181. ———. ———.]—*Estate insufficient to pay legacies in full.*—Where the estate of testator is solvent, but is insufficient to pay the legacies in full, the profit costs of a solr. given to him by the will of which he is appointed exor. & trustee do not take priority over the other legacies, but must abate proportionally.—*Re BROWN, WACE v. SMITH* (1918), 62 Sol. Jo. 487.

Annotation:—Distd. Jones v. Wright (1927), 44 T. L. R. 128.

1182. Right of co-trustees to tax bill.]—Where a member of a firm of solrs. is a trustee, entitled under the instrument of trust to charge for his professional services, & his firm to deliver a bill of costs to the trustees of the instrument for work done as solrs. to the trust, the co-trustee is a "party chargeable" within Solicitors Act, 1843 (c. 73), s. 37, & can tax the bill under the Act on a summons taken out under R. S. C., Ord. 54, r. 4 (F.).—*Re DAVIES (H. P.) & SON*, [1917] 1 Ch. 216; 86 L. J. Ch. 200; 115 L. T. 854; 61 Sol. Jo. 184.

D. Trustee in Bankruptcy.

See, now, Bankruptcy Act, 1914 (c. 59), s. 82 (1).

1183. Agreement by committee of inspection—To fix remuneration.]—By Bankruptcy Act, 1883 (c. 52), s. 72, where creditors appoint any person to be trustee of a debtor's estate his remuneration, if any, is to be fixed, if the creditors so resolve, by the committee of inspection, & shall be in the nature of a commission or percentage, one part payable on the amount realised & the other part on the amount distributed in dividend. By Bankruptcy Act, 1883 (c. 52), s. 72, where the trustee is a solr. he may contract that the remuneration for his services as trustee shall include all professional services. The creditors of a bkpt. appointed a solr. the trustee in the bkpcy. "at a remuneration to be fixed by the committee of inspection"; & subsequently the committee passed a resolution that the remuneration of the trustee should be "his proper professional charges as a solr. for attendance & work done & expenses incurred by him in or about the proceedings in the bkpcy."—*Held*: the resolution was invalid, inasmuch as it was contrary to Bankruptcy Act, 1883 (c. 52), s. 72, which required that the remuneration should be a commission or percentage on the amount realised or distributed. *Semble*: where the trustee, being a solr., contracts, under Bankruptcy Act, 1883 (c. 52), s. 73, with the committee of inspection that his remuneration shall include his professional charges, the proper course is to fix his commission or percentage as trustee under Bankruptcy Act, 1883 (c. 52), s. 72, at such a rate as will cover his reasonable professional charges.—*Re WAYMAN, Ex p. OFFICIAL RECEIVER* (1889), 24 Q. B. D. 68; *sub nom. Re WAYMAN, Ex p. BOARD OF TRADE*, 59 L. J. Q. B. 28; 61 L. T. 644; 38 W. R. 95; 6 T. L. R. 18; 6 Morr. 272.

SUB-SECT. 3.—LIABILITY FOR MISCONDUCT OR NEGLIGENCE.

A. In General.

See, also, TRUSTS & TRUSTEES.

1184. Duty to act as prudent solicitor.]—SMITH v. STONEHAM (1886), 3 T. L. R. 77.

Annotation:—Reid. Re Partington, Partington v. Allen (1887), 57 L. T. 654.

1185. Culpable breach of trust—Ground for striking off roll.]—A solr., becoming a trustee is, responsible, in his character of officer of the ct., as well as in that of trustee, for the performance of his duty. *Semble*: a culpable breach of trust by a solr. is ground for striking him from the roll of solrs.—THOMPSON v. FINCH (1857), 28 L. T. O. S. 279, L. JJ.

1186. Summary jurisdiction of court—Removal from trust.]—The *cestuis que trust* under a deed, the trustee of which was a solr., presented a petition in the matter of the solr. & in the matter of Trustee Act, alleging that the trustee had taken the benefit of Insolvent Act, had repudiated the trusts, refused to discharge his duties as trustee, & otherwise misconducted himself in the trusts, & praying the appointment of a new trustee in his place & a vesting order. The trustee denied or offered explanations of the various imputations against him, claimed a balance to be due to him, & objected to being removed from the trusteeship:—*Held*: Trustee Act, 1850 (c. 60), s. 3, does not give the ct. jurisdiction under the Act to displace a trustee who is desirous of continuing in the trust; the trustee could not, under the summary jurisdiction of the ct. over solrs., be removed from the trust for acts done by him, not in the character of solr. or in any relation immediately arising out of that character, but in the character of trustee, & that the order could not be sustained.—*Re BLANCHARD* (1861), 3 De G. F. & J. 131; 30 L. J. Ch. 516; 4 L. T. 426; 25 J. P. 661; 7 Jur. N. S. 505; 9 W. R. 647; 45 E. R. 828, L. JJ.

Mentd. *Bristowe v. Booth* (1869), L. R. 5 C. P. 80; *Coombes v. Brookes* (1871), L. R. 12 Eq. 61; *Re Bignold's Settmt. Trusts* (1872), 7 Ch. App. 223; *Re Lightbody's Trusts* (1884), 52 L. T. 40.

1187. Order for payment of money due.]—Where an applt., although he is not a client, invokes the summary jurisdiction of the ct. over a solr. as one of its officers, & shows conduct towards him which the ct. considers dishonourable, or shows that the solr., as his trustee, has been guilty of a breach of trust, & also that by such conduct or breach his position has been prejudiced, the ct. will exercise such jurisdiction whether or not a remedy by action exists or relief in equity can be obtained in respect thereof, & will make a summary order on the solr. to pay to the applt. money which it considers he ought to pay as an honourable man under the circumstances.—*Re A SOLICITOR, Ex p. HALES*, [1907] 2 K. B. 539; 76 L. J. K. B. 931; 97 L. T. 212; 23 T. L. R. 573; 51 Sol. Jo. 626, D. C.

United K. B. 296.

1188. Order for accounts.]—Where on bill, against a firm of solrs. who were the trustees of a settlement, for an account, but in which there was no charge of wilful neglect or default, & no relief prayed as against it, pltf. succeeded in establishing his case. The ct., in ordering an account, directed an inquiry as to defts.' dealings with the trust fund, & if on taking the accounts it should appear that they had been guilty of wilful neglect or default in the discharge of their duty, they should be charged, in taking the accounts,

with such wilful neglect or default.—NASH v. HOWELL (1869), 21 L. T. 743.

1189. — Cost of vouching.]—A solr. was the exor. & trustee of the will of testator, together with testator's two sons, one of whom took no part in the management of the estate, but the other, who was also a specific devisee of part of testator's real estate on which a legacy was charged, at first managed the property. The solr. limited himself to giving advice to the brothers. A lady entitled for life under the will to the income of a legacy, pressed for accounts, & the solr. forwarded to her sixteen months after testator's death a paper which purported to be an account of the acting trustee as manager of the estate. The account did not distinguish between capital & income. No subsequent accounts were delivered, & the sums due on account of the legacy were in arrear. The legatee took out a summons against the three trustees for an account, & to make them personally liable for costs. The son of testator, who had not acted, died pending the proceedings. On the hearing of the summons a general administration order was made & costs reserved. From the master's certificate it appeared that the solr. trustee & the acting trustee were chargeable with certain sums to the estate. No charge was made against the solr. other than his refusal to account:—*Held*: the solr. trustee & the acting trustee must pay the costs of pltf. & of the personal representatives of the deceased trustee down to & including judgment & also the costs of taking & vouching the accounts.—*Re SKINNER, COOPER v. SKINNER*, [1904] 1 Ch. 289; 73 L. J. Ch. 94; 89 L. T. 663; 52 W. R. 346.

Annotation:—Mentd. Re Holton's Settmt. Trusts, Holton v. Holton (1919), 88 L. J. Ch. 444.

1190. Order for payment into court.]—Order made that a solr., who was also a trustee of a will, should pay into ct. trust money which he had by affidavit admitted that he had in his hands, upon motion made by pltf., *cestui que trust*, in a suit to administer the estate of testator, the notice of motion being entitled in the suit & in the matter of the solr.—*Re CLERHEW'S ESTATE, CLERHEW v. CLERHEW, Re HOWARD* (1871), 24 L. T. 860; 19 W. R. 930, L. JJ.

Annotation:—Folld. Re Carroll, Brice v. Carroll, [1902] 2 Ch. 175.

1191. — Failure to obey order—Attachment.]—PRESTON v. ETHERINGTON, ETHERINGTON v. PRESTON (1887), 37 Ch. D. 104; 57 L. J. Ch. 176; 58 L. T. 318; 36 W. R. 49; 4 T. L. R. 47, C. A.

Annotations:—Mentd. Buckley v. Crawford (1892), 62 L. J. Q. B. 87; *Iles v. T—* (1892), 36 Sol. Jo. 502; *Re Smith, Hands v. Andrews*, [1893] 2 Ch. 1; *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697; *Harper v. McIntyre* (1908), 99 L. T. 191.

B. Indemnification of Co-Trustee.

See TRUSTS & TRUSTEES.

1192. General rule—Innocent trustee entitled to indemnity.]—Where there were two trustees, one of whom was a solr. & entrusted by the other with the management of the trust estate, to which, by his negligence, loss accrued, as between the two trustees, the solr. trustee was held bound to reimburse his co-trustee all the costs, charges & expenses properly incurred by the latter in suits & other proceedings rendered necessary by such negligence of the former.—LOCKHART v. REILLY, REILLY v. LOCKHART (1856), 25 L. J. Ch. 697; 27 L. T. O. S. 49; 4 W. R. 438, L. C.; *subsequent proceedings* (1857), 1 De G. & J. 464, L. C.

Annotations:—Apld. Wilson v. Thomson (1875), L. R. 20 Eq. 459. *Distd. Bahin v. Hughes* (1886), 31 Ch. D. 390. *Consd. Chillingworth v. Chambers*, [1896] 1 Ch. 685. *Folld. Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536.

Sect. 1.—Solicitor as trustee: Sub-sect. 3, B. Sects. 2 & 3. Part VI. Sect. 1.]

Apld. *Re Linsley, Cattley v. West*, [1904] 2 Ch. 785. **Refd.** *Re Partington, Partington v. Allen* (1887), 57 L. T. 654; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Head v. Gould*, [1898] 2 Ch. 250; *The Millwall*, [1905] P. 155.

1193. ———.]—As a general rule, there is no right of indemnity as between trustees, so as to render a trustee who, acting honestly but erroneously has committed a breach of trust liable to indemnify his co-trustees who may have been no parties to the breach of trust.

The cases where such right has been allowed are cases where the non-acting trustee has had some independent right to indemnity, *e.g.* where the acting trustee has been a solr., & acting as such for the trust, has by negligence or improper conduct lost the trust fund.—*BAHIN v. HUGHES* (1886), 31 Ch. D. 390; 55 L. J. Ch. 472; 54 L. T. 188; 34 W. R. 311; 2 T. L. R. 276, C. A.

Annotations:—**Consd.** *Re Partington, Partington v. Allen* (1887), 57 L. T. 654. **Apld.** *Bacon v. Camphausen* (1888), 58 L. T. 851. **Consd.** *Elvidge v. Bellingham* (1893), 37 Sol. Jo. 600. **Refd.** *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536; *Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812.

1194. ———.]—*Re PARTINGTON, PARTINGTON v. ALLEN* (1887), 57 L. T. 654; 4 T. L. R. 4.

Annotation:—**Mentd.** *Shaw v. Cates*, [1909] 1 Ch. 389.

1195. ———.]—Where one of the two trustees actively manages the trust fund, & is solr. to the trust estate, he must indemnify his co-trustee against loss caused to the trust fund from an improper investment made at his instance & under his advice.—*Re TURNER, BARKER v. IVIMEY*, [1897] 1 Ch. 536; 66 L. J. Ch. 282; 76 L. T. 116; 45 W. R. 495; 13 T. L. R. 249; 41 Sol. Jo. 313.

Annotations:—**Apld.** *Re Linsley, Cattley v. West*, [1904] 2 Ch. 785. **Refd.** *Head v. Gould*, [1898] 2 Ch. 250. **Mentd.** *Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479; *Re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583; *Re Barker, Ravenshaw v. Barker* (1898), 46 W. R. 296; *Re Mackay, Griesemann v. Carr*, [1911] 1 Ch. 300.

1196. ———.]—A solr. trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate.—*Re LINSLEY, CATTLEY v. WEST*, [1904] 2 Ch. 785; 73 L. J. Ch. 841; 53 W. R. 172; 48 Sol. Jo. 606. **Annotation:—****Consd.** *The Millwall*, [1905] P. 155.

1197. Exception to rule—Other trustee active participator in breach.]—Where one of two trustees by whom a breach of trust is committed is a solr., he cannot merely because he is a solr., be required to indemnify his co-trustee where that co-trustee has himself been an active participator in the breach of trust & has not participated in it merely in consequence of the advice & control of the solr.—*HEAD v. GOULD*, [1898] 2 Ch. 250; 67 L. J. Ch. 480; 78 L. T. 739; 46 W. R. 597; 14 T. L. R. 444; 42 Sol. Jo. 553.

SECT. 2.—SOLICITOR AS RECEIVER.

Appointment of solicitor in cause receiver.]—See RECEIVERS, Vol. XXXIX., p. 17, Nos. 157–159.

Institution of proceedings.]—See RECEIVERS, Vol. XXXIX., p. 64, No. 747.

PART V. SECT. 3.

11991. Remuneration.]—The duties of a person acting as exor. of, & as solr. to, the estate of a deceased person

are quite distinct, & the fact that deceased, by his will, expressed a wish that his exor. should act as solr. to the estate, & thereby empowered him

to charge for any professional business, will not diminish his right to commission as exor.—*Re SHORT* (1885), 11 V. L. R. 634.—AUS.

SECT. 3.—SOLICITOR AS EXECUTOR.

1198. Refusal to prove will—Unless remunerated.]

—A. devised his real & personal estate to B., an attorney, who made the will, & C. in trust to invest the personal estate in land, & settle the same on deft. for life, with remainders over, & made plths. exors., & gave them £20 a-piece. Plths. refuse to prove the will, unless defts. would give them £300, viz. £100 to B. & £200 to C. Deft. covenants to pay these sums accordingly; & plths. having proved the will file their bill for the allowance; & the Lord Chancellor refused satisfaction principally for that pltf. was an attorney, & from the evidence it appeared, he had urged difficulties to extort this allowance from deft.; though, he said, there might be cases where such allowance would be established.—*POMFRET v. MURRAY* (1740), 9 Mod. Rep. 230; 88 E. R. 417.

1199. Remuneration.]—*CARMICHAEL v. WILLSON* (1830), 4 Bli. N. S. 145; 5 E. R. 52; *sub nom.* *WILLSON v. CARMICHAEL*, 2 Dow. & Cl. 51, H. L.

Annotations:—**Consd.** *Bainbrigge v. Blair* (1845), 1 New Pract. Cas. 283; *Craddock v. Piper* (1850), 1 H. & Tw. 617. **Mentd.** *Heighington v. Grant* (1840), 9 L. J. Ch. 142.

—.]—See EXECUTORS, Vol. XXIV., pp. 602–605, Nos. 6327–6358.

1200. Appointment of receiver.]—*HAMILTON v. GIRDLESTON*, [1876] W. N. 202.

1201. Gift by beneficiary—Out of residue of estate.]—Testator appointed a solr. as one of the exors. of his will. Shortly after testator's death a document in the following terms was signed by each of the beneficiaries under the will. "To the exors. of the will of the late Mr." (naming testator) "as one of the persons interested in the residue of the estate of" (testator) "I hereby signify my wish & request that the sum of £1,000 be paid to Mr." (naming the solr. exor.) "from the residue of the estate, in consideration of his consenting to act as an exor. of the will, & as an expression of my approval of his conduct in relation to the affairs of deceased; & I agree to bear my proportion of such sum of £1,000 in proportion to the value of my interest in the estate." There was a conflict of evidence as to whether the proposal that the gift should be made emanated in the first instance from the solr. exor. himself or not. The money having been duly handed over to him, one of the beneficiaries afterwards commenced this action to have the document signed by himself cancelled, & his proportion of the £1,000 repaid. It was admitted that deft. was the first to bring the proposal before this particular beneficiary, though it was said to have been done at the request of another beneficiary:—**Held:** such a gift to an exor. from a beneficiary will not be upheld save under exceptional circumstances, circumstances which negative any suspicion of misrepresentation, pressure, or unfairness on the part of the exor., & establish that the gift or promise was made by the beneficiary acting deliberately, & with a thorough knowledge & appreciation of what he is doing, & independently of any influence on the part of the exor., or fear consequent upon his position; that in the present case, though there were no threats of any kind, yet there was necessarily pressure incident to the very fact of deft.'s position as exor., & his being the only person thoroughly conversant with the affairs of testator; pltf. accordingly signed the document from an apprehension that it would be the worse for him, owing to deft.'s position, if he

declined to sign it; notwithstanding the wording of the document, there was no bargaining in the transaction, or any idea of paying debt. to induce him to act as exor.; & pltf. was therefore entitled

to have his share of the money repaid to him, & the document signed by him given up to be cancelled.—*WHEELER v. SARGEANT* (1893), 69 L. T. 181; 3 R. 663.

Part VI.—Remuneration of Solicitors—Costs.

SECT. 1.—IN GENERAL.

1202. Charge for inspection of documents—Defendant ordered to produce documents for plaintiff's inspection—Documents remaining in possession of defendant's solicitor.]—Where documents, which a debt. is ordered to produce, are permitted to remain in his solr.'s office, for pltf.'s inspection, the solr. is not entitled to charge pltf. for inspecting them; although the clerk in ct. would have been

entitled to demand 6s. 8d. per hour.—*WOODROFFE v. DANIEL* (1839), 10 Sim. 126; 59 E. R. 561.

1203. Local solicitor retained by Treasury to prosecute—Liability to account for sums received for costs.]—When local solrs. are retained by the Treasury to conduct prosecutions on their behalf, such local solrs. are agents for the Treasury, & are therefore bound to account to the Treasury for any sums of money received in respect of costs, & to

PART VI. SECT. 1.

t. General rule.]—*HAMILTON v. McNEILL* (1895), 3 Terr. L. R. 298.—CAN.

a. —.]—An attorney is entitled to all fair & reasonable amounts for services performed & disbursements actually made by him.—*R. v. ELLIS, Ex p. BAIRD* (1895), 33 N. B. R. 141.—CAN.

b. —.]—The amount of remuneration which a lawyer should receive depends to some extent upon the magnitude of the interests concerned, & more upon the skill which manifests on his client's behalf than upon the number of interviews he may have or the time spent.—*LANNI, STANTON v. SOMERVILLE* (1919), 14 O. L. R. 575; 16 D. L. R. 718; 15 O. W. N. 303.—CAN.

c. —.]—An attorney is not entitled to any reward for services rendered to his client beyond his just & fair professional remuneration during the subsistence of the relationship of attorney & client, unless the client had competent & independent advice to measure the amount of service rendered by the attorney.—*BROEN-DRO NATH MULLICK v. LUCKHIMONI DASSEE* (1902), 1 L. R. 29 Cal. 595; 6 C. W. N. 816.—IND.

d. —.]—The employing of a professional person implies an undertaking to remunerate him, but the inference may be rebutted by circumstances.—*MAUSON v. BAILLIE* (1855), 2 Macq. 80.—SCOT.

e. —.]—Where the relation of agent & client is constituted, the obligation of the client to remunerate the agent for his services is implied unless expressly dispensed with.—*BELL v. OGILVIE* (1863), 2 Macph. (Ct. of Sess.) 336; 36 Sc. Jur. 162.—SCOT.

f. Acting as solicitor & counsel to client.]—Pltf., the recorder of T., acted as solr. & counsel for debt. town in several prosecutions brought against the town. His duties were not defined by the council, & there was nothing in the legislation or in the practice to impose upon him the duty of acting for the town in such cases:—*Held*: he was entitled to recover as against the town remuneration for his services.—*LAURENCE v. TRURO CORPN.* (1894), 26 N. S. R. (14 R. & G.) 231.—CAN.

g. Compromise of action—Whether solicitor deprived of costs—Collusion.]—A *bona fide* settlement between the parties to an action by which that & other actions between virtually the same parties are arranged without reference to pltf.'s attorney or his costs, but without any collusion with a view to deprive him of his costs, will

not be disturbed by the ct. though the consequences of the arrangement be to deprive such attorney of his costs.—*LANGLEY v. HEPBURN* (1877), 3 V. L. R. (L.) 119.—AUS.

h. —.]—Collusion to deprive the attorney of his costs must be clearly made out to entitle him to proceed for them. Here pltf. informed his attorney that he intended to settle with debt., & said that he would see the costs paid. No objection was made, nor any notice given to debt. not to pay pltf.; but several months after the settlement, the pltf. being insolvent, the attorney issued a *fi. fa.* for his costs.—*Held*: the writ must be set aside.—*BROWN v. CONANT* (1856), 2 P. R. 208.—CAN.

k. —.]—If debts. make a collusive settlement of a suit with pltf., without the knowledge of pltf.'s solr. & with the object of depriving the latter of his costs, he is entitled, on application to a judge in chambers, to an order that debts. should pay his costs.—*STEWART v. HALL* (1908), 8 W. L. R. 479; 17 Man. L. R. 603.—CAN.

l. —.]—*DICARLO v. McLEAN* (1915), 8 O. W. N. 27, 279; 33 O. L. R. 231.—CAN.

m. —.]—Where a settlement is made between litigants personally for the purpose of depriving solrs. of their costs, the ct. will allow the solrs. to apply summarily for payment of their costs by either of the parties, but the solrs. must apply to the ct. & they must establish that the settlement was collusive.—*BIGFORD v. SQUIRRELL*, [1921] 2 W. W. R. 739.—CAN.

n. —.]—*MULLIGAN v. GILLIGAN* (1841), 3 I. L. R. 323.—IR.

o. —.]—The ct. will not interfere to enforce payment of costs by a debt. to pltf.'s attorney, where the matter has been compromised without his knowledge, if a clear case of collusion be not established, or if the action be for unliquidated damages.—*M'LOUGHLIN v. MURPHY* (1856), 27 L. T. O. S. 328.—IR.

p. —.]—Motion for costs of pltf.'s attorney notwithstanding settlement of action. The ct. must be perfectly satisfied that there has been collusion between the parties to the action to deprive an attorney of his costs by settling the action before it will interfere.—*GLENNON v. O'DONOGHUE* (1865), 13 L. T. 207.—IR.

q. —.]—A "satisfaction piece," collusively signed by debt. at the instance of pltf., whereby

debt.'s attorney was deprived of costs, which were payable by pltf., set aside at the instance of the attorney.—*SHARPLEY v. CARWOOD* (1873), 1 R. 7 C. L. 38.—IR.

r. —.]—Where an arrangement is entered into for the compromise of an action by pltf. & debt., without the knowledge of pltf.'s solr., by the payment of a certain sum to pltf. in discharge of the claim & costs, the ct. has jurisdiction to give pltf.'s solr. liberty to continue the action for the recovery of his costs, on being satisfied that the purpose of the arrangement made by the parties included the purpose of depriving pltf.'s solr. of his costs.—*DUNTHORNE v. BUNBURY* (1888), 21 L. R. Ir. 6.—IR.

t. —.]—Where debt. in good faith settles an action in such a way as to deprive pltf.'s solr. of his costs, such solr. is not entitled to leave to proceed with the action for the recovery of his costs.—*RIDEOUT v. McLEOD* (1898), 6 B. C. R. 161.—CAN.

aa. —.]—Parties to a suit may settle between themselves without the knowledge of their solrs. provided they do so honestly & without any intention of depriving the solrs. of their costs. The ct. in such case will not interfere to protect the solr. in respect of his costs.—*HANEY v. ELMER*, [1920] 1 W. W. R. 682, 30 Man. L. R. 380.—CAN.

bb. —.]—*BRIEN v. WALSH* (1852), Hayes & Jo. 23.—IR.

cc. —.]—*HAMILTON & JAFFRAY v. BRYSON & SERVICE* (1813), 17 Fac. Coll. 378.—SCOT.

dd. Right to charge commission & costs.]—Debt., when solr. for pltf., collected certain moneys for them. He was a director of pltf. co. & also the holder of debentures past due:—*Held*: he had a right to set-off the debenture debt against the moneys collected; but he had no right to charge a commission for collection over & above his costs.—*SYDNEY LAND & LOAN CO. v. A SOLICITOR* (N. S.) (1910), 7 E. L. R. 549.—CAN.

ee. Right to fees under K. B. Rule 697 (Sask.).]—*KAMBACK v. CANADIAN NORTHERN TOWN PROPERTIES*, [1924] 3 D. L. R. 632; [1924] 2 W. W. R. 992; 19 Sask. L. R. 329.—CAN.

ff. Inquiry as to how much solicitor will charge—Whether consultation fee may be charged.]—Where a vendor named in an agreement for sale of land on which default had been made by the purchaser, enters a solr.'s office & asks him how much he would charge for clearing his title, but not getting a satisfactory answer leaves him &

Sect. 1.—In general. Sects. 2 & 3: Sub-sect. 1, A. & B.]

pay over to the Treasury the difference between the sums so received as costs & the sum allowed them on taxation.—*Re PARKINSON, Re PROSECUTION BY THE TREASURY, R. v. GERSHON* (1887), 56 L. T. 715; 3 T. L. R. 528, D. C.

Assignment of costs by bankrupt solicitor.]—See *BANKRUPTCY*, Vol. V., pp. 775, 782, Nos. 6660, 6661, 6714.

Remuneration under Land Registration Act, 1925 (c. 21).]—See *Solicitors' Remuneration* (Registered Land) Order, 1925.

SECT. 2.—AMOUNT OF COSTS RECOVERABLE.

See Part VII., *post*.

SECT. 3.—SPECIAL AGREEMENTS AS TO COSTS.

SUB-SECT. 1.—FORM OF AGREEMENT.

A. Under Attorneys and Solicitors Act, 1870.

See *Solicitors Act*, 1870 (c. 28), s. 4.

1204. Necessity for writing.]—*Re HEMSWORTH & SPYER'S AGREEMENT* (1883), 27 Sol. Jo. 499.

1205. —.]—*Re RUSSELL, SON & SCOTT*, No. 2292, *post*.

1206. — Agreement to charge nothing.]—An agreement by an attorney with a client "to charge him nothing if he lost the action, & to take nothing for costs out of any money that might be awarded to him in such action" need not be in writing.—*JENNINGS v. JOHNSON* (1873), L. R. 8 C. P. 425; 37 J. P. 695.

Annotations:—*Apprvd. Clare v. Joseph*, [1907] 2 K. B. 369. *Refd. Wild v. Simpson*, [1919] 2 K. B. 544.

1207. —.]—A solr., who was acting for a client in a county ct. action in which the client was pltf., verbally agreed with him that he, the client, should not pay the solr. any costs. At the trial of the action the jury returned a verdict for pltf. with damages. The county ct. judge, on the application of deft., entered judgment for pltf. for the amount of the verdict without costs on the ground that under the proviso to *Solicitors Act*, 1870 (c. 28), s. 5, pltf. was not entitled to recover from deft. more costs than were payable by pltf. to his solr. under the agreement:—*Held*: (1) apart from the Act pltf. could not recover from deft. more costs than he was liable to pay his solr., inasmuch as party & party costs were awarded as an indemnity only; (2) upon the construction of the Act, for the purpose of applying the proviso to sect. 5 it was not necessary that the agreement should be in writing.—*GUNDRY v. SAINSBURY*,

[1910] 1 K. B. 645; 79 L. J. K. B. 713; 102 L. T. 440; 26 T. L. R. 321; 54 Sol. Jo. 327, O. A.

Annotations:—*As to* (1) *Consd. McLean v. Carlisle* (1917), 61 Sol. Jo. 399. *Generally, Refd. Adams v. London Improved Motor Coach Builders* (1921), 124 L. T. 587.

1208. — Agreement to charge less than ordinary costs.]—*IBBERSON v. NECK* (1886), 2 T. L. R. 427.

1209. —.]—An agreement by a solr. with a client to charge him nothing for costs if he won his action, & if he lost it, to charge only the same amount for costs as he would have recovered from the opposite party had the action been successful, is not an agreement which is required by *Solicitors Act*, 1870 (c. 28), s. 4, to be in writing.—

v. JOSEPH, [1907] 2 K. B. 369; 76 L. J. K. B. 724; 96 L. T. 770; 23 T. L. R. 498; 51 Sol. Jo. 467, O. A.

Annotation:—*Appld. Gundry v. Sainsbury*, [1910] 1 K. B. 645.

1210. — Agreed amount retained by solicitor.]

—Where a client deposited with a solr. a sum of money to be applied in payment of costs in certain matters of business with which the solr. was entrusted, & after the costs had been incurred, verbally agreed with the solr. what the amount should be, & the solr. retained out of the sum sufficient to pay himself the agreed amount of costs. On the bkpey. of the client:—*Held*: (1) his trustee was entitled to delivery of a bill of costs from the solr., & the retainer of the money by the solr. did not amount to payment; (2) the jurisdiction to order delivery of a bill is independent of, & not ancillary to, the jurisdiction to order taxation.—*Re WEST, KING & ADAMS, Ex p. CLOUGH*, [1892] 2 Q. B. 102; 61 L. J. Q. B. 639; 67 L. T. 57; 40 W. R. 614, D. C.

Annotations:—*As to* (1) *Distd. Re Thompson, Ex p. Baylis*, [1891] 1 Q. B. 462. *Refd. Re Chapman* (1903), 20 T. L. R. 3. *Generally, Refd. Re Frape, Ex p. Perrett*, [1893] 2 Ch. 281.

1211. What constitutes agreement in writing—Necessity for signature by both parties.]—To constitute an agreement as to costs between a solr. & his client within *Solicitors Act*, 1870 (c. 28), s. 4, the document must be signed by both parties.—*Re LEWIS, Ex p. MUNRO* (1876), 1 Q. B. D. 721; 45 L. J. Q. B. 816; 35 L. T. 857; *sub nom. R. v. MUNRO, Re LEWIS*, 24 W. R. 1017, D. C.

Annotations:—*Expld. Bowley v. Atkinson* (1879), 13 Ch. D. 283. *Follid. Re Raven, Ex p. Pitt* (1881), 45 L. T. 742. *Distd. Re Thompson, Ex p. Baylis*, [1894] 1 Q. B. 462. *Refd. Re Russell & Scott* (1885), 30 Ch. D. 114; *Re Hill* (1886), 54 L. T. 566; *Re George, Francis v. Bruce* (1890), 44 Ch. D. 627; *Caerleon Tinplate Co. v. Hughes* (1891), 60 L. J. Q. B. 640; *Pontifex v. Farnham* (1892), 68 L. T. 168; *Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102; *Re Frape, Ex p. Perrett*, [1893] 2 Ch. 281; *Re Thomas*, [1893] 1 Q. B. 670; *Re Jones*, [1895] 2 Ch. 719; *Bake v. French* (No. 2), [1907] 2 Ch. 215; *Hickman v. Kent or Romney Marsh Sheep-Breeders' Assocn.*, [1915] 1 Ch. 881.

1212. —.]—A document containing the terms of an agreement as to the amount of costs

engages another solr. to do the work, the solr. first mentioned is not entitled to charge a consultation fee.—*WOODWORTH v. ALLAN* (1925), 36 B. C. R. 20.—*CAN.*

f. Unauthorised interference in case of minor.]—A solr. interfering in the case of a minor, without due inquiry, is not entitled to costs.—*Re GOODES* (1850), 16 L. T. O. S. 325.—*IR.*

g. Right to sue on quantum meruit.]—An attorney retained for the conduct of a chancery suit, & accepting such retainer, thereby enters into a specific contract to carry on the proceedings & cannot, without due notice, & before the suit is terminated, rescind that contract, & sue on a *quantum meruit*.—*COPPINGER v. SYNNOTT* (1853), 3 I. C. L. R. 563.—*IR.*

h. Right to reasonable commission on rents collected.]—*Solicitors who have had the management & sale of property for a client & have made no charge by way of costs are, with the consent of the client, entitled to a reasonable commission on rents & interest collected & moneys realised by sale.*—*GLENDINNING v. SIEVWRIGHT* (1903), 22 N. Z. L. R. 897.—*N.Z.*

k. Charge for preparing bill of costs.]—A client, having employed an agent to prepare a bill of advocacy for the purpose of delay, is liable in payment of the expense of it.—*CLYNE v. SWANSON* (1830), 8 Sh. (Ct. of Sess.) 391; 5 Fac. Coll. 325.—*SCOT.*

l. Expenses of committee of investigation & charge for making copies.]—Where a committee of a joint stock

co. was appointed to make an investigation for behoof of the co.; & one of their number, a writer to the Signet, acted as their clerk, but did not stipulate for remuneration:—*Held*: not entitled to make a charge for his time & trouble, but entitled to reimbursement of his outlay, besides a charge for making copies in his own chambers of the proceedings of the committee for their behoof.—*DUNCAN v. UNION CANAL CO.* (1831), 9 Sh. (Ct. of Sess.) 398.—*SCOT.*

m. Right to recover costs from estate.]—An attorney who is *bond fide* employed for that purpose, & conducts the suit honestly, is entitled to recover his lawful fees & disbursements from the estate.—*QUIN v. PILKINGTON* (1894), 11 S. C. 416.—*S. AF.*

payable by a client to her solr., signed by the client only, is not an "agreement in writing" within Solicitors Act, 1870 (c. 28), s. 4, as the document must be signed by both parties, & the solr. may be required to deliver a detailed bill of costs, to be taxed in the ordinary way.—*Re RAVEN, Ex p. PITT* (1881), 45 L. T. 742; 30 W. R. 134.

Annotations:—*Reid. Re Russell & Scott* (1885), 30 Ch. D. 114; *Re Thompson, Ex p. Baylis*, [1894] 1 Q. B. 462; *Re Jones*, [1895] 2 Ch. 719.

1213. ———.]—*Re HEMSWORTH & SPYER'S AGREEMENT* (1883), 27 Sol. Jo. 499.

1214. ——— Document signed by client alone—*Statement of account.*]—*Re FERNANDES*, [1878] W. N. 57; 22 Sol. Jo. 348.

Annotations:—*Consd. Clare v. Joseph*, [1906] 2 K. B. 592. *Reid. Re Russell & Scott* (1885), 30 Ch. D. 114; *Pontifex v. Farnham* (1892), 62 L. J. Q. B. 344.

1215. ———.]—*Re RAVEN, Ex p. PITT*, No. 1212, *ante*.

1216. ——— Letter consequent upon communication from third party.]—A solr. delivered his bill, & after an interval wrote to his client that legal proceedings would be taken unless it were paid. He also wrote to a third party. In consequence of the letter to the third party, which had been communicated to him, the client wrote to the solr., "I am off to Scotland, & will send you a cheque for the whole amount on my return." The solr. permitted a few months to elapse, & issued a writ, whereupon the client applied for an order to tax:—*Held*: he was entitled to the order. As the client's letter was not in reply to the solr.'s demand for payment, there was no agreement in writing within Solicitors Act, 1870 (c. 28), s. 4; & the forbearance of the solr. to sue, coupled with the client's letter, did not bring the case within the sect.—*PONTIFEX v. FARNHAM* (1892), 62 L. J. Q. B. 344; 68 L. T. 168; 41 W. R. 238; 37 Sol. Jo. 146; 5 R. 149.

Annotation:—*Dbtd. Bake v. French* (No. 2), [1907] 2 Ch. 215.

1217. ——— *Receipt.*]—A solr. agreed to conduct certain litigation for his client for a fixed sum of money. In the course of the litigation the client paid the solr. certain sums amounting in all to more than the sum agreed. The litigation terminated in a settlement favourable to the client, & a fresh arrangement was made that the solr. should retain the amount he had received from his client, though in excess of the amount originally agreed. This arrangement was embodied in a receipt signed by the client, on payment to her by the solr. of the amount recovered for her in the action:—*Held*: (1) the receipt though signed only by the client & not by the solr., was "an agreement in writing" within Solicitors Act, 1870 (c. 28), s. 4; (2) the money retained by the solr. was, in view of his client's consent as contained in the receipt, a payment by the client to the solr. within Solicitors Act, 1843 (c. 73), s. 41.—*Re THOMPSON, Ex p. BAYLIS*, [1894] 1 Q. B. 462; 63 L. J. Q. B. 187; 70 L. T. 238; 42 W. R. 462; 10 T. L. R. 89. D. C.

Annotations:—*As to* (1) *Folld. Re Jones*, [1895] 2 Ch. 719. *Apld. Bake v. French*, [1907] 2 Ch. 215. *Reid. Ruf v. Pauwels*, [1919] 1 K. B. 660; *Rye v. Purcell*, [1926] 1 K. B. 446. *As to* (2) *Consd. Re Baylis*, [1896] 2 Ch. 107.

———.]—*Re JONES*, No. 1260, *post*.

———. *Memorandum referred to in letter from solicitor.*]—*Pltf.*, a solr., claimed in an account which was being taken before the master a sum of £635 alleged to be due under a memorandum signed by defts., in which they agreed the balance due to *pltf.* for his costs of contentious business previously done by him on their behalf. This memorandum was referred to in a letter by *pltf.*'s firm & written by them to defts.: *Held*: on the facts, there was an agreement in

writing signed by both parties; even if that were not so there was an agreement signed by defts., & that was a sufficient agreement in writing within Solicitors Act, 1870 (c. 28), s. 4; & the agreement must be referred to the taxing master for examination.—*BAKE v. FRENCH* (No. 2), [1907] 2 Ch. 215; 76 L. J. Ch. 605; 97 L. T. 750; 51 Sol. Jo. 554.

Annotations:—*Reid. Reid v. Cupper*, [1915] 2 K. B. 147; *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168; *Ruf v. Pauwels*, [1919] 1 K. B. 660.

1220. What constitutes agreement "respecting amount & manner of payment"—*Retainer in criminal proceedings—Agreement for payment out of proceeds at sale of furniture—To "cover" costs of defence.*]—A solr. was retained to defend a man charged with embezzlement & to act for him in a civil action in which he was deft. Both retainers were in writing. By the retainer in the criminal proceedings which was dated June 14, 1912, the client agreed that the solr. should receive the proceeds of the sale of certain furniture "to cover" the charges of the defence. The solr. received these proceeds. By the retainer in the civil action the solr. was to act for the client in the conduct of the action for an inclusive fee of one hundred guineas. On Oct. 28, 1912, the client pleaded guilty to the criminal charge & was sentenced to penal servitude. Subsequently judgment was recovered against him under R. S. C., Ord. 14, in the civil action. On Feb. 10, 1914, *applt.*, who had been appointed on Oct. 1, 1913, administrator of the client's property under Forfeiture Act, 1870 (c. 23), s. 9, applied by summons in the K. B. Div. under Solicitors Act, 1870 (c. 28), s. 8, to set aside the agreements as to costs, as being unfair & unreasonable, & for the delivery of a bill of costs & for taxation. The solr. in answer to the application contended (*inter alia*) that the amount agreed by the civil retainer had been paid more than twelve months before the application, inasmuch as he had collected with, as he alleged, the authority of the client, the sum of £100 from debtor of the client, & that, therefore, by reason of Solicitors Act, 1870 (c. 28), s. 10, the application was out of time. On Oct. 1, 1912, the client had assigned all his real & personal estate to the liquidator of a co. which had formerly employed him. On Apr. 1, 1914, the liquidator assigned the estate to *applt.* On Apr. 4, 1914, the master made an order setting aside the agreements & ordering the delivery of a bill of costs for taxation. On appeal the judge at chambers set aside the master's order on the ground that by reason of payment the application was out of time. On appeal to the Div. Ct.:—*Held*: (1) the retainer in the criminal proceedings was not an agreement "respecting the amount & manner of payment" of the solr.'s charges within Solicitors Act, 1870 (c. 28), s. 4; (2) with regard to the retainer in the civil action, the solr. could succeed on his defence of payment only if the £100 had been received & retained by him in satisfaction of the agreed sum to the knowledge of the client & with the intention on the latter's part that the agreement should in that way be ratified; & there must be a further inquiry as to the facts relevant to this question.—*Re JACKSON*, [1915] 1 K. B. 371; 84 L. J. K. B. 548; 112 L. T. 395; 31 T. L. R. 109; 59 Sol. Jo. 272, D. C.

B. Under Solicitors' Remuneration Act, 1881.

See Solicitors' Remuneration Act, 1881 (c. 44), s. 8.

1221. *Necessity for writing.*]—*Re BAYLIS*, No. 1942, *post*.

1222. ——— *Verbal agreement to pay balance of account stated.*]—*TURNER v. WILLIS*, No. 1329, *post*.

Sect. 3.—Special agreements as to costs: Sub-sect. 1, B.; sub-sects. 2 & 3, A.]

1223. — Payment in discharge of past costs.]—

Where a solr. accepted a lump sum in discharge of his client's costs of a completed purchase without any agreement in writing, & without delivery of a formal bill of costs:—*Held*: the bill was not outstanding, & did not require to be included in an *ex parte* order for taxation obtained by the solr. in respect of another bill.

Semle: a payment in discharge of past costs by way of accord & satisfaction is not an agreement for remuneration within Solicitors' Remuneration Act, 1881 (c. 44), s. 8, & precludes taxation in the absence of special circumstances. A solr. acting for both mtgor. & mtgee. is not required to include the mtge. costs where there is no relation of solr. & client as to those costs between him & the mtgor., in his application for an *ex parte* order for taxation of separate bills against the mtgor. client.—*Re DUNCAN* (1907), 51 Sol. Jo. 485.

1224. Sufficiency of signature—Signature by party to be bound.]—(1) An agreement between solr. & client is a good agreement under above Act, s. 8, if signed by the person to be bound thereby, although it is not signed by the other party.

(2) In order to impeach an agreement between solr. & client as unfair & unreasonable under above Act, s. 8 (4), it is not necessary that an action should have been brought to set it aside, or a previous order for taxation obtained; but, on a summons for taxation, if the evidence shows that there has been such an agreement & that there are grounds for suspicion of unfairness, the ct. will order the taxing master in taxing the bill of costs to consider whether the agreement was fair & reasonable.

(3) The words "by agreed costs £80" in such an agreement held to be a sufficient description of all the costs incurred up to the date of the agreement.—*Re FRAPE, Ex p. PERRETT*, [1893] 2 Ch. 284; 62 L. J. Ch. 473; 68 L. T. 558; 41 W. R. 417; 37 Sol. Jo. 373; 2 R. 411, C. A.

Annotations:—As to (2) *Reid. Re A. & B., Ex p. W.* (1900), 44 Sol. Jo. 315. As to (3) *Distd. Re Baylis*, [1896] 2 Ch. 107. *Reid. Re Thompson, Ex p. Baylis*, [1894] 1 Q. B. 462. Generally, *Reid. Re Urmston* (1903), 48 Sol. Jo. 16.

1225. — Of solicitor—Name written on heading of account.]—The written name of a solr. in the heading of an account made out by his clerk does not amount to the signature of the solr. to an agreement contained in the account.—*Re FRAPE, Ex p. PERRETT*, [1893] 2 Ch. 284; 62 L. J. Ch. 473; 68 L. T. 47; 41 W. R. 232; 37 Sol. Jo. 196; 2 R. 411; *on appeal*, [1893] 2 Ch. p. 293, C. A.

Annotations:—*Reid. Re Thompson, Ex p. Baylis*, [1894] 1 Q. B. 462; *Re Baylis*, [1896] 2 Ch. 107; *Re A. & B., Ex p. W.* (1900), 44 Sol. Jo. 315; *Re Urmston* (1903), 48 Sol. Jo. 16.

1226. What constitutes agreement within the Act—Undertaking in letter—Costs of mortgage.]—S. being desirous of borrowing money on mtge. wrote to P., a solr., a letter instructing him to raise £300 upon a specified security, & undertaking "to pay your costs, which I agree at £20, exclusive of money out of pocket, to be incurred in & about doing what is necessary for the purpose of these instructions." P. found a mtgee. & carried out

the mtge., acting on behalf of both the mtgor. & the mtgee., & retained out of the £300, £20 for costs of both parties, other than out-of-pocket costs. S. then applied for an order directing P. to deliver a bill of all such fees, charges & disbursements as he claimed or had deducted, & referring such bill when delivered to taxation:—*Held*: (1) S., the mtgor., was a "client" & had employed P. as his solr. within above Act, s. 1; (2) although the £20 was partly in respect of business in which the solr. was acting on behalf of the mtgee., the letter was an agreement for remuneration between client & solr. within above Act, s. 8; (3) in the absence of evidence that the charge of £20 was either unfair or unreasonable it ought not to be referred for taxation.—*Re PALMER* (1890), 45 Ch. D. 291; 59 L. J. Ch. 575; 62 L. T. 778; 38 W. R. 673; 6 T. L. R. 377, C. A.

Annotations:—As to (3) *Consd. Re Frape, Ex p. Perrett*, [1893] 2 Ch. 284. *Reid. Ray v. Newton* (1912), 108 L. T. 313.

1227. — Statement of accounts signed by client—Agreed costs.]—*Re FRAPE, Ex p. PERRETT*, No. 1224, *ante*.

1228. — — — — —.]—*Re BAYLIS*, No. 1942. *post*.

SUB-SECT. 2.—CONSTRUCTION.

See, generally, DEEDS, Vol. XVII., pp. 242 *et seq.*

1229. Jurisdiction of court to construe—On application for taxation.]—A public co., who by their act of incorporation were bound to pay all costs, charges, & expenses incurred in the purchase of lands either by themselves or the vendor, entered into a contract for the purchase of lands not comprised within the compulsory clause of their Act, & in the memorandum of agreement it was stipulated that the costs, etc., as well of themselves as of the vendor, should be paid & discharged by them pursuant to their Act. Subsequently they obtained another Act of Parliament, by which it was enacted that all costs, etc., which they were liable to pay should be taxed as therein mentioned. Then Solicitors Act, 1843 (c. 73), was passed; & the co. having refused to pay vendor's solr.'s bill of costs when delivered, an action of covenant was brought on the agreement. The co. then moved to refer the bill for taxation, but the motion was refused with costs. On a motion or petition for taxation, there is no jurisdiction to construe an agreement; but if there be any equitable grounds for interference with the legal effect of it, or any necessity to consider its import, it can only be by bill filed for that purpose.—*Re RHODES* (1844), 8 Beav. 224; 14 L. J. Ch. 97; 50 E. R. 88; *sub nom. Re RHODES, Ex p. GREAT WESTERN RY. CO.*, 3 Ry. & Can. Cas. 516; 4 L. T. O. S. 250; 8 Jur. 1109.

Annotations:—*Consd. Re Hirst & Capes* (1908), 99 L. T. 624. *Reid. Re Stephen* (1848), 2 Ph. 562; *Re Fisher* (1854), 18 Beav. 183.

1230. — — — — —.]—(1) To obtain the taxation of a bill of costs after payment petitioner must allege & prove specific items of overcharge, even if the payment has been made under protest & upon pressure.

(2) Upon a petition for taxation, the ct. has no

right.—*Re ALEXANDER TO GRAHAM*, [1921] 1 I. R. 186.—*IR*.

PART VI. SECT. 3, SUB-SECT. 2.

a. Construction of word "disbursements."]—An agreement between a solr. & client by which the former agrees not to charge "solr.'s fees," but only disbursements, does not include counsel fees charged by the solr., who,

PART VI. SECT. 3, SUB-SECT. 1.—B.

n. Scale fee disallowed on sale of real property.]—In a contract for the sale of real property the purchaser entered into an agreement as follows: "Assignment to be prepared by my solr. at my expense, together with all searches & abstracts of title or copies of documents." The vendor's solr. in furnishing his bill of costs

claimed the scale fee, relying on Solrs.' Remuneration Act, 1881, General Orders, 1884, sched. 1. The taxing master ruled that the bill was prepared on a wrong principle, & that as the contract was specific the vendor's solr. was not entitled to the scale fee, & directed an amended bill of costs to be furnished setting forth the charges in detail:—*Held*: the taxing master was

jurisdiction to determine the construction of a disputed special contract as to the costs.

(3) The true construction of Solicitors Act, 1843 (c. 73), s. 38, is, that a third party, liable to pay costs originally payable by a client to his solr., stands, on a reference to tax, in the same situation as the client himself, & the costs must be taxed as between solr. & client.—*Re THOMPSON* (1845), 8 Beav. 237; 1 New Pract. Cas. 142; 14 L. J. Ch. 137; 4 L. T. O. S. 330; 9 Jur. 169; 50 E. R. 93. *Annotations*:—*As to* (2) *Consd.* *Hirst & Capes & Elsworth v. Fox* (1908), 99 L. T. 624. *Reid.* *Re Fisher* (1854), 18 Beav. 183; *Ward v. Lawson* (1872), 8 Ch. App. 65.

1231. ———.]—A solr. acted for clients under a special agreement as to costs, which was doubtful:—*Held*: the ct. had no jurisdiction to determine the construction & effect of the special agreement on petition.—*Re BEALE* (1849), 11 Beav. 600; 50 E. R. 949.

1232. Limitation of client's liability—"Carrying on" action.]—Where the following memorandum was given by M., an attorney, to H., his client: "I undertake to carry on this action on having the cash provided for costs out of pocket, such costs not to exceed £15 including counsel's fees, not any witnesses' expenses":—*Held*: H. was not liable for any costs beyond the £15, & the words "carrying on" meant to execution & not to judgment only.—*MOON v. HALL* (1864), 17 C. B. N. S. 760; 11 L. T. 275; 13 W. R. 83; 144 E. R. 304.

1233. Liability dependent on success of action—Costs awarded but not paid.]—Applt., a solr., agreed that he would not charge resp. (a) such costs in excess of party & party costs as are usually known by the term solr. & client costs, (b) profit costs in litigious matters where resp. lost his own case, unless in any such action, resp. was awarded any costs such as costs of an issue or interlocutory costs when applt. was to be entitled to look to resp. for an equivalent amount. If resp. succeeded in obtaining judgment applt. was to be entitled to look to resp. for (c) the full amount of his out-of-pocket expenses & disbursement or other payments, (d) party & party costs exclusive of sums received by him under (c). If resp. lost applt. was to receive disbursements only, & any party & party costs awarded to resps. Resp. requested applt. to confirm this arrangement in writing, & after a discussion of the difficulty in which a client would be placed by reason of Solicitors Act, 1870 (c. 28), & the decision in *Gundry v. Sainsbury*, No. 1207, ante, an attempt was made by applt. to do so, & at the same time to protect resp. On the construction of the written arrangement:—*Held*: in an action by resp. against a third party, in which resp. recovered costs, but which costs, owing to defts. insolvency were never paid, applt. was entitled not only to his out-of-pocket expenses, but to judgment against resp. on his bill of costs as delivered.—*MCLEAN v. CARLISH* (1917), 61 Sol. Jo. 399.

SUB-SECT. 3.—VALIDITY OF AGREEMENTS.

A. In General.

1234. Agreement to accept amount fixed by third party.]—An attorney may maintain as *assumpsit*, in

being a barrister, acted as counsel.—*Re SOLICITOR*, 17 C. L. T. Occ. N. 123.—CAN.

p. *Right to recover counsel's fees from solicitor.*]—*MILLER v. MCCARTHY* (1876), 27 C. P. 147.—CAN.

q. *Right of parties to show mistake in agreements.*]—*KANE v. DUBLIN & WICKLOW RY. CO.* (1858), 10 Ir. Jur. 160.—IR.

r. *Construction of word "outlay."*

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McCoy v. Hogg (1918), 52 I. L. T. 109.—IR.

t. *Whether counterclaims included in "out-of-pocket expenses."*]—A firm of solrs. entered into an agreement with a client to conduct two cases in which he was pltf. for a specific sum of money, to include advocacy & everything but costs out of pocket. Defts. filed counterclaims in both actions after the agreement had been

consideration of soliciting a cause in other cts. than that in which he is admitted; & a promise to pay him what a third person shall award for his trouble is lawful.—*THURSBY v. WARREN* (1629), Cro. Car. 159; 79 E. R. 738.

Annotations:—*Mentd.* *Chapple v. Durston* (1830), 1 Cr. & J. 1; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

1235. Conveyance taken from married woman.]—A solr. makes an absolute conveyance to himself of £1,000 from pltf.'s wife, whilst she was parted from her husband; the considerations expressed in the deed, are for services done, & favours shown; the bill is brought to set aside the deed, as obtained by fraud. Lord Hardwicke, on all the circumstances of this case, decreed the deed should stand only as a security for such sum as was justly due to deft.—*SAUNDERSON v. GLASS* (1742), 2 Atk. 296; 26 E. R. 581, L. C.

Annotations:—*Reid.* *Crossley v. Parker* (1820), 1 Jac. & W. 460; *Ingram v. Wyatt* (1828), 1 Hag. Ecc. 384; *Cheslyn v. Dalby* (1836), 2 Y. & C. Ex. 170; *Booth v. Creswicke* (1844), 13 L. J. Ch. 217.

1236. Agreement for lump sum.] — (1) An agreement by a solr. to take a gross sum from his client in lieu of costs is not void, though regarded by the ct. with jealousy.

(2) Settlement of a bill of costs between a solr. & client upon a special agreement, precludes an order being made upon petition for taxation: the agreement must first be set aside by suit, before the matter can be reopened.—*Re WHITCOMBE* (1844), 8 Beav. 140; 1 New Pract. Cas. 79; 14 L. J. Ch. 19; 4 L. T. O. S. 130A; 50 E. R. 56

Annotations:—*Consd.* *Philby v. Hazle* (1860), 8 C. B. N. S. 647. *Reid.* *Re Stephen, Ex p. Bass* (1848), 2 Ph. 562; *Re Fisher* (1854), 18 Beav. 183; *Stedman v. Collett* (1854), 17 Beav. 608; *Re Russell & Scott* (1885), 30 Ch. D. 114; *Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102.

1237. — Must be fair.]—The settlement of a solr.'s bill by the client for a fixed sum is valid, & will not be disturbed by the ct., when it has been entered into fairly, & with proper knowledge on both sides.

Several years after a solr. had ceased to act for his client, an agreement was entered into between them, for the delivery up of the client's papers, in consideration of a fixed sum to be paid to the solr. when the Ct. of Ch. should declare that he was one of the next of kin of E. & entitled to a fund in ct. No bill was delivered, & five years afterwards the right of the client was established:—*Held*: the agreement was valid, there having been no fraud or undue pressure, the client having had the full benefit of the agreement, & it being impossible to replace the parties in their original position.—*STEDMAN v. COLLETT* (1854), 17 Beav. 608; 24 L. J. Ch. 113; 18 Jur. 457; 51 E. R. 1171; *sub nom.* *STEADMAN v. COLLETT*, 23 L. T. O. S. 45.

Annotations:—*Reid.* *Morgan v. Higgins* (1859), 1 Giff. 270; *Olley v. Fisher* (1886), 55 L. T. 807; *Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102.

1238. — ———.]—*MORGAN v. HIGGINS*, No. 2633, post.

1239. — Presumption of fairness.]—In the absence of a plea of no signed bill delivered, it is competent to an attorney to rely upon a contract for a specific sum for business to be done, without producing a bill & showing charges fair & reason-

made:—*Held*: the counterclaims were not included in the agreement, & the solrs. were therefore entitled to their charges in respect of such counterclaims.—*Re STEELE, Ex p. REES & DAY* (1892), 11 N. Z. L. R. 104.—N.Z.

PART VI. SECT. 3, SUB-SECT. 3.—A.

a. *General rule.*]—No bargain between a solr. & client, whereby the latter undertakes to pay more than the

Sect. 3.—Special agreements as to costs: Sub-sect. 3, A. & B. (a) & (b).]

able amounting to or exceeding the stipulated sum.—SCARTH v. RUTLAND (1866), L. R. 1 C. P. 642.

1240. Agreement to act at fixed salary.]—A count in a declaration in *assumpsit* set forth an agreement between an attorney & solr. & a co., that "from January then next, pltf., as the attorney & solr. of the co., should receive a salary of £100 *per annum*, in lieu of rendering an annual bill of costs for general business transacted by him for the co. as such attorney & solr.; & should for such salary advise & act for the co. on all occasions in all matters connected with the co." the prosecuting & defending of suits, preparing bonds, & some other matters, for which he was to be allowed the regular charges, being excepted, "& that he should attend the secretary & the board of directors when required." The count then alleged, "That in consideration that pltf. had, at the request of the co., promised the co. to perform his part of the agreement, the co. promised pltf. to perform their part, & to retain & employ him as such attorney & solr. of the said co., on the terms aforesaid." The count then alleged for breach, that "though for a small space of time the co. did retain & employ pltf. as such attorney & solr. on the terms aforesaid, & did pay him a small part of the salary, & though he was always ready & willing to advise & act for the co., & to accept the salary on the terms aforesaid, & in all other respects to fulfil the agreement on his part, yet the co. disregarding, etc., did not, nor would, continue to retain or employ pltf. as such attorney or solr. on the terms aforesaid, but, on the contrary," in May, "wrongfully dismissed & discharged pltf. from such employment & retainer, & then & from thence hitherto have wholly refused to retain or employ him as such attorney & solr. of the co., & to pay him the salary as aforesaid, by reason of which last-mentioned premises pltf. has wholly lost & been deprived of the salary, & also of divers great gains & profits which he might & otherwise would have derived from such employment in & about the prosecuting & defending of suits & preparing of bonds, etc." After a verdict for pltf., with £200 damages:—*Held*: the count did sufficiently allege a consideration for the promise to retain & employ pltf. as attorney & solr., & the consideration was not exhausted by the promise on the part of the co. to perform the agreement.—EMMENS v. ELDERTON (1853), 4 H. L. Cas. 624; 13 C. B. 495; 22 L. T. O. S. 1; 18 Jur. 21; 10 E. R. 606, H. L.; *affg.* S. C. *sub nom.* ELDERTON v. EMMENS (1848), 6 C. B. 160, Ex. Ch.

Annotations:—Mentd. Beckham v. Drake (1849), 2 H. L. Cas. 579; Goodman v. Pocock (1850), 15 Q. B. 576; G. N. Ry. v. Harrison (1852), 19 L. T. O. S. 259; Rust v. Nottidge (1852), 1 E. & B. 99; Hochster v. De La Tour (1853), 2 E. & B. 678; Payne v. New South Wales Coal & Intercolonial Steam Navigation Co. (1854), 10 Exch. 283; Reid v. Haskins (1855), 5 E. & B. 729; Cuckson v. Stones (1858), 5 Jur. N. S. 337; Darlow v. Edwards & Snow (1862), 6 L. T. 905; Whittle v. Frankland (1862), 2 B. & S. 49; Worthington v. Sudlow (1862), 8 Jur. N. S. 668; Danube & Black Sea Ry. & Kustendjie Harbour Co. v. Xenos, Xenos v. Danube & Black Sea Ry. & Kustendjie Harbour Co. (1863), 13 C. B. N. S. 825; McIntyre v.

Belcher (1863), 14 C. B. N. S. 654; Churchward v. R. (1865), L. R. 1 Q. B. 173; Lewin v. Brown (1866), 14 W. R. 640; Frost v. Knight (1870), L. R. 5 Exch. 322; Boston Deep Sea Fishing & Ice Co. v. Ansell (1888), 59 L. T. 345; Turner v. Sawdon, [1901] 2 K. B. 653; Devonald v. Rosser (1906), 75 L. J. K. B. 688; *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315; Sweet v. Williams (1922), 128 L. T. 379.

1241. —.]—A co. who employed standing solrs. at a fixed salary, became the purchaser under the ct. The biddings were opened on payment by appct. of the costs of the co.:—*Held*: appct. was not, on the taxation, entitled to the benefit of the private arrangement between the co. & their solrs.—RAYMOND v. LAKEMAN (1865), 34 Beav. 584; 55 E. R. 761.

1242. —.]—An agreement between a client & a solr. that the solr. shall be paid a fixed yearly salary, to be clear of all expenses of his office, & to include all emoluments, he paying to the client any surplus which may arise of receipts over payments, is not opposed to the provisions of the Solicitors Acts, nor to the policy of the law, where it is also a term of the agreement that the solr. is not to transact professional business for any other client. *Qu.*: if a client & his solr. were to agree that the solr. should be paid a fixed salary, & should receive no costs beyond disbursements, whether an adverse party in a suit, on being ordered to pay costs, could be compelled to pay the client any costs beyond the solr.'s disbursements.—GALLOWAY v. LONDON CORPN. (1867), L. R. 4 Eq. 90; 36 L. J. Ch. 978; 16 L. T. 407; 15 W. R. 1032.

1243. —.]—A public body employed a solr. as their clerk at a fixed annual salary for which (*inter alia*) he was to prosecute & defend all legal proceedings taken by or against them. Out-of-pocket expenses were to be paid by them. In an action brought against them judgment was entered for them with costs to be taxed as between solr. & client. On taxation the registrar struck out all items except out-of-pocket expenses paid by the solr. on the ground that all work done by him in the conduct of the action was covered by his salary:—*Held*: the taxation was wrong & ought to be reviewed.—HENDERSON v. MERTHYR TYDFIL URBAN COUNCIL, [1900] 1 Q. B. 434; 69 L. J. Q. B. 335; 48 W. R. 332, D. C.

Annotation:—Reid Adams v. London Motor Builders, [1921] 1 K. B. 495.

B. In Contentious Matters.

(a) In General.

See Attorneys & Solicitors Act, 1870 (c. 28), s. 8.

1244. General rule—Agreement must be fair & reasonable.]—*Re* STUART, *Ex p.* CATHCART, No. 1284, *post*.

1245. Right of taxing master to opinion of court—When arising—No money payable under agreement.]—By an agreement between clients & solrs., it was agreed that in the event of the solrs. succeeding in recovering certain property for the clients, they should receive 10 per cent. on the value of the property. The agreement was submitted to the taxing master before the solrs. had taken any steps in the matter, & the taxing master

recognised fees for the work to be done, can be enforced.—*Re* GEDDES & WILSON (1869), 2 Ch. Ch. 417.—CAN.

1240 i. Agreement to act at fixed salary.]—The agreement to pay a solr. a fixed sum as a yearly salary in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future.—FALKNER v. GRAND JUNCTION RY. CO. (1883), 4 O. R. 350.—CAN.

1240 ii. —.]—An attorney may

agree to do work for a client for a lump sum in lieu of his ordinary fees.—INCORPORATED LAW SOCIETY v. HUBBARD, [1904] T. S. 168.—S. AF.

1240 iii. —.]—An agreement to pay an attorney a lump sum for professional services is valid & binding unless undue advantage has been taken by one party to the agreement of the other, & neither of the parties can, without the consent of the other, go behind the agreement & insist that a bill of costs shall be

taxed.—MURRAY v. YOYO, [1912] C. P. D. 807.—S. AF.

1240 iv. —.]—An agreement by a party to pay a lump sum for costs in a civil case is invalid.—MARKS & HOLLAND v. PALMER, [1915] T. P. D. 246.—S. AF.

b. Agreement to do work at half fees.]—It is very unprofessional to offer to do business at half the usual price.—MOEGAN v. COCHRANE (1847), 10 L. T. O. S. 37.—IR.

required the opinion of the ct. to be taken thereon under Attorneys & Solicitors Act, 1870 (c. 28), s. 4:—*Held*: the opinion of the ct. on the validity or fairness of the agreement could not be required under sect. 4 of the Act, before any money was payable under the agreement.—*Re ATTORNEYS & SOLICITORS ACT, 1870 (1875)*, 1 Ch. D. 573: 45 L. J. Ch. 47; 24 W. R. 38.

Annotations:—*Refd. Re A Solicitor, Ex p. Law Society*, [1912] 1 K. B. 302; *Wild v. Simpson*, [1919] 2 K. B. 544.

(b) *Particular Instances.*

1246. Payment of costs depending on result—No costs if unsuccessful.—A., an attorney, agreed to conduct a cause for B., for one hundred guineas, besides his taxed costs; if tried, A. to pay all expenses; if not, he was to receive the same sum; if tried, & a verdict against B., A. to have no demand on B. for costs:—*Held*: whether this agreement were legal or not, A. should have declared specially on it.—*GUY v. GOWER (1816)*, 2 Marsh. 273.

1247. ———.]—It is a good defence to an action on an attorney's bill, that he undertook to perform the business on the principle of "No cure, no pay."—*TABRAM v. HORN (1827)*, 1 Man. & Ry. K. B. 228; 6 L. J. O. S. K. B. 24.

Annotation:—*Refd. Fray v. Voules (1859)*, 33 L. T. O. S. 133.

1248. ———.]—*LUXFORD v. LARGE (1833)*, 5 C. & P. 421; 172 E. R. 1036, N. P.

1249. ———.]—*TURNER v. TENNANT (1846)*, 10 Jur. 429, n.

1250. Agreement to pay out-of-pocket expenses only.—Debt on an attorney's bill for business done in conducting a suit at law. Pleas *nunquam indebtedus*, a set-off, & money paid into ct.:—*Held*: debt. was not precluded from giving in evidence a contract that the business should be done for "the money out of pocket."—*JONES v. READE (1836)*, 5 Ad. & El. 529; 5 Dowl. P. C. 216; 2 Har. & W. 382; 1 Nev. & P. K. B. 18; 6 L. J. K. B. 9; 111 E. R. 1265.

Annotation:—*Refd. Jewell v. Wyatt (1838)*, 1 Will. Woll. & H. 47.

1251. Agreement to pay interest.—An agreement, pending a litigation, that a solr. shall be entitled to compound interest on his demand, cannot be supported.

PART VI. SECT. 3, SUB-SECT. 3.—
B. (b).

1250 i. Agreement to pay out-of-pocket expenses only.—There is no principle of public policy to prevent an attorney stipulating to conduct an action for the costs out of pocket; & if such an agreement be clearly shown, the ct. will stay proceedings in an action brought to recover full costs.—*BARRETT v. CLANCY (1834)*, Haynes & Jo. 702.—IR.

1250 ii. ———.]—A law agent having committed a blunder in conducting a criminal prosecution, offered to conduct a new prosecution & to "charge nothing therefor, except mere outlays, should we succeed in proving B. to be the guilty person"; & this offer was accepted, & the prosecution failed:—*Held*: the agent was bound by the agreement, & was not entitled to charge except for outlay.—*SWANSON v. ROBERTSON (1833)*, 11 Sh. (Ct. of Sess.) 718.—SCOT.

c. Interest of solicitor conflicting with duty—Agreement invalid.—*MOSS v. MOSS (No. 2) (1900)*, 21 N. S. W. Eq. 253.—AUS.

d. Agreement to pay costs already incurred.—Deft. agreed by letter to pay to pltf. solrs. by promissory notes a sum certain in money for their costs previously incurred in the conduct of

an action:—*Held*: Act, No. 8, 1868–9, s. 8, provided that agreements in writing, duly signed, whether with respect to past or future work, were valid, but the agreement, being one made between solr. & client, was subject to the control of a ct. of equity.—*HARGRAVE v. MILLER*, [1925] S. A. S. R. 379.—AUS.

e. Agreement to pay solicitor out of insurance moneys if charge of arson failed.—*Re FRASER (1890)*, 13 P. R. 409.—CAN.

f. Agreement to pay retaining fee—Proper advice given to clients.—The solr. during the progress of the action in respect of which the costs in question were incurred, made a contract in writing with his clients for the payment to him of a retaining fee of \$100, explaining fully to them the effect of the bargain, & that, in case of their success in the action & costs being awarded to them, they would not be able to tax against or claim from the opposite party the amount of this fee. The officer allowed the retaining fee on taxation, & reported that the contract was a fair & reasonable one:—*Held*: the contract could not be enforced against the clients.—*FORD v. MASON (1894)*, 16 P. R. 25.—CAN.

g. Threats to client—Agreement invalid.—In the course of the negotia-

ions between the solr. & the client leading up to the making of the impeached agreement, the solr. had in a letter made a statement that the amount of his disbursements in the litigation had been considerably in excess of the actual amount, & had also strongly intimated the probability that he would be compelled to dispose of a certain judgment, in which his clients were largely interested & which had been assigned to him, upon terms which might have left little or nothing for them unless they would provide him with funds to carry on the litigation.—*Held*: without imputing to the solr. an intentional misstatement of the amount of his disbursements for the purpose of procuring the arrangement or the intention to hold out the prospect of the loss of the claim as a threat for the purpose of securing an undue advantage, that the misstatement & the threats were such as to render the clients incapable of acting freely & independently & therefore, the agreement should be set aside.—*PRESTON v. NUGENT (1900)*, 13 Man. L. R. 511.—CAN.

1252. Agreement with illiterate person—To pay costs out of property subject of suit.—A client obtained an order of course for the taxation of his solr.'s bill. A special agreement existed between them, which ought to have been mentioned on the application; but this was in the possession of the solr., who refused to furnish a copy. The ct. declined to discharge the order, though irregular.

Agreement between a solr. & his client, an illiterate person, for payment of his bills, taken at a given amount, solely out of the produce of some property, the subject of the suit:—*Held*: not to preclude taxation.—*Re INGLE (1855)*, 21 Beav. 275; 25 L. J. Ch. 169; 26 L. T. O. S. 65; 1 Jur. N. S. 1059; 52 E. R. 865.

1253. Agreement to refund amount paid—In event of obtaining decree for costs.—A solr., pending a suit in Chancery, received from A., his client, in 1846, his bill for costs already incurred, upon an agreement with A., to refund the amount to him in the event of his obtaining a decree for costs in the suit. A. became bkpt. in 1847, & shortly after obtained his certificate, & died. The suit proceeded, the assignees not interfering, & a decree was pronounced under which the costs were awarded to A., & were received by the solr. In an action against the solr. by the assignees of A.:—*Held*: the contingent right to have the amount advanced by him for costs repaid under the agreement, which was a valid agreement, & made upon a sufficient consideration, was an interest in A., which on his bkpcy. passed to his assignees; & consequently the latter were entitled to recover the sum so paid by A. as money received to their use.—*MORGAN v. TAYLOR (1859)*, C. B. N. S. 653; 28 L. J. C. P. 178; 5 Jur. N. S. 791; 7 W. R. 285; 141 E. R. 262.

1254. Agreement not to charge extra costs.—

tions between the solr. & the client leading up to the making of the impeached agreement, the solr. had in a letter made a statement that the amount of his disbursements in the litigation had been considerably in excess of the actual amount, & had also strongly intimated the probability that he would be compelled to dispose of a certain judgment, in which his clients were largely interested & which had been assigned to him, upon terms which might have left little or nothing for them unless they would provide him with funds to carry on the litigation.—*Held*: without imputing to the solr. an intentional misstatement of the amount of his disbursements for the purpose of procuring the arrangement or the intention to hold out the prospect of the loss of the claim as a threat for the purpose of securing an undue advantage, that the misstatement & the threats were such as to render the clients incapable of acting freely & independently & therefore, the agreement should be set aside.—*PRESTON v. NUGENT (1900)*, 13 Man. L. R. 511.—CAN.

h. Agreement to pay fee & part of property recovered.—Suit by a pleader against his client to enforce a contract which provided for the payment to the former of a large remuneration for his services, including a portion of the

Sect. 3.—Special agreements as to costs: Sub-sect. 3, B. (b), & C. (a) & (b); sub-sect. 4.]

Where an attorney had been employed by the father of an infant to bring an action for a personal injury to the infant, on the understanding that in the event of his recovering damages he would not charge extra costs, & he did recover damages:—*Held*: the infant, by his father, could sue the attorney for the damages, & the attorney could not detain any part for extra costs, even although, through defect in pltf.'s evidence in the original action, & other circumstances, such costs had turned out greater in amount than could have been expected.—*COLLINS v. BROOK* (1859), 4 H. & N. 270; 28 L. J. Ex. 143; 32 L. T. O. S. 357; 157 E. R. 842; *on appeal* (1860), 5 H. & N. 700, Ex. Ch.

Annotation:—*Mentd. Re Brocklebank, Ex p. Brocklebank* (1877), 6 Ch. D. 358.

1255. Agreement to pay additional commission.]—Where, according to agreement, a solr. charged, in addition to his costs, a commission of 5 per cent. upon certain property recovered for a client, such charge was disallowed, although it formed part of a settled account.—*PINCE v. BEATTIE* (1863), 32 L. J. Ch. 734; 9 L. T. 315; 27 J. P. 804; 9 Jur. N. S. 1119; 11 W. R. 979.

1256. —.]—*Re ANGELL* (1877), 41 J. P. Jo. 292.

1257. Agreement to conduct bankruptcy proceedings—No provision for continuation of retainer.]—A solr. agreed to conduct certain bkpcy. proceedings on the terms that his costs should not exceed £10. In the course of the proceedings his clients left him & employed other solrs., & he sent in a bill of costs for a larger amount than £10. The county ct. judge, sitting in bkpcy., declared the agreement to be void, because it did not contain a provision that the solr. originally employed might conduct the bkpcy. proceedings to an end:—*Held*: the order was wrong on the ground that the agreement was fair & reasonable, & the solr. could have gained no advantage if he had been allowed to prosecute the proceedings in bkpcy. to a conclusion, since under no circumstances could he have obtained costs beyond the amount of £10 out of the estate.—*Re OWEN, Ex p. PAYTON* (1885), 52 L. T. 628; *sub nom. Re OWEN, Ex p. PEYTON*, 2 Morr. 87, D. C.

1258. Agreement not to charge any remuneration.]—*KNOWLES v. GRUNDY* (1884), 1 T. L. R. 25, D. C.

1259. Agreement for excessive remuneration.]—*Re STUART, Ex p. CATHCART*, No. 1284, *post*.

1260. Agreement as to costs of criminal business—In police court or at quarter sessions.]—(1) An

agreement as to the payment of costs by a client to his solr., though signed by the client only, is an "agreement in writing" within Solicitors Act, 1870 (c. 28), s. 4.

(2) Costs in respect of business done on a criminal charge in a police ct., & at quarter sessions are subject to taxation, & an agreement relating to them is within Solicitors Act, 1870 (c. 28).—*Re JONES*, [1895] 2 Ch. 719; 64 L. J. Ch. 832; 73 L. T. 543; 60 J. P. 7; 44 W. R. 10; 13 R. 707; *on appeal*, [1896] 1 Ch. 222, C. A.

Annotations:—*As to* (1) *Folld. Bako v. French* (No. 2), [1907] 2 Ch. 215. *Refd. Ruf v. Pauwels*, [1919] 1 K. B. 660; *Rye v. Purcell*, [1926] 1 K. B. 446.

Agreements amounting to champerty.]—*See ACTION*, Vol. I., pp. 85–87, Nos. 695–708.

C. In Non-Contentious Matters.

(a) In General.

See Solicitors' Remuneration Act, 1881 (c. 44), s. 8.

1261. Jurisdiction of court—To refer to taxing master—Where evidence impeaching agreement.]—*Re PALMER*, No. 1226, *ante*.

1262. —.]—*Re FRAPE, Ex p. PERRETT*, No. 1224, *ante*.

1263. —.]—*Re BAYLIS*, No. 1942, *post*.

1264. —.]—*Re A. & B., Ex p. W.*, No. 1286, *post*.

1265. What court must consider—Absence of independent advice.]—*Re HOGGART'S SETTLEMENT*, No. 1269, *post*.

Moderation of costs.]—*See* Sect. 7, *post*.

(b) Particular Instances.

1266. Agreement to pay according to amount realised—Payment partly in cash & partly in shares.]—*Re GRAY, Ex p. EVERITT* (1886), 30 Sol. Jo. 551, C. A.

1267. Agreement for remuneration in addition to scale fee.]—*Re SCOTT & BAKER* (1889), 33 Sol. Jo. 270.

1268. Agreement obtained under pressure—Client acting in ignorance.]—On Mar. 13, 1888, a client instructed a solr. to act on his behalf in the completion of the purchase of a tea & coffee business for £500. A number of letters were written, & according to the solr.'s statement, between twenty & thirty interviews held, & other business done. On Mar. 31, 1888, the client & his solr. signed a memorandum of agreement that the bill of costs, without being made up to date, should be £42. The client was a gentleman's valet, & alleged that he acted in ignorance & under pressure in coming to the agreement:—*Held*: under the circumstances, the bargain was unfair &

property in suit:—*Held*: that such a contract stands on a different footing from one between private persons, & the ct., before enforcing it, should require pltf. clearly to show its fairness, & that no undue advantage has been taken of the client. It is necessary in such a case to look to the whole of the circumstances & the substance of the transaction, & not merely to the language of the agreement.—*NUTHOO LALL v. BUDREE PERSHAD* (1869), 1 N. W. 1.—*IND*.

k. Note given for amount in excess of vakil's fee.]—*ANANTAYYA v. PADMAYYA* (1892), 1 L. R. 16 Mad. 278.—*IND*.

l. Agreement for special remuneration.]—A country solr. may contract with his client for special remuneration for his personal attendance in Dublin on the trial of an action on a law argument. Such contract must be clearly shown to have been entered into by

the client with full knowledge of its effect, & to be in itself just & reasonable.—*NEW ROSS UNION TO COLFER*, [1894] 3 I. R. 118.—*IR*.

m. Appeal to House of Lords without authority of client—Verbal understanding with Scottish agents to pay expenses.]—Scottish agents without consulting their client, instructed Parliamentary solrs. to conduct an appeal to the House of Lords in the client's name. This was done. During its progress the client became aware of what had been done, & did not communicate with the parties in London, & repudiate the proceedings, but, as he alleged, came to a verbal understanding with the Scottish agents, that they should relieve him of the expenses of the proceedings. In a question between him & the Parliamentary agents:—*Held*: he was liable in payment of their business account.—*ROBERTSON, ETC. v. FOULDS* (1860), 22 Dunl. (Ct.

of Sess.) 714; 32 Sc. Jur. 275.—*SCOT*
n. To guarantee law agent his costs of fighting case unsuccessfully.]—*MACKENDRICK v. NATIONAL UNION OF DOCK LABOURERS*, [1911] S. C. 83.—*SCOT*.

PART VI. SECT. 3, SUB-SECT. 3. — G. (b).

o. Agreement to pay lump sum.]—*WHITE v. CURRY* (1876), 39 U. C. R. 569.—*CAN*.

p. Agreement to pay percentage on money recovered—Client without independent advice.]—Widow of slender means & delicate health consulted a San Francisco attorney, formerly of the Ontario Bar, with regard to her interest in an Ontario estate, & after he had acted as her attorney for some time entered into an agreement with him to give him 25 per cent. of any moneys coming to her from the estate in return for his services. In entering

unreasonable, & must be set aside.—*MEARNS v. KNAPP* (1889), 37 W. R. 585.

1269. Agreement to pay percentage of sum recovered.]—An agreement between a client & solr. whereby the latter is to be remunerated by a percentage of a sum to be recovered in a matter that is not a suit, action or contentious proceeding, though not champertous, will be strictly regarded by the ct., which, in considering it propriety, will have regard to whether the client had independent advice, & fully understood the purport of the agreement.—*Re HOGGART'S SETTLEMENT* (1912), 56 Sol. Jo. 415.

1270. Agreement to take bill of exchange.]—A solr. cannot evade his obligation to deliver a bill of costs by taking a bill of exchange from his client for an agreed amount.

On Mar. 22, 1910, deft. entered into an agreement with his solr., whereby deft. agreed the costs due from him to the solr. for work done at the sum of £2,000 & gave him a bill of exchange for that amount payable on demand; the payment not to be enforced for two years. In 1912 the receiver of the property of the solr.'s firm, appointed in a partnership action, presented the bill, which was dishonoured, & then brought an action on the bill in the name of the firm against deft., claiming £2,000 & interest from Mar. 22, 1912. Deft. obtained leave to defend the action &, without delivering a defence, he issued a summons, which was not intituled in the matter of the Solicitors Acts, asking for an order that pltf. should deliver to him a complete bill of costs for work done up to Dec. 11, 1909; that the agreement should be inquired into under Solicitors Act, 1870 (c. 28), s. 4, & Solicitors' Remuneration Act, 1881 (c. 44), s. 8, & the bill taxed; & that proceedings in the action should be stayed:—*Held*: the client was entitled under the Acts of Parliament to have a complete bill of costs delivered & an inquiry into the agreement; the solr. could not escape from this liability by taking a bill of exchange for the agreed amount; the summons must be headed under the Acts of Parliament; & the action ought not to be stayed.—*RAY v. NEWTON*, [1913] 1 K. B. 249; 82 L. J. K. B. 125; 108 L. T. 313; 57 Sol. Jo. 130, C. A.

1271. Agreement as to costs of promoting company—Payment out of deposits.]—The solr. who had projected, & at his own expense brought forward, a scheme for making a railway, entered into an agreement with the persons who became the provisional committee for prosecuting the undertaking, that the costs & expenses should be paid by such solr. & projector, & that the members of such provisional committee should not be personally liable to him for such costs & disbursements, but that the same should be paid out of the fund to arise from the deposits to be paid on the shares:—*Held*: this agreement was not illegal as between the provisional committee & the shareholders, regarded as trustee & *cestui que trust*, inasmuch as the trustee was entitled to be indemnified by his *cestui que trust* in respect of the costs & expenses properly incurred.

Qu.: whether the contract to pay future costs out of the deposits was illegal as between the solr. & client, attending to the fact that the client, being

a trustee, might properly stipulate that he should not be personally liable for the costs to be incurred, but that the same should be paid exclusively out of the trust fund.—*PARSONS v. SPOONER* (1846), 5 Hare, 102; 4 Ry. & Can. Cas. 163; 15 L. J. Ch. 155; 6 L. T. O. S. 344; 10 Jur. 423; 67 E. R. 845.

Annotation:—*Reid. Melhado v. Porto Alegre Ry.* (1874). L. R. 9 C. P. 503.

—*See COMPANIES*, Vol. X., pp. 1112, 1113, Nos. 7824, 7831, 7832.

SUB-SECT. 4.—EFFECT OF VALID AGREEMENT.

See Solicitors Act, 1870 (c. 28), ss. 4, 5; Solicitors' Remuneration Act, 1881 (c. 44), s. 8.

1272. Jurisdiction of court—To order taxation.]—*ANON.* (1732), 2 Barn. K. B. 164; 94 E. R. 423.

1273. ———.]—*Re WHITCOMBE*, No. 1236, *ante*.

1274. ———.]—Solicitors Act, 1843 (c. 73), gives no jurisdiction to adjudicate on petition as to the taxation of a bill of costs where there is a special agreement as to the payment thereof.—*Re ELDERTON* (1845), 4 L. T. O. S. 310.

1275. ———.]—A bill of costs incurred prior to the passing of Solicitors Act, 1843 (c. 73), held to be within its operation, though none of the business included in it was business for which, before the statute, a bill would have been taxable.—*Re EYRE* (1848), 2 Ph. 367; 17 L. J. Ch. 277; 11 L. T. O. S. 41; 41 E. R. 985, L. C.

Annotations:—*Reid. Re Fisher* (1854), 18 Beav. 183; *Stedman v. Collett* (1854), 17 Beav. 608.

1276. ———.]—*Re PALMER*, No. 1226, *ante*.

1277. ———. Agreement in respect of non-professional work—Effect of Solicitors' Remuneration Act, 1881 (c. 44).]—Where an agreement has been made for the remuneration of a solr., & the solr. alleges that the remuneration was for non-professional work, the person chargeable cannot obtain the common *ex parte* order for the delivery & taxation of the bill of costs. The Solicitors' Remuneration Act, 1881 (c. 44), s. 8, has made no difference in the practice in this respect.—*Re Inderwick* (1883), 25 Ch. D. 279; 54 L. J. Ch. 72; 50 L. T. 221; 32 W. R. 541, C. A.

Annotations:—*Reid. Re Jones* (1887), 56 L. J. Ch. 720; *Re Pollard* (1888), 20 Q. B. D. 656; *Re Shilson, Coode* (1904), 73 L. J. Ch. 541.

1278. Duty of taxing master—To give effect to agreement for out of pocket costs only.]—Under the common order to tax, the taxing master will have regard to an agreement by the solr. to charge only costs out of pocket.—*Re PHILP* (1860), 2 Giff. 35; 29 L. J. Ch. 866; 3 L. T. 208; 6 Jur. N. S. 1024; 66 E. R. 15.

1279. ——— To exclude work done under special agreement—On common order to tax.]—On a common order to tax a solr.'s bill of costs the taxing master has no jurisdiction to include in such taxation an item in an account headed "Cash Account," representing work done under a special agreement.—*Re TEMPLETON & COX* (1909), 101 L. T. 144; *sub nom. Re T. & C.*, 53 Sol. Jo. 672, C. A.

1280. Effect on solicitor's right of action—Breach of agreement to employ.]—*REES v. WILLIAMS*, No. 1287, *post*.

into the agreement in question, pltf. had no independent advice:—*Held*: according to the law of both California & Ontario, an attorney who bargains in a matter of advantage to himself with his client is bound to show that the transaction was fair & equitable & that the client was fully informed of his rights & interests in the subject-

matter of the transaction & the nature & effect of the transaction itself, & was so placed as to be able to deal with the attorney at arm's length; & that deft. had not satisfied the *onus* on him in this regard.—*MACMAHON v. TAUGHER* (1914), 26 O. W. R. 774; 7 O. W. N. 9; 32 O. L. R. 491; 20 D. L. R. 421.—*CAN.*

q. Agreement to participate in speculative building profits.]—*AITKEN v. CAMPBELL'S TRUSTEES*, [1909] S. C. 1217; 46 Sc. L. R. 830; [1909] 2 S. L. T. 58.—*SCOT.*

r. Agreement to pay commission & ay for legal work done.]—*VAN DER ALT v. HOFMEYER*, [1920] C. P. D. 50. *S. AF.*

Sect. 3.—Special agreements as to costs: Sub-sects. 4 & 5. Sect. 4: Sub-sects. 1 & 2, A. (a) & (b) i.]

1281. Effect on client's right against third party—Recovery of costs—Solicitor employed at annual salary.]—HENDERSON v. MERTHYR TYDFIL URBAN COUNCIL, No. 1243, ante.

SUB-SECT. 5.—ENFORCEMENT AND AVOIDANCE OF AGREEMENTS.

See Solicitors Act, 1870 (c. 28), ss. 8–10; Solicitors' Remuneration Act, 1881 (c. 44), s. 8 (4).

1282. How set aside—Action unnecessary.]—Re FRAPE, Ex p. PERRETT, No. 1224, ante.

1283. — Summons at chambers.]—An application under Attorneys & Solicitors Act, 1870 (c. 28), s. 8, made in the Q. B. Div., to set aside an agreement between a solr. & his client as to costs, may be made at chambers upon a summons.—Re THOMAS, [1893] 1 Q. B. 670; 68 L. T. 759; 41 W. R. 524; 37 Sol. Jo. 458; 5 R. 387; sub nom. Re HOWELL THOMAS, Ex p. JACQUES, 62 L. J. Q. B. 474, D. C.

1284. — Jurisdiction of court—Where agreement pronounced fair by taxing master.]—The question whether an agreement as to costs between solr. & client is fair & reasonable under Solicitors Act, 1870 (c. 28), ss. 8, 9, is one for the ct. or a judge to determine. Such an agreement must be not only fair as between the parties, but it must also be reasonable; & if the work to be done by the solr. is such that the tribunal which has to determine that question would say that the amount to be paid by the client in respect of it is unreasonable, then such agreement would be declared void upon the ground that it is unreasonable in its terms. *Semble*: the jurisdiction of the ct. or judge under sects. 8 & 9, even where an opinion has been pronounced under sect. 4 that an agreement is fair & reasonable, is as large as if no such opinion had been pronounced, although in such a case, when exercising the jurisdiction given by sects. 8 & 9, the tribunal which has to examine the agreement will require a very strong case to act under those sects. after the jurisdiction under sect. 4 has already been exercised.—Re STUART, Ex p. CATHCART, [1893] 2 Q. B. 201; 62 L. J. Q. B. 623; 69 L. T. 334; 41 W. R. 614; 9 T. L. R. 545; 37 Sol. Jo. 603; 4 R. 506, C. A.

1285. — Costs of business in police court or at quarter sessions.]—The jurisdiction under Solicitors Act, 1870 (c. 28), s. 8, to set aside an agreement between a solr. & his client as to costs relating to business done by the solr. in a police ct. or at quarter sessions is in the High Ct. Neither a police ct. nor quarter sessions is a "court" within the meaning of sect. 8.—Re JONES, [1896] 1 Ch.

PART VI. SECT. 3, SUB-SECT. 5.

i. Agreement to pay retaining fee—Client informed that fee would not be allowed on taxation—Whether fee recoverable.]—The solr., during the progress of the action in respect of which the costs in question were incurred, made a contract in writing with his clients for the payment to him of a retaining fee of \$100, explaining fully to them the effect of the bargain, & that, in case of their success in the action & costs being awarded to them, they could not be able to tax against or claim from the opposite party the amount of this fee. The officer allowed the retaining fee on taxation, & reported that the contract was a fair & reasonable one:—*Held*: the contract could not be enforced against the clients.—FORD v.

MASON (1894), 16 P. R. 25.—CAN.

a. Solicitor's costs part of alimony settlement.]—ANDREWS v. MOODIE (1907), 6 W. L. R. 185; 17 Man. L. R. 1.—CAN.

b. Agreement must be reasonable or court will rectify it.]—Even where an agreement is made between a solr. & his client as to the solr.'s charge for certain work, if the ct. deems the charge to be unreasonable & unfair it will rectify it. The law in force in Saskatchewan as to agreements between solr. & client is the same as the law stood in England prior to the enactment of Attorneys & Solrs. Act, 1870.—GOLA v. PHILION (Sask.), [1920] 3 W. W. R. 348.—CAN.

c. Right of client to return of

222; 65 L. J. Ch. 191; 73 L. T. 543; 60 J. P. 7; 44 W. R. 146, C. A.

Annotations:—*Reid. Bake v. French* (No. 2), [1907] 2 Ch. 215; *Ruf v. Pauwels*, [1919] 1 K. B. 660; *Rye v. Puroell*, [1926] 1 K. B. 446.

1286. Effect of delay.]—This is an application by a client for the delivery & taxation of a solrs.' bill. The client, being desirous of turning his business into a limited liability co., entered into the agreement with his solrs. *Prima facie* the sum stated seems unreasonable. There has been no payment within the meaning of Solicitors Act, & no delivery of bill. Although there has been a long delay, there is no Statute of Limitations applicable. I therefore direct the delivery of the bill in the usual way. If resps. deliver a bill containing one item, that is, the agreed amount, I direct the taxing master, under Solicitors' Remuneration Act, 1881 (c. 44), s. 8 (4), to certify if the agreement is fair & reasonable, costs to be reserved until the taxing master has certified (BYRNE, J.).—*Re A. & B., Ex p. W.* (1900), 44 Sol. Jo. 315.

1287. Enforcement—Action on failure to employ.]—The declaration alleged that by an agreement in writing between pltf., who was an attorney, & deft., it was agreed (*inter alia*), that deft. should be prepared to sell certain gasworks, & that pltf. should be employed to carry out the sale, & be paid a commission of 4 per cent. on the purchase-money in lieu of costs. Breach, that deft. would not permit pltf. to carry out the sale, & had refused to pay any commission. Plea, that the agreement was for services to be done by pltf. as deft.'s attorney & solr. within Solicitors Act, 1870 (c. 28), s. 8, which enacts that "no action shall be brought upon any such agreement." On demurrer:—*Held*: the plea was bad, & the action maintainable, for sect. 8 was intended to prevent actions to recover the remuneration agreed upon in lieu of costs when the work had been done, & did not apply to an action for refusing to allow the attorney to do the work & earn the remuneration.—REES v. WILLIAMS (1875), L. R. 10 Exch. 200; 44 L. J. Ex. 116; 32 L. T. 462; 39 J. P. 552; 23 W. R. 550.

1288. Condition precedent to enforcement—Agreement within Solicitors Act, 1870 (c. 28)—Necessity for examination by taxing master.]—BAKE v. FRENCH (No. 2), No. 1219, ante.

Effect of bankruptcy.]—See BANKRUPTCY, Vol. V., p. 642, Nos. 5767, 5768, 5771, 5772.

SECT. 4.—BILL OF COSTS.

SUB-SECT. 1.—IN GENERAL.

See Solicitors Act, 1843 (c. 73), s. 37.

1289. Sufficiency of signed bill—Independent of question as to liability.]—Where an attorney blends

money paid—Necessity for submitting agreement to taxing master.]—JACKSON v. GLUBISH (Alta.), [1927] 3 D. L. R. 468.—CAN.

d. Special agreement made by attorney to look to opposite party for fees.]—When an attorney entered into a special agreement with his client, that he would not seek to make him responsible for costs, but would look to the opposite party for them. In an action for work & labour by the attorney:—*Held*: such agreement having been proved, the attorney could not recover.—KIGHRON v. M'CULLAGH (1847), 11 L. L. R. 456.—IR.

e. Right to quantum meruit.]—MENZIES, BRUCE-LOW & THOMSON v. M'LENNAN (1895), 32 So. L. R. 231.—SCOT.

several claims in one bill, the client is entitled to have the whole bill taxed; if the attorney does not deliver a specific bill as to the whole, it is the same as if he had delivered no bill at all; & it makes no difference that the jury, at the trial of an action to recover the whole amount of the various claims, knew that, in fact, the client is not liable for certain of the claims. For the question as to the sufficiency of a signed bill under the statute arises prior to & is independent of the question as to liability; since a bill is referred to taxation, save in special & excepted cases, on the assumption of liability, & simply to settle the question of amount. It is doubtful whether an attorney may maintain an action for work as to which he has delivered a bill, although there is other work pending for which he has a distinct claim against his client, & which he has not included in his bill nor in his action. But as a bill bad in part is bad altogether, even as to a claim not maintainable, if it does not contain all the claims included in the particulars in the action it is insufficient.—*PIGOT v. CADMAN* (1857), 1 H. & N. 837; 26 L. J. Ex. 134; 28 L. T. O. S. 325; 5 W. R. 353; 156 E. R. 1439.

Annotations:—*N.F. Haigh v. Ousey* (1857), 7 E. & B. 578. *Expld. Re Tilleard* (1863), 32 Beav. 476.

Whether bill of costs privileged—Production & inspection.—*See DISCOVERY*, Vol. XVIII., p. 124, Nos. 737-739.

Secondary evidence of bill of costs.—*See EVIDENCE*, Vol. XXII., p. 249, Nos. 2299-2302.

SUB-SECT. 2.—DELIVERY OF BILL.

A. Necessity for Delivery.

(a) In General.

See Solicitors Act, 1843 (c. 73), s. 37.

Whether delivery condition precedent to proceedings by solicitor.—*See Sub-sect. 2, A. (b), post.*

When court will order delivery.—*See Sub-sect. 2, B., post.*

1290. Duty of solicitor to deliver.—*Re HARDING*, No. 2104, *post.*

1291. — Unaffected by taking bill from client — For agreed amount.—*RAY v. NEWTON*, No. 1270, *ante.*

See, also, Nos. 1363-1366, *post.*

1292. Solicitor acting for trustees.—Where trustees for the sale of property & distribution of the

proceeds among the several parties entitled employed a solr., & at the meeting to wind up, the accounts were laid out on a table, & remained there for some hours, & after deducting the costs, the funds were divided among the claimants, a petition for taxation within a year after was dismissed, though the solr. had not delivered a bill of costs, & had refused to do so when asked by the *cestui que trust*, petitioner, without being paid for preparing it, there being no objection taken at the meeting, nor any complaint except an observation that the costs were large, & the trustees being satisfied. But in such a case it would be proper for a solr. to deliver a bill of costs to the trustee, who could hold it for the inspection of the *cestui que trusts*.—*Re FAULKNER* (1849), 13 L. T. O. S. 21.

1293. Solicitor acting as clerk to commissioners—Business done as clerk—Yearly salary.—Where an attorney was employed as clerk at a fixed salary, by improvement comrs. appointed under a local Act:—*Held*: no signed bill need be delivered to make the comrs. liable for the salary.—*BUSH v. MARTIN* (1863), 2 H. & C. 311; 2 New Rep. 287; 33 L. J. Ex. 17; 8 L. T. 509; 9 Jur. N. S. 851; 11 W. R. 1078; 159 E. R. 129.

Annotations:—*Appld. Re Jones* (1887), 36 Ch. D. 105. *Reid. A.-G. v. Newcastle-on-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492.

1294. Order for payment on adjournment.—*SHEPHERD v. CRAWFORD* (1733), 2 Barn. K. B. 286; 94 E. R. 504.

(b) Proceedings by Solicitor.

i. For Costs.

See, now, Solicitors Act, 1843 (c. 73), s. 37.

When court will order delivery of bill of costs.—*See Sub-sect. 2, B., post.*

1295. General rule.—To an action of *assumpsit* for attorney's fees, deft. may plead in bar 3 Jac. 1, c. 7, & that plff. has given him no bill.—*BROOKES v. HAYES* (1678), Freem. K. B. 257; 3 Salk. 19; T. Rayn. 245; 89 E. R. 184.

1296. ——*CLARKE v. GODFREY* (1725), Cooke, Pr. Cas. 27; 1 Stra. 633; 125 E. R. 930.

1297. ——Before an attorney can bring an action for his fees he must leave the bill with his client according to 2 Geo. 2, c. 23.—*BROOKS v. MASON* (1789), 1 Hy. Bl. 290; 126 E. R. 170.

Annotation:—*Consd. Browne v. Black*, [1912] 1 K. B. 316.

1298. Out-of-pocket expenses.—An attorney cannot maintain an action even for the money out of pocket in a cause until he has delivered a

PART VI. SECT. 4, SUB-SECT. 2.—A. (a).

1290 i. Duty of solicitor to deliver.—Before a client is to be called upon to pay his attorney's bill, he is entitled to a copy of it specifying the items. It is not sufficient to state the amount in gross.—*Ex p. PHILIP* (1887), 26 N. B. R. 178.—*CAN.*

1290 ii. ——An attorney was employed to conduct the entire defence of a prisoner. He appeared upon the preliminary investigation before a police magistrate. He received money from prisoner. Upon an application for the delivery of his bill he swore that it had been agreed that he was to use the money in procuring prisoner's release, but was to keep no account of the money paid out. This the client denied:—*Held*: the attorney should deliver an ordinary bill of costs, & such an agreement must be in writing.—*Re A.* (1889), 6 Man. L. R. 181.—*CAN.*

1290 iii. ——A solr. of the Supreme Ct. of Judicature for Ontario who as such does business in carrying on proceedings for a client in the Exchequer Ct. of Canada is subject to the provisions of Solr.'s Act with regard to delivery & taxation of his bill of fees, charges or disbursements in respect of such business.—*O'CONNOR v. GEMMILL* (1899), 26 A. R. 27.—*CAN.*

1290 iv. ——A solr. is not, by 10 & 11 Geo. 5, c. 45, s. 34 (3), relieved from the duty of rendering to his client a bill giving such a general statement of the services rendered as would afford any other solr. sufficient information to advise the client as to the propriety or reasonableness of the bill.—*PERRY v. MURPHY*, [1926] 4 D. L. R. 123; 59 O. L. R. 209.—*CAN.*

1290 v. ——Where a lump sum has been paid by the client on an oral agreement between him & the solr. that this sum is in full payment of all costs incurred or to be incurred in the action, that agreement is not binding on the client so as to relieve the solr. from the duty to deliver a bill of costs on application.—*Re A SOLICITOR* (1908), 3 Hong Kong L. R. 28.—*HONG KONG.*

1290 vi. ——For his services in connection with a petition in divorce in 1919 a solr. was paid a lump sum. No bill of costs was ever delivered,

nor was there any agreement in writing in respect of such costs. On a summons calling on the solr. to show cause why he should not be ordered to deliver a bill of costs:—*Held*: a verbal agreement between a solr. & client for a lump sum to cover costs is not binding on the client, there had been no payment within Practitioners Act, 1908, s. 38, & a bill of costs must be delivered.—*Re C.*, [1921] N. Z. L. R. 436.—*N.Z.*

1. Solicitors Act, R. S. O. 1914 (c. 159)—Sufficiency of writing.—*R. v. MILLAR, FERGUSON & HUNTER* (1922), 70 D. L. R. 254.—*CAN.*

PART VI. SECT. 4, SUB-SECT. 2.—A. (b) i.

g. Business not clearly professional.—Where an attorney has been employed in the conduct of business not clearly professional, it is a question for the jury whether the employment was as attorney, so as to require the delivery of a signed bill of costs as a condition precedent to an action by him for remuneration.—*CHAMBERS v. GREEN* (1876), 2 V. L. R. (L.) 194.—*AUS.*

h. Delivery of bill must be proved.—In an action by an attorney for his

Sect. 4.—Bill of costs: Sub-sect. 2, A. (b) i. & ii.]

bill signed.—*MILLER v. TOWERS* (1791), Peake, 138; 170 E. R. 107, N. P.

Annotation:—*Consd. Hill v. Humphreys* (1801), 2 Bos. & P. 343.

1299. Business done at quarter sessions.]—An attorney cannot maintain an action for his bill unless he has first signed & delivered it, although all the business was done at quarter sessions.—*CLARKE v. DONOVAN* (1794), 5 Term Rep. 694; 1 Esp. 137; 101 E. R. 386.

Annotations:—*Apld. Smith v. Wattleworth* (1825), 6 Dow. & Ry. K. B. 510. *Folld. Sylvester v. Webster* (1832), 9 Bing. 388.

1300. —.]—An attorney's bill for business done at the ct. of quarter sessions is liable to taxation as well as his bill for business done in a superior ct. at Westminster, & therefore must be delivered, signed, before an action can be brought thereon, one month before such action brought, pursuant to 2 Geo. 2, c. 23.—*SYLVESTER v. WEBSTER* (1832), 9 Bing. 388; 1 Dowl. 708; 2 Moo. & S. 506; 2 L. J. C. P. 24; 131 E. R. 682.

1301. Agency business.]—In an action by one attorney against another for agency business, a bill need not be delivered signed, under 2 Geo. 2, c. 23.—*NELSON v. GARFORTH* (1791), 1 Esp. 220; 170 E. R. 335.

1302. —.]—It is not necessary that a bill for agency business should be delivered signed a month before the commencement of an action upon it.—*HILL v. WEIGHT* (1838), 5 Scott, 662.

1303. Business in bankruptcy.]—An agent appointed to practise in the Insolvent Debtor's Ct. if he be an attorney of any of the superior cts. of record cannot recover his bill of costs for business done in procuring the discharge of an insolvent debtor without delivering his bill one month before action brought pursuant to the provisions of 2 Geo. 2, c. 23, s. 23.—*SMITH v. WATTLEWORTH* (1825), 4 B. & C. 364; 1 C. & P. 615; 6 Dow. & Ry. K. B. 510; 3 L. J. O. S. K. B. 244; 107 E. R. 1095.

Annotation:—*Folld. Hare v. Adams* (1838), 1 Will. Woll. & H. 77.

1304. —.]—(1) An attorney's bill, for business in bkpcy., need not be delivered one month before action brought, pursuant to 2 Geo. 2, c. 23, s. 23.

(2) It is not requisite, that a bill for business in bkpcy. should be taxed under 6 Geo. 4, c. 16, s. 14, before the commencement of an action.

(3) Attending upon, & concerting measures with, the attorney of the opposing creditor, to resist the discharge of an insolvent, is not such business as will render it incumbent upon an attorney to deliver his bill one month before the commencement of an action, pursuant to the 2 Geo. 2, c. 23.—*CROWDER v. DAVIES* (1829), 3 Y. & J. 433; 148 E. R. 1248.

Annotation:—*Folld. Hamilton v. Pitt* (1830), 7 Bing. 232.

1305. —.]—Business done under a commission of bkpcy. is not business in respect of which an attorney is compellable to deliver a bill a month before the action.—*HAMILTON v. PITT* (1830), 7 Bing. 232; 131 E. R. 90; *sub nom. HAMILTON v. JONES*, 4 Moo. & P. 726; 9 L. J. O. S. C. P. 49.

1306. —.]—A charge by an attorney for business done before the Ct. of Review in Bkpcy. requires that a signed bill should be delivered before

action brought.—*HARE v. ADAMS* (1838), 1 Will. Woll. & H. 77.

1307. —.]—Proceedings under a fiat in bkpcy. before country comrs., appointed under 1 & 2 Will. 4, c. 56, are not proceedings at law or in equity, requiring the delivery of a signed bill of costs, under 2 Geo. 2, c. 23, s. 23.—*HARPER v. WILLIAMS* (1841), 2 Man. & G. 815; Drinkwater, 154; 3 Scott, N. R. 97; 10 L. J. C. P. 189; 5 Jur. 342; 133 E. R. 974.

Solicitor instituting bankruptcy proceedings against client.]—*See Nos. 1330–1332, post.*

1308. Business done by Irish solicitors in Irish courts—Action against domiciled Englishman.]—An Irish attorney suing in the English cts. a person domiciled in England for business done in the Irish cts. need not deliver a signed bill one month before bringing the action. Solicitors Act, 1843 (c. 73), s. 37, does not extend to such a case.—*KERNAGHAN v. WADESON* (1855), 3 C. L. R. 764; 24 L. T. O. S. 253.

1309. Professional business.]—(1) An action on an attorney's bill cannot be maintained for professional business against an attorney without delivering a signed bill previous to the action.

(2) An item for money lent may be separated from the professional items & be recovered.—*HEMING & BAXTER v. WILTON* (1830), Mood. & M. 529; 173 E. R. 1247; *sub nom. HEMMING v. WILTON*, 4 C. & P. 318, N. P.

1310. Work done in court.]—If any part of an attorney's bill be for business done in the ct., the bill must be delivered a month before the action is brought, otherwise pltf. cannot recover:—*Held*: these charges were for business done in the ct.; "drawing & ingrossing an affidavit of debt in order to hold a party to bail; paid for swearing, etc."—*WINTER v. PAYNE* (1796), 6 Term Rep. 645; 101 E. R. 750.

Annotations:—*Apld. Benton v. Garcia* (1800), 3 Esp. 149. *Distd. Burton v. Chatterton* (1820), 3 B. & Ald. 486. *Consd. Watt v. Collins* (1825), 2 C. & P. 71; *Smith v. Taylor* (1831), 5 Moo. & P. 66.

1311. Non-taxable items.]—If an attorney have demands in his professional capacity, some taxable, & others not so, he cannot recover for the un-taxable items, without delivering a signed bill for them, or including them in the signed bill delivered for the taxable business.—*THWAITES v. MACKERSON* (1828), 3 C. & P. 341; Mood. & M. 199; 173 E. R. 1130, N. P.

1312. —.]—*WARDLE v. NICHOLSON*, No. 1433, *post.*

1313. —.]—*BECKE v. PENN*, No. 1466, *post.*

1314. — Advances on behalf of client.]—*PROTHERO v. THOMAS*, No. 1357, *post.*

1315. — Delivery of particulars under judge's order after action brought.]—An attorney, not having delivered any bill to his client before action brought; but having delivered a bill of particulars of his demand under a judge's order after action brought; is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, & within the provision of 2 Geo. 2, c. 23, s. 23, requiring a bill to be delivered a month before the action brought.—*MOWBRAY v. FLEMING* (1809), 11 East, 285; 103 E. R. 1013.

Annotations:—*Consd. Watt v. Collins* (1825), 2 C. & P. 71. *Distd. Wardle v. Nicholson* (1833), 4 B. & Ad. 469.

1316. — Preparing affidavit of petitioning

fees, he must prove the delivery of his bill, although the deft. has suffered judgment by default.—*RIDOUT v. BROWN* (1835), 4 O. S. 74.—*CAN.*

k. Services in inferior courts.]—

Neither the rule of Mich. Term, 1800, nor 3 Jac. I, c. 7, s. 1 (Imp.), requiring an attorney to serve his client with an itemised bill before action, applies to services in the inferior cts. or for

services on a preliminary examination on a criminal charge.—*GEROW v. WEBBER* (1919), 46 N. B. R. 358.—*CAN.*

l. Right of attorney's executor to

creditor.]—A charge for preparing an affidavit of the petitioning creditor's debt & bond to the Chancellor, in order to obtain a commission of bkpcy. is not a taxable item in an attorney's bill, within 2 Geo. 2, c. 23, s. 23, as being a charge at law or in equity, the affidavit not having been sworn nor a commission issued.—*BURTON v. CHATTERTON* (1820), 3 B. & Ald. 486; 106 E. R. 739.

Annotations:—*Distd.* *Wilson v. Gutteridge* (1824), 4 Dow. & Ry. K. B. 736. *Consd.* *Wardle v. Nicholson* (1833), 4 B. & Ad. 469. *Refd.* *Smith v. Taylor* (1831), 7 Bing. 259; *Re Rivers, Ex p. Cass* (1835), 4 L. J. Bey. 39; *Harper v. Williams & Lowe* (1841), 10 L. J. C. P. 189.

1317. Search in registry.]—A charge for searching whether satisfaction of a judgment was entered, or whether an issue was entered, will not constitute an attorney's bill a taxable bill, so as to make it necessary to deliver it signed before action brought.

They are not taxable items, as any one may do this kind of business who is not an attorney (*ABBOTT, C.J.*).—*FENTON v. CORREIA* (1825), 2 C. & P. 45; Ry. & M. 262; 172 E. R. 21, N. P.

Annotations:—*Apld.* *Ex p. Bowles' Trustees* (1835), 1 Bing. N. C. 632; *Re Rice* (1837), 4 Scott, 416.

1318. — Advances to client.]—*HEMING & BAXTER v. WILTON*, No. 1309, *ante*.

1319. — Preparing warrant of attorney.]—*Qu.*: whether preparing & engrossing a warrant of attorney is a charge which renders it necessary for an attorney to deliver a bill, pursuant to 2 Geo. 2, c. 23.—*JAMES v. CHILD* (1832), 2 Cr. & J. 678; 2 Tyr. 732; 2 L. J. Ex. 78; 149 E. R. 285.

1320. — Advising client as to execution on judgment.]—A charge for advising a client as to an execution on a judgment obtained against him is not a taxable item in a bill of costs, so as to require a signed bill to be delivered before bringing an action.—*PEPPER v. YEATMAN* (1836), 2 Har. & W. 116.

1321. — — — — —.]—If an attorney brings an action against a client & part of his demand is for money advanced to his client's use & the remainder for business done which requires a bill to be delivered & no bill has been delivered, he shall not be allowed to divide his demands at the trial, & recover for the money advanced.—*BENTON v. GARCIA* (1800), 3 Esp. 149; 170 E. R. 569, N. P.

1322. Taxable & non-taxable items—Insufficient delivery.]—If an attorney introduce into his bill certain items connected with his professional capacity though not immediately within the terms of 2 Geo. 2, c. 23, & in an action upon the bill fail because it was not properly delivered according to the directions of the statute he must fail altogether, & will not be allowed to recover for such items only. *Qu.*: whether the same rule would not prevail if such items were not at all connected with his professional capacity.—*HILL v. HUMPHREYS* (1801), 2 Bos. & P. 343; 126 E. R. 1317.

Annotations:—*Distd.* *Mowbray v. Fleming* (1809), 11 East, 285. *Expld.* *Sparrow v. Johns* (1838), 7 L. J. Ex. 176. *Apld.* *Ivimey v. Marks* (1847), 16 M. & W. 850. *Refd.* *Warren v. Cunningham* (1819), Gow. 71.

1323. Bill shown to & acquiesced in by client.]—*CROWDER v. SHEE*, No. 1416, *post*.

1324. Agreement for gross sum.]—*WILKINSON v. SMART*, No. 1525, *post*.

Duty to specify items.]—*See* Sub-sect. 5, *post*.

1325. Effect of delivery after action brought.]—In a suit instituted by a solr. for payment of costs

due to him from a client, it appeared by the answer that he had not delivered a signed bill conformably to the Act of Parliament: a bill duly signed was subsequently delivered, & that fact was put in issue by a supplemental bill; *semble*: the defect in the title of pltf., as it stood at the institution of the suit, was not cured; but held that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions.—*PRITCHARD v. DRAPER* (1831), 1 Russ. & M. 191; 39 E. R. 74, L. C.; *affd. sub nom.* *NOTTIDGE v. PRICHARD* (1834), 8 Bli. N. S. 493; 2 Cl. & Fin. 379, H. L.

Annotations:—*Mentd.* *Parker v. Morrell* (1848), 2 Ph. 453; *Piercy v. Fynney* (1871), L. R. 12 Eq. 69.

ii. Account Stated.

See Solicitors Act, 1843 (c. 73), s. 37.

See, generally, CONTRACT, Vol. XII., p. 571, Nos. 4761 *et seq.*

Whether court will order delivery—Agreement as to costs.]—*See* Nos. 1363–1366, *post*.

1326. Whether delivery of bill essential.]—*SCADDING v. EYLES*, No. 1954, *post*.

1327. — Charges assented to by client.]—In an action for an attorney's charges, if pltf. fails on the count for work & labour because no bill has been delivered, he cannot recover under a count upon an account stated, though he prove that the charges were assented to by the client.—*BROOKS v. BOCKETT* (1847), 9 Q. B. 847; 16 L. J. Q. B. 178; 8 L. T. O. S. 466; 11 Jur. 284; 115 E. R. 1500.

Annotation:—*Refd* *Re Van Laun, Ex p. Chatterton*, [1907] 2 K. B. 23.

1328. — Agreement to take smaller sum for larger unliquidated amount.]—A declaration stated that deft. was indebted to pltf. in divers unliquidated debts, namely, for so much as pltf. deserved to have of deft. for work done by pltf. as attorneys for deft.; that pltf. alleged that the said debts amounted to £171 9s. 8d. & deft. to £147, that it was agreed that the dispute between them should be put an end to, & the amount of the debts fixed at £150; that pltf. should relinquish their claim to the residue; & that the debts should be satisfied upon the terms of deft. agreeing to pay pltf. £150; that the disputes were ended; that the debts were agreed & fixed at £150; that pltf. had not made any further claim; & that debts were satisfied upon the terms in that behalf. Breach, non-payment of £150. Plea, that pltf. did not, "one calendar month before the commencement of this suit, deliver to the deft. a signed bill":—*Held*: the declaration, at the best, amounted to a special count on an account stated, & the plea was good in form & substance.—*BRIDGMAN v. DEAN* (1852), 7 Exch. 199; 21 L. J. Ex. 90; 18 L. T. O. S. 245; 155 E. R. 915.

1329. — Agreement for settlement not in writing.]—Where, a solr. having a claim against his client for costs, & the client having a cross-claim against the solr., the parties agree upon the amounts of their respective claims & state an account showing a balance in the solr.'s favour, an action may be maintained by the solr. for that balance, notwithstanding that he had delivered no detailed bill, & that the agreement for the settlement of the cross-claims was not in writing.—*TURNER v. WILLIS*, [1905] 1 K. B. 468; 74 L. J.

sue for costs—Bill not delivered.] There is no law in force in India to prevent an exor. of an attorney from maintaining a suit for business done

by the attorney, without previously delivered a bill of costs to deft., & left it with him for a reasonable time before bringing the action; & the

fact that deft. had notice that the bill was to be referred to taxation is immaterial.—*WILKINSON v. ARBAS SIRCAR* (1869), 3 B. L. R. 96.—IND.

Sect. 4.—Bill of costs: Sub-sect. 2, A. (b) ii., iii. & iv., & (c), B. (a), (b) & (c).]

K. B. 365; 92 L. T. 412; 53 W. R. 348; 49 Sol. Jo. 351, D. C.

*Annotation:—*Refd. *Re Van Laun, Ex p. Chatterton*, [1907] 2 K. B. 23.

See, also, No. 1453, *post*.

iii. Bankruptcy of Client.

See Solicitors Act, 1843 (c. 73), s. 37.

1330. Instituting bankruptcy proceedings against client.]—An attorney's bill of costs, though it has not been signed & delivered under 2 Geo. 2, c. 23, s. 22, is a good legal debt, upon which a commission of bkpcy. may issue.—*Ex p. SUTTON* (1805), 11 Ves. 163; 32 E. R. 1050, L. C.

1331. —.]—An attorney not having delivered his bill according to 2 Geo. 2, c. 23, though he cannot bring an action may be petitioning creditor in a commission of bkpcy. but his debt must be afterwards examined.—*Ex p. STEELE* (1809), 16 Ves. 161; 33 E. R. 945, L. C.

*Annotation:—*Mentd. *Bray v. Hine & Fox* (1818), 6 Price, 205.

1332. —.]—A solr. may sue out a commission upon his debt for costs, without, as in the case of an action, having delivered his bill one month previous thereto, but it is quite of course after the commission to refer such bill to the master to be taxed.—*Re HOWELL, Ex p. HOWELL* (1812), 1 Rose, 312, L. C.

*Annotation:—*Refd. *Brown v. Tibbits* (1862), 11 C. B. N. S. 855.

1333. Proof in bankruptcy.]—EICKE v. NOKES, No. 1441, *post*.

Proceedings for business done in bankruptcy.]—*See* Nos. 1303–1307, *ante*.

iv. Other Cases.

See Solicitors Act, 1843 (c. 73), s. 37.

1334. Special contracts between solicitors & clients—Whether Solicitors Act, 1843 (c. 73), s. 37, applicable.]—THOMAS v. CROSS, No. 2629, *post*.

1335. Action on promissory note—Given on account of bill of costs.]—It is no answer to an action on a promissory note, that it was given on account of an attorney's bill, not delivered, pursuant to Solicitors Act, 1843 (c. 73), before action brought.—JEFFREYS v. EVANS (1845), 14 M. & W. 210; 3 Dow. & L. 52; 14 L. J. Ex. 363; 153 E. R. 452.

*Annotations:—*Apld. *Thomas v. Cross* (1864), 5 New Rep. 148. Refd. *Tate v. Hitchins* (1849), 7 C. B. 875.

1336. Foreclosure action by solicitor mortgagee—Costs secured by mortgage—Order for delivery of bill not personally served.]—THOMAS v. CROSS, No. 2629, *post*.

1337. Action against guarantor of bill.]—Where A. guarantees the payment to B., an attorney, within six months of "all costs for business done for C., or which B. may thereafter do in reference to or arising out of the affairs of C.," the delivery of a bill of such costs by B. to C. before the end of

the six months is not a condition precedent to B.'s bringing an action on the guarantee against A.; & in such an action, therefore, an equitable plea alleging the non-delivery of a bill of such costs by B. to C. before the end of the six months, & want of notice to debt., before the same period, of the amount of such costs, was held to be bad & no answer to the action. *Semble: debt. should, before the expiration of the six months, have applied to the equitable jurisdiction of the ct. for an order for the delivery of pltf.'s bill of costs.*—REECE v. COX (1867), 16 L. T. 327.

(c) Proceedings against Solicitor.

See Solicitors Act, 1843 (c. 73), s. 37.

1338. Solicitors right to set off costs due from client—Whether delivery condition precedent to exercise of right.]—An attorney cannot set-off his bill without having delivered it.—MURPHY v. CUNNINGHAM (1793), 1 Anst. 198; 145 E. R. 844. *Annotation:—*Refd. *Brown v. Tibbits* (1862), 11 C. B. N. S. 855.

1339. ——— Time for delivery.]—In an action against an attorney, to which he gives notice of set-off of his bill for business done for pltf., he must deliver a bill signed, but it need not be delivered a month under the statute.—BULMAN v. BIRKETT (1796), 1 Esp. 449; 170 E. R. 416, N. P.

1340. ———.]—An attorney may set off a claim for costs, notwithstanding no signed bill has been delivered.—BROWN v. TIBBITS (1862), 11 C. B. N. S. 855; 31 L. J. C. P. 206; 6 L. T. 385; 10 W. R. 465; 142 E. R. 1031.

*Annotation:—*Distd. *Rawley v. Rawley* (1876), 1 Q. B. D. 460. *See, also*, No. 1453, *post*.

B. Delivery by Order of Court.

(a) Jurisdiction of Court to Order.

See Solicitors Act, 1843 (c. 73), s. 37; R. S. C., Ord. 26A.

1341. Jurisdiction inherent & statutory.]—The ct. has a general jurisdiction, independently of 2 Geo. 2, c. 23, s. 23, to order an attorney to deliver a bill of costs to his client, & account for moneys received; although they have no power to order it to be taxed, except in the cases provided for by that Act.—CLARKSON v. PARKER (1838), 7 Dowl. 87; 4 M. & W. 532; 1 Horn & H. 343; 8 L. J. Ex. 72; 2 Jur. 1018; 150 E. R. 1540.

*Annotations:—*Expld. *Re Elmslie* (1869), L. R. 9 Eq. 72. Dtd. *Re Pollard* (1887), 20 Q. B. D. 160. Refd. *Doe d. Sabin v. Sabin* (1840), 8 Dowl. 468; *Cardale v. Bull* (1843), 4 Q. B. 611.

1342. —.]—*Re DRUCE* (1893), 94 L. T. Jo. 583, D. C.

1343. —.]—*Re FOSTER, BARNATO v. FOSTER*, No. 1356, *post*.

1344. Jurisdiction independent of jurisdiction to order taxation.]—*Re WEST, KING & ADAMS, Ex p. CLOUGH*, No. 1210, *ante*.

1345. By whom order may be made—Judge of

PART VI. SECT. 4, SUB-SECT. 2.—A. (c).

m. By originating summons to compel delivery of bill.]—An application by way of originating summons by a client to compel his solrs. to deliver their bills of costs for services rendered & for the taxation thereof:—*Held: to be barred by Legal Professions Act, R. S. B. C., 1924 (c. 136), s. 101, since the application was made more than three months after the making of a contract whereby it was agreed that the client should pay the solrs. a stated sum in settlement of all accounts between them, & that thereupon each*

party should release & discharge the other from all claims & demands.—*Re LEGAL PROFESSIONS ACT, Re BARNARD, ROBERTSON, HEISTERMAN & TAIT*, [1926] 3 W. W. R. 63; [1926] 3 D. L. R. 113; 37 B. C. R. 161.—CAN.

PART VI. SECT. 4, SUB-SECT. 2.—B. (a).

n. General rule.]—A client is entitled to a statement of account from the attorney who has collected money for him & of the attorney's bill of costs. In case of refusal of the attorney to deliver such statement & bill of costs, the ct. having authority over its own

officers, will compel him to furnish them.—GUNTER v. SHARP (1877), 1 P. & B. 286.—CAN.

o. Whether payment made or not.]—Under Victorian Common Law Procedure Act, s. 396, the ct. has power to order delivery of his bill by an attorney, whether or not it has been paid, & whether or not it is one which it would have jurisdiction to refer to taxation.—DUFFETT v. McEVoy (1885), 10 App. Cas. 300, P. C.—AUS.

p. In absence of retainer.]—Upon an application to compel attorneys to deliver a bill for payments & charges in relation to a certain lot of land &

court other than that wherein action brought.]—An order for the delivery of an attorney's bill may be made by a judge of a different ct. from that in which the action is brought, although a judge of the latter ct. is attending at chambers at the time such order is made.—*BENNETT v. DEAN* (1842), 4 Man. & G. 638; 5 Scott, N. R. 196; 134 E. R. 262.

1346. — Any judge of High Court—No business transacted in any court.]—The jurisdiction given by Solicitors Act, 1843 (c. 73), to order delivery of a solr.'s bill of costs where no part of the business charged for has been transacted in any ct. of law or equity, was given to the Lord Chancellor & Master of the Rolls as judges of the Ct. of Ch., & was transferred to the High Ct. of Justice by Jud. Act, 1873 (c. 66), s. 16. The judges of the Q. B. Div., therefore, have jurisdiction to order the delivery of a bill of costs in such a case, though the application for delivery ought to be made in the Ch. Div.—*Re POLLARD* (1888), 20 Q. B. D. 656; 57 L. J. Q. B. 273; 4 T. L. R. 424; *sub nom. Re POLLARD, Ex p. STEVENS*, 59 L. T. 96; 36 W. R. 515, C. A.

*Annotations:—*Refd. *Re Webster* (1891), 60 L. J. Ch. 338; *Re Collyer-Bristow*, [1901] 2 K. B. 839; *Re Stead* (No. 2) (1910), 54 Sol. Jo. 618.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 18 (2); R. S. C., Ord. 55, r. 26A.

— County court judge.]—*See* No. 1349, *post*.

(b) *Application for Order.*

See Solicitors Act, 1843 (c. 73), ss. 37, 43.

Orders for taxation of costs.]—*See* Sect. 5, *post*.

1347. Whether plaintiff limited to summary remedy in High Court—Action in Chancery Division.]—Bill filed by a country solr. against a London solr., alleging that deft. had made a special agreement with pltf. to transact certain business for him on agency terms, & charging that deft. falsely pretended that the agreement was one not for agency but for partnership in the particular business. The bill charged that, on either construction of the agreement, pltf. was entitled to an account, & prayed that deft. might deliver his bills of costs as pltf.'s agent, & also for a general account of all dealings & transactions between them. Deft. demurred, on the ground that the proper remedy of pltf. was by petition under Solicitors Act, 1843 (c. 73):—*Held*: the demurrer ought to be overruled.—*WARD v. LAWSON* (1872), 8 Ch. App. 65; 42 L. J. Ch. 273; 21 W. R. 88, L. C.

*Annotation:—*Refd. *Re Inderwick* (1883), 25 Ch. D. 279.

1348. — — —.]—*PHILLIPS v. GALMOYE* (1885), 29 Sol. Jo. 422.

1349. — Action in county court—For bill of costs & account—Effect of action.]—Pltf. retained deft. to act for him as his solr. in four matters. In one only were proceedings taken in the county ct.; in none of the others was process issued. As deft.

delayed to deliver a cash account & bill of costs, pltf. issued a plaint in the county ct. claiming an account:—*Held*: pltf. was entitled to claim this relief in the county ct. & was not limited to the summary remedy by summons in the High Ct. under Solicitors Act, 1843 (c. 73); but, *semble*, pltf. would have to accept as accurate the amounts of deft.'s bills of costs as to matters in respect of which there had been no proceedings in the county ct.—*CHAMBERS v. TABRUM*, [1920] 1 K. B. 840; 89 L. J. K. B. 606; 122 L. T. 779, D. C.

1350. Whether application in Chancery Division essential—When no business transacted in any court.]—*Re POLLARD*, No. 1346, *ante*.

See, now, R. S. C., Ord. 65, r. 26A.

1351. Heading of summons—Under Solicitors Acts.]—Summary order upon a petition under Solicitors Act, 1843 (c. 73), s. 37, against assignees in bkpey. of a solr., who had employed a London agent to deliver their bills of costs; & against agent to deliver his bill of costs & petitioner's papers in his possession.

Such petitions should be intituled in the matter of both solrs.; but a petition in the matter of a solr. need not be intituled in the matter of the Act.—*Re WALTON* (1858), 4 K. & J. 78; 32 L. T. O. S. 9; 70 E. R. 33.

1352. — — —.]—*RAY v. NEWTON*, No. 1270, *ante*.

1353. Delay in application—No ground for refusal—Undertaking to deliver bill on payment of costs—Application more than twelve months after.]—A solr., on payment of his costs, undertook to deliver his bill, but he neglected. On a petition presented more than twelve months after, the ct., under its general jurisdiction, ordered the delivery with costs.—*Re FOLJAMBE* (1846), 9 Beav. 400; 50 E. R. 398.

1354. — — — Repeated applications to solicitor.]—The lapse of nearly six years is not necessarily enough, even with strong special circumstances, to preclude an application to compel an attorney to deliver an account of money deposited with him by appct. as his client. Repeated applications for an account, even although contradicted on the other side, if coupled with any reasonable ground for not having before applied to the ct., not contradicted, as, for example, that hitherto the attorney has been in indigent circumstances, will excuse the delay.—*Re VANN* (1854), 15 C. B. 341; 3 C. L. R. 126; 24 L. T. O. S. 77; 139 E. R. 455.

1355. — — — Solicitor possessing necessary materials.]—*Re BAYLIS*, No. 1942, *post*.

(c) *Grant or Refusal of Order.*

See Solicitors Act, 1843 (c. 73), s. 37.

1356. To ascertain whether any grounds for taxation.]—In 1917 a son agreed to pay his mother's debts upon the security of a mtge. of

to answer the affidavits filed in support of the rule, it appeared that there was no retainer of the attorneys, or either of them, as such:—*Held*: the ct., therefore, could not grant the first part of the rule.—*Re KEYS & SMITH* (1863), 13 C. P. 262.—CAN.

g. Jurisdiction to order delivery & reference to taxation in same bill.]—A judge cannot by the same order direct the delivery & reference to taxation of a bill.—*Re BOOMER, BOOMER v. ANDERSON* (1865), 16 C. P. 163.—CAN.

r. Summons not referring to affidavit—Whether amendment allowed.]—A summons calling upon an attorney to deliver his bill of costs did not refer to any affidavit or papers filed.

Amendment allowed.—*Re BARTON* (1868), 4 P. R. 237.—CAN.

t. On solicitor's failing to show retainer for definite amount.]—*Re SOLICITOR* (1912), 22 O. W. R. 156; 3 O. W. N. 1274; 4 D. L. R. 217.—CAN.

a. Insolvency of solicitor.]—A solr. will be compelled to make out his costs & furnish his account of credits to his client, though insolvent.—*MULVANY v. DILLON* (1826), 1 Hog. 292.—IR.

PART VI. SECT. 4, SUB-SECT. 2.—
B. (b).

1351 i. Heading of summons—Under Solicitors Acts.]—A *præcipe* order for the delivery & taxation of a solr.'s bill of costs taken out by a client under

Rule 964A, added to King's Bench Act by 10 Edw. 7, c. 17, s. 12, should, under § 7 Vict. c. 73, s. 43 (Imp.), which is still in force in Manitoba, be styled in the matter of the solr. & not in the action in which the costs were incurred.—*DESAULNIERS v. JOHNSTON* (1911), 20 Man. L. R. 431.—CAN.

PART VI. SECT. 4, SUB-SECT. 2.—
B. (c).

b. Business done out of court.]—An attorney or solr. may be ordered to deliver a bill of his charges for business done by him as such, though the services performed were not in whole or in part for business done in ct., as in this case, where the retainer was to

Sect. 4.—Bill of costs: Sub-sect. 2, B. (c) & (d).]

certain life policies. He employed a solr. to carry out the transaction & to prepare the mtge. deed, & he opened an account at a bank upon which the solrs. could draw to pay the debts. The son went abroad to serve with the army, appointing his wife & the solr. his attorneys to act for him in the matter. The solr. accordingly paid the debts & prepared the mtge. deed, giving a charge on the policies for the total sum paid. The items of which the total sum constituting the mtge. debt was made up appeared in the schedule to the deed. The deed contained a recital that the item of £914 appearing in the schedule was "the ascertained & agreed amount of the costs & disbursements of" the lender's solrs. for the negotiations leading to & of & incidental to the indenture; & in the schedule, under date Nov. 27, 1917, the £914 was stated to be the lender's solr.'s costs for services mentioned in the recital. It appeared that on that date the solr. drew a cheque payable to himself for this amount on the account at the bank, & so paid himself. The son was at that time abroad & did not return until after the deed was executed by his attorney. No bill of these costs was delivered. The solr. was not a party to the mtge. deed. The son thereupon applied for delivery of a bill of costs. The mother did not join in the application. The solr. opposed the application on the ground that the sum was not charged against the son, but was charged against the mother & had been approved & paid by her as mtgor. out of the money lent to her by the son as mtgee. :—*Held*: the solr. must be ordered to deliver a bill of costs.

The powers of the ct. to order delivery of a bill & taxation rest, in the first place, on the original jurisdiction of the ct. over its officers; in the second place on Solicitors Act, 1843 (c. 73), s. 37, which empowers the ct. to order delivery of a bill in any case where they could under the Act refer the bill for taxation if delivered. Indeed, in some cases delivery of the bill may be ordered to see whether there are grounds for taxation (*SCRUTTON, L.J.*).—*Re FOSTER, BARNATO v. FOSTER*, [1920] 3 K. B. 306; 89 L. J. K. B. 958; 36 T. L. R. 721; 64 Sol. Jo. 600, C. A.

1357. Where no charges for professional services—Debt & costs paid on behalf of client.]—Pltf.'s attorney, who, at deft.'s request, puts in bail for him & afterwards pays the debt & costs, need not deliver a bill a month before he sues for the money so advanced.—*PROTHERO v. THOMAS* (1815), 6 Taunt. 196; 1 Marsh. 539; 128 E. R. 1009.

Annotation:—*Reid, Sparrow v. Johns* (1838), 3 M. & W. 600.

1358. — Sum paid on discontinuance of action.]—Where it appeared by the attorney's account that he had paid £15 5s. for discontinuance of an action, but he swore that he had not made, & did not intend to make, any charge for his own labour in the cause, the ct. refused to compel him to deliver a true bill of his fees, charges, & disbursements.—*SPARROW v. JOHNS* (1838), 3 M. & W. 600; 1 Horn & H. 116; 7 L. J. Ex. 176; 150 E. R. 1284.

1359. — Gratuitous services.]—The ct. has no

investigate the title of & purchase property.—*Re O'DONOHUE & WARMOLL* (1868), 4 P. R. 266.—CAN.

c. Right of subsequent incumbrancer to have detailed bill of costs delivered.]—On a sale of property under a power in a mtge., the solrs. more than a year before this application, with the approbation of the agent of the mtgee. (who was out of the country), retained out of the proceeds

of the sale a lump sum for their costs, & delivered no bill :—*Held*: a special circumstance under R. S. O. 1877, c. 140, s. 44, entitling a subsequent incumbrancer to have a bill of costs in detail delivered to him upon payment of the costs of a copy.—*Re MALCOLMSON & WADE* (1882), 11 P. R. 242.—CAN.

d. Application for delivery of bill after lapse of year.]—Solrs. retained out

jurisdiction to order a solr. to furnish a bill of costs to a client against whom he refuses to make any charges for his professional assistance.—*Re GRIFFITH, EGGAR & GRIFFITH* (1891), 7 T. L. R. 269, D. C.

1360. — No deduction from money due to client.]—Under the common order for the delivery & taxation of a solr.'s bill of costs, if the solr. makes no claim for costs, & swears that he has not retained any costs out of moneys of his client in his hands, he is not liable to deliver a cash account to his client. *Semble*: under such circumstances the solr. would still be liable to account to the client upon a proper application under the summary jurisdiction over solrs.—*Re LANDOR*, [1899] 1 Ch. 818; 68 L. J. Ch. 373; 80 L. T. 643; 47 W. R. 457; *sub nom. Re L—*, 43 Sol. Jo. 479.

1361. Professional employment only.]—An *ex p.* order for the delivery of a bill of costs discharged with costs, the allegation of the professional employment being denied by the solr.—*Re ELDRIDGE* (1849), 12 Beav. 387; 50 E. R. 1109.

1362. ——*Re Inderwick*, No. 1277, *ante*.

1363. Agreement as to costs—Between attorneys of both parties—Upon settlement of action.]—The ct., upon the application of defts., ordered pltf.'s attorney to deliver his bill of costs, though upon the settlement of the action it had been expressly agreed between the attorneys of the respective parties, that, on certain accommodation being given to defts., pltf.'s attorney should receive £60 as an ascertained amount of costs between attorney & client.—*TANNER v. LEA* (1842), 4 Man. & G. 617; 5 Scott, N. R. 237; 134 E. R. 253.

1364. — Sum retained by solicitor—No valid agreement in writing—Mere retainer not amounting to payment.]—*Re WEST, KING & ADAMS, Ex p. CLOUGH*, No. 1210, *ante*.

1365. — Within Solicitors Act, 1870 (c. 28), s. 4—Agreement unreasonable—Bill accepted by client for agreed amount.]—*RAY v. NEWTON*, No. 1270, *ante*.

1366. — Retainer not amounting to.]—*Re JACKSON*, No. 1220, *ante*.

1367. After lump sum paid by client in discharge.]—(1) A gross sum was paid to a solr. in discharge of his claim; but no bill of costs was delivered :—*Held*: the client was entitled to have a bill of costs delivered.

(2) The solr. of trustees & exors. received payment of his bill of costs out of the estate :—*Held*: a residuary legatee was entitled to have a copy of the bill delivered on payment of the costs of it.

(3) The ct., notwithstanding there was not such pressure or such allegations & proof of overcharges as have been usually relied on in such cases, ordered the taxation of a solr.'s bill after payment.—*Re BLACKMORE, Re BILLING, Re SPIKE* (1851), 13 Beav. 154; 18 L. T. O. S. 2; 15 Jur. 784; 51 E. R. 60.

Annotations:—*As to* (1) *Distd. Turner v. Hand* (1859), 27 Beav. 561. *Reid, Re Stogdon* (1887), 56 L. J. Ch. 420; *Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102.

1368. ——*Agreement by a solr. to receive a fixed sum for costs for business hereafter to be done is not binding on the client, who is, notwithstanding payment under it, entitled to an order of*

of moneys in their hands belonging to their client, sufficient to pay their costs, & handed the client a cheque for the balance. The client took the cheque but did not cash it until she had written to the solrs. stipulating that the cashing should be without prejudice to her right to recover a larger sum, if such was due her. After the lapse of a year from the receipt of the cheque, the client applied

ct. for the delivery of a bill of costs & its taxation.
—*Re* NEWMAN (1861), 30 Beav. 196; 54 E. R. 863.

1369. Sum retained by solicitor in satisfaction.]—
Re BLACKMORE, *Re* BILLING, *Re* SPIKE, No. 1867,
ante.

1370. Solicitor refusing to deliver up client's deeds & papers—Costs not incurred in any action—No cause pending.]—Where a solr. has in his possession deeds & papers belonging to his client, which he refuses to part with, the ct. has jurisdiction to order the solr. to deliver the deeds & papers, & also his bill of costs, the party offering to pay what the master shall find to be due to him, though there is no cause pending, & though no part of the costs has been incurred in respect of any action or suit in law or equity.—*Re* MURRAY (1826), 1 Russ. 519; 38 E. R. 200; *sub nom.* *Re* —, 4 L. J. O. S. Ch. 207.

*Annotations:—*Fold, *Re* Rice (1837), 2 Keen, 181. *Reid.* *Re* Barker (1834), 6 Sim. 476.

1371. Exorbitant bill—Withdrawal on taxation.]—*Re* GRIFFITH, EGGAR & GRIFFITH (1891), 7 T. L. R. 269, D. C.

1372. Circumstances indicating fraudulent preference.]—*Re* DRUCE (1893), 94 L. T. Jo. 583, D. C.

1373. Application by three of four trustees—& cestui que trust.]—Four persons having taken conveyance of property claimed by a fifth, for the purpose of raising money to prosecute his claims, employed a solr., & deposited the money, etc., with him; three of the trustees, together with the *cestui que trust*, having employed another solr., applied to the ct. to order the delivery of the former solr.'s bill, & to refer it for taxation, they undertaking to pay what should be found due. The former solr. was forbidden by the fourth trustee to deliver his bill, pay over the money, or deliver up the papers. The ct. ordered the delivery of the bill & taxation, reserving all other questions & also costs, & permitting the solr. to review his bill, though made out fully, if not actually delivered.—*Re* RICHARDSON (1846), 7 L. T. O. S. 25.

1374. Illegality of retainer—No defence to claim for delivery.]—One of the defences by a solr. to a claim for the delivery of a bill of costs, & an account of moneys paid in connection with certain litigation, was that the work which the solr. was employed to do was illegal, on the ground of maintenance & champerty, & that no assistance ought therefore to be afforded by the ct. to either party as against the other:—*Held*: such a defence in the case of a solr. could not be set up as a ground of immunity from the jurisdiction of the ct., & must be regarded as wholly untenable, & the order asked for must be made.—*Re* THOMAS, JAQUESS *v.* THOMAS, [1894] 1 Q. B. 747; 63 L. J. Q. B. 572; 10 T. L. R. 367; 38 Sol. Jo. 340; 9 R. 299, C. A.

(d) *Enforcement of Order.*

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq.*

1375. By attachment.]—A party in a cause who has obtained & served, according to the 12th Amended Order of Aug. 1841, an order that his solr. shall deliver his bill of costs within a month, which is disobeyed, is entitled under the 15th Order of Aug. 1841, to enforce obedience by the writ of attachment.—*LANE v.* OLIVER (1842), 2 Hare, 97; 12 L. J. Ch. 144; 6 Jur. 1080; 67 E. R. 40.

1376. —.]—An action is not maintainable

on a judge's order made under Solicitors Act, 1843 (c. 73), s. 37.

Attachment is the proper remedy.—*DENT v.* BASHAM (1854), 9 Exch. 469; 2 C. L. R. 989; 23 L. J. Ex. 161; 22 L. T. O. S. 247; 18 Jur. 295; 2 W. R. 201; 156 E. R. 200.

*Annotations:—**Reid.* *Godfrey v.* George (1895), 65 L. J. Q. B. 249; *Norton v.* Gregory (1895), 73 L. T. 10.

1377. —.]—*Re* LEWIS (1897), 41 Sol. Jo. 737.

1378. —.]—*Re* J. (1897), 41 Sol. Jo. 788.

1379. —.]—*Re* FANSHAWE, *Ex p.* DILLAMORE (1906), 50 Sol. Jo. 733.

1380. — Necessity for formal demand.]—*Re* BASTOR (1849), 14 L. T. O. S. 180.

Sufficiency of demand.]—*See* CONTEMPT OF COURT, Vol. XVI., pp. 58, 59, Nos. 657, 671.

1381. — Order served with proper indorsement.]—The proper mode of enforcing the delivery of a solr.'s bill is to serve the order with a proper indorsement, under the 12th Amended Order of Apr. 11, 1842, & upon default being made, an attachment will go as of course.—*Ex p.* BELTON (1858), 25 Beav. 368; 31 L. T. O. S. 295; 53 E. R. 677.

1382. — —.]—The proper mode of enforcing the delivery of a solr.'s bill is to serve the order with a proper indorsement, under the 23rd Consolidated Order, rule 10; & upon default, an attachment will issue as of course.—*Re* BOWEN (1863), 9 Jur. N. S. 612; 11 W. R. 607.

*Annotation:—**Mentd.* *Pace v.* Pace (1891), 67 L. T. 383.

1383. — Personal service of order necessary—Waiver.]—A motion was made for the attachment of a solr. for non-compliance with an order of the ct. upon him to deliver a bill of costs within a fortnight. It appeared that the order had not been personally served upon him, but had been left with his clerk at his office. The solr. had written giving reasons for his delay & promising the bill of costs during the then ensuing week:—*Held*: personal service of the order was necessary & the necessity for such personal service had not been waived by the letter, & therefore the motion for attachment must be dismissed.—*Re* CUNNINGHAM (1886), 55 L. T. 766.

1384. — Excuse for non-delivery—Illness—Compliance out of time.]—A rule to show cause why an attachment should not issue against the former attorneys of a deft. in a cause for not delivering their bill of costs to deft.'s new attorneys, pursuant to a Baron's order, discharged, the bill having been delivered since the rule was served on the parties: & illness having been assigned in the affidavit as the cause of the parties not obeying the order, the rule was discharged without costs. Such an order is not of a peremptory nature, nor absolute in the first instance.—*GRIPPER v.* COLE (1823), 11 Price, 593; 147 E. R. 574.

1385. — — Lack of material.]—A solr. was ordered to deliver his bill for taxation. Upon a motion to commit for the non-delivery, he swore he had no documents or memoranda from which he could make out his bill. The ct. made no order on the motion.—*Re* KER (1850), 12 Beav. 390; 50 E. R. 1110.

1386. — Extension of time—Granted on applicant paying costs of motion.]—An order was made upon a solr. for the delivery of his bill within fourteen days. He was unable to comply, & on a motion for the second order, he asked for further

for an order for the delivery of a bill of costs:—*Held*: the circumstances did not amount to payment of the costs, & the order for delivery was made.—*SCHRAGG v.* SCHRAGG (1885), 11 P. R.

218.—CAN.

e. *Agreement to pay lump sum—Absence of evidence to show reasonableness.]—**Re* SOLICITOR (1911), 19 W. L. R. 249; 4 Sask. L. R. 402.—CAN.

PART VI. SECT. 4, SUB-SECT. 2.—
B. (d).

1375 i. By attachment.]—*Re* SOLICITOR (1910), 17 O. W. R. 2; 2 O. W. N. 67; 22 O. L. R. 30.—CAN.

Sect. 4.—Bill of costs: Sub-sect. 2, B. (d) & (e), C. & D. (a) & (b).]

time. It was given, but he was ordered to pay the costs of the motion.—*Re DENDY* (1856), 21 Beav. 565; 52 E. R. 978.

1387. ——— Service of order for extension.]—Before a client, who has obtained an order against his solr. for delivery of his bill of costs within a fixed time, which time is afterwards extended by order, can obtain leave to issue a writ of attachment for non-compliance with the orders, both orders must be drawn up & served, or a four day order obtained.—*Re SEAL, Re SEAL & EDGELOW*, [1903] 1 Ch. 87; 72 L. J. Ch. 58; 87 L. T. 731; *sub nom. Re S.*, 51 W. R. 164; 47 Sol. Jo. 72.

1388. Whether action on order maintainable.]—*DENT v. BASHAM*, No. 1376, *ante*.

1389. Application for more detailed bill than that delivered—At chambers.]—Re AN ATTORNEY (1858), 31 L. T. O. S. 82.

(e) *Appeals from Order—Whether Order “Final” or “Interlocutory.”*

1390. Order final—R. S. C., Ord. 58, rr. 3, 15.]—An order dismissing an originating summons for delivery of a bill of costs by a solr. & taxation is a final order, & an appeal from it should be treated as a final, not an interlocutory, appeal.—*Re REEVES (HERBERT) & Co.*, [1902] 1 Ch. 29; 71 L. J. Ch. 70; 85 L. T. 495; 50 W. R. 252; 46 Sol. Jo. 50, C. A.

Annotations:—Folld. Haydon v. Cartwright, [1902] W. N. 163. *Appld. Re Jerome*, [1907] 2 Ch. 145. *Refd. Re Jackson*, [1915] 1 K. B. 371; *Re Wingfields*, [1923] 2 K. B. 112. *Mentd. Cogstad v. Newsum*, [1921] 2 A. C.

1391. —.]—HAYDON v. CARTWRIGHT, [1902] W. N. 163; 37 L. J. N. C. 420, C. A.
Annotation:—Refd. Re Marchant, [1908] 1 K. B. 998.

C. What Amounts to Delivery.

See Solicitors Act, 1843 (c. 73), s. 37.

1392. Constructive delivery—Mortgagors & mortgagees—Trustees & cestuis que trust.]—R. & B. acted jointly in a sale of copyholds to which their respective clients were entitled, B. having the conduct of the sale. The purchaser required the property to be enfranchised, & wrote to B. asking him to arrange for the enfranchisement, & undertaking to pay his charges & the expenses. R. made out his bill of costs against his own clients, sent it to B., who sent it to the purchaser. The purchaser obtained an order for taxation of this bill on the usual petition of course by a third party. On motion by R. to stay all further proceedings under this order:—*Held*: the common form allegation in a petition of course, that the solr. “delivered to your petitioners his bill of fees & disbursements,” is a material allegation which is not satisfied by a merely constructive delivery; in the circumstances of this case there had been no delivery to the purchaser; & the order had been irregularly obtained, & must be discharged.

Now, delivery in the ordinary practice by the mtgee.’s solr. of his bill of costs is not to his own client, but it is to the mtgor. or to the mtgor.’s solr.; & consequently one finds that in the common form in the orders is an allegation that the mtgor. has had the bill delivered to him by the mtgee.’s solr. I think, for reasons which I am now about to state, that that is a material allegation, because

there are cases in which the bill which the solr. delivers to his own client, the mtgee., is a bill which would be absolutely right as between himself & the mtgee., though possibly not so between himself & the mtgor. The mtgee. might have told his solr. to do certain things; the solr. might have explained in his ordinary course of duty, “I will do that for you, but recollect if it is done you cannot charge the mtgor.” The mtgee. might say, “Well, I will have it done,” & then the solr. delivers his bill to the mtgee., which is a proper bill as between the two. That bill is not delivered, I will assume, in point of fact, to the mtgor. or his solr.: Can the mtgor. obtain taxation of it upon an allegation that the bill has been “delivered to him”? In my opinion he cannot. I think the delivery of the bill cannot mean a constructive delivery of the bill, & there would be no constructive delivery of the bill in the case which I have just put. So also in the case of a trustee & cestuis que trust, where the trustee employs his own solr. That is an ordinary typical case. In that case the trustee may have given special instructions to the solr. which would warrant him, & justify him, as between himself & his individual client the trustee, in making certain charges. Upon that the solr. might draw out his bill & send it in to the trustee; but I think that that could not be called a “delivery,” certainly it cannot be said, in point of fact, to be a delivery to the cestuis que trust; & I think, in the case I am putting, it would not be right to hold that constructively it was a delivery of the bill to the cestuis que trust (*CHITTY, J.*).—*Re ROBERTSON* (1889), 42 Ch. D. 553; 58 L. J. Ch. 832; 62 L. T. 38; 38 W. R. 170.

1393. Delivery of draft bill—To enable agreement being reached as to amount.]—Re HULBERT & CROWE, No. 1772, *post*.

1394. Delivery of memorandum of charges—Business not completed.]—Re SMITH & SON (1901), 45 Sol. Jo. 469.

Delivery to party to be charged therewith.]—See Sub-sect. 2, D., *post*.

Place of delivery.]—See Sub-sect. 2, G., *post*.

Delivery one month before action brought.]—See Sub-sect. 2, F., *post*.

D. To Whom Delivery made— Party to be charged therewith. (a) In General.

See Solicitors Act, 1843 (c. 73), s. 37.

1395. General rule—Client of solicitor.]—Re ABBOTT, No. 1413, *post*.

1396. ——— Not third person agreeing to be liable for costs.]—The person entitled to raise the defence that there is no signed bill delivered one month before action is the client of the solr., & a person, not being the client who has made himself responsible under an agreement to pay costs, is not “a party to be charged therewith” within Solicitors Act, 1843 (c. 73), s. 37, & is not entitled to raise the defence, but such a person is entitled, under sect. 38, to have the bill of costs taxed.—*GREENING v. REEDER* (1892), 67 L. T. 28; 40 W. R. 623; 36 Sol. Jo. 464, D. C.

1397. Delivery to relative of client.]—In an action on an attorney’s bill of costs, issue being joined on a plea no bill had been delivered according to Solicitors Act, 1843 (c. 73), it appeared that

PART VI. SECT. 4, SUB-SECT. 2.—C.

1. Conditional delivery.]—Solrs. delivery bills of costs, indorsing on each, “In the event of taxation, we reserve to ourselves the right of deliver-

ing another & more complete bill”: —*Held*: an absolute delivery.—*Re SPENCER & McDONALD* (1872), 19 Gr. 467.—**CAN.**

g. Delivery to person secondarily

liable.]—It is a sufficient delivery of a bill if it is delivered to a person secondarily liable, who hands it to the person primarily liable.—*SMITH v. BULLER* (1886), 5 N. Z. L. R. 41 (S. C.).—**N.Z.**

the costs were for business done in the arrangement of a separation between Mrs. H., deft.'s niece, & her husband, while Mrs. H. was on a visit to deft. After Mrs. H. had left deft.'s house, the bill was delivered there, headed "In the Matter of Mr. & Mrs. H.," inclosed in a letter addressed to deft. & saying: "As I understand Mrs. H. is no longer residing under your care, & presuming therefore that you may not be remaining longer in town, I beg to hand you my account, in the hope that it will be found satisfactory"—*Held*: it did not sufficiently appear that the bill was delivered to deft. as the "party to be charged," within Solicitors Act, 1843 (c. 73), s. 37.—*GRIDLEY v. AUSTEN*, *DAUBNEY v. PHIPPS* (1849), 16 Q. B. 504; 18 L. J. Q. B. 337; 13 Jur. 680; 117 E. R. 972.

Annotations:—*Refd.* *Champ v. Stokes* (1861), 6 H. & N. 683; *McLean v. Weaver* (1924), 40 T. L. R. 663.

1398. Delivery to specially appointed agent.—(1) Delivery of a bill of costs to an agent of the client appointed for that purpose:—*Held*: sufficient.

(2) Delivery of a bill of costs, unsigned, but accompanied by a letter signed by the solr., & referring to the bills:—*Held*: a sufficient compliance with Solicitors Act, 1843 (c. 73), s. 37.—*Re BUSH* (1844), 8 Beav. 66; 1 New Pract. Cas. 80; 14 L. J. Ch. 6; 4 L. T. O. S. 131A; 50 E. R. 26.

Annotation:—*As to* (1) *Apld.* *Re Kellock* (1887), 56 L. T. 887.

1399. ———.]—*Re KELLOCK*, No. 1422, *post*.

1400. Delivery to servant at party's residence.—In an action on an attorney's bill, a delivery of the bill to a servant at deft.'s residence is *prima facie* evidence of a delivery to deft.—*MACGREGOR v. KELLY* (1819), 3 Exch. 794; 6 Dow. & L. 635; 18 L. J. Ex. 391; 13 L. T. O. S. 120; 154 E. R. 1066.

Annotations:—*Consd.* *Browne v. Black*, [1912] 1 K. B. 316. *Refd.* *Daubney v. Phipps* (1849), 16 Q. B. 504. *Mentd.* *Nicholson v. Tanham* (1870), 18 W. R. 523.

1401. Work done for parish—Bill sent to ex-overseer—Headed to "The parish officers of . . ."—Accompanying note requesting payment.—Where an attorney sent his bill to an ex-overseer, headed to "The parish officers of A. B." accompanied by a note requesting payment of his bill against the parish:—*Held*: not to be in compliance with the statute requiring the delivery of an attorney's bill to the party to be charged therewith.—*WELBY v. BROWN* (1846), 8 L. T. O. S. 122; 11 J. P. 602.

Annotation:—*Mentd.* *March v. Davies* (1818), 1 Exch. 668.

1402. Work done for commissioners—Delivery to clerk of successors—At private office.—A delivery of a bill of costs, for work done for a body of comrs. who, at the time of the delivery, had gone out of office, upon the clerk of their successors, at his private office, is not sufficient to charge the former comrs. personally.—*CURLING v. YOUNG* (1847), 8 L. T. O. S. 517, N. P.; *subsequent proceedings*, 9 L. T. O. S. 51.

1403. Work done for trustees—Delivery to cestui que trust—Whether delivery to trustee sufficient.—*Re ROBERTSON*, No. 1392, *ante*.

1404. ——— **Delivery to manager of trust property—Manager not authorised to receive bills.**—Solrs. to trustees delivered to their clients in the years 1883 & 1884 bills of costs for work done for them as trustees, which were paid without taxation, the solrs. not having informed their clients that, if administration proceedings were subsequently brought & the bills were moderated in those proceedings, the trustees would have to pay out of their own pockets the amounts by which the bills were reduced on moderation. The solrs. also

delivered to the manager of an asylum carried on by the trustees as part of the trust estate, other bills of costs for work done for the trustees. It was admitted that the bills delivered to the trustees were honest, & not excessive:—*Held*: as to the bills paid without taxation, the fact of the solrs. not having given such information to their clients was not a special circumstance justifying taxation after payment; &, as to the bills delivered to the manager of the asylum, delivery to him was not, in the absence of proof that he was authorised to receive bills for the trustees, delivery to the trustees.—*Re LAYTON, STEELE & Co.* (1890), 38 W. R. 652.

1405. Bill taken away after being shown to party charged.—*PHIPPS v. DAUBNEY*, No. 1495, *post*.

1406. Bill addressed & delivered to party to be charged—No name on bill itself.—*TAYLOR v. HODGSON*, No. 1470, *post*.

1407. ———.]—A bill of costs signed by the attorney & headed in the matter of business, but not addressed to any one, was inclosed in an envelope, & sent by post to the client:—*Held*: a sufficient delivery of the bill to the party to be charged therewith, within Solicitors Act, 1843 (c. 73), s. 37.—*ROBERTS v. LUCAS* (1855), 11 Exch. 41; 19 J. P. 359; 156 E. R. 737; *sub nom.* *LUCAS v. ROBERTS*, 3 C. L. R. 987; 24 L. J. Ex. 227; 25 L. T. O. S. 101; 1 Jur. N. S. 527; 3 W. R. 415.

1408. Effect of misdirection.—In an action on an attorney's bill, a new trial will not be granted on the ground that the bill was misdirected.—*WELSH v. SILWELL* (1847), 11 Jur. 471.

(b) *Delivery to Solicitor of Party to be Charged.*

See Solicitors Act, 1843 (c. 73), s. 37.

1409. Whether sufficient.—A party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the stat. 2 Geo. 2, c. 23, s. 23, which delivery was accordingly made to the second attorney in the cause:—*Held*: this was a sufficient delivery to the party to be charged therewith, within the words & meaning of that statute, so as to enable the first attorney to bring his action against the client for the amount of such bill.—*VINCENT v. SLAYMAKER* (1810), 12 East, 372; 104 E. R. 146.

Annotations:—*Consd.* *Phipps v. Daubney* (1851), 2 L. M. & P. 180. *Apld.* *Re Kellock* (1887), 56 L. T. 887.

1410. ——— **Bill brought to party's knowledge—Party attending taxation.**—Delivery of an attorney's bill to the attorney of the party to be charged sufficient, if the party himself attend the taxation, or the bill be shown to have come to his hands.—*WARREN v. CUNNINGHAM* (1819), Gow, 71; 171 E. R. 842, N. P.

1411. ———.]—In an action on an attorney's bill against a member of the provisional committee of a railway co., it appeared that pltf., who was employed as local agent & attorney, sent his bill to the residence of the solr. of the co., who laid it on one occasion before the committee when deft. was present, & on another occasion it was laid before the committee by the secretary when deft. was absent:—*Held*: a sufficient delivery of the bill within Solicitors Act, 1843 (c. 73), s. 37.—*EGGINGTON v. CUMBERLEDGE* (1847), 1 Exch. 271; 2 New Pract. Cas. 456; 5 Ry. & Can. Cas. 113; 16 L. J. Ex. 283; 10 L. T. O. S. 113; 11 Jur. 932; 154 E. R. 114.

1412. ———.]—*PHIPPS v. DAUBNEY*, No. 1495, *post*.

1413. Delivery by mortgagee's solicitors to

Sect. 4.—Bill of costs: Sub-sect. 2, D. (b) & (c), E., F. & G.]

solicitors of mortgagor — For taxation.]—The delivery of a solr.'s bill of costs, on which to found a taxation of it, must be a delivery to the party chargeable with the payment of it, that is, to the client.

Where the bill of costs of a mtgee.'s solr. was delivered to the solr. of the mtgor. for taxation, such delivery was held to have been an improper one for the purpose.

When once a mtgor. has paid the bill of costs he cannot, as between himself & the solr. of the mtgee., have it taxed, except under special circumstances; but, as between himself & the mtgee., he may have it taxed, under the third party clause of Solicitors Act, 1843 (c. 73), s. 38.—*Re ABBOTT* (1861), 4 L. T. 576.

Annotations:—Distd. *Re Kellock* (1887), 56 L. T. 887. **Refd.** *Re Longbotham* (1901), 73 L. J. Ch. 681.

1414. ———.]—*Re KELLOCK*, No. 1422, *post*.

1415. ———.]—*Re ROBERTSON*, No. 1392, *ante*.

(c) *Where Persons Jointly Liable.*

See Solicitors Act, 1843 (c. 23), s. 37.

1416. Whether delivery to one sufficient.]—

(1) Although an attorney shows his client a copy of his bill, explaining the different charges to him, in the reasonableness of which the client acquiesces, the attorney is still bound to leave a copy of the bill with him, according to the provisions of 2 Geo. 2, c. 23, before he can maintain an action upon it.

(2) But where several are jointly liable to an attorney for business done, the delivery of a copy of the bill to one of them is sufficient to maintain a separate action against any of the others.—*CROWDER v. SHEE* (1808), 1 Camp. 437; 170 E. R. 1013.

Annotation:—As to (2) Follid. *Oxenham v. Lemon* (1823), 2 Dow. & Ry. K. B. 461.

1417. — Person from whom instructions received—Managing business for both.]—Where two persons are liable to an attorney for business done on their joint retainer, it is sufficient for him to deliver a copy of his bill in pursuance of 2 Geo. 2, c. 23, to one of them from whom he received his instructions & to whom the management of the business was left by the other; *aliter* of a delivery to that one who did not intermeddle; for he cannot be considered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill.—*FINCHETT v. HOW* (1809), 2 Camp. 275; 170 E. R. 1154.

Annotations:—Follid. *Oxenham v. Lemon* (1823), 2 Dow. & Ry. K. B. 461. **Refd.** *Pocock v. Russen* (1829), Mood. & M. 357.

1418. — Several persons interested in different suits—Individually interested in all suits.]—Several persons being deeply interested in different suits at law, which were similar in their nature, & employed the same attorney to conduct the whole business. When any one of them called on the attorney he spoke about all the other cases, as well as that in which he was individually interested, & gave general directions:—*Held*: a sufficient compliance with 2 Geo. 2, c. 23, s. 23, for the attorney to deliver one bill to one of the parties, to entitle him to maintain an action against all of them for the amount of his costs.—*OXENHAM v. LEMON* (1823), 2 Dow. & Ry. K. B. 461; 1 L. J. O. S. K. B. 133.

Annotation:—Refd. *Tate v. Hitchins* (1849), 7 C. B. 875.

PART VI. SECT. 4, SUB-SECT. 2.—
D. (c).

h. Right to deliver separate bills charging taxation items on each bill.]—*Re BELFAST WATER COMRS.*, *Ex p.*

ORR, SAME, *Ex p.* *USHER*, SAME, *Ex p.* *CONNOR* (1888), 21 L. R. Ir. 342.—**IR.**

PART VI. SECT. 4, SUB-SECT. 2.—E.
k. Nominal plaintiff.]—A client who

1419. — Promoters of joint stock company.]—*PHIPPS v. DAUBNEY*, No. 1495, *post*.

1420. — —.]—*MANT v. SMITH*, No. 1492, *post*.

1421. — Pleading.]—In an action on an attorney's bill against two defts., a plea by one of them, that no bill had been delivered to him or left at his dwelling-house, is bad on special demurrer.—*KITELEY v. SCOFIELD & HARVEY* (1842), 6 Jur. 1059.

Annotation:—Refd. *Tate v. Hitchins* (1849), 7 C. B. 875.

E. Persons entitled to Delivery.

See Solicitors Act, 1843 (c. 73), ss. 37–40.

Delivery to party to be charged therewith.]—*See Sub-sect. 2, D., post*.

1422. General rule.]—(1) The solrs. of some mtgors. who were selling the property mortgaged applied, in the scope of their employment, to the solrs. for the mtgees. for their bill of costs in relation to their services upon the occasion of the sale, which the mtgors.' solrs. had, on behalf of their clients, undertaken to pay. The mtgees.' solrs. sent in a document to the solrs. for the mtgors. which was held to be a bill of costs. A petition was presented to tax the bill, a special application being necessary, as the mtgees.' solrs. claimed to withdraw the bill:—*Held*: apart from the undertaking, there had been sufficient delivery without delivery to the mtgees., & the bill could not be withdrawn.

(2) Solicitors Act, 1843 (c. 73), says that the bill is to be delivered unto the party to be charged therewith, but it is quite clear that that party may appoint an agent to receive it (*STIRLING, J.*).

(3) The right of the client is to obtain the bill from his solr., & the right of the third party is to obtain & get a copy of the bill upon payment of the costs for the purposes of reference (*STIRLING, J.*)—*Re KELLOCK* (1887), 56 L. T. 887; 35 W. R. 695.

1423. Residuary legatee—Solicitor acting for trustees & executors.]—*Re BLACKMORE, Re BILLING, Re SPIKE*, No. 1367, *ante*.

1424. One of two clients—Though costs paid by other client.]—*PAINTER v. LINDSELL*, No. 1781, *post*.

1425. Mortgagor—From solicitor of mortgagee.]—*Ex p.* *FORD* (1852), 20 L. T. O. S. 111.

1426. Mortgagee—From solicitor of mortgagor—Undertaking to deliver bill.]—A solr. of a mtgor. ordered, upon petition, to deliver to a mtgee. a copy of his bill of costs, in pursuance to his undertaking.—*Re BAILEY* (1865), 34 Beav. 392; 55 E. R. 686.

1427. — Though amount charged against mortgagor—Mortgagor no party to proceedings.]—*Re FOSTER, BARNATO v. FOSTER*, No. 1356, *ante*.
See also, Nos. 1413–1415, *ante*.

1428. Creditor obtaining judgment for administration of testator's estate — "Party interested"—Bills paid by testator's executor.]—A creditor who has obtained judgment for the administration of the estate of deceased testator is a "party interested" within Solicitors Act, 1843 (c. 73), s. 39, & is therefore entitled to an order for delivery & taxation of bills of costs which have been paid by testator's exor.—*Re JONES & EVERETT*, [1904] 2 Ch. 363; 91 L. T. 286; 53 W. R. 59; 48 Sol. Jo. 624; *sub nom.* *Re ROBERTS-JONES & EVERETT*, 73 L. J. Ch. 706.

1429. Action settled by plaintiff's solicitor in payment of debt & costs—On request of defendant—

is merely a nominal pltf., being in this case the person in whose name an election petition has been filed, & who lent his name for the purpose of convenience, & was not held responsible

Whether defendant entitled to delivery.]—Pltf., an attorney, employed by A. to bring an action against deft., settled it at the request of deft., upon the terms of paying debt & costs. In an action for the amount claimed in respect of this settlement:—*Held*: pltf. was not the attorney of deft., so as to require the delivery of a signed bill within Solicitors Act, 1843 (c. 73), s. 37.—*TOWNSEND v. SURGROVE* (1847), 2 New Pract. Cas. 442; 10 L. T. O. S. 112.

F. Time for Delivery.

See Solicitors Act, 1843 (c. 73), s. 37; Legal Practitioners Act, 1875 (c. 79), s. 2.

1430. General rule—One month before action—Object of rule.]—*ANON.* (1773), Lofft, 341; 98 E. R. 684.

1431. Application of rule—Obtaining bankrupt's certificate.]—An attorney's bill for obtaining a bkpt.'s certificate, must be signed & delivered a month before he can sue thereon.—*COLLINS v. NICHOLSON* (1810), 2 Taunt. 321; 127 E. R. 1101.

Annotations:—*Refd.* *Wilkinson v. Diggell* (1823), 1 B. & C. 158; *Smith v. Wattleworth* (1825), 3 L. J. O. S. K. B. 244; *Harper v. Williams* (1841), 2 Man. & G. 815.

1432. — Bill containing taxable items.]—Charges by an attorney for attending & advising a party in a suit, are taxable charges; & though they be the only taxable charges in a bill of many items, the attorney cannot recover any part of his demand without leaving his bill with deft. a month before action, according to 2 Geo. 2, c. 23.—*SMITH v. TAYLOR* (1831), 7 Bing. 259; 5 Moo. & P. 66; 9 L. J. O. S. C. P. 88; 131 E. R. 100.

Annotation:—*Distd.* *Brooks v. Brooks, Re Rice* (1837), 6 L. J. C. P. 243.

1433. — County court business.]—(1) An attorney's bill for business done in the county ct. is within 2 Geo. 2, c. 23, s. 23, & must be delivered to the client one month before action brought.

(2) A charge for attesting a replevin bond is a charge relating to a suit in that ct.

(3) An attorney not having delivered any bill to his client before action brought, but particulars of demand, containing some taxable items, after action brought, cannot recover for an item not taxable if such item be in respect of business done, or money paid to his client's use, in his character of attorney.—*WARDLE v. NICHOLSON* (1833), 4 B. & Ad. 469; 1 Nev. & M. K. B. 355; 2 L. J. K. B. 76; 110 E. R. 532.

Annotation:—*Generally, Refd.* *Nicholas v. Hayter* (1834), 2 Ad. & El. 348.

1434. Delivery of bill in parts.]—*BEARDSALL v. CHEETHAM*, No. 1446, *post*.

1435. How month reckoned—Exclusive of days on which bill delivered or action brought.]—Under 2 Geo. 2, c. 23, s. 23, which directs that no attorney

shall commence an action for his fees until the expiration of one month or more after he shall have delivered his bill, the month is to be reckoned exclusively of the days on which the bill is delivered & the action brought.—*BLUNT v. HESLOP* (1838), 8 Ad. & El. 577; 9 Dowl. 982; 3 Nev. & P. K. B. 553; 1 Will. Woll. & H. 461; 7 L. J. Q. B. 216; 2 Jur. 542; 112 E. R. 957.

Annotations:—*Refd.* *Young v. Higgon* (1840), 6 M. & W. 49; *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204; *Browne v. Black*, [1912] 1 K. B. 316.

1436. — When bill posted—Clear calendar month after receipt.]—A bill is not "sent by the post" [under Solicitors Act, 1843 (c. 73), s. 37] to the party to be charged one month before action unless it was posted at such a time that it would in the ordinary course of post be delivered to the party to be charged one clear calendar month before the commencement of the action.—*BROWNE v. BLACK*, [1912] 1 K. B. 316; 81 L. J. K. B. 458; 105 L. T. 982; 28 T. L. R. 119; 56 Sol. Jo. 144, C. A.

Annotation:—*Consd.* *Retail Dairy Co. v. Clarke*, [1912] 2 K. B. 388.

1437. Effect of mistake in date of items.]—A mistake in the date of items in an attorney's bill, which does not mislead, does not vitiate the delivery of the bill a month before action brought.—*WILLIAMS v. BARBER* (1813), 4 Taunt. 806; 128 E. R. 548.

Annotation:—*Refd.* *Re Grant, Bulcraig*, [1906] 1 Ch. 121.

1438. Application to bring action within month—Bill taxable in inferior court.]—*Re DUCKERS* (1906), 50 Sol. Jo. 411.

G. Place of Delivery.

See Solicitors Act, 1813 (c. 73), s. 37.

1439. "Last known place of abode"—Client with another known place of abode.]—Previous to the bringing an action on an attorney's bill, it is sufficient under 2 Geo. 2, c. 23, s. 23, to deliver a bill at deft.'s last known apparent place of abode at the time when the bill was delivered. It is not sufficient for deft. to show that he had another known place of abode, subsequent to the delivery of the bill.—*WADESON v. SMITH* (1816), 1 Stark. 324; 171 E. R. 486, N. P.

1440. — No permanent place of abode.]—*HANROTT'S TRUSTEES v. EVANS* (1887), 4 T. L. R. 128.

1441. — Evidence of delivery at—Delivery at place not shown to be abode of client—Bill handed by client to another solicitor for taxation.]—(1) It is not sufficient evidence of delivery of a signed bill at deft.'s abode, that a signed bill is delivered at a particular place not shown to be his abode, & that he afterwards gives this to his present attorney, who attends the taxation of costs.

by the attorney for his costs, is not entitled to an order on the attorney for delivery of his bill of costs, etc.—*Re ATTORNEYS* (1876), 1 P. R. 319.—*CAN.*

PART VI. SECT. 4, SUB-SECT. 2.—F.

1. How month reckoned—Lunar month.]—The month required by 2 Geo. 2, c. 23, for the delivery of an attorney's bill is a lunar, & not a calendar month, & the day of the service of the bill is included.—*BERRY v. ANDRUSS* (1835), 3 O. S. 615.—*CAN.*

m. Where one attorney sues another.]—Where one attorney sues another, it is not necessary to deliver a bill one month before action.—*DRAPER v. BEASLEY* (1850), 8 U. C. R. 260.—*CAN.*

n. Right to sue again if bill not delivered before first action.]—If a

solr.'s action for fees for professional services, though heard on the merits, fails on the ground of non-delivery of his bill before action as required by Legal Professions Act, s. 75, he may deliver a bill, & being a new action to which the defence of *res judicata* would not apply.—*BANTON v. AMAR CHAND* (B. C.), [1921] 3 W. W. R. 368.—*CAN.*

o. Whether after lapse of three years.]—A solr. agreed to act for a client in a certain action until the client obtained another solr., which, however, he never did, & the solr. continued to act for him until the action was concluded:—*Held*: the solr. having received a payment from the client, this was a payment on account only & not a settlement of the costs under a special contract, & the solr. was entitled to render & collect a bill for

his solr. & client costs even though he had allowed more than three years to elapse since the completion of the action.—*Re LEGAL PROFESSIONS ACT & BECK*, [1925] 3 W. W. R. 64.—*CAN.*

p. Defendant in Ireland—Application of Solicitors Act.]—An English solr. suing in this country a deft. domiciled here, for costs incurred in doing business in England, is not bound to serve his bill of costs, pursuant to 6 & 7 Vict. c. 74, s. 37 (Eng.), one month prior to bringing the action.—*WHITE v. CHICHESTER* (1846), 9 I. L. R. 409.—*IR.*

q. Irish solicitor suing in England.]—An Irish solr. suing in England a solr. domiciled there, for business done in Ireland, is not bound to serve his bill of costs one month before the bringing of the action.—*GUINNESS v. ALLEN* (1846), 9 I. L. R. 412.—*IR.*

Sect. 4.—Bill of costs: Sub-sect. 2, G., H., I., J. & K.; sub-sect. 3.]

(2) An attorney may prove his bill under a commission of bkpt. without delivering a signed bill.—*EICKE v. NOKES* (1829), Mood. & M. 303; 173 E. R. 1168, N. P.

Annotations:—As to (1) Distd. Eglington v. Cumberledge (1847), 1 Exch. 271. *As to (2) Rejd. Brown v. Tibbits* (1862), 11 C. B. N. S. 855. *Generally, Rejd. Dwyer v. Collins* (1852), 7 Exch. 639.

1442. "Office of business"—Place where client or agent carrying on business.]—BLANDY v. DE BURGH, No. 1444, post.

1443. Where work done for provisional committee—At office of company—Or to agent—Not private business address of former member.]—

(1) In an action by the solrs. of a proposed railway co., against A., a member of the provisional committee, for work done by them for the co., before, whilst, & after A. was a member, a delivery of a signed bill, addressed to the committee, to B., an earlier member of the committee, at his place of business, & containing some items incurred before A. became a member, is not a sufficient delivery within Solicitors Act, 1843 (c. 73), s. 37, to charge A.

(2) The bill should be delivered either at the office of the co., or at least to some person who can reasonably be considered to represent the committee.—*EDWARDS v. LAWLESS* (1848), 6 C. B. 329; 6 Dow. & L. 105; 5 Ry. & Can. Cas. 357; 17 L. J. C. P. 293; 11 L. T. O. S. 310; 136 E. R. 1278.

1444. — & scheme abandoned—Office of provisional committee.]—In 1845, certain persons, one of whom was deft., formed themselves into a committee for establishing a railway co. They took offices in Moorgate Street, where a brass plate was put up with the name of the co. engraved thereon. In Nov. 1845, the co. was provisionally registered. In Jan. 1846, the scheme was abandoned, & deft. interfered no further with it. A sub-committee was afterwards appointed, by whom it did not appear, for the purpose of ascertaining & arranging the claims upon the committee men. In Sept. 1846, plff., a local attorney & agent of the co., delivered a signed bill at the office in Moorgate Street, addressed to "the provisional committee of the co.":—*Held*: (*WILDE, C.J. & VAUGHAN-WILLIAMS, J.*) this was not a sufficient delivery at the "office of business" of deft., to charge him within Solicitors Act, 1843 (c. 73), s. 37; (*COLTMAN, J. & MAULE, J.*) it was.—*BLANDY v. DE BURGH* (1848), 6 C. B. 623; 6 Dow. & L. 412; 5 Ry. & Can. Cas. 361; 18 L. J. C. P. 2; 12 L. T. O. S. 217; 12 Jur. 1005; 136 E. R. 1393.

1445. At address given by client—At office of third party.]—A person who had no place of business of his own, directed communications to be addressed & sent to him at his attorney's office, where he occasionally called & wrote letters. An attorney's bill of costs was addressed & left there for him more than a month before action brought, yet he did not actually receive it but a fortnight before action:—*Held*: there was evidence for the jury to find that the bill of costs was properly left there a month before action in compliance with Solicitors Act, 1843 (c. 73), s. 37.—*SPYER v. BERNARD* (1863), 2 New Rep. 172; *sub nom. SPIER v. BERNARD*, 8 L. T. 396.

H. Delivery of More than One Bill—Delivery in Parts.

1446. Right to deliver bill in parts.]—Where an attorney did different kinds of professional work

for a client, & after all the business was transacted sent in a bill for one part of the business, & subsequently sent in a bill for the other part, & commenced an action for the first part of the business before the expiration of the month in respect of the delivery of the second bill, & after the expiration of that month commenced an action for the other part, the ct. made an order for the consolidation of the two actions.—*BEARDSALL v. CHEETHAM* (1858), E. B. & E. 243; 27 L. J. Q. B. 367; 31 L. T. O. S. 115; 6 W. R. 504; 120 E. R. 499.

1447. — Or successive bills—Parts of one bill.]—*COBBETT v. WOOD*, No. 1530, post.

1448. Whether solicitor entitled to deliver more than one bill—Several matters forming one transaction.]—If various matters form but one transaction, some being at law, & others for conveyancing, one bill only ought to be made out.

The ct. has no power to refer an attorney's bill to taxation, at the prayer of a person who is not the original client, but who has ultimately paid the bill.—*DOE d. PALMER v. ROE* (1835), 4 Dowl. 95; 1 Har. & W. 339.

1449. Delivery of several bills by London agent—Whether treated as one at option of country solicitor.]—London solrs. acted as agents in London for a country solr. during the years 1877 to 1884 inclusive. The agency was terminated in 1884. During the period of the agency the London agents delivered to the country solr., generally once a year but sometimes oftener, detailed bills of the charges which they claimed against him in each of the actions or other matters in which they had acted for him. They also delivered to him a cash account for each year, in which he was credited with all payments made by him to them, & all moneys received by them on his behalf, & was debited with all payments made by them to him or on his behalf, & with the gross amounts of the several bills of charges which had been delivered. The balance appearing to be due from him on each account but the last was carried on to the next account. Some of the actions continued during several years, & one of them, *Rhodes v. Jenkins*, continued during the whole period of the agency, & was not then concluded. After the close of the agency the country solr. claimed a taxation of the whole of the bills:—*Held*: the bills of costs in *Rhodes v. Jenkins*, notwithstanding the fact that all the costs in it had not yet been taxed, being in fact separate bills, could not be treated as one continuous bill, at the option of the country solr.—*Re NELSON, SON & HASTINGS* (1885), 30 Ch. D. 1; 54 L. J. Ch. 998; 53 L. T. O. S. 415; 33 W. R. 615; 1 T. L. R. 507, C. A.

Annotations:—Consd. Re Johnson & Weatherall (1888), 37 Ch. D. 433. *Expld. Re Romer & Haslam*, [1893] 1 Q. B. 286. *Rejd. Re Massey* (1910), 54 Sol. Jo. 50.

1450. Separate bills delivered simultaneously for separate transactions—Whether treated as one bill.]—*Re WARD*, No. 2290, post.

Delivery of amended bill.]—See Sub-sect. 6, post.

I. Proof of Delivery.

See Solicitors Act, 1843 (c. 73), s. 37.

1451. Proof of posting—Letter placed in box cleared by postman.]—Proof of the delivery of a letter inclosing a bill of costs to a bellman, or that the letter was put into a box in the attorney's office, & that the bellman called every afternoon & took all letters found in that box, is sufficient proof of a "posting" of such letter within Solicitors Act, 1843 (c. 73).—*SKILBECK v. GARBETT*

(1845), 7 Q. B. 846; 14 L. J. Q. B. 338; 5 L. T. O. S. 265; 9 Jur. 939; 115 E. R. 706.

—See, generally, EVIDENCE, Vol. XXII., p. 368, Nos. 3753–3762.

Evidence of delivery at place of abode.]—See No. 1441, *ante*.

1452. Indorsement of delivery of copy on original.]—A bill with an indorsement upon it, “Mar. 4, 1815, delivered a copy to C. D.,” which indorsement is proved to be in the handwriting of a deceased clerk of pltf.’s, whose duty it was to have delivered a copy of the bill, & proved to have existed at the time of the date, is evidence to prove the delivery of the bill.—**CHAMPNEYS v. PECK** (1816), 1 Stark. 404; 171 E. R. 511, N. P.

*Annotation:—*Reid. Doe d. Patteshall v. Turford (1832), 3 B. & Ad. 890.

Admissibility of secondary evidence of bill—Notice to produce.]—See EVIDENCE, Vol. XXII., p. 249, Nos. 2299–2302.

J. Effect of Non-Delivery.

1453. Debt not barred—Action to recover not maintainable.]—To *assumpsit* on an attorney’s bill of costs, deft. pleaded a set-off, & in support of that plea, put in an account furnished to him by pltf. Pltf.’s credit side of the account contained his claim for costs, but of this no signed bill had been delivered, & deft. therefore contended that the debit side only of pltf.’s account could be looked to:—**Held:** the whole account was evidence for the jury, as the non-delivery of a signed bill does not bar the debt, but merely, if insisted on, prevents its recovery by action.—**HARRISON v. TURNER** (1847), 10 Q. B. 482; 16 L. J. Q. B. 295; 11 Jur. 817; 116 E. R. 184.

*Annotation:—*Reid. Brown v. Tibbits (1862), 11 C. B. N. S. 855.

Whether delivery condition precedent—To proceedings by solicitor.]—See Sub-sect. 2, A. (b) i., *ante*.

—To solicitor exercising right of setting off costs—In action by client against solicitor.]—See Sub-sect. 2, A. (c), *ante*.

K. Plea of Non-Delivery.

1454. Must be specially pleaded.]—In an action on an attorney’s bill non-delivery of the bill must be pleaded, or pltf. need not prove the delivery.—**MOORE v. DENT** (1835), 1 Mood. & R. 462, N. P.

*Annotation:—*Cnsd. Beck v. Mordaunt (1835), 2 Scott, 178.

1455. —.]—(1) In an action on an attorney’s bill, deft. cannot, under the general issue, insist that a proper bill of costs was not delivered.

(2) It would be convenient that attorneys should state upon their bills the name of the ct. in which the business is done. But whether it be necessary for them to do so need not be determined now; for we think deft.’s plea does not entitle him to take advantage of the omission. It has been frequently ruled that a defence of this nature must be specially pleaded (**LORD DENMAN, C.J.**).—**JANE v. GLENNY** (1837), 7 Ad. & El. 83; 2 Nev. & P. K. B. 258; Will. Woll. & Dav. 479; 6 L. J. K. B. 218; 1 Jur. 475; 112 E. R. 402.

*Annotation:—*As to (2) Reid. Lewis v. Primrose (1844), 6 Q. B. 265.

PART VI. SECT. 4, SUB-SECT. 2.—K.

r. Whether plea to merits.]—Non-delivery of the bill is not a plea to the merits.—**DEMPSKY v. WINSTANLEY** (1849), 6 U. C. R. 409.—**CAN.**

PART VI. SECT. 4, SUB-SECT. 3.

t. Whether court will order.]—Solrs. having delivered an unsigned bill

of costs, the clients applied for & obtained an order that the solrs. should deliver a bill & for taxation of the same when delivered. Under this order the solrs. delivered a bill in which certain charges were made larger than they had been in the previous unsigned bill, & some new items were charged. Objection was taken on the part of the clients that nothing more should

1456. —.]—In debt for an attorney’s bill, deft., under the plea of “never indebted,” cannot object that pltf. has not proved that he delivered a signed bill one month before action brought. He must raise that objection by way of special plea.—**ROBINSON v. ROLAND** (1838), 6 Dowl. 271; 1 Will. Woll. & H. 74; 3 Jur. 136.

1457. Must be pleaded at original hearing—Not on further directions.]—**PRITCHARD v. DRAPER**, No. 1325, *ante*.

1458. Must negative delivery in terms of statute.]—A plea to an action on an attorney’s bill that no signed bill had been delivered, must negative all the modes of delivery pointed out by Solicitors Act, 1843 (c. 73).—**FLOWER v. NEWTON** (1847), 9 L. T. O. S. 312; 11 Jur. 875.

1459. — Sufficiency of plea by one of several defendants.]—*Assumpsit* against several defts. for work & labour by pltf. as an attorney, with counts for money paid, etc. Plea, by one of defts., to the whole declaration, that the action was commenced, after Solicitors Act, 1843 (c. 73), for the recovery of fees, charges, & disbursements due to pltf. as an attorney, as in the first count mentioned, & that no signed bill had been delivered to deft., or sent by the post to, or left for him at, his counting house, office of business, dwelling-house, or last known place of abode. On special demurrer:—**Held:** the plea sufficiently negatived the delivery of a bill of costs within the terms of the statute.—**TATE v. FITCHINS** (1849), 7 C. B. 875; 7 Dowl. & L. 123; 18 L. J. C. P. 256; 13 L. T. O. S. 188; 14 Jur. 20; 137 E. R. 347.

1460. Cannot be pleaded after suffering judgment by default—Plea as to merits.]—Deft. in an action on an attorney’s bill being let in to plead on an affidavit of merits after suffering judgment by default, is not permitted to plead that no bill has been delivered pursuant to the statute.—**BECK v. MORDANT** (1835), 2 Bing. N. C. 140; 4 Dowl. 112; 1 Hodg. 196; 2 Scott, 178; 132 E. R. 55.

*Annotation:—*Dstd. Wilkinson v. Page (1844), 6 Man. & G. 1012.

1461. “Issuable plea.”]—In an action on an attorney’s bill a plea of non-delivery of a signed bill is an issuable plea.—**WILKINSON v. PAGE** (1844), 6 Man. & G. 1012; 7 Scott, N. R. 961; 13 L. J. C. P. 121; 2 L. T. O. S. 401; 8 Jur. 293; 134 E. R. 1202.

*Annotation:—*Mentd. Burch v. Leake (1844), 8 Scott, N. R. 66.

1462. Cannot be pleaded after bill taxed & allocatur made.]—Where an attorney’s bill has been taxed & the master has made his allocatur, a judge will not allow deft., in action on such bill, to plead that no signed bill has been delivered, in addition to pleas of *nunquam indebtedus* & payment.—**WHALLEY v. GLOVER** (1850), 3 Car. & Kir. 13, N. P.

SUB-SECT. 3.—REDELIVERY OF BILL.

1463. Whether court will order—Lapse of time—No suggestion of fraud, mistake or overcharge.]—After the lapse of nine years the ct. will not compel an attorney to redeliver bills for business done by him, without some suggestion of fraud,

be allowed on taxation in respect to any item appearing in the new bill than was charged in respect of it in the first bill, nor should new items be allowed:—**Held:** by applying for an order for delivery of a bill the clients must be considered to have consented to the old bill being withdrawn; & the objection could not prevail.—**Re WALSH & FRITH** (1904), 24 C. L. T. 57, 7

Sect. 4.—Bill of costs: Sub-sects. 3 & 4, A. & B.; sub-sect. 5, A.]

mistake or overcharge.—*MANNING v. BROWN* (1834), 3 Dowl. 31.

SUB-SECT. 4.—SIGNATURE OF BILL.

A. In General.

See Solicitors Act, 1843 (c. 73), s. 37.

1464. Necessity for signature.]—*ELLISON v. KIRBY* (1730), Cooke, Pr. Cas. 60; 125 E. R. 957.

1465. — Business done at quarter sessions.]—*CLARKE v. DONOVAN*, No. 1299, *ante*.

1466. — Unsigned bill for conveyancing business—Delivered with signed bill for business in court.]—If an attorney deliver a bill to his client duly signed, for business in ct., & another separate bill for conveyancing, not signed, in an action for the amount of the conveyancing bill, its not being signed is no objection at the trial; but a judge would, on application, order both bills to be taxed.

The question here is, whether an attorney is bound by the statute to deliver a bill of non-taxable matters. I think I cannot enlarge the words of the Statute " (TINDAL, C.J.).—*BECKE v. PENN* (1835), 7 C. & P. 397; 173 E. R. 177, N. P.

See, now, Solicitors Act, 1843 (c. 73), s. 37.

1467. Object of provision requiring signature—Protection of client.]—*Re PENDER*, No. 1711, *post*.

1468. — Client may waive omission or treat bill as nullity—Effect of waiver.]—A solr. who delivers an unsigned bill of costs is bound by it; but his client may either treat it as a nullity or waive the want of signature. & adopt it; though after such waiver the client cannot treat the bill as non-delivered.

After more than twelve months from the delivery of unsigned bills, the client applied for their taxation:—*Held*: he was not entitled, except on showing sufficient "special circumstances."

The possession of the papers in a cause is not a sufficient special circumstance to warrant the taxation of a bill delivered more than twelve months.—*Re GEDYE* (1851), 14 Beav. 56; 20 L. J. Ch. 410; 17 L. T. O. S. 149; 15 Jur. 851; 51 E. R. 208.

1469. Unsigned bills accompanied by signed letter—Letter expressly referring to bills.]—*Re BUSH*, No. 1398, *ante*.

1470. — — —.]—Where an unsigned bill of costs was sent by an attorney, which did not on the face of it charge any person, but was accompanied by a letter, signed by the attorney, referring to the bill, & charging debt. with the amount of it:—*Held*: the letter & the bill must be read together, & this was a sufficient delivery within Solicitors Act, 1843 (c. 73), s. 37.—*TAYLOR v. HODGSON* (1845), 3 Dow. & L. 115; 14 L. J. Q. B. 310; 10 Jur. 355.

Annotations:—Distd. Welsh v. Silwell (1847), 11 Jur. 471.

Refd. Martindale v. Falkner (1846), 2 C. B. 706.

See, also, Nos. 1472, 1477, 1478, post.

O. L. R. 41; 2 O. W. R. 220, 268, 409, 618, 1082; 3 O. W. R. 1; 4 O. W. R. 137, 302.—**CAN.**

a. — Bill with fuller particulars.]—C., a solr., was employed by U. & other aboriginal natives, to act for them in prosecuting a land claim in the Native Land Ct. An agreement was signed by U., fixing the amount of brief & retainer fees, & fixing a fee for every day that C. should be engaged in any matter or thing pertaining to the business of the claim. The bill did not purport to be a solr.'s bill of costs, & was not signed. On affidavit C. stated that he was retained & acted as Native agent only, & not as solr.

The bill of costs was paid more than a month before the summons to refer to taxation:—*Held*: the bill was taxable, & the solr. have time to deliver a bill with fuller particulars.—*Re CASH, Ex p. UTIKU POTAKA* (1880), O. B. & F. 92.—**N. Z.**

PART VI. SECT. 4, SUB-SECT. 4.—A.

1464 i. Necessity for signature.]—*Re FALLS* (1891), 29 L. R. Ir. 1.—**IR.**

b. What amounts to signature—Bills made out in attorney's handwriting.]—A general account, including the bill of costs delivered by an attorney to his client, though made out in the hand-

1471. Signature on envelope.]—*BLAKE v. HUMMEL* (1884), as reported in 1 T. L. R. 22.

1472. Signature by assignee—Bill of costs assigned by solicitor—Notice of assignment to client.]—A solr. assigned his bill of costs & the right to recover on it, & the assignee gave notice of the assignment & delivered the bill to the party to be charged inclosed in a letter signed by himself. After the expiration of a month he brought an action in his own name on the bill of costs:—*Held*: pltf. was an assignee within Solicitors Act, 1843 (c. 73), s. 37, & was entitled to maintain the action.—*INGLE v. M'CUTCHAN* (1884), 12 Q. B. D. 518; 53 L. J. Q. B. 311, D. C.

Annotation:—Consd. Briscoe v. Briscoe, [1892] 3 Ch. 543.

1473. Signature by clerk—Solicitor physically incapacitated—Hand guided over name.]—Where a solr., whose right hand was paralysed, had his hand guided over his name to a bill of costs by a clerk who had written the name:—*Held*: a sufficient subscription of the bill to satisfy Solicitors Act, 1843 (c. 73), s. 37.—*ANGELL v. TRATT* (1883), Cab. & El 118.

Omission of signature—Client's right to tax not affected.]—*See Sect. 5, sub-sect. 3, C. (c) i., post.*

B. Solicitors in Partnership.

1474. Signature in firm name—Without adding Christian names.]—When two persons are in partnership as attorneys, it is sufficient, under 3 Jac. 1, c. 7, & 2 Geo. 2, c. 23, if their bill for business done is signed in the name of the firm, without the Christian name of either partner.—*SMITH v. BROWN* (1831), 1 Cr. & J. 542; 5 C. & P. 94; 1 Tyr. 486; 9 L. J. O. S. Ex. 151; 148 E. R. 1538.

Annotation:—Apld. Owen v. Scales (1842), 10 M. & W. 657

1475. Signature by one on behalf of both.]—A bill for work done by two attorneys in partnership, was delivered signed by one of them, in the following terms, "This is our bill. For self & R., J.:—*Held*: this was a sufficient signature.—*OWEN v. SCALES* (1842), 10 M. & W. 657; 2 Dowl. N. S. 304; 12 L. J. Ex. 26; 6 Jur. 1000; 152 E. R. 635.

1476. Alteration in firm—Work done by old & new firm—Bill signed by new firm.]—Where attorneys bring an action upon their signed bill, which bill contains some items which they are not entitled to recover, the action may be maintained for the residue.

A. & B. were partners as attorneys, & as such transacted business for C., a client. They then took D. into partnership, & A. went out of the firm, which, however, still retained his name. The new firm also transacted business for C., & a signed bill having been delivered in the names of A., B. & D., & an action brought to recover the whole amount due in respect of the business performed by both firms, & pltf., having at the trial abandoned all the items due to the old firm of A.

writing & headed in the name of the attorney, does not amount to a signing of the separate bills under the statute.—*KERR v. BURNS* (1860), 4 All. 604.—**CAN.**

c. —.]—Pltf., a solr., had furnished to debt., his client, a bill of costs not signed by the former. An arrangement having taken place, pltf. agreed to accept a smaller sum, & wrote the following memorandum at foot of the bill of costs: "The amount of these costs are settled for — G. W. Allen":—*Held*: a sufficient subscription under 12 & 13 Vict. c. 53, s. 2.—*ALLEN v. MURPHY* (1859), 9 I. C. L. R. 305.—**IR.**

& B. alone :—*Held* : they were entitled to recover the residue in that action.—*PILGRIM v. HIRSCHFELD* (1863), 3 New Rep. 36 ; 9 L. T. 288 ; 12 W. R. 51.

Annotation :—*Distd. Penley v. Anstruther* (1883), 8 L. J. Ch. 367.

1477. — Unsigned bill in covering letter of new firm.]—A bill of costs for professional work done in part by one firm of solrs. & in part by another firm who have succeeded to the practice of the first firm is properly signed & delivered so as to enable the new firm to sue for & recover the whole costs if, though itself unsigned, it is delivered together with a letter signed by the new firm referring to the bill.

Professional work was done by a firm, which consisted at first of R. & P., & afterwards of P. & G. practising under the name of R., P. & G., the business & debts of R. & P. having been transferred to R., P. & G. Bills for the costs of the whole work were delivered unsigned, but inclosed with a letter signed by R., P. & G. referring to the bills :—*Held* : the bills were properly signed & delivered to enable R., P. & G. to sue for & recover the whole amount, as to the earlier items, as assignees of R. & P. ; as to the later items, in their own right.—*PENLEY v. ANSTRUTHER* (1883), 52 L. J. Ch. 367 ; 48 L. T. 664.

Annotations :—*Appld. Ingle v. M'Cutchan* (1884), 12 Q. B. D. 518 ; *McLean v. Weaver* (1921), 40 T. L. R. 663.

1478. Assignment to firm of costs previously due to member—No notice of assignment to client—Unsigned bill in firm name with letter from solicitor—Effect of addition of firm name.]—Where a solr. takes a partner & assigns to the new firm the right to recover costs owing to him but no notice of the assignment is given to the client, the bill of costs may be sued on by the solr. who did the work, even if it be made out in the name of the firm & not signed, provided that a covering letter is signed by the solicitor who did the work ; & the addition to the letter of the signature of the firm does not make the bill a bad bill.—*MCLEAN v. WEAVER* (1921), 41 T. L. R. 47, C. A.

See, also, Nos. 1469, 1470, ante.

SUB-SECT. 5.—FORM AND CONTENTS OF BILL.

A. In General.

See Solicitors Act, 1813 (c. 73), s. 37.

1479. Information for purposes of taxation—Sufficient information.]—(1) Although an attorney's bill contains items not specified according to the 2 Geo. 2, c. 23, s. 23, he may still recover the portion of his bill, as to which the provisions of the statute have been complied with.

Seven items in the bill were stated in the aggregate ; but two only were found by the arbitrator, to whom the cause had been referred, to be for business done at law or in equity :—*Held* : pltf. might recover the five other items.

(2) An attorney is bound to deliver to his client a bill, containing his whole charges : a delivery of a bill, containing only the items of the extra costs, & omitting the items of taxed costs which have been received from the other side, is not a sufficient compliance with the statute.

The third question is, whether the charges in respect of extra costs are sufficiently stated ; & it appears to me they do not comply with the requisites of the statute. Those charges by

themselves are not intelligible to the officer of the ct. An attorney's bill, generally speaking, ought to give a history of the causes, so as to enable the officer to judge if the propriety of the various items of which it is composed ; but if part only of the charges are set forth he has not sufficient materials whereon to form his judgment. A delivery of a bill containing merely the extra costs is certainly not according to the general practice, which is for the attorney to deliver a bill of the whole costs giving his client credit for the sum that has been received (*TINDAL, C.J.*).—*WALLER v. LACY* (1840), 8 Dowl. 563 ; 1 Man. & G. 54 ; 1 Scott, N. R. 186 ; 9 L. J. C. P. 217 ; 4 Jur. 435 ; 133 E. R. 245.

Annotations :—*As to* (1) *Refd. Ivimey v. Marks* (1847), 16 M. & W. 843 ; *Williams v. Griffith* (1849), 3 Exch. 335 ; *Cook v. Gillard* (1852), 1 E. & B. 26 ; *Haigh v. Ousey* (1857), 7 E. & B. 578 ; *Pigot v. Cadman* (1857), 1 H. & N. 837 ; *Sidwell v. Mason* (1857), 2 H. & N. 306 ; *Pilgrim v. Hirschfeld* (1863), 3 New Rep. 36 ; *Smith v. Betty*, [1903] 2 K. B. 317 ; *Re Mercantile Lighterage Co.*, [1906] 1 Ch. 491 ; *Re Osborn v. Osborn*, [1913] 3 K. B. 862. *As to* (2) *Refd. Cobbett v. Wood*, [1908] 2 K. B. 420. *Generally, Mentd. Courtenay v. Williams* (1844), 3 Hare, 539.

1480. — — —.]—*PAGE v. WATKINS*, No. 1521, *post*.

1481. — Defendant already in possession of information.]—(1) Where an attorney's bill of costs, delivered under Solicitors Act, 1843 (c. 73), s. 37, contains items applicable to proceedings in the superior cts. of law, but does not contain any statement from which it can be inferred in which of those cts. the business was transacted the bill is to be presumed to be a compliance with that Act, unless the party charged thereby proves that any further information was practically required for the purpose of taxation, or shows that the name of the ct. in which the business was done would have been of use to him. The reason for requiring the name of the ct. to be stated, which prevailed under the 2 Geo. 3, c. 23, does not exist since Solicitors Act, 1843 (c. 73), & since the scale of allowances has become uniform in all the superior cts. of law.

(2) *Semble* : a bill of costs which is defective as to part of the items contained in it may be good as to the residue, so as to entitle the attorney to recover the amount as to which a sufficient bill of costs has been delivered.

(3) *Semble* : the true meaning of the statute is that a debt., who undertakes to prove that a bill is not a *bond fide* compliance with the Act, cannot found an objection upon want of information in the bill, if it appears that he is already in possession of that information.—*COOK v. GILLARD* (1852), 1 E. & B. 26 ; 22 L. J. Q. B. 90 ; 20 L. T. O. S. 205 ; 17 Jur. 137 ; 118 E. R. 316.

Annotations :—*As to* (1) *Refd. Roy v. Turner* (1855), 4 W. R. 126 ; *Haigh v. Ousey* (1857), 7 E. & B. 578 ; *Pigot v. Cadman* (1857), 1 H. & N. 837. *As to* (2) *Refd. Haigh v. Ousey* (1857), 7 E. & B. 578 ; *Cobbett v. Wood*, [1908] 1 K. B. 590. *As to* (3) *Folld. Cobbett v. Wood*, [1908] 1 K. B. 590.

1482. — Reasonable information—To enable solicitor to advise client.]—(1) An attorney's bill of costs, delivered under Solicitors Act, 1843 (c. 73), s. 37, is sufficient if it gives such reasonable information to the client as will enable him to take advice as to its taxation, & it need not be so explicit on the face of it as to enable an attorney at once to say, without further inquiry, whether the charges are proper.

(2) When the bill contains charges for proceedings in actions, the names of the parties to which are given, & it appears from the description of the proceedings that they must have taken place in

PART VI. SECT. 4, SUB-SECT. 5.—A.

d. Claims for money lent.]—It is improper for an attorney to include in an account against his client, claims for money lent, with professional charges, in order to take security for the whole.—*SMITH v. JONES* (1851), 2 All. 176.—*CAN.*

Sect. 4.—Bill of costs: Sub-sect. 5, A., B. & C.]

one of the superior cts. it is not now necessary that the name of the particular court should be stated in the bill.

(3) The insufficiency of one or more items does not disentitle the attorney from recovering for that part of the bill which is unexceptionable.—*HAIGH v. OUSEY* (1857), 7 E. & B. 578; 26 L. J. Q. B. 217; 29 L. T. O. S. 89; 3 Jur. N. S. 634; 5 W. R. 523; 119 E. R. 1360.

Annotations:—As to (1) Folld. Cobbett v. Wood, [1908] 1 K. B. 590. As to (3) Refd. Blake v. Hummell (1884), 51 L. T. 430.

1483. — To enable taxing master to exercise discretion.]—(1) Although it is well settled law that the ct. will not interfere with the exercise of a discretion by a taxing master where he has not acted on any wrong principle or applied any wrong consideration, yet where the ct. is satisfied that the bill brought in for taxation does not contain the necessary materials to enable him reasonably to exercise his discretion it will direct the bill to be amended & the taxing master to review his taxation of the bill so amended.

(2) In order to enable a taxing master to form a considered judgment as to the sum that is proper to be allowed under the heading "instructions for brief" the bill of costs carried in for taxation should contain under that heading a summary statement of the details of the matters to which regard is to be had. It should state the length of the documents to be perused, in cases in which perusal has not been previously charged, the names of the witnesses who have been attended, the places to which journeys have been made with the time occupied in each, & the amount of travelling expenses.—*SLINGSBY v. A.-G.*, [1918] P. 236; 87 L. J. P. 146; 119 L. T. 104. C. A.

Annotations:—As to (1) Refd. Re Stahlwerk Becker Akt. (1919), 36 R. P. C. 211; The Lord Strathcona (No. 3), [1926] W. N. 270.

Taxation of costs.]—See Sect. 5, post.

1484. Anticipated charges—Business to be transacted at future period.]—(1) A solr. on behalf of a client agree to advance a sum of money for him in payment of legacy & administration duties, on condition that the same be secured with interest on a fund in ct. to which the client is entitled; a security is accordingly given by the client, charging the fund in ct. with the payment of the sum to be advanced by the solr. with interest thereon; the sum actually advanced by the solr. is much less in amount than the sum originally mentioned & intended to be advanced, & is inserted in the solicitor's bill of costs as a disbursement:—*Held*: that the sum was properly introduced into the bill as a disbursement.

(2) Anticipated charges introduced into a bill in respect of business to be transacted at a future period, not allowed.—*Re BEDSON* (1845), 9 Beav. 5; 1 New Pract. Cas. 339; 15 L. J. Ch. 153; 6 L. T. O. S. 294; 50 E. R. 244.

Annotation:—As to (1) Refd. Re Remnant (1849), 11 Beav. 603.

1485. Charges for professional work.] — Re SHILSON, COODE & Co., No. 1523, post.

1486. Abbreviations.]—An attorney may deliver a bill of costs containing such abbreviations of English words as are usual & intelligible.—*REYNOLDS v. CASWELL* (1811), 4 Taunt. 193; 128 E. R. 303.

1487. —.]—An attorney may recover the amount of his bill in an action, although the copy

delivered under the 2 Geo. 2, c. 23, & 12 Geo. 2, c. 13, contain such abbreviations as—"Declon.," "Instrons.," "Confce.," "Afft.," "Attg.," etc.—*FROWD v. STILLARD* (1829), 4 C. & P. 51; 172 E. R. 603, N. P.

Annotation:—Refd. Martindale v. Falkner (1846), 2 C. B. 706.

1488. Number of folios in document—Must be stated.]—The number of folios in a deed or other document should be stated in a solr.'s bill of costs.—*Re FORSTER, Ex p. WALKER* (1859), 1 L. T. 160; *on appeal, sub nom. Re FOSTER, Ex p. WALKER* (1860), 2 De G. F. & J. 105, L. JJ.

Annotation:—Refd. Re Robinson (1867), 16 W. R. 110.

1489. Cash account — Items appearing as "cash."]—A solr. acted for a client in the administration of her father's estate & business. He also acted as her personal solr. & professionally in other family matters with which she was concerned. In a cash account which the solr. delivered several items appeared as "cash" merely. The client claimed that a further & better "cash account" should be rendered alleging that the items in question were insufficient to enable her to indemnify the payments so as to appropriate them to the different accounts, but the application was refused by the judge in chambers:—*Held*: as it was the practice of the taxing officers to accept cash accounts in this form, subject to their being properly vouched at a later date, & it was shown that justice could thus be done between the parties, the refusal of the application was a matter of discretion, & the ct. would not interfere with the order made by the judge at chambers.—*Re HARMAN* (1915), 59 Sol. Jo. 351.

Professional charges separated from disbursements.]—See R. S. C., Ord. 65, r. 19H., Appendix N.

B. The Heading—Name of Party to be Charged.

See Solicitors Act, 1843 (c. 73), s. 37.

Delivery to party to be charged.] — See Subsect. 2, D., ante.

1490. Whether heading to bill essential.]—Deft., the surveyor of highways of the parish of L., retained pltf. to defend an indictment against the parish for the non-repair of a highway. Pending the proceedings deft. ceased to be surveyor, & a new surveyor was appointed. In a correspondence between deft. & pltf. as to the costs of the indictment, the deft. requested pltf. to send his bill of costs to the new surveyor. Pltf. sent by post his bill of costs to deft. in the following letter: "Herewith you have my bill of costs in the L. matter. I have sent a copy to the surveyor of the parish of L." The bill was headed, "The surveyor of the highways of the township of L. & the inhabitants of the parish, debtors to C.," pltf.:—*Held*: as the Solicitors Act, 1843 (c. 73), s. 36, does not require any heading to an attorney's bill, the requisites of that Act were complied with, since the bill & the letter sufficiently notified to deft. that he was the party to be charged.

No particular form of heading being prescribed by Solicitors Act, 1843 (c. 73), as essential to an attorney's bill of costs, if the bill be sent with a letter & the party to whom it is sent knows that it is intended to charge him, it is sufficient within the requirements of the sect.—*CHAMP v. STOKES* (1861), 6 H. & N. 683; 30 L. J. Ex. 242; 4 L. T. 334; 7 Jur. N. S. 607; 158 E. R. 282.

1491. Form of heading.]—CHAMP v. STOKES, No. 1490, ante.

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e. General rule.]—In an action by an attorney for his costs it must

appear on the face of the bill of costs served on deft., that pltf. seeks to charge him with that amount thereof.

—*MANNING v. GLYN & SHEEHAN* (1835), 1 Jo. Ex. 513.—**IR.**

f. —.]—A bill of costs in order

1492. — Should indicate party to be charged.]—In an action on an attorney's bill against three defts., who were promoters of a joint stock co., it appeared that pltf. sent to one of them in a letter a bill, headed "To the promoters of the L. co." :—*Held* : a sufficient delivery of the bill within Solicitors Act, 1843 (c. 73), s. 37.

All that the statute requires is, that the heading of the bill should indicate the party to be charged. Here the bill is headed "To the promoters of the co." ; & that sufficiently indicates that defts. are the parties to be charged (WATSON, B.).—MANT v. SMITH (1859), 4 H. & N. 324 ; 28 L. J. Ex. 234 ; 32 L. T. O. S. 319 ; 157 E. R. 864.

1493. Sufficiency of heading to charge party—Solicitor employed by company—Delivery to member of committee.]—M'GREGOR v. TILER (1848), 12 L. T. O. S. 129.

1494. — — — — —.]—GRIDLEY v. AUSTEN, DAUBNEY v. PHIPPS, No. 1397, *ante*.

1495. — — — — —.]—(1) Deft. was a member of the provisional committee of the Northampton, Lincoln & Hull ry. co. Pltf., an attorney who had been employed by the co., delivered his bill of charges, headed "Northampton, Lincoln & Hull Railway to R. H. Daubney, debtor" :—*Held* : it sufficiently charged deft. within Solicitors Act, 1843 (c. 73), s. 33.

(2) It is not a sufficient delivery of a bill of costs within the statute for the attorney to show it to the party charged, & then to take it away again, unless the attorney showing it intends to leave it with the party, & merely takes it back at his request.—PHIPPS v. DAUBNEY (1851), 16 Q. B. 514 ; 2 L. M. & P. 180 ; 20 L. J. Q. B. 273 ; 17 L. T. O. S. 232 ; 15 Jur. 797 ; 117 E. R. 976, Ex. Ch. ; *affg.* S. C. *sub nom.* GRIDLEY v. AUSTEN, DAUBNEY v. PHIPPS (1849), 16 Q. B. 504.

Annotations :—*As to* (1) *Refd.* Roberts v. Lucas (1855), 11 Exch. 41 ; Mant v. Smith (1859), 4 H. & N. 324 ; Champ v. Stokes (1861), 6 H. & N. 683 ; McLean v. Weaver (1924), 40 T. L. R. 663.

1496. — — — — —.]—Solicitor employed by promoters of company.]—MANT v. SMITH, No. 1492, *ante*.

1497. Name of party to be charged omitted in bill—Bill accompanied by letter charging party.]—TAYLOR v. HODGSON, No. 1470, *ante*.

1498. — — — — —.]—CHAMP v. STOKES, No. 1490, *ante*.

1499. — — — — —.]—Bill inclosed in envelope addressed to party charged.]—ROBERTS v. LUCAS, No. 1407, *ante*.

C. Court and Cause.

See Solicitors Act, 1843 (c. 73), s. 37.

1500. Whether necessary to specify—Name of court.]—LANE v. GLENNY, No. 1455, *ante*.

1501. — — — — —.]—An attorney's bill of costs for common law business, delivered under Solicitors Act, 1843 (c. 73), must show in what ct. the business was done.—ENGLEHEART v. MOORE (1846), 15 M. & W. 548 ; 4 Dow. & L. 60 ; 15 L. J. Ex. 312 ; 7 L. T. O. S. 211 ; 153 E. R. 967.

Annotations :—*Consd.* Anderson v. Boynton (1849), 13 Q. B. 308. *Refd.* Ivimey v. Marks (1847), 16 M. & W. 843 ; Cook v. Gillard (1852), 1 E. & B. 26 ; Haigh v. Ousey (1857), 26 L. J. Q. B. 217 ; Ingle v. M'Cutchan (1884), 12 Q. B. D. 518.

1502. — — — — —.]—HAIGH v. OUSEY, No. 1482, *ante*.

1503. — — — — —.]—attorney's bill of costs, delivered under Solicitors Act, 1843 (c. 73), must state whether the business done was in a ct. of equity or of law, & if in both, then it must show in what ct. the business charged for was done.—

ROY v. TURNER (1855), 26 L. T. O. S. 150 ; 4 W. R. 126.

Annotation :—*Refd.* Haigh v. Ousey (1857), 7 E. & B. 578.

1504. — — — — — & cause.]—Under 2 Geo. 2, c. 23, s. 23, an attorney's bill for work & disbursements in a suit must specify the ct. in which the suit was.

A bill to be correct must specify the ct. & the cause (PATTESON, J.).—LEWIS v. PRIMROSE (1844), 6 Q. B. 265 ; 13 L. J. Q. B. 269 ; 3 L. T. O. S. 219 ; 8 Jur. 982 ; 115 E. R. 103.

Annotations :—*Folld.* Engleheart v. Moore (1846), 15 M. & W. 548. *Consd.* Martindale v. Falkner (1846), 2 C. B. 706 ; Ivimey v. Marks (1847), 16 M. & W. 843 ; Anderson v. Boynton (1849), 13 Q. B. 308. *Refd.* Cozens v. Graham (1852), 16 Jur. 952.

1505. — — — — —.]—An attorney is bound to specify in his bill as well every ct., as the name of every suit, in which the business charged for was done. Such bill is an entire thing, & if the same bill blends charges for work done in a ct. of equity with charges for work apparently done in some ct. of common law, without pointing out which, the client cannot judge or be advised whether he should refer the whole bill for taxation ; & the charges in the same bill for equity business, though correctly stated, cannot be recovered.—IVIMEY v. MARKS (1847), 4 Dow. & L. 709 ; 16 M. & W. 843 ; 17 L. J. Ex. 165 ; 9 L. T. O. S. 105 ; 11 Jur. 355 ; 153 E. R. 1433.

Annotations :—*Consd.* Anderson v. Boynton (1849), 13 Q. B. 308 ; Keene v. Ward (1849), 7 Dow. & L. 333. *Dbtd.* & *Folld.* Roy v. Turner (1855), 26 L. T. O. S. 151. *N.F.* Haigh v. Ousey (1857), 7 E. & B. 578 ; *Folld.* Pigot v. Cadman (1857), 1 H. & N. 837. *Consd.* Re Tilleard (1863), 32 Beav. 476. *Refd.* Page v. Watkins (1851), 16 L. T. O. S. 512 ; Cook v. Gillard (1852), 1 E. & B. 26 ; Pilgrim v. Hirschfeld (1863), 12 W. R. 51.

1506. — — — — — Particulars collected by reasonable inference from items.]—An attorney's bill must show the ct. & the cause in which the business referred to in it, or the greater part thereof, was done. These particulars should be expressly stated, or must be capable of being collected by fair & reasonable intendment from the nature of the several items of charge.—MARTINDALE v. FALKNER (1846), 2 C. B. 706 ; 3 Dow. & L. 600 ; 15 L. J. C. P. 91 ; 6 L. T. O. S. 372 ; 10 Jur. 161 ; 135 E. R. 1124.

Annotations :—*Consd.* Anderson v. Boynton (1849), 13 Q. B. 308. *Refd.* Ivimey v. Marks (1847), 16 M. & W. 843 ; Dimes v. Wright (1849), 8 C. B. 831 ; Keene v. Ward (1849), 13 Q. B. 515 ; Cook v. Gillard (1852), 1 E. & B. 26 ; Cozens v. Graham (1852), 12 C. B. 398. *Mentd.* R. v. Tewkesbury Corp'n. (1868), L. R. 3 Q. B. 629.

1507. — — — — —.]—An attorney's bill is not in compliance with Solicitors Act, 1843 (c. 73), unless it furnish reasonable information, showing in what ct. & in what cause each item charged for has been transacted.—DIMES v. WRIGHT (1849), 8 C. B. 831 ; 7 Dow. & L. 292 ; 19 L. J. C. P. 137 ; 14 L. T. O. S. 252 ; 137 E. R. 735.

Annotations :—*Refd.* Cook v. Gillard (1852), 1 E. & B. 26 ; Cozens v. Graham (1852), 12 C. B. 398.

1508. — — — — —.]—(1) An attorney's bill, to be in strict compliance with Solicitors Act, 1843 (c. 73), s. 37, must contain, in express terms, or by reasonable inference, a statement of the name of every cause & of every ct. in which any part of the business charged for has been transacted. A bill of costs headed "Yourself v. Round," the client's name being Gannon, & indorsed "*Hancock v. Round*," was inclosed in a signed letter addressed to Gannon, beginning "*Hancocks v. Round*,—I send you my bill in this matter." All the business comprised in the bill had reference to a purchase of land

to comply with 12 & 13 Vict. c. 53, s. 2, must clearly point out on the face of it, or by some writing connected with it, the party or parties to be charged.—KIENRAN v. BRERETON (1868), 17 L. C. L. R. 203.—IR,

Sect. 4.—Bill of costs: Sub-sect. 5, C., D. & E.]

under a decree of the court of Ch. in a cause of "*Hancock v. Round*":—*Held*: the name of the cause sufficiently appeared.

(2) The bill was not headed in any ct.: but the whole related to one transaction, & some of the items were for attendances at the Accountant-General's & at the master's offices, & in ct. upon a petition to the Vice-Chancellor:—*Held*: the bill gave reasonable information to the client as to the course to be pursued in order to tax the bill, & therefore that the statute was complied with.—*SARGENT v. GANNON* (1849), 7 C. B. 742; 6 Dow. & L. 691; 18 L. J. C. P. 220; 13 L. T. O. S. 117; 137 E. R. 294.

1509. Whether name of court sufficiently indicated—Collected by reasonable inference from items.]—*SARGENT v. GANNON*, No. 1508, *ante*.

1510. — Business done in superior court—Charges relating to several actions—Courts specified in majority of items.]—In an action by an attorney for business done, it appeared that he had delivered a bill, under Solicitors Act, 1843 (c. 73), s. 37, which contained charges in respect of nine actions in the Ct. of Exch. & two in the Ct. of Common Pleas. The Cts. & the parties to these causes were named in the bill. It contained also items in respect of two other actions, each of which appeared to have been in some one of the Superior Cts. of Law: as to one of these, the parties were named in the bill; as to the other, it appeared that present deft. had informed pltf. that an action had been brought against him, deft., & no more appeared to have been done. The items in respect of actions as to which both parties & Cts. were specified, made up the greater part of the whole bill:—*Held*: a sufficient compliance with the statute.—*KEENE v. WARD* (1849), 13 Q. B. 515; 7 Dow. & L. 333; 19 L. J. Q. B. 46; 14 L. T. O. S. 310; 14 Jur. 65; 116 E. R. 1359.

Annotations:—*Apld.* *Haigh v. Ousey* (1857), 7 E. & B. 578. *Refd.* *Anderson v. Boynton* (1849), 14 Jur. 14; *Cook v. Gillard* (1852), 1 E. & B. 26.

1511. — Inference from items charged.]—*COOK v. GILLARD*, No. 1481, *ante*.

1512. Letter referring to writ served—Enclosed with bill.]—A., an attorney in London, inclosed a writ of summons, & subsequently a notice of declaration & particulars, to B., an attorney in the country, for service. B., by letter, apprised A. of the service, annexing the account of his charges. The name of the cause was mentioned in the letters, but not the ct. in which the business was done:—*Held*: the bill gave A. sufficient information, & Solicitors Act, 1843 (c. 73), s. 37, was complied with.—*COZENS v. GRAHAM* (1852), 12 C. B. 398; 21 L. J. C. P. 206; 16 Jur. 952; 138 E. R. 960.

Annotation:—*Apld.* *Cook v. Gillard* (1852), 1 E. & B. 26.

1513. Whether name of cause sufficiently indicated.]—*SARGENT v. GANNON*, No. 1508, *ante*.

1514. — Nature of business apparent from items.]—Where an attorney's bill gives the ct. in which the business was transacted, & the nature of such business appears from the various items,

which relate to proceedings in reference to particular causes, such bill is sufficient within Solicitors Act, 1843 (c. 73), s. 37, though it does not specify by name the causes in which the business was so transacted.—*ANDERSON v. BOYNTON* (1849), 13 Q. B. 308; 7 Dow. & L. 25; 19 L. J. Q. B. 42; 12 L. T. O. S. 421; 14 Jur. 14; 116 E. R. 1281.

Annotations:—*Refd.* *Keene v. Ward* (1849), 13 Q. B. 515; *Cook v. Gillard* (1852), 1 E. & B. 26; *Re Allen, Davies v. Chatwood* (1879), 11 Ch. D. 244.

1515. — Reasonable description of business—Knowledge of client.]—*HAIGH v. OUSEY*, No. 1482, *ante*.

1516. Whether business transacted in court—Settlement of debt & costs by plaintiff's solicitor—On defendant's request.]—*TOWNSEND v. SURGROVE*, No. 1429, *ante*.

D. Items to be Specified.

See Solicitors Act, 1843 (c. 73), s. 37.

1517. Duty to specify items—Lump sum for costs of action insufficient—Although costs taxed as between party & party.]—In an attorney's bill, it is not sufficient to charge the costs of an action brought for the now deft. by pltf. as attorneys, at one sum in the lump, although the costs in that action had been taxed at that sum as between party & party.—*DREW v. CLIFFORD* (1825), 2 C. & P. 69; Ry. & M. 280; 171 E. R. 32, N. P.

Annotations:—*Consd.* *Re Osborn v. Osborn*, [1913] 3 K. B. 862. *Refd.* *Ivimey v. Marks* (1847), 16 M. & W. 843; *Haigh v. Ousey* (1857), 7 E. & B. 578; *Pigot v. Cadman* (1857), 1 H. & N. 837.

1518. — Attendances.]—If, in an action for an attorney's bill, it appear that pltf. in his bill charges for specific attendances on particular days; & besides that, charges a further sum for several attendances. The judge at the trial will direct the jury to deduct this latter sum from the amount of the bill.—*ROWNSON v. EARLE* (1829), as reported in 4 C. & P. 44; 172 E. R. 600, N. P. *Annotation*:—*Mentd.* *Vansandau v. Browne* (1832), 9 Bing. 402.

1519. — —.]—*NOKES v. WARTON*, No.

1520. — —.]—A charge in a solr.'s bill "for attending a great many times" is too vague & on taxation the charge will be disallowed.—*Re PENDER* (1847), 10 Beav. 390; 2 New Pract. Cas. 343; 10 L. T. O. S. 49; 50 E. R. 632.

Annotation:—*Apld.* *Re Tilleard* (1863), 32 Beav. 476.

1521. — Costs paid on behalf of client.]—In an action on an attorney's bill it appeared that in the bill of costs delivered to deft. were several items for briefs delivered to, & consultations with, a barrister, but no fees stated. At the end of the bill, however, was one item, "Paid to Mr. — his fees, £43 16s." In the same bill was also the following item—"Yourself against Barland, paid costs herein, £4 12s. 2d." On plea of "no signed bill delivered":—*Held*: these items were insufficient, & they rendered the whole bill bad, & the verdict ought to be entered on that issue for deft.

The manner in which the bill was made out rendered it a bad bill within the statute, for no

PART VI. SECT. 4, SUB-SECT. 5.—D.

g. General rule.]—In preparing a bill of costs whether for party & party or solr. & client costs the proper method, even where more than the tariff fee with respect to an item is asked for under Rule 21, is to include in each of the items of the Schedule which apply to the bill all of the work done under that head & ask for a fee appropriate thereto.—*Re MCKAY* (Alta.), [1926] 3 W. W. R. 497.—*CAN.*

h. Duty to specify items—Lump sum for costs of action insufficient.]—A

solr. made a block charge of \$1,400 for his services, time, & expenses:—*Held*: it should be resolved into details & taxed in items.—*Re MOWAT* (1896), 17 P. R. 180.—*CAN.*

k. — —.]—*GUNDY v. JOHNSTON* (1912), 23 O. W. R. 101; 4 O. W. N. 121; 12 D. L. R. 71.—*CAN.*

l. — —.]—*Solrs. Act, R. S. O.* 1897, c. 174 (now 2 Geo. 5, c. 28), is not complied with by the delivery of a bill of costs, charges, & disbursements, in which the amount charged for each service is not stated,

but a lump sum charged; & pltf. cannot succeed in an action for the amount of a bill so framed, though delivered more than one month before action.—*GOULD v. FERGUSON* (1913), 20 O. L. R. 161; 4 O. W. N. 1493.—*CAN.*

m. — —.]—Where services are rendered in different matters, the client is entitled to have a bill which shows how much the solr. claims in each matter—in substance a separate bill for each matter; & disbursements must—unless in special cases—be kept

one by looking at it could advise the client whether it was taxable or not (POLLOCK, C.B.).—PAGE v. WATKINS (1851), 16 L. T. O. S. 512, N. P.

1522. ——— "Extra costs."—PIGOT v. CADMAN, No. 1289, *ante*.

1523. ——— Lump sum by way of commission—For collection of rents.]—In the absence of a special agreement, solrs. cannot charge a lump sum by way of commission for the collection of rents in their bill of costs, as if the work is professional, items must be delivered, & if non-professional, it cannot be charged in the bill.—*Re SHILSON, COODE & Co.*, [1904] 1 Ch. 837; 73 L. J. Ch. 541; 90 L. T. 641; 52 W. R. 556; 20 T. L. R. 418.

1524. ——— Notwithstanding agreement to pay lump sum.]—Where an attorney agrees with his client to receive a gross sum & costs out of pocket in lieu of costs to be incurred, the bill is nevertheless taxable; & therefore the delivery of a bill containing a charge of £50 for business done, the particular items being left in blank, & only those carried out in figures which consisted of actual disbursements, is not such a "delivery of a signed bill" as is contemplated by Solicitors Act, 1843 (c. 73), s. 37.—*PHILBY v. HAZLE* (1860), 8 C. B. N. S. 647; 29 L. J. C. P. 370; 2 L. T. 433; 7 Jur. N. S. 125; 141 E. R. 1320; *sub nom.* PHILLEY v. HAYLE, 8 W. R. 611.

Annotations:—*Apld.* *Wilkinson v. Smart* (1875), 33 L. T. 573. *Refd.* *Bush's Exors. v. Martin* (1863), 9 Jur. N. S. 851.

1525. ———.]—A solr. cannot recover for professional charges where a certain sum has been agreed on, without delivering a signed bill of costs pursuant to Solicitors Act, 1843 (c. 73), s. 37.

A firm of solrs. had delivered a bill in which the business done was specified in six items: £25 was put down opposite one item, & there stated to be the agreed amount of costs; no sum was opposite the other items. In an action for the amount claimed in the bill:—*Held*: no sufficient bill had been delivered under Solicitors Act, 1843 (c. 73), s. 37, & a rule to enter a non-suit made absolute.—*WILKINSON v. SMART* (1875), 33 L. T. 573; 24 W. R. 42.

Annotation:—*Apld.* *Blake v. Hummell* (1884), 51 L. T. 430.

— Delivery of items on taxation.]—*See* Nos. 2291, 2292, *post*.

1526. ——— Instructions for brief—Summary of work done.]—*SLINGSBY v. A.-G.*, No. 1483, *ante*.

1527. Objection that item not specified—How pleaded.]—An objection to an attorney's bill that the items are too general must be taken by a plea of no signed bill delivered.—*JONES v. O'HARE* (1849), 13 L. T. O. S. 99.

E. Inclusion of Party and Party Costs.

See Solicitors Act, 1843 (c. 73), s. 37.

1528. Must be included—Though already paid.]—*WALLER v. LACY*, No. 1479, *ante*.

1529. ———.]—Under an order that the costs, charges & expenses of a retiring liquidator should be taxed & provided for, he carried in a bill showing disbursements & professional charges in separate columns. Amongst the latter he included & gave credit for two bills of party & party costs which had been taxed some time previously & paid

to him by a third party. The registrar, on the ground that they had already been paid, struck out these items, with the result that the total amount of the costs was diminished. He proceeded to tax the bill on the footing that it must be treated as a whole & the disbursements & professional charges added together; & he thus reduced it by more than one-sixth. Items for drawing the bill of costs & attending the taxation were accordingly disallowed:—*Held*: the bills for party & party costs were properly included, & ought not to have been struck out of the bill; & for the purpose of ascertaining whether one-sixth had been taxed off the bill the amount of the professional charges only, omitting the disbursements, must be taken into consideration.—*Re MERCANTILE LIGHTERAGE CO., LTD.*, [1906] 1 Ch. 491; 75 L. J. Ch. 171; 94 L. T. 405; 54 W. R. 389; 22 T. L. R. 250; 50 Sol. Jo. 240.

Annotation:—*Consd.* *Cobbett v. Wood*, [1908] 2 K. B. 420.

1530. ———.]—Pltfs. had acted as solrs. for deft.'s wife on a petition by her in the High Ct. for a judicial separation. The petition was dismissed but deft. was ordered to pay the costs as between party & party, & accordingly pltfs. delivered to him a bill of party & party costs. That bill having been taxed, deft. paid to pltfs. the amount allowed upon the taxation. Pltfs. then delivered to deft. a bill in respect of the extra costs of the proceedings on the petition as between solr. & client, which bill did not contain the items allowed in respect of party & party costs. This bill not being paid, pltfs. sued deft. for the amount of it as for necessities supplied to the wife:—*Held*: the bill was not a sufficient bill within Solicitors Act, 1843 (c. 73), s. 37, & therefore the action was not maintainable.

I can see no reason why a solr.'s bill may not be delivered in parts, or why successive bills, respectively showing the costs due down to a certain date, or including particular groups of items, may not be delivered, provided that it clearly appears that they are all really parts of one bill (*FLETCHER MOULTON, L.J.*).—*COBBETT v. WOOD*, [1908] 2 K. B. 420; 77 L. J. K. B. 878; 99 L. T. 482; 24 T. L. R. 615; 52 Sol. Jo. 517, C. A.

Annotations:—*Refd.* *Re Osborn & Osborn*, [1913] 3 K. B. 862; *Abrahams v. Buckley*, [1924] 1 K. B. 903.

1531. ———.]—A firm of solrs. had acted for a client in a successful action. They delivered a bill of costs as between party & party to the unsuccessful party which, after taxation, was paid. They afterwards, upon a request from their client to send in a bill of solr. & client costs, delivered to him a bill which included all the items already included in the bill of party & party costs. The client then took out a summons asking for an order that the bill, so far as it related to solr. & client items, & in so far as the items had not been allowed on taxation & paid by defts., should be referred to the master to be taxed; which summons was dismissed:—*Held*: the solr. & client bill as delivered properly included the party & party items that had formed the subject of the bill previously delivered to the opposite party, & that the summons asking for a separate taxation of the solr. & client items was rightly dismissed.—*Re OSBORN & OSBORN*, [1913] 3 K. B. 862; 83 L. J. K. B. 70; 109 L. T. 505, C. A.

separate from fees.—*Re SOLICITOR*, [1923] 3 D. L. R. 882 53 O. L. R. 34.—CAN.

n. ———.]—A bill of costs setting forth a large number of items, but making one lump charge only for the whole, & containing also a general charge without items, is not in com-

pliance with Law Practitioners Act, 1882, s. 27, & cannot be sued on by the solr.—*POWNALL v. STANLEY* (1903), 22 N. Z. L. R. 922.—N.Z.

PART VI. SECT. 4, SUB-SECT. 5.—E.

a. Letters between solicitor & agent.]

—Necessary letters between a solr. & his agent on the business of the cause are taxable as between party & party, whether the agent resides in the county town of the county in which the solr. resides, or in another county, or in Toronto.—*AGNEW v. PLUNKETT* (1883), 11 P. R. 456.—CAN.

Sect. 4.—Bill of costs: Sub-sect. 5, F. (a) & (b) i., ii., iii., iv., v., vi. & vii.]

F. Disbursements.

(a) In General.

See Solicitors Act, 1843 (c. 73), s. 37.

1532. Meaning of "disbursements"—Actual payments before delivery of bill.]—SADD v. GRIFFIN, No. 1558, *post*.

*See, now, R. S. C., Ord. 55, r. 27 (29A); Nos. 1558–1563, *post*.*

1533. Distinction between professional & non-professional disbursements—Professional disbursements included in bill—Non-professional in cash account.]—The costs of taxation depend on whether one-sixth is taken off the bill of costs; & to determine this, a distinction is to be made between strictly professional charges & disbursements & independent cash payments.

Such payments as a solr. may make in the due discharge of his duty which he has undertaken as solr., whether the client furnish him with the money for the purpose or not, ought to be allowed him as professional disbursements, such as fees to officers of ct. & counsel, etc., but payments which the solr. is not bound to make, such as purchase-money, interest thereon, etc., are not within the rule, & ought properly to be charged in a cash account; & such latter payments are not to be affected by the existence or non-existence of a cash account for other purposes.

Where, therefore, a solr. paid a bill of costs for which his client, in an action for which the client had employed another solr., had become liable:—*Held*: the sum so paid, not being paid in performance of the solr.'s professional duties, nor in his professional character, ought not to be allowed as a disbursement in the bill of costs; & it properly formed an item of a cash account.—*Re REMNANT* (1849), 11 Beav. 603; 18 L. J. Ch. 374; 14 L. T. O. S. 265; 50 E. R. 949.

Annotations:—Apld. Re Buckwell & Berkeley, [1902] 2 Ch. 596. Consd. Re Kingdon & Wilson, [1902] 2 Ch. 242. Distd. Re Fletcher & Dyson, [1903] 2 Ch. 688. Apld. Re Blair & Girling, [1906] 2 K. B. 131. Consd. Brown v. Barber, [1913] 2 K. B. 553. Refd. Re Haigh (1849), 12 Beav. 307; Re Lamb (1889), 23 Q. B. D. 5; Re Seal, Ex p. Crickett (1893), 37 Sol. Jo. 685.

Disbursements entered in separate column from professional charges.]—*See R. S. C., Ord. 65, r. 19, H, Appendix N.*

(b) What Disbursements may or may not be included in —

i. Counsel's Fees.

See Solicitors Act, 1843 (c. 73), s. 37.

1534. Allowed.]—*Re REMNANT, No. 1533, ante.*

1535. Specifically paid by client.]—Moneys specifically paid by a client to his solr. for counsel's fees & stamps, as they were required:—*Held*: properly included in the solr.'s bill in calculating the sixth on a taxation.—*Re METCALFE* (1862), 30 Beav. 406; 51 E. R. 946.

Annotation:—Refd. Re Seal, Ex p. Crickett (1893), 37 Sol. Jo. 685.

1536. —.]—DEVEREUX v. WHITE & Co. (1896), 13 T. L. R. 52; 41 Sol. Jo. 67, C. A.

Unpaid before bill delivered.]—*See Sub-sect. 5, G., *post*.*

1537. Payments should specify cause—& each particular fee.]—(1) The taxation of the bill of costs of the agent of a solr., upon the footing of a special agreement requiring the master to depart

from the ordinary rules of taxation, cannot be obtained upon petition.

(2) An account of all the dealings & pecuniary transactions not connected with the bills of costs, cannot be obtained upon a petition for the taxation of costs. The account directed on petition being limited to moneys paid or duly appropriated towards satisfaction of the bills.

(3) In general, a solr. cannot obtain the taxation of his agent's costs without bringing the amount into ct.; but, under special circumstances, that condition will be dispensed with or the amount limited.

(4) Agent of a solr. held, by the irregularity of his conduct, to have discharged himself, & ordered, before taxation or payment of his bills, to deliver up all papers, etc., on an undertaking of the principal to re-deliver them, as the ct. should order.

(5) Payment in respect of counsels' fees should specify the cause, & each particular fee. Payments, except for stated & specific fees for particular matters of business done or to be done, disapproved of.—*Re SMITH* (1841), 4 Beav. 309; 49 E. R. 358; *subsequent proceedings, sub nom. Re SMITH, Ex p. HUSBAND* (1846), 9 Beav. 182, 342.

Annotations:—As to (2) Distd. Cooper v. Ewart (1847), 2 Ph. 362. Consd. Re Le Brasseur & Oakley, [1896] 2 Ch. 487. Refd. King v. Savery (1856), 25 L. J. Ch. 564; Re Osborne (1858), 27 L. J. Ch. 532. As to (4) Consd. Griffiths v. Griffiths (1843), 2 Hare, 587.

ii. Payments of Debt, Costs, etc.

See Solicitors Act, 1843 (c. 73), s. 37.

1538. Payment of costs—Of former solicitor.]—*Re REMNANT, No. 1533, ante.*

1539. — To other side—No specific payment from client.]—Items of the costs taxed in two actions & paid by the attorney, & for which he had received no specific payment from his client, are properly inserted in the bill of costs, & need not be in the cash account.—*HARRISON v. WARD* (1835), 4 Dowl. 39; 1 Har. & W. 353.

Annotation:—Consd. Re Bedson (1845), 9 Beav. 5.

1540. Payment of debt & costs—To other side—Sum received from client.]—WOOLLISON v. HODGSON, No. 2457, *post*.

iii. Payments of Purchase-Money and Interest.

See Solicitors Act, 1843 (c. 73), s. 37.

1541. Cannot be included in bill.]—*Re KINGDON & WILSON, No. 1551, *post*.*

1542. — Item for cash account—Existence of cash account for other purposes.]—*Re REMNANT, No. 1533, ante.*

iv. Payments into Court, Payments of Deposits, etc.

See Solicitors Act, 1843 (c. 73), s. 37.

1543. Payment into court—Money received from client.]—Deft. in a cause being advised to pay £48 into ct., gave his attorney £50 for the purpose of making such payment, which was done. The attorney afterwards delivered his bill to the client, not including the £48, & on taxation more than one-sixth was taken off. The attorney then claimed to add the £48, which would have made the deduction less than one-sixth, stating that the item had been inadvertently omitted. *Qu.*: whether such item was chargeable as a disbursement by the attorney, but held, that, at all events, the attorney, not having treated it as a disbursement in making out his bill, could not claim to insert it as such for the purposes of the taxation.—

PART VI. SECT. 4, SUB-SECT. 5.—
F. (b) i.

1534 i. Allowed.]—In an action for the balance of a counsel fee of \$1,000

for the services of one of plffs. (a firm of barristers & solrs.) as counsel for deft. at the trial of an important action.—*Held*: deft. had agreed to

pay a fee of \$1,000, & the charge was not unreasonable.—*ALLAN v. DANGERFIELD* (1911), 18 W. L. R. 184; 4 Sask. L. R. 363.—*CAN.*

HAYS v. TROTTER (1834), 5 B. & Ad. 1106; 110 E. R. 1102; *sub nom.* HAYS v. TROTTER, BACKHOUSE v. TROTTER, 3 Nev. & M. K. B. 174; *sub nom.* HAYES v. TROTTER, 3 L. J. K. B. 91.

Annotations:—*Consd.* Franklin v. Featherstonhaugh (1834), 3 Nev. & M. K. B. 779; *Itc* Bedson (1845), 11 Beav. 5.

1544. Payment of deposit—As security for costs of discovery—Mere loan to client.—Deposits paid by a solr. on behalf of his client as security for costs of discovery under R. S. C., Ord. 31, rr. 25, 26, & not repaid, are not disbursements within Solicitors Act, 1843 (c. 73), s. 37, & are not properly included in the solr.'s bill of costs.

They should be entered in the solicitor's cash account.—*Re* BUCKWELL & BERKELEY, [1902] 2 Ch. 596; 71 L. J. Ch. 713; 87 L. T. 215; 51 W. R. 21; 46 Sol. Jo. 687, C. A.

Annotation:—*Distd.* *Re* Grant, Bulcraig, [1906] 1 Ch. 124.

1545. — On presentation of bankruptcy petition.—In taxing a bill of costs under Solicitors Act, the taxing Master has no jurisdiction to substitute, for an item admittedly not chargeable, an item properly chargeable but omitted from the bill; for that in fact is altering the bill, which can only be done on a proper application to the ct. But he can correct an error in the casting of the bill, although it alters the amount, for that is not taxation, but arithmetic.

But the £5 deposit paid into ct. under Bankruptcy Rules, 1886, r. 147, on the presentation of a bkpcy. petition is, by r. 112 (1), of the same rules & the scale of costs thereunder, properly entered as a disbursement in a solr.'s bill of costs, & does not fall within the principle of *Re Buckwell & Berkeley*, No. 1544, *ante*.—*Re* GRANT, BULCRAIG & Co., [1906] 1 Ch. 124; 75 L. J. Ch. 106; 93 L. T. 760; 54 W. R. 165; 22 T. L. R. 96; 50 Sol. Jo. 96.

1546. Fees to officers of court.—*Re* REMNANT, No. 1533, *ante*.

v. Payments of Estate and Other Death Duties.

See Solicitors Act, 1843 (c. 73), s. 37.

See, generally, ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 6, Nos. 11, 12.

1547. Legacy duty.—*Re* BEDSON, No. 1484, *ante*.

1548. ——The town agents of a country solr., in passing the accounts of an administrator, paid four sums amounting to £11 8s. 6d. at the Stamp Office for legacy duty & stamps. These were included by the country solr. in his bill of fees & disbursements, but upon taxation they were struck out, by which the bill was reduced more than one-sixth. Upon a petition asking for liberty to except to the taxing master's certificate:—*Held*: the payment for legacy duty & stamps could only be made as agent, & it was not a professional disbursement, & ought to be inserted in the cash account, & not in the bill of fees & disbursements.—*Re* HAIGH (1849), 12 Beav. 307; 19 L. J. Ch. 79; 15 L. T. O. S. 129; 14 Jur. 340; 50 E. R. 1079.

Annotations:—*Distd.* *Re* Lamb (1889), 23 Q. B. D. 5. *Consd.* *Re* Kingdon & Wilson, [1902] 1 Ch. 242.

1549. Probate duty.—*Re* BEDSON, No. 1484, *ante*.

1550. ——A payment for probate duty made by a solr. on behalf of his client is a "disbursement" within Solicitors Act, 1843 (c. 73), s. 37, & is properly included in his bill of costs.—*Re* LAMB (1889), 23 Q. B. D. 5; 58 L. J. Q. B. 455; 37 W. R. 506; 5 T. L. R. 471.

Annotation:—*Overd.* *Re* Kingdon & Wilson, [1902] 1 Ch. 242.

1551. Estate duty.—(1) A payment for estate duty made by a solr. on behalf of his client ought

not to be included in his bill of costs as a "disbursement" within Solicitors Act, 1843 (c. 73), s. 37.

(2) Upon a purchase, is not the purchaser's solr. bound to attend the completion & pay the purchase-money before he can get the conveyance & yet he cannot include the purchase-money in his bill as a professional disbursement (COZENS-HARDY, L.J.).—*Re* KINGDON & WILSON, [1902] 2 Ch. 242; 71 L. J. Ch. 604; 86 L. T. 639; 50 W. R. 533; 18 T. L. R. 588; 46 Sol. Jo. 502, G. A.; *reversg.* S. C. *sub nom.* *Re* K. & W., 46 Sol. Jo. 410.

Annotations:—*Distd.* *Re* Grant, Bulcraig, [1906] 1 Ch. 124. *Refd.* *Re* Buckwell & Berkeley, [1902] 2 Ch. 596.

vi. Payments of Stamp Duties.

See Solicitors Act, 1843 (c. 73), s. 37.

1552. Money specifically paid by client for.—*Re* METCALFE, No. 1535, *ante*.

1553. Duty payable on registration of company—On amount of nominal share capital—Item for cash account.—A payment by a solr., who is instructed by the promoter of a co. to act for him in relation to the formation & registration of the co., under the Companies Acts, of the stamp duty payable on the registration of the co., on the amount of its nominal share capital under Stamp Act, 1891 (c. 39), s. 112, as extended by Finance Act, 1899 (c. 9), s. 7, ought not to be included in the solr.'s bill of costs as a "disbursement" within Solicitors Act, 1843 (c. 73), s. 37, but should be entered in the cash account.—*Re* BLAIR & GIRLING, [1906] 2 K. B. 131; 75 L. J. K. B. 624; 94 L. T. 873; 54 W. R. 549; 22 T. L. R. 547; 50 Sol. Jo. 500, C. A.

vii. Other Disbursements.

See Solicitors Act, 1843 (c. 73), s. 37.

1554. Money received from clients for specific disbursements.—If a client in the course of a cause advances money to his attorney for specific disbursements in the cause, those disbursements must nevertheless be included in the bill of costs. Therefore, where, upon taxation, a sum was deducted less than one-sixth of the amount of the bill delivered, including those disbursements, the ct. ordered the client to pay the costs of the taxation.—*HINDLE v. SHACKLETON* (1809), 1 Taunt. 536; 127 E. R. 942.

Annotation:—*Consd.* *Re* Bedson (1845), 9 Beav. 5.

1555. Professional fees paid on behalf of client—Expense authorised by client.—A party attached for contempt in an ecclesiastical ct. employed a common law attorney to procure his discharge. At the time of doing so, he ascertained, in company with the attorney, what the costs in the ecclesiastical ct. would probably amount to, & authorised him to employ a proctor & to pay what might be necessary. The attorney employed a proctor who did the business required & settled with the adverse proctor, whose charges on that occasion were objected to & reduced. The attorney paid the bill of the proctor retained by him, having first examined the charges & had them inspected, though not regularly taxed, by the taxing officer of the ecclesiastical ct., who thought them reasonable. He afterwards delivered his own bill to the client, containing items amounting to £9 for his own charges & £14 for the proctor's & other charges in the ecclesiastical ct. The master taxed off £2 from the former items but declined taxing the latter; & he included the whole in his allocatur:—*Held*: (1) the costs in the ecclesiastical ct. were properly included in the bill as disbursements by the attorney; (2) under the circumstances it was not necessary to refer them back to the master

Sect. 4.—Bill of costs: Sub-sect. 5, F. (b) vii., & G. & H.; sub-sect. 6.]

for taxation.—**FRANKLIN v. FEATHERSTONHAUGH** (1834), 1 Ad. & El. 475; 3 Nev. & M. K. B. 779; 3 L. J. K. B. 163; 110 E. R. 1289.

Annotations:—As to (1) Consd. Re Bedson (1845), 9 Beav. 5. **Refd. Re Remnant** (1849), 18 L. J. Ch. 374.

1556. Payments made to witnesses—Allowances received as agent for client.]—Where an attorney for a prosecution receives the allowance by the county for the witnesses' expenses he does so as the agent & not as the attorney of the prosecutor. He has not therefore any right to include the payments made to the witnesses as disbursements on behalf of his client, though he gives credit for the receipt of the same sum. Nor will he be allowed to charge him with any payments made to the witnesses beyond those allowances, unless there be an express authority or sanction for such on the part of the prosecutor.—**EDKINS v. JACKSON** (1844), 2 L. T. O. S. 312; 8 J. P. 59.

1557. Items incurred on special instructions—Solicitor acting for local authority.]—In taxing a bill between solr. & client under Solicitors Act, 1843 (c. 73), s. 37, the taxing master must allow disbursements for items incurred on the client's special instructions, & for which the usual charges are made, even though that client is a local authority.

The question whether the items are expenses that ought to be allowed as between the local authority & the ratepayers does not arise on such a taxation, but is a matter for the auditor under Public Health Act, 1875 (c. 55), ss. 247, 249.—**Re PORTER, AMPHLETT & JONES**, [1912] 2 Ch. 98; 81 L. J. Ch. 544; 107 L. T. 40; 56 Sol. Jo. 521.

London agent's charges—Whether county solicitor entitled to treat as disbursement—As against client.]—See No. 2174, *post*.

G. Unpaid Items.

1558. Taxation under Solicitors Act, 1843 (c. 73), s. 37—Whether solicitor entitled to include unpaid items—Counsel's fees.]—For the purpose of taxation of a solr.'s bill under above Act, "disbursements" means actual payments before delivery of the bill, & any sums claimed in the bill as disbursements, *e.g.* fees to counsel, which have not been paid before its delivery, must be disallowed.—**SADD v. GRIFFIN**, [1908] 2 K. B. 510; 77 L. J. K. B. 775; 99 L. T. 502; 24 T. L. R. 715; 52 Sol. Jo. 507, C. A.

Annotations:—Distd. Re Eden, Watkins v. Eden, [1920] 2 K. B. 333. **Consd. Smith v. Howes**, [1922] 1 K. B. 590. **Refd. Re Massey** (1909), 101 L. T. 517; **Re Hildesheim**, [1914] 3 K. B. 811.

See, now, R. S. C., Ord. 65, r. 27 (29A).

1559. ——— Printers' charges.]—A solr. delivered to his client his bill of costs, together with an accompanying letter. The bill included certain items of disbursements in respect of counsel's fees & printers' charges which had not then been paid by the solr., & these items were not set out under a separate heading in the bill, but included among the other items in order of date. The letter stated that the unpaid items consisted of counsel's fees & printers' charges of which it gave the respective totals:—**Held**: even assuming that the letter could be read as part of it, the bill did not "set out such unpaid items or disbursements under a separate heading in the bill" within R. S. C., Ord. 65, r. 27 (29A).—**Re HILDESHEIM**, [1914] 3 K. B. 841; 84 L. J. K. B. 1; 111 L. T. 749; 58 Sol. Jo. 687, C. A.

1560. ——— Necessity to set out unpaid items under separate heading in bill—Reference to unpaid items

in letter insufficient—R. S. C., Ord. 65, r. 27 (29A).]
—**Re HILDESHEIM**, No. 1559, *ante*.

1561. ——— Fees paid before commencement of taxation.]—By R. S. C., Ord. 65, r. 27 (29A), in taxations under above Act, of a solr.'s fees, charges & disbursements, no such disbursements shall be allowed which have not been actually made before delivery of the bill of costs, unless the bill shall expressly state that they have not been made, & shall set out the unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed if they are actually made before the commencement of the proceedings in which the taxation takes place & are made in discharge of an antecedent liability of the solr., including counsel's fees, properly incurred on behalf of the client: Provided that if the proceedings for taxation shall have been commenced by the client or a third party, payments made by the solr. pending such proceedings in discharge of any such antecedent liability so set out in the bill, including counsel's fees, may be allowed if actually made before the commencement of the taxation.

A solr. issued a specially indorsed writ & a summons for judgment against his client upon a bill of costs. On Mar. 23, 1921, an order was made under Ord. 14 that the bill should be referred to the master to be taxed pursuant to above Act & that the solr. should be at liberty to sign judgment against the client for the amount found due to the solr. by the master's *allocatur*. The bill expressly stated that certain fees to counsel had not been paid, & these fees were set out under a separate heading in the bill as indicated by R. S. C., Ord. 65, r. 27 (29A). On Apr. 1, 1921, the fees were paid. On Apr. 9, 1921, the taxation commenced. The client objected to the fees being allowed as disbursements, & the taxing master upheld the objection:—**Held**: the order of Mar. 23 represented the result of two proceedings: (a) a summons for judgment by the solr.; (b) a summons by the client for taxation of the bill under above sect.; therefore "proceedings for taxation" had been "commenced by the client" within R. S. C., Ord. 65, r. 27 (29A), & consequently that the taxing master had power to allow the fees.—**SMITH v. HOWES**, [1922] 1 K. B. 590; 91 L. J. K. B. 388; 126 L. T. 625; 66 Sol. Jo. 367, C. A.

1562. Taxation under Solicitors Act, 1860 (c. 127), s. 28—Counsel's fees.]—For the purpose of taxation of a solr.'s bill under above sect. "costs, charges, & expenses" may include fees to counsel which have not been paid before the delivery of the bill or the commencement of the taxation.

A lady was involved in litigation with certain moneylenders. Her son was finding the money for the costs thereof. The lady & her son were being advised by different solrs. The son's solr. prepared the brief in the litigation & the lady's solr. perused & approved it. The litigation was settled, & the lady recovered certain property. Her solr. then applied for a charging order on the property recovered for his costs, charges, & expenses, & obtained by consent an order that his bill of costs as then delivered should be taxed & an undertaking that the amount found due should be paid. The bill of costs contained (a) a sum for counsel's fees which had not then been paid, & (b) a sum for preparing the brief in the litigation. Upon taxation of the bill:—**Held**: the counsel's fees, which were paid during the taxation, should be allowed as costs, charges, & expenses, though not paid before the commencement of the taxation, but that the sum for preparing the brief should not be allowed.—**Re EDEN, WATKINS v. EDEN**,

[1920] 2 K. B. 333 ; 90 L. J. K. B. 188 ; 123 L. T. 134 ; *sub nom.* EDEN v. MILLER, 64 Sol. Jo. 357, C. A.

Annotation :—*Reid*. Goodchild v. Roberts, [1925] 1 Ch. 592.

1563. ——— **R. S. C., Ord. 65, r. 27 (29A) not applicable.**—Pltf. deposited two leases with resp., his solr., & by a written instrument charged his interest in the two messuages comprised therein as security for the repayment of certain sums advanced to him by resp., & for all costs, charges & disbursements incurred by him in an action for pltf. An order was made for an account of what was due to the resp. under the deposit & agreement. Various bills were delivered, some of which were directed to be taxed & two were referred to be moderated. In one of these there were included as disbursements counsels' fees to the amount of £22. These had not been paid, but there was no note to that effect, nor were they set out under a separate heading in the bill in accordance with above regulation. The fees were in fact paid before the bill was submitted for moderation, & were ultimately allowed by the taxing master. On a summons by pltf. to vary the report of the taxing master :—*Held* : above regulation only applied to a taxation under above Act & according to *Re Eden, Watkins v. Eden*, No. 1562, *ante*, was held not to extend to a taxation of the costs, charges, & expenses of a solr. applying for a charging order under Solicitors Act, 1860 (c. 127) ; nor could it apply to the case of moderation of a bill which was not the same as taxation ; therefore there was here no taxation under Solicitors Act, 1843 (c. 73), or otherwise, & the summons would be dismissed with costs.—GOODCHILD v. ROBERTS, [1925] Ch. 592 ; 95 L. J. Ch. 32 ; 133 L. T. 133 ; 69 Sol. Jo. 621.

II. Effect of Insufficiency of Some Items.

1564. Whether solicitor entitled to recover on items sufficiently stated.—WALLER v. LACY, No. 1479, *ante*.

1565. ———] —COOK v. GILLARD, No. 1481, *ante*.

1566. ———] —PIGOT v. CADMAN, No. 1289, *ante*.

1567. ———] —HAIGH v. OUSEY, No. 1482, *ante*.

1568. ———] —PILGRIM v. HIRSCHFELD, No. 1476, *ante*.

1569. ———] —BLAKE v. HUMMEL (1884), 1 Cab. & El. 345 ; 51 L. T. 430 ; 1 T. L. R. 22.

SUB-SECT. 6.—AMENDMENTS AND WITHDRAWALS.

1570. Whether leave of court essential—Addition to charges.—*Re* WALTERS, No. 1587, *post*.

1571. ——— **Substitution of chargeable for non-chargeable items.**—*Re* GRANT, BULCRAIG & CO., No. 1545, *ante*.

1572. ——— **When charges reduced or increased.**—(1) In an action by a solr. for work done the particulars were described as having been delivered to defts. in a signed bill of costs more than a month before action brought. Defts. denied liability, & also relied upon the fact that pltf. had delivered a prior bill of costs for a less amount. The jury found for pltf. on the question of liability, & a verdict was entered for him, but leave was refused to carry in the second bill for taxation. On appeal :—*Held* : pltf. was not bound by the first bill delivered, & although, by reason of the proviso in Solicitors Act, 1843 (c. 73), s. 37, in the

absence of special circumstances, there could be no reference to taxation under that Act after verdict, the ct. had jurisdiction to refer the matter to a taxing master, who would be entitled to take both bills into his consideration in arriving at the amount for which judgment should be entered.

I am far from saying that defts. have not shown a certain amount of authority for the proposition that the rule applied in the case of taxation under Solicitors Act, 1843 (c. 73), & the obligation on a solr. who has delivered a bill of costs to obtain leave before he can bring in a second bill for taxation, is a rule applicable not only in the case of the second bill being a reduction of the amount claimed in the first, but also to the case where it increases that amount. That seems to me to be right (VAUGHAN WILLIAMS L.J.).

(2) A solr. may amend *bona fide* his bill of costs at any time before an order of taxation has been obtained or taxation has been threatened by the client.

(3) *Semble* : although the taxing master, acting as a referee, would bring to bear upon the question the principles of taxation, yet all the principles applicable to taxation of a bill of costs would not necessarily apply, *e.g.* the rule that the solr. must pay the costs of taxation if one-sixth part of the bill be taxed off.—LUMSDEN v. SHIPCOTE LAND CO., [1906] 2 K. B. 433 ; 75 L. J. K. B. 665 ; 95 L. T. 17 ; 54 W. R. 461 ; 22 T. L. R. 559 ; 50 Sol. Jo. 499, C. A.

1573. Powers of taxing master—Correction of arithmetical errors.—*Re* GRANT, BULCRAIG & CO., No. 1545, *ante*.

1574. Amendment before delivery—Bill fully made out.—*Re* RICHARDSON, No. 1373, *ante*.

1575. Whether solicitor bound by bill as delivered.—(1) Delivery of an attorney's bill is conclusive evidence against an increase of charge in a subsequent bill on any of the items contained in it : & strong presumptive evidence against any additional items.

(2) If errors or real omissions in the former bill could be proved they ought to be allowed for (*per* CUR.).—LOVERIDGE v. BOTHAM (1797), 1 Bos. & P. 49 ; 126 E. R. 772.

Annotations :—*As to* (1) *Consd.* Lumsden v. Shipcote Land Co. (1906), 75 L. J. K. B. 665. *Reid.* *Re* Walters (1845), 1 New Pract. Cas. 288.

1576. ———]—(1) A solr. having delivered his bill, is bound by it, & the taxation must be on that bill : he is not entitled, as of course, to reduce his demand, or to reserve the power of adding to the charges.

(2) A bill of costs was made out by C., a country solr., against F. & A., also solrs., living in the country. A part of the business to which the bill of costs related had been transacted by C. at the instance of B. & B., the agents in town of F. & A., & the payment of the bill had been applied for by C. to both F. & A. & B. & B. :—*Held* : an order obtained *ex p.* by B. & B. for taxation of the bill was irregular & must be dismissed.—*Re* CARVEN (1845), 8 Beav. 436 ; 14 L. J. Ch. 372 ; 50 E. R. 171.

Annotations :—*As to* (1) *Consd.* *Re* Chambers (1865), 5 New Rep. 298 ; *Re* Grant Bulcraig, [1906] 1 Ch. 124. *Reid.* *Re* Holroyde & Smith (1881), 43 L. T. 722 ; *Re* Thompson (1885), 30 Ch. D. 441.

1577. ——— **Bill paid.**—(1) Where payment of a bill of costs has been obtained by undue pressure, a taxation may be directed on proof of overcharge, without showing that such overcharges are so gross as to amount to fraud.

PART VI. SECT. 4, SUB-SECT. 6.
p. Whether leave of court essential.—A solr., having rendered a bill

of costs, cannot send in a fresh bill containing additions, without the leave of the ct. ; & this should be obtained

upon an application for taxation.—*KIRKLAND & STAINS v. VAUTIER* (1886), 4 N. Z. L. R. 394 (S. C.).—N.Z.

Sect. 4.—Bill of costs: Sub-sects. 6 & 7. Sect. 5: Sub-sect. 1, A.]

(2) It is a "special circumstance" within Solicitors Act, 1843 (c. 73), where, on paying off a mtgee., a solr. produces his bill & insists on payment as a condition for immediate completion, though items are objected to, & a taxation will be directed after payment, if there are apparent overcharges.

(3) A taxation at the instance of a mtgor. of the bill of the mtgee.'s solr., must be as between the solr. & his client, the mtgee.

(4) Upon an application to tax a paid bill, the solr. will not be permitted to add to any undercharges contained therein, but the taxation must be had on the bill as delivered & paid.—*Re WELLS* (1845), 8 Beav. 416; 14 L. J. Ch. 215; 5 L. T. O. S. 19; 9 Jur. 820; 50 E. R. 163.

Annotations:—As to (1) Expld. Re Harrison (1847), 10 Beav. 57. *Refd. Re Stephen, Ex p. Bass* (1848), 2 Lh. 562.

1578. Bill intended as sketch or estimate.]—

(1) Where a solr. has delivered a bill he cannot afterwards amend it when he finds the client is about to refer it for taxation although the bill delivered was only intended as a sketch or estimate.

(2) Where the solr. has a balance in his hands of his client's money, & on sending in his bill retains the amount of the bill, & sends a cheque for the balance, the retention of the cheque by the client will not be such a payment as is contemplated by Solicitors Act, 1843 (c. 73), s. 41, unless the client distinctly receive the payment as the balance of the account.

(3) An order for the taxation of a solr.'s bill may be made *ex p.* after the expiration of one month from the delivery of it, but within twelve months.—*Re GAITSKELL* (1845), 1 Ph. 576; 14 L. J. Ch. 450; 6 L. T. O. S. 29; 9 Jur. 909; 41 E. R. 752, L. C.

Annotations:—Generally, Refd. Re Andrews (1853), 17 Beav. 510; *Re Loughborough* (1857), 23 Beav. 439; *Re Jones* (1895), 73 L. T. 543.

1579. Withdrawal of non-taxable items.]—

Application of a solr., after an order for taxation, to withdraw a non-taxable item from his bill, refused.—*Re BLAKESLEY & BESWICK* (1863), 32 Beav. 379; 8 L. T. 343; 27 J. P. 436; 9 Jur. N. S. 1265; 11 W. R. 656; 55 E. R. 148.

1580. — Request for memorandum of charges before business completed—Delivery of bill.]—*Re SMITH & SON* (1901), 45 Sol. Jo. 469.

1581. — Taxation under Solicitors Act, 1843 (c. 73)—Party & party taxation.]—Upon a taxation between party & party, the bill of costs may be added to or varied after it has been brought into the office, at any time before the taxation is concluded; but the practice is different upon a taxation under above Act.—*DAVIS v. DYSART (EARL)* (1855), 21 Beav. 124; 25 L. J. Ch. 122; 26 L. T. O. S. 84; 1 Jur. N. S. 1153; 4 W. R. 41; 52 E. R. 805; *on appeal* (1856), 8 De G. M. & G. 33, L. JJ.

Annotations:—Apld. Sadd v. Griffin, [1908] 2 K. B. 510. *Refd. Churton v. Frewen* (1867), 16 L. T. 171.

1582. — Bonâ fide amendments—Before order for taxation obtained—Or taxation threatened by client.]—*LUMSDEN v. SHIPCOTE LAND CO.*, No. 1572, *ante*.

1583. Rectification of mistakes & omissions.]—*LOVERIDGE v. BOTHAM*, No. 1575, *ante*.

1584. —.]—Pltf. had obtained an order for

taxation of his solr.'s bill amounting to £399. The solr., with the master's permission, struck out certain items as having been inserted by mistake. The bills were then taxed, & less than a sixth was taken off; but, if the items struck out were included, then more than a sixth would have been taken off:—*Held*: as less than a sixth had been taxed off, pltf. must pay the costs of taxation.—*MARSHALL v. OXFORD* (1832), 5 Sim. 456; 58 E. R. 408.

1585. —.]—(1) By error & mistake, some items were omitted from, & others undercharged & overcharged in, a bill of costs referred for taxation. On a petition by the exor. of the solr., liberty was given to insert the omitted items & increase those undercharged, but he was not allowed to decrease the overcharges, & the costs of the application were ordered to be paid by petitioner.

(2) Pending a taxation, both the solr. & client died, the reference was revived, & the taxation continued between the representatives.—*Re WHALLEY* (1855), 20 Beav. 576; 52 E. R. 726.

Annotations:—As to (1) Refd. Re Grant, Bulmerig, [1906] 1 Ch. 124. *Generally, Refd. Re Waugh* (1859), 29 Beav. 666; *Re Nicholson* (1861), 30 L. J. Ch. 796.

1586. —.]—A solr. cannot, upon objection being taken to the charges made in a bill of costs delivered by him, withdraw it & substitute another, unless the charges objected to were inserted upon misrepresentation or by mistake or accident, & unless such circumstances can be proved the original & not the substituted bill must stand for taxation.—*Re HOLROYDE & SMITH* (1881), 43 L. T. 722; 45 J. P. 437; 29 W. R. 599.

Annotations:—Consd. Re Shirley (1883), 27 Sol. Jo. 600. *Distd. Re Jones, Ex p. King* (1886), 51 L. T. 618. *Apld. Re Kellock* (1887), 56 L. T. 887.

1587. — Clear & unequivocal proof of mistake essential—Parliamentary agent's charges.]—

(1) After the delivery of his bill a solr. may supply an omission or correct a mistake, but there must be clear & unequivocal proof that it was a mistake; it will not do to deliver a bill of costs, & if on taxation it is about to be reduced more than one-sixth, then to apply to add to or increase the charges.

(2) A solr. who employs a parliamentary agent, but acts in some instance by himself, & not through the agent, cannot be allowed to charge parliamentary agent's fees instead of fees already charged in a delivered bill as a solr.

(3) Mistakes & omissions in a solr.'s bill as to a parliamentary agent's charges must be clearly proved to be such before any correction can be allowed.—*Re WALTERS* (1845), 9 Beav. 299; 1 New Pract. Cas. 288; 5 L. T. O. S. 342; 50 E. R. 359.

Annotations:—As to (1) Consd. Re Grant, Bulmerig, [1906] 1 Ch. 124. *Generally, Refd. Re Shirley* (1883), 27 Sol. Jo. 600.

1588. Whether withdrawal of original & delivery of amended bill permitted—For purposes of taxation—On overcharges being objected to—Client returning bill with suggested alterations.]—A solr. who has delivered his bill to the person chargeable therewith cannot afterwards avoid the taxation of the bill by withdrawing it & delivering an amended bill, even though the person chargeable sent back the original bill, with suggested alterations which were partially acquiesced in.—*Re*

15831. Rectification of mistakes & omissions.]—*Re O'DONOHUE* (1892), 15 P. R. 93.—CAN.

a. Undertaking to receive lesser amount if bill substituted.]—On an application to refer an attorney's bill

to taxation, an amended bill of costs was allowed to be substituted for the bill delivered to the client; the attorneys undertaking to receive in full of their fees, charges, etc., the amount of the original bill or the amended bill

as taxed, whichever might be the least.—*Re B. & S.* (1872), 6 P. R. 18.—CAN.

r. Whether withdrawal of original & delivery of amended bill permitted—For purposes of taxation.]—A solr. had rendered two bills of costs to

HEATHER (1870), 5 Ch. App. 694; 39 L. J. Ch. 781; 18 W. R. 1079, L. J.

Annotations:—*Apld.* *Re Holroyde & Smith* (1881), 43 L. T. 722. *Consd.* *Re Thompson* (1885), 30 Ch. D. 441. *Apld.* *Re Jones* (1886), 2 T. L. R. 477; *Re Kellock* (1887), 35 W. R. 695. *Consd.* *Re Wood* (1891), 36 Sol. Jo. 127. *Distd.* *Re Negus*, [1895] 1 Ch. 73; *Lumsden v. Shipcote Land Co.* (1906), 75 L. J. K. B. 665. *Consd.* *Re Grant, Bulraig*, [1906] 1 Ch. 124. *Reid.* *Re Russell & Scott* (1885), 52 L. T. 794; *Sadd v. Griffin* (1908), 77 L. J. K. B. 775.

1589. ——— Bill unsigned.]—(1) A solr. cannot, after delivery of a bill of costs, & objection taken to the amounts of the charges therein contained, even though the bill be unsigned, withdraw the bill from taxation, & substitute another in which the charges are reduced.

(2) Where a bill of costs has once been delivered the client acquires a right to have it taxed, & the right to tax the original bill so delivered is not taken away if an amended bill is subsequently sent in.—*Re JONES, Ex p. KING* (1886), 54 L. T. 648; 2 T. L. R. 477, D. C.

1590. ——— Mistake, misrepresentation or accident.]—*Re HOLROYDE & SMITH*, No. 1586, *ante*.

1591. ——— On payment of costs up to date of substitution—Before order for taxation made.]—A solr., after delivering his bill of costs, may, before being served with an order for taxation, withdraw it & substitute another bill of a reduced amount.—*Re CHAMBERS* (1865), 34 Beav. 177; 5 New Rep. 298; 34 L. J. Ch. 292; 11 L. T. 726; 11 Jur. N. S. 230; 13 W. R. 375; 55 E. R. 602.

Annotations:—*Expld.* *Re Holroyde & Smith* (1881), 43 L. T. 722. *Reid.* *Re Thompson* (1885), 30 Ch. D. 441; *Parker v. Blankhorn, Newbould v. Bullward* (1888), 59 L. T. 906; *Lumsden v. Shipcote Land Property Co.* (1906), 54 W. R. 461.

1592. ——— Necessity for special circumstances.]—*Re SHIRLEY* (1883), 27 Sol. Jo. 600.

1593. Condition reserving power to add to charges—Validity of.]—*Re CARVEN*, No. 1576, *ante*.

1594. Condition reserving right to withdraw & alter—Must be fully & clearly stated to client—Validity of condition.]—A solr. may, when sending in his bill of costs to his client, reserve to himself the right to withdraw or alter it on condition, provided the condition is fully & clearly stated to the client; but if the solr. has sent in his bill without any condition, or with a condition which he could not fairly impose, he cannot afterwards withdraw it or send in an amended bill.

A firm of solrs., on being pressed by their clients to send in their bills of cost, delivered a bill accompanied by a letter saying that there were certain charges which, owing to haste, had not been included in the bill, but that they were willing to accept a stated sum in full discharge, though if such sum was not paid within eight days, they reserved to themselves the right to withdraw the bill & deliver another. The clients, however, insisting on being furnished with the particulars of further charges, the solrs. wrote withdrawing the bill. The clients then obtained a common order for taxation of that bill, & for delivery & taxation of a further bill. On motion by the

client—different in amount, but for the same business, the latter bill containing various items not inserted in the first. On application by the client to tax the first bill:—*Held*: the solr. might amend it by adding all the omitted items as set forth in the second bill.—*Re H. H. T., Ex p. COOPER* (1880), O. B. & F. 20.—N.Z.

PART VI. SECT. 5, SUB-SECT. 1.—A. t. Solicitor & client costs.]—An application for an order directing regis-

trars to tax costs between solr. & client was refused, the Chief Justice stating that the question was duly considered by the judges at the organisation of the Supreme Ct., & it was not thought advisable to regulate costs between solr. & client.—*DOAK v. MERCHANTS MAR. INSURANCE CO.*, Cass. Dig., 2nd ed., 677.—CAN.

a. Security for costs—When ordered.]—The fact that a client, who has applied to have an attorney's bill taxed, is out of the jurisdiction, is not

solrs., the judge discharged the common order on the ground that no bill had been "delivered" within Solicitors Act, 1843 (c. 73), s. 37, but ordered the solrs. to deliver a bill within fourteen days, such bill to be taxed. The solrs., in pursuance of that order, delivered a second bill, but of a considerably less amount than the first, whereupon the clients appealed to reverse that order & to have it declared that the bill to be taxed was that first delivered:—*Held*: (1) discharging the last-mentioned order, the first bill was conditional, but the condition was one which a solr. could not impose on his client, & therefore the original common order for taxation must stand; (2) the clients should under the circumstances, instead of obtaining the common order to tax, have obtained a special order on petition raising the question as to the right of the solrs. to withdraw their bill, they were therefore allowed no costs of the proceedings in the ct. below, but only the costs of the appeal.—*Re THOMPSON* (1885), 30 Ch. D. 441; 55 L. J. Ch. 138; 53 L. T. 479; 34 W. R. 112, C. A.

Annotations:—*As to* (1) *Apld.* *Re Kellock* (1887), 56 L. T. 887; *Re Wood*, [1891] W. N. 203. *Consd.* *Re Grant, Bulraig*, [1906] 1 Ch. 124; *Lumsden v. Shipcote Land Co.*, [1906] 2 K. B. 433. *As to* (2) *Apld.* *Re Webster*, [1891] 2 Ch. 102. *Generally, Reid.* *Sadd v. Griffin*, [1908] 2 K. B. 510.

1595. Scandalous & impertinent matter in bill—Striking out—Jurisdiction of court to order.]—The general jurisdiction of the ct. to prevent proceedings before it being made the vehicle of scandal or impertinence extends to a bill of costs delivered; &, accordingly, entries in a bill of costs which contain scandalous matter will be ordered to be struck out.—*Re MILLER, Re FRENCH, LOVE v. HILLS* (1884), 54 L. J. Ch. 205; 51 L. T. 853; 33 W. R. 210.

SUB-SECT. 7.—TAXATION OF BILL OF COSTS.
See Sect. 5, post.

SECT. 5.—TAXATION OF COSTS.

SUB-SECT. 1.—JURISDICTION OF THE COURT.

A. In General.

See Solicitors Act, 1843 (c. 73).

1596. Nature of jurisdiction—Threefold.]—In dealing with solrs.' costs, the ct. has a threefold jurisdiction. First, the statutory jurisdiction conferred by Solicitors Acts. . . . Secondly, the ct. has, I apprehend, jurisdiction to deal with solrs.' bills of costs under its general jurisdiction over the officers of the ct. . . . Thirdly, there remains the ordinary jurisdiction of the ct. in dealing with contested claims (*STIRLING, J.*).—*Re PARK, COLE v. PARK* (1888), 41 Ch. D. 326; 58 L. J. Ch. 128; 59 L. T. 925; *affd.* (1889), 41 Ch. D. p. 336, C. A.

Annotations:—*Consd.* *Re Foss, Billbrough, Plaskitt & Foss*, [1912] 2 Ch. 161. *Reid.* *Re Miller, Chapman v. Miller* (1889), 58 L. J. Ch. 728; *Lumsden v. Shipcote Land Co.* (1906), 75 L. J. K. B. 665; *Re Osborn & Osborn*, [1913] 3 K. B. 862; *Re Palace Restaurants*, [1914] 1 Ch. 492; *Jones v. Whitehouse*, [1918] 2 K. B. 61.

a sufficient ground for an order for security for costs, but, upon special circumstances being shown, it may be.—*Re A. B.* (1874), 6 P. R. 210.—CAN.

b. Power of common law court.]—Where an order is made for taxation of an attorney's bill, as between attorney & client under R. S. O. 1877, c. 140, s. 49, a common law court has no power here, as it has in England, under 6 & 7 Vict. c. 73, s. 43, to make a summary order for payment of the amount found due from the client, except by

Sect. 5.—Taxation of costs: Sub-sect. 1, A., B. & C. (a).]

1597. Whether existing apart from statute.]—The ct. has authority to refer an attorney's bill for taxation, independently of 2 Geo. 2, c. 23, & 30 Geo. 2, c. 19.—*WILSON v. GUTTERIDGE* (1824), 3 B. & C. 157; 4 Dow. & Ry. K. B. 736; 2 L. J. O. S. K. B. 221; 107 E. R. 693.

*Annotations:—*Dbtd. & N.F. Dagley v. Kentish (1831), 2 B. & Ad. 411. *Expld.* Re Barker (1834), 6 Sim. 476. N.F. *Ex p.* Bowles's Trustees (1835), 1 Bing. N. C. 632. Dbtd. Doe d. Palmer v. Roe (1835), 1 Har. & W. 339. *Distd.* Re Gaitskell (1845), 6 L. T. O. S. 29.

1598. —.]—The ct. have no authority on the application of an attorney to refer the bills of another attorney for agency charges to the officer for taxation, as the words of 12 Geo. 2, c. 13, s. 6, take such bills out of the operation of 2 Geo. 2, c. 23, s. 23, & leave attorneys when their bills of costs are the subject of dispute, to pursue their remedy in the ordinary manner.—*WEYMOUTH v. KNIPE* (1836), 3 Bing. N. C. 387; 5 Dowl. 495; 2 Hodg. 280; 3 Scott, 764; 6 L. J. C. P. 61; 132 E. R. 459.

*Annotations:—*N.F. Jones v. Roberts (1837), 8 Sim. 397. *Folld.* Cardale v. Bull (1843), 3 Q. B. 611. *Expld.* Smith v. Dimes (1849), 4 Exch. 32. *Refd.* Windsor v. Herbert (1841), 6 Jur. 73; Billing v. Coppock (1847), 1 Exch. 14.

1599. —.]—*CLARKSON v. PARKER*, No. 1341, *ante.*

1600. — Jurisdiction over solicitors as officers of court.]—The jurisdiction to tax bills of attorneys & solicitors as officers of the ct. subsisted long before the statute (*LORD ELDON, C.*).—*Ex p.* ARROWSMITH (1806), 13 Ves. 124; 33 E. R. 241, L. C.

*Annotation:—*Consd. Clarkson v. Parker (1838), 4 M. & W. 532.

1601. —.]—The jurisdiction of this ct. & its authority to make such orders is independent of 2 Geo. 2, c. 23, & is founded in the necessary inherent control of the ct. over the conduct of its officers.—*R. v. BACH* (1821), 9 Price, 349; 147 E. R. 115.

*Annotations:—*Dbtd. & N.F. Dagley v. Kentish (1831), 2 B. & Ad. 411. *Mentd.* R. v. Villers (1823), 11 Price, 575.

1602. —.]—An attorney having sued for the amount of his bill, which did not contain any item taxable by 2 Geo. 2, c. 23, deft., who had before tendered part of the amount, but objected to the rest as unreasonable, moved to have it referred to the master, on the ground of the general authority possessed by the ct. over its officers. The ct. refused to interfere.—*DAGLEY v. KENTISH* (1831), 2 B. & Ad. 411; 1 Dowl. 330; 9 L. J. O. S. K. B. 183; 109 E. R. 1195.

*Annotations:—*Consd. Re Barker (1834), 6 Sim. 476. *Folld.* *Ex p.* Bowles's Trustees (1835), 1 Scott, 583; Doe d. Palmer v. Roe (1835), 4 Dowl. 95; Weymouth v. Knight (1836), 3 Scott, 764. *Expld. & Distd.* Williams v. Griffith (1840), 6 M. & W. 32. *Consd.* Cowdell v. Neale (1856), 1 C. B. N. S. 332.

1603. —.]—*Re PARK, COLE v. PARK*, No. 1596, *ante.*

1604. —.]—*Re GRIFFITH, EGGAR & GRIFFITH* (1891), 7 T. L. R. 269, D. C.

1605. —.]—*Re FOSTER, BARNATO v. FOSTER*, No. 1356, *ante.*

1606. — At common law.]—Independently of the statute as to taxation of costs, the ct. still retains power at common law to order bills generally to be taxed.—*ANON.* (1817), 2 Chit. 155.

*Annotations:—*N.F. Dagley v. Kentish (1831), 2 B. & Ad. 411. *Refd.* Clutterbuck v. Combes (1833), 5 B. & Ad. 400.

consent.—*Re A. B. & C. D.* (1879), 8 P. R. 126.—*CAN.*

*c. Effect of submission to court's jurisdiction.]—*Where the client obtains the order for taxation, he thereby submits himself to the summary

jurisdiction of the ct., & should be ordered to pay the amount found to be due to the solr.—*Re WASHINGTON* (1888), 12 P. R. 386.—*CAN.*

d. To order personal representatives of solicitor to have bill taxed.]

1607. —.]—The Ct. of K. B. does not exercise any common law jurisdiction in taxing attorney's bills. The ct., in the exercise of its statutory jurisdiction, refused to order an attorney's bill to be taxed at the instance of a third person, where the client had before admitted the amount to be due, & declined taxing the bill; such client having since become bkpt., & the application being made for the purpose of reducing his claim so as to prevent his being a good petitioning creditor.—*CLUTTERBUCK v. COMBES* (1833), 5 B. & Ad. 400; 2 Nev. & M. K. B. 209; 110 E. R. 838.

*Annotations:—*Folld. *Ex p.* Bowles's Trustees (1835), 1 Bing. N. C. 632; Doe d. Palmer v. Roe (1835), 1 Har. & W. 339.

1608. —.]—The ct. has no common law jurisdiction to order an attorney's bill to be taxed.—*Ex p.* BOWLES'S TRUSTEES (1835), 1 Bing. N. C. 632; 1 Hodg. 143; 1 Scott, 583; 131 E. R. 1261; *sub nom.* Re BOWLES'S TRUSTEES, 4 L. J. C. P. 203.

*Annotation:—*Apld. Re Rico (1837), 4 Scott, 416.

1609. —.]—The ct. has no power under Solicitors Act, 1843 (c. 73), s. 37, to direct taxation of a part only of a solr.'s bill of costs; but the ct. has such a power by virtue of its inherent jurisdiction & apart from statute. Taxation of part of an agency bill of costs may be directed upon the terms of payment into ct. by appcts. of the whole amount claimed to be due by the agents.—*STORER & Co. v. JOHNSON* (1890), 15 App. Cas. 203; 60 L. J. Ch. 31; 62 L. T. 710; 38 W. R. 756, H. L.; *varying* S. C. *sub nom.* Re JOHNSON & WEATHERALL (1888), 37 Ch. D. 433, C. A.

*Annotations:—*Consd. Re Park, Cole v. Park (1889), 41 Ch. D. 326; Reid v. Burrows, [1892] 2 Ch. 413. *Distd.* Re Osborn & Osborn, [1913] 3 K. B. 862. *Consd.* Re Foster, Barnato v. Foster, [1920] 3 K. B. 306. *Refd.* Re Ward (1896), 65 L. J. Ch. 595.

1610. Statutory jurisdiction.]—*R. v. BACH*, No. 1601, *ante.*

1611. —.]—*WILSON v. GUTTERIDGE*, No. 1597, *ante.*

1612. —.]—*DAGLEY v. KENTISH*, No. 1602, *ante.*

1613. —.]—*CLARKSON v. PARKER*, No. 1341, *ante.*

1614. — Under Solicitors Acts.]—*Re PARK, COLE v. PARK*, No. 1596, *ante.*

1615. —.]—An originating summons was taken out by the beneficiaries under a will, as plffs., against the administratrix with the will annexed of testator as deft., asking to have a bill of costs of a solr., who had been employed by the administratrix in the administration of the estate, taxed. The administratrix, who was also tenant for life under the will, had paid the bill out of the trust property more than twelve months before the summons was taken out. Plffs. alleged that the bill contained items which were not properly payable out of the trust estate, & that the solr. had notice of the breach of trust at the time when he received payment. The summons was entitled in the matter of the solr. & in the matter of the estate, & was served on the solr. He was not, however, made a deft.:—*Held*: the ct. had no jurisdiction to refer a bill for taxation at the instance of third parties, except under Solicitors Act, 1843 (c. 73), & as the bill had been paid more than twelve months before the summons was taken out, plffs. were barred by sect. 41 of

This ct. has no authority to order the personal representatives of a deceased Solr. to have his costs taxed, even though they are in possession of the client's deeds.—*TURKINGTON v. KIERNAN* (1846), 9 I. Eq. R. 477.—*IR.*

that Act.—*Re JACKSON, Re COTTRELL, BOUGHTON-LEIGH v. BOUGHTON-LEIGH* (1889), 40 Ch. D. 495; 58 L. J. Ch. 387; 60 L. T. 589; 37 W. R. 282.

Taxation of part of bill of costs.]

—*STORER & CO. v. JOHNSON*, No. 1609, *ante*.

1617. ———.]—*Re FOSTER, BARNATO v. FOSTER*, No. 1356, *ante*.

— **Proceedings for winding up company.]**—*See COMPANIES*, Vol. X., p. 815, No. 5309.

B. Who May Exercise Jurisdiction.

1618. Judge of High Court.]—Under Solicitors Act, 1843 (c. 73), references for taxation may be made by the Vice-Chancellors as well as by the Lord Chancellor & Master of the Rolls.—*Re CAREW* (1845), 8 Beav. 128; 4 L. T. O. S. 310; 50 E. R. 51; *subsequent proceedings*, 5 L. T. O. S. 142.

1619. ———.]—Jurisdiction of the Vice-Chancellor, under Solicitors Act, 1843 (c. 73), to order the taxation of bills of costs.—*Re HOWARD* (1845), 8 Beav. 424; 50 E. R. 166.

1620. ——— **Non-contentious business.]**—*Re POLLARD*, No. 1346, *ante*.

1621. ———.]—An ordinary judge has no power to refer bills to taxation for business not done in any ct. The Lord Chancellor & Master of the Rolls only have such power. It is vested in them not merely as judges but in their particular capacities.—*Re A SOLICITOR* (1887), 52 J. P. 85; 4 T. L. R. 146, D. C.

— **In bankruptcy.]**—*See BANKRUPTCY*, Vol. IV., pp. 518–520, Nos. 4715, 4716, 4742; Vol. V., p. 1057, No. 8642.

1622. Chief clerk of Chancery Division.]—*Re ARGLES* (1880), 15 L. J. N. C. 6.

See, now, R. S. C., Ord. 61, r. 1B.

1623. District registrar—Liverpool or Manchester.]—A registrar of the District registry of Liverpool or Manchester has no jurisdiction to make a common order for taxation of a bill of costs on an originating petition of course.—*Re PORRETT*, [1891] 2 Ch. 433; 60 L. J. Ch. 396; 64 L. T. 752; 39 W. R. 531; 7 T. L. R. 414, C. A.

Annotation :—*Consd. Re Stead*, [1910] 2 K. B. 713.

1624. ———.]—*STEAD v. SMITH*, No. 2280, *post*.

See, now, R. S. C., Ord. 35, r. 6A.

C. In What Business Taxation Ordered.

(a) In General.

1625. Must be business transacted in professional capacity.]—*FENTON v. CORREIA*, No. 1317, *ante*.

1626. ———.]—(1) The ct. will not refer to taxation on attorney's bill containing taxable items where an action is brought upon it by his exor.

(2) To give the ct. jurisdiction to refer a bill to taxation, the action must be brought by an attorney on his bill, & the bill must contain

taxable items.—*WILLIAMS v. GRIFFITH* (1842), 10 M. & W. 125; 2 Dowl. N. S. 281; 11 L. J. Ex. 341; 152 E. R. 409.

Annotation :—*As to* (2) *Refd. Cowdell v. Neale* (1850), 1 C. B. N. S. 332.

1627. ———.]—Solicitors Act, 1843 (c. 73), does not authorise the taxation of every pecuniary demand or bill of a solr., for every species of employment in which he may happen to be engaged.

A bill may be taxed though no part of the business was transacted in any ct. of law or equity, but such business must be connected with the profession of an attorney or solr.:—business in which the attorney or solr. was employed because he was an attorney or solr., or in which he would not have been employed if he had not been an attorney or solr., or if the relation of attorney or solr. & client had not subsisted between him & his employer.—*ALLEN v. ALDRIDGE, Re WARD* (1844), 5 Beav. 401; 13 L. J. Ch. 155; 2 L. T. O. S. 438; 8 Jur. 435; 49 E. R. 633.

Annotations :—*Apld. Re Baker, Lees*, [1903] 1 K. B. 189. *Refd. Re Osborne* (1858), 25 Beav. 353.

1628. ——— **Several bills—Some containing no taxable items.]**—Where an attorney makes out one bill against one of his clients, which contains taxable items, & another against that client jointly with others, which has no taxable item, the former does not draw the latter with it for taxation.—*LANGLEY v. FURNIVAL* (1828), 6 L. J. O. S. K. B. 330.

1629. ——— **What are taxable items.]**—“Attending A. & B., the proposed bail of deft., & examining them as to their competency to justify.” “Attending plff. in several actions commenced against deft., & arranging with him to take cognovits therein,” are taxable items in an attorney's bill within 2 Geo. 2, c. 23, s. 23.—*WATT v. COLLINS* (1825), 2 C. & P. 71; Ry. & M. 284; 171 E. R. 1022, N. P.

Annotations :—*Refd. Smith v. Taylor* (1831), 7 Bing. 259; *Pepper v. Yeatman* (1836), 2 Har. & W. 116.

1630. ———.]—A charge in an attorney's bill for serving a *subpoena* on a witness, is not a taxable item.—*TRISIDDER v. SMITH* (1838), 1 Will. Woll. & H. 51; *sub nom. TRESIDDER v. SMITH*, 2 Jur. 205.

1631. ——— **Jurisdiction of judge.]**—It is for the judge, to whom application is made for an order to tax a bill of costs, to decide whether or not such bill contains taxable items. Where, therefore, such an order was made at the instance of the attorney, the client not appearing to the summons, the ct. refused to set aside the order, although it was alleged that the bill contained no taxable items.—*Re JOHNSON* (1855), 26 L. T. O. S. 108; 1 Jur. N. S. 1140; 4 W. R. 89.

1632. ——— **Effect of failure to raise objection.]**—*Re JOHNSON*, No. 1631, *ante*.

1633. Non-contentious business.]—If a solr. retains money received by him in his character of solr. for the use of his client, his bill is taxable,

PART VI. SECT. 5, SUB-SECT. 1.—B.

e. Court of Chancery.]—On an application by a client for taxation of costs in a suit in Chancery, & in another suit in a county ct. his affidavit admitted a retainer in the latter suit, but denied one in the former. The solr. making no claim for costs in the former suit :—*Held* : the Ct. of Ch. could not order taxation between the client & solr.—*Re CAMERON* (circa 1866), 1 Ch. Ch. 356.—**CAN.**

f. Local master.]—An order will not be granted for taxation before a master in an outer county even on a consent.—*Re SOLICITORS*, 3 Ch. Ch. 90.—**CAN.**

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g. ———.]—*Re SKINNER* (1890), 13 P. R. 447.—**CAN.**

h. To tax English bill of costs.]—An English solr. transacted business in England for a client then residing there, but who subsequently came to reside in Ireland. The solr. then served his bill of costs on the client in Ireland, & proceeded at law in Ireland to recover the amount. On petition by the client for a taxation of the bill under the statute :—*Held* : the ct. had no jurisdiction to order the taxation in Ireland of an English bill of costs.—*Itor v. DODD, Re SOLICITORS' ACT* (1856), 27 L. T. O. S. 328.—**IR.**

k. Authority of officer of Court of Sessions.]—There is no authority in any officer in the Ct. of Sessions to tax costs as between attorney & client.—*DUFFY v. HOOGSETT* (1857), 4 Nfld. L. R. 150.—**NFLD.**

PART VI. SECT. 5, SUB-SECT. 1.—C. (a).

1633 i. Non-contentious business.]—A bill of costs of an attorney for work done as a parliamentary agent, is taxable under Common Law Procedure Statute, 1865 (No. 274), s. 387.—*Exp. HOPKINS* (1877), 3 V. L. R. (L.) 115.—**AUS.**

1633 ii. ———.]—The mtgees. of land

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though it contains no charges for business done in a ct. of law or equity.

Semble: items in a solr.'s bill for preparing & settling a bill in equity will render the solr.'s bill taxable, though the bill in equity was never filed.—*Re BARKER* (1834), 6 Sim. 476; 58 E. R. 673.

1634. —[Where a solr. refuses to deliver up deeds & papers in his possession, except upon payment of his bill of costs, the ct. has jurisdiction to order taxation of such bill, & the delivery up of the deeds & papers, upon payment of the taxed costs, though the costs have been incurred in respect of conveyancing & other general business, & not in respect of the prosecution or defence of any suit or action.—*Re RICE* (1837), 2 Keen, 181; 6 L. J. Ch. 291; 1 Jur. 351; 48 E. R. 597.

1635. —[A charge in an attorney's bill for searching for an old judgment & advising as to its revival does not constitute an item taxable within 2 Geo. 2, c. 23, s. 23.—*Re RICE* (1837), 4 Scott, 416; 1 Jur. 310; *sub nom. Ex p. RICE*, 3 Hodg. 130; *sub nom. BROOKS v. BROOKS*, *Re RICE*, 6 L. J. C. P. 243.

1636. —[No jurisdiction is given to a ct. of law to refer an attorney's bill to taxation, by Solicitors Act, 1873 (c. 73), s. 37, although an action be pending on such bill in such ct. of law, where no part of the business in transacted in any ct. of law or equity.—*BUSH v. SAYER*, *Re BUSH & MULLINS* (1844), 7 Man. & G. 1027; 8 Scott, N. R. 756; 14 L. J. C. P. 35; 4 L. T. O. S. 135 A; 135 E. R. 417.

1637. — **Provided business done in professional capacity.**—*ALLEN v. ALDRIDGE*, *Re WARD*, No. 1627, *ante*.

1638. — **Ascertainment of amount under agreement creating security for costs.**—The ct. will not, upon a summons for taxation, ascertain the amount which is charged upon property by an agreement creating a security for payment of costs under rule 7 of the Solicitors' Remuneration Order, 1882.—*Re CARNEGIE* (1907), 52 Sol. Jo. 14.

1639. Bill subject of set-off.—The cts. have no power to refer, for taxation, an attorney's bill of costs, which is made a cause of set-off in an action brought against him, the items charged in it being wholly for business done in the cts. of equity.—*SLATER v. BROOKS* (1811), 5 Jur. 531.

1640. Whether for every pecuniary demand of solicitor—For every species of employment.—*ALLEN v. ALDRIDGE*, *Re WARD*, No. 1627, *ante*.

1641. Agreement to pay out of pocket expenses only.—An agreement to charge only costs out of pocket does not preclude a taxation.

A solr. in 1849, agreed to charge sums out of pocket only, provided the client was unable to recover the proper costs in the business. A taxation was ordered of a bill for business in 1853, in the usual terms, & without determining any question as to the agreement.—*Re RANSOM* (1854), 18 Beav. 220; 52 E. R. 87.

is:—*Distd. Ward v. Lawson* (1872), 8 Ch. App. 65. *Refd. Re Philp* (1860), 11 Giff. 35.

1642. —*Re PHILP*, No. 1278, *ante*.

1643. Agreement for payment of fixed sum—For future services.—*Re NEWMAN*, No. 1368, *ante*.

having brought ejectment & sold under the power of sale, their solr. sent the surplus purchase money to the mtgor., accompanied by a statement of the amount due, in which one item was for "solr.'s costs, \$143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale:—*Held*: the two bills might be considered as particulars of

the one item in the previous statement, & the bill of costs in the suit drew with it the other bill, which would not alone have been subject to taxation; & both bills were therefore referred.—*Re MACDONALD*, *Ex p. GLASS* (1863), 3 P. R. 138; 11 C. L. J. O. S. 111.—*CAN.*

1. Offer to take in full settlement

1644. Where payment made by third party.—*Re CHAPMAN* (1903), 20 T. L. R. 3, C. A.

Annotations:—*Apld. Re C.* (1909), 53 Sol. Jo. 616. *Consd. Re Foster*, *Barnato v. Foster*, [1920] 3 K. B. 306.

1645. Costs of Interlocutory proceedings—After settlement of principal litigation—Settlement omitting reference to Interlocutory proceedings.—During the progress of an action several orders were made, upon interlocutory applications that pltf. should pay deft.'s costs, in some cases "in any event."

The action was subsequently settled upon the terms, indorsed on the briefs of counsel "Record withdrawn. No costs on either side," the question of the costs of the interlocutory proceedings not being present to their minds:—*Held*: after the settlement of the action defts. were entitled to taxation & payment of their costs of the interlocutory proceedings which pltf. had been ordered to pay.—*WALTER v. BEWICKE*, *MOREING & Co.* (1904), 90 L. T. 409, C. A.

Annotation:—*Consd. Mansfield v. Robinson*, [1928] 2 K. B. 353.

1646. Bill must be the delivered bill.—(1) C., a solr., sent in to exors. a bill of costs for £83, writing at the foot, "say £78," & the £78 was paid. The residuary legatee obtained an order to tax the bill, which was taxed at £66, being more than five-sixths of £78, but less than five-sixths of £83. The residuary legatee objected to certain items as excessive, & the taxing master considered that they were excessive, but held, that, as the exors. had authorised them & admitted their liability to pay them, the residuary legatee could not have them reduced. The judge held that the taxing master was right in allowing these items; that the bill must be treated as a bill for £78, from which less than one-sixth had been taxed off, & that the solr. was entitled to the costs of the reference:—*Held*: the bill delivered, within Solicitors Act, 1843 (c. 73), s. 37, was a bill for £83, & as more than one-sixth had been taxed off, the solr. must, according to that sect., pay the costs of the reference; the case not coming within the proviso giving the ct. a discretion where special circumstances are certified.

(2) P., a solr. delivered a bill for £362, but stated that he would only claim £320, & the £320 only was entered in the cash account which he delivered to his clients. The clients obtained an order for taxation. The taxing master taxed the bill at £820, being more than five-sixths of £320, but less than five-sixths of £362, & certified that he had allowed the solr. the costs of the reference, as he considered that since he had never claimed more than £320, the difference of £42 between this sum & the amount of the whole bill, ought to be reduced from the sums taxed off, thus reducing them to £40, which was less than a sixth of the sum he had claimed:—*Held*: special circumstances were certified, so as to give the ct. a discretion as to the costs of the reference, but the special circumstances were not such as to induce the ct. to depart from the general rule that the costs of the reference should follow the event of the taxation, & in this case also, more than one-sixth having been taxed off the £362, the solr. must pay the costs of the reference.

lesser sum refused.—Where a solr. has offered to take in full settlement less than the amount of a bill of costs as rendered, & has made the offer in a manner unequivocal & binding upon him, then & not otherwise he is to be allowed the benefit of the offer upon taxation if the client reject it & proceed to tax the bill.—*Re ALLISON* (1886), 12 P. R. 6.—*CAN.*

(3) *Semble*: the one-sixth rule in Solicitors Act, 1843 (c. 73), s. 37, is not abrogated by Jud. Act, 1873 (c. 66), & R. S. C., Ord. 65.—*Re CARTHEW, Re PAULL* (1884), 27 Ch. D. 485; 54 L. J. Ch. 134; 51 L. T. 435; 32 W. R. 940; 28 Sol. Jo. 709, C. A. *Annotation*:—*As to* (1) *Apld. Re Mackenzie, Ex p. Short* (1893), 69 L. T. 751.

(b) *Civil Business.*

1647. Agency business.]—A bill of fees & disbursements for agency business ordered to be taxed.—*PAGET v. NICHOLSON* (1755), 1 Dick. 285; 21 E. R. 278.

Annotation:—*Refd. Lees v. Nuttall* (1834), 2 My. & K. 284.

1648. — As between solicitors.]—*CORNER v. HAKE* (1789), 2 Cox, Eq. Cas. 173; 30 E. R. 79.

Annotation:—*Refd. Jones v. Roberts* (1838), 8 Sim. 397.

1649. — — —.]—The bill of costs of an attorney, agent to the attorney employed by the party in respect of whose business the agency charges have been incurred, will not be ordered to be referred to a master to be taxed on the application of the client.—*WILDBORE v. BRYAN* (1820), 8 Price, 677; 146 E. R. 1333.

Annotation:—*Refd. Cardale v. Bull* (1843), 4 Q. B. 611.

1650. — — — Whether order obtained as of course.]—An order for the taxation of an agent's bill cannot be obtained as of course by a solr., nor can the rule for bringing the amount of the agent's bill into ct., upon such application, be dispensed with except under special circumstances.—*LEES v. NUTTALL* (1834), 2 My. & K. 284; 4 L. J. Ch. 124; 39 E. R. 952.

Annotation:—*Apld. Jones v. Roberts* (1838), 8 Sim. 397.

1651. — — —.]—A country solr. is entitled, under Solicitors Act, 1843 (c. 73), s. 37, as "the party chargeable," to an order of course for taxation of his London agent's bill of costs without bringing any sum of money into ct.—*Re WILDE*, [1910] 1 Ch. 100; 79 L. J. Ch. 119; 101 L. T. 734.

1652. — — — General jurisdiction of court.]—A solr. can obtain the taxation of his agent's bill of costs, under the general jurisdiction of the ct.—*JONES v. ROBERTS* (1838), 8 Sim. 397; 7 L. J. Ch. 156; 2 Jur. 30; 59 E. R. 158.

Annotations:—*Refd. Re Smith* (1841), 4 Beav. 309; *Cardale v. Bull* (1843), 4 Q. B. 611; *Smith v. Dimes* (1849), 4 Exch. 32; *Reid v. Burrows*, [1892] 2 Ch. 413.

1653. — — —.]—This ct. has authority to refer for taxation the bill of costs of a solr. who acts as agent for another.—*TOGHILL v. GRANT, Re BOORD* (1840), 2 Beav. 261; 9 L. J. Ch. 298; 48 E. R. 1181; *on appeal*, 2 Beav. 263, n., L. C.; *subsequent proceedings* (1843), 6 Beav. 348.

1654. — — —.]—Under 2 Geo. 2, c. 23, & 12 Geo. 2, c. 13, the cts. had no power, by direct statutory provision, or in the exercise of any common law authority, to order taxation of an agency bill delivered by one attorney to another.—*CARDALE v. BULL* (1843), 4 Q. B. 611; 1 L. T. O. S. 144; 7 Jur. 847; 114 E. R. 1028.

Annotation:—*Consd. Smith v. Dimes* (1849), 4 Exch. 32.

1655. — — — Part of agent's bill.]—(1) The ct. has no jurisdiction under Solicitors Act, 1843 (c. 73), to refer part of an agent's bill to taxation.

(2) The ct. has, however, under its general jurisdiction, power to direct the taxation of a bill relating to ct. business, whether the bill be an agent's bill or a bill delivered by a solr. to his client, & also to refer part of a bill to taxation.—*Re JOHNSON & WEATHERALL* (1888), 37 Ch. D. 433; 57 L. J. Ch. 306; 58 L. T. 692; 36 W. R. 374; 4 T. L. R. 268, C. A.; *varying S. C. sub nom. STORER & Co. v. JOHNSON* (1890), 15 App. Cas. 203, H. L.

Annotations:—*As to* (2) *Consd. Re Park, Cole v. Park* (1889), 41 Ch. D. 326; *Re Osborn & Osborn*, [1913] 3 K. B. 862. *Refd. Reid v. Burrows*, [1892] 2 Ch. 413; *Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306. *Generally, Refd. Re Ward* (1896), 65 L. J. Ch. 595.

1656. Solicitors Act, 1843 (c. 73).]

Under the above Act, s. 37, an attorney's bill for agency business is taxable.—*SMITH v. DIMES* (1849), 7 Dow. & L. 78; 4 Exch. 32; 19 L. J. Ex. 60; 13 Jur. 518; 154 E. R. 1113.

Annotations:—*Consd. Bush v. Martin* (1863), 2 H. & C. 311; *Re Johnson & Weatherall* (1888), 37 Ch. D. 433. *Apld. Re Wilde*, [1910] 1 Ch. 100. *Refd. Reid v. Burrows*, [1892] 2 Ch. 413.

1657. — — —.]—An agency bill is taxable, & the ct. has the power to refer such a bill to the master for taxation, under above Act.—*SMITH v. WILLIAMS* (1849), 13 L. T. O. S. 344.

1658. — — — Part of agent's bill.]—*Re JOHNSON & WEATHERALL*, No. 1655, *ante*.

1659. — — — London agent.]—*Re WILDE*, No. 1651, *ante*.

1660. — — — Necessity for bringing amount into court.]—A solr. cannot obtain the taxation of his agent's bill without bringing the amount into ct.—*OSTLE v. CHRISTIAN* (1823), Turn. & R. 324; 37 E. R. 1124, L. C.

Annotations:—*Apld. Lees v. Nuttall* (1834), 2 My. & K. 284. *Consd. Jones v. Roberts* (1838), 8 Sim. 397. *Refd. Re Smith* (1841), 4 Beav. 309; *Reid v. Burrows*, [1892] 2 Ch. 413.

1661. — — —.]—*LEES v. NUTTALL*, No. 1650, *ante*.

1662. — — —.]—*Re SMITH*, No. 1537, *ante*.

1663. — — —.]—*STORER & Co. v. JOHNSON*, No. 1609, *ante*.

1664. — — —.]—*Re WILDE*, No. 1651, *ante*.

1665. — — — Taxation upon footing of special agreement—Departure from ordinary rules.]—*Re SMITH*, No. 1537, *ante*.

1666. — — —.]—A solr. agreed to undertake the defence of another solr. upon agency charges. On special petition, a taxation of his bill was ordered, "having regard to the agreement."—*Re GEDYE* (1857), 23 Beav. 347; 53 E. R. 136.

Annotations:—*Refd. Re Philp* (1860), 2 Giff. 35; *Ward v. Lawson* (1872), 8 Ch. App. 65.

1667. — — —.]—*WARD v. LAWSON*, No. 1347, *ante*.

1668. — — — Account of transaction unconnected with bill—Whether obtainable.]—*Re SMITH*, No. 1537, *ante*.

1669. — — — Attendance before arbitration.]—Where the attorney of one of the parties in a cause referred to arbn. employs another attorney to attend before the arbitrator in his stead, for the

PART VI. SECT. 5, SUB-SECT. 1.—
C. (b).

1647 i. Agency business.]—Charges by a solr. who acted as agent for the principal solr., are subject to taxation, though the principal receives a commission.—*Re IDINGTON & MICKLE* (1881), 8 P. R. 566.—*CAN.*

1647 ii. — — —.]—An attorney's bill of costs, the vast majority of the items

in which had no reference at all to litigation, but referred to work of general agency performed by the attorneys for their client:—*Held*: not to be such a bill as the ct. would refer to the taxing officer for taxation.—*WALKER v. SYFRET, GODLINGTON & LOW* (1906), 23 S. C. 529.—*S. AF.*

m. Business in which solicitor did not act as such.]—The ct. has no

jurisdiction in directing the taxation of a solr.'s bill of costs, to order any account of dealings between the parties, in which the solr. did not act as such, even though the latter has given credit for such items in the bill of costs.—*SNEYD v. CONROY* (1845), 8 L. Eq. R. 469.—*IR.*

n. Business done at & before parliamentary election.]—Where, at

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purpose of conducting his client's case, the bill of costs of the attorney so employed in respect of this business is not a bill for business done, within Solicitors Act, 1843 (c. 73), s. 37, which can be referred to taxation.—*Re SIMONS* (1844), 2 Dow. & L. 500; 14 L. J. Q. B. 41; *sub nom. Re SIMMONDS*, 9 Jur. 227.

Annotations:—*Refd. Smith v. Dimes* (1849), 4 Exch. 32; *Smith v. Williams* (1849), 13 L. T. O. S. 344.

1670. — Country agent employed by town solicitor.]—Where, in the course of a prosecution by the Post Office for forgery, which was tried in the country, the attorney to the Post Office employed a country attorney to do such part of the business as could not be performed in London:—*Held*: the business was done in the character of agent, & the bill was not taxable, notwithstanding that it charged the principal attorney not with a proportion, but with the whole amount of the profits arising from the business which was so done.—*Re SIMONS, SIMONS v. PEACOCK* (1845), 3 Dow. & L. 156; 14 L. J. Q. B. 296; 5 L. T. O. S. 390; 9 Jur. 711.

Annotations:—*Refd. Smith v. Dimes* (1849), 4 Exch. 32; *Smith v. Williams* (1849), 13 L. T. O. S. 344.

1671. — — — — —.]—*Re DAVIS* (1846), 7 L. T. O. S. 338.

1672. — London agent employed by country solicitor.]—(1) A solr. introduced an intended pltf. in a cause to his town agent, & the intended pltf. gave a retainer to the town agent, after receiving an indemnity from the solr. with the knowledge of the town agent, who himself gave an undertaking to the solr. to charge in the conduct of the suit as between principal & agent only. During part of the time the suit was being carried on the solr. was uncertificated:—*Held*: the common order to tax the town agent's bill of costs, made on the petition of the solr., was not irregular.

(2) Petitioner having on his petition given a false address & having neither explained it nor given a true address was ordered to give security for costs though he was not contemplating going out of the jurisdiction.—*Re SMITH, Ex p. FOLEY* (1849), 11 Beav. 456; 50 E. R. 894; *sub nom. Re SMITH*, 13 L. T. O. S. 251; *subsequent proceedings, sub nom. FOLEY v. SMITH*, 17 L. T. O. S. 273.

Annotation:—*As to (2) Refd. Atkins v. Cook* (1857), 5 W. R. 381.

1673. — Right to one bill of costs—Principal party to cause.]—The solr. of deft. in the cause, & who is himself deft. in the same cause, & appears by a second solr., cannot be allowed more than one bill of costs, if it appears that the second solr. has, either before or after his retainer, agreed to allow his client, the first solr., a portion of the profits of his costs in the cause.

A., B. & C. were defts. in the cause, against whom the bill was dismissed, with costs. B. & C. acted as the solrs. of A., & appointed D. to act as their own solr. in the same cause. After the retainer, an agreement was entered into between B. & D., whereby D. agreed to allow B. & C. a portion of the profits of his bill of costs:—*Held*: the agreement constituted D., in substance, an agent for B. & C., & the separate bills of costs of B., & of C. & D., were properly taxed as a joint bill, & all such costs as would not have been allowed in a case of agency

were properly disallowed.—*DEERE v. ROBINSON* (1849), 7 Hare, 283; 19 L. J. Ch. 405; 68 E. R. 116.

1674. — — — Agreement to act on terms of principal & agent.]—*Re SMITH, Ex p. FOLEY*, No. 1672, *ante*.

1675. — — — English solicitor in France.]—A firm of London solrs. employed an English solr. practising in Paris to make certain inquiries in France in connection with an English action. Upon an application to tax the bill of costs:—*Held*: the relationship between the parties was the same as that of a country solr. & a London agent, & the bill was liable to taxation.—*Re MAUGHAM* (1885), 2 T. L. R. 115, C. A.

— **London agents.]**—*See* Nos. 1651, 1672, *ante*.

Arbitration—Costs of award.]—*See* ARBITRATION, Vol. II., pp. 605–610, Nos. 2369–2415.

— **Arbitrator's & umpire's fees.]**—*See* ARBITRATION, Vol. II., pp. 425, 426, Nos. 759–772.

— **]**—*See* R. S. C., Ord. 65, r. 15.

— **Compulsory purchase of land.]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 201–203, Nos. 803–814.

Bankruptcy business.]—*See* BANKRUPTCY, Vol. IV., pp. 217, 218, 518–523, Nos. 2025–2033, 4715–4780.

1676. Company business—Winding up.]—*Re BRABANT* (1879), 23 Sol. Jo. 779.

Annotations:—*Consd. Re Foss, Billbrough, Plaskitt & Foss*, [1912] 2 Ch. 161. *Refd. Re Palace Restaurants*, [1914] 1 Ch. 492.

1677. — — — — —.]—*Re LIVERPOOL HOUSEHOLD STORES ASSOCN.*, [1889] W. N. 48.

Annotations:—*Consd. Re Foss, Billbrough, Plaskitt & Foss*, [1912] 2 Ch. 161. *Refd. Re Palace Restaurants*, [1914] 1 Ch. 492.

— **]**—*See, also, COMPANIES*, Vol. X., p. 953, Nos. 6530–6533.

1678. County court business—Replevin bond.]—*WARDLE v. NICHOLSON*, No. 1433, *ante*.

— **Remittal from High Court to county court.]**—*See* COUNTY COURTS, Vol. XIII., p. 490, No. 407.

— **County court costs generally.]**—*See* COUNTY COURTS, Vol. XIII., pp. 523, 524, Nos. 735–742.

Compulsory purchase of land.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 235, 236, Nos. 1259–1265.

1679. Crown business—Prosecuting extent.]—The bill of the solrs. prosecuting the extent for the Crown may be taxed.—*R. v. COLLINGRIDGE* (1816), 3 Price, 280; 146 E. R. 261.

1680. Election business—Professional services.]—Candidates at a general election for Members of Parliament employed a firm of solrs. as their election agents:—*Held*: the employment was professional, & their bill of costs was subject to taxation, within Solicitors Act, 1843 (c. 73).—*Re OSBORNE* (1858), 25 Beav. 353; 27 L. J. Ch. 532; 31 L. T. O. S. 79; 7 Jur. N. S. 296; 6 W. R. 401; 53 E. R. 671.

Annotation:—*Distd. Re Oliver* (1867), 36 L. J. Ch. 261.

1681. — Non-professional services — Canvasser.]—Where, for a parliamentary election, a solr. was employed as canvassing agent, other persons being employed as legal agents:—*Held*: his bills were not liable to taxation.—*Re OLIVER* (1867), 36 L. J. Ch. 261; 31 J. P. 375; 15 W. R. 331.

1682. — Returning officer.]—A solr. who was appointed returning officer for the election of a

& before a parliamentary election, an attorney was employed to assist in procuring the return of a candidate:—*Held*: the at. had jurisdiction to order his bill of costs for such services to be taxed.—*Re COLLIS* (1854), 23 L. T. O. S. 10. — *IR.*

o. Special agreement to pay solicitor & client costs.]—Where a special agreement was made for the taxation of a solr.'s bill of costs as between solr. & client & payment thereof by the opposite party, there was no jurisdiction under the Law Practitioners Act,

1861, to refer the bill for taxation.—*Ex p. WEST* (1877), 3 N. Z. Jur. N. S. 41. — *N.Z.*

p. Compromise.]—Where an arrangement is come to between the parties to an action whereby the action is withdrawn, deft. agreeing to pay the

school board under Elementary Education Act, 1870 (c. 75), sent in a bill of his charges in the usual form of a solr.'s bill of costs, including both the election charges proper & attendance at the board after the election was over. On a motion to discharge the common order for taxation:—*Held*: as he had by the form of his bill of costs constituted himself solr. to the board, the bill in question was liable to taxation.—*Re JONES* (1872), L. R. 13 Eq. 336; 41 L. J. Ch. 367; 20 W. R. 395.

1683. House of Lords business.—The ct. cannot order a solr.'s bill of costs, for business done wholly in the House of Lords, in the prosecution of an appeal, to be referred for taxation, because their officer has no means whereby he may be enabled to tax such a bill.—*WILLIAMS v. ODELL* (1817), 4 Price, 279; 146 E. R. 464.

1684. ———.]—*Re RAPHAEL, Ex p. SALOMON*, No. 1689, *post*.

Manorial business.—*See COPYHOLDS*, Vol. XIII., p. 45, Nos. 531, 532.

1685. Parliamentary business.—Under the common order to tax a solr.'s bill, the taxing masters would tax a bill for Parliamentary business upon the scale of Parliamentary allowances.—*Re SUDLOW* (1849), 11 Beav. 400; 18 L. J. Ch. 182; 13 L. T. O. S. 63; 50 E. R. 871.

Annotation:—*Consd. Re Baker, Lees*, [1903] 1 K. B. 189.

1686. ——— **Work as Parliamentary agent—Not as solicitor.**—Where a bill of costs delivered by a Parliamentary agent, who is likewise a solr., relates exclusively to business done by him in the capacity of a Parliamentary agent, & not in that of a solr., the bill cannot be referred for taxation under Solicitors Act, 1843 (c. 73).—*Re BAKER, LEES & CO.*, [1903] 1 K. B. 189; 72 L. J. K. B. 136; 87 L. T. 662; 51 W. R. 246; 19 T. L. R. 113; 47 Sol. Jo. 148, C. A.

——— **Private bills.**—*See PARLIAMENT*, Vol. XXXVI., pp. 278, 286, Nos. 259–261, 331–334.

1687. Poor law business—Employment by guardians of poor.—*SOUTHAMPTON GUARDIANS v. BELL & TAYLER*, No. 1738, *post*.

1688. Proceedings before Lord Chancellor—In visitatorial capacity.—Proceedings before the Lord Chancellor, as exercising the visitatorial power upon a royal foundation, not within the statute for taxing bills of costs.—*Ex p. DANN* (1804), 9 Ves. 547; 32 E. R. 715.

1689. Proceedings under Poor Persons Rules.—Where a person appeals to the House of Lords *in forma pauperis* & is successful, the contract between pauper applt. & his solr. must be taken to be the ordinary one, so that from the moment of the retainer, so long as the retainer holds good, the pauper client is bound to pay the costs in the same way as any other impecunious litigant who employed a solr. would be bound.—*Re RAPHAEL, Ex p. SALOMON*, [1899] 1 Ch. 853; 68 L. J. Ch. 309; 80 L. T. 226; 47 W. R. 330; 43 Sol. Jo. 299; *on appeal*, 68 L. J. Ch. 765; 81 L. T. 479, C. A.

1690. ———.]—*LANDI v. CARL ROSA OPERA CO., LTD.*, [1919] W. N. 273.

See R. S. C., Ord. 16, r. 31B.

costs, the ct. has no jurisdiction under Law Practitioners Act to construe the agreement or to order the taxation of the costs.—*ANDERSON v. STRODE* (1886), 4 N. Z. L. R. 227 (S. C.).—N. Z.

PART VI. SECT. 5, SUB-SECT. 1.—C. (c).

g. Whether court will order taxation.—It is the duty of the ct. if called on, to ascertain whether a solr.'s charges, though for services as a solr. in

criminal proceedings, are consistent with his duty as an officer of the ct., & notwithstanding the fact that there is no tariff of fees for services in criminal matters & the rules of ct. respecting taxation are in relation to civil matters, resort may be had to them, if objection is not made, for the purpose of starting proceedings to dispute the amount chargeable for such services.—*Re T.*, [1921] 1 W. W. R. 1095; 16 Alta. L. R. 449; 57 D. L. R. 704.—CAN.

(c) Criminal Business.

See Costs in Criminal Cases Act, 1908 (c. 15).

1691. Whether court will order taxation—Work at sessions.—The ct. will refer an attorney's bill to be taxed, though all the business be done at quarter sessions.—*Ex p. WILLIAMS* (1791), 4 Term Rep. 496; 100 E. R. 1139; *previous proceedings*, 4 Term Rep. 124.

Annotations:—*Appld. Smith v. Wattleworth* (1825), 1 Dow. & Ry. K. B. 510. *Distd. Beoke v. Wells* (1832), 3 Tyr. 193. *Consd. Sylvester v. Webster* (1832), 9 Bing. 388.

1692. ———.]—*CLARKE v. DONOVAN*, No. 1299, *ante*.

1693. ———.]—Order directing taxation of a solr.'s bill for business done in the ct. of great sessions discharged, the ct. not assuming jurisdiction for that purpose alone.—*Ex p. PARTRIDGE* (1818), 3 Swan. 398; 36 E. R. 909; *previous proceedings* (1817), 2 Mer. 500.

Annotation:—*Distd. Re Murray* (1826), 1 Russ. 519.

1694. ———.]—*SYLVESTER v. WEBSTER*, No. 1300, *ante*.

1695. ——— **Central Criminal Court.**—An attorney's bill of charges for business done in the Central Criminal Ct., is taxable by order of a judge of one of the superior cts.—*CURLING v. SEDGER* (1838), 4 Bing. N. C. 743; 6 Dowl. 759; 6 Scott, 678; 8 L. J. C. P. 71; 2 Jur. 545; 132 E. R. 975.

Annotation:—*Refd. Doe d. Sabine v. Sabine* (1840), 4 Jur. 247.

1696. ——— **Under Solicitors Act, 1843 (c. 73).**—Deft., a London attorney, employed pltf. also a London attorney, to go to Cambridge & defend a person indicted for bribery at an election there. In 1841 & 1842, pltf. delivered to deft. bills of costs unsigned, & in Feb. 1847, he delivered signed bills:—*Held*: the bills were taxable under above Act.—*BILLING v. COPPOCK* (1847), 1 Exch. 14; 154 E. R. 6; *sub nom. Re BILLING, BILLING v. COPPOCK*, 5 Dow. & L. 126; 16 L. J. Ex. 265.

Annotations:—*Consd. Smith v. Dimes* (1849), 4 Exch. 32. *Refd. Reid v. Burrows*, [1892] 2 Ch. 413.

1697. ——— **Work done before magistrate.**—*COWDELL v. NEALE*, No. 1871, *post*.

D. On Whose Application Ordered.

(a) Client.

i. In General.

See Solicitors Act, 1843 (c. 73), s. 37.

1698. Bankrupt client—Assignees neglecting to apply.—If assignees neglect to have a solr.'s bill of costs taxed by the comrs., the bkpt. may after having settled with creditors apply to the general jurisdiction of the ct., & obtain an order to tax the bill.—*Re BROOM, Ex p. BAYLEY* (1830), Mont. 208. *Annotation*:—*Refd. Re Que, Ex p. Que* (1832), 1 L. J. Bcy. 45.

1699. ——— **After commission superseded.**—Bkpt. may, after his commission has been superseded, get the solr.'s bill taxed by an officer of the ct. under the general jurisdiction in bkpcy.—*Re QUE, Ex p. QUE* (1832), 1 L. J. Bcy. 45.

1700. ——— **Application after long delay.**—A fiat was sued out on June 7, by an attorney against his debtor, for the amount of his bill of costs, & the bkpt. was shortly afterwards discharged under

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r. General rule.—An agent who had been employed to recover an heritable debt having received the amount, retained from it a sum to pay his business accounts, which were untaxed. In an action of accounting, which was subsequently brought by the client:—*Held*: he was entitled to insist that the agent's accounts should be taxed.—*HENDERSON v. JACKSON* (1852), 14

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the Insolvent Act, having inserted the amount of the attorney's bill in his schedule. The bkpt. passed his last examination; & on Dec. 4, petitioned for an order to tax the attorney's bill, with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt:—*Held*: the bkpt. could not, after lying by so long, & after his previous admission of the debt, apply for such an order.—*Re GINGELL, Ex p. GINGELL* (1833), 2 Deac. & Ch. 546; 2 L. J. Bcy. 22.

1701. — Costs incurred prior to insolvency.]—Order for taxation, obtained by an insolvent debtor, of a bill of costs incurred prior to his insolvency, discharged with costs.—*Re HALSALL* (1848), 11 Beav. 163; 11 L. T. O. S. 430; 50 E. R. 779.

1702. — After discharge.]—Bkpt. who has obtained his discharge & who has become entitled to the surplus of his estate, all the creditor's having been paid in full, is not entitled under Solicitors Act, 1843 (c. 73), s. 39, to obtain the taxation of a bill of costs paid by the trustee in the bkpcy.—*Re LEADBITTER* (1878), 10 Ch. D. 388; 48 L. J. Ch. 242; 39 L. T. 286; 27 W. R. 267, C. A.

Annotations:—Reid, Bird v. Philpott, [1900] 1 Ch. 822; Re Jones & Everett, [1904] 2 Ch. 363.

1703. — Right of assignee to apply.]—In a suit for an account by the assignees of a bkpt. against the exor. of the solr. to the commission bills of costs, for which the exor. takes credit as against the sum due from his testator to the bkpt.'s estate will, on motion, be referred for taxation.—*STEPHENS v. DAVIES* (1827), 6 L. J. O. S. Ch. 66.

1704. — —.]—An assignee of a bkpt., although not a creditor, may apply for an order of reference to the master for taxation of the solr.'s bills, notwithstanding such bills have been settled & ascertained by the comrs. under 6 Geo. 4, c. 16, s. 14.—*Re BIAS, Ex p. BARLOW* (1830), 9 L. J. O. S. Ch. 84.

1705. — —.]—Where the client of a solr. becomes bkpt., & the solr. does not prove for the amount of his bill of costs in the bkpcy., the assignee cannot obtain an order to tax without giving an undertaking to pay the whole amount of the bill.—*Re ELMSLIE & Co.* (1869), L. R. 9 Eq. 72.

Taxation in Bankruptcy proceedings generally, see BANKRUPTCY, Vol. IV., pp. 518-523.

1706. Representative of deceased client.]—A representative of a person who had obtained an order to tax a bill, can revive it only on an undertaking to pay.—*MURPHY v. BALDERSTON* (1741), 2 Atk. 114; 26 E. R. 472; *sub nom. MURPHY v. BALDERSTON*, Barn. Ch. 265.

1707. —.]—The exor. of a deft. who had expressed his satisfaction with his attorney's bill, & had made a payment on account, may yet have it referred to be taxed, even after a lapse of four years.—*WOOLLASTON v. WESTON* (1835), 1 Har. & W. 366.

1708. —.]—T. employed D. as his solr. to obtain the *supersedeas* of a fiat issued against A. In Apr. 1842, D. delivered to T. his bill of costs, when the latter paid £60 on account. In May R.,

on behalf of himself & H., wrote to D. thus, "Your account shall be settled by us as soon as the business, meaning the *supersedeas*, is settled." Shortly afterwards H. wrote to D. to the effect that he & R. would settle his account if anything happened to T. Shortly after the date of that letter, T. died:—*Held*: the letters were an acknowledgment to pay without taxation only the account due at their dates, & T.'s extrix. had a right to have taxed all subsequent bills of costs against T. & his estate.—*Re ARDERNE, Ex p. TREDGOLD* (1843), 7 Jur. 220.

1709. — Solicitors acting for deceased & his representative.]—*Re DALBY*, No. 1734, *post*.

1710. — Claim by solicitors in administration of estate of deceased.]—(1) Solrs. claimed in the administration of the estate of a deceased client in respect of the balance of certain bills which had been delivered to the client more than twelve months before his death, & on account of which the client had made payments. The exor. thought that some of the items in the bills required investigation, but no case of special circumstances was raised. The chief clerk referred all the bills to the taxing master for taxation or moderation, without giving any special directions:—*Held*: although the reference had gone too far, & ought not to have been in such a form that the taxing master might infer that he was to tax the bills as if they had come before him in the ordinary course there must be a direction in the form of the order in *Allen v. Jarvis*, No. 2560, *post*, that the taxing master should inquire & state whether any & of which of certain disputed items in the bills were fair & proper to be allowed, & to what amount respectively.

(2) Retaining a bill of costs for over twelve months without objection is only *prima facie* evidence of the charges being reasonable.—*Re PARK, Cole v. PARK* (1889), 41 Ch. D. 326; 58 L. J. Ch. 547; 61 L. T. 173; 37 W. R. 742, C. A.

Annotations:—As to (1) Consd. Re Osborn & Osborn, [1913] 3 K. B. 862. Apld. Jones v. Whitehouse, [1918] 2 K. B. 61. Reid. Re Miller, Chapman v. Miller (1889), 58 L. J. Ch. 728; Lumsden v. Shipcote (1906), 75 L. J. K. B. 665; Re Palace Restaurants, [1914] 1 Ch. 492. Generally, Reid. Re Foss, Billbrough, Plaskitt & Foss, [1912] 2 Ch. 161.

1711. Where bill unsigned.]—The provisions of Solicitors Act, 1843 (c. 73), s. 37, for the authentication by signature of a solr.'s bill of costs, are intended for the protection of the client only, & therefore where a bill has been delivered without such authentication, that circumstance is no objection to an application by the client for its taxation.

The form of order adopted by the M. R. for referring bills for taxation after a month from the time of delivery has elapsed is correct.—*Re PENDER* (1846), 2 Ph. 69; 16 L. J. Ch. 25; 8 L. T. O. S. 113; 10 Jur. 891; 41 E. R. 868, L. C.

Annotations:—Consd. Young v. Walker (1847), 16 M. & W. 446; Re Gedy (1851), 11 Beav. 56. Reid. Re Billing, Billing v. Coppock (1847), 5 Dow. & L. 126; Re Tilleard (1863), 32 Beav. 476; Ex p. Jarman (1877), 4 Ch. D. 835; Re Jones (1886), 2 T. L. R. 177.

1712. —.]—An attorney's bill may be referred for taxation under Solicitors Act, 1843 (c. 73), s. 37, though not signed by him or inclosed in a letter signed by him & referring to it.—*YOUNG v. WALKER* (1847), 16 M. & W. 446; 8 L. T. O. S. 394.

1713. —.]—*BILLING v. COPPOCK*, No. 1696, *ante*.

Dunl. (Ct. of Sess.) 1040; 24 Sc. Jur. 630; 1 Stuart, 1068.—SCOT.

t. —.]—The right of a client to have an agent's accounts taxed, could only be foreclosed by the most express waiver.—*M'LAREN v. MANSON* (1857), 20 Dunl. (Ct. of Sess.) 218; 30 Sc. Jur. 113.—SCOT.

a. —.]—A client is not precluded from demanding taxation of his agent's business account by having accepted payment of a balance brought out on the agent's cash-account in which he had taken credit for the amount of his business account the strict doctrine of settled account not

being applicable in a question between agent & client.—*COCKBURN v. CLARK* (1885), 12 R. (Ct. of Sess.) 707; 22 Sc. L. R. 475.—SCOT.

b. Failure of client to tax within month admits reasonableness of bill.]—Where a signed attorney's bill had been delivered, & a month elapsed without

1714. —.].—*Re A FIRM OF SOLICITORS, Ex p. D'ARAGON* (1887), 3 T. L. R. 815, C. A.

1715. **Married woman.**]—Where a married woman employs a solr. & makes her separate estate liable, she is, though not personally liable, a "party chargeable" within Solicitors Act, 1843 (c. 73), s. 37.—*WAUGH v. WADDELL* (1853), 16 Beav. 521; 22 L. J. Ch. 612; 21 L. T. O. S. 16; 1 W. R. 206; 51 E. R. 880; *previous proceedings, sub nom. Re WAUGH* (1852), 15 Beav. 508.

Annotation:—*Consd. Thomas v. Cross* (1864), 5 New Rep. 148.

1716. **Taxation of solicitor & client items—After taxation of party & party items.**]—*Re OSBORN & OSBORN*, No. 1531, *ante*.

1717. **Trustee—Against co-trustee also solicitor—Charging for professional services.**]—A trustee may obtain taxation of the bill of costs rendered by a co-trustee who is a solr. with power to charge for professional services, & the bill does not cease to be a bill because it is described as a note of charges. The trustee asking for taxation is, however, personally responsible for the costs incurred.—*Re H. P. DAVIES & SON*, [1917] 1 Ch. 216; 86 L. J. Ch. 200; 115 L. T. 854; 61 Sol. Jo. 181.

Taxation of agency business.]—*See Nos. 4337, 4338, post.*

ii. *Where Joint Retainer.*

1718. **General rule.**]—Where several persons give separate retainers to a solr. to take proceedings on behalf of all, the strict right of each of them is to have the solr.'s bill taxed without serving any person other than the solr.; but in order to prevent multiplicity of taxations, the ct. will so far as possible direct a single taxation in the presence of all parties interested.

Where thirty-five persons had separately retained a solr., to take proceedings on their behalf, & fifteen of them applied for taxation of his bill, the judge ordered taxation, but directed the order not to be drawn up without proof that the others had been communicated with, & either declined to take part in the proceedings or were made resps. Some of the parties could not be found & the judge thereupon dismissed the application:—*Held*: the judge was right in taking steps to have a taxation in the presence of all parties, but was wrong in dismissing the application when it was found impracticable to serve all the parties, & taxation must be ordered.—*Re SALAMAN*, [1894] 2 Ch. 201; 63 L. J. Ch. 664; 70 L. T. 772; 42 W. R. 530; 38 Sol. Jo. 340; 7 R. 540, C. A.

1719. **Right of one or some of clients.**]—Where any part of a solr.'s bill relates to business done in this ct. the whole may be taxed, although part of the business was for other persons jointly with the person applying.—*MARGERUM v. SANDIFORD* (1791), 3 Bro. C. C. 233; 29 E. R. 508.

Annotation:—*Reid. Creuze v. Lowth* (1793), 4 Bro. C. C. 316.

1720. —.].—Where business is done by an attorney for two persons jointly, his bill cannot be referred to the master on the application & undertaking of one of them only. *Qu.*: whether an action pending on the bill makes any difference.—*HOBBY v. PRITCHARD* (1836), 2 M. & W. 124; 5 Dowl. 301; 2 Gale, 214; 6 L. J. Ex. 24; 150 E. R. 696.

the client taking steps to tax it, the charges were admitted to be reasonable.—*DWYER v. HERMAN* (1881), 2 N. S. W. L. R. (Law) 280.—*AUS.*

PART VI. SECT. 5, SUB-SECT. 1.— D. (a) ii.

1719 i. **Right of one or some of clients.**]—Where an order for taxation had been obtained *ex p.* at the instance of one or two clients who had jointly retained the

solr., such order was set aside as irregular.—*Re BEECHER, BARKER & STREET* (circa 1867), 2 Ch. Ch. 215.—*CAN.*

c. **Whether liability joint or several.**]—Notwithstanding that the retainer of a solr. by two persons is in form a joint one, the ct. will look into the facts of the case to discover the real nature of the transaction, & will determine the rights of the solr. & clients accordingly; such a retainer

1721. —.].—*Re CHILCOTE*, No. 1892, *post*.

1722. —.].—Bill of costs incurred by two persons, ordered to be taxed, on the application & upon the undertaking of one.—*LOCKHART v. HARDY* (1841), 4 Beav. 224; 49 E. R. 324.

Annotation:—*Reid. Re Lewin* (1853), 16 Beav. 608.

1723. —.].—*Re PHIPPS* (1850), 14 J. P. Jo. 351.

1724. —.].—Where a solr. is retained by two persons jointly, an application for taxation by one, in the absence of the other, should not be made as of course.—*Re LEWIN* (1853), 16 Beav. 608; 1 W. R. 269; 51 E. R. 915.

1725. —.].—An order of course to tax a solr.'s bill incurred by three persons, obtained on the application of two of them, is irregular.—*Re ILBERTON* (1863), 33 Beav. 201; 55 E. R. 344.

1726. —.].—**Necessity for joinder of remainder.**]—(1) One of three petitioning creditors may apply for the taxation of the solr.'s bill, without the others joining in the application.

(2) Notwithstanding an action is commenced by the solr., before such an application is made, still, if more than a sixth is taken off the bill, the solr. pays the costs of taxation.

A conditional order to that effect, to save expense, was made in the first instance.—*Re SCHELINGSER, Ex p. WATTS* (1836), 1 Deac. 588; *sub nom. Re SCHLESINGER, Ex p. WATTS*, 5 L. J. Bcy. 31, Ct. of R.

1727. —.].—**Remainder refusing to concur.**]—*Re RICHARDSON*, No. 1373, *ante*.

1728. —.].—A solr. was employed by three partners. He brought an action against them for his bill of costs, & representing one, he obtained judgment against him by default:—*Held*: (1) this did not prevent the others from obtaining an order for taxation; (2) an application for taxation by the two was regular, the third not concurring, but he ought to be served with the petition.—*Re HAIR* (1847), 10 Beav. 187; 11 Jur. 139; 50 E. R. 554; *sub nom. Re HARE*, 2 New Pract. Cas. 138; 16 L. J. Ch. 163; 9 L. T. O. S. 1; *subsequent proceedings* (1848), 11 Beav. 96.

Annotation:—*Reid. Re Lewin* (1853), 16 Beav. 608.

1729. —.].—**Some parties unable to be found.**]—*Re SALAMAN*, No. 1718, *ante*.

1730. —.].—**Whether amount of applicants' interest material.**]—(1) In a petition to tax it is not necessary to specify all the items objected to.

(2) Upon an application by one of several persons interested, for the taxation of a bill of costs of considerable amount, the ct., in determining petitioner's right to a taxation, will not regard the amount of petitioner's interest.

(3) It is no sufficient objection to an order for taxation, under the third party clause, that petitioners are actuated by personal feelings to present the petition, & that their interest in the matter is very small.—*Re DAWSON & BRYAN* (1860), 28 Beav. 605; 2 L. T. 686; 6 Jur. N. S. 878; 8 W. R. 554; 54 E. R. 498.

Annotations:—*Generally, Consd. Re Smith* (1884), 32 W. R. 408. *Reid. Re Wellborne* (1900), 83 L. T. 611.

1731. —.].—**Service on parties not joining—Necessity for.**]—*Re HAIR*, No. 1728, *ante*.

1732. —.].—*Re SALAMAN*, No. 1718, *ante*.

does not necessarily make the persons signing it joint debtors to the solr. to whom it was given, but it may be taken distributively.—*Re CAMERON & LEE* (1898), 18 P. R. 176.—*CAN.*

d. —.].—Where co-suitors employ the same attorney their liability to him for costs is joint, not several.—*GOLDBERG & ADLER'S LIQUIDATOR v. CASTLE WINE & BRANDY CO.*, [1907] T. H. 228.—*S. AF.*

Sect. 5.—Taxation of costs: Sub-sect. 1, D. (b) & (c) i.]

(b) Solicitors.

See Solicitors Act, 1843 (c. 73), s. 37.

1733. Whether solicitor entitled—After verdict in action on bill of costs—Omission of defendant to procure taxation.]—Where, in an action on a bill of costs, a verdict is taken by consent for pltf., subject to the taxation of the bill within the first five days of the next subsequent term, & deft. omits to adopt measures to procure the taxation of the bill, pltf. is entitled to sign judgment in the ordinary way, & to tax his bill of costs in the action. —*TUCKER v. NECK* (1837), 4 Bing. N. C. 113; 6 Dowl. 231; 3 Hodg. 242; 5 Scott, 393; 132 E. R. 732.

1734. — Solicitor acting for testator & his executors—Taxation of bills for combined business.]—A solr. was employed by testator in his lifetime, & by his exors. & trustees after his death. The latter having applied for a taxation of the bills subsequent to the death:—*Held*: the solr. was, on this application, entitled to have a taxation of all the bills.—*Re DALBY* (1845), 8 Beav. 469; 50 E. R. 184.

1735. — Bill delivered by other solicitor.]—When one solr. asks another to look up some old deeds in his possession, & offers to pay his costs, the bill for these costs is taxable in the usual way.—*Re BOWEN* (1872), 41 L. J. Ch. 327; 20 W. R. 395.

1736. — Proof in bankruptcy of client.]—A solr. who tenders a proof in the bkpcy. of his client, in respect of costs due to him by the client, is not entitled to insist on having his bill referred for taxation to the taxing master, but the registrar has jurisdiction to determine the amount due, availing himself, if necessary, of the advice of the taxing master.—*Re WOODS, Ex p. DITTON* (1880), 13 Ch. D. 318; 42 L. T. 161; 28 W. R. 402, C. A. *Annotations*:—*Reid. Re Bushell* (No. 1), *Ex p. Izard* (1883), 23 Ch. D. 75; *Re Park, Cole v. Park* (1889), 41 Ch. D. 326; *Re Van Laun, Ex p. Chatterton*, [1907] 2 K. B. 23; *Re Palazzo Restaurants*, [1914] 1 Ch. 492.

1737. — Notwithstanding bill taxed by clerk to local authority.]—*Re BLAKE & CROYDON RURAL SANITARY AUTHORITY* (1886), 2 T. L. R. 336, D. C.

1738. — —.]—A solr. employed by guardians of the poor is entitled, notwithstanding that his bill of costs has been taxed by the clerk of the peace under Poor Law Amendment Act, 1844 (c. 101), s. 39, to an order for taxation as between solicitor & client under Solicitors Act, 1843 (c. 73), s. 37.—*SOUTHAMPTON GUARDIANS v. BELL & TAYLER* (1888), 21 Q. B. D. 297; 59 L. T. 181; 52 J. P. 567; 36 W. R. 924, D. C.

Annotation:—*Consd. Re Porter, Amphlett & Jones*, [1912] 2 Ch. 98.

1739. Receiver of costs due to solicitor.]—The mere receiver of costs due to an attorney, cannot, in a bill wherein he is debited for such receipt as costs received, treat this as a taxable item, & obtain the taxation of the bill thereon.—*HAGGETT v. BRAND* (1832), 2 L. J. Ex. 23.

1740. Assignee of solicitor—Assignee of costs.]—(1) *Qu.*: whether an assignee of costs due to a solr. is such an "assignee" of the solr. as is, under Solicitors Act, 1843 (c. 73), s. 37, entitled to obtain a taxation of the costs.

(2) If an assignee of costs can obtain a taxation,

he cannot obtain an order of course to tax one bill of costs out of several, even if that bill only has been assigned to him. An order to tax one bill out of several alone can only be obtained by means of a special application.—*Re WARD* (1885), 28 Ch. D. 719; 54 L. J. Ch. 508; 33 W. R. 783.

(c) Third Persons.

i. In General.

See Solicitors Act, 1843 (c. 73), s. 38.

1741. General rule.]—A person may move to have his own attorney's bill taxed, but not the attorney's of another person (*per Cur.*).—*CHADWELL v. BRUER* (1728), 1 Barn. K. B. 43; 94 E. R. 30.

1742. Taxation as between original parties.]—Under the third party clause in Solicitors Act, 1843 (c. 73), s. 38, the third party stands in the position of the client, & if the client is not entitled to a taxation against the solr., neither is the third party entitled to a taxation, under the Act, either as against the solr. or as against the client. But he may be entitled to have a taxation as against the client in a suit.—*Re MASSEY* (1865), 34 Beav. 463; 6 New Rep. 195; 34 L. J. Ch. 492; 12 L. T. 519; 11 Jur. N. S. 594; 13 W. R. 797; 55 E. R. 714.

Annotations:—*Consd. Re Longbotham*, [1904] 1 Ch. 152. *Reid. Re Wellborne* (1900), 83 L. T. 611; *Re Gray*, [1901] 1 Ch. 239; *Re Foster, Barnato v. Foster*, [1920] 3 K. B.

1743. —.]—*Re NEWMAN*, No. 1797, *post*.

1744. —By an agreement, dated July 15, 1885, the W. Local Board agreed with the Earl of Litchfield & Lord Anson, his eldest son, for the purchase of land, part of their entailed estates, at a price to be fixed by arbn. The agreement contained a clause that the local board should pay all the costs of the reference to arbn. The arbn. took place & the purchase was completed. The vendors' solrs. sent in their bill of costs to the board, & the board obtained the usual order for taxation on the petition of a third party liable to pay under Solicitors Act, 1843 (c. 73), s. 38, which provides that the third party shall stand in the same position as the original client. The order for taxation, which was in the common form, contained a recital that petitioners submitted to pay what should be found due upon taxation. The bill of costs contained a number of heavy fees paid to eminent surveyors who had been called as witnesses for the vendors at the arbn. The local board objected to these payments as excessive. The taxing master at first marked them for reduction, but, on the vendors' solrs. producing a letter from Lord Anson stating that he had acted for his father in the matter, & had authorised the calling of the surveyors in question, & approved the payments made to them, the taxing master held that he was precluded from reducing the items. The local board took out a summons to review the taxation:—*Held*: by taking the usual third-party order for taxation under Solicitors Act, 1843 (c. 73), s. 38, the local board had precluded themselves from taking any objection to the bill of costs, which could not have been taken by the vendors; & though by the agreement the board were only bound to pay reasonable costs, they could not, on taxation, object to anything authorised by the

PART VI. SECT. 5, SUB-SECT. 1.—D. (b).

e. Dispute as to facts.]—An order to tax is not to be granted *ex p.* to the solr. where there appear to be any facts in dispute between him & the client.—*Re FITCH*, 1 Ch. Ch. 288.—*CAN.*

f. Joint & several liability—Right to prove against estate of joint debtor.]—*FURLONG v. SCALLAN* (1875), 9 I. R. Eq. 202.—*IR.*

g. —.]—Where on an application by a solr. for a taxation, the client disputed the retainer as to the whole bill, & also set up Stat. Frauds:—

Held: the ct. could refer these defences to the master.—*Re BACON* (1870), 3 Ch. Ch. 79.—*CAN.*

PART VI. SECT. 5, SUB-SECT. 1.—D. (c) i.

h. Assignees — Second assignee.]—An assignee in insolvency employed

vendors, as unreasonable. Their proper course, if the payments were unreasonable, was not to apply for taxation, but to refuse to pay, & leave the vendors to bring an action or refer the matter to arb'n.—*Re HOLLIDAY & GODLEE* (1888), 58 L. T. 301.

Annotations:—*Distd. Re Gray*, [1901] 1 Ch. 239. *Refd. Re Cohen & Cohen*, [1905] 2 Ch. 137.

1745. Taxation as between solicitor & client.—The rule that the taxation of a bill under the third-party clause, Solicitors Act, 1843 (c. 73), s. 38, is as between solr. & client, is subject to this limitation, that a solr. cannot charge against a trust estate anything not necessary for the administration thereof, though expressly directed by the trustee; but must look for payment of such charges to the trustee personally.

Where a *cestui que trust* had obtained an order under Solicitors Act, 1843 (c. 73), s. 39, to tax the bill of costs of his trustees' solr., & the bill was so taxed as to render the solr. liable for the costs of the taxation, & after that the solr. appealed therefrom:—*Held*: the taxing master must be allowed to exercise his discretion as to the allowance or disallowance of particular items; the fact of the business being trust business could not be disregarded.—*Re BROWN* (1867), L. R. 4 Eq. 464; 36 L. J. Ch. 842; 16 L. T. 729; 15 W. R. 1030.

Annotations:—*Consd. Re Gray*, [1901] 1 Ch. 239. *Appld. Re Longbotham*, [1904] 2 Ch. 152; *Re Cohen & Cohen*, [1905] 1 Ch. 345. *Refd. Brown v. Burdett* (1888), 40 Ch. D. 244; *Re Robertson* (1889), 42 Ch. D. 553; *Re Negus*, [1895] 1 Ch. 73; *Re Cohen & Cohen* (1905), 92 L. T. 782.

1746. —.—.]—(1) The solrs. of a co., on the withdrawal of a petition for its winding up, gave petitioners' solrs. a written undertaking "to pay all proper costs & charges incident to & recoverable under the petition, such costs in case of difference to be taxed." Petitioners' solrs. subsequently delivered their bill to the solrs. of the co., but they were unable to agree the amount. The co. subsequently obtained an order of course under Solicitors Act, 1843 (c. 73), s. 38, the third-party section, for the taxation of the bill. On motion to discharge the order:—*Held*: the undertaking was one to pay party & party costs, Solicitors Act, 1843 (c. 73), s. 38, referred only to the taxation of solr. & client costs, the co. were not third parties within the sect., & the order was therefore irregular & must be discharged with costs.

(2) *Semble*: if on a party & party taxation, where the party taking the taxation pays the costs, the solr. whose bill is under taxation delivers an extortionate bill with the view of increasing the costs of taxation, the taxing master has a discretion & can report the circumstances specially, & the ct. has authority in such a case not only to deprive the solr. of his costs, but also to make him pay the costs of taxation.—*Re GRUNDY, KERSHAW & Co.* (1881), 17 Ch. D. 108; 50 L. J. Ch. 467; 44 L. T. 541; 29 W. R. 581.

Annotation:—*As to* (1) *Follid. Re Cowdell* (1883), 52 L. J. Ch. 246.

1747. —.—.]—A person liable to pay costs as

between party & party is not entitled to a reference for taxation under the third-party clause, Solicitors Act, 1843 (c. 73), s. 38.—*Re COWDELL* (1883), 52 L. J. Ch. 246; 31 W. R. 335.

Annotation:—*Distd. Re Collyer-Bristow*, [1901] 2 K. B. 839.

1748. —.—.]—It is well settled that under this third-party clause the taxation must be as between the solr. & his client. But still the third party was only entitled under that clause to tax a bill which he was liable to pay (*LINDLEY, L.J.*).—*Re MORECROFT* (1885), 1 T. L. R. 484; 29 Sol. Jo. 471, C. A.

Annotation:—*Appld. Re Longbotham*, [1904] 2 Ch. 152.

1749. —.—.]—Upon a reference under the Lands Clauses Acts between a co. & a landowner relative to the value of land taken compulsorily by the co., the umpire directed that the co. should pay the costs of the award, including therein the costs of preparing the award. The co. took up the award & paid the amount fixed by the arbitrator for so doing. This amount included a bill of costs of solrs. employed by the umpire to draw up the award. The co. applied in the K. B. Div. for an order for taxation of the solrs.' bill of costs under Solicitors Act, 1843 (c. 73), s. 38:—*Held*: the umpire being chargeable with the bill & the co. having paid it, the case came within the words of the Act & the bill was taxable, but the order should be to tax it in the Ch. Div.—*Re COLLYER-BRISTOW & Co.*, [1901] 2 K. B. 839; 76 L. J. K. B. 941; 50 W. R. 4; 45 Sol. Jo. 724; *sub nom. Re COLLYER-BRISTOW & Co., CROSSLEY v. LOWESTOFT WATER & GAS Co.*, 85 L. T. 208; *sub nom. Re CROSSLEY & LOWESTOFT WATER & GAS Co., Re COLLYER-BRISTOW & Co.*, 17 T. L. R. 741, C. A.

1750. Scope of liability not increased.—*Re THOMPSON*, No. 1230, *ante*.

1751. —.—.]—*Re MORECROFT*, No. 1748, *ante*.

1752. —.—.]—This is a third party taxation, & the general rule is that a third party stands, as between himself & the solr. whose bill he is taxing, in the position of the party chargeable (*CHITTY, J.*).—*Re NEGUS*, [1895] 1 Ch. 73; 64 L. J. Ch. 79; 71 L. T. 716; 43 W. R. 68; 39 Sol. Jo. 29; 13 R. 85.

Annotations:—*Appld. Re Gray*, [1901] 1 Ch. 239; *Re Longbotham*, [1904] 2 Ch. 152. *Follid. Re Cohen & Cohen*, [1905] 2 Ch. 137. *Refd. Re M'Garel* (1897), 45 W. R. 321.

1753. —.—.]—Lessees having obtained the usual third party order to tax the lessor's solr.'s bill of costs in the preparation of a mining lease, took objection to the allowance by the taxing master of certain items for charges for negotiations leading up to the lease, & in particular for fees paid to a mining engineer who had been consulted on behalf of the lessor, & for various correspondence with him:—*Held*: the third party order to tax obtained by the lessees did not alter the nature or enlarge the scope for their liability, upon the existence of which the order to tax was based; but even on a third party taxation the ct. was bound to look at the nature of the items, & to consider whether, apart from the order, appct. was under any liability to pay them; & the bill

a firm of attorneys to perform certain services in connection with the estate. Subsequently he resigned the position & gave these attorneys the moneys of the estate remaining in his hands, with instructions to pay their own costs first, & then hand the balance to the new assignee. This they did & rendered their bill of costs:—*Held*: the estate of the insolvent was, within C. S. U. C. c. 36, s. 38, the "party liable to pay," though "not chargeable as a principal," & the second assignee was entitled to have the bill taxed.—

Re A. & B. (1873), 6 P. R. 68.—**CAN.**

k. —.—.]—A solr. agreed with his client, without furnishing any bills, to accept a certain sum in payment for professional services rendered. Some days subsequently the client was adjudicated bkpt., & at the request of the assignees in bkpcy. the solrs. furnished bills of costs, & more than twelve after the bills had been furnished the assignees applied that they should be referred for taxation:—*Held*: the assignees were not entitled to an order calling upon the solr. to tax

his costs.—*Re SEALY* (1911), 45 I. L. T. 1.—**IR.**

l. —.—.]—When a client who has obtained an order to tax his solr.'s bill of costs becomes bkpt., his assignee, if the solrs. undertakes not prove in the bkpcy. for the costs, cannot continue the taxation without giving an undertaking to pay the taxed amount of the bill.—*Re MERRICK, Ex p. JOYCE*, [1911] 1 I. R. 279.—**IR.**

m. Trustees of tenant for life.—*Re CUSACK* (1888), 21 L. R. Ir. 493.—**IR.**

Sect. 5.—Taxation of costs: Sub-sect. 1, D. (c) i., ii. & iii.]

must therefore be referred back to the taxing master to revise his taxation.

Though a solr. may include in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not by obtaining an order to tax thereby render himself liable for the whole bill.—*Re GRAY*, [1901] 1 Ch. 239; 70 L. J. Ch. 133; 84 L. T. 24; 49 W. R. 298; 45 Sol. Jo. 139.

Annotations:—**Consd.** *Re Fletcher & Dyson*, [1903] 2 Ch. 688. **Apprvd.** *Re Longbotham*, [1904] 2 Ch. 152. **Folld.** *Re Cohen & Cohen*, [1905] 2 Ch. 137. **Refd.** *Re Mostyn & Fitzsimmons* (1903), 19 T. L. R. 191; *Re Lewis* (1904), 49 Sol. Jo. 54.

1754. ———.]—*Re LONGBOTHAM & SONS*, No. 1780, *post*.

1755. Application made only for collateral purpose.]—*CLUTTERBUCK v. COMBES*, No. 1607, *ante*.

1756. Order of course.]—Under ordinary circumstances, an order for taxation may be obtained as of course by third parties, "liable to pay."—*Re BRACEY* (1845), 8 Beav. 338; 5 L. T. O. S. 234; 50 E. R. 133.

1757. ———.]—The taxation under Solicitors Act, 1843 (c. 73), s. 38, or the "third party liable clause," is by order of course; but, under s. 39, or third party interested clause, the application is special.—*Re STRAFORD* (1852), 16 Beav. 27; 51 E. R. 686.

1758. Applicants actuated by personal motives—Interest in subject-matter small.]—*Re DAWSON & BRYAN*, No. 1730, *ante*.

ii. Persons Having Paid or Agreeing to Pay Costs.

See Solicitors Act, 1843 (c. 73), s. 38.

1759. Whether entitled to taxation—Payment by volunteer.]—A party who by agreement has paid the bill of costs of another party, cannot apply for a taxation.—*LANGFORD v. NOTT* (1820), 1 Jac. & W. 291; 37 E. R. 386.

Annotations:—**Consd.** *Doe d. Palmer v. Roe* (1835), 4 Dowl. 95. **Refd.** *Re Hartley* (1861), 30 Beav. 620; *Vincent v. Venner* (1833), 1 My. & K. 212.

1760. ———.]—(1) An action between A. & B. is compromised, B. undertaking to pay A.'s costs as between attorney & client. The bill of costs of A.'s attorney being taxed more than a sixth is taken off. The attorney is liable to pay the costs of the taxation to B.

(2) A party agreeing to pay the costs of the attorney of another as between attorney & client, is entitled to have the attorney's bill taxed.—*SADLER v. PALFREYMAN*, *CHAMBERS v. SADLER* (1834), 1 Ad. & El. 717; 3 Nev. & M. K. B. 599; 3 L. J. K. B. 179; 110 E. R. 1381.

1761. ———.]—*DOE d. PALMER v. ROE*, No. 1448, *ante*.

1762. ———.]—*Re BECKE & FLOWER*, No. 1850, *post*.

1763. — Compromise of dispute.]—A party under a bond of indemnity for the costs of another, having, on a compromise, paid what the solr. stated to be the amount of them, is entitled afterwards to have the bill taxed.—*BALME v. PAVER* (1821), Jac. 305; 37 E. R. 866.

1764. ———.]—An agreement to pay costs is an agreement to pay taxed costs; & a third party paying a solr.'s bill of costs, in order to compromise a suit, stands in the same situation with respect to the right of claiming taxation as

the solr.'s client.—*VINCENT v. VENNER* (1833), 1 My. & K. 212; 2 L. J. Ch. 49; 39 E. R. 661.

Annotations:—**Folld.** *Re Hartley* (1861), 30 Beav. 620. **Consd.** *Re Grundy, Kershaw* (1881), 17 Ch. D. 108. **Distd.** *Re Spoucer, Spencer v. Hart* (1881), 51 L. J. Ch. 271.

1765. ———.]—*Re BELLYSE* (1859), cited in 30 Beav. at p. 623; 54 E. R. at p. 1032.

Annotations:—**Folld.** *Re Hartley* (1861), 30 Beav. 620. **Refd.** *Re Grundy, Kershaw* (1881), 17 Ch. D. 108.

1766. ———.]—A. & B. compromised a suit, B. agreeing to pay A.'s costs, & any question on this was to be referred to an arbitrator who was named. A.'s solr. delivered his bill of costs to B.:—*Held*: B. was entitled to a taxation by an order of course.—*Re HARTLEY* (1861), 30 Beav. 620; 54 E. R. 1031.

Annotation:—**Distd.** *Re Grundy, Kershaw* (1881), 17 Ch. D. 108.

1767. ———.]—(1) On a compromise of litigation E. agreed to pay the costs of C. as between solr. & client relating to the matters in dispute in the litigation, such costs to be agreed or taxed:—*Held*: this was not an agreement that E. would indemnify C. against all costs which her solrs. could call upon her to pay, but that he would pay her reasonable & proper costs, not including extra costs which the solrs. could only recover from her by special arrangement.

(2) The solrs. delivered a bill which contained items for extra costs of this description, whereupon E. obtained a third party order for taxation under Solicitors Act, 1843 (c. 73), s. 38:—*Held*: this did not enlarge his liability so as to compel him to pay the extra costs.—*Re COHEN & COHEN*, [1905] 2 Ch. 137; 74 L. J. Ch. 517; 92 L. T. 782; 49 Sol. Jo. 517; *sub nom. Ex p. COHEN & COHEN*, 53 W. R. 529, C. A.

Annotation:—*As to* (1) **Refd.** *Hirst & Capes & Elsworth v. Fox* (1908), 99 L. T. 624.

1768. ———.]—*HIRST & CAPES v. FOX*, No. 2181, *post*.

1769. — Agreement to pay fixed sum.]—P., under the pressure of legal proceedings taken against him by M. & co., as attorneys for the National Bank of Scotland, entered into an agreement to pay £200 to M. & co. for their costs. It was alleged by P. that this payment & a further payment to the National Bank were made upon the terms that the bank should exhaust their remedies on certain acceptances given by third persons before taking proceedings against P., & that the Bank were now acting in violation of the agreement. P. thereupon applied that M. & co. should be ordered to deliver to him a copy of their bill of costs in the matter of the above proceedings. The ct. refused to grant the application.—*Re MORRIS* (1872), 27 L. T. 554; *sub nom. Re MORRIS, Ex p. POOLEY*, 21 W. R. 192.

1770. ———.]—In a testamentary suit a compromise was effected, which included a fixed sum to be paid to deft.'s attorney for his agreed costs. This sum was paid to him:—*Held*: the ct. could not afterwards order his bill to be taxed on the application of his client.—*HOLDITCH v. CARTER* (1873), L. R. 3 P. & D. 115; 42 L. J. P. & M. 78; 21 W. R. 934; *sub nom. HOLDITCH v. CLIFTON & CARTER*, 29 L. T. 249; 37 J. P. 825.

Annotation:—**Consd.** *Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306.

1771. ———.]—Deft. in an action agreed, through his solr., to pay pltf.'s solr. a fixed sum for his costs & for his trouble in promoting a composition between deft. & his creditors. Within twelve months of the payment of the amount deft.

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entitled to taxation—Compromise of dispute.]—*Re MCCARTHY, PEPLER & MCCARTHY* (1893), 15 P. R.

took out a summons for the delivery by pltf.'s solr. of a bill of his costs:—*Held*: no fraud or undue pressure upon deft. having been established, there was no "special circumstances" within Solicitors Act, 1843 (c. 73), ss. 37, 38, 40, 41, to warrant the application. *Semble*: deft. was not a party "chargeable" within Solicitors Act, 1843 (c. 73), so as to be entitled to make the application.—*Re HERITAGE, Ex p. DOCKER* (1878), 3 Q. B. D. 726; 47 L. J. Q. B. 509; 38 L. T. 509; 26 W. R. 633.

1772. ———.]—On Aug. 3, 1894, R. commenced an action against W., his son & partner, for dissolution of partnership. Notice of motion for a receiver was given, but stood over pending negotiations for a settlement until Aug. 22. A draft agreement for settlement was sent on Aug. 15, by pltf.'s solrs. to deft.'s solrs., containing among other clauses the following: "The cost of the action & of this agreement & of the notice of dissolution for the London Gazette, shall be paid by W." On Aug. 17, pltf.'s solrs. sent to deft.'s solrs. a draft bill of costs for £48 19s. with an explanatory letter saying that they were sent in order that deft.'s solrs. might peruse them before completion, & the amount agreed upon might be inserted in the agreement. On Aug. 21, the parties and their solrs. met, & the agreement was signed by pltf. & deft. with the words "Such costs being agreed at £45," added at the end of the draft clause set out above. The action was abandoned according to the agreement, & on Aug. 27, W. obtained the common order to tax the bill so delivered. Pltf.'s solrs. moved to discharge this order. It was alleged at the hearing of the motion that the amount was agreed under pressure:—*Held*: the sending the bill under the circumstances stated was not a delivery of a bill within the meaning of the Attorneys & Solicitors Acts, & whatever might have been W.'s rights to have a bill delivered & taxed on a special application, he was not entitled to the common order to tax, & this order must be discharged with costs.—*Re HULBERT & CROWE* (1894), 71 L. T. 748; 39 Sol. Jo. 83; 13 R. 442.

1773. ———.]—Undertake to pay party & party costs.]—*Re GRUNDY, KERSHAW & Co.*, No. 1746, *ante*.

iii. Mortgagor or Mortgagee.

See Solicitors Act, 1843 (c. 73), s. 38.

1774. Mortgagor—Taxation as between original parties.]—A mtgee.'s solr. would not part with the deeds until payment of his bill of costs, which had been delivered to the mtgor.'s solr. a month previously:—*Held*: this was not a sufficient case of pressure to induce the ct. to order a taxation.

A mtgor. has not a right to have the bills of the mtgee.'s solr. taxed upon different principles from those which would be applied to the taxation of the same bill, upon the petition of the mtgee.

Payment of a solr.'s bill, delivered at the last moment of settling a mtgee., being insisted on, without any opportunity of examination being afforded, is a "special circumstance," within Solicitors Act, 1843 (c. 73).—*Re JONES* (1845), 8 Beav. 479; 50 E. R. 188.

Annotation:—*Reid. Re Longbotham* (1904), 90 L. T. 538.

1775. ———.]—*Re HARRISON*, No. 1979, *post*.

1776. ———.]—It requires a very special case to induce the ct. to order taxation after payment, the ct. being reluctant to open a matter

deliberately settled. The rule is that there must be both pressure & overcharges, or items in the bill itself of such a nature as to amount to what is vaguely called fraud.

The doctrine of pressure, in cases of taxation after payment, is not to be extended, & the application for taxation should be made speedily.

Where a mtgor. seeks the taxation of the bill of the mtgee.'s solr., it must be looked at, not as between the mtgor. & the solr., but as between the solr. & his client, the mtgee.

Where a considerable portion of a bill of costs is for business, which, in the exercise of an honest & fair discretion, ought never to have been transacted, the ct., although there be no serious amount of pressure, will order a taxation after payment.—*Re BARROW* (1853), 17 Beav. 547; 24 L. J. Ch. 126; 22 L. T. O. S. 217; 18 Jur. 181; 2 W. R. 109; 51 E. R. 1116.

1777. ———.]—*Re FISHER*, No. 1788, *post*.

1778. ———.]—*Re ABBOTT*, No. 1413, *ante*.

1779. ———.]—Upon a petition by a mtgor. to tax the bill of the mtgee.'s solr., after payment, the mtgee. must be served.

A mtgor. seeking to tax the bill of the mtgee.'s solr., as against the solr., stands in the position of the mtgee. himself, & if the mtgee. cannot tax it, neither can the mtgor.; but the mtgor. may tax it as against the mtgee. for the purpose of diminishing the amount of his claim.—*Re BAKER* (1863), 32 Beav. 526; 2 New Rep. 151; 8 L. T. 566; 11 W. R. 792; 55 E. R. 207.

Annotations:—*Consd. Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306. *Reid. Re Massey* (1865), 34 Beav. 463.

1780. ———.]—On the taxation, under the third-party sect. [s. 38] of Solicitors Act, 1843 (c. 73), of the bill of a mtgee.'s solr. at the instance of the mtgor., items which the mtgor. would not be liable to pay as between himself & the mtgee. must be disallowed, even though the solr. would be entitled to charge them as against his client, the mtgee.—*Re LONGBOTHAM & SONS*, [1904] 2 Ch. 152; 73 L. J. Ch. 681; 90 L. T. 801; 52 W. R. 660; 48 Sol. Jo. 546, C. A.

Annotations:—*Consd. Re Lewis* (1901), 49 Sol. Jo. 54. *Appl. Re Cohen & Cohen*, [1905] 2 Ch. 137. *Consd. Re Hirst & Capes*, [1908] 1 K. B. 982.

1781. ———.]—Agreement to pay expenses.]—Deft., who had borrowed money of pltf., was, by an agreement, to which pltf.'s attorney was the attesting witness, to pay the expenses of that agreement & of the various securities, including a warrant of attorney:—*Held*: pltf.'s attorney, who had prepared those securities, was compellable to deliver his bill to deft. to be taxed.—*PAINTER v. LINDSELL* (1840), 6 Bing. N. C. 197; 8 Dowl. 250; 8 Scott, 453; 9 L. J. C. P. 151; 133 E. R. 78.

1782. ———.]—No part of business transacted in court.]—The bill of costs of a mtgee.'s solr. for business done in relation to the mtgee., & the sale of the mtged. estate, is taxable at the instance of the mtgor., under Solicitors Act, 1843 (c. 73), though no part of the business may have been transacted in any ct. of law or equity.—*Re LEES* (1844), 5 Beav. 410; 13 L. J. Ch. 151; 2 L. T. O. S. 457; 49 E. R. 637.

Annotations:—*Reid. Re Thompson* (1845), 8 Beav. 237; *Re Eyre* (1848), 2 Ph. 368; *Re Stephen, Ex p. Bass* (1848), 2 Ph. 562.

1783. ———.]—Order as of course—Where application within twelve months.]—A mtgee.'s solr. retained the amount of his bill of costs out of the

PART VI. SECT. 5, SUB-SECT. 1.— D. (c) iii.

n. *Mortgagor*.]—The mtgees. of land having brought ejectment, &

under the power of sale, their solr. sent the surplus purchase-money to the mtgor., accompanied by a statement of the amount due, in which one

item was for "solr.'s costs, \$143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale;—

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produce of the sale of the mtged. estate, & he charged the amount in an account delivered to the mtgor. :—*Held*: an order for taxation within twelve months might be obtained as of course, & a special petition having been presented for that object, the order was made, but petitioner was ordered to pay the costs.—*Re BIGNOLD* (1845), 9 Beav. 269; 50 E. R. 347.

Annotations:—*Distd. Re Holland* (1854), 23 L. T. O. S. 203. *Apld. Re Brady* (1867), 15 W. R. 632. *Consd. Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102. *Reid. Re Longbotham*, [1904] 2 Ch. 152.

1784. — Necessity for delivery of bill to mortgagee.]—*Re KELLOCK*, No. 1422, *ante*.

1785. — After payment of bill.]—After payment, an *ex parte* order for taxation is irregular, & the same rule applies, where the payment is made by a mtgee., & the taxation is at the instance of the mtgor. as the party ultimately "liable to pay."—*Re CAREW* (1844), 8 Beav. 150; 1 New Pract. Cas. 83; 14 L. J. Ch. 100; 4 L. T. O. S. 231; 50 E. R. 60.

Annotation:—*Consd. Re Barber, Ex p. Manchester & Leeds Ry.* (1845), 14 M. & W. 720.

1786. — — — — —.]—*Re JONES*, No. 1774, *ante*.

1787. — — — — —.]—A bill of costs was delivered on the day appointed to complete the transfer of a mtge. It was objected to, but the solr. of the mtgee. refused to complete until payment. The mtgor. paid it, but it was afterwards ordered to be taxed.—*Re PHILLPOTTS* (1853), 18 Beav. 84; 52 E. R. 33; *sub nom. Re PHILLPOTTS, Ex p. DAVIES*, 2 W. R. 3.

Annotation:—*Expld. Re Heritage, Ex p. National Land Co.* (1854), 2 Eq. Rep. 234.

1788. — — — — —.]—Upon paying off a mtge., the bill of the mtgee.'s solr., though objected to, was paid in full, the solr. undertaking "to refund" so much of "the mtgees.' law charges" as might be "found to be in excess of what they were entitled to receive":—*Held*: the ct. would enforce the undertaking, upon petition, by ordering a taxation, & it was to be as between the mtgor. & mtgees.—*Re FISHER* (1854), 18 Beav. 183; 52 E. R. 72.

1789. — Trustee in bankruptcy.]—The trustee in bkpcy. of a mtgor. held entitled to an order to tax, under Solicitors Act, 1843 (c. 73), the bill of costs of the solr. of the mtgee. incurred in selling the property under a power of sale.—*Re ALLINGHAM* (1886), 32 Ch. D. 36; 55 L. J. Ch. 800; 54 L. T. 905; 34 W. R. 619, C. A.

Annotations:—*Consd. Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102; *Re Ford, Ex p. Official Receiver* (1901), 84 L. T. 329. *Reid. Re Palace Restaurants*, [1914] 1 Ch. 492.

1790. Mortgagee—Second mortgagee—Costs of first mortgagee.]—A second mtgee. presented a petition to tax the bill of costs of the first mtgees.' solr., which had been paid out of the produce of the sale of the mtged. estate:—*Held*: the first mtgees. must be served with the petition.—*Re JESSOP* (1863), 32 Beav. 406; 55 E. R. 159.

Annotation:—*Consd. Re Massey* (1865), 34 Beav. 463.

1791. — Third mortgagee.]—The mere circumstance that a solr. is accountable to a client in a money account is not sufficient to subject him to the summary jurisdiction of the ct., & neither that jurisdiction nor the jurisdiction under

the Act of Parliament can be raised on a summons at chambers, but either of them must be the subject of a special application to the ct.

F., a solr., had acted for a mtgor. & for first & second mtgees. The latter were about to sell the property, when G., a third mtgee., arranged to pay all that was due in respect of the mtges., & a lump sum for costs, the bills not having then been made out; & it was agreed that the accounts should be thereafter adjusted. The bill subsequently sent in exceeded the sum so paid, & it contained items properly chargeable against the mtgor. only. G. by summons under Solicitors Act, 1843 (c. 73), sought a taxation:—*Held*: he had no remedy upon this application, & as the ct. would not exercise its general jurisdiction upon summons, *a fortiori* would it refuse when there was an agreement between the parties.—*Re FORSYTH* (1865), 2 De G. J. & Sm. 509; 12 L. T. 687; 11 Jur. N. S. 615; 13 W. R. 932; 46 E. R. 472, L. J.J.

Annotations:—*Folld. Re Gold* (1871), 24 L. T. 9. *Expld. Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306.

1792. — — — — —.]—Under pressure of a threat by first mtgee. to transfer his mtge. to third mtgee. the second mtgee. paid off the first mtge. debt, interest & costs under protest against the amount of the costs, & accepted a transfer of the first mtge. The deed of transfer recited that a certain sum was due for costs, & assigned it, as well as the principal & interest, to the transferee. On a summons by the transferee for taxation of the bill of costs which had been delivered six days before completion of the transfer:—*Held*: he was estopped by the recital on the deed from obtaining an order for taxation.—*Re GOLD* (1871), 24 L. T. 9; 19 W. R. 343.

Annotation:—*Expld. Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306.

Taxation of costs in mortgage generally.]—See MORTGAGE, Vol. XXXV., pp. 694-696, Nos. 4372-4391.

iv. Other Persons.

1793. Real plaintiff—Obliged to sue in another's name.]—A person who is the real pltf. in a cause, but who is obliged to sue in the name of another, may apply to the ct. to have his attorney's bill in the cause taxed.—*Re MASTERS* (1835), 1 Har. & W. 348.

1794. Husband—In respect of costs of wife & wife's former husband.]—A husband became liable for bills of costs due from his wife, *dum sola*, & from her former husband, to a solr.:—*Held*: though the relation of solr. & client did not exist between the solr. & the second husband, yet the latter was entitled to a taxation of the bills of costs.—*WARING v. WILLIAMS* (1839), 2 Beav. 1; 48 E. R. 1078.

1795. Person conveying property to trustees—For carrying on litigation & paying costs.]—A., who claimed some property, conveyed it to trustees, upon trusts for carrying on the litigation & payment of the costs, etc. The trustees employed a solr., & they raised a sum of money, upon A.'s notes drawn for the purpose, which they placed in the solr.'s hands. A. alone obtained an *ex p.* order for taxation; it was discharged for irregularity.—*Re RICHARDSON, Ex p. MOBBS* (1845), 8 Beav. 499; 50 E. R. 196; *subsequent proceedings* (1846), 7 L. T. O. S. 25.

Held: the mtgor. was clearly a person entitled to apply for taxation within C. S. U. C. c. 35, s. 8.—*Re MACDONALD, Ex p. GLASS* (1863), 3 P. R. 138, 1 C. L. J. O. S. 111.—CAN.

1785 i. — After payment of bill.]—T (1887), 12 P. R. 240.—CAN.

1790 i. Mortgagee—Second mortgagee—Costs of first mortgagee.]—First mtgees. sold under power of sale, & paid their attorney's costs:—*Held*: a second mtgee. was held not entitled to the right of taxing these costs.—*Re CRONYN, Kew & BETTS* (1880), 8

P. R. 372.—CAN.

PART VI. SECT. 5, SUB-SECT. 1.—D. (c) iv.

o. Next friend of married woman.]—Married women joined with their husbands in an application for taxation

1796. Ratepayers.]—Where a surveyor of highways within a parish employed an attorney to conduct an indictment for an obstruction of one of the highways, & to transact other business, & paid his bill out of the moneys raised by the highway rate:—*Held*: the ratepayers were not persons "liable to pay" within Solicitors Act, 1843 (c. 73), s. 38, & could not, therefore, apply for a reference of the bill to taxation.—*Re BARBER* (1845), 14 M. & W. 720; 3 Dow. & L. 244; 1 New Pract. Cas. 307; 15 L. J. Ex. 9; 6 L. T. O. S. 130; 9 Jur. 976; 153 E. R. 665; *sub nom. Re BARKER, Ex p. MANCHESTER & LEEDS RY. CO. & RASTRICK TOWNSHIP RATEPAYERS*, 10 J. P. 648.

1797. Lessee.]—(1) There is no general rule as to how much pressure will entitle a party to have a solr.'s bill taxed after payment. But if reasonable facilities for taxation have been refused at the last moment, when it has become imperative to the party to obtain immediately the papers to which the solr.'s lien applied, & the party has consequently paid the bill, that is a special circumstance which, coupled with items of apparent overcharge, will justify the ct. in directing taxation after payment.

(2) W., on May 31, 1865, agreed in writing to take a lease from G. & T., & to pay their costs of the agreement & of the lease & counterpart, & incidental thereto. W. paid the bill of G. & T.'s solrs., & afterwards applied for taxation against the solrs. An order was made to tax the bill "upon the terms of the agreement dated May 31, 1865":—*Held*: this reference to the agreement was erroneous, for that the order must be to tax the bill which W. had paid, without anything to limit the bill to that which would be the proper bill as between G. & T. & W.—*Re NEWMAN* (1867), 2 Ch. App. 707; 36 L. J. Ch. 843; 17 L. T. 128; 15 W. R. 1189, L. J.

Annotations:—As to (1) *Consd. Re Boycott* (1885), 29 Ch. D. 571. *Generally, Re Lacey* (1883), 53 L. J. Ch. 287.

1798. —.—Appets. were lessees of property belonging to a hospital, & the lease contained a clause that all assignments & underleases should be prepared by the clerk to the hospital. Applicants having arranged to underlet their premises, the underleases were prepared by the clerk to the hospital, a member of resp. firm of solrs., whose charges appets. now sought to obtain an order to tax:—*Held*: as there was no liability on the part of appets. under the lease to pay the charges, or any direct employment by appets. of resps. as their solrs., the ct. had no jurisdiction to order the bill to be taxed.—*Re COOKSON, WAINWRIGHT & PENNINGTON* (1886), 2 T. L. R. 363.

1799. —.—*Re GRAY*, No. 1753, *ante*.

1800. Person supplying funds for prisoner's defence.]—*Re MILLS* (1885), 79 L. T. Jo. 162, D. C.

1801. Purchaser.]—*Re MORECROFT* (1885), 1 T. L. R. 484; 29 Sol. Jo. 471, C. A.

Annotation:—*Consd. Re Longbotham*, [1901] 2 Ch. 152.

Persons interested.]—*See* Sub-sect. 1, D. (d), *post*.

(d) *Persons Interested*.

See Solicitors Act, 1843 (c. 73), s. 39.

1802. Discretion of court—Exercise of discretion.]—(1) *Qu.*: whether the provision in Solicitors

of costs:—*Held*: notwithstanding 35 Vict. c. 16 (O.), the married women must in such cases have a next friend.—*Re SPENCER & McDONALD* (1872), 19 Gr. 467.—CAN.

PART VI. SECT. 5, SUB-SECT. 1.—
D. (d).

1806 i. Persons beneficially interested
—(*Cestui que trust*.)—Any one *cestui que*

trust may, in the discretion of the ct., obtain an order under the third party clauses of Solrs. Act for the taxation of a bill of costs for business connected with the trust estate of a solr. employed by the trustee.—*SANDFORD v. PORTER* (1889), 16 A. R. 565.—CAN.

1806 ii. —.—When a trustee employs a solr. in matters concerning the trust estate, & pays him out of the

Act, 1843 (c. 73), s. 41, as to the necessity of showing "special circumstances" on an application for taxation of a bill of costs after payment, applies in the case of an application by a *cestui que trust* under sect. 39 for taxation of a bill paid by trustees. Whether the provision applies or not, the ct., on an application under sect. 39, has a discretion as to ordering taxation, even where special circumstances are shown.

(2) Where overcharges of only £2 or £3 were shown, & no pressure or fraud was proved, the ct. declined to exercise its discretion by ordering taxation.—*Re CHOWNE* (1884), 52 L. T. 75, C. A.
Annotation:—As to (1) *Consd. Re Wellborne*, [1901] 1 Ch. 312.

1803. Executor—On behalf of cestui que trust—Executor not acting in administration.]—Reference of a solr.'s bill of costs to be taxed, upon the application of one of two trustees & exors. by whom he had been employed in the conduct of the cause & in other matters relating to the executorship, the exor. making the application not having acted, & his acting co-exor. refusing to consent to the application, the bill having been long since paid by the acting exor., but unknown to the parties beneficially interested, & no settlement of the executorship accounts having been made, notwithstanding repeated applications, until lately, & the *cestuis que trust*, one of them a married woman, having executed a release to the exors. Motion on behalf of the solr. to discharge the order of reference refused, the *cestui que trust* having a right to use the name of his trustee for the purpose of taxation, & the release to the exors. not operating to prevent him from prosecuting against the solr. the remedy given him by statute.—*HAZARD v. LANE* (1817), 3 Mer. 285; 36 E. R. 110, L. C.

1804. Persons beneficially interested.]—Where a bill of costs against exors. contained charges to a considerable extent beyond what would have been allowed them in their accounts with testator's estate:—*Held*: it was a proper case of taxation at the instance of the persons beneficially interested after payment by the exors.—*Re DICKSON* (1856), 8 De G. M. & G. 655; 26 L. J. Ch. 89; 28 L. T. O. S. 153; 3 Jur. N. S. 29; 5 W. R. 108; 44 E. R. 542, L. JJ.

Annotations:—*Consd. Re Massey* (1865), 34 Beav. 463; *Re Elmslie, Ex p. Tower Subway Co.* (1873), L. R. 18 Eq. 326; *Re Longbotham*, [1904] 2 Ch. 152. *Reid. Re Strother* (1857), 3 K. & J. 518; *Re Chowne* (1884), 52 L. T. 75; *Re Cheesman*, [1891] 2 Ch. 289; *Re Wellborne* (1900), 70 L. J. Ch. 172. *Mentd. Evanturel v. Evanturel & Remillard* (1874), 43 L. J. P. C. 58.

1805. —. Being also executor—Application by one executor.]—*Re PERKINS*, No. 2242, *post*.

1806. —. Cestui que trust.]—In an action by a *cestui que trust* against his trustees for administration, the solrs. of the trustees were joined as defts. It was alleged that grossly exorbitant sums had been allowed in the accounts as costs to the trustees' solrs., & the relief asked for against them was that their bills might be taxed. The solrs. demurred:—*Held*: such an action could not be maintained by a third party, *cestui que trust*, against solrs. & the proper remedy was by petition under Solicitors Act, 1843 (c. 73), s. 39. No leave to amend was given.—*Re SPENCER, SPENCER v.*

proceeds of the estate, the *cestui que trust* is not entitled to have the solr.'s bill of costs taxed; but the trustee will only be allowed in his account such charges as were fair & reasonable.—*LANGFORD (LADY) v. MAHONY* (1843), 5 L. Eq. R. 569; 4 Dr. & War. 81; 3 Con. & Law. 317.—IR.

p. — *Widow.*—*Re EARLY*, [1897] 1 L. R. 6. —IR.

Sect. 5.—Taxation of costs: Sub-sect. 1, D. (d); sub-sect. 2, A. & B.]

HART (1881), 51 L. J. Ch. 271; 45 L. T. 645; 30 W. R. 296, C. A.

Annotations:—Consd. Re Blundell, Blundell v. Blundell (1888), 40 Ch. D. 370. *Apld. Re Jackson, Re Cottrell, Boughton Leigh v. Boughton Leigh* (1889), 40 Ch. D. 495. *Refd. Cowper v. Stoneham* (1893), 68 L. T. 18; *Midgley v. Midgley*, [1893] 3 Ch. 282.

1807. — — — — — *After death of trustees.*—Taxation ordered, at the instance of *cestuis que trust*, of a bill incurred in respect of a trust estate by trustees, both being now dead; but any balance due from the solr. was ordered to be paid into ct. to a separate account & not to petitioners.—*Re HALLETT* (1855), 21 Beav. 250; 52 E. R. 855.

1808. — — — — — *Necessity for proof of fraud.*—Under the third-party clause [Solicitors Act, 1843 (c. 73), s. 39] it is not necessary, where a *cestui que trust* applies for taxation of bills paid by trustees or exors., to show that there are fraudulent overcharges.

Taxation ordered, at the instance of a legatee, of a bill of costs of the exors.' solr., for the amount of which a mtge. had been given by them.—*Re DRAKE* (1856), 22 Beav. 438; 52 E. R. 1177.

Annotations:—Consd. Re Wellborne, [1901] 1 Ch. 312. *Refd. Re Cheesman*, [1891] 2 Ch. 289.

1809. — — — — — *Application after payment—Delay of more than twelve months.*—Application by *cestui que trust* for the taxation of a bill of costs paid by his trustees more than twelve calendar months, refused.

Where a *cestui que trust* applies for taxation, then if there has been no payment, the rules under which taxation is to be directed are such as are pointed out by Solicitors Act, 1843 (c. 73), s. 37, & if there has been payment, by sect. 41.

Whenever Solicitors Act, 1843 (c. 73), applies, the ct. cannot in any case whatever send a bill for taxation as against the solr., if it has been paid more than twelve months, but the ct. may, after that period, direct a taxation as between a trustee & his *cestui que trust*, to justify the payments of the former.

The words "any such bill," in sect. 41, do not mean the bill mentioned in the sect. immediately preceding, viz., any bill "previously taxed & settled"; nor are they limited to such bills as under the provisions of the Act are sought to be taxed by a party directly chargeable.

Semble: where a solr.'s bill has been paid by a trustee, the *cestui que trust* cannot after the expiration of twelve months from payment, obtain a taxation, as against the solr., although he had no notice of the payment until after the twelve months had expired.—*Re DOWNES* (1844), 5 Beav. 425; 13 L. J. Ch. 159; 2 L. T. O. S. 438; 49 E. R. 643

Annotations:—Consd. Re Pender (1846), 16 L. J. Ch. 25. *Apld. Re Wellborne*, [1901] 1 Ch. 312.

1810. — — — — — *By virtue of the proviso in Solicitors Act, 1843 (c. 73), s. 41, taxation, upon the application of a cestui que trust of a bill of costs paid by his trustees, will not be ordered under sect. 39 where the application is not made within twelve calendar months after payment; regard being had to what must now be treated as the settled practice of the ct.—Re*

WELLBORNE, [1901] 1 Ch. 312; 70 L. J. Ch. 172; 83 L. T. 611; 49 W. R. 113; 45 Sol. Jo. 104, C. A.

1811. — — — — — *No objection taken at payment.*—*Re FAULKNER*, No. 1292, *ante*.

1812. — — — — — *Proof of special circumstances.*—*Re CHOWNE*, No. 1802, *ante*.

1813. — — — — — *Application before payment.*—*Re DOWNES*, No. 1809, *ante*.

1814. *Interested third party—Application more than twelve months after payment.*—*Re MASSEY*, No. 2002, *post*.

1815. *Judgment creditor—Judgment for administration of estate.*—*Re JONES & EVERETT*, No. 1428, *ante*.

1816. *Whether taxation as between original parties—Application more than twelve months after payment.*—*Re DOWNES*, No. 1809, *ante*.

1817. — — — — — *A cestui que trust has no right to question his trustee's retainer of a solr. as between himself & the solr.; or to obtain an order for a separate taxation of the solr.'s bill of costs; but he has a right to attend the taxation of the trustees, & raise the question of retainer only as one between himself & his trustees.*—*Re STORY, Ex p. MARWICK* (1859), 1 L. T. 16; 8 W. R. 15.

1818. — — — — — *Trustees having employed a solr. in the distribution of a trust estate, certain beneficiaries obtained an order for the taxation of the solr.'s bill of costs under Solicitors Act, 1843 (c. 73), s. 39:—Held: (1) the costs must be taxed as between the trustees & their solr., & if properly chargeable against the trustees as such, must be allowed out of the estate irrespective of the ultimate incidence amongst the beneficiaries, which was a question outside the scope of such taxation; (2) the prospective costs of completing final distribution might properly be included in such a bill.*—*Re MILES*, [1903] 2 Ch. 518; 72 L. J. Ch. 704; 88 L. T. 863; 52 W. R. 47; 47 Sol. Jo. 655.

1819. *Special application—Necessity for.*—*Re STRAFORD*, No. 1757, *ante*.

SUB-SECT. 2.—APPLICATION FOR ORDER.

A. In General.

See Solicitors Act, 1843 (c. 73), ss. 37, 38; R. S. C., Ord. 54, r. 4, E., F. (1), Ord. 55, r. 2 (15), Ord. 62, r. 18.

1820. *Where made—At chambers.*—An application to tax an attorney's bill ought to be made at chambers.—*BASSETT v. GIBLETT* (1834), Dowl. 650.

1821. *How made—Application for re-taxation.*—*A.-G. v. NETHERCOAT*, No. 2470, *post*.

1822. — — — — — *Ex parte application—Where previous order to change solicitor.*—An order for the taxation & payment of an attorney's bill, after a previous order to change the attorney, cannot be made upon an *ex parte* application.—*GILLOW v. RIDER* (1855), 15 C. B. 729; 3 C. L. R. 263; 139 E. R. 612.

1823. — — — — — *Special application—Summons not petition.*—Special applications for delivery & taxation of a bill of costs, & for payment over the appct. of the balance of the cash account, must be made by summons, & not by petition.—*Re EDMONDS* (1871), 25 L. T. 152; 19 W. R. 1048.

Annotation:—Refd. Re Kellock (1887), 56 L. T. 887.

PART VI. SECT. 5, SUB-SECT. 2.—A.

q. *How made—(On præcipe.)*—The common order to tax may be obtained by a client on *præcipe*; it is not necessary to apply to a judge in chambers for it.—*Re DANIEL*, 1 Ch. Ch. 224.—CAN.

r. — — — — — *Upon a motion in*

chambers for an order for the delivery & taxation of a solr.'s bill of costs relating to certain proceedings under a mtge.—*Held*: the chancery practice of obtaining such orders on *præcipe* is the more convenient one, & should prevail in all divisions of the High Ct. of Justice.—*Re FITZGERALD* (1884), 10 P. R. 279.—CAN.

t. — — — — — *Where an order for the delivery & taxation of bills had been taken out on præcipe, on the application of the administrator of the client, & the fact that the solr. disputed the retainer by such client was not brought to the notice of the ct. on the issuing of the order, but it was established that the administrator did*

1824. Title of application.]—On a motion for judgment under Solicitors Act, 1843 (c. 73), s. 43, the affidavit ought to be intituled in the matter of the attorney, & not in the name of the cause.—*Re HAIR* (1844), 7 Man. & G. 510; 8 Scott, N. R. 231; 6 Jur. 326; 135 E. R. 205; *previous proceedings, sub nom. Re HARE*, 8 Jur. 577.

1825. Validity of petition—Where allegations as to conduct of solicitor.]—It is no objection to a petition to tax the solr.'s bill, that it contains allegations reflecting on the conduct of the solr.; for, if such allegations are improper, they may be referred for scandal.—*Re WELLS, Ex p. WELLS* (1835), 1 Deac. 69.

1826. Proper party to petition—Trustee—Petition by cestui que trust.]—A trustee is not a proper party to a petition presented by a *cestui que trust* for the delivery & taxation of bills of costs paid by a trustee.—*Re MOLE* (1852), 22 L. J. Ch. 455; 20 L. T. O. S. 154.

1827. Contents of petition—Specification of all items objected to.]—*Ex p. ANDREWS*, No. 2117, *post*.

1828. — — —.]—*Re DAWSON & BRYAN*, No. 1730, *ante*.

1829. Indorsement of petition—By London agents acting for country solicitors.]—London solrs. acting for country solrs., duly authorised, obtained an order for taxation of costs. The names of the London solrs. were indorsed on the petition for taxation as principals. The order for taxation was discharged on the motion of the client without costs.—*Re SCHOLES & SONS* (1886), 32 Ch. D. 245; 55 L. J. Ch. 626; 54 L. T. 466; 34 W. R. 515; 2 T. L. R. 476.

1830. Service of summons—Out of jurisdiction.]—A summons to tax a bill of costs, not being a writ of summons within R. S. C., Ord. 11, r. 1, leave to serve it out of the jurisdiction will not be granted.—*Re BOURON, Ex p. BRANDON* (1886), 54 L. T. 128; 34 W. R. 352, D. C.

Annotation:—Mentd. Re Busfield, Whaley v. Busfield (1886), 55 L. J. Ch. 467.

See, now, R. S. C., Ord. 11, r. 8A.

B. When Special Application Necessary.

1831. Where retainer disputed.]—(1) The ct. has jurisdiction to make an order for the taxation of a bill, giving liberty to the client to question the retainer.

(2) C., with others guaranteed payment to the extent of their respective subscriptions of the expenses of an application for an Act of Parliament. T., who acted as the solr. in the matter, brought an action against C. for the amount of his bill of costs. C. paid into ct. the amount subscribed by him, & pleaded to the action. Subsequently C. presented a petition, & obtained an order of course for taxation. The petition did not contain a submission to pay, nor the order any direction to the taxing master to state the amount due from C. to T. On a motion to discharge this order with costs:—*Held*: an order on a petition presented under such circumstances was not of course; where taxation was asked & the retainer disputed, a special application & order were necessary; such an order was now offered to the

petitioner, & if rejected the order of course to be discharged, but without costs, on the ground that such order of course was in accordance with the practice in the office.—*Re THURGOOD* (1854), 19 Beav. 541; 2 Eq. Rep. 1152; 23 L. J. Ch. 952; 24 L. T. O. S. 10; 18 Jur. 821; 2 W. R. 682; 52 E. R. 461.

Annotation:—As to (2) Rejd. Re Jones (1887), 36 Ch. D. 105.

1832. — —.]—*Re Inderwick*, No. 1277, *ante*.

Retainer generally.]—*See Part IV., Sect. 1, ante.*

1833. Where previous order obtained—Order of course proving abortive—By default of solicitor.]—An action having been commenced by a solr. against his client to recover the amount of his bill of costs, the client obtained the common order at the Rolls for a taxation. The taxing master recommended the parties to come to an arrangement between themselves, & for that purpose proposed to adjourn the taxation, & in the event of the negotiations failing to give another appointment. Proposals were made on both sides, & not accepted, & four days after the solr. had submitted his offer to the client having elapsed without a reply, he proceeded to sign judgment in his action. The time limited by the order of course having then expired, the client presented a special petition for taxation, & an order to that effect was made at the Rolls, & in effect, appealed against:—*Held*: the decision was right, & the appeal failed, inasmuch as the special petition was rendered necessary, not by any fault of the client but by the solrs. having departed from the understanding come to by the parties before the taxing master.—*Re CATTIN* (1857), 30 L. T. O. S. 110, L. J. J.; *affg. S. C. sub nom. Re CATTIN, Ex p. BAILEY* (1856), 3 Jur. N. S. 33.

1834. — — —.]—By default of client.]—On Oct. 21, 1893, a client obtained the common order of course to tax a bill of costs, which had been delivered to him by his solrs. on May 10, 1893, & also to tax another bill alleged to have been delivered on Oct. 27, 1892. On Nov. 29, 1893, the taxing master gave notice that he had fixed Dec. 7 for the taxation. The parties attended on that day, & the taxing master then held that the alleged bill of Oct. 27, 1892, was not really a bill of costs, but was only a list of disbursements, & that, as the order directed him to tax two bills, & there was in fact only one, he could not under the order tax that one. On a subsequent application to tax the solrs.' costs of the abortive order, the master held that the order had become inoperative, because he had not extended the time fixed by the order for the making of his certificate, & that he had no jurisdiction to order the client to pay the costs of the proceedings. But he intimated that it would be fair for the client to pay the solrs. £2 2s. The solrs. then acting for the client afterwards offered to pay that sum, & while the original solrs. were considering whether they would accept the offer, a second order of course was obtained to tax the bill of May 10, 1893. This order was obtained without any mention of the former order. On a motion by the solrs. to discharge this order:—*Held*: the order had been irregularly obtained, & after the first order had become abortive, the

not then know that the retainer was disputed:—*Held*: there was no suppression of a material fact, & that the order was regular.—*TOMS, Re CAMERON* (1871), 3 Ch. Ch. 204.—*CAN.*

a. — — —.]—Whether question of negligence inquired into.]—On summons to obtain an order for taxation of costs, the alleged negligence of a solr. in instituting useless proceedings will not

be inquired into, but a reservation will be made in the order of the right of the client to raise the question of negligence by other proceedings.—*Re —* (1884), 2 N. Z. L. R. 361 (S. C.).—*N.Z.*

b. — — —.]—Upon petition.]—Bill of costs will be ordered to be taxed upon petition & a bill is not necessary, unless it be to set aside securities obtained from the client.—*HAMILTON*

v. BREWSTER (1820), 2 Mol. 407.—*IR.*

c. To whom made—Supreme Court Judge.]—Where no action is brought by a solr. on his bill, his application for an order for taxation must be made to a Supreme Ct. Judge, irrespective of the amount of the bill.—*BARCLAY v. HOLMES* (1921), 63 D. L. R. 269; 17 Alta. L. R. 339; [1922] 1 W. W. R. 52.—*CAN.*

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client was not entitled to obtain another order to tax the bill, except upon a special application & on the terms of paying the solrs.' costs of the former proceedings. The order was not, however, discharged; but the judge directed the taxing master to proceed under it to tax the bill, & also to tax the solrs.' costs of the former proceedings & to bring those costs into account.—*Re TAYLOR, SONS & TARBUCK*, [1894] 1 Ch. 503; 63 L. J. Ch. 290; 70 L. T. 161; 42 W. R. 329; 38 Sol. Jo. 238; 8 R. 170.

Annotation:—Refd. Re Macintosh & Thomas, [1903] 2 Ch. 391.

1835. Where action brought by solicitor—For amount greater than bill of costs.]—A solr. delivered a bill of costs with a cash account at the foot, which showed a balance due to him larger than the amount of the bill, & then brought an action for the whole amount:—*Held*: under the circumstances, the common order to tax was improper, & a special application must be made.—*Re YETTS* (1864), 33 Beav. 412; 3 New Rep. 598; 55 E. R. 427.

Annotation:—Distd. Re Ward (1896), 65 L. J. Ch. 595.

1836. After payment of bill.]—A summons taken out to tax a bill paid eight years ago is not the proper course; a person wishing to tax such a bill must show a special case & proceeded by petition.—*Re WOODARD* (1869), 17 W. R. 1006.

1837. Where application not made within twelve months of delivery of bill.]—*Re STREET*, No. 1939, *post*.

1838. Where right of solicitor to withdraw bill disputed.]—*Re THOMPSON*, No. 1594, *ante*.

1839. —.]—*Re WOOD* (1891), 36 Sol. Jo. 127.

1840. Where another unsettled bill outstanding—Application by assignee of bill.]—*Re WARD*, No. 1740, *ante*.

1841. Where dispute as to relationship—Between two solicitors.]—*Re HANDELSEY* (1891), 35 Sol. Jo. 563.

1842. Where dispute as to facts.]—*Re C.*, No. 2262, *post*.

C. Time for Application.

See Sub-sect. 3, post.

SUB-SECT. 3.—WHEN ORDER MADE.

A. In General.

See Solicitors Act, 1843 (c. 73), s. 37.

1843. Bill taxed by commissioners in bankruptcy—Specific errors must be shown.]—A petition for an order to tax a solr.'s bill of costs up to the choice of assignees, after it has been taxed by the comrs., will not be granted unless specific errors are stated.—*Re SUTTON, Ex p. BRERETON* (1819), 4 Madd. 479; 56 E. R. 782.

1844. — Effect of lapse of more than twelve months.]—Where a solr. had received the estate of a bkpt. & charged the assignees, his clients, in

PART VI. SECT. 5, SUB-SECT. 3.—A.

d. Solicitor having funds of client in possession.]—Where a solr. has funds of a client in his possession, or has papers over which he claims a lien, this ct. will order delivery & taxation of his bills & payment of any balance, though the services for which he claims have been wholly in county ct. proceedings.—*Re PRINCE*, 3 Ch. Ch. 282.—**CAN.**

e. Whether upon lapse of seven years.]—Where a solr. had irregularly proceeded to tax as between solr. & client, in the client's absence, the ct. upon a petition presented seven years afterwards, ordered a taxation, treating the previous taxation as void, &

ordered the solr. to pay costs of the application.—*CLARKE v. MANNERS, Re MANNERS* (1853), 4 Gr. 432.—**CAN.**

f. One taxable item in bill.]—When a solr.'s bill contains one taxable item the whole bill is taxable.—*HOWARD v. BURROWS* (1890), 7 Man. L. R. 181.—**CAN.**

PART VI. SECT. 5, SUB-SECT. 3.—B. (a).

g. Right of solicitor.]—Under 34 Vict. c. 12, s. 13 (O.), where a month has elapsed since the delivery of a bill of costs, the solr. is entitled to a reference for taxation to the master of the county in which the work was done.

his account, with the amount of his bill of costs, & the bills had been taxed & ascertained by the comrs. more than a twelvemonth before the presentation of a petition by a creditor for the taxation of the bills, it was held that Solicitors Act, 1843 (c. 73), s. 47, did not apply.—*Re SCOWCROFT, Ex p. REES* (1845), 6 L. T. O. S. 104; 9 Jur. 996, Ct. of R.

1845. Where action not finished—Right of solicitor.]—If a decree has been obtained in a cause, & has for a long time been prevented from being worked out by the obstinate conduct of some of defts., the solr. of pltf. is entitled to have his costs taxed, without waiting for the end of the suit.—*HOBSON v. SHEARWOOD* (1845), 8 Beav. 486; 5 L. T. O. S. 19; 50 E. R. 191.

1846. — Right of client—Where subsequent order in action for taxation & payment.]—A., the next friend of infants in a suit, employed B. as solr. therein & in other matters. An order was made, in the suit, for the taxation & payment to B. of his costs of suit. Before this had been done, A. obtained, *ex p.* an order to tax B.'s bill in all the matters in which he had been employed for A.:—*Held*: the order was regular.—*Re FLUKER* (1855), 20 Beav. 143; 52 E. R. 557.

1847. Costs omitted in taxation under previous order—Application by solicitor.]—The costs of all parties were, in 1857, ordered to be taxed & paid out of a fund in ct., & the residue was directed to be paid to the parties entitled. Solrs., who had acted for some defts. down to 1840, had no notice of the order, & their costs had been omitted in the taxation. Upon their petition, these costs were ordered to be taxed & paid by the parties to whom the residue of the fund had been paid over.—*ARMSTRONG v. STORER* (No. 2), *BAZALGETTE v. ARMSTRONG, ARMSTRONG v. JEFFREYS* (1859), 27 Beav. 471; 54 E. R. 187.

1848. Effect of delay by client after delivery of bill.]—*BROOKS v. SIDEBOTTOM* (1874), cited in 10 Ch. App. 292, n.

Annotation:—Consd. De Bay v. Griffin (1875), 10 Ch. App. 292, n.

—.]—*See Sub-sect. 3, B., post.*

1849. Effect of delivery of amended bill by solicitor.]—*Re JONES, Ex p. KING*, No. 1589, *ante*.

Amendments & withdrawals of bills.]—*See Sect. 4, sub-sect. 6, ante.*

B. Application before Payment.

(a) Within One Month of Delivery of Bill.

See Solicitors Act, 1843 (c. 73), s. 37.

1850. Absolute right of client.]—(1) After payment of a bill, an order for taxation is not to be obtained as of course, even by a party liable to pay the same. Under Solicitors Act, 1843 (c. 73), any party entitled to the order may obtain it, as of course, & without special direction, within one month after delivery, & with such special directions as the ct. may order to be imposed, after the expiration of one month from the delivery, but not

—*Re SOLICITORS* (1877), 7 P. R. 263.—**CAN.**

h. —.]—On an application by solrs. to tax costs against their clients, when the bill was rendered on Aug. 22, & the petition presented on Sept. 22:—*Held*: too soon. The month must be reckoned exclusive of the day of rendering the bill & presenting the petition.—*Re MORPHY & KERR* (1866), 2 Ch. Ch. 56.—**CAN.**

k. Application in chambers.]—Where the bill had been delivered more than a month, the client must apply for taxation in chambers; otherwise the order can be obtained on *præcipe*.—*Re* (1866), 2 Ch. Ch. 58.—**CAN.**

after verdict, writ of inquiry, or payment. In those cases a special order made upon special circumstances, to be proved to the satisfaction of the ct. is required.

(2) A mere volunteer, under no previous liability, does not by paying a solr.'s bill acquire a right to tax it.—*Re BECKE & FLOWER* (1844), 5 Beav. 406; 13 L. J. Ch. 157; 2 L. T. O. S. 438; 8 Jur. 505; 49 E. R. 635.

Annotation :—**Reid**, *Re Gaitskell* (1845), 5 L. T. O. S. 325.

1851. —.]—*Ex p.* ELLIS (1860), 2 L. T. 233.

1852. *Re BROCKMAN*, No. 2188, *post.*

(b) Within Twelve Months of Delivery of Bill.

See Solicitors Act, 1843 (c. 73), s. 37.

1853. Right to order as of course.]—*Re* BYRCH,
HOLLAND v. GWYNNE, No. 2251, *post*.

1854. ———. — *Re* BIGNOLD, No. 1783, *ante*.

1855. Whether order made ex parte.]—*Re GAITSKELL*, No. 1578, *ante*.

1856. Jurisdiction of court to impose condition—
Payment into court of amount of bill—Bill for
small amount.]—Where a reference for taxation
of a solr.'s bill of costs is applied for, after the
expiration of the one month mentioned in Solici-
tors Act, 1843 (c. 73), s. 37, & the bill is under £100
in amount, the order will be made for a reference,
without requiring the amount of the bill to be paid
into ct.—*Re BROMLEY* (1844), as reported in 7
Beav. 487; 49 E. R. 1154; *sub nom. Re BROMLEY,*
Ex p. LONDON & BRIGHTON RY. Co., 13 L. J. Ch.
320.

Annotations:—**Consd.** *Re Brockman*, [1909] 1 Ch. 354.
Refd. *Re Plummer*, [1917] 2 Ch. 432.

1857. — Production of deeds—Costs of appointing new trustees of settlement.]—*Ex p.* SALTER (1844), 2 L. T. O. S. 325, L. C.

1858. — Submission to pay.]—*Re* BROCKMAN,
No. 2188, *post*.

——.]—See Sub-sect. 4, B., *post*.

1859. What directions court will give—Order for taxation of second of two bills—First bill delivered more than twelve months.]—A solr. delivered to the directors of an abortive railway co. his bill of costs, No. 1. It was perused by an experienced solr., named by the solr. retained, at the request of the directors, & items were taxed off, leaving £275 5s. 5d. as the amount due. The directors paid £200 on account, leaving a balance of £75 5s. 5d. due. An order to wind up the co., under the Winding-up Acts, was obtained, & the solr. claimed a lien on the papers for his costs. He delivered a bill of costs, No. 2, commencing with the balance of £75 5s. 5d., amounting to £233 9s. 10d. On the petition of the official manager, seeking the taxation of the solr.'s bills of costs, No. 1 & No. 2, it appeared that the bill of costs No. 1 had been duly delivered more than twelve months before the date of the petition to tax:—*Held*: bill No. 1 could not be taxed, except under special circumstances, which did not exist in this case; & the ct. ordered bill No. 2 to be taxed, directing the master not to investigate the accuracy of the balance of bill No. 1, with which bill No. 2 commenced, further than to ascertain that that balance had not in fact been paid.—*Re JAMES, Ex p. QUILTER* (1850), 4 De G. & Sm. 183; 64 E. R. 789.

Annotations:—*Distd.* *Re* Marseilles Extension Ry. & Land Co., *Ex p.* Evans (1870), L. R. 11 Eq. 151. *Consd.* *Re* Foss, Bilbrough & Foss, [1912] 2 Ch. 161.

———.]—See Sub-sect. 4, B., *post*.

PART VI. SECT. 5, SUB-SECT. 3.—
B. (c).
1866 1. *General rule—Taration not ordered—Without proof of special cir-*
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cumstances.].—A petitioner seeking to tax a bill rendered over a year must allege & establish items of overcharge, & show special circumstances.—*Re*

1860. When time begins to run—Bills delivered at different times—Relating to same business.]—N. acted as solr. of J. from 1833 to 1857, & during that period received & paid large sums of money on his account. In Nov. 1853, N. delivered to J. his account current from 1833 to that time, & in it took credit for twenty-seven bills of costs, which he delivered at the same time. N. afterwards, in Feb. 1857, & June, 1857, delivered continuations of his accounts, taking credit in them for subsequent bills of costs, which were delivered along with the accounts in which they were included. None of the accounts were ever settled. In July, 1857, the relation of solr. & client was determined, & J. placed the matter in the hands of a fresh solr. In Mar. 1858, the last account was delivered, with another bill of costs. In Apr. 1858, J. presented a petition for taxation of all the bills, showing considerable items of overcharge :—*Held* : a taxation of all the bills ought to be directed, though most of them had been delivered more than twelve months before the petition was presented.

The continuance of the connection between solr. & client will be taken into account as a reason for delaying a petition for taxation.—*Re NICHOLSON*, (1861), 3 De G. F. & J. 93 ; 45 E. R. 813 ; *sub nom. Re NICHOLSON, Ex p. JOHNSON*, 30 L. J. Ch. 585 ; 4 L. T. 167 ; 7 Jur. N. S. 434 ; 9 W. R. 441, L. JJ. ; *subsequent proceedings*, 29 Beav. 665.

Annotation:—Expld. Re Elmslie, Ex p. Tower Subway Co. (1873), L. R. 16 Eq. 326.

1861. — — — — —.]—*Re* STREET, No. 1930,
post.

1862. — — — — — Effect of letter correcting
earlier bills. — *Re* CARTWRIGHT, No. 2033, *post*.

1863. — [The retainer & employment of a solr. in such a matter as a bkpcy., an administration, or a winding up, does not constitute an entire contract so as to deprive the solr. of his right to payment, except for costs out of pocket, till the whole matter is completed, & successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery. Accordingly, where solrs. had been retained to act for a trustee in bkpcy., & also to protect the interests of S., a creditor, who subsequently by arrangement with the other creditors took over bkpt.'s estate, & delivered a bill of costs up to a certain date, with an intimation that there were then & would still be some further items, & delivered a second bill of costs, incurred after the date to which the first bill came down—on an application to tax both bills, more than twelve months after the delivery of the first:—*Held*: they must be treated as separate bills, & the second bill only could be taxed.—*Re HALL & BARKER* (1878), 9 Ch. D. 538; 47 L. J. Ch. 621; 26 W. R. 501.]

Annotations :— *Apld.* *Re Nelson & Hastings* (1885), 30 Ch. D. 1. **Consd.** *Re Romer & Haslam*, [1893] 2 Q. B. 286; *Underwood & Piper v. Lewis*, [1894] 2 Q. B. 306. **Refd.** *Re Baylis*, [1896] 2 Ch. 107; *Re Pomeroy & Tanner*, [1897] 1 Ch. 284.

1864. — Where payments made on account of balances on accounts.]—*Re* NELSON, SON & HASTINGS, No. 1449, *ante*.

1865. — — —.]—*Re* HUDSON, [1904]
W. N. 32.

(c) *After Twelve Months of Delivery of Bill.*

See Solicitors Act, 1843 (c. 73), s. 37.

1866. General rule — Taxation not ordered — Without proof of special circumstances.]—(1) An

CAMERON (1868), 2 Ch. Ch. 311.—CAN.
1866 ii. ————.]—The ct.
cannot refer a bill after it has been
delivered twelve months, unless under

N

5.—*Taxation of costs: Sub-sect. 3, B. (c) & (d).*]

application to tax an attorney's bill under Solicitors Act, 1843 (c. 73), must be within twelve calendar months after payment; but, under special circumstances, the ct. has power to order bills to be taxed twelve months after they shall have been delivered.

(2) Where a party does not apply for the taxation of a bill of costs within a month after the bill is delivered, but waits till an action is brought against him, & then makes terms & obtains time from the attorney, these are such special circumstances as will induce the ct. not to refer a bill of taxation under Solicitors Act, 1843 (c. 73).

(3) Where a promissory note & a bill of exchange, the one at two & the other at six months' date, had been given in payment of the balance of an attorney's bill—*qu.*: whether payment under Solicitors Act, 1843 (c. 73), s. 41, is to be considered to have taken place at the time of the giving of the note, or at the time of its actual payment.

(4) *Semble*: the mere non-payment of fees due to a barrister or special pleader, does not constitute sufficient special circumstances to warrant an order for referring to taxation a bill which has been delivered more than twelve months.—*Re WILTON* (1843), 13 L. J. Q. B. 17; *sub nom.* *ROSS v. WILTON* 2 L. T. O. S. 127, 155; 7 Jur. 1133.

Annotations:—As to (2) *Reid. Sayer v. Wagstaffe, Re Saunders* (1841), 2 L. T. O. S. 515. As to (4) *Reid. Re Nelson & Hastings* (1885), 30 Ch. D. 1. *Generally, Reid. Re Massey* (1909), 101 L. T. 517.

1867. ————.]—*Re HARPER*, No. 1922, *post*.

1868. ————.]—*Re JAMES, Ex p. QUILTER*, No. 1859, *ante*.

1869. ————.]—*Re GEDYE*, No. 1468, *ante*.

1870. ————.]—*BENNETT v. HILL*, No. 2176, *post*.

1871. ————.]—(1) The mere fact that an action is pending upon an attorney's bill does not give a common law judge jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances.

(2) *Qu.*: whether charges for attendances, etc., in attempting to procure bail for a person who has been committed by a single magistrate for a breach of the peace, constitute charges for business done in a ct. of law, so as to enable a judge to refer the bill for taxation.—*COWDELL v. NEALE* (1856), 1 C. B. N. S. 332; 26 L. J. C. P. 37; 28 L. T. O. S. 173; 21 J. P. 326; 2 Jur. N. S. 1248; 140 E. R. 137.

1872. ————.]—To entitle a client to an order for taxation of his solr.'s bill of costs

after the expiration of twelve months from its delivery he must show either pressure or gross overcharge, amounting to what this ct. designates as fraud. But it is not necessary to show both.

Taxation of a solr.'s bill for Parliamentary business ordered, under Solicitors Act, 1843 (c. 73), s. 37, upon a petition presented more than twelve months from the delivery of the bill, on the ground of gross overcharges, amounting to what this ct. designates as fraud, coupled with misrepresentation by him in accounting for one of the items overcharged, notwithstanding the client knew of the circumstances, & had another legal adviser within a month of the delivery of the bill, & might reasonably have availed himself of these circumstances to present his petition within the twelve months. The special circumstances need not be such as to show want of knowledge, or opportunity for taxation, in the client.—*Re STROTHER* (1857), 3 K. & J. 518; 26 L. J. Ch. 695 30 L. T. O. S. 63; 3 Jur. N. S. 736; 5 W. R. 797; 69 E. R. 1214.

Annotation:—*Reid. Re Baker, Lees*, [1903] 1 K. B. 189.

1873. ————.]—*Re NICHOLSON*, No. 1860, *ante*.

1874. ————.]—Where certain bills of costs were delivered to petitioner by his former solr. more than twelve months prior to the date of the petition, the ct. held that the charges were of such a nature & amount as constituted, under Solicitors Act, 1843 (c. 73), s. 47, special circumstances, so as to give petitioner a right to an order to have them taxed, although more than twelve months after delivery of the bills had elapsed.—*Re ST. PIERRE B. HOOK*, (1861), 3 Giff. 372; 66 E. R. 454; *sub nom.* *Re HOOK*, 5 L. T. 502; 10 W. R. 116; *sub nom.* *COOK v. ROSSLYN (EARL)*, *Re ST. PIERRE B. HOOK*, 8 Jur. N. S. 875.

1875. ————.]—I am of opinion that . . . there are no special circumstances sufficient to induce me to deviate from the ordinary course, which is to treat a solr.'s bill delivered more than a year as conclusive as to the amount, & to prevent the client having it taxed (*MALINS, V.-C.*).—*DE BAY v. GRIFFIN* (1875), 10 Ch. App. 292, n.; *on appeal*, 10 Ch. App. 291, L. JJ.

1876. ————.]—*OMMANEY v. CLEVELAND EXTENSION MINERAL RY. CO.* (1890), *Times*, Feb. 17, D. C.

1877. *Exception to rule—Company going into liquidation within twelve months.*—Bills of a solr. of a co. delivered within twelve months before it is wound up, or after the winding up has commenced, are subject to taxation, though twelve months have elapsed since their delivery.—*Re MARSEILLES EXTENSION RAILWAY & LAND CO., Ex p. EVANS*

special circumstances.—*READ v. COTTON* (1860), 6 C. L. J. O. S. 114.—*CAN.*

1866 iii. ————.]—Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should show such special circumstances as would have justified a reasonable man in not previously seeking a taxation, or that he was prevented by some unavoidable cause.—*PATTULLO v. CHURCH* (1880), 8 P. R. 363.—*CAN.*

1866 iv. ————.]—*ARNOLDI v. O'DONOHUE* (1882), 2 O. R. 322.—*CAN.*

1866 v. ————.]—*Re BUTTERFIELD* (1891), 14 P. R. 149.—*CAN.*

1866 vi. ————.]—*Re CHISHOLM & LOGIE* (1891), 16 P. R. 162.—*CAN.*

1866 vii. ————.]—*ARNOLDI*

v. TREMAINE, [1925] 3 D. L. R. 911; 57 O. L. R. 310.—*CAN.*

1866 viii. ————.]—Where an action has been brought by an attorney for a sum of £68, balance of untaxed costs, more than twelve months after the delivery of the bill thereof; & it appeared that before action brought, the attorney had offered to take a sum of £40 in full:—*Held*: it was a proper case for a reference for taxation, & the special circumstances were sufficient, under 12 & 13 Vict. c. 33, s. 2.—*HUGHES v. MURRAY* (1863), 9 L. T. 93.—*IR.*

1866 ix. ————.]—Where payment is made on account of bills of costs, & the amount is appropriated to one of the accounts contained in such bills in preference to others, but no notice of this appropriation is given to the person paying, such a payment is not a bar to an application for

reference made more than twelve months after delivery, where special circumstances are shown.—*Re SMITH, ANDERSON & Co.* (1883), 1 N. Z. L. R. 339 (S. C.)—*N.Z.*

1866 x. ————.]—*QUEENSBERRY'S (DUKE) EXECUTORS v. TAIT* (1822), 1 Sh. (Ct. of Sess.) 398.—*SCOT.*

1876 i. ————.]—*Re MCCARTHY* (No. 1), *MCCARTHY v. WALKER* (1898), 2 Terr. L. R. 346.—*CAN.*

1876 ii. ————.]—*Re M'CAY* (1866), 15 L. T. 101.—*IR.*

1. *Exception to rule—Company ordered to be wound up.*—The rule requiring special circumstances to warrant the reopening or taxation of a bill of costs after twelve months, does not apply where the bill has been delivered after a co. has been ordered to be wound up.—*CLARKE v. UNION FIRE INS. CO., EASTON'S CASE* (1884), 10 P. R. 339.—*CAN.*

(1870), L. R. 11 Eq. 151; 40 L. J. Ch. 197; 23 L. T. 647; 19 W. R. 379.

Annotations:—**Folld.** *Re Foss, Bilbrough, Plaskitt & Foss*, [1912] 2 Ch. 161. **Refd.** *Re Park, Cole v. Park, Park v. Cole* (1889), 37 W. R. 742.

1878. ——— **Application subsequently made by liquidator.**—(1) A co. went into voluntary liquidation. A bill of costs was delivered by their solrs. to the co. less than twelve months before the liquidation. The liquidator took out a summons to tax more than twelve months after delivery of the bill:—**Held**: since delivery twelve months had not expired within Solicitors Act, 1843 (c. 73), s. 37, the date of the winding up, not the issue of the summons, being the material date.

(2) Moneys advanced by the co. to the solrs. were retained by them in satisfaction of the bill:—**Held**: the retention did not amount to payment within Solicitors Act, 1843 (c. 73), s. 41, there being no settlement of account.—*Re Foss, Bilbrough, Plaskitt & Foss*, [1912] 2 Ch. 161; 81 L. J. Ch. 558; 106 L. T. 835; 56 Sol. Jo. 574.

Annotation:—**Mentd.** *Re Palace Restaurants*, [1914] 1 Ch. 492.

1879. ——— **Fund paid into court within twelve months—Application made on distribution of fund.**—B. acted as attorney for G. in an action which resulted in G.'s recovering a large sum. A bill was filed by persons claiming through G. to establish their equitable title to that sum, & in Feb. 1871, deft. in the action paid the sum recovered into ct. to the credit of the cause in which B. was deft. in respect of his lien. In Mar. 1871, B. delivered his bill of costs in the action to G. In Dec. 1873, the suit was compromised, & the fund distributed except a sum kept in ct. to answer B.'s claims:—**Held**: B. was not entitled to have his bill of costs paid out of the fund without taxation, however the case might have stood, if his bill had been delivered at such a time that G.'s right to tax it would have been lost before the fund was paid into ct.—*De Bay v. Griffin* (1875), 10 Ch. App. 291; 23 W. R. 737, L. J.

1880. **Jurisdiction to refer to master for investigation—Where objection to particular items.**—*Re Park, Cole v. Park*, No. 1710, *ante*.

1881. ——— **Where a solr. sues by a specially indorsed writ to recover the amount of a bill of costs, which has been delivered more than twelve months before action brought, & applies for leave to sign final judgment for the amount thereof under R. S. C., Ord. 14, deft., in the absence of special circumstances entitling him to have the bill taxed under Solicitors Act, 1843 (c. 73), s. 37, is not entitled, upon showing a reasonable ground of objection to a few only of the items in the bill as being unreasonable in amount, to have the whole bill taxed, but the ct., in the exercise of its general jurisdiction, will give leave to defend as to the items objected to so as to have those items inquired into by taxation or otherwise.**—*Jones & Son v. Whitehouse*, [1918] 2 K. B. 61; 87 L. J. K. B. 840; 119 L. T. 92; 62 Sol. Jo. 604, C. A.

(d) *After Action Brought.*

See Solicitors Act, 1843 (c. 73), s. 37.

1882. **Whether order made.**—The bill of an attorney cannot be taxed at the trial of an action brought upon it, nor after verdict. If there has been an account settled between the attorney & his client, the bill shall never afterwards be taxed

as of course (LORD MANSFIELD, C.J.).—*Hooper v. Till* (1779), 1 Doug. K. B. 198; 99 E. R. 130.

Annotations:—**Consd.** *Re Park, Cole v. Park* (1889), 41 Ch. D. 326. **Refd.** *Brown v. Tibbits* (1862), 11 C. B. N. S. 855.

1883. ——— **LANGSTAFFE v. TAYLOR**, No. 1973, *post*.

1884. ——— **—**—An attorney's bill may be referred to the master for taxation, after an action had been brought upon it, & a verdict recovered, on a suggestion that some of the items of the bill would not have been allowed by the master, had it been originally referred to him for taxation; but upon the terms of deft. paying the costs of the application, the costs of the taxation, & the costs of the cause as between attorney & client, pltf. being at liberty to take out forthwith the money which had been paid into ct.—*Lee v. Wilson* (1820), 2 Chit. 63.

Annotation:—**Consd.** *Re Whitcher* (1844), 2 Dow. & L. 407.

1885. ——— **—**—An attorney's bill may be referred for taxation, after verdict for the full amount.—*Nuttall v. Marr* (1823), 3 Dow. & Ry. K. B. 33.

1886. ——— **—**—Where, in an action for an attorney's bill, the defence insisted on was, that pltf. had been overpaid, but pltf. obtained a verdict, a motion to refer the bill to the master for taxation was held to be too late.—*Stables v. Brayshaw* (1825), 3 L. J. O. S. K. B. 160.

1887. ——— **—**—On a summons by one of two defts., after an action commenced on an attorney's bill, to have such bill referred to the master for taxation, the judge in his discretion has power, by common law, to order the taxation without requiring deft., who has obtained the summons, or his attorney, to enter into an undertaking to pay what shall appear to be due on such taxation.—*Watson v. Postan* (1832), 2 Cr. & J. 370; 2 Tyr. 406; 1 L. J. Ex. 131; 149 E. R. 158.

1888. ——— **—**—An *ex parte* application by deft. to have his solr.'s bill taxed after an action had been commenced to recover the amount of it, & to have proceedings at law stayed in the meantime, allowed to be regular.—*Hooper v. Holdway* (1833), 2 L. J. Ch. 185, L. C.

1889. ——— **Writ of inquiry executed.**—Attorney's bill not to be taxed after inquiry executed.—*Clarke v. Taylor* (1735), Cooke, Pr. Cas. 118; Barnes, 124; 125 E. R. 995.

1890. ——— **Judgment by default.**—Where an action at law has been brought by a solr. for his costs, & deft. permitted judgment to go by default at law, equity cannot interfere to order taxation.—*Bryan v. Twigg* (1834), 3 L. J. Ch. 114.

1891. ——— **Action on promissory note.**—*Re A Solicitor* (1894), 38 Sol. Jo. 239.

1892. ——— **Action against two clients jointly—Undertaking to pay by one alone.**—A bill of costs having been incurred by A. & B. jointly, & an action having been brought against them for the recovery of the amount, the ct. refused to direct a taxation & to stay the proceedings at law, on the undertaking of A. alone, to pay what might be found due.—*Re Chilcote* (1839), 1 Beav. 421; 48 E. R. 1003.

Annotation:—**Refd.** *Re Lewin* (1853), 16 Beav. 608.

1893. ——— **Jurisdiction to make order without imposing terms.**—Where an attorney's bill contains taxable items, the ct. has authority, after action brought, to refer it for taxation, without requiring any admission of liability on the bill,

PART VI. SECT. 5, SUB-SECT. 3.—
B. (d).

m. *Duty of client to come promptly.*—Although the cts. will interfere &

order a retaxation of costs, even after a judgment has been obtained for them, when the overcharges are gross & excessive, yet a client must come promptly, more especially when the

relationship of solr. & client has ceased to exist, to obtain such relief, & it will not be granted if the amount overpaid is small.—*Re Scott, Scott v. Burnham*, 3 Ch. Ch. 467.—CAN.

Sect. 5.—Taxation of costs: Sub-sect. 3, B. (d) & (e), & C. (a) i., ii. & iii.]

or imposing any other terms upon debt.—**WILLIAMS v. GRIFFITH** (1840), 6 M. & W. 32; 8 Dow, 414; 9 L. J. Ex. 185; 4 Jur. 803; 151 E. R. 310.

Annotations:—*Re* **Peters v. Sheehan** (1842), 10 M. & W. 213; *Cowdell v. Neale* (1856), 1 C. B. N. S. 332.

1894. — Necessity for proof of special circumstances.]—*Re* **BARNARD, Ex p. WETHERELL**, No. 2030, *post*.

1895. — Stay of further proceedings.]—**ANON.**, [1876] W. N. 39; 20 Sol. Jo. 261; Bitt. Prac. Cas. 111; 2 Char. Cham. Cas. 3.

1896. — Action on amended bill.]—**LUMSDEN v. SHIPCOTE LAND CO.**, No. 1572, *ante*.

1897. Order made before notice of action.]—A client obtained an order of course to tax, after action brought, but before notice of it, & the order did not provide for the costs of the action:—*Held*: this was not irregular.—*Re* **FARINGTON** (1864), 33 Beav. 346; 55 E. R. 401.

Annotation:—*Distd. Re* **Webster**, [1891] 2 Ch. 102.

Action by personal representative of solicitor.]—*See* Sub-sect. 3, B. (e), *post*.

(e) After Death of Solicitor.

1898. Whether taxation ordered—After action brought by personal representative.]—**GREGG'S CASE** (1706), 1 Salk. 89; 91 E. R. 83; *subsequent proceedings*, 2 Salk. 596.

1899. — Motion to tax deceased attorney's bill denied.]—**GRIFFITH v. SQUIRE** (1730), Cooke, Pr. Cas. 58; 125 E. R. 956.

1900. — An attorney's bill may be referred for taxation, though it is his exor. who sues on it.]—**PENSON v. JOHNSON** (1813), 4 Taunt. 724; 128 E. R. 515.

Annotation:—*Expld. Doe d. Sabin v. Sabin* (1840), 8 Dowl. 468.

1901. — WILLIAMS v. GRIFFITH, No. 1626, *ante*.

1902. — Several bills of costs of a solr. had been paid by his client, without any taxation having been made, & without their being examined by any other professional adviser on behalf of the client. After the death of the solr., a petition was presented, praying that these bills might be referred for taxation:—*Held*: the ct. had not jurisdiction to make an order, as against the exors. of the solr., for the taxation of these bills after the solr.'s death.—**MADDEFORD v. AUSTWICK** (1838), 3 My. & Cr. 423; 7 L. J. Ch. 304; 3 Jur. 668; 40 E. R. 990, L. C.

Annotations:—*Appld. Doe d. Sabin v. Sabin* (1840), 8 Dowl. 468. *Consd. Re* **Vines & Hobbs, Ex p. Shackell** (1852), 2 De G. M. & G. 812.

1903. — Bill delivered by executor.]—An attorney's bill delivered by his exor. before action brought, is not taxable.—**DOE d. SABIN v. SABIN** (1840), 8 Dowl. 468; 4 Jur. 247.

1904. — Re VINES & HOBBS, Ex p. SHACKELL, No. 2106, *post*.

1905. Revival of order—Death of solicitor pending taxation.]—*Re* **WHALLEY**, No. 1585, *ante*.

1906. — Whether order made ex parte.]—Pending a taxation the solr. died:—*Held*: his exors. might revive the proceeding against their client by an *ex p.* order.—*Re* **WAUGH** (1859), 29 Beav. 666; 30 L. J. Ch. 796, n.; 9 W. R. 775; 54 E. R. 787.

Annotation:—*Folld. Re* **Nicholson** (1861), 30 L. J. Ch. 796.

1907. — A client may apply ex parte against an extrix. of a solr. deceased, to

revive an order for the taxation of the solr.'s bills of costs.—*Re* **NICHOLSON** (1861), 29 Beav. 665; 30 L. J. Ch. 796; 9 W. R. 774; 54 E. R. 786.

1908. Form of order—After death of one of two solicitors.]—*Re* **CURTIS & BETTS**, [1887] W. N. 126, C. A.

1909. Validity of order—Where no legal personal representative appointed.]—*Re* **CURTIS & BETTS**, [1887] W. N. 126, C. A.

C. Application after Payment.

(a) What Amounts to Payment.

i. In General.

1910. Necessity for delivery of proper bill of costs.]—*Re* **BAYLIS**, No. 1942, *post*.

1911. Proof of payment.]—*Re* **WOOD** (1844), 4 L. T. O. S. 109; *subsequent proceedings* (1845), 4 L. T. O. S. 310.

1912. Payment of estimated amount.]—Payment of the estimated amount of a bill of costs, though falling a trifle short of the real amount of the bill afterwards made out & sent, but the balance not demanded, nor any intimation of anything still due, is payment to satisfy Solicitors Act, 1843 (c. 73).—*Re* **DUNCAN** (1845), 6 L. T. O. S. 82.

1913. Payment by solicitor executor to himself—With concurrence of co-executor.]—*Re* **LETHBRIDGE**, No. 2020, *post*.

1914. Payment by third party.]—A solr. delivered a general estimate of costs due to him, without specifying the particulars. The client signed a memorandum agreeing to the statement, & requesting A., to whom he had given his acceptance, to pay the amount. A bill filed by the client more than three years afterwards, to obtain a delivery & taxation of the bill of costs, was dismissed with costs.—**TURNER v. HAND** (1859), 27 Beav. 561; 54 E. R. 222.

Annotations:—*Expld. Re* **Stogdon** (1887), 56 L. J. Ch. 420. *Distd. Re* **West, King & Adams, Ex p. Clough**, [1892] W. Q. B. 102.

1915. Payment on account.]—An application to tax a solr.'s bill within a year of its delivery should be made by common order, & not by special summons, although a payment may have been made on account.—*Re* **WOODARD** (1869), 18 W. R. 37.

1916. — Pltf. had paid the amount of an account sent in by his solr., which account was not, however, a "bill of costs" inasmuch as it did not set out the particular items charged. More than twelve months after such payment, pltf. took out a summons for delivery & taxation of solr.'s bill of costs. No bill of costs had been delivered at the date of the hearing of the summons:—*Held*: the payment on account could not in the circumstances be made referable to the bill of costs which would be delivered after the hearing of the application; & pltf. was entitled to the common form order for delivery & taxation, notwithstanding the payment made upwards of twelve months before the issue of the summons.—*Re* **CALLIS** (1901), 49 W. R. 316.

1917. Payment of principal, interest & costs by mortgagor.]—*Re* **GRIFFITH, JONES & Co.**, No. 1986, *post*.

1918. Payment to solicitor's managing clerk.]—*Re* **HEATH, PARKER & BRETT** (1898), 43 Sol. Jo. 98, C. A.

ii. Giving Negotiable Instrument.

1919. Whether equivalent to payment.]—Where a client gives his attorney a bill of exchange or

PART VI. SECT. 5, SUB-SECT. 3.— C. (a) i.

1910 i. Necessity for delivery of proper

bill of costs.]—Where no bill of costs has been delivered by a solr. to his client, there cannot be payment within

Solrs. Act, R. S. O. 1897, c. 174, s. 49.—*Re* **PINKERTON & COOKE** (1899), 18 P. R. 331.—**CAN.**

promissory note for the amount of his bill, which is ultimately paid, the twelve months limited by Solicitors Act, 1843 (c. 73), s. 41, for taxation of the bill after payment, date from the time when the bill or note was paid, not when it was originally given, unless there be circumstances to show that it was treated by the parties as actual payment at the time when given.—*Re HARRIES* (1844), 13 M. & W. 3; 1 Dow. & L. 1018; 13 L. J. Ex. 259; 3 L. T. O. S. 138; 8 Jur. 453; 153 E. R. 1.
Annotation:—*Consd. Re Sanders, Ex p. Wagstaff, Sayer v. Wagstaff* (1844), 14 L. J. Ch. 116.

1920. ———.]—(1) The delivery by a client of a promissory note, held, under the circumstances, to amount to a payment of a bill of costs.

(2) The special circumstances under which a paid bill may be taxed are such as exist or take place at the time of payment, or such as appear on the face of the bills themselves: (a) where payment is extorted, & there are improper charges even of a small amount, or (b) where the charges are so gross as to evidence fraud & oppression, taxation will be directed after payment.

(3) It is imprudent for a client to pay, & for a solr. to receive, his bill of costs, so closely upon their delivery, that they cannot have been deliberately & carefully perused & examined by the client; but this alone is not sufficient to warrant a taxation after payment.—*Re CURRIE* (1846), 9 Beav. 602; 1 New Pract. Cas. 549; 8 L. T. O. S. 310; 10 Jur. 976; 50 E. R. 476.

1921. ———. **Promissory note.**—*SAYER v. WAGSTAFF*, No. 2152, *post*.

1922. ———. **Accompanied by memorandum of lien.**—(1) A solr., at the request of his client, delivered certain bills, accompanied by a cash account; & at a subsequent meeting, the client, without any pressure other than the influence arising from his want of money to meet so large a demand as appeared on the balance, signed a promissory note for the amount, & also a memorandum of lien on his real estates for the same by way of security to the solr. The client had had sufficient time to examine the bills, & the solr. had not asked for payment. On a petition for an order to tax:—*Held*: the promissory note & memorandum amounted, under the circumstances, to payment; as the petition was not presented within the year after payment, the order for taxation could not be made.

(2) There being only general complaints of numerous overcharges & unreasonable items, but no specific items pointed out as erroneous, & the petition being presented more than a year after delivery:—*Held*: the special circumstances were not such as to justify taxation, even if the bill had not been paid.—*Re HARPER* (1847), 10 Beav. 284; 2 New Pract. Cas. 336; 10 L. T. O. S. 33; 50 E. R. 591.

1923. ———.]—*Re A SOLICITOR* (1804), 38 Sol. Jo. 239.

1924. ———. **Effect of subsequent dishonour.**—(1) An attorney had delivered a bill in 1840 & continued to act as attorney afterwards. In 1842 the client, being pressed for payment, demanded a statement of his account, & gave two joint notes of hand, which the attorney swore he received "in lien of cash." The attorney, after these notes became due & were paid, delivered two other bills, comprising some of the items, & extending over a portion of the time included in the first. On motion to refer the bills for taxation:—*Held*: the three bills together constituting in point of fact but one bill, "the payment of any such bill" within Solicitors Act, 1843 (c. 73), s. 41, so as to preclude taxation after the lapse of twelve months

must be a payment after the delivery of the whole of such bills.

(2) *Semble*: the mere delivery of a bill of exchange or promissory note is not a payment within that section, when, if the bill of exchange or promissory note were dishonoured at maturity, the client would remain liable on the attorney's bill.—*Re PEACH* (1844), 2 Dow. & L. 33; 13 L. J. Q. B. 249; 8 Jur. 692.

Annotation:—*As to* (1) *Refd. Re Hall & Barker* (1878), 47 L. J. Ch. 621.

1925. ———.]—The handing by a client to his solr. of a negotiable security for the amount of his bill of costs, coupled with the giving of a receipt by the solr. in which it is expressed to be taken "in settlement" of his bill, does not amount to payment in the event of the negotiable security being dishonoured, unless there be proof, the *onus* of which lies on the solr., that such was at the time the intention of the parties, & that the client was aware of the effect of the transaction upon his right to tax the bill of costs.—*Re ROMER & HASLAM*, [1893] 2 Q. B. 286; 69 L. T. 547; 42 W. R. 51; 4 R. 486; *sub nom. Re ROMER, Ex p. SNELL*, 62 L. J. Q. B. 610, C. A.

Annotation:—*Refd. Underwood & Piper v. Lewis*, [1891] 2 Q. B. 306.

1926. ———.]—Pltf., having acted as solr. to deft., delivered to him a bill of costs, & deft. signed two promissory notes in payment. The first of the notes to become due was dishonoured. In an action on the note deft. contended that he was entitled to have the bill taxed before paying the note:—*Held*: without deciding whether deft. had a right to taxation, pltf. was entitled to judgment on the note for the amount claimed, & if deft. applied for taxation & was held entitled to it he might, when the other note fell due, have a defence to the extent of any sum deducted from the bill.—*STEWART-MOORE v. SPRAGUE* (1917), 34 T. L. R. 113.

1927. **When time begins to run—Date of payment of instrument—Or when note given.**—*Re WILTON*, No. 1866, *ante*.

1928. ———.]—*Re PEACH*, No. 1924, *ante*.

1929. ———.]—*Ex p. HUTCHINS* (1844), 3 L. T. O. S. 165.

1930. ———.]—*Re HARRIES*, No. 1919, *ante*.

1931. ———.]—*SAYER v. WAGSTAFF*, No. 2152, *post*.

iii. Retaining Clients' Money.

1932. **Whether equivalent to payment.**—*Re GAITSKELL*, No. 1578, *ante*.

1933. ———.]—*Re COLQUHOUN, DUNT v. DUNT*, No. 2086, *post*.

1934. ———.]—(1) A retainer of a sum by a solr. out of moneys received for his client, is not a payment of his bill by the client.

(2) Letters written by a solr. to his client which are not properly required for the interests of the client in the business for which the solr. is engaged will not be allowed on taxation.

(3) In a proceeding by summons for taxation, it is not necessary to specify palpable overcharges by affidavit.—*Re BRADY* (1867), 15 W. R. 632.

1935. ———. **Retainer by solicitor executor.**—*Re LETTIBRIDGE*, No. 2020, *post*.

1936. ———. **Retainer by mortgagee's solicitor—Mortgagor not informed of amount of surplus.**—A solr., acting on behalf of mtgees., sold the mtged. premises, & on June 27, 1850, he retained the amount of his bill of costs out of the proceeds of the sale. On June 29, 1850 he sent a copy of the bill to the solr. of the mtgor., & on June 27,

Sect. 5.—Taxation of costs: Sub-sect. 3, C. (a) iii. & iv.]

1851 the mtgor., applied for an order for taxation:—Held: the taxation might have been had upon the common order; the petition was presented in time; it could scarcely be considered a payment of the bill of costs until petitioner had the means of knowing the amount of the surplus, & he was entitled to taxation, but he must pay the costs beyond the costs of the common order.—*Re STEELE* (1851), 20 L. J. Ch. 562.

1937. — Retainer with client's assent.]—In an action by a client against his solr., the latter pleaded his bill of costs by way of set-off. The client obtained an order for the delivery of the bill & suffered himself to be *non prossed*:—**Held:** it was not necessary to state these circumstances on an *ex p.* application in Chancery for taxation.

There being in this case no bill delivered, & no payment in the proper sense of the term which means either a payment of the money or a retainer of the amount by the solr. with the assent of the client, I think this must be treated like any other case, & that the client was entitled to the order of course (*ROMILLY, M.R.*).—*Re DAVID* (1861), 30 Beav. 278; 54 E. R. 896.

1938. — Where no bill of costs delivered.]—Testator gave a legacy to a person payable at a future day; when the day arrived, the legatee was believed to be dead, but it was not known whether he had died intestate or not. The legacy was invested, & a solr., not the exor. of testator, or in any way connected with him, became the obligee of the bond to secure it. The solr. then took the usual steps to obtain information & to ascertain whether or not the legatee was dead; but being unsuccessful, he demanded a bond of indemnity before paying over the legacy to the next of kin of the legatee, who had taken out administration to him, on the supposition that he was dead, & alleging that his bill of costs amounted to a lump sum, of which the particulars were not stated, nor was any bill delivered, he deducted that sum from the legacy & handed over the balance to the next of kin of deceased legatee:—**Held:** no particulars being stated, nor bill delivered, & the solr. who had constituted himself a trustee having made professional charges for his trouble in making the enquiries which were all objected to, the bill was taxable notwithstanding payment or retainer of moneys in payment.—*Re FOULKES & PARKER* (1847), 2 New Pract. Cas. 491.

1939. — —.]—A solr. retained the amount of his bill of costs out of money in his hands belonging to the client, & the client, on receiving the balance of the money, but before the bill of costs had been delivered, signed an account in which the total amount of the costs was an item, & gave a receipt for the balance:—**Held:** (1) there had been no payment of the bill within Solicitors Act, 1843 (c. 73), s. 41; & the client was entitled to have the bill taxed more than a year after the retainer of the costs & the signature of the account; (2) a special application was necessary under the circumstances.

(3) If bills relating to different parts of one transaction are delivered at different times, the year within which application for taxation should be made does not begin to run till the last has been delivered.—*Re STREETER* (1870), L. R. 10 Eq. 165; 39 L. J. Ch. 495; 22 L. T. 429.

Annotations:—As to (1) *Apld. Re Stogdon* (1887), 56 L. J. Ch. 420; *Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102. **Consd.** *Hitchcock v. Stretton*, [1892] 2 Ch. 343; *Re Frape, Ex p. Perrett*, [1893] 2 Ch. 284. **Refd.** *Re Baylis*, [1896] 2 Ch. 107. As to (3) **Consd.** *Re*

Foster, Barnato v. Foster, [1920] 3 K. B. 306. **Generally, Refd.** *Re Cartwright* (1873), L. R. 18 Eq. 469; *Re Hall & Barker* (1878), 9 Ch. D. 538; *Re Nelson & Hastings* (1885), 30 Ch. D. 1; *Re Romer, Ex p. Snell* (1893), 62 L. J. Q. B. 610; *Re Thompson, Ex p. Baylis*, [1894] 1 Q. B. 462.

1940. — —.]—Preliminary agreement between a solr. & his client on obtaining a loan on mtge., no bill of costs having been delivered, held illegal, & delivery of bill & taxation ordered more than twelve months after completion of the transaction & payment of the balance to the client.

A solr. lent his client £200 on a promissory note. The note was made out for £210, the addition being alleged to be for costs on the transaction:—**Held:** the client was not precluded from requiring a bill of costs, showing how the £10 was made up, by the lapse of nearly three years & subsequent money transactions between the parties.—*Re CAWLEY & WHATLEY* (1870), 18 W. R. 1125.

1941. — —.]—From Feb. 1874, to Aug. 1879, S. had acted as the solr. & man of business of B., a married woman, & during this period had wound up her former husband's estate, collected her rents, & managed her estates, lent her money, & negotiated mtges. for her. In the course of these transactions the various items of receipt & payment on her behalf, including costs & professional charges, were entered in a book of accounts kept by S. Copies of these accounts were sent to B. from time to time, & one of the mtges. by B. to S. contained a recital that they had been gone through & settled. In Aug. 1879, when a mtge. was negotiated from a third person of sufficient amount to pay off B.'s debt to S., the accounts were gone through & explained to B., when S. retained the amount due to him for advances & for his costs & professional charges out of the mtge. money, & carried the balance to her credit in the book of accounts. B. thereupon signed the account. S. continued to act for B. as before down to the end of 1885. B. had no independent advice when she signed the account in Aug. 1879. On an application by B. & her husband for the delivery & consequent taxation of bills of costs from Feb. 1874, to Aug. 1879:—**Held:** there had been no payment within Solicitors Act, 1843 (c. 73), s. 41, & B. was entitled to an order for delivery of proper bills of costs for the period required, & a consequent taxation, notwithstanding the lapse of time & the signature by B. of the accounts.—*Re STOGDON* (1887), 56 L. J. Ch. 420; *sub nom. Re STOGDON, Ex p. BAKER*, 56 L. T. 355; 51 J. P. 565.

Annotations:—**Expld.** *Hitchcock v. Stretton*, [1892] 2 Ch. 343. **Consd.** *Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102; *Re Frape, Ex p. Perrett*, [1893] 2 Ch. 284. **Refd.** *Re Thompson, Ex p. Baylis*, [1894] 1 Q. B. 462; *Re Baylis*, [1896] 2 Ch. 107.

1942. — —.]—(1) To constitute payment of a bill of costs such as will preclude taxation after twelve months under Solicitors Act, 1843 (c. 73), s. 41, a proper bill with items must be delivered; a cash account debiting the client with a lump sum for costs is insufficient.

(2) A solr. who pays himself by retention of moneys of his client, & does not deliver a bill of costs, cannot treat that retention as payment; & such retention will not be referred to a bill subsequently delivered under an order of the ct.

(3) A cash account containing an item for "costs as agreed" does not, where it is admitted that there was an antecedent verbal agreement, constitute an agreement in writing within Solicitors' Remuneration Act, 1881 (c. 44), s. 8.

(4) Delay in applying for delivery of a bill will

not relieve the solr. from the obligation to deliver a bill where he has in his possession the necessary

(b) A settled account, though coupled with the retainer of agreed costs, it is not "payment" as between solr. & client unless a proper bill is delivered.

(6) Where there is an agreement as to costs between a solr. & his client the ct. can refer that to the taxing master to ascertain whether it is fair & reasonable, & if not, it is not to be treated as binding on the client.—*Re BAYLIS*, [1896] 2 Ch. 107; 65 L. J. Ch. 612; 74 L. T. 506; 44 W. R. 533; 12 T. L. R. 339; *sub nom. Re B.*, 40 Sol. Jo. 355, C. A.

Annotation:—*As to* (6) *Refd. Re A. & B., Ex p. W.* (1900), 44 Sol. Jo. 315.

1943. — *Balance of account accepted by client.*—*Re ANGOVE* (1882), 26 Sol. Jo. 417, C. A. *Annotation*:—*Consd. Re Colyer* (1892), 37 Sol. Jo. 83.

1944. — *When treated by client as payment.*—The lady has treated the money paid to her as the balance due, & assented to the solr. keeping or retaining the amount of his bill. There is no distinction in law between a solr. & his client & any other person & his customer in the matter of payment. Special circumstances within Solicitors Act, 1843 (c. 73), s. 41, are not confined to pressure or overcharge, or any particular kind of circumstances (*CHITTY, J.*).—*Re COLYER* (1892), 37 Sol. Jo. 83.

1945. — *Bill of costs delivered subsequent to retainer.*—A firm of solrs. retained, out of money in their hands belonging to their client, the amount of their costs for professional work. They kept a running account with the client, crediting him with money received, & debiting him from time to time with the amount of the costs. The accounts were from time to time balanced, & signed by the client as having been "settled & approved" by him, but no bills of costs were then delivered. Four years after the last settlement of accounts the client brought an action for an account. The solrs. then delivered their bills of costs. At the trial pltf. abandoned his claim for an account, but contended that he was entitled to have the bills taxed:—*Held*: the payment made was referable to the bills subsequently delivered, the case came within Solicitors Act, 1843 (c. 73), s. 41, & there being no special circumstances, the ct. would not direct taxation.—*HITCHCOCK v. STRETTON*, [1892] 2 Ch. 343; 61 L. J. Ch. 529; 66 L. T. 707; 40 W. R. 555.

Annotations:—*Appld. Re Thompson, Ex p. Baylis*, [1894] 1 Q. B. 462. *Distd. Re Baylis*, [1896] 2 Ch. 107. *Refd. Re Frupe, Ex p. Perrett*, [1893] 2 Ch. 284.

1946. — — — — —.]—*Re BAYLIS*, No. 1942, *ante*.

1947. — *Where no settlement of account.*—*Re WEST, KING & ADAMS, Ex p. CLOUGH*, No. 1210, *ante*.

1948. — — — — —.] *Re FOSS, BILLBROUGH, PLASKITT & FOSS*, No. 1878, *ante*.

1949. — *Where special agreement with client.*—*Re THOMPSON, Ex p. BAYLIS*, No. 1217, *ante*.

iv. Settlement of Accounts.

1950. Whether equivalent to payment.—*HOOPER v. TILL*, No. 1882, *ante*.

1951. — — — — —.]—Settlement of accounts between attorney & client, not conclusive; the nature of their connection, excepting their accounts from the operation of the general rule in equity. There-

fore accounts settled & signed, & where vouchers are delivered up, & a note given for the balance, will be reopened at a very considerable distance of time after such settlement, where the parties stand in the relative situation to each other of attorney & client, agent & principal; & where the balance is in favour of the former under the peculiar circumstances affecting this case.—*LEWES v. MORGAN* (1817), 5 Price, 42; 146 E. R. 530, H. L.

Annotations:—*Refd. Haro v. Bruford* (1824), 13 Price, 277; *Hiles v. Moore* (1848), 17 L. J. Ch. 385; *Gresley v. Mousley* (1862), 3 De G. F. & J. 433; *Bateman v. Hunt*, [1904] 2 K. B. 530; *Choose v. Keen* (1907), 77 L. J. Ch. 163.

1952. — *Settlement of bill during action.*—Where client has no professional advice.]—A settlement of a bill of costs during the continuance of the suit, while the client has no professional adviser, except the solr. himself, is not a bar to its taxation. Charges by a country solr. for attending the cause in London are to be allowed in some cases; but the circumstance of their being undertaken by the direction of the client, is not alone a sufficient ground for allowing them, as the solr. himself is better able to judge of their necessity.—*CROSSLEY v. PARKER* (1820), 1 Jac. & W. 460; 37 E. R. 443.

Annotations:—*Refd. Horlock v. Smith* (1837), 2 My. & Cr. 495; *Sayer v. Wagstaff, Re Sanders, Ex p. Wagstaff* (1844), 14 L. J. Ch. 116.

1953. — *Account signed by both parties.*—The signing by solr. & client of a debtor & creditor account, in which a bill of costs is one item, is sufficient to constitute a payment so as to preclude taxation, on a petition presented twelve months after.—*Re CATTIN, BARWELL v. BROOKS* (1844), 8 Beav. 121; 1 New Pract. Cas. 81; 4 L. T. O. S. 152; 50 E. R. 48.

Annotation:—*Refd. Re Stephen, Ex p. Bass* (1848), 2 Ph. 562.

1954. — *Account stated.*—Stating an account does not bar a client from taxing his solr.'s bill.—*SCADDING v. EYLES* (1846), 9 Q. B. 858; 15 L. J. Q. B. 364; 7 L. T. O. S. 226; 10 Jur. 945; 115 E. R. 1501.

Annotations:—*Refd. Brooks v. Bockett* (1847), 9 Q. B. 847; *Turner v. Willis*, [1905] 1 K. B. 468; *Re Van Laun, Ex p. Chatterton*, [1907] 2 K. B. 23. *Mentd. Evans v. Heathcote*, [1918] 1 K. B. 418.

1955. — — — — —.]—The giving of a mtge. with a covenant to pay for the agreed amount of a solr.'s bill of costs is not equivalent to payment of the bill within Solicitors Act, 1843 (c. 73), s. 41.

A solr. from time to time rendered to his client a debtor & creditor cash account, & his draft unsigned bill of costs for contentious business. On each occasion the client waived the delivery of a signed bill & discussed & agreed the amount of the draft bill, which amount was then debited against him in the cash account & a balance was struck, & the client wrote at the foot of the cash account "I agree this account" & signed it. On the third occasion the client gave the solr. a mtge. for the agreed balance of the stated cash account, which for the main part represented the agreed sum for costs, & covenanted to pay it with interest. More than twelve months afterwards the client became bkpt., & the solr. claimed to prove for the principal & interest due under the covenant in the mtge. less the value of the security, & he also claimed to prove for the same principal sum on an account stated:—*Held*: as between the debtor & the solr., the carrying of the agreed sum for costs into the cash account & the subsequent

PART VI. SECT. 5, SUB-SECT. 3.—C. (a) iv.

n. *General rule.*—After a settlement, the accounts cannot be opened for investigation or taxation, but *ex facie* errors may be corrected.—*M'ARA v. GILFILLAN* (1831), 9 Sh. (Ct. of Sess.) 684.—*SCOT*.

Sect. 5.—Taxation of costs: Sub-sect. 3, C. (a) iv. & v., & (b) i. & ii.]

statement of account between them was equivalent to payment of the costs within Solicitors Act, 1843 (c. 73), s. 41, & there were no special circumstances which entitled the debtor to require delivery of a detailed bill for taxation.—*Re VAN LAUN, Ex p. PATTULLO*, [1907] 1 K. B. 155; *sub nom. Re VAN LAUN, Ex p. CHATTERTON*, 76 L. J. K. B. 142; 95 L. T. 840; 23 T. L. R. 97; 51 Sol. Jo. 83; 14 Mans. 11; *on appeal*, [1907] 2 K. B. 23, C. A.

Annotation:—*Mentd. London & Westminster Bank v. Button* (1907), 51 Sol. Jo. 466.

1956. — Where right to dispute costs reserved.]—*Ex p. ELLIS* (1860), 2 L. T. 233.

1957. — Receipt signed by client.]—*Re FRAPE, Ex p. PERRETT*, No. 1224, *ante*.

v. Giving Security.

1958. Whether equivalent to payment—Giving bond.]—*BAGWELL v. JOBSON* (1728), 1 Barn. K. B. 144; 94 E. R. 101.

1959. — — —.]—*PALMEY v. SWAN* (1732), 2 Barn. K. B. 128; 94 E. R. 400.

1960. — — —.]—*MARSH v. CARTER* (1734), *Cooke, Pr. Cas.* 109; 125 E. R. 989.

1961. — — — To nominee of solicitor—On account of costs.]—Bond given by a client to the nominee of a solr., for a sum of money, in payment of costs; the actual sum to be afterwards ascertained by taxation. The solr. indebted to the nominee. Bill for an account & taxation dismissed as against the nominee; but the bill of costs decreed to be taxed.—*HARRISON v. WILTSHIRE* (1838), 9 Sim. 255; 2 Jur. 679; 59 E. R. 356.

1962. — Giving bond & mortgage.]—An attorney cannot take from his client a bond for unliquidated costs. Notwithstanding such bond & a mtge. has been given, the bills may be taxed, & upon payment deft. to reconvey, & the bond declared void.—*NEWMAN v. PAYNE* (1793), 4 Bro. C. C. 350; 2 Ves. 199; 29 E. R. 930, L. C.

Annotations:—*Reid, Lewis v. Morgan* (1796), 3 Aust. 769; *Langstaffe v. Taylor* (1807), 14 Ves. 262; *Lupton v. White, White v. Lupton* (1808), 15 Ves. 432; *Wood v. Downes* (1811), 18 Ves. 120; *Booth v. Creswicke* (1841), 13 L. J. Ch. 217.

1963. — Security given by testator—Application by executor.]—Where an attorney's bill had been approved of & adjusted, & the payment secured by testator eighteen years before, the et., on an application made by the exor., refused to order such bill to be referred to the prothonotary for taxation.—*Re DALBY, Ex p. BOSWORTH* (1836), 5 L. J. C. P. 201.

1964. — Giving mortgage.]—(1) Where a bill of costs has been delivered & security given for the amount, that is equivalent to payment, for the purpose of precluding taxation without special circumstances.

After the delivery of a solr.'s bill, & on the occasion of a purchase by the client, & of a mortgage to raise part of the purchase-money, which the client required in order to complete the purchase, the client executed a mtge. to the solr. for a round sum, which included & exceeded by a small amount the bill of costs & the amount of certain advances made formerly by the solr. to

the client. Some time afterwards, the client applied for & received the excess, & subsequently the mtge. was transferred, with the client's concurrence:—*Held*: this amounted to payment of the bill, so as to preclude taxation without further special circumstances than the above.

(2) Where a solr. pressed for the amount of his bill, but offered an opportunity of taxation, & apprised his client that it would be difficult to have the bill taxed after payment, & the client chose to pay without taxation, & afterwards applied to have the bill taxed without showing overcharges amounting to fraud:—*Held*: the application ought to have been dismissed with costs.—*Re BOYLE, Ex p. TURNER* (1854), 5 De G. M. & G. 540; 24 L. J. Ch. 71; 23 L. T. O. S. 262; 2 W. R. 617; 43 E. R. 979, L. JJ.

Annotation:—*As to (1) Expld. Re Van Laun, Ex p. Pattullo*, [1907] 1 K. B. 155.

1965. — — — Application by client's assignee in bankruptcy.]—Property was mortgaged by a client to his solr. as security for costs incurred & to be incurred. The client became bkpt., & his assignee applied by summons to set aside the mtge. & to have all the bills taxed. The judge refused the application on the ground that a solr. might arrange with his client to accept a stated sum for costs, & so avoid the expense of taxation; but a letter being produced, which was read as a waiver of any objection to a taxation:—*Held*: that order must be discharged, & general taxation directed.—*Re THOMPSON* (1866), 14 L. T. 6, L. JJ.

1966. — — —.]—*Re VAN LAUN, Ex p. PATTULLO*, No. 1955, *ante*.

Payment under pressure.]—*See* Sub-sect. 3, D. (c), *post*.

(b) Within Twelve Months of Payment.

i. In General.

See Solicitors Act, 1843 (c. 73), s. 41.

1967. Discretion of court.]—*Re CHOWNE*, No. 1802, *ante*.

1968. Order not made ex parte.]—*Re CAREW*, No. 1785, *ante*.

1969. Application by third party.]—*Re DAWSON & BRYAN*, No. 1730, *ante*.

1970. Payment before delivery.]—*Re FIELDER & SUMNER, Ex p. BAILEY*, No. 2112, *post*.

1971. Application must be made without delay.]—In Oct. 1907, six bills of costs were delivered, & these were paid by the clients in June, 1908. At the date of delivery of the bills certain counsel's fees had not been discharged by the solrs., but all had been paid when the bills were settled. A summons asking for an order for taxation was issued by the clients on Dec. 16, 1908:—*Held*: on the evidence, there were no "special circumstances" within sect. 41 of the Solicitors Act, 1843 (c. 73), s. 41, entitling the clients to the order.

Semble: a person desirous of obtaining an order for taxation after payment of a bill of costs must make his application without delay.—*Re MASSEY* (1909), 101 L. T. 517; 26 T. L. R. 68; 54 Sol. Jo. 50.

1972. Application to tax second of two bills—Right of solicitor to have both taxed.]—A bill of costs was settled by retainer; a second & subsequent bill was also settled in the same way. On an application to tax the second bill only:—*Held*:

PART VI. SECT. 5, SUB-SECT. 3.—
C. (b) i.

o. General rule—Special circumstances must be shown.]—*Re BAKER, Re MACDONALD* (1889), 13 P. R. 227.—**CAN.**

p. — — —.]—*MACDONNEL v.*

& MANN (1823), 2 Sh. (Ct. of Sess.) 185.—**SCOT.**

q. Payment made by note for lesser amount.]—A solr. had been employed to conduct a suit, & otherwise rendered professional services. Without furnishing a bill he demanded £45, but com-

promised for the client's note for £40, which was renewed & ultimately paid. A motion by the client, after eleven months, for an order to furnish a bill & to refer it for taxation, was refused with costs.—*Re FAIRBANKS*, 1 Ch. Ch. 222.—**CAN.**

solr. could not insist on having both taxed.—*Re GREGG* (1861), 30 Beav. 259; 31 L. J. Ch. 632; 10 W. R. 127; 54 E. R. 888.

ii. *Necessity for Proof of Special Circumstances.*

See Solicitors Act, 1843 (c. 73), s. 41.

1973. General rule—Special circumstances must be shown.]—An attorney's bill of costs settled & paid, or after judgment in an action, not to be referred for taxation of course; as it may upon a special case of fraud, or improper charges, notwithstanding payment, a release, judgment, or other security.—*LANGSTAFFE v. TAYLOR* (1807), 14 Ves. 262; 33 E. R. 521.

Annotations:—Distd. Crossley v. Parker (1820), 1 Jac. & W. 460. *Consd. Horlock v. Smith* (1837), 2 My. & Cr. 495.

1974. ———. ———.]—Where a bill of costs has been paid, the client ought not to obtain an order of taxation as of course. Where a bill had been paid pending the suit, & under some degree of pressure practised by the solr. towards the client, the ct. refused to discharge an order for taxation obtained subsequently, as of course.—*HOWELL v. EDMUNDS* (1827), 4 Russ. 67; 6 L. J. O. S. Ch. 29; 38 E. R. 730.

Annotations:—Consd. Horlock v. Smith (1837), 2 My. & Cr. 495. *Refd. Sayer v. Wagstaff, Re Sanders, Ex p. Wagstaff* (1844), 14 L. J. Ch. 116.

1975. ———. ———.]—*HORLOCK v. SMITH*, No. 2042, *post*.

1976. ———. ———.]—*Re BECKE & FLOWER*, No. 1850, *ante*.

1977. ———. ———.]—*SAYER v. WAGSTAFF*, No. 2152, *post*.

1978. ———. ———.]—The general rule is, that a paid bill is not to be referred for taxation; & special circumstances & grounds are required to take a case out of this rule.

The bill of trustee's solr. was delivered on Nov. 27, & on Dec. 10 paid, after some deductions, by the solr. of the *cestui que trust*, as he alleged, under protest. A petition for taxation presented by the *cestui que trust* in Jan. following was dismissed with costs.—*Re NEATE* (1847), 10 Beav. 181; 50 E. R. 551.

1979. ———. ———.]—**Though payment made under protest.]**—(1) The solr. of a mtgee. of property contracted to be sold, delivered his bill of costs to the trustee for sale, appointed by the mtgor., several days before the day of meeting, to complete the sale, & on the day before the meeting he delivered a supplementary bill; the parties having met, the trustee for sale objected to some of the items in the bill, & the solr. offered to take off a certain sum, but, on the offer being refused, he insisted on being paid before completing; & accordingly the trustee paid the bill under protest:—*Held*: the bill was not liable to be taxed. "Protest" at the time of payment of a bill of costs, means merely that the party is dissatisfied, & will apply to have the bill taxed; but the party does not thereby acquire or reserve to himself any right to have it taxed, unless there are special circumstances.

(2) Where the mtgor., or his trustee, pays the bill of costs of the mtgee.'s solr., he can only have it taxed afterwards in the same manner, & on the same footing, as the mtgee. himself could have done before payment.—*Re HARRISON* (1847), 10 Beav. 57; 2 New Pract. Cas. 146; 16 L. J. Ch. 170; 9 L. T. O. S. 119; 11 Jur. 197; 50 E. R. 503.

Annotations:—As to (1) N.F. Re Dearden (1853), 9 Exch. 210. *Consd. Re Newman* (1867), 2 Ch. App. 709, n. *Refd. Re Boycott* (1885), 29 Ch. D. 571. *As to (2) Apld. Re Massey* (1865), 34 Beav. 463.

1980. ———. ———.]—*Re DEARDEN*, No. 2013, *post*.

1981. ———. ———.]—*Re BURCHELL, WILDE & Co.* (1902), 46 Sol. Jo. 570.

1982. ———. ———.]—*Re HARDING*, No. 2104, *post*.

1983. ———. ———.]—A lady possessing property to her separate use, employed her trustee to act as her solr., in legal proceedings, etc., respecting it. There was evidence to show that she knew the rule as to a solr. trustee, & she gave him a retainer after he had refused to act, unless on the ordinary terms. The bill of costs was delivered & paid, after making a deduction; &, within the year, application was made for taxation, on the grounds that the solr. ought not to charge for professional services, & that the charges were erroneous. It was said also, that there was pressure, but this was not clearly made out. The petition was dismissed with costs.—*Re WYCHE* (1848), 11 Beav. 209; 12 L. T. O. S. 121; 50 E. R. 796.

1984. ———. ———.]—*Re BROWNE, Ex p. JEFFERIES*, No. 2113, *post*.

1985. ———. ———.]—*Re BARROW*, No. 1776, *ante*.

1986. ———. ———.]—A foreclosure judgment having been obtained, debts., to avoid bringing in accounts, & to put an end to the action, paid to pltf.'s solr. the amount he asked for principal, interest & costs, a certain portion of the amount being stated to represent the costs of the action. Afterwards the judge on the application of debts., ordered delivery & taxation of the solr.'s bill. But, on appeal, the ct. doubted whether there had been any payments of a solr.'s bill within Solicitors Act, 1843 (c. 73), s. 38, & held that, if the transaction had amounted to payment of the solr.'s bill, there were no special circumstances, under sect. 41 of the Act, entitling debts. to tax a bill already paid.—*Re GRIFFITH, JONES & Co.* (1883), 53 L. J. Ch. 303; 50 L. T. 434; 32 W. R. 350, C. A.

1987. ———. ———.]—**Solicitor charging on higher scale.]**—*Re DURNFORD*, [1883] W. N. 29.

1988. ———. ———.]—After a solr.'s bill has been paid an order for the taxation of it will not be made, unless special circumstances, as overcharges such as amount to fraud, or which are accompanied by pressure, can be shown which, in the opinion of the judge, appear to make it proper that the bill should be taxed.—*Re MUNNS & LONGDON* (1884), 50 L. T. 356; 32 W. R. 675.

1989. ———. ———.]—*HITCHCOCK v. STRETTON*, No. 1945, *ante*.

1990. Application by third party—Cestui que trust.]—The ct. will not direct an attorney's bill to be referred to taxation after payment, unless it can be impeached on the grounds of gross overcharge, fraud, or mistake, or some specific charge, which must be distinctly pointed out, & although the application was made by a *cestui que trust*, who had a direct interest in the subject matter for which the expenses in the bill were incurred, yet it having been previously paid by the representative of a surviving trustee, acting under a deed of trust for sale, the ct. refused to interfere.—*WILKINSON v. FOSTER* (1823), 7 Moore, C. P. 496; 1 L. J. O. S. C. P. 25.

Annotation:—Refd. Doe d. Evans v. Southall (1838), 2 Jur. 809.

1991. ———. ———.]—*Re BENNETT*, No. 2128, *post*.

1992. ———. ———.]—*Re CHOWNE*, No. 1802, *ante*.

1993. ———. ———.]—Where neither a case of pressure is proved against a solr., nor improper items of charge shown by a third party applying for an order to tax the bill, the application, will be refused with costs.—*Re EVANS* (1845), 1 New Pract. Cas. 343; 15 L. J. Ch. 115; 6 L. T. O. S. 254.

1994. ———. ———.]—On a petition for taxation under the third-party clause of Solicitors Act, 1843 (c. 73),

Sect. 5.—Taxation of costs: Sub-sect. 3, C. (b) ii. & iii., (c) i. & ii., & D. (a).]

where the party immediately chargeable has paid the solr., & the third party liable has repaid him, it is not necessary to prove pressure.—*Re TURNER, Ex p. BURTON* (1856), 4 W. R. 805.

1995. Application made in reasonable time.]—The ct. will refer an attorney's bill of costs to be taxed by the master, after it has been paid, on application within a reasonable time, without showing circumstances of fraud or imposition.—*GLASCOTT v. CASTLE* (1832), 2 Cr. & J. 355; 1 Dowl. 317; 2 Tyr. 302; 1 L. J. Ex. 103.

iii. *What are Special Circumstances.*
See Sub-sect. 3, D., *post*.

(c) *After Twelve Months of Payment.*
i. *In General.*

1996. Taxation not ordered.]—Taxation of a solicitor's bill of costs after payment & lapse of several years, refused.—*WATERS v. TAYLOR* (1837), 2 My. & Cr. 526; Donnelly, 274; 6 L. J. Ch. 245; 1 Jur. 375; 40 E. R. 740, L. C.

*Annotations:—*Consd. *Edwards v. Meyrick* (1842), 2 Haro. 60; *Blagrove v. Houth* (1856), 2 K. & J. 509; *Watson v. Rodwell* (1879), 39 L. T. 614. *Refd.* *Horlock v. Smith* (1837), 2 My. & Cr. 495; *Maddeford v. Austwick* (1838), 3 My. & Cr. 423; *Re Arderne, Ex p. Tredgold* (1843), 7 Jur. 220; *Sayer v. Wagstaff, Re Sanders, Ex p. Wagstaff* (1844), 14 L. J. Ch. 116; *Hiles v. Moore* (1848), 17 L. J. Ch. 385; *Re Stephen* (1848), 2 Ph. 562.

1997. —.]—*BINNS v. HEY*, No. 2170, *post*.

1998. —.]—A solr., having been professionally employed by A. claimed £400 on account of his costs, but in 1844 received £180, & then gave to A. a receipt, discharging him from all personal liability in respect of such costs. In 1850, after the solr.'s death, A. presented a petition for the delivery of a bill of costs, by the exors. of the solr., & for the taxation of the same, alleging that the costs in respect of which the £400 was claimed had been paid out of the estate of A. under his bkpcy., which had occurred in 1844. The petition was dismissed with costs, without prejudice to any other proceedings A. might be advised to institute.—*Re FYSON, FYSON v. WHITE* (1850), 16 L. T. O. S. 229.

1999. —.]—*Re LAYTON, STEELE & Co.*, No. 1404, *ante*.

2000. —.]—*Re HARMAN & SON*, [1912] W. N. 111.

2001. — At instance of third party—Cestui que trust.]—*Re DOWNES*, No. 1809, *ante*.

2002. —.]—The lapse of twelve calendar months after payment of a bill of costs, precludes taxation under the Solicitors Act.

The rule applies, where payment is made by trustees, etc., & the application for taxation is made, under Solicitors Act, 1843 (c. 73), s. 38, by a party "liable to pay."—*Re MASSEY* (1845), 8 Beav. 458; 1 New Pract. Cas. 47; 5 L. T. O. S. 302; 50 E. R. 180.

*Annotation:—*Refd. *Re Smith* (1884), 32 W. R. 408.

2003. —.]—Twelve months after payment of a bill of costs by trustees to their solr. it cannot be taxed, under Solicitors Act, 1843 (c. 73), upon the application of their *cestui que trust*.—*Re PRESS & INSKIP* (1865), 35 Beav. 34; 55 E. R. 806.

*Annotation:—*Refd. *Re Wellborne* (1900), 70 L. J. Ch. 172.

2004. —.]—This is an application for

taxation under Solicitors Act, 1843 (c. 73), s. 38, generally called the third-party clause. The objection raised is that the bill in question has been paid upwards of a year. LORD LANGDALE, M.R., had the point before him so long ago as the year 1845, in the case of *Re Massey*, No. 2002, *ante*, & he there decided that the proviso at the end of sect. 41 applies to applications under sect. 38. It would now be too late for me to reconsider the matter, but, if I give my opinion, I think that that decision is right, & is the only decision which could be arrived at on the matter (CHITTY, J.).—*Re SMITH* (1884), 32 W. R. 408.

2005. — Beneficiaries under will.]—*Re JACKSON, Re COTTRELL, BOUGHTON-LEIGH v. BOUGHTON-LEIGH*, No. 1615, *ante*.

2006. —.]—*Re WELLBORNE*, No. 1810, *ante*.

2007. — Though bill not signed by solicitor.]—Where twelve calendar months have elapsed since payment of a solr.'s bill of costs by his client, such bill, although not signed by the solr., is prohibited by Solicitors Act, 1843 (c. 73), s. 41, from being referred to taxation.—*Re SUTTON & ELLIOTT* (1883), 11 Q. B. D. 377; 52 L. J. Q. B. 752; 49 L. T. 436, C. A.

*Annotations:—*Refd. *Re Wellborne* (1900), 45 Sol. 101; *Re Duncan* (1907), 51 Sol. Jo. 485.

2008. — Costs retained by solicitor.]—*Re VINES & HOBBS, Ex p. SHACKELL*, No. 2106, *post*.

2009. — Under special agreement.]—*Re URMSTON* (1903), 48 Sol. Jo. 16.

ii. *Fraud and Undue Influence.*

2010. Right to order—Fraud.]—The solr. to the fiat having delivered his bill of costs, & retained the amount of it before the end of 1850, was discharged in July, 1851; No application for taxation was made before Oct. 1852:—*Held*: it was not consistent with safety or propriety to direct taxation in a summary way, even if the ct. had jurisdiction to do so.

I entertain great doubt whether there is authority in the absence of a case of fraud to interfere under the summary jurisdiction which is given or regulated by Solicitors Act, 1843 (c. 73) (LORD CRANWORTH, L.J.).—*Re TYTHER, Ex p. PEMBERTON* (1852), 2 De G. M. & G. 960; 22 L. J. Bey. 76; 42 E. R. 1147, L. JJ.

*Annotation:—*Consd. *Re Wellborne*, [1901] 1 Ch. 312.

2011. — Undue influence.]—An account which had been settled between a client who was an old lady, & her solr., including arranged bill of costs, was ordered to be opened & the bill of costs taxed, after the lapse of nearly two years, without actual proof of error or overcharge, on the ground that the client had acted under undue influence & without sufficient information, & that much of the business charged for was unnecessary & improper.—*WATSON v. RODWELL* (1879), 11 Ch. D. 150; 48 L. J. Ch. 209; 39 L. T. 614; 43 J. P. 542; 27 W. R. 265, C. A.

D. Special Circumstances.

(a) *In General.*

2012. What constitutes special circumstances—Discretion of court to decide.]—*Re BLACKMORE, Re BILLING, Re SPIKE*, No. 1367, *ante*.

2013. —.]—(1) The ct. will not lay down any fixed rule as to the special circumstances under which an attorney's bill may be ordered to

PART VI. SECT. 5, SUB-SECT. 3.— C. L. T. 438.—CAN.

C. (c) i.
1996 i. Taxation not ordered.]—*Re* *JONES v. MOFFETT* (1846), 3 Jo. & Lat. 636.—IR.

PART VI. SECT. 5, SUB-SECT. 3.— D. (a).

i. *General rule.]*—The ct. cannot refer a bill after it has been delivered

be taxed after payment. Solicitors Act, 1843 (c. 73), s. 41, should be construed liberally.

(2) Where an attorney's bill is paid in order to obtain possession of deeds, & an intention is at the same time expressed to have the bill taxed, an order will be made to refer the bill for taxation.—*Re DEARDEN* (1853), 9 Exch. 210; 2 C. L. R. 308; 23 L. J. Ex. 14; 22 L. T. O. S. 90; 17 Jur. 993; 2 W. R. 18; 156 E. R. 90.

Annotations:—As to (1) *Consd. Re Boycott* (1885), 29 Ch. D. 571. *Generally, Refd. Re Massey* (1865), 34 Beav. 463; *Re Newman* (1867), 2 Ch. App. 709, n.

2014. ———.]—Mtgees. for £2,000 were proceeding to sell the mtged. estates. On Sept. 1, S., the mtgor.'s solr., wrote to B., the mtgee.'s solr., informing him that he had found a transferee, & proposing to complete the transfer on Sept. 3. B. wrote back proposing Sept. 10, for completion, & afterwards postponed the appointment to Sept. 13. His bill of costs, which amounted with surveyor's charges to more than £450, was received by S. on Sept. 9. On that day S. wrote to B., saying that the bill of costs appearing excessive, & would require to be carefully gone into, but did not propose to postpone the completion. On Sept. 12, S. took with him a written protest against the bill & had two interviews with B., at which arrangements were made for completion. S. did not mention the subject of costs at either interview, but deposed that he had intended to do so at a third appointment on the same day, which B. did not keep. On Sept. 13, the parties met, the transfer was completed, & the bill of costs paid, B. refusing to part with the deeds unless it was paid. S. delivered his written protest, & it appeared that B. expressed willingness to reconsider his bill if any item were shown to be erroneous, but said nothing to the effect that it was to be treated as open to taxation. The mtgor. applied for taxation, alleging pressure & overcharge, but not referring to any specific items of overcharge. The judge made an order for taxation, & B. appealed:—*Held*: (1) (*COTTON & FRY, L.J.J.*) the order for taxation must be discharged, for as the shortness of the interval between the delivery of the bill & the time fixed for completion did not arise from any act of the mtgee.'s solr., but was owing only to the desire of the mtgor. for speedy completion, there was no pressure such as to justify taxation, though the case would have been otherwise if the mtgee. had been pressing for an early settlement; (2) (*BOWEN, L.J.*), the Solicitors Act, 1843 (c. 73), s. 41, authorises taxation after payment where there are special circumstances which, in the opinion of the judge, require the same; there was no inflexible rule that the special circumstances must be pressure with overcharge, or overcharge so gross as to amount to fraud; & in the present case, as the parties did not at completion treat the bill as finally settled, & B. had taken advantage of the inconvenience which a postponement of the settlement would have occasioned to the mtgor., there were special circumstances justifying taxation; (3) (*BOWEN, L.J.*), where a bill was so large

as to be redolent of overcharge it was not necessary that specific items of overcharge should be pointed out; (4) (*FRY, L.J.*), though the bill appeared excessive, the ct. could not treat overcharge as shown, unless specific items were pointed out on which it could exercise its judgment.—*Re BOYCOTT* (1885), 29 Ch. D. 571; 55 L. J. Ch. 835; 52 L. T. 482; 34 W. R. 26, C. A.

Annotations:—As to (2) *Apprvd. Re Norman* (1886), 16 Q. B. D. 673. *Apld. Re Williams, Ex p. Love* (1891), 65 L. T. 68. *Consd. Re Cheesman*, [1891] 2 Ch. 289; *Re Massey* (1909), 101 L. T. 517. *Refd. Re P. & M.* (1895), 39 Sol. Jo. 640.

2015. ———.]—The "special circumstances" which, under Solicitors Act, 1843 (c. 73), s. 37, allow a solr.'s bill of costs to be referred for taxation, although twelve months have elapsed since it was delivered to the client, are not merely pressure & overcharge, or overcharge amounting to fraud. A judge has a discretion in ordering the bill of costs to be taxed, if it contains items unreasonably large, or charges requiring explanation, or gross blunders. *Semble*: the same principle ought to be applied to the taxation of a bill of costs which has been paid. Bills of costs delivered by a solr. contained the following charges: £735 for the costs of a reference, lasting six days; £83 for witnesses' expenses, none of which had been paid by the solr., but nearly the whole of which had been paid by the client; & £71 for shorthand notes of the proceedings at a reference where no professional shorthand writer had been employed, but the clerk to the solr. had taken the notes, & it did not appear that the solr. had given his clerk any part of the £71 charged. More than twelve months had elapsed since the bills were delivered:—*Held*: these charges constituted "special circumstances" within Solicitors Act, 1843 (c. 73), s. 37, which justified a judge in referring the bill for taxation.

The statute uses the words "special circumstances." Those are wide, comprehensive, & flexible words, & I think . . . that no ct. can or ought to lay down any exhaustive definition of them. Charges which in one case would be special circumstances, in another would not be such. It is for the discretion of the judge to say what all special circumstances in a particular case (*LOPES, L.J.*).—*Re NORMAN* (1886), 16 Q. B. D. 673; 54 L. T. 113; 34 W. R. 313; 2 T. L. R. 272; *sub nom. Re NORMAN, Ex p. BRADWELL*, 55 L. J. Q. B. 202, C. A.

Annotations:—*Consd. Re Eloy* (1887), 56 L. J. Ch. 905; *Re Cheesman*, [1891] 2 Ch. 289. *Apld. Re Hirst & Capes*, [1908] 1 K. B. 982. *Refd. Re P. & M.* (1895), 39 Sol. Jo. 640; *Re Massey* (1909), 101 L. T. 517. *Generally, Mentd. Wickins v. Wickins*, [1918] P. 265.

2016. ———.]—There is no rigid rule as to what kind of circumstances will justify the taxation of a solr.'s bill after payment, but the judge has in each case to determine whether there are special circumstances which make it right to refer the bill for taxation, & if there are special circumstances in the case the Ct. of Appeal will not readily interfere with the decision of the ct. below that they are sufficient to justify taxation.—*Re*

twelve months, unless under special circumstances.—*READ v. COTTON* (1860), 6 C. L. J. O. S. 114.—*CAN.*

a. Necessity for stating special circumstances in petition.—On an application under C. S. U. C. c. 35, s. 30, for taxation of a solr.'s bill, after the expiration of twelve months from its delivery, the special circumstances relied upon by petitioner to entitle him to an order must be specified in the petition, & must be proved by proper evidence.—*Re GILDERSLEEVE & WALKER* (1873), 6 P. R. 117.—*CAN.*

b. What constitute special circumstances—Pressure put upon client to pay.—Where a client's agent paid an attorney's bill, objecting to some items, but unable, without paying it to get papers out of the attorney's hands, the ct. considering some of the charges unreasonable ordered a taxation.—*DOE d. FRASER v. EAGLESTON* (1836), 5 O. S. 77.—*CAN.*

c. Special understanding.—The bill of costs in question was for professional services rendered deft. in an investigation of his conduct as a

public official before a comr. appointed by the Ontario Govt. The special circumstance relied upon to enable deft. to obtain the order for taxation after the lapse of more than a year from the delivery of the bill was, in the words of deft., that "there was a distinct understanding between me & the above-named plffs. that the payment of the said bill of costs was to lie over to await the decision of the Ontario Govt. who were by both me & the said plffs., as they stated, expected to pay the said bill of costs, I being

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CHEESMAN, [1891] 2 Ch. 289; 60 L. J. Ch. 714; 64 L. T. 602; 39 W. R. 497.

*Annotations:—*Consd. *Re Williams, Ex p. Love* (1891), 65 L. T. 68. *Appl. Re P. & M.* (1895), 39 Sol. Jo. 640. *Distd. Re Burchell, Wilde* (1902), 46 Sol. Jo. 570; *Gane & Kilner v. Linley* (1909), 53 Sol. Jo. 198. *Consd. Re Ward, Bowie* (1910), 102 L. T. 527. *Refd. Re Massey* (1909), 54 Sol. Jo. 50.

2017. —.]—*Re P. & M.*, No. 2132, *post*.

2018. —.]—*HIRST & CAPES v. FOX*, No. 2181, *post*.

2019. —.]—*Re WARD, BOWIE & CO.*, No. 2145, *post*.

2020. — **Whether confined to pressure or fraudulent overcharge—After payment of bill.]—**(1) Where the relation of solr. & client exists, pressure & overcharges are the special circumstances ordinarily urged as grounds for an order to tax after payment of a bill of costs; but they are not the only special circumstances; & in cases where the bill has been paid by a trustee, exor., or administrator, the party interested in the property out of which the payment is made, or who is ultimately to bear the payment, such special circumstances as pressure, etc., cannot exist, inasmuch as the party may not be able to know anything about the bills by reason of the solr. holding them back; & in that class of cases the ct. will, on that ground alone, order delivery & taxation, if application is made within twelve months after payment.

(2) Though in cases where a solr. is an exor. & retains the amount of his bills of costs out of testator's assets, that might not be considered a payment of a bill of costs within Solicitors Act, 1843 (c. 73), yet where there are two exors., A. & B. of whom A. is a solr., & authorised to charge professionally, & A. & B. as exors. draw & sign cheques on the bankers of the executorship, & then B. delivers the cheques to A. in his character of solr., that is a payment within the statute.—*Re LETHBRIDGE* (1851), 18 L. T. O. S. 192; *subsequent proceedings* (1852), 19 L. T. O. S. 19.

2021. —.]—(1) The rule of the ct. is, that to obtain a taxation after payment, there must either be both overcharge & pressure, or overcharge so gross as to amount to fraud.

(2) A solr. is not bound to do that on the undertaking of the opposite solr. which the latter is not entitled to as of right.

(3) The cases of taxation after payment on the ground of pressure are not to be extended.

A., the mtgor.'s solr., sent a reconveyance to B., the mtgee.'s solr., for execution, unstamped. On Aug. 23, B. delivered his bill of costs, which was objected to; & on Sept. 10, A. applied to B. for the loan of the deed to get it stamped, on his undertaking to return it, which was refused, & on Sept. 18, the mtge. & bill were paid. The mtgee. afterwards applied for a taxation, & the pressure relied on was, that he had been compelled to pay the bill in order to get the reconveyance stamped & avoid the penalties; & that no taxation could be had in the Long Vacation. He also alleged overcharges, which were not clearly made out. The application was refused with costs.—*Re HUBBARD* (1852), 15 Beav. 251; 51 E. R. 534.

2022. —.]—*Re STROTHER*, No. 1872, *ante*.

one of their officers, & the charges against me having fallen through":—*Held*: the existence of the above understanding, if proved, was not a special circumstance within R. S. O. 1877, c. 140, s. 35, to justify an order

for the taxation of the bill after the lapse of a year from its delivery; but that the bill should have been taxed subject to such understanding.—*FLETCHER v. FIELD* (1885), 10 P. R. 608.—CAN.

2023. —.]—*Re FOSTER, Ex p. WALKER*, No. 2137, *post*.

2024. —.]—*Re HERITAGE, Ex p. DOCKER*, No. 1771, *ante*.

2025. —.]—*Re BOYCOTT*, No. 2014, *ante*.

2026. —.]—*Re COLYER*, No. 1944, *ante*.

2027. — **After twelve months from delivery.]—***Re NORMAN*, No. 2015, *ante*.

2028. —.]—*HIRST & CAPES v. FOX*, No. 2181, *post*.

2029. **Knowledge of special circumstances must be newly acquired.]—**In order to ground an application to tax an attorney's bill, after verdict, under Solicitors Act, 1843 (c. 73), s. 37, the "special circumstances" must have relation to some matter newly come to the knowledge of the party, & it is not sufficient to show circumstances known to deft. before the action.—*Re WHICHER, WHICHER v. THOMAS* (1844), 13 M. & W. 549; 2 Dow. & L. 407; 14 L. J. Ex. 78; 4 L. T. O. S. 159; 153 E. R. 229.

*Annotations:—*Consd. *Re Barnard* (1852), 16 Beav. 5. *Refd. Re Robinson* (1867), 16 W. R. 110.

2030. —.]—In an action brought by an attorney against his client, upon his bill of costs, the client obtained an order for taxation on the terms of withdrawing all his pleas except *nunquam indebitatus*. Afterwards, he withdrew all his pleas, & applied to the judge for an order of taxation, under Solicitors Act, 1843 (c. 73), which was refused for want of jurisdiction:—*Held*: the client could not obtain an order for taxation from the Ct. of Ch., there being no special circumstance beyond mere overcharge.

Semble: where judgment has been given in the attorney's action, the special jurisdiction given by the Solicitors Act, 1843 (c. 73), s. 37, does not exist.

Where special circumstances are relied upon as a ground for taxation after the prescribed time, they must be such as the client could not have reasonably availed himself of sooner.

A mere overcharge, in the absence of fraud, does not amount to a special circumstance for the taxation of a bill.—*Re BARNARD, Ex p. WETHERELL* (1852), 2 De G. M. & G. 359; 16 Beav. 5; 20 L. T. O. S. 241; 17 Jur. 53; 42 E. R. 911, L. JJ.

*Annotations:—*Distd. & Expld. *Re Strother* (1857), 3 K. & J. 518. *Refd. Re Barber* (1851), 23 L. T. O. S. 216.

(b) Overcharges.

i. In General.

2031. **Whether special circumstance — Mere overcharges.]—**Proof of overcharge alone is insufficient to obtain the taxation of a paid bill; but it is a necessary ingredient.—*Re STIRKE* (1847), 11 Beav. 304; 50 E. R. 834.

2032. —.]—An application for taxation of a solr.'s bill of costs made more than twelve calendar months after delivery allowed, the ct. being of opinion that certain alleged overcharges constituted in themselves a sufficient "special circumstance."—*Re ST. PIERRE B. HOOK* (1861), 3 Giff. 372; 66 E. R. 454; *sub nom. Re HOOK*, 5 L. T. 502; 10 W. R. 116; *sub nom. COOK v. ROSSLYN (EARL), Re ST. PIERRE B. HOOK*, 8 Jur. N. S. 875.

2033. —.]—Where several bills of costs are successively delivered, & none are paid, though

PART VI. SECT. 5, SUB-SECT. 3.—
D. (b) i.

d. General rule.]—Large items in a solr.'s bill of costs, which themselves require explanation, afford sufficient evidence of special circumstances to

money may have passed & been placed to the account of the client, all the bills must be treated as single bills. So, where, after a series of bills had been delivered, the client complained of some of the charges, whereupon the solr. suggested a taxation, but wrote a letter, signed by him, stating that he should endeavour to increase certain of the charges, that letter being held to be a legal bill of costs, it could be taken as part of the series, so as to bring the whole within the twelve months allowed by Solicitors Act, 1843 (c. 73), s. 37.

Mere overcharges are not "special circumstances" within Solicitors Act, 1843 (c. 73).—*Re CARTWRIGHT* (1873), L. R. 16 Eq. 469; 42 L. J. Ch. 735; 28 L. T. 891; 21 W. R. 861, L. C.

Annotations:—**Consd.** *Re Hall & Barker* (1878), 9 Ch. D. 538; *Re Nelson & Hastings* (1885), 30 Ch. D. 1. **Refd.** *Lumsden v. Shipcote Land Property Co.* (1906), 51 W. R. 461.

2034. — — — — **Mistake.**—A solr. delivered a bill of costs, which was paid, containing overcharges due to a mistake as to the proper scale charges & to scale charges for work which was not all done:—*Held*: the overcharges in themselves were sufficient to have the bill referred for taxation.—*Re G.* (1909), 53 Sol. Jo. 469.

2035. — — — — **Where security taken.**—A solr. having taken a judgment of his client for £400 whilst the cause was depending, & also several extraordinary charges appearing in his bill; Lord Hardwicke, though adjusted & allowed seventeen years ago, referred the bill to be taxed, & ordered the judgment & other securities to be delivered up.—*DRAPERS' CO. v. DAVIS* (1712), 2 Atk. 295; 26 E. R. 580, L. C.

Annotations:—**Apld.** *Lewis v. Morgan* (1796), 3 Anst. 769. **Consd.** *Langstaffe v. Taylor* (1807), 14 Ves. 262; *Crossley v. Parker* (1820), 1 Jac. & W. 460. **Expld.** *Horlock v. Smith* (1837), 2 My. & Cr. 495. **Refd.** *Wood v. Downes* (1811), 18 Ves. 120.

2036. — — — — .]—Taxation of a solr.'s bill refused after security given, payment & acquiescence, some charges though improper, not being so gross as to amount to fraud.—*PLENDERLEATH v. FRASER* (1811), 3 Ves. & B. 174; 35 E. R. 411, L. C.

Annotations:—**Consd.** *Crossley v. Parker* (1820), 1 Jac. & W. 460; *Horlock v. Smith* (1837), 2 My. & Cr. 495; *Sayer v. Wagstaff, Re Sanders, Ex p. Wagstaff* (1844), 14 L. J. Ch. 116. **Refd.** *Waters v. Taylor* (1837), *Donnelly*, 274; *Blagrove v. Routh* (1856), 2 K. & J. 509.

2037. — — — — .]—The ct. will relieve a client against the extortion of an attorney.

Even if a client has given an attorney a bond or mtge. to secure the payment of what was charged to be due to him on account of a law suit the cts. of equity have relieved the client & ordered the bill to be taxed.

What is the reason the court goes upon? . . . why, the great power & influence that an attorney has over his client (*LORD HARDWICKE, C.*).—*WALMESLEY v. BOOTH* (1711), 2 Atk. 25; *Barn. Ch.* 475; 26 E. R. 412, L. C.

Annotations:—**Consd.** *Newman v. Payne* (1793), 4 Bro. C. C. 350; *Lewis v. Morgan* (1796), 3 Anst. 769; *Langstaffe v. Taylor* (1807), 14 Ves. 262. **Distd.** *Plenderleath v. Fraser* (1814), 3 Ves. & B. 174. **Consd.** *Crossley v. Parker* (1820), 1 Jac. & W. 460. **Refd.** *Saunderson v. Glass* (1742), 2 Atk. 296; *Gilbert v. Chudleigh* (1748), 2 Nov. Supp. 372; *Oldham v. Hand* (1751), 2 Ves. Sen. 259; *Ward v. Hartpole* (1776), 3 Bl. 470; *Morse v. Royal* (1806), 12 Ves. 355; *Wood v. Downes* (1811), 18 Ves. 120; *Ingram v. Wyatt* (1828), 1 Hag. Ecc. 381; *Cheslyn v. Dalby* (1836), 2 Y. & C. Ex. 170.

enable the client to obtain an order for taxation of the bill after payment.—*Re BENNETT & ATTENBOROUGH, Ex p. CAMERON* (1872), 3 V. R. (Law) 220.—**AUS.**

e. — — — — .]—In the absence of gross overcharge or pressure, the ct. will not tax a bill rendered several years, & treated as paid, the solr. having abandoned any excess over certain

2038. **Trifling overcharges.**—Petition to tax a bill of costs after payment, on the ground of trifling overcharges, dismissed with costs.—*Re DRAKE* (1844), 8 Beav. 123; 4 L. T. O. S. 152; 50 E. R. 49.

Annotation:—**Refd.** *Re Thompson* (1845), 8 Beav. 237.

2039. — — — — .]—*Re CHOWNE*, No. 1802, ante.

2040. — — — — **Substantial overcharges.**—*Re WILLIAMS*, No. 2165, post.

2041. — — — — .]—The "special circumstances" required by Solicitors Act, 1843 (c. 73), s. 37, to entitle a client to have his attorney's bill referred to taxation, after the expiration of twelve months from its delivery, may be matters appearing on the face of the bill, such as large & unusual charges requiring explanation.—*Re ROBINSON* (1867), L. R. 3 Exch. 4; 37 L. J. Ex. 11; 17 L. T. 179; 16 W. R. 110.

Annotations:—**Consd.** *Watson v. Rodwell* (1878), 7 Ch. D. 625; *Re Norman* (1886), 16 Q. B. D. 673. **Apld.** *Re Eley* (1887), 56 L. J. Ch. 905. **Refd.** *Re Lacey* (1883), 53 L. J. Ch. 287.

2042. — — — — **Where no evidence of fraud.**—

(1) A solr.'s bill of costs had been delivered, after the death of the client, to the solrs. employed by his representatives, & paid by them after investigation; & some, but not all, of the papers of the deceased client were delivered up. An application, made three years after, for the taxation of the bill, without referring to any specific errors, but alleging generally, that the bill contained exorbitant charges, was refused.

(2) Where a client has paid his solr.'s bill without pressure, & with full means of examining it before payment, & afterwards seeks to open the bill & refer it for taxation, he must state, in his petition, & prove to the satisfaction of the ct., specific errors of such a character as amount to evidence of fraud. A general allegation of improper charges will not be sufficient.

(3) A mere *prima facie* error in such a bill will not authorise the ct. to refer it for taxation.

(4) The circumstance, that a solr. has omitted to give his client credit for certain items with which he ought to have been credited, will be a ground for a distinct inquiry what sums the solr. has received which ought to be set off against the amount of the bill; but will not, of itself, be a ground for referring the whole bill for taxation.—*HORLOCK v. SMITH* (1837), 2 My. & Cr. 495; 6 L. J. Ch. 236; 40 E. R. 728; *sub nom. SMITH v. HURLOCK*, *Donnelly*, 261; 1 Jur. 302, L. C.

Annotations:—*As to* (1) **Distd.** *Re Burbury, Ex p. Bateman* (1851), 5 De G. M. & G. 358. *As to* (2) **Apld.** *Waters v. Taylor* (1837), 2 My. & Cr. 528. **Distd.** *Jones v. Powys* (1841), 10 L. J. Ex. Eq. 49. **Apld.** *Sayer v. Wagstaff, Re Sanders, Ex p. Wagstaff* (1844), 14 L. J. Ch. 116. **Consd.** *Hiles v. Moore* (1818), 17 L. J. Ch. 385; *Re Stephen, Ex p. Bass* (1818), 2 Ph. 562. **Apld.** *Re Dickson* (1856), 8 De G. M. & G. 655; *Re Strother* (1857), 3 K. & J. 518; *Re Harle* (1868), 17 W. R. 21. **Distd.** *Watson v. Rodwell* (1879), 39 L. T. 611. **Refd.** *Blagrove v. Routh* (1856), 2 K. & J. 509.

—.]—*Re CURRIE*, No. 1920,

ante.

2044. — — — — .]—*COOKE v. SETREE*, No. 2169, post.

2045. — — — — .]—*Re BARNARD, Ex p. WETHERELL*, No. 2030, ante

2046. — — — — .]—*Re BOYLE, Ex p. TURNER*, No. 1964, ante.

2047. — — — — .]—A., an attorney who had done work for B. during several years, &

sums received by him.—*Re THOMPSON*, 2 Ch. Ch. 100.—**CAN.**

f. *General allegation of errors—Whether sufficient to open settled account.*—If the relation of solr. & client

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delivered an account current, having money of B.'s in his hands raised by mtge. on a settlement of accounts, deducted the amount of his bills, took a receipt, & paid over the balance; afterwards B. demanded bills, which were delivered without prejudice, containing items which made the account more than before, & then after twelve months from the settlement applied to the ct. for a taxation:—*Held*: in the absence of any gross overcharge which would raise the presumption of fraud, what took place amounted to payment; & on A.'s abandoning the additional items, there should be no reference.—*Re BISCHOFF & COKE, Ex p. HEMMING* (1856), 28 L. T. O. S. 144.

Annotations:—*Expld. Re Stogdon* (1887), 56 L. J. Ch. 420. *Apld. Hitchcock v. Stretton*, [1892] 2 Ch. 343. *Distd. Re Frapce, Ex p. Perrett*, [1893] 1 Ch. 284. *Apld. Re Thompson, Ex p. Baylis*, [1894] 1 Q. B. 462. *Expld. Re Baylis*, [1896] 2 Ch. 107.

2048. ————.]—*Re HARLE*, No. 2064, *post*.

2049. ————.]—On a summons to tax bills of costs delivered more than twelve months, on the ground that the relation of solr. & client continued to subsist between the parties until within a short time of taking out the summons, & that the bills contained numerous overcharges:—*Held*: the relation of solr. & client, although an important circumstance, was not conclusive; & as the overcharges did not amount to fraud, there was nothing to take the case out of Solicitors Act, 1843 (c. 73), s. 37.—*Re ELMSLIE & Co., Ex p. TOWER SUBWAY CO.* (1873), L. R. 16 Eq. 326; 42 L. J. Ch. 570; 28 L. T. 731; 22 W. R. 54.

2050. ————.]—*Re HERITAGE, Ex p. DOCKER*, No. 1771, *ante*.

2051. ————.]—*Re LACEY & SON*, No. 2130, *post*.

2052. ————.]—*Re CHOWNE*, No. 1802, *ante*.

2053. ———— **Where no evidence of pressure.**]
—A mtgor. presented a petition praying that certain bills of costs, which had been paid under certain special circumstances, might be taxed. The petition stated that a meeting was appointed for the completion of a transfer of mtges. & payment of the money, & that the solr. of the mtgees. presented four bills of costs, two of which were agreed upon, & the others, which related to matters between the mtgees. & their solr., not: but as it appeared that a postponement of the settlement might be serious to the mtgor., it was agreed that they should be paid by him. The bills contained many improper & exorbitant charges, & the petition specified certain items of overcharge:—*Held*: as the statements & evidence showed a case of great & unnecessary pressure, & as the bills, which were between the solr. & other parties, contained items which could not be duly examined at the time, there was sufficient reason on either ground to induce the ct. to make the order.

If payment be made under pressure, the circumstance of pressure alone is enough to induce the ct. to order a taxation.

Even without pressure, items of overcharge are enough to render the circumstances "special," under Solicitors Act, 1843 (c. 73), s. 41.

exists, a general allegation of errors in the settled account is sufficient to cause it to be opened.—*LAWLESS v. MANSFIELD* (1841), 4 L. Eq. R. 113; 1 Dr. & War. 557.—*IR.*

PART VI. SECT. 5, SUB-SECT. 3.—
D. (b) ii.

2062 i. Charges that would be disallowed

on taxation.—After payment of a bill of costs, the ct. will not disturb it on the ground of overcharge unless it appears to be a case of gross & exorbitant overcharge amounting to fraud.—*Re WALKER, WALKER v. ROCHESTER* (1884), 10 P. R. 400.—*CAN.*

g. When court will order attorney to refund overcharge.—*MELANSON v.*

It is not sufficient in order to exclude taxation, to show that no objection was made at the time to the payment either of particular items or of the whole bill.

Semble: the transaction of paying off or transferring a mortgage is of itself a "special circumstance" within the Act.—*Re KINNEIR, Ex p. PRICE* (1858), 32 L. T. O. S. 262; 5 Jur. N. S. 423; 7 W. R. 175.

2054. ————.]—*Re CHOWNE*, No. 1802, *ante*.

2055. ———— **Solicitor offering to repay overcharges.**—A petition was presented for the taxation of a paid bill of costs alleging specific items of overcharge. The solr. thereupon offered to repay the amount of such items & the costs. Petitioner did not accede to this, but brought the petition to a hearing. The ct. ordered the taxation of the bill treating these items as omitted.—*Re CATLIN* (No. 2) (1857), 23 Beav. 412; 53 E. R. 162.

2056. ———— **Where relation of solicitor & client continues to within twelve months of application.**—*Re NICHOLSON*, No. 1860, *ante*.

2057. ———— **Where evidence of fraud.**—*Re HARDING*, No. 2104, *post*.

2058. ———— **Business which ought not to have been performed.**—*Re BLISS* (circa 1853), cited in 22 L. T. O. S. at p. 218.

Annotation:—*Consd. Re Barrow* (1853), 22 L. T. O. S. 217.

2059. ————.]—*Re BARROW*, No. 1776, *ante*.

2060. ————.]—*Re STROTHER*, No. 1872, *ante*.

2061. ———— **Where evidence of pressure.**—*Re RANCE*, No. 2133, *post*.

ii. Particular Instances.

2062. Charges that would be disallowed on taxation.—(1) A bill of costs, where the amount of it has been settled between the solr. & client, & part of it has been paid & security given for the remainder, will not be ordered to be taxed, merely because it contains charges which would be disallowed on taxation.

(2) *Semble*: an order obtained as of course or the taxation of a bill of costs, which has been settled & paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition, seeking to discharge that order, enters into the merits of the case.—*GRETTON v. LEYBURN* (1823), Turn. & R. 407; 37 E. R. 1158.

Annotations.—*Consd. Horlock v. Smith* (1837), 2 My. & Cr. 495. *Refd. Waters v. Taylor* (1837), 2 My. & Cr. 526; *Maslo v. Drake* (1841), 1 Beav. 433; *Sayer v. Wagstaff, Re Sanders, Ex p. Wagstaff* (1844), 14 L. J. Ch. 116; *Blagrove v. Routh* (1856), 2 K. & J. 509.

2063. ————.]—The mere circumstance that a bill of costs contains items which would be disallowed or reduced on taxation, is not, of itself, sufficient to entitle the party to a taxation of a bill which has been settled & paid.

Where an account, comprising bills of costs, is settled & paid as between a solr. & client, & no surprise or fraud is practised, the ct. will not direct a taxation of the bill, though it appears to contain items which would be disallowed or reduced on taxation, unless it appears that the overcharges are in themselves so extravagant & improper, as under the circumstances to be con-

WHITE (1847), 3 Kerr, 501.—*CAN.*

h. ————.]—An attorney received from his client a note for £50, costs in three suits. The client being sued for this note in the name of W., apparently a nominal pltf., paid £29 & gave a confession for the balance. The bills were afterwards taxed at £24, & the ct. then ordered the attorney to refund the

sidered fraudulent.—*MASSIE v. DRAKE* (1841), 4 Beav. 433; 49 E. R. 406.

Annotations:—Expld. Ex p. Andrews (1844), 13 L. J. Ch. 222. *Consd. Sayer v. Wagstaff, Re Sanders, Ex p. Wagstaff* (1844), 13 L. J. Ch. 161.

2064. ———.]—In order to obtain taxation of a bill of costs after a long lapse of time it is necessary to show items of gross overcharge amounting to fraud, & it is not sufficient to point out items which the solr. was clearly not entitled to charge, & which would have been struck off on taxation.—*Re HARLE* (1868), 19 L. T. 305; 17 W. R. 21.

2065. ———.]—*GANE & KILNER v. LANGLEY* (1909), 53 Sol. Jo. 198, C. A.

2066. Excessive charges by mortgagee's solicitor—On transfer of mortgage.]—The single fact that, upon a transfer of a mtge., a mere draft bill of costs of the mtgee.'s solr. is, for the first time, produced & then paid, is not of itself, without proof of pressure or fraud, a sufficient "special circumstance" to authorise taxation after payment, nor is that fact sufficient coupled with overcharges which are not so gross as to evidence fraud.—*Re FYSON* (1846), 9 Beav. 117; 50 E. R. 287; *sub nom. Re FYSON v. CURLING*, 1 New Pract. Cas. 455; 8 L. T. O. S. 49.

Annotations:—Consd. Re Massey (1865), 34 Beav. 463. *Refd. Re Stephen, Ex p. Bass* (1848), 3 Ph. 562; *Re Gray*, [1901] 1 Ch. 239, *Re Longbotham* (1904), 90 L. T. 538.

2067. Practice as to amount chargeable uncertain.]—In taxation, abstracts are ordinarily passed if they contain eight folios on an average; but the strict rule is that they should contain ten folios.

Taxation of a paid bill, sought on the ground of overcharge in abstracts containing less than ten folios refused, the practice being in uncertainty, & there being no pressure or surprise.—*Re WALSH* (1850), 12 Beav. 490; 50 E. R. 1148.

2068. Liability to pay disputed.]—A mtgor., without giving six months' notice, requested the mtgee. to accept payment & to transfer the mtge. The transfer being executed, the mtgee.'s solrs. refused to deliver it or the title deeds to the mtgor. without payment of their bill of costs. The mtgor.'s solr. objected to items amounting to less than £9 in all, but paid the full amount in order to obtain the deeds:—*Held*: the above were not such special circumstances as to subject the bill to taxation after payment; *semble*: one of the special circumstances required is overcharge & an item objected to, not because the business was not done or because the charge was excessive, but because the liability to pay it is disputed, is not such an overcharge as to be sufficient ground for taxing a paid bill.—*Re FINCH & SHEPHEARD, Ex p. BARTON* (1853), 4 De G. M. & G. 108; 16 Beav. 585; 1 Eq. Rep. 109; 22 L. J. Ch. 670; 43 E. R. 448, L. JJ.

Annotations:—Consd. Re Deardon (1853), 9 Exch. 210. *Distd. Re Newman* (1867), 15 W. R. 630. *Refd. Re Boycott* (1885), 29 Ch. D. 571.

2069. Charges for work which ought not to have been done.]—*Re BARROW*, No. 1776, *ante*.

2070. Procuration fee by mortgagee's solicitor.]—A mtgee.'s solr.'s bill was delivered at the completion of the mtge. transaction, & the amount retained after objection. A petition, presented eleven months afterwards for taxation was refused, although the bill contained an objectionable item of £20 for procuration money.—*Re BAYLEY* (1854), 18 Beav. 415; 2 W. R. 404; 52 E. R. 163.

Annotation:—Distd. Re Fielder & Sumner, Ex p. Bailey (1871), 40 L. J. Ch. 615.

amount overpaid.—*Ex p. COLBORN* (1853), 1 P. R. 208.—CAN.

k. Alleged untrue statements as to disbursements.]—*Re S., McLEAN v. CAMPBELL* (1864), 14 C. P. 323.—CAN.

l. Whether special circumstances confined to fraud & gross overcharges.]—The "special circumstances" which, by R. S. O. 1887, c. 147, s. 34, must exist to justify a reference to taxation

2071. Charges that would be disallowed on taking account—As between executor & estate.]—*Re DICKSON*, No. 1804, *ante*.

2072. Scale fee improperly charged—By mistake of both parties.]—When part of the purchase-money is allowed to remain on mtge. of the property sold, the solr. of the vendor mtgee. cannot charge the scale fee under Sched. 1, Part 1, of the General Order under Solicitors Remuneration Act, 1881 (c. 44), for investigating the mtgor.'s title. But where a fee of £95, was charged for such investigation, under a common mistake of the parties that the scale applied, the ct. refused to accede to an application, made after payment, for taxation.—*Re GLASCODINE & CARLYLE* (1885), 52 L. T. 781, C. A.

2073. ———.]—A bill of costs delivered by a mtgor.'s solr. to his client contained two items of charge for "mtgor.'s solr.'s fee for negotiating loan." On an application by the client for taxation more than twelve months after delivery:—*Held*: the charging as a scale charge for something that was not specified among the scale charges given in Sched. 1, Part 1, of the rules under Solicitors Remuneration Act, 1881 (c. 44), was of itself a "special circumstance" sufficient to justify an order for taxation twelve months after the delivery of the bill.—*Re PYBUS* (1887), 35 Ch. D. 568; 56 L. J. Ch. 921; 57 L. T. 362; 35 W. R. 770.

2074. ———.]—A lessee with an option of purchasing the freehold of the land leased gave notice of his desire to exercise the option. At the same time he mentioned to E., the solr. for the lessors, that he desired to borrow some money on mtge. for the purpose of completing the purchase. E. said he thought one of the lessors had money to lend, & communicated the lessee's desire to him. The lessee & lessor met & arranged between them that £800 should be advanced upon mtge. of the property about to be purchased. E. acted as solr. in reference to the mtge. & purchase. He did not ask for or inspect any abstract of title on behalf of the mtgee., as the only title was that of the lessors, a copy of which had been given to the lessee. The purchase & mtge. were completed, & E. delivered a bill of costs, by which he charged the fees allowed by Sched. 1, Part 1, of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), for negotiating loan & investigating title & preparing mtge. The bill was paid, & a summons was taken out after payment for taxation:—*Held*: (1) E. was not entitled to the scale fee for negotiating the loan, as he had done nothing more than bring the parties together; nor to that for investigating title, as there had been no investigation, & the overcharge in these respects was such as to constitute "special circumstances" justifying taxation after payment under Solicitors Act, 1843 (c. 73), s. 41; (2) it appearing that there had been a bargain between the client & E. previous to payment not to dispute the bill of costs, the summons was dismissed.—*Re ELEY* (1887), 37 Ch. D. 40; 56 L. J. Ch. 905; 57 L. T. 253; 36 W. R. 96; *on appeal*, 37 Ch. D. 42, C. A.

2075. ———.]—*Re G.*, No. 2034, *ante*.

2076. Charge for fees paid to witnesses—Where paid by client.]—*Re NORMAN*, No. 2015, *ante*.

2077. Excessive fee to shorthand writer.]—*Re NORMAN*, No. 2015, *ante*.

after twelve months from delivery of the bills, are not confined to cases of actual fraud or gross overcharge & pressure.—*Re BUTTERFIELD* (1891), 14 P. R. 149.—CAN.

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2078. Excessive charge for reference.]—*Re NORMAN*, No. 2015, *ante*.

2079. Error in casting up.]—*Re H.* (1891), 36 Sol. Jo. 127.

2080. Charges open to criticism.]—The fact that a solr.'s bill of costs contains charges open to criticism amounts to "special circumstances" within Solicitors Act, 1843 (c. 73), s. 41, so as to entitle an interested party to an order for taxation after payment of the bill.—*Re N.* (1912), 56 Sol. Jo. 520.

iii. Proof of Overcharge.

2081. Onus of proof—On client—After payment of bill.]—When a bill of costs is paid, the *onus* of proving overcharges is thrown on the client.—*Re TOWLE* (1860), 30 Beav. 170; 3 L. T. 283; 54 E. R. 853.

2082. Necessity for showing specific overcharges.]—Petition to tax a solr.'s bill which had been paid. An affidavit not showing specific overcharges, insufficient to support it.—*WHARTON v. HORNE* (1834), 3 L. J. Ch. 182.

2083. —.]—*HORLOCK v. SMITH*, No. 2042, *ante*.

2084. —.]—Order for taxation of a solr.'s bill under the circumstances, after a settlement, upon the common petition, without stating the objectionable items.—*JONES v. POWYS* (1841), 10 L. J. Ex. Eq. 49.

2085. —.]—Within twelve months after payment of a bill of costs, a client presented a petition for its taxation, but the petition having specified no items of overcharge, no order could be made. The twelve months having then expired, the ct. refused to allow the petition to stand over, for the purpose of amendment, by specifying the items.—*BARWELL v. BROOKS* (1844), 7 Beav. 345; 3 L. T. O. S. 121; 49 E. R. 1098; *subsequent proceedings, sub nom. Re CATTIN, BARWELL v. BROOKS*, 8 Beav. 121.

2086. —.]—(1) Petition by mtgor. for taxation of the mtgee.'s solr.'s bill, presented five months after it had been discharged by retainer, dismissed with costs, on the ground that it neither alleged any circumstances of pressure nor any specific items of overcharge.

(2) The retainer of a sum in payment of a bill of costs may or may not be proper, according to the circumstances.—*Re COLQUHOUN, DUNT v. DUNT* (1846), 9 Beav. 116; 7 L. T. O. S. 2; 50 E. R. 299.

Annotation:—Generally, Refd. Re Deardon (1853), 17 Jur. 993.

2087. —.]—*Re HARPER*, No. 1922, *ante*.

2088. —.]—A solr. to a railway co., provisionally registered, brought an action against three of the managing directors, for the amount of his bill of costs, & recovered judgment. An order was afterwards obtained for winding up the co. under the Act, & a petition was then presented by the official manager for taxing the solr.'s bill under Solicitors Act, 1843 (c. 73), on the ground of excessive charges:—*Held*: the ct. could not be called upon to examine the items of a bill to ascertain their correctness, & an allegation of excessive charges was not such a special circumstance as to bring the case within Solicitors Act, 1843 (c. 73), s. 38.—*Re SHREWSBURY & LEICESTER RY. CO., Re VARDY* (1851), 20 L. J. Ch. 325.

PART VI. SECT. 5, SUB-SECT. 3.— D. (b) iii.

2082 i. Necessity for showing specific

overcharges.]—After bill of costs paid, & a receipt in full taken, the client is not entitled to an order to tax the costs, merely swearing they never had

2089. —.]—*Re BROWNE, Ex p. JEFFERIES*, No. 2113, *post*.

2090. —.]—*Re ABBOTT*, No. 2162, *post*.

2091. —.]—*Re BOYCOTT*, No. 2014, *ante*.

2092. —.]—*Necessity for affidavit.]*—*Re BRADY*, No. 1934, *ante*.

2093. —.]—Where allegation of payment under pressure.]—*Ex p. ANDREWS*, No. 2117, *post*.

2094. —.]—*Re THOMPSON*, No. 1230, *ante*.

2095. —.]—Where bill paid by trustee.]—*Re BENNETT*, No. 2128, *post*.

2096. —.]—Where the petition, by parties interested, for taxation of a solr.'s bill, which had been paid by the trustees, stated no special circumstances, except allegations of erroneous charges, without specifying any, the ct. refused permission to amend the petition, but dismissed it with liberty to file another.—*ANON.* (1845), 9 Jur. 612.

2097. —.]—Where refusal by solicitor to produce bill.]—*Re LOUGHBOROUGH*, No. 2163, *post*.

2098. —.]—Charges by solicitor mortgagee.]—Where one of a body of mtgees. is a solr. & acts as such in enforcing the mtge. security, he is entitled to charge profit costs against the mtgor., whether the mtgees. are trustees or not. If in such a case the mtgor., in applying for an order to tax the bill of the solr. mtgee., desires to raise the objection to profit costs, he should state his objection in his petition for taxation.—*Re DONALDSON* (1884), 27 Ch. D. 544; 54 L. J. Ch. 151; 51 L. T. 622.

Annotation:—Consd. Re Doody, Fisher v. Doody, Hibbert v. Lloyd, [1893] 1 Ch. 129.

2099. Necessity to specify all objectionable items.]—(1) A solr.'s bill of costs paid under pressure, & protested against, referred for taxation. (2) Protest, combined with other circumstances, may be a ground of reference of a bill of costs for taxation.

(3) Where there is evidence of pressure the ct. will, if necessary, direct a general reference for taxation, although in the petition for taxation some only of the items of the bill of costs may be objected to.—*Re ALCOCK, Ex p. WILKINSON* (1845), 2 Coll. 92; 1 New Pract. Cas. Eq. 65; 5 L. T. O. S. 235; 9 Jur. 720; 63 E. R. 651.

Annotation:—As to (1) Distd. Re Browne (1852), 1 De G. M. & G. 322.

2100. —.]—*Re DAWSON & BRYAN*, No. 1730, *ante*.

(c) Payment under Pressure.

i. In General.

2101. Whether special circumstance.]—*COOKE v. SETREE*, No. 2169, *post*.

2102. —.]—*HOWELL v. EDMUNDS*, No. 1974, *ante*.

2103. —.]—*Re ALCOCK, Ex p. WILKINSON*, No. 2090, *ante*.

2104. —.]—Payment of a bill of costs is, *prima facie*, an admission of its correctness, & the client is bound to prove "special circumstances" to authorise its taxation. Such special circumstances are usually pressure, as where an immediate payment is required, at a time when it would be very inconvenient to the party paying, that any delay should occur in the completion of the business; & secondly, error or overcharge in the bill. If the overcharges evidence fraud, very slight, if any, circumstances are necessary to induce the ct. to order a taxation.

been taxed; he must show specific error.—*MAHON v. SCANLON* (1827), 2 Mol. 388.—*IR.*

A client may pay his solr. a bill of costs, without ever having seen or had delivered to him any bill, but such a course would be bad conduct in the solr. & imprudent in the client.—*Re HARDING* (1847), 10 Beav. 250; 16 L. J. Ch. 288; 50 E. R. 578.

Annotation:—*Dbtd. Re Dearden* (1853), 2 C. L. R. 308.

2105. ———.]—A compromise of a solr.'s claim for costs, if effected under circumstances of pressure upon the client, does not oust the jurisdiction of the ct., to tax the bills upon petition.—*Re STEPHEN* (1848), 2 Ph. 562; 4 Ry. & Can. Cas. 723; 17 L. J. Ch. 219; 41 E. R. 1060, L. C.

Annotation:—*Consd. Stedman v. Collett* (1854), 17 Beav. 608.

2106. ———.]—(1) The ct. has jurisdiction under Solicitors Act, 1843 (c. 73), to order the taxation of a deceased solr.'s bill as against his exor., although the relief sought is not asked in any cause pending in the ct.

One of four exors., a solr., acted in that capacity for testator during his life & for his exors., he being one of them, & afterwards, his costs were either during testator's lifetime, or subsequently, out of his estate fully satisfied & discharged. Twelve years had elapsed since the solr. had been dead, & twenty years since he had ceased to act as solr.; & there had been a decree in a suit instituted for the purpose of administering the estate of testator, in which the exor. of the solr. had or might have been called on to account for all sums of money paid to or retained by him out of the assets of testator in discharge of his bill of costs.

Upon a petition for taxation of these bills having been presented by the administratrix of testator's surviving exor.:—*Held*: in the absence of all proof of imposition or overcharge, it was not a case in which, under Solicitors Act, 1843 (c. 73), the ct. ought to order a taxation of the bills as against the exor. of the solr.

(2) A solr. transacted the business of exors., his father, a retired solr., being one of them. Bills were made out & delivered to the father, who duly paid them, & receipts were given for the sums paid. Ten years after the last of such payments, the administratrix of the surviving exor. of testator presented a petition for taxation of those bills:—*Held*: as no reason had been given for the delay in presenting the petition, the mere relation in which the son stood towards his father, or the mode in which he was paid, either by a specific payment or by a credit given to the son by the father, did not constitute special circumstances within Solicitors Act, 1843 (c. 73), s. 41, so as to justify the ct. in ordering the taxation of the bills which had been already paid.

(3) A solr. from time to time, during a period of twelve years, received or retained money in liquidation of his costs due from the exors. of testator, to whom his father had been solr. & exor.:—*Held*: the delivery of the bills of costs not having been proved, the administratrix, of the surviving exor. was entitled to have an order for the delivery & taxation of such bills of costs.—*Re VINES & HOBBS, Ex p. SHACKELL* (1852), 2 De G. M. & G. 842; 21 L. T. O. S. 259; 17 Jur. 793; 42 E. R. 1101, L. JJ.

2107. ——— *Where proof of overcharge.*—*Re WELLS*, No. 1577, *ante*.

2108. ———.]—*Re CURRIE*, No. 1920, *ante*.

2109. ———.]—Taxation after payment ordered, on proof of pressure, & on showing grounds for thinking that the bill would be considerably

reduced on taxation.—*Re SLADDEN* (1847), 10 Beav. 488; 50 E. R. 670.

2110. ———.]—A meeting was appointed to settle important matters on Aug. 23, & the costs were to be paid by A. The bill of costs was delivered the evening before, & payment was then insisted on, though the bill was objected to. Upon evidence of overcharge, taxation was ordered after payment.

Two suits, were compromised; in one there was an order to dismiss on the payment of costs, & the other was stayed only. The costs of both were paid under pressure, & there were overcharges:—*Held*: the Master of the Rolls had jurisdiction to order a taxation.—*Re ELMSLIE* (1850), 12 Beav. 538; 50 E. R. 1166.

2111. ———.]—Payment of a solr.'s bill of costs under pressure is not of itself sufficient to induce the ct. to order its subsequent taxation: there must also be overcharges.—*Re HERITAGE, Ex p. NATIONAL LAND CO. (OFFICIAL MANAGER)* (1854), 2 Eq. Rep. 234; 22 L. T. O. S. 302.

2112. ——— *Before delivery of bill.*—When a client has paid his solr.'s bill under pressure before delivery of the bill he is entitled to have it taxed, at any time before the expiration of a year.—*Re FIELDER & SUMNER, Ex p. BAILEY* (1871), 40 L. J. Ch. 615; 25 L. T. 56.

Annotation:—*Distd. Re Griffith, Jones* (1883), 53 L. J. Ch. 303.

ii. What Constitutes Undue Pressure.

2113. Degree of pressure—Taxation of costs before payment rendered impossible.—(1) To constitute a case for taxation of costs after payment on the ground of undue pressure, the pressure must have been of such a kind as to have rendered it impossible or difficult to have the costs taxed before payment in the ordinary course.

(2) An unexplained delay of nine months after payment in the presentation of a petition for taxation on such grounds held fatal to the application.

(3) To support such a petition, on the ground of extravagant & improper charges, the allegations directed to that point must be specific, & must be such as to amount to evidence of fraud.—*Re BROWNE, Ex p. JEFFERIES* (1852), 1 De G. M. & G. 322; 21 L. J. Ch. 412; 18 L. T. O. S. 313; 42 E. R. 576, L. JJ.

Annotations:—*As to* (1) *Appl. Re Mash* (1851), 15 Beav. 83; *Re Finch* (1853), 16 Beav. 585. *As to* (2) *Refd. Re Fielder & Sumner, Ex p. Bailey* (1871), 40 L. J. Ch. 615. *As to* (3) *Appl. Re Finch* (1853), 16 Beav. 585.

2114. ——— *Reasonable facilities for taxation refused.*—*Re NEWMAN*, No. 1797, *ante*.

2115. Threat to discontinue business.—*AUBREY v. POPKIN* (1768), 1 Dick. 403; 21 E. R. 326, L. C.

Annotations:—*Consd. Crossley v. Parker* (1820), 1 Jac. & W. 460; *Horlock v. Smith* (1837), 2 My. & Cr. 495. *Refd. Cooke v. Setree* (1812), 1 Ves. & B. 126.

2116. Undue influence over client.—A bill of costs, settled & paid after examination, discussion, & an abatement made by the solr., referred for taxation under the circumstances, but on the terms of the client admitting the cash payments contained in the settled account.

A solr. delivered his bill of costs. His client had time to examine it, & obtained professional advice & assistance respecting it. Objections were made to the items, & after discussion the client obtained a considerable deduction. He settled the account, admitted the balance, obtained the vouchers, & afterwards paid the amount admitted to be due.

PART VI. SECT. 5, SUB-SECT. 3.—

D. (c) ii.

m. Threat to enforce payment.]—

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Issue having been joined on the question of payment under compulsion:—*Held*: letters from the attorney of the party who had obtained

judgment, threatening to enforce the same in case of non-payment, was evidence of compulsion.—*STRANGE v. PHELAN* (1850), 2 Ir. Jur. 84.—IR.

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The relation of solr. & client continued after the payment. The ct. directed a taxation of the bill, notwithstanding this settlement, thinking that the client was, "to an alarming extent," in the power of the solr.; that the bill, which contained general items to a very considerable amount under the terms, "numerous attendances" & "innumerable attendances," was not sufficiently explanatory; that the solr. did not do all, which under the circumstances he ought to have done, to facilitate to the client the exercise of his right to a full statement of the particulars of the charge & to the proper investigation of each particular item; & "that the parties were on terms so unequal as to make it difficult to make any bargain which could be binding upon the client in the absence of other assistance." Where accounts & bills of costs of a solr. are delivered a sufficient time before the settlement to allow the client to examine them, & obtain advice & assistance respecting them, & the opportunity is taken advantage of, & the bills, being examined, objections are taken, upon discussion of which an allowance is made, a settlement come to, & the balance paid, *prima facie*, a taxation is precluded; but if, under the above circumstances, the client is in the power or at the mercy of the solr., if the bills delivered be not sufficiently explanatory, if the client, though having time to examine the bills has not been able to obtain, or has not been allowed to employ the most effective means of examination, if it appears that the solr. in whose power the client is, is driving a bargain with him on unequal terms, & that the relation of solr. & client & the power of the solr. continues, then all the circumstances above referred to as tending to establish the settlement may be unavailing.—*NOKES v. WARTON* (1842), 5 Beav. 448; 49 E. R. 651.

2117. Payment induced on completion of transaction—Refusal to allow execution until payment.]

—(1) If a solr. has refused to allow certain deeds to be executed until his bill of costs is paid, & the bill is paid under protest, & the deeds executed, this may constitute such a "special circumstance" as to induce the ct. to tax the bill under Solicitors Act, 1843 (c. 73).

(2) A petition for the taxation of a bill of costs, which sufficiently sets forth special circumstances for taxation, need not mention the specific items which are objected to.—*Ex p. ANDREWS* (1814), 13 L. J. Ch. 222; *sub nom. Re CLEMENTS, Ex p. ANDREWS*, 3 L. T. O. S. 257; 8 Jur. 327, L. C.

Annotations:—As to (1) Refd. Re Thompson (1845), 14 L. J. Ch. 137. *As to (2) Consd. Ex p. Wilkinson* (1845), 2 Coll. 92. *Refd. Re Browne* (1852), 1 De G. M. & G. 322.

2118. ———.]—A purchaser of lands in mtge. agreed to pay the expenses of the mtgee. in completing the purchase. Previously to the contract the purchaser had requested the mtgee.'s solr., as alleged by the latter & not denied by the former, to apply to the several parties interested to agree to the purchase. On the morning of the completion of the purchase, the mtgee.'s solr. sent his bill of costs to the purchasers' solr., containing various charges as against the purchaser himself for attendances on the several parties interested, & also on pltf.'s own solr., & payment was demanded by the solr. of the mtgee. before he would permit his client to join in the conveyance. On a petition for taxation:—*Held*: the allegation of the mtgee.'s solr. that he had so acted at the instance of the purchaser not being denied or in any way met by the latter was fatal to the petition.—*Re COOPER* (1847), 2 New Pract. Cas. 149; 8 L. T. O. S. 406.

2119. ———.]—Where the alleged pressure consisted in the refusal to allow the execution of a reconveyance, which was required without delay to make a good title to a purchaser, except on payment of the bill of the mtgee.'s solr. taxation after payment refused.—*Re DOLMAN* (1854), 2 W. R. 447.

2120. ——— Refusal to deliver up documents.]—Taxation ordered, after payment under protest, the payment being insisted on as a condition for parting with a deed necessary to complete a purchase.—*Re TRYON* (1844), 7 Beav. 496; 2 L. T. O. S. 516; 8 J. P. 408; 49 E. R. 1158.

Annotations:—Consd. Re Johnson & Weatherall (1888), 37 Ch. D. 433; *Re Cheesman*, [1891] 2 Ch. 289. *Refd. Re Stephen* (1848), 1 Ph. 562; *Re Browne* (1851), 15 Beav. 61.

2121. ——— Mortgage.]—*Re JONES*, No. 1774, *ante*.

2122. ———.]—The cases as to "pressure," as a special circumstance to justify taxation of a bill of costs, after payment thereof, have gone far enough, & will not be extended; & accordingly, where, in a mtge. transaction, a solr. was employed to prepare the deeds securing the property to a second mtgee., who was paying off the first mtgee., who had called in his money, & had refused to give up the deeds without payment of his bill of costs, & the client paid the bill under protest, & then applied for taxation on the ground of overcharges, & of pressure arising from an apprehension of foreclosure by the first mtgee., if there should be any delay in paying him off; but it appeared that foreclosure could not be made for six months:—*Held*: not a case of pressure sufficient to justify taxation.—*Re MASH* (1851), 15 Beav. 83; 51 E. R. 467; *sub nom. Re NASH*, 18 L. T. O. S. 115.

2123. ———.]—*Re FINCH & SHEPHEARD, Ex p. BARTON*, No. 2068, *ante*.

2124. ———.]—Appcts., in order to get possession of papers which were necessary to complete a transaction, paid their solrs.' bill of costs under protest & reserving their rights. On an application to tax the bill:—*Held*: the payment did not preclude taxation, as there were special circumstances within Solicitors Act, 1843 (c. 73), s. 41.—*Re LEGGATS & CARRUTHERS* (1908), 53 Sol. Jo. 84.

2125. ———.]—A solr. delivered his bill, which contained two columns of charges, the first of which amounted to £32, & the second, which was headed "If this bill be taxed, the following are the charges," amounted to £23. The solr. refused to deliver up the papers unless paid £32, & the client paid that sum under protest. A taxation was ordered, & the solr., having refused to consent to an order of course, was ordered to pay the costs of a special petition for that purpose.—*Re LETT* (1862), 31 Beav. 488; 1 New Rep. 8; 27 J. P. 73; 8 Jur. N. S. 1119; 54 E. R. 1227; *sub nom. Re LETTS, Ex p. TOSLAND*, 32 L. J. Ch. 100; 7 L. T. 303; 11 W. R. 15.

2126. ———.]—Resp., as solr. for a lessor, refused to hand over an executed counterpart of an agreement for a lease, & threatened to let the land to parties other than the lessee unless his costs as such solr. were paid. The lessee's solrs. were willing to pay the costs subject to the determination of a question whether these were to be itemised or upon scale fees. Ultimately, resp. insisting on his item costs in full before completion, the lessee's solrs. paid them under protest, & two days afterwards issued a summons for taxation:—*Held*: there were special circumstances in which taxation would be ordered although the costs had been paid.—*Re R. E. F.* (1908), 53 Sol. Jo. 83.

2127. — **Refusal to complete without payment.**—*Re WELLS*, No. 1577, *ante*.

2128. — ———.]—Where a *cestui que trust* seeks to tax the solr.'s bill paid by his trustee, on the ground of overcharge, he must allege & prove specific items.

It is a "special circumstance," within Solicitors Act, 1843 (c. 73), where a solr. produces his bill at the time appointed for the settlement of a transaction, & refuses to complete except on payment thereof.—*Re BENNETT* (1845), 8 Beav. 467; 1 New Pract. Cas. 291; 14 L. J. Ch. 403; 5 L. T. O. S. 474; 50 E. R. 183.

Annotation:—*Consd. Re Kinneir, Ex p. Price* (1859), 32 L. T. O. S. 262.

2129. — ———.]—*Re HARRISON*, No. 1979, *ante*.

2130. — ———.]—A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs gave notice in Dec. 1882, of his exercise of the option, & stated that he should not require an abstract of title. The time for completion was Mar. 25, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier & that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of Dec. On Feb. 2, 1883, the vendor's solrs. sent in their bill of costs in which they charged 30s. per cent. on the purchase money of each lot, considering that this was the proper charge under Schedule I. to the general rules under Solicitors' Remuneration Act, 1881 (c. 44), which provides that amount of remuneration to a vendor's solr. "for deducing title to freehold copyhold or leasehold property & perusing & completing conveyance, including preparation of contract or conditions of sale, if any." The purchaser's solrs. objected to these charges, but the vendor's solrs. refused to allow completion unless they were paid, & on Feb. 14 the purchaser paid them under protest & completed the purchase. After this he applied for taxation of the bill:—*Held*: the case was governed by the new Rules but that the bill was framed on an erroneous footing, for that the *ad valorem* remuneration authorised by Schedule I. was chargeable only where the whole of the business in respect of which it was imposed, viz. the deducing title & perusing & completing conveyance, was done; here as there was no deducing of title, but only perusal & completion of the conveyances, Schedule I. did not apply but that under the General Order, rule 2 (c), the solr.'s remuneration was to be regulated by the old system as modified by Schedule II., but having regard to the dates there was no pressure & there was no overcharge amounting to fraud, & there were therefore no special circumstances to authorise taxation after payment.—*Re LACEY & SON* (1883), 25 Ch. D. 301; 53 L. J. Ch. 287; 49 L. T. 755; 32 W. R. 233, O. A.; *reusg. S. C. sub nom. Re PARKER TO GEORGE*, 32 W. R. 222.

Annotations:—*Consd. Re Denno & Secretary of State for War* (1884), 54 L. J. Ch. 45; *Re Boycott* (1885), 29 Ch. D. 571; *Re Hickley & Steward* (1885), 54 L. J. Ch. 608; *Re Faulkner* (1887), 36 Ch. D. 566; *Re Peace & Ellis* (1887), 57 L. T. 753; *Re Pybus* (1887), 35 Ch. D. 568; *Re Greville's Settlement* (1888), 40 Ch. D. 441. *Apld. Re Keeping & Gloag* (1888), 58 L. T. 679. *Distd. Re Read*, [1894] 3 Ch. 238. *Apld. Re Baillie* (1899), 15 T. L. R. 277. *Consd. Re Romain*, [1903] 1 Ch. 702. *Refd. Re Field* (1885), 29 Ch. D. 608; *Fleming v. Hardcastle* (1885), 52 L. T. 851; *Re Robson* (1890), 45 Ch. D. 71; *Cholditch v. Jones*, [1896] 1 Ch. 42; *Re Thomas, Evans v. Griffiths*, [1900] 1 Ch. 454.

2131. — ———.]—*Re Boycott*, No. 2014, *ante*.

2132. — ———.]—It is dangerous to overlay the language of an Act of Parliament which has entrusted the ct. with a discretion by defining special circumstances under which alone taxation

will be directed & reducing the discretion almost to a nullity. Here the bill was paid under protest, but that is not by itself a sufficient special circumstance. The protest is equivalent to an assertion that the party paying the bill means to tax it, if he can, & an expression that he is dissatisfied with it. It prevents the solr. thinking that the payment is a final settlement (*CHITTY, J.*).—*Re P. & M.* (1895), 39 Sol. Jo. 640.

2133. — **To avoid postponement.**—Taxation ordered of a paid bill of mtgee.'s solr. in a mixed case of pressure & of improper items.

The mtgee. took legal proceedings against the mtgor., whereby expenses were being incurred. The mtgee.'s solr. delivered his bill on Dec. 25, & the parties met to complete a transfer on Dec. 29. The bill contained a charge for an abstract, which was more than double what it ought to have been, but the solr. refused to reduce it, & the bill was paid. It did not appear that any proposal had been made to settle the matter & postpone the question of costs. The ct., considering that there had been both pressure & overcharge, ordered a taxation.—*Re RANCE* (1856), 22 Beav. 177; 52 E. R. 1076.

Annotation:—*Refd. Re Boycott* (1885), 29 Ch. D. 571.

2134. — ———.]—*Re KINNEIR, Ex p. PRICE*, No. 2053, *ante*.

2135. — ———.]—Petitioner had mortgaged his estate to A., whom he had employed as his solr.; he then employed A. to sell his estate, & at the attendance to complete the purchase, A. for the first time presented his bill of costs in respect to the sale, & refused to complete unless his debt, interest & that bill of costs, were at once paid. Petitioner was much in want of money, & the purchaser had come from some distance to attend the appointment. Five months afterwards petitioner prayed taxation:—*Held*: these facts amounted to such undue pressure as to justify taxation, notwithstanding payment, & the lapse of time; the more because the items of the bill were very high.—*Re PUGH, Ex p. BRISCOE* (1863), 1 De G. J. & Sm. 673; 8 L. T. 586; 27 J. P. 436; 11 W. R. 762; 46 E. R. 266, L. JJ.

Annotations:—*Distd. Re Lacey* (1883), 53 L. J. Ch. 287. *Refd. Re Newman* (1867), 2 Ch. App. 709, n.

2136. Refusal to take instructions without payment—Solicitors to executors—Application by residuary legatee.—By Solicitors Act, 1843 (c. 73), s. 41, it is enacted, that the payment of an attorney's bill shall in no case preclude the ct. or judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such ct. or judge, appear to require the same, upon such terms & conditions, and subject to such directions, as to such ct. or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment.—*Re HARDING* (1848), 11 L. T. O. S. 471.

2137. Threat to take possession under security.—A client indebted to a solr. for costs & for money lent, executed as security a bill of sale of his farming stock & furniture, with a proviso for the deed to be void on payment of the amount, & of all sums which the solr. might advance, with interest. A bill for costs & money due for advances was afterwards delivered, & the client employed another solr. to investigate the matter. The two solrs. corresponded, & an offer was made, on behalf of the client, to pay what was due if the exact amount of the claim was stated & the vouchers were produced. The original solr. stated his willingness to produce the vouchers, if certain draft deeds were prepared & an appointment made

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for settlement, & that he would have the bills taxed. After some further delay, the solr. gave a written notice requiring payment on the following day, & stating that if the money were not paid he should take possession under the deed. The money not being paid, he accordingly caused possession to be taken, whereupon the whole amount claimed for bills of costs, advances & interest was paid by the client under protest. Under these circumstances, the client presented a petition for taxation, alleging various instances of overcharge in the bills of costs, & that they were paid under undue pressure. One of the Vice-Chancellors refused to order taxation; but upon appeal it was held that payment under these circumstances did not preclude the client's right to taxation; the rule was, that to tax a bill after payment the client must show either undue pressure or overcharge amounting to fraud, & this case falling within the former branch of the rule, the bills must be taxed.—*Re FOSTER, Ex p. WALKER* (1860), 2 De G. F. & J. 105; 29 L. J. Ch. 625; 2 L. T. 553; 25 J. P. 131; 6 Jur. N. S. 687; 8 W. R. 620; 45 E. R. 562, L. J. J.; *reversg. S. C. sub nom. Re FORSTER, Ex p. WALKER* (1859), 1 L. T. 160.

Annotation:—Refd. Re Robinson (1867), 16 W. R. 110.

No opportunity to examine bill.]—See Sub-sect. 3, C., post.

(d) Payment under Protest.

2138. Whether special circumstance.]—Re JONES, No. 1774, *ante*.

2139. —.]—Re ALCOCK, Ex p. WILKINSON, No. 2099, *ante*.

2140. —.]—Re HARRISON, No. 1979, *ante*.

2141. —.]—In Mar. 1817, a railway co. agreed to purchase some property & to pay the vendor's costs. In May, 1817, possession was delivered. The bill of costs of the vendor's solr. was delivered on June 13, 1818, & a meeting to complete the purchase took place between the solrs. on June 20, when objections were then made to the bill. It was then paid, under protest, & with an intimation that it would be taxed, & a petition for taxation was presented a few days after:—*Held*: there was not sufficient evidence of pressure to open the matter by ordering a taxation.—*Re WELCHMAN* (1848), 11 Beav. 319; 50 E. R. 840.

2142. —.]—Where a bill of costs is paid under a protest in order to obtain some document on which the solr. whose bill of costs is sought to be taxed has a lien, the objectionable items in it ought to be specified before payment.—*Re DAVIE, Ex p. WHITE* (1859), 8 W. R. 15.

2143. —.]—Re P. & M., No. 2132, *ante*.

2144. —.]—A contract for the purchase of land was made on Aug. 11, 1909. After delay till Jan. 11, 1910, the purchaser commenced an action to compel completion. The action was settled, after going as far as the summons for directions, the vendor's party & party costs to be paid by the purchaser. The bill was delivered on Mar. 12. No application to tax it was made, but it was paid under protest. An urban district council, who were the real purchasers, objected to costs incurred before instructions to sue:—*Held*: no case for taxation after payment had been made out.—*Re KING* (1910), 74 J. P. 445.

2145. —.]—G., a client, purchased the equity of redemption in certain properties in 1906 & employed W. to act as his solr. in the matter. In July, 1909, W., as solr. for three mtgees., gave G.

notice to pay off the mtges. It was arranged, after some delay, that the mtges. should be paid off & reconveyances taken, after which fresh mtges. were made. Completion was fixed for Jan. 28, & W. delivered his bill on Jan. 21, G. paid the bill "under protest" & now applied to tax the bill. The solrs. for one of the new mtgees. paid W. £10 8s. 4d. for an abstract of title. It was said that W. as solr. for G. when he purchased in 1906 ought to have made an abstract of title. Triplicate charges were made for letters & attendances, inasmuch as W. acted for three mtgees., but the charges were moderate. One item of 10s. 2d., however, was admittedly charged in error. Before the master W. offered to return £4, each party paying his own costs, but this was declined:—*Held*: there is no rigid rule as to what circumstance will justify taxation of a solr.'s bill after payment; & appct. had not made out special circumstances.—*Re WARD, BOWIE & Co.* (1910), 102 L. T. 527; *affd.*, 102 L. T. 881, C. A.

Where payment under pressure.]—See Sub-sect. 3, D. (c), ante.

(e) Reservation of Right to Tax.

2146. Whether special circumstance—Intention to tax expressed at time of payment.]—A bill of costs was delivered by the solr. in 1809, & shortly afterwards paid by the client: between that time & Mar. 1817, four other bills of costs were delivered, & various payments were made on account: in Nov. 1817, a sixth bill was delivered, when the client paid the general balance due on the bills of costs, at the same time stating, that he would insist on having the bills taxed; an application for taxation to a judge at law in 1818, & an application to the Ct. of K. B. in 1819, failed, from circumstances not involving the merits of the question: some attempts at a compromise were made from time to time; & the client was obliged on three or four occasions to leave England, in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were improper; the ct. ordered that the bill last delivered should be taxed generally, & that the five antecedent bills should be referred to the master, with a direction that the client should deliver to the solr. a schedule of the items complained of, & that the master should exercise as large a discretion as he might think fit with respect to the evidence on which he should proceed in forming his judgment concerning these items.—*SCOUGALL v. CAMPBELL* (1826), 3 Russ. 545; 38 E. R. 679, L. C.

Annotation:—Refd. Re Johnson & Weatherall (1888), 37 Ch. D. 433.

2147. —. Payment under pressure.]—Re DEARDEN, No. 2013, *ante*.

2148. —. Reservation of single item.]—If mtgee. take steps to recover his mtge. money, & the mtgor., desirous of stopping the action, agrees to pay principal, interest, & costs on a given day, & on the bill of costs, etc., being presented, items are objected to; but the bill after some fifteen days is paid, without protest, & a receipt accepted in full, except as to one item objected to, the consideration of which is reserved, there is no special ground for taxation, & a petition under those circumstances was dismissed with costs.—*Re REEVES* (1845), 5 L. T. O. S. 190.

2149. —. Express reservation.]—A client who pays his solr.'s bill of costs, expressly subject to his "right to tax," which payment, by cheque, is accepted & retained by the solr. without reference

to such condition, may tax the bill after payment, as such a condition constitutes "special circumstances" under Solicitors Act, 1843 (c. 73), s. 41.—*Re WILLIAMS, Ex p. LOVE* (1891), 65 L. T. 68.

Annotations:—Distd. Re Burchell Wilde (1902), 46 Sol. Jo. 570. *Apld. Re Leggatts & Carruthers* (1908), 53 Sol. Jo. 84. *Refd. Re T.* (1909), 53 Sol. Jo. 487; *Re Ward Bowle* (1910), 102 L. T. 527.

2150. ———.]—*Re BURCHELL, WILDE & CO.* (1902), 46 Sol. Jo. 570.

2151. ———.]—*Re T.* (1909), 53 Sol. Jo. 487.

(f) *Continuance of Relationship of Solicitor and Client.*

2152. *Whether special circumstance.*]—The mere fact of the continuance of the relation of solr. & client at the time when a client pays his solr.'s bill, unattended by other circumstances, whether of undue pressure or charges of a character amounting to fraud or imposition, although meriting consideration when found in co-existence with such circumstances, is not alone sufficient to induce the ct. to refer a bill for taxation after payment.

A promissory note taken in discharge of an account postpones, but does not constitute the actual payment of the account, until it is itself paid.

On Nov. 3, 1842, a client gave his promissory note to his solr. for the amount of his bill of costs previously delivered, & on the 17th of the same month he paid the note. On Nov. 15, 1843, the client presented a petition for taxation of the bill, which was answered on the 16th, & was served on the 21st:—*Held*: the application for taxation had been made within twelve calendar months, pursuant to Solicitors Act, 1843 (c. 73), s. 41.—*SAYER v. WAGSTAFF* (1844), 4 L. T. O. S. 169; 8 Jur. 1083; *sub nom. SAYER v. WAGSTAFF, Re SANDERS, Ex p. WAGSTAFF*, 14 L. J. Ch. 116, L. C.

Annotations:—Refd. Re Harries (1811), 1 Dow. & L. 1018; *Re Romer & Haslam*, [1893] 2 Q. B. 286. *Mentd. Re London, etc. Banking Co.* (1865), 31 Beav. 332; *Allen v. Royal Bank of Canada* (1925), 95 L. J. P. C. 17.

2153. ———.]—*Re NICHOLSON*, No. 1860, *ante*.

2154. ———.]—Taxation ordered upon an application made after the expiration of twelve months after delivery of the bill, on the ground of the continuance of the relation of solr. & client subsequently to the delivery of the bill.—*Ex p. FLOWER* (1868), 18 L. T. 457; *sub nom. Re F—*, 16 W. R. 749.

Annotations:—Distd. Re Elmslie, Ex p. Tower Subway Co. (1873), L. R. 16 Eq. 326; *Re Layton Steele* (1890), 38 W. R. 652.

2155. ———.]—*Re ELMSLIE & CO., Ex p. TOWER SUBWAY CO.*, No. 2049, *ante*.

(g) *No Opportunity to Examine Bill.*

2156. *Whether special circumstance—Payment at time of delivery.*]—On a petition for taxation of the payment of a bill of costs, the fact of payment at the time of delivery, without an opportunity for inquiry, is itself a very special circumstance.—*Re TUGWELL* (1845), 5 L. T. O. S. 35.

2157. ———.]—*Re WELLS*, No. 1577, *ante*.

2158. ———.]—*Re JONES*, No. 1774, *ante*.

2159. ———.]—*Re CURRIE*, No. 1920, *ante*.

2160. ———.]—*Re FYSON*, No. 2066, *ante*.

2161. ———.]—*Re PHILLPOTTS*, No. 1787, *ante*.

2162. ———.]—Where a client intends to pay a bill of costs at the meeting to complete a matter, the mere fact of the bill being then delivered & of his paying it without having had

an opportunity of examining it, will not alone be sufficient to entitle the client to a taxation, but such a circumstance forms a material consideration.

Items of overcharge must be shown to warrant a taxation after payment.

A mtgor. & her solr. met the mtgee's solr. to complete, when the money was paid in three cheques, one of which was handed to the mtgor.'s solr., who retained it for his costs. His bill was delivered at the time in a sealed packet. Items of overcharge being afterwards proved, a taxation was directed.—*Re ABBOTT* (1854), 18 Beav. 393; 23 L. J. Ch. 955; 24 L. T. O. S. 10; 2 W. R. 379; 52 E. R. 155.

2163. ———.]—(1) Order made for taxation of bills of costs after payment, where the solr. had produced them on the execution of a mtge., out of the produce of which they had been paid, but had taken them back immediately, & afterwards refused to produce them.

(2) It is not necessary to specify items of overcharge, upon a petition for taxation after payment, in a case in which the solr., by retaining the bill of costs & refusing to produce it, prevents the client pointing out the overcharges.—*Re LOUGHBOROUGH* (1857), 23 Beav. 439; 53 E. R. 173.

2164. ———.]—*Payment nine days after delivery.*]—Petition to tax a bill of costs, paid without pressure, nine days after its delivery, dismissed with costs.—*Re DREW* (1847), 10 Beav. 368; 10 L. T. O. S. 139; 50 E. R. 624.

2165. ———.]—*Client going abroad.*]—Taxation ordered of an unpaid bill of costs, eighteen months after its delivery, the "special circumstances" being, that it was delivered long after application for it, on the eve of the client going abroad, & contained substantial overcharges, not acquiesced in.—*Re WILLIAMS* (1852), 15 Beav. 417; 51 E. R. 599.

(h) *Non-Payment of Disbursements.*

2166. *Whether special circumstance—Non-payment of counsel's fees.*]—*Re WILTON*, No. 1866, *ante*.

2167. ———.]—The London agents had charged the country solr. with fees to counsel which had not yet been paid, but the country solr. had not supplied them with sufficient funds to pay the fees:—*Held*: this charge was not a circumstance sufficient to justify a taxation.—*Re NELSON, SON & HASTINGS* (1885), 30 Ch. D. 1; 1 T. L. R. 423; *on appeal*, 30 Ch. D. 11, C. A.

Annotations:—Refd. Re Johnson & Weatherall (1888), 37 Ch. D. 433; *Re Romer & Haslam*, [1893] 2 Q. B. 286, *Re Massey* (1910), 54 Sol. Jo. 50.

2168. ———.]—*Payment after delivery but before payment of bill.*]—*Re MASSEY*, No. 1971, *ante*.

(j) *Other Circumstances.*

2169. *Gross errors.*]—Though the ct. will open a solr.'s bill, & order taxation, after several years, & a security given, or even payment, upon gross errors, fraud or undue pressure, where nothing appeared but a trifling inaccuracy, & under other favourable circumstances, the ct. would not restrain proceeding upon a security, obtained, while business was depending.—*COOKE v. SETREE* (1812), 1 Ves. & B. 126; 35 E. R. 40.

Annotations:—Consd. Horlock v. Smith (1837), 2 My. & Cr. 495. *Distd. Waters v. Taylor* (1837), 2 My. & Cr. 526. *Refd. Crossley v. Parker* (1820), 1 Jac. & W. 460; *Sayer v. Wagstaff Saunders, Ex p. Wagstaff* (1844), 14 L. J. Ch. 116; *Blagrove v. Routh* (1856), 2 K. & J. 509; *Davies v. Parry* (1859), 1 Giff. 174; *Morgan v. Higgins* (1859), 1 Giff. 270.

Sect. 5.—Taxation of costs: Sub-sect. 3, D. (j); sub-sect. 4, A. & B.]

2170. Dispute as to sum deposited with solicitor.]

—(1) Under Solicitors Act, 1843 (c. 73), s. 41, the ct. cannot, even under special circumstances, refer a bill for taxation which has been paid more than twelve months.

(2) Under Solicitors Act, 1843 (c. 73), s. 37, the ct. has power, at any time, under special circumstances, to refer for taxation a bill which has been delivered, but not paid, more than twelve months.

(3) An attorney's bill had been delivered to some ignorant parties in June, 1840, & in Nov. 1842, a summons for its taxation had been dismissed by a judge at chambers, on the ground of the insufficiency of the materials on which it was founded. It appeared that a sum of money had been deposited in 1839, in the joint names of the attorney & another party, on behalf of the clients:—*Held*: there being a dispute respecting the sum, the ct. would refer the bill, & require the attorney to account on a rule nisi obtained in Trinity term, 1843.—*BINNS v. HEY* (1843), 1 Dow. & L. 661; 13 L. J. Q. B. 28; 2 L. T. O. S. 155; 7 Jur. 1154.

Annotations:—As to (1) *Consd. Re Downes* (1844), 5 Beav. 425. *Generally, Reid. Ross v. Wilton* (1843), 7 Jur. 1133; *Re Lees* (1844), 13 L. J. Ch. 151; *Re Wellborne*, [1901] 1 Ch. 312.

2171. Application by executors—Where estate insolvent.]—*MUTLOW v. MUTLOW, Re STUBBS* (1844), 4 L. T. O. S. 171.

2172. Application by cestui que trust—Where lack of independent advice—Costs of solicitor-trustee.]—On a settlement of account between a *cestui que trust* & trustee, a solr., the latter charged for professional services in the trust. A release was extended, but, the *cestui que trust* not having had any independent professional assistance on the occasion, the ct. relieved him from the professional charges, beyond costs out of pocket.—*TODD v. WILSON* (1846), 9 Beav. 486; 1 New Pract. Cas. 489; 15 L. J. Ch. 450; 10 Jur. 626; 50 E. R. 431.

2173. Dispute as to completeness of bill—Employment of country solicitors.]—The clients of a town solr., on the delivery of his bill of costs, objected that it was not complete, inasmuch as it did not contain items in respect of business done by a country solr., whom the clients designated as the town solr.'s agent, but whom the town solr. claimed a right to treat as having been employed directly by the clients. More than a twelvemonth after the delivery of the bill the clients presented a petition to have it taxed:—*Held*: the dispute as to the completeness of the bill was a special circumstance rendering it fit to direct a taxation after the lapse of twelve months.—*Re BAGSHAW, Ex p. HUDDERSFIELD & MANCHESTER RAILWAY & CANAL CO.* (1848), 2 De G. & Sm. 205; 11 L. T. O. S. 43; 12 Jur. 510; 64 E. R. 91.

2174. —. Particulars of agency charges.]—Upon an application to tax a bill of costs after the expiration of twelve months from the date of the delivery of the bill, on the ground that certain items for agency charges are treated as disbursements, & no particulars of them are given, it must appear on the face of the bill that appct. has not been furnished with such detailed informa-

tion as will enable him to form a fair opinion as to whether he ought to proceed upon a taxation or not. When such items taken together do not represent a substantial part of the whole bill the ct. will hesitate to order a taxation on the ground that the bill is incomplete; but when such items bear a substantial proportion to the amount due under a separate heading in a particular matter which forms a part of the whole bill, the ct. will not limit an order for taxation to the particular matter, but will regard the whole bill as incomplete & taxable.—*Re POMEROY & TANNER* (1897), 76 L. T. 149.

2175. Commencement of action.]—*GEDYE v. ROBERTS* (1850), 15 L. T. O. S. 209.

2176. —.]—Where the party chargeable has neglected for twelve months after delivery of an attorney's bill to apply for taxation, he can only obtain it under "special circumstances"; & the mere fact that an action has been commenced upon it is not a "special circumstance" within the meaning of the statute, so as to authorise a judge to refer the bill to taxation without pltf.'s consent.—*BENNETT v. HILL* (1853), 21 L. T. O. S. 101.

2177. Possession of papers in action.]—*Re GEDYE*, No. 1468, *ante*.

2178. Change of solicitors—Payment of second bill.]—*Re BOYLE, Ex p. TURNER*, No. 1964, *ante*.

2179. Paying off or transferring mortgage.]—*Re KINNEIR, Ex p. PRICE*, No. 2053, *ante*.

2180. Criminal charge pending against managing clerk—Forgery.]—Where a charge of felony [forgery] is pending against the managing clerk of a solr., on the trial of which the *bona fides* & legality of the charges in a professional bill of costs delivered by the solr. to his client, the prosecutor, at a period anterior to the charge of felony may directly affect the question of the accused's guilt or innocence, the ct. will, on the application of the solr., as a matter of common justice, order such bill to be referred to taxation, notwithstanding that it had been settled in account between the parties some months before.—*Re FISHER & CO.* (1879), 42 L. T. 261.

2181. Application by third party—Without knowledge of payment by client—Where agreement for payment by third party.]—An agreement by a third party [under a compromise] to pay costs due to a solr. from his client is not a bar to the right of the third party to apply for the taxation of the solr.'s bill under Solicitors Act, 1843 (c. 73), s. 38. The paying of such a bill after notice for taxation has been given behind the back of the third party is a "special circumstance" giving a right to taxation, as a special circumstance is not confined to pressure, overcharge, or fraud, but includes any circumstance of an exceptional nature which the judge in the exercise of his judicial discretion may consider sufficient to justify such taxation.—*HIRST & CAPES v. FOX*, [1908] A. C. 416; 99 L. T. 624; *sub nom. Re HIRST & CAPES*, 77 L. J. K. B. 938; 52 Sol. Jo. 684, H. L.

Annotations:—*Consd. Mosley v. Kitson* (1912), 57 Sol. Jo. 12. *Reid. Re Brockman*, [1909] 2 Ch. 170.

SUB-SECT. 4.—FORM OF ORDER.

A. In General.

See R. S. C., Appendix K., Nos. 41–43.

2182. Order granted after one month from delivery of bill.]—*Re PENDER*, No. 1711, *ante*.

his own handwriting, of advances made to the solr. & for which he had received no credit, applied that the costs should be sent back to the

master for taxation. The application was refused with costs.—*AUSTIN v. CHAMBERS* (1842), 3 Dr. & War. 178.—*IR.*

PART VI. SECT. 5, SUB-SECT. 4.—A. o. Common order.]—On an *ex p.* application of a client by petition for taxation, the common order only

2188. Common order.]—*Re SMITH* (1854), 19 Beav. 329.

2184. —.]—*Re PLUMMER*, No. 2238, *post*.

B. Conditions and Directions.

2185. Submission to pay—Whether necessary.]—*Re PATER* (1844), 3 L. T. O. S. 240; 8 J. P. 453.

2186. —.]—*Re HARCOURT* (1887), 32 Sol. Jo. 92.

*Annotation:—***Apld.** *Re Debenham & Walker*, [1895] 2 Ch. 430.

2187. —.]—When a client applies for a taxation of his solr.'s bill of costs, his petition contains an undertaking by him to pay the balance if any, which may be found due from him to the solr. upon the taxation & the result is that the order for taxation contains a direction for payment of that balance by the client accordingly, the ct. having jurisdiction over him by virtue of his undertaking (*NORTH, J.*).—*Re DEBENHAM & WALKER*, [1895] 2 Ch. 430; 64 L. J. Ch. 859; 73 L. T. 115; 43 W. R. 690; 13 R. 631.

2188. —.]—(1) On an application within one month of delivery of a bill of costs the client has an absolute right to have the bill taxed without any money being brought into ct. & without any submission to pay. After the expiration of one month there is no such absolute right, but a submission to pay is not in any case a necessary part of a common order to tax.

(2) If a submission is inserted, it should be a submission to pay not what is due, but what is payable having regard (*inter alia*), to the defence of Stat. Limitations, & questions arising under that Act should be dealt with by the taxing master.

In our opinion the submission to pay is not really necessary in any case, for sect. 43 of the Act [Solicitors Act, 1843 (c. 73)] enables an order to be made in any Division for payment of the certified balance. . . . The submission avoids the necessity of a separate application under sect. 43 (*COZENS-HARDY, M.R.*).—*Re BROCKMAN*, [1909] 2 Ch. 170; 78 L. J. Ch. 460; 100 L. T. 821; 25 T. L. R. 595; 53 Sol. Jo. 577, C. A.

*Annotation:—***Generally, Refd.** *Re Plummer*, [1917] 2 Ch. 432.

2189. —.]—**Extent of.]—**An order for the taxation of a solr.'s bill on the undertaking of A. to pay same, does not extend to a bill of costs, for which A. is liable jointly with B.

A. was individually indebted to a solr. for costs in a cause, & A. & B. were jointly indebted to the same solr. for costs relating to other business. A. obtained an order for the taxation of the solr.'s bill of costs in the cause, & all other suits, causes, & matters wherein he had been employed by A.; & it was ordered, that all proceedings against A. should be stayed. The solr. afterwards arrested A. & B. for their joint account:—*Held*: such proceedings was not a breach of the order.—*COLLINS v. PRICE* (1835), 4 L. J. Ch. 94.

2190. —.]—**Whether accepted from client living abroad.]—**The ct. will not direct the taxation of a solr.'s bill, on the undertaking of a client, who is living abroad, to pay what may be found due.—*BODICOTE v. BOSTOCK* (1835), 4 L. J. Ch. 238.

can be obtained; if a special order is required, notice must be given.—*Re ATKINSON & PEGLEY* (1859), 1 Ch. Ch. 187.—**CAN.**

p. Long form.]—On an application to tax a solr.'s bill, more than a month having elapsed since its delivery, an order was issued in the long form in use before O. J. Act, instead of the form under r. 443, as the master is mentioned in that order, but the taxing officer is the proper officer to tax bills of costs under r. 438 of the Act.—*Re SOLICITORS* (1881), 9 P. R. 90.—**CAN.**

q. Bill should be referred to taxation simply.]—An order for the taxation of a solr.'s bill, at the instance of the client, should refer the bill simply for taxation.—*Re CLARKE* (1882), 9 P. R. 197.—**CAN.**

r. —.]—**Whether solicitor's undertaking included in order.]—**On a petition praying a reference for taxation of costs; & that the master should be directed to have regard, on the taxation, to the solr.'s undertaking to charge only costs out of pocket; the ct., without mentioning that undertaking in the order, simply directed a

2191. —.]—**Must be made by all applicants.]—***Re CHILCOTE*, No. 1892, *ante*.

2192. —.]—The usual submission in an order for taxation of a solr.'s bill of costs to pay the solr. what shall appear to be due to him on the taxation, must be made by the person or all the persons on whose application the order is made, whether the application is by the client alone or in conjunction with an assignee of all his interest under the taxation; the assignee being bound, as a condition of obtaining the order, to join in the submission even though the client is bkpt.—*Re BATTAMS & HUTCHINSON*, [1897] 1 Ch. 699; 66 L. J. Ch. 394; 76 L. T. 385; 45 W. R. 458, 41 Sol. Jo. 387.

2193. —.]—**Jurisdiction to except particular items.]—***Re HUGHES*, [1899] W. N. 125.

*Annotation:—***Distd.** *Re Brockman*, [1909] 1 Ch. 354.

2194. —.]—**Must be limited to what is "payable."]**—*Re BROCKMAN*, No. 2188, *ante*.

2195. Direction to disallow costs.]—Where a party gave a written retainer to a solr., & made affidavits in support of certain proceedings taken by him on her behalf, a motion to refer his bills of costs for taxation, with a direction to the master to disallow the costs incurred in such proceedings, on the ground that they were improperly taken, was refused:—*Held*: the party was only entitled to the common order for taxation.—*WIGGINS v. PEPPIN* (1839), 2 Beav. 403; 3 Jur. 721; 48 E. R. 1237; *on appeal*, 2 Beav. p. 408, n., L. C.

*Annotation:—***Refd.** *Pinner v. Knights* (1843), 5 Beav. 174.

2196. Delivery up of papers.]—An order of course to tax directed that, on payment, all the papers, etc., of the client should be delivered up. The solr. claimed a special lien on some of the papers beyond the costs. A motion to discharge the order was refused, because, if the solr. had such special lien, he would be protected when application was made to the ct., for the delivery of the papers.—*Re TEAGUE* (1848), 11 Beav. 318; 50 E. R. 839.

*Annotation:—***N.F.** *Er p. Jarman* (1877), 4 Ch. D. 835.

2197. —.]—*Ex p. JARMAN*, No. 2225, *post*.

2198. Direction to report specifically.]—Special direction given on an order for taxation, that if the solr. should be unable to establish any of the charges by reason of the death of his clerk, or the absence of the books & papers delivered to the client, the taxing master should report specifically thereon.—*Re WATTS* (1844), 7 Beav. 491; 49 E. R. 1156.

2199. Reference without prejudice to client's liability—As to amount to be found due.]—*Qu.*: whether an attorney's bill will be referred to taxation, without prejudice to the client's liability to pay the amount that may be found to be due, or to his right to dispute the retainer.—*Re REECE* (1849), 18 L. J. Ex. 137.

2199a. —.]—*BAKER v. MERYWEATHER* (1849), 2 Car. & Kir. 737; 15 L. T. O. S. 97, N. P.

2200. Liberty to dispute retainer.]—*Re REECE*, No. 2199, *ante*.

2201. —.]—*Re THURGOOD*, No. 1831, *ante*.

taxation:—*Held*: this order did not reserve the question upon the undertaking; neither was it thereby intended that that question should not be open to the Taxing Master.—*BOROUGH v. HAMILTON* (1856), 9 Ir. Jur. 179.—**IR.**

PART VI. SECT. 5, SUB-SECT. 4.—B.

t. Whether order should contain stay of proceedings.]—In an action against a firm of solrs. for the recovery of money collected by them for pltf., the solrs. claimed the right to retain the money for extra costs between solr. & client in proceedings which they had

Sect. 5.—Taxation of costs: Sub-sect. 4, B.; sub-sects. 5, 6, 7 & 8.]

2202. ———.]—In ordering the taxation of a bill claimed against two persons, the ct. gave both liberty to question the retainer, & directed the taxing master to distinguish by & to whom each sum found due was to be paid.—*Re KITTON* (1866), 35 Beav. 369; 55 E. R. 938.

2203. Direction to inquire as to propriety of amendment.]—Special direction to taxing master to see whether matter had been improperly introduced by amendment & to charge pltf. therewith.—*BURCHELL v. GILES* (1848), 11 Beav. 34; 50 E. R. 729.

See, now, R. S. C., Ord. 65, r. 27 (32).

2204. Security for costs—Applicant giving false address.]—*Re SMITH, Ex p. FOLEY*, No. 1672, *ante*.

2205. Direction to treat bill as bill of firm—Bill delivered in name of one partner alone.]—A. & B. were appointed exors. of F.'s will, B. was a solr. & a partner in the firm of B. & C. but was authorised by the will, notwithstanding his being an exor., to charge for professional services. The firm of B. & C. was employed professionally in the affairs of the executorship, & three several bills of costs which had been incurred, one of them in the lifetime of testator, were delivered to the exors., who drew cheques for the amount, which cheques were handed over by A. to B. in his capacity of solr. On a petition for delivery of the bills & taxation by a party beneficially interested in the residuary estate, the delivery of the cheques by A. to B. was held to be a payment, & more than a year having elapsed since payment of two of the bills, delivery & taxation were refused; but as to the third payment having been made within the year, it was ordered to be delivered by a given time, & the petition as to taxation, etc., was ordered to stand over till after delivery to give petitioner an opportunity of considering whether taxation would be desirable. Resps. then delivered a bill of costs, not in the name of the firm, but in the name of C. only. Petitioner having decided upon proceeding with the taxation, applied for an order accordingly, & asked the ct. to insert in the order a direction that the master might treat the bill delivered as that of the firm & not of C. only:—*Held*: the ct. had no power to give any such direction, but could only order taxation of the bill which was delivered & on which the claim was made, & as B. claimed nothing, the order would be for taxation of the bill as delivered in the name of C.—*Re LETHBRIDGE & MACKRILL* (1852), 19 L. T. O. S. 19.

2206. Proceedings stayed till hearing of counterclaim.]—Order made for taxation of the costs, but proceedings on the bill of costs to be stayed till after the trial of the counterclaim.—*SLATER v. CATHCART* (1891), 8 T. L. R. 92, D. C.

2207. Payment of costs of former application.]—*Re TAYLOR, SONS & TARBUCK*, No. 1834, *ante*.

Where application after one month from delivery of bill.]—*See Sub-sect. 3, B. (a), ante*.

SUB-SECT. 5.—COSTS OF APPLICATION FOR ORDER.

2208. Whether costs follow result of taxation—No general rule.]—There is no general rule that the

conducted for pltf. Pltf., however, alleged that there had been a special agreement precluding any such claim:—*Held*: an order for taxation of defts.' bill of costs should not have contained a stay of proceedings in

pltf.'s action, as he was entitled to have the question of the existence of the alleged agreement determined by a trial in the ordinary way.—*MYERS v. MUNROE* (1906), 16 Man. L. R. 112.—**CAN.**

costs of applications for taxation under Solicitors Act, 1843 (c. 73), ss. 38, 39, must in all cases follow the result of the taxation.—*Re KINGDON & WILSON*, [1902] 2 Ch. 242; 71 L. J. Ch. 604; 86 L. T. 639; 50 W. R. 533; 18 T. L. R. 588; 46 Sol. Jo. 502, C. A.; *reversg.* S. C. *sub nom.* *Re K. & W.*, 46 Sol. Jo. 410.

Annotations:—*Refd. Re Buckwell & Berkeley*, [1902] 2 Ch. 596; *Re Grant, Bulcraig*, [1906] 1 Ch. 124.

2209. Costs of special application—Where common order obtainable.]—A special application for the taxation of a solr.'s bill, where all that was sought might have been obtained by motion of course, refused, with costs.—*ANON.* (1823), 1 L. J. O. S. Ch. 104.

2210. ———.]—(1) The amount of a bill of costs was included in a settled account between a solr. & client, & retained by the solr. out of moneys in his hands:—*Held*: the ct. had not jurisdiction, upon petition under Solicitors Act, 1843 (c. 73), to open the account & order taxation, & it could only be done by bill.

(2) A special petition was presented for the taxation of two bills; it succeeded only as to one, as to which the order might have been obtained as of course. Petitioner was ordered to pay all the costs.—*Re CATTLIN, BARWELL v. BROOKS* (1844), 8 Beav. 121; 1 New Pract. Cas. 81; 4 L. T. O. S. 152; 50 E. R. 48.

Annotation:—*As to (1) Distd. Re Stephen, Ex p. Bass* (1818), 2 Ph. 562.

2211. ———.]—(1) In equity the client in prosecuting the common order for taxation may object, on the ground of want of retainer, to any items of the bill, except those as to which he has admitted the retainer by his petition. The practice is different at law.

(2) A party applying for a special order for taxation, in a case in which he might have obtained the common order, must pay the costs though he succeeds.—*Re BRACEY* (1845), 8 Beav. 266; 14 L. J. Ch. 299; 5 L. T. O. S. 123; 50 E. R. 105; *sub nom.* *Re BRACEY, Ex p. SIMS*, 9 Jur. 417.

Annotations:—*As to (1) Appld. Re Herbert* (1887), 34 Ch. D. 501. *Distd. Re Jones* (1887), 36 Ch. D. 105.

2212. ———.]—*Re STEELE*, No. 1936, *ante*.

2213. ———.]—A client presented a special petition for the taxation of his solr.'s bill, complaining that the solr. had taken reckless proceedings, & praying that the costs of them might be wholly disallowed on taxation. A special petition was held to be unnecessary, & petitioner was ordered to pay the costs of it.—*Re ATKINSON & PILGRIM* (1858), 26 Beav. 151; 53 E. R. 854.

2214. ———.]—**Order of course previously refused.]**—An order of course for taxation was refused at the secretary's office; but the ct., on a special application, thought that it was a proper case for an order of course:—*Held*: the costs ought to follow the result of the taxation.

In a doubtful case, the client should apply to the solr. for his consent to an order of course.—*Re TAYLOR* (1852), 15 Beav. 145; 51 E. R. 492.

2215. ———.]—*Re KELLOCK*, No. 1422, *ante*.

2216. ———.]—**Where refusal of solicitor to consent to common order.]**—A solr. ordered to pay the costs of a special petition, rendered necessary by his refusal to consent to the common order for delivery of his bill & for its taxation.—*Re ADAMSON* (1854), 18 Beav. 400; 52 E. R. 181.

PART VI. SECT. 5, SUB-SECT. 5.

a. Lapse of several years—Ex parte taxation.]—Where a solr. had irregularly proceeded to tax as between solr. & client, in the client's absence, the ct., upon a petition presented seven years

2217. — By cestui que trust—Common order obtained by trustees.]—*Re* STORY, *Ex p.* MARWICK, No. 1817, *ante*.

2218. — Payment under pressure.]—*Re* LETT, No. 2125, *ante*.

2219. Application to tax costs of taxation—Effect of tender.]—*Re* EASTERN COUNTIES RY. CO., *Ex p.* LITHGOW (1845), 4 L. T. O. S. 490.

2220. Application rendered necessary by mistake of solicitor.]—*Re* RICHARDS, No. 2510, *post*.

SUB-SECT. 6.—SERVICE OF ORDER.

See R. S. C., Ord. 41, r. 5 ; Ord. 11, r. 8A.

2221. What is good service—Delivery to servant.]—*Re* NORVALL, [1869] W. N. 255.

2222. Jurisdiction to order service out of jurisdiction.]—The ct. has no power to authorise service out of the jurisdiction unless in cases where it is enabled to do so by statute.

Leave to serve the common order to tax on a solr. out of the jurisdiction not given.—*Re* MAUGHAM (1874), 22 W. R. 748.

Annotation :—*Re*fd. *Re* Busfield, Whaley v. Busfield (1886), 32 Ch. D. 123.

SUB-SECT. 7.—VARIATION OF ORDER.

2223. When common order varied—Necessity for proof of special circumstances.]—The common order for taxation of the solr.'s bill will not be varied, except under special circumstances.—*Re* SHIRLEY, *Ex p.* RANDALL (1840), 1 Mont. D. & De G. 341 ; 10 L. J. Bey. 4 ; *sub nom.* *Re* SHIRLEY, *Ex p.* BANDALL, 4 Jur. 1040.

2224. — Omission of order to pay excess received.]—Where on taxation it appears that an attorney has been overpaid by his client, but the usual clause requiring the attorney to refund any sum found to have been overpaid, is omitted in the order for taxation, the ct. will not afterwards supply the omission.—*PEACE v. JONES* (1840), 8 Dowl. 314.

2225. — Second bill delivered.]—In making an order for taxation under Solicitors Act (c. 73), s. 38, it is discretionary with the ct. whether or not to add the order for the delivery up of papers. A solr. delivered to his client a bill of costs incurred in pending suits in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending the client obtained an order of course for taxation & delivery up of papers, whereupon the solr. delivered a bill for the further costs. On a motion to discharge the order on the ground that the solr. had a lien on the papers for further costs :—*Held* : the order should be amended so as to include both bills. *Semble* : the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up.—*Ex p.* JARMAN (1877), 4 Ch. D. 835 ; 46 L. J. Ch. 485.

2226. Effect of delay in application.]—In Oct. 1839, a client obtained an order to tax his solr.'s bill. He commenced the taxation in Jan. 1840, & proceeded therein to a very considerable extent.

A year & a half after, & before the report, the client applied to vary the order :—*Held* : after his acquiescence, he came too late to alter the order, & too early to correct any erroneous principle acted

on by the master.—*TARBUCK v. TARBUCK* (1841), 4 Beav. 149 ; 49 E. R. 296.

2227. —.]—Solrs. employed in a suit, & a prosecution arising thereout, delivered two bills. The surviving plffs. obtained an order for the taxation of the bills, submitting to pay what was due "on the taxation of their said bills" ; before the taxing master they disputed their retainer in the prosecution. The master having completed the taxation, they presented a petition, praying that they might be ordered to pay the first bill only, & that, if necessary, the master's certificate, & the order for taxation might be varied. The petition was dismissed with costs.—*Re* SPRINGALL (1844), 8 Beav. 63 ; 14 L. J. Ch. 12 ; 4 L. T. O. S. 109 ; 50 E. R. 25.

Annotation :—*Re*fd. *Re* Tibbitts (1881), 30 W. R. 177.

2228. —.]—An order of course was obtained for the taxation of a solr.'s bill of costs, & the taxation was commenced & virtually completed :—*Held* : an application to vary such order on the ground of an alleged mistake appearing on the face of it ought to have been made directly the mistake was discovered, & not delayed until after the virtual completion of the taxation.—*Re* TIBBITTS (1881), 30 W. R. 177.

Annotation :—*Re*fd. *Re* Graham & Wigley (1908), 52 Sol. Jo. 684.

2229. — Material facts suppressed—Lapse of previous order.]—When a client has obtained the common order to tax his solr.'s bill, if he allows the time thereby limited for the making of the certificate, to elapse without taking any proceedings under the order, he is not entitled to obtain a second order of course, suppressing the fact that he has obtained the first order.

On June 27, a client commenced an action in the Q. B. Div. against his solr., claiming £75 as money received by the solr. for his use. On July 1 the solr. delivered his bill of costs to the client. On July 17 the solr. delivered his defence in the action, claiming to set off against the client's demand professional charges to the amount of £90, & some other items amounting to £31, in respect of which he claimed indemnity from the client. On July 30, issue was joined in the action. On Oct. 1 the client, suppressing the existence of the action, obtained *ex parte* in the Ch. Div. the common order to tax the solr.'s bill. The order was not served on the solr. till Oct. 29, & no proceedings were taken under it before it became inoperative by reason of the expiration of the month thereby limited for the making of the taxing master's certificate. On Feb. 11, the action not having been yet tried, the client, suppressing the existence of the action & the making of the former order to tax, obtained *ex parte* in the Ch. Div. a second common order to tax the solr.'s bill. Upon a motion by the solr. to discharge this order for irregularity :—*Held* : the second order had been obtained irregularly, & by means of a suppression of material facts, & the client must pay the costs of the motion to discharge it.—*Re* WEBSTER, [1891] 2 Ch. 102 ; 60 L. J. Ch. 338 ; 64 L. T. 250 ; 39 W. R. 535.

Annotation :—*Consd.* *Re* Macintosh & Thomas, [1903] 2 Ch. 394.

SUB-SECT. 8.—APPEAL FROM ORDER.

See Sub-sect. 12, *post*.

afterwards, ordered a taxation, treating the previous taxation as void, & ordered the solr. to pay costs of the application.—*CLARKE v. MANNERS, Re* MANNERS (1853), 4 Gr. 432.—CAN.

PART VI. SECT. 5, SUB-SECT. 6.
b. *Substituted service.*—Under King's Bench Act, R. S. M. 1902, c. 40, s. 368, an order may be made for service substitutionally on a solr., who

has left the jurisdiction & cannot be found, of a notice of motion for an order to refer to taxation his bill of costs rendered.—*Re* REID (1908), 8 W. L. R. 393 ; 17 Man. L. R. 652.—CAN.

Sect. 5.—Taxation of costs: Sub-sect. 9, A. & B. (a) & (b).]

SUB-SECT. 9.—DISCHARGE OF ORDER.

A. In General.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 31 (g), 62; R. S. C., Ord. 70, rr. 2, 3.

2230. What court will consider—Regularity of order—Not merits.]—Where the common order for the taxation of a solr.'s bill of costs has been obtained *ex p.*, & the solr. applies to discharge it, on the ground, that the order ought to have been obtained on special application, the ct. will not enter into the merits, further than to decide on the regularity of the order; & will not, even if the facts warrant it, then make a special order for taxation: such order must be the subject of another application by the client.—*GREGG v. TAYLOR* (1838), 1 Beav. 123; 8 L. J. Ch. 98; 48 E. R. 885.

2231. ———.]—An order of course for taxation cannot be supported on merits as a special order, upon the occasion of a motion to discharge it.

Qu.: whether the taxation, at the instance of a *cestui que trust*, of a bill of costs which has been long since settled & paid by trustees out of a trust fund, ought to take place as against the solr. or as against the trustees for the purpose of justifying their payment.—*GROVE v. SANSOM* (1838), 1 Beav. 297; 48 E. R. 954.

2232. Waiver of irregularity—Must be clear & unequivocal.]—An agreement was signed between a solr. & his clients, by which the former was to take a sum agreed on, in full of all demands. An order of course afterwards obtained for the taxation of his bill was discharged for irregularity.

An irregular order for taxation may be waived, but it must be done in some clear & unequivocal manner.—*Re MACKRILL* (1847), 11 Beav. 42; 50 E. R. 732.

2233. ——— What amounts to waiver—Proceeding under order.]—Order for taxing a bill of costs, entitled in the cause, if obtained by a party to the cause, regular, under the general jurisdiction. But a person, not a party in the cause, must apply *ex p.* under 2 Geo. 3, c. 23, s. 22. Such an irregularity would be waived by proceeding under the order.—*BIGNOL v. BIGNOL* (1805), 11 Ves. 328; 32 E. R. 1114, L. C.

Annotation:—Refd. Barton v. Pyne (1842), 1 Hare, 493.

2234. ———.]—A solr.'s bill of costs having been referred to the taxing master for taxation, & more than one-sixth part of the amount having been struck off, a petition was presented to confirm the master's report, & for a reference back to the taxing master, to tax the costs of taxation. Previous to the presentation of the original petition, which was a special one, the solr. had brought an action to recover the amount of his bill of costs; & on the reference of the bill for taxation, the consideration of the costs of the action was reserved:—*Held*: (1) the costs of & incidental to the original petition, & the petition for reference back to the master ought to be paid by the solr.; (2) the costs of the action ought to be paid by petitioners, & the amount of the latter ought to be deducted from the former, the solr. paying the balance, or having it deducted from his bill; but on petition to confirm the master's report, after a reference for taxation of a bill of costs, it was too late to object that the petition for taxation ought to have been a common petition, & not a special one.—*Re HAIR* (1848), 11 Beav. 96; 50 E. R. 753; *sub nom. Re HAIR, Ex p. Cox*, 17 L. J. Ch. 247; 11 L. T. O. S. 346.

2235. ———.]—An order for taxation was to be void, unless the master made his report in a fortnight, or certified that further time was necessary. The time elapsed without such certificate, & the parties afterwards attended several times before the master without objecting:—*Held*: the irregularity had been waived, & an order was made for the master to proceed in the taxation.—*Re FIELD* (1853), 16 Beav. 593; 51 E. R. 909.

2236. ——— Delay in following up order.]—(1) A delay of two days in following up an order for the taxation of a bill of costs is not a waiver of that order.

(2) The ct. is unwilling to interfere with the discretion exercised by a judge at chambers as to costs.—*SHERIFF v. GRESLEY (LADY)* (1835), 4 Ad. & El. 338; 111 E. R. 814; *sub nom. SHERIFF v. GRESLEY (LADY)*, 1 Har. & W. 588; 5 Nev. & M. K. B. 491; 5 L. J. K. B. 7.

2237. Time for motion to discharge—Effect of delay.]—*Re HILLIARD, Ex p. ARTHUR & Co.* (1891), 7 T. L. R. 753; 35 Sol. Jo. 698, C. A.

Annotations:—Distd. Re Plummer, [1917] 2 Ch. 432. *Refd. Re Graham & Wigley* (1908), 52 Sol. Jo. 684.

2238. ———.]—In Feb. 1917, the client obtained an order of course to tax his solr.'s bill on application made within one month from delivery. The order contained no submission to pay & no direction for delivery of papers, but contained an unqualified prohibition against the commencement of any proceedings by the solr. in respect of the bill pending the reference. A reference was made to a taxing master, but the client did not proceed further under the order, & the solr. alleged on oath that he believed that the client obtained the order with the sole view of delaying payment & had no intention of proceeding under the order. The solr. now moved to set aside the order for irregularity on the ground that the words restraining the commencement of proceedings by the solr. were erroneously inserted or in the alternative that these words might be struck out or in the further alternative that notwithstanding the order, he might be at liberty to commence proceedings against the client:—*Held*: (1) the application in the circumstances was not too late; (2) the unqualified prohibition against the commencement of proceedings by the solr. pending the reference was in accordance with the established form of order on the client's application within one month from delivery & the order could not be set aside for irregularity, but having regard to the uncontradicted evidence that the client was using it for the purpose of delay, the ct., under its inherent jurisdiction to prevent abuse of its orders, was entitled to direct, as it did, that unless the client obtained an appointment to tax within fourteen days the order should be discharged.—*Re PLUMMER*, [1917] 2 Ch. 432; 86 L. J. Ch. 702; 117 L. T. 561; 61 Sol. Jo. 694.

2239. When costs disallowed—F frivolous objection.]—In obtaining the common order for taxation the grounds of the application should be truly stated, & if they are inaccurately stated the common order will be discharged.

Hence, where A. agreed to let premises to B., & B. agreed to pay all the expenses attending the making of the lease, C., the solr. employed by A., having delivered his bill to B., the latter applied for the common order to tax, alleging, among other things, that he had employed C., whereas it was only in consequence of the agreement that C. delivered his bill to B. at all. The ct. discharged the order for irregularity, but because of the frivolous nature of the objection discharged it without costs, expressing regret that in that way

only could its disapprobation be marked.—*Re GABRIEL* (1846), 10 Beav. 45; 8 L. T. O. S. 182; 50 E. R. 499.

2240. ——— **Delay in application.]—***Re WAVELL*, No. 2252, *post*.

2241. **When costs granted against solicitor—Withdrawal of bill on notice of intention to tax.]—***Re WOOD* (1891), 36 Sol. Jo. 127.

B. Grounds for Discharge.

(a) In General.

2242. **Order obtained by one joint client.]—**One of two exors., although beneficially interested in testator's estate cannot obtain an order for taxation of a bill of costs delivered to the exors. jointly.

A solr. was employed by two persons, A. & B. An order of course for taxation was obtained by A. alone, on the allegation that the solr. was employed by A. It was discharged for irregularity.—*Re PERKINS* (1845), 8 Beav. 241; 14 L. J. Ch. 168; 4 L. T. O. S. 472; 9 Jur. 220; 50 E. R. 95.

2243. ———.]—*Re CARVEN*, No. 1576, *ante*.

2244. ——— **Where subsequent order obtained by another.]—***Re EMANUEL* (1895), 39 Sol. Jo. 724.

2245. **Misrepresentation in application—As to parties employing solicitor.]—***Re PERKINS*, No. 2242, *ante*.

2246. ———.]—*Re GABRIEL*, No. 2239, *ante*.

2247. ——— **As to payment of bill.]—**Application by residuary legatee, more than twelve months after payment for the taxation of a solr.'s bill against the exor., refused; notwithstanding there had been some agreement between the legatee & solr., & that payment had afterwards been made behind the back of the legatee.

Order for taxation, made upon affidavit of service, discharged with costs; the petition having misrepresented the case, & the real facts being found not to warrant the order.—*Re REES* (1849), 12 Beav. 256; 50 E. R. 1059.

2248. ——— **As to delivery of bill.]—***Re ABEL* (1867), 15 W. R. 730.

2249. ———.]—*Re ROBERTSON*, No. 1392, *ante*.

2250. **Agreement for payment of bill by lump sum.]—***Re MACKRILL*, No. 2232, *ante*.

2251. **Order in respect of some of several matters—Direction for delivery up of all papers.]—**After the expiration of a month from the delivery of a bill of costs & before the expiration of twelve months an order of course may be obtained for its taxation.

A client who had employed a solr. in several matters, obtained an order of course for the taxation of the costs of one matter only, with a direction, that on payment the solr. should deliver all the papers belonging to the client. It was discharged with costs for irregularity.—*Re BYRCH, HOLLAND v. GWYNNE* (1844), 8 Beav. 124; 4 L. T. O. S. 231; 50 E. R. 49.

Annotations:—Distd. Re Stephen, Ex p. Bass (1848), 4 Ry. & Can. Cas. 723. *Folld. Re Law & Gould* (1856), 21 Beav. 481. *Apld. Ex p. Jarman* (1877), 4 Ch. D. 835. *Distd. Re Ward* (1896), 65 L. J. Ch. 595.

2252. ———.]—An order for the taxation of two out of four bills, & the delivery up of the papers, discharged, but without costs, the solr. having attended the taxing master without having objected, & not having applied to discharge the order until six weeks after notice of it.—*Re WAVELL* (1856), 22 Beav. 634; 52 E. R. 1253.

Annotation:—Distd. Re Ward (1896), 65 L. J. Ch. 595.

2253. ———.]—A solr. claimed five bills of costs against his client. The client obtained an order of course to tax two only. It was discharged with

costs.—*Re LAW & GOULD* (1856), 21 Beav. 481; 52 E. R. 945.

Annotation:—Distd. Re Ward (1896), 65 L. J. Ch. 595.

2254. **Payment by way of set-off—Set-off allowed after order made.]—**In a plaint in the county ct., deft. pleaded a set-off for work & labour, etc., as an attorney. Before the day of hearing pltf. obtained a judge's order to tax deft.'s bill. The judge of the county ct., on the hearing, allowed the set-off. This ct. refused to rescind the order for taxation.—*Ex p. COOPER* (1854), 14 C. B. 663; 23 L. T. O. S. 80; 139 E. R. 273.

2255. **Bankruptcy of solicitor.]—**After the delivery by a solr. of his bill of costs, he executed a deed, assigning all his property for the benefit of his creditors, which became binding on all creditors under Bankruptcy Act, 1861 (c. 134). The clients afterwards obtained the common order for taxation against the solr. himself, notwithstanding the deed. He thereupon gave them notice of the deed, but went in before the taxing master & opposed the taxation. There was a balance due from him.

The ct. allowed the clients to complete the taxation, on their undertaking not to proceed personally against the solr.—*Re BARTRUM* (1864), 10 L. T. 313; 12 W. R. 699, L. JJ.

2256. **Order obtained against two partners—Bill due to one partner—Refusal of client to amend.]—**C. had acted as solr. for X., & before his bill was paid took P. into partnership. X. then paid the bill by cheque to the order of C. & P., & received an acknowledgment in their joint names, but in P.'s handwriting. He then took out an order to tax the bill as against C. & P. They then wrote to him informing him that C. alone was interested in the bill, & requested him to get the order altered so as to be against C. alone, but this he declined to do:—*Held*: the order must be discharged, C. consenting to an order against himself alone.—*Re CURNOT & PARKINSON* (1871), 40 L. J. Ch. 608.

2257. **Petition improperly indorsed—London agents acting for country solicitors.]—***Re SCHOLES & SONS*, No. 1829, *ante*.

2258. **Order used for purpose of delay.]—***Re PLUMMER*, No. 2238, *ante*.

(b) Order of Course Obtained where Special Application Necessary.

2259. **General rule—Order discharged.]—**If an order for taxation of costs is obtained of course in a case in which it ought to have been obtained upon special application, it will be discharged.—*HARRIS v. START* (1838), 4 My. & Cr. 261; 41 E. R. 102, L. C.

Annotation:—Refd. Holcombe v. Antrobus (1845), 8 Beav. 405.

2260. ———.]—*Re HADDELEY* (1891), 35 Sol. Jo. 563.

2261. ———.]—*Re STILL* (1892), 36 Sol. Jo. 843.

2262. ———.]—A client obtained an order for taxation of his solr.'s bill of costs by presenting a petition of course. It appeared subsequently that there was a dispute as to the facts between him & his solr. affecting his right to have the order:—*Held*: he ought to have proceeded by way of special application.—*Re C.* (1909), 53 Sol. Jo. 616.

2263. **Order of course obtained after payment of bill.]—**An order of course, obtained by a client for the taxation of his solr.'s bill of costs after payment thereof, discharged.—*SAYER v. WAGSTAFF* (1843), 12 L. J. Ch. 496.

When special application necessary.]—*See* Subject. 2, B., *ante*.

Sect. 5.—Taxation of costs: Sub-sect. 9, B. (c); sub-sect. 10, A., B., C. & D.]

(c) Suppression of Material Facts.

2264. Previous reference to arbitration.]—An order, obtained *ex parte* upon motion, discharged, on account of the suppression of material facts.

Order of course for taxation discharged on the ground of the suppression of an alleged previous reference to arbn., though the fact was disputed.—*DE FEUCHÈRES v. DAWES* (1843), 11 Beav. 46; 50 E. R. 733; *sub nom.* *FEUCHERES v. DAWES*, 1 L. T. O. S. 251.

*Annotations:—***Apld.** *Re Walker* (1851), 14 Beav. 227. **Consd.** *Richards v. Scarborough Market Co.* (1853), 17 Beav. 83.

2265. — Direction by arbitrator as to costs.]—The rule, that on application for orders of course all material facts must be stated, is to be strictly adhered to.

Upon an arbn. between A. & B., A.'s costs were directed to be paid by B., & were moderated by the arbitrator & paid. A. afterwards obtained an order of course to tax his solrs.' bills of costs, suppressing these facts. The order was discharged.—*Re WINTERBOTTOM* (1851), 15 Beav. 80; 51 E. R. 466.

2266. Proceedings taken in name of third party—Order obtained in respect of mortgage transaction.]—A. employed a solr. in the matter of a mtge., & there was a dispute between them, whether he was not also liable for the costs of legal proceedings taken in the name of a third party. A. obtained *ex parte* at the Rolls an order for taxation: he stated, however, the mtge. transaction alone, & suppressed the other matters. It was discharged on the ground of the suppression.—*Re WALKER* (1851), 14 Beav. 227; 51 E. R. 274.

2267. Receipt given by solicitor.]—A solr. consented to take a less sum than the sum claimed by him for his bill of costs, & it was agreed between him & his client that same should be received & taken in full of all demands, & the solr. gave his client a receipt, stating the sum so received to be in full of all demands. The client afterwards, but within the time allotted by the Act, obtained the common order to tax his solr.'s bill, but did not state that the receipt had been given by the solr. & received by him:—*Held*: the common order could not be sustained whatever might be the case as to a special order, & the common order was discharged with costs.—*Re HUNT* (1851), 18 L. T. O. S. 82.

2268. Previous order for taxation.]—The rule upon applications for *ex p.* orders is the same as that upon *ex p.* applications for injunctions, & in both cases the suppression of a material fact is fatal to the order.

An order of course for taxation discharged, on the ground of the suppression of the fact that there had been a previous order of the Q. B. for taxation, upon terms which had not been complied with, & a subsequent application to the Exchequer for taxation, which had been refused.—*Re GEDYE* (1852), 15 Beav. 254; 21 L. J. Ch. 430; 19 L. T. O. S. 359; 51 E. R. 535.

*Annotation.—***Consd.** *Re Collyer-Bristow, Russell, Hill, Ex p. Fletcher* (1899), 81 L. T. 110.

2269. Payment—Of one of two bills.]—An order of course was obtained for the taxation of two bills of costs. One had been paid, & the fact had been suppressed. The ct. discharged the order altogether.—*Re HINTON* (1852), 15 Beav. 192; 51 E. R. 510.

2270. — By third party.]—A client of a solr. who had acted in certain proceedings on behalf of this client & one hundred & twenty-four others obtained a common order to tax upon a petition of course, which omitted to state material facts, including the fact that the solr.'s bill of costs in respect of the proceedings had been paid by a third party:—*Held*: the order must be discharged.—*Re S.* (1910), 55 Sol. Jo. 127.

2271. Settlement of account.]—In Dec. an account was signed by a client, one item of which was the amount of a bill of costs previously delivered. The balance was paid over a month after. Four months afterwards the client, suppressing the settlement, obtained an order of course to tax. It was discharged.—*Re HOLLAND* (1854), 19 Beav. 314; 23 L. T. O. S. 203; 2 W. R. 514; 52 E. R. 371.

2272. Agreement for payment.]—*Re INGLE*, No. 1252, *ante*.

2273. Agreement to refer to Law Society—Particular item in bill.]—An agreement was made to pay reasonable & proper costs, & a bill of costs was delivered. The only real question was whether the negotiation fee was properly chargeable. It was agreed to refer the question to the council of the Law Society, & a case was submitted to resps. for approval. Resps. said they would have altered the case by stating that no negotiation in fact took place, & refused to proceed with the reference, & obtained the common order to tax. For appcts. it was said that an order of course would not have been made if the agreement to refer had been disclosed. Resps. said that only a special agreement going to the whole bill required to be mentioned, not an agreement as to one item even if such an agreement was in fact concluded:—*Held*: the test was that stated in *Re Gedge*, No. 2268, *ante*: Was the matter omitted of sufficient moment & importance to require grave consideration or discussion? Only matters of real moment & importance require to be mentioned, & the fact that at one time the parties intended to refer the question to the Law Society was not such a matter.—*Re COLLYER-BRISTOW, RUSSELL, HILL & Co., Ex p. FLETCHER* (1899), 81 L. T. 110.

SUB-SECT. 10.—CONDUCT OF THE TAXATION.

A. In General.

2274. Place of taxation—Master's office.]—The master's office is the proper place for taxation of a bill of costs.—*BRICKNALL v. STANFORD* (1838), 2 Jur. 1010.

2275. Effect of stay of winding-up proceedings—Bills in course of taxation.]—A railway co. was ordered to be wound up. A claim was made before the master, but not prosecuted. One contributory agreed to pay all debts proved before the master, & thereupon an order was made to stay all proceedings under the winding-up order. In the same matter two solrs. obtained an order for the taxation & payment of their bills of costs. The taxation was commenced, & had not concluded when the order to stay proceedings was made:—*Held*: (1) claimant was entitled to proceed before the master to exhibit such proof as he might be able; (2) the solrs. were entitled to proceed with the taxation of their bills of costs.—*Re DOVER & DEAL RY. CO., CINQUE PORTS, THANET & COAST JUNCTION CO., CLIFTON'S CASE* (1854), 5 De

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*c. Day of taxation.]—*Taxation on Good Friday is not irregular.—*GILLMORE v. GILBERT* (1850), 2 All. 50.—**CAN.**

G. M. & G. 743; *sub nom. Re DOVER, DEAL & CINQUE PORTS RY. CO., Ex p. CLIFTON, Ex p. HOOK, Ex p. THOMPSON*, 24 L. J. Ch. 83; 24 L. T. O. S. 85; 3 W. R. 8; 43 E. R. 1059.

2276. Order not made in suit or matter—Applications made to Master of Rolls.]—When the common order for taxation has been obtained, not made in a suit or matter, but under Solicitors Act, all special applications connected therewith must be made to the Master of the Rolls, even though the Chancery proceedings in respect of which the order has been made may have been depending in some other branch of the ct., & orders may have been made therein.—*Re BELL*, (1864), 2 Hem. & M. 501; 4 New Rep. 497; 10 L. T. 781; 12 W. R. 1076; 71 E. R. 558.

B. Taxing Officers.

See, now, R. S. C., Ord. 35, rr. 4, 6A.

2277. District registrar—Administration action.]—The ct. will not, except under very special circumstances, direct the costs of an action commenced in a district registry to be taxed otherwise than by the taxing master in London.—*DAY v. WHITTAKER* (1877), 6 Ch. D. 734; 46 L. J. Ch. 680; 36 L. T. 683; 25 W. R. 767.

Annotation:—Appld. Re Wilson, Wilson v. Alltree (1884), 27 Ch. D. 242.

2278. ———.]—In Supreme Court Funds Rules, 1884, rr. 11 & 12, the words “taxing officer” must be taken in connection with R. S. C., Ord. 65, r. 27 (43), so as to make it equivalent to “district registrar” where the ct. has ordered taxation to be made by that officer.

Notwithstanding the wording of R. S. C., Ord. 65, r. 4, the ct. will not, except under very special circumstances, direct the costs of administration actions, though commenced, & prosecuted in a district registry, to be taxed otherwise by the taxing master in London.

But the Paymaster General is bound to act on the district registrar's certificate of taxation where the ct. has, in the exercise of its discretion, directed taxation in the district registry.—*Re WILSON, WILSON v. ALLTREE* (1884), 27 Ch. D. 242; 53 L. J. Ch. 989; 32 W. R. 897.

2279. ——— Duty of Paymaster General.]—Re WILSON, WILSON v. ALLTREE, No. 2278, *ante*.

2280. ——— Non-contentious business.]—Application having been made, by originating summons in the Manchester District registry, before the amendment in July, 1910, of Order 35, r. 6A, to a judge of the K. B. Div. sitting at Manchester for an order referring a bill of costs of a solr. for non-contentious business to the district registrar for taxation:—*Held*: “the proper officer” to tax the bill within Solicitors Act, 1843 (c. 73), s. 37, was not the district registrar, but a master of the Supreme Ct.—*STEAD v. SMITH*, [1911] A. C. 688; 81 L. J. K. B. 68; 105 L. T. 120; 55 Sol. Jo. 616, H. L.

2281. Registrar of county court.]—TOLPUTT (II.) & Co., LTD. v. MOLE, No. 2848, *post*.

C. The Application to Tax.

See R. S. C., Ord. 65, r. 19D.

2282. Sufficiency of notice—Effect of insufficient notice.]—A *cognovit*, dated Nov. 3, by which £5 was to be paid on Nov. 5, & the residue of pltf.'s demand at stated periods, pltf. being at liberty to sign judgment & issue execution for the whole upon any default, was signed by two defts., W.

& J., on Nov. 3, & by other deft., I., on Nov. 7. On Nov. 7, the first instalment was paid to pltf.'s attorney's clerk, who had no authority to receive it; & subsequently, on that day, judgment was signed; on Nov. 8, notice was given to tax costs on Nov. 9, which, at the request of one of defts. was postponed till Nov. 10. On the morning of Nov. 10, defts.' attorney received a notice to attend the taxation of costs at two o'clock that day; he did not attend, & the costs were taxed in this absence:—*Held*: the judgment was regular, the execution of I., on Nov. 7, related back to Nov. 3; the acceptance of the instalment by the clerk without authority did not waive the default, & it was unnecessary under the circumstances, to give a full day's notice to tax costs on Nov. 10.

Qu.: whether the omission to give one day's notice to tax costs renders a judgment for debt & costs irregular.—*PERRY v. TURNER* (1831), 2 Cr. & J. 89; 1 Dowl. 300; 2 Tyr. 128; 1 L. J. Ex. 13.

Annotation:—Appld. Lloyd v. Kent (1836), 5 Dowl. 125.

2283. ———.]—Although deft. may have appeared in an action & pltf. taxes his costs without giving notice of taxation that is not an irregularity sufficient to induce the ct. to set aside a judgment & subsequent proceedings.—*LLOYD v. KENT* (1836), 5 Dowl. 125; 2 Har. & W. 130.

Annotations:—Distd. Welch v. Vickery (1846), 15 M. & W. 59. *Refd. Hawkins v. Hassell* (1844), 13 L. J. Ex. 341.

2284. ———.]—A notice of continuance given on Saturday evening to attend & proceed with the taxation at twelve o'clock on the following Monday at Westminster, was held sufficient.—*BLAKE v. WARREN* (1840), 6 M. & W. 151; 9 L. J. Ex. 136; 4 Jur. 27; 151 E. R. 360.

2285. ———.]—Re HILL, No. 2363, *post*.

2286. Failure to notify client—Subsequent notification & re-taxation—Right of client to set-up irregularity.]—On July 21, the master proceeded, *ex p.*, in a taxation in the absence of the client, who had not been served with a warrant to proceed on that day. A warrant was afterwards regularly served for July 31, subscribed “to complete the taxation.” The client did not attend; but, the master being informed of the former irregularity, retaxed so much of the bills as had been taxed on July 21:—*Held*: the client not having attended the warrant of July 31, could not set up the irregularity of July 21.—*Re MOURILYAN* (1848), 11 Beav. 48; 50 E. R. 734.

2287. Duty of solicitor to attend when matter called on.]—GREGORY'S CASE (1822), 1 L. J. O. S. K. B. 5.

D. Proceedings at Taxation.

2288. Several bills—Collective or separate taxation.]—Re PEACH, No. 1924, *ante*.

2289. ———.]—DEVEREUX v. WHITE & Co. (1896), 13 T. L. R. 52; 41 Sol. Jo. 67, C. A.

2290. ———.]—A solr. delivered on the same day a cash account accompanied by seven bills of costs, amounting in all to £260, in respect of which he received £210 on account, leaving a balance of £50 due to him. The solr. afterwards wrote stating that he did not intend to claim payment of this balance. The clients then obtained an order of course to tax one of the bills delivered. Their solr. subsequently wrote to the solr. saying that the other bills were agreed to, & there was not any dispute with regard to them:—*Held*: the seven bills were separate bills, & not one bill

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d. Necessity for notice.]—Notice of taxation of a bill of costs must be given to the party primarily liable for payment of such bill.—*ALLEN v. BRITISH SOUTH AFRICAN ASPHALTE CO. (LIQUIDATORS OF)* (1906), 23 S. C. 420.—S. AF.

n. — Allowance per diem to arbitrators & counsel.]—Held: the amount to be allowed *per diem* to arbitrators & counsel was a matter peculiarly within the province of the taxing officer, & his decision should not be interfered with.—*Re HILLYARD &*

Beav. 596; 50 E. R. 947; *on appeal* (1851), 21 L. J. Ch. 236, L. JJ.; *subsequent proceedings* (1853), 22 L. T. O. S. 109, L. C. & L. JJ.

2305. To assess lump sum in lieu of taxation.]—The discretion given to taxing officers by R. S. C., Ord. 65, r. 27 (38A), to assess a lump sum for costs in lieu of taxation, is a very delicate one, to be exercised judicially & only when special circumstances justify that course, & then only on evidence; & if a taxing officer proceeds under the sub-rule, it is his duty to state in his certificate that he has assessed under the sub-rule, & to give his reasons for doing so.

A taxing officer stated in his certificate that he had taxed a bill of costs at a certain figure, but he had in fact proceeded under the sub-rule & had assessed a lump sum for costs in lieu of taxation. On summons to review without carrying in objections:—*Held*: the taxing officer had proceeded on a wrong principle, & the bill of costs must go back for taxation.—*Re JOHNSTON, MILLS v. JOHNSTON*, [1904] 1 Ch. 132; 73 L. J. Ch. 17; 89 L. T. 497.

Annotations:—*Expld.* *Re Commonwealth Oil Corp'n., Pearson v. Same Co.*, [1917] 1 Ch. 404. *Refd.* *Re Shilson, Coode*, [1904] 1 Ch. 837.

2306. — Meaning of "other cause."]—R. S. C., 1883, as to the costs of preparing & sending out notices, do not, expressly or by analogy, apply to (a) notices of judgment in a debentureholders' action, or (b) notices of meetings of creditors & members of a co. to agree to an arrangement under Companies (Consolidation) Act, 1908 (c. 69), s. 120.

In the case of the notices of judgment & of meetings aforesaid the taxing master may, under R. S. C., Ord. 65, r. 27 (38A), assess the costs thereof at gross sums, & in that sub-rule the words "other cause" are not to be read as *ejusdem generis* with those matters which are expressly mentioned in the sub-rule, but the taxing master may act on the sub-rule in cases where no misconduct or negligence on the part of the solrs. whose costs are being taxed is imputed.—*Re COMMONWEALTH OIL CORPN., LTD., PEARSON v. COMMONWEALTH OIL CORPN., LTD.*, [1917] 1 Ch. 404; 86 L. J. Ch. 348; 116 L. T. 402; 61 Sol. Jo. 315.

Annotation:—*Consd.* *Re Wyatt's Appln.*, [1918] 2 Ch. 293.

Whether court will review exercise of discretion.]—*See Nos. 2371–2374, post.*

(c) Parties.

See R. S. C., Ord. 65 r. 27 (27).

2307. General rule—Discretion of taxing master.]—It is in the discretion of the taxing master to determine the proper parties to attend taxation of costs; & the taxing master having excluded a party on the ground of want of separate interest, the ct. refused to disturb the decision.—*STAHL-SCHMIDT v. LETT* (1861), 7 Jur. N. S. 1271; 9 W. R. 830.

Annotation:—*Apld.* *Re Salmond, Rydon v. Williams* (1905), 22 T. L. R. 161.

2308. — — — — —.]—An order was made in an administration action that the costs of plff. & of defts. should be taxed as between solr. & client &

be paid out of testator's estate. One of defts. was an infant, who appeared by her guardian *ad litem*. After the order for taxation the infant came of age & changed her solrs. The taxing master thereupon directed that the guardian *ad litem* should attend before him by his solrs. upon the taxation:—*Held*: the master had a discretion under order R. S. C., Ord. 65, r. 27 (27), to make the order, & the ct. would not interfere.—*Re SALMOND, RYDON v. WILLIAMS* (1905), 22 T. L. R. 161.

2309. Personal representative of deceased party.]—On the hearing of a cause the bill was dismissed with costs as against defts., such costs to be taxed, & when taxed, to be paid by plffs. Before the costs were taxed one of plffs. died: the master proceeded with the taxation, & made his certificate, notwithstanding the surviving plffs. objected to the taxation on the ground that the suit was abated. On the application to quash the certificate:—*Held*: the proceedings were regular.—*MEREDYTH v. HUGHES* (1829), 3 Y. & J. 188; 148 E. R. 1146, Ex. Ch.

Annotation:—*Apld.* *Aspden v. Seddon*, [1877] W. N. 207.

2310. — — — — —.]—*ASPDEN v. SEDDON*, [1877] W. N. 207.

2311. Guardian ad litem of infant.]—*Re SALMOND, RYDON v. WILLIAMS*, No. 2308, *ante*.

Bankruptcy—Official receiver.]—*See BANKRUPTCY*, Vol. IV., pp. 198, 199, Nos. 1829, 1835.

— — — — — Trustee.]—*See BANKRUPTCY*, Vol. IV., p. 217, Nos. 2025–2027.

— — — — — Bankrupt.]—*See BANKRUPTCY*, Vol. IV., p. 233, No. 2184.

(d) Evidence.

See R. S. C., Ord. 65, r. 27 (25).

Discretion of master.]—*See Sub-sect. 10, E. (b), ante.*

2312. Cross-examination—Of solicitor.]—A solr. may be cross-examined on an affidavit made by him in support of a bill of costs under a common order for taxation, & it is the duty of the examiners to take such examination.—*Re FLUX, ARGLES & RAWLINS* (1874), 44 L. J. Ch. 375.

2313. — — — — — Of client—By solicitor.]—*BROWN v. GREAT WESTERN RY. CO.* (1887), 3 T. L. R. 582, D. C.

2314. — — — — —.]—On a taxation between solr. & client, the master, after perusing an affidavit of the solr. & an affidavit of the client denying the facts, refused to allow the solr. to submit an affidavit in reply, or to cross-examine the client:—*Held*: under such circumstances, the master should allow further evidence, & should take *vivâ voce* evidence under the powers given him by R. S. C., Ord. 65, r. 27, (25).—*Re EVANS, Ex p. BROWN* (1887), 35 W. R. 546, D. C.

2315. Attendance of witnesses before master—Whether court will compel.]—The ct. will not compel the attendance of a witness before the prothonotary to enable him to tax a bill of costs arising in this ct., referred to him for that purpose by a master in Chancery.—*PROTHEROE v. THOMAS* (1819), 8 Taunt. 670; 3 Moore, C. P. 3; 129 E. R. 544.

ROYAL INSURANCE CO. (1887), 12 P. R. 285.—CAN.

2305 i. To assess lump sum in lieu of taxation.]—*Re JOHNSTON* (1901), 21 C. L. T. 561; 22 C. L. T. 24; 3 O. L. R.

2305 ii. — — — — —.]—Under an order for the taxation of an itemised bill of costs rendered, the taxing officer must tax the bill, pass upon each item: he has no power, acting under the order, to

allow a bulk sum.—*Re SOLICITORS* (1919), 44 O. L. R. 273; 15 O. W. N. 205.—CAN.

PART VI. SECT. 5, SUB-SECT. 10.—E. (c).

2307 i. General rule—Discretion of taxing master.]—The taxing officer has a discretion as to the attendance of parties claiming a right to attend at taxation, & his discretion will not be

lightly interfered with.—*CLARKE v. UNION FIRE INS. CO., CASTON'S CASE* (1884), 10 P. R. 339.—CAN.

o. Parties with interest.]—*GALL v. COLLINS* (1888), 12 P. R. 413.—CAN.

PART VI. SECT. 5, SUB-SECT. 10.—E. (d).

p. Affidavits—Showing nature of work done.]—*Re RICHARDSON*, 3 Ch. Ch. 144.—CAN.

Sect. 5.—Taxation of costs: Sub-sect. 10, E. (d), (e) &

2316. —.]—The ct. has no power to compel a person to appear & give evidence before the master on taxation.—*M'DOUGALL v. NICHOLLS* (1835), 1 Har. & W. 341.

—.]—*Sec. now, R. S. C., Ord. 65, r. 27 (25).*

2317. —.]—**Whether power to order shorthand note.**—On a taxation of a solr.'s bill of great complexity, it became necessary to examine witnesses orally before the taxing master, who, before the examination, stated his opinion to be that a shorthand writer ought to be employed. Neither party objected; each employed a shorthand writer, & the taxing master stated that he should rely on the notes. More than one-sixth having been taxed off, he allowed against the solr. half the costs of the shorthand notes of the evidence, on the ground that the parties ought to have employed one shorthand writer. The solr. objected to the allowance of any part of the expense of the shorthand notes:—*Held*: neither a judge nor taxing master has jurisdiction to order a shorthand note of evidence to be taken, but as neither party had objected to having it taken, but had acceded to the taxing master's view, the allowance to the successful party of the same costs as if they had agreed on one shorthand writer ought not to be disturbed.—*Re HILFARY & TAYLOR* (1887), 36 Ch. D. 262; 56 L. J. Ch. 758; 56 L. T. 867; 35 W. R. 705; 3 T. L. R. 642, C. A.

2318. Affidavits — Admissibility — Affidavit by solicitor.—*Qu.*: whether the affidavit of a solr. is admissible as evidence before the master in support of his bill of costs.—*HICKS v. KEATE* (1839), 3 Jur. 1024.

2319. —.]—**Affidavit by client—Discretion of master.**—On the taxation of an attorney's bill of costs, with liberty for the client to dispute the retainer, the master may, on the investigation, receive the affidavit of the client upon the subject, or not, just as the master pleases.—*Re STEADMAN* (1849), 14 L. T. O. S. 205.

2320. —.]—**Disputing retainer or showing special agreement as to charges.**—The master has no power upon taxation to receive affidavits disputing the retainer, or to show any special agreement as to charges.—*SOUTHER v. HOPE* (1853), 21 L. T. O. S. 95.

2321. —.]—**Contradicting affidavits by solicitor & client—Duty of master—To allow further evidence.**—*Re EVANS, Ex p. BROWN*, No. 2314, *ante*.

(e) *Taking Accounts between Parties.*

See R. S. C., Ord. 27, r. 27 (27), (28).

2322. Confined to accounts relating to bill—Whether general account between parties allowed.—*RUSSEL v. BUCHANAN*, No. 2391, *post*.

2323. —.]—(1) Under the common order for the taxation of costs, the master is not authorised to take an account of pecuniary matters between the parties, which are foreign to the bill of costs; but *secus* where moneys are paid by the client on account of the bill of costs, or where by agreement between the solr. & client, the moneys which come to the hands of the solr. are to be applicable to the payment of the bill of costs.

(2) Under the common order, the master is not authorised to allow interest on the balances of moneys of the client from time to time in the hands of the solr., though such appears to have been the agreement between the parties.—*JONES*

v. JAMES (1839), 1 Beav. 307; 3 Jur. 310; 48 E. R. 958.

Annotations:—As to (1) *Consd. Cooper v. Ewart* (1847), 2 Ph. 362; *King v. Savory* (1856), 8 De G. M. & G. 311. *Refd. Re Le Brasseur & Oakley*, [1896] 2 Ch. 487. As to (2) *Refd. Harvey v. Mayhew* (1853), 2 W. R. 128.

2324. —.]—*Re SMITH*, No. 1537, *ante*.

2325. —.]—Where the taxing master has received no special directions from the ct. in regard to payments made by a client to his solr., it is his duty to confine himself to simple payments plainly proved to have been made on account of the bill of costs.

In ascertaining what is due on bills of costs, & in the consideration of what payments have been made on account of them, questions of law & fact of considerable difficulty may incidentally arise, & may possibly justify & require discussion & determination, even in the jurisdiction exercised by the ct. on petitions for taxation.—*Re SMITH, Ex p. HUSBAND* (1846), 9 Beav. 182; 15 L. J. Ch. 238; 7 L. T. O. S. 79; 50 E. R. 313; *sub nom. HUSBAND v. SMITH*, 1 New Pract. Cas. 413.

Annotations:—*Refd. Cooper v. Ewart* (1847), 2 Ph. 362; *Stedman v. Collett* (1854), 24 L. J. Ch. 113; *Re Le Brasseur & Oakley*, [1896] 2 Ch. 487.

2326. —.]—Under the common order for taxing a solr.'s bill the master ought to take an account of sums received by the solr. for his client, in the character of solr., & which are connected with the items of the bill. But the master ought not to take, under that order, a general account between the parties.—*COOPER v. EWART* (1847), 2 Ph. 362; 15 Sim. 564; 16 L. J. Ch. 417; 9 L. T. O. S. 511; 41 E. R. 983, L. C.

Annotation:—*Refd. Re Le Brasseur & Oakley*, [1896] 2 Ch. 487.

2327. —.]—A solr., who was in the habit of lending out money for his clients & receiving the interest thereon, came to a settlement with a client some years before her death, on which occasion a particular sum was found due from him, which was duly credited to the client; no question was afterwards raised as to the correctness of this settlement, nor was there ever any other afterwards. Between the date of the settlement & the time of the death of the client various sums accrued due in respect of interest on the moneys so lent out, & in respect of which, though not received in the lifetime of the client, advances were made to her by the solr. as if they were. After her death, her exor. retained the solr. in the matter of the executorship, & the sum outstanding was paid to him, with all arrears of interest, by the solr., who also made out a cash account, showing the amount of receipts of the death of the client, but not the payments made to her on account of the arrears, & taking credit for the bill of costs, due to him at her death. Instead of opening a new account this account was continued, & the arrears of interest received after the death was debited against the solr., who still neglected to credit himself with the payments made to the client. On the footing of this account, the exor., with the knowledge & concurrence of the solr., distributed the residue of the estate among the residuary legatees. Subsequently the solr. delivered his bill of costs, as against the exor., & on coming before the taxing master, on an order for taxation, then for the first time items of charge were made for the payments to the client in her lifetime, & on an objection being thereto, time was given to the solr. to explain; but no explanation being given, the taxing master disallowed the items, as not proper to be

PART VI. SECT. 5, SUB-SECT. 10.—E. (e).

2322 i. *Confined to accounts relating to bill—Whether general account between parties allowed.*—*O'DONOHUE v. BEATTY* (1891), 19 S. C. R. 356; 14 P. R. 317.—CAN.

introduced into an account against the exor., but only as against the estate, & the bill of costs against the exor. was the only subject-matter of reference.—*Re WHELDON* (1847), 2 New Pract. Cas. 333; 9 L. T. O. S. 290.

2328. ———.]—A decree directed a reference to the taxing master to tax deft.'s bills of costs, & a reference to the master in ordinary to take an account of all the dealings & transactions between pltf. & defts. By a subsequent order made on a motion it was directed that, notwithstanding the decree, both references should go to the taxing master:—*Held*: the order was erroneous, as varying the decree in such a manner in which it could not be varied upon motion without consent.—*KING v. SAVERY* (1856), 8 De G. M. & G. 311; 25 L. J. Ch. 564; 2 Jur. N. S. 431; 4 W. R. 471; 44 E. R. 410, L. JJ.

2329. ———.]—*Re LE BRASSEUR & OAKLEY*, No. 2330, *post*.

2330. ——— *After allocatur.*—(1) The direction in the common order to tax a solr.'s bill that he should give credit for all sums of money by him received of or on account of the client must be read as including & confined to all moneys which the solr. in his character of solr. or agent of the client has received for or on account of, or is legally or equitably liable to pay over to such client, & against which, if sued for by the client, the solr. could set off his costs when taxed.

(2) Where on the taxation of a bill of costs a party objects to the course which the taxing master proposes to adopt in the taxation, it is not in accordance with the practice that he should at once bring the matter before the ct. on motion. He should allow the taxing master to make his certificate, & then carry in his objections to it, & allow the master to answer them, & upon that apply to the ct. to vary the certificate.—*Re LE BRASSEUR & OAKLEY*, [1896] 2 Ch. 487; 65 L. J. Ch. 763; 74 L. T. 717; 45 W. R. 87; *sub nom. Re L. & O.*, 40 Sol. Jo. 637, C. A.

Annotations:—As to (2) *Consd.* *Harbin v. Gordon*, [1914] 2 K. B. 577. *Generally, Refd.* *General Council of the Bar (England) v. I. R. Comrs*, [1907] 1 K. B. 462; *Wells v. Wells*, [1914] P. 157.

(f) Where Retainer Disputed.

2331. Order obtained by solicitor—Whether retainer can be disputed.—On a general reference to taxation of an attorney's bill, the prothonotary cannot take into his consideration the question of retainer.—*NELSON v. SLACK* (1833), 2 Moo. & S. 820.

2332. ———.]—Where a client obtains the common *ex parte* order for the taxation of a solr.'s bill of costs, he cannot dispute his retainer to the extent of the whole of the bill, though he may do so in respect of particular items in the bill, the practice being to require the client on his application for the order to make an admission of the retainer; but where a solr. obtains the common

ex parte order the client is not bound by the allegation of retainer contained in the petition, & consequently may object to every item in the bill on the ground of there having been no retainer. Consequently it is no objection to the common order when obtained by a solr. that he knew that the clients disputed his retainer as to the whole bill.—*Re JONES* (1887), 36 Ch. D. 105; 56 L. J. Ch. 720; 57 L. T. 26; 35 W. R. 649; 3 T. L. R. 609.

Annotations:—*Consd.* *Re Hilliard, Ex p. Arthur* (1891), 7 T. L. R. 753. *Refd.* *Re Wingfield & Blew*, [1904] 2 Ch. 665.

2333. ———.]—*Qu.*: whether on an order for taxation obtained by the solr. under Solicitors Act, 1843 (c. 73), s. 37, containing a specific statement of a retainer in a particular transaction, it is open to the client who chooses to go in under the order to dispute such retainer.—*Re WINGFIELD & BLEW*, [1904] 2 Ch. 665; 73 L. J. Ch. 797; 91 L. T. 783; 48 Sol. Jo. 700, C. A.

Annotations:—*Refd.* *Sheppard v. Sheppard*, [1905] P. 185; *Gilroy v. Gilroy* (1914), 58 Sol. Jo. 378.

2334. Order obtained by client—Right to dispute retainer—Whether confined to particular items.—*Re BRACEY*, No. 2211, *ante*.

2335. ———.]—*Re HAIR*, No. 1728, *ante*.

2336. ———.]—*Re JONES*, No. 2332, *ante*.

2337. ———.]—The question of retainer can be raised on a common order to tax as to particular items or heads, but not as to the whole of a bill of costs.

A bill of costs was divided into general costs & costs relating to a particular matter. On a common order to tax:—*Held*: the whole of the latter, except two small items, having been incurred without authority were properly taxed off.—*Re HERBERT* (1887), 34 Ch. D. 504; 56 L. J. Ch. 719; 56 L. T. 522; 35 W. R. 606.

Annotation:—*Refd.* *Re Jones* (1887), 36 Ch. D. 105.

2338. ———.]—A solr. having delivered ten bills of costs to a client, the client obtained an order to tax the ten bills, the order containing no reservation of a right to dispute the solr.'s retainer:—*Held*: it was not open to the client to dispute the retainer of the solr. as to one of the bills *in toto*, though he could dispute the retainer as to particular items in any of the bills.—*Re FRAPE, Ex p. PERRETT* (No. 2), [1891] 2 Ch. 290; 63 L. J. Ch. 678; 71 L. T. 80; 42 W. R. 475; 38 Sol. Jo. 439; 8 R. 274.

2339. ———.]—Certain clients applied for & obtained an extension of time to carry in a bill under a common order to tax costs which had been obtained by the solrs., & allowed nearly two months to elapse after service of the order. They then moved to discharge the order on the ground that there was no retainer.

Motion refused. A taxing master has authority to decide the question of retainer in such case upon taxation.—*Re GRAHAM & WIGLEY* (1908), 52 Sol. Jo. 684.

PART VI. SECT. 5, SUB-SECT. 10.— E. (f).

2331 i. Order obtained by solicitor—Whether retainer can be disputed.—*MACDONALD v. PIPER* (1885), 10 P. R. 586.—CAN.

2331 ii. ———.]—In taxing a solicitor & client bill of costs the taxing officer has jurisdiction, as part of the taxation, to decide the question of retainer with respect to individual heads of charges when a retainer as to one item is admitted.—*Re O'C.*, [1924] 3 D. L. R. 630; [1924] 2 W. W. R. 1135; 20 Alta. L. R. 522.—CAN.

q. ———.]—Where one of two
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alleged clients, against whom solrs. seek to obtain a taxation of certain bills of costs, disputes the retainer, the usual order for taxation should be made against the unresisting client, such taxation to be on notice to the other, with liberty to him to attend & intervene, & to be conclusive against him as to the *quantum* of liability in case he is ultimately found liable in the dispute as to the retainer.—*Re MACDONALD* (1895), 16 P. R. 498.—CAN.

r. ———.]—An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill.—

Re MADHAVJI (1908), 1 L. R. 33 Bom. 667.—IND.

t. Order obtained by client—Right to dispute retainer—Power to order production & affidavit of documents by solicitor.—Upon taxation of bills of costs rendered by solrs., where the retainer is disputed & the taxing officer is inquiring as to it, he has power, under Rule 757, to direct the solrs. not only to produce all documents in their custody, possession or power, but to make & file an affidavit stating that the documents produced are all those in their custody, possession or power.—*Re SOLICITORS*, [1926] 1 D. L. R. 428; 58 O. L. R. 177.—CAN.

Sect. 5.—Taxation of costs: Sub-sect. 10, E. (g), & F.; sub-sect. 11, A., B. & C.]

(g) Where Negligence Alleged.

2340. Power of master to inquire into.]—Although the master, on taxation, has not jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary.—*HEALD v. HALL* (1833), 2 Dowl. 163.

2341. ———.]—Upon the petition of the administratrix of an assignee to have two bills of costs taxed, having regard to acts of unskilfulness & negligence charged against the solr. : & one of the bills having been incurred in bkpcy. & the other at law ; & an order having been made by a judge at law, referring the latter for taxation, but declining to refer the former, which had been taxed by the comr. :—*Held* : the costs incurred in bkpcy. should be referred for taxation in the ordinary way, but the costs at law were not within the jurisdiction of this ct. for taxation.

This ct. will not direct the taxing officers, in taxing a solr.'s bill of costs, to have regard to acts of imputed negligence, except, as in the case of *Re Southall, Ex p. Southall*, No. 2295, ante, where the bill of costs constituted petitioning creditor's debt.—*Re BILLINTON, Ex p. BILLINTON* (1840), 10 L. J. Bey. 13 ; 4 Jur. 1140.

2342. ———.]—On taxation of an attorney's bill, the master has no jurisdiction to disallow items on the ground that in respect of the business to which they refer, the attorney was guilty of negligence.

Where A. & B. delivered a bill in their joint names for business done as attorneys, & the master, on taxation, disallowed part of the bill, on the ground that B. was not a certificated attorney during a portion of the time to which the bill referred, the ct., on affidavit that B.'s name was used at the request of friends, but that he was really not a partner with A., allowed A. to deliver a fresh bill in his own name only for the items so disallowed.—*MATCHETT v. PARKES* (1842), 9 M. & W. 767 ; 11 L. J. Ex. 287 ; 152 E. R. 325. *Annotation* :—*Expld. Re Massey & Carey* (1884), 26 Ch. D.

F. The Allocatur.

See R. S. C., Ord. 52, r. 26, Ord. 65, r. 27 (17), (39).

2343. Sufficiency.] —COLE v. SUTHERLAND (DUKE) & BARKER (1845), 4 L. T. O. S. 355.

2344. Error in allocatur—Right of party aggrieved.]—If there is an error in casting up the amount after taxation, & the error is not brought under the attention of the master before he makes his allocatur, the party damnified by the error has no right himself to set it right, but should apply to the judge or the master.—*LEVY v. DREW* (1847), 2 New Pract. Cas. 394 ; 2 Saund. & C. 142 ; 10 L. T. O. S. 170 ; 12 Jur. 119.

2345. Time for making—Extension of time—Discretion of master.]—The common form of order for taxation of a bill of costs, when the order is made upon the application of the client after the expiration of one month but before the expiration of twelve months from the delivery of the bill, provides that the taxing master "is to make his certificate in a month, unless the master shall

extend the time to enable him to make his certificate, or this order is to be of no effect."

Upon the construction of the order for taxation read in conjunction with R. S. C., Ord. 65, r. 27 (57), the taxing master had power to grant an extension of the time after the expiration of the month appointed by the order for the making of his certificate.

The power of the taxing master to extend the time under an order in this form ought not to be exercised as of course or freely.—*Re MACINTOSH & THOMAS*, [1903] 2 Ch. 394 ; 72 L. J. Ch. 609 ; 88 L. T. 820 ; 51 W. R. 659 ; 47 Sol. Jo. 604, C. A. *Annotations* :—*Reid. R. v. Lewis*, [1906] 2 K. B. 307 ; *Re Plummer*, [1917] 2 Ch. 432.

Right of party to carry in objection—After signing allocatur.]—See No. 2368, post.

SUB-SECT. 11.—REVIEW OF TAXATION.

A. In General.

See R. S. C., Ord. 65, r. 27 (41), (42).

2346. Effect of delay.]—An attorney who, in his affidavit of increase on taxing costs, represents that he has paid money to witnesses in the cause when he has not in fact paid it, though he may have taken steps for doing so, or who, without proper ground, makes statements tending to heighten the costs payment to witnesses, with intent to favour such witnesses or to oppress the opposite party, commits an offence for which, on a timely application, he may be punished by the ct. But, where the losing party in a cause complained that the adverse attorney has claimed payments for the production of maps by witnesses at the trial, which maps, it was said, were not in fact produced, & of a counterpart, produced by a witness but not used or required ; also for money alleged to have been paid by the attorney to a witness, whereas such money was not paid till long after the affidavit of increase was sworn ; but such complaint was not made till nearly a year & a half after the taxation, complainant's attention having been drawn to the subject recently & by accident :—*Held* : it was too late, unless upon a very strong case, to bring such details before the ct. as charges to be answered by an attorney ; & a rule to answer matters was refused.—*DOE d. MENCE v. HADLEY* (1851), 17 Q. B. 571 ; 117 E. R. 1400 ; *sub nom. DOE d. MENTZ v. HADLEY*, 18 L. T. O. S. 93.

2347. After compromise of cause—No objection taken to items.]—If, upon taxation of an attorney's bill of costs before a master, a party does not object to certain items expecting the bill to be paid by the other side, he shall not be allowed, after the case has been compromised, & he has himself to pay the costs so taxed, to come & say that they were improperly allowed.—*PARKER v. GREAT WESTERN RY. CO.* (1852), 20 L. T. O. S. 52.

2348. Adjournment to chambers—General objection to allocatur of chief clerk—Only some items in dispute.]—On a general objection being taken to a Chief Clerk's certificate, where some only of the items were in dispute the case was adjourned to

PART VI. SECT. 5, SUB-SECT. 10.—*E. (g).*

2340 i. Power of master to inquire into.]—THOMSON v. MILLIKEN (1868), 15 Gr. 197.—CAN.

2340 ii. ———.]—Under the common order for taxation of a solr.'s bill of costs, O. J. A., Form 136, a taxing officer has power to investigate & dispose of questions of carelessness,

impropriety, & negligence in the conduct of the business to which the bill relates ; & the officer's certificate is conclusive as to all matters within his jurisdiction.—*MILLAR v. CLINE* (1887), 12 P. R. 155.—CAN.

PART VI. SECT. 5, SUB-SECT. 10.—*F.*

a. How far conclusive.]—The tax-

ing officer's allocatur is sufficient proof that the business charged for was done by the solr.—*CLARKE v. UNION FIRE INS. CO., CASTON'S CASE* (1884), 10 P. R. 339.—CAN.

PART VI. SECT. 5, SUB-SECT. 11.—*A.*

b. Liability for costs of unsuccessful motion.]—Where on an application for a review of taxation of costs, it

Chambers, & pltf. ordered to furnish a list of the items to which he objected.—*MAW v. PEARSON* (1863), 3 New Rep. 99.

2349. Motion to discharge master's order.]—*Re LE BRASSEUR & OAKLEY*, No. 2330, *ante*.

B. Review by Master.

See R. S. C., Ord. 65, r. 29 (39), (40).

2350. Application for review—Time for—Before allocatur made.]—An application to review the taxation of costs ought not to be made before the master has made his allocatur, as he has not, until doing so, finally decided what costs he will allow.—*SELLMAN v. BOORN* (1841), 8 M. & W. 552; 10 L. J. Ex. 433; 151 E. R. 1158; *sub nom.* *SELWOOD v. BOORE*, 5 Jur. 846.

*Annotation:—*Consd. *Harbin v. Gordon*, [1914] 2 K. B. 577.

2351. ——— Not after acceptance of money under allocatur.]—*Re MARSHALL, Ex p. WOOLER*, No. 2382, *post*.

2352. ——— Allocatur post dated—To avoid miscarriage of justice.]—*Re FURBER* (1898), 42 Sol. Jo. 613, C. A.

2353. ——— Who may apply—Solicitor of party.]—In taxation as between solr. & client, a solr. or a firm of solrs. may be entitled to be regarded as a "party" within R. S. C., Ord. 65, r. 27 (39), (41), & may be entitled to a review of taxation in his or their own interests, as, for instance, where he or they have a lien for costs on a fund.—*Re CLARKE'S SETTLEMENT* (1911), 55 Sol. Jo. 293.

Review by bankruptcy taxing master—Of taxation in county court.]—*See* BANKRUPTCY, Vol. IV., p. 218, No. 2033.

C. Objections.

See, now, R. S. C., Ord. 65, r. 27 (39).

2354. Necessity for.]—The ct. will not grant a review of taxation upon a ground which was not specifically presented before the master.—*HORE v. SAXL* (1856), 17 C. B. 599; 25 L. J. C. P. 181; 139 E. R. 1211.

2355. ———.]—At the hearing counsel for pltf. took the objection that there was no evidence that the trustees were liable to their own solr. . . . This point was not raised in the written objection:—*Held*: it was too late to take the objection.—*Re NATION, NATION v. HAMILTON* (1887), 57 L. T. 648.

2356. ———.]—Upon such an application [for a review of taxation] it is necessary that the person who seeks a review should show that he has taken his objections to the taxation when before the master (*LORD ESHER, M.R.*).—*SHRAPNEL v. LAING* (1888), 20 Q. B. D. 334; 57 L. J. Q. B. 195; 58 L. T. 705; 36 W. R. 297; 4 T. L. R. 241, C. A.

*Annotations:—*Reid. *Amon v. Bobbett* (1889), 60 L. T. 912; *Hinska Angfartygs Akt. v. Brown, Toogood* (1891), 7 T. L. R. 578; *Westacott v. Bevan*, [1891] 1 Q. B. 774; *Pincott v. Letts* (1897), 77 L. T. 160; *Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500; *Craske v. Wade* (1899), 80 L. T. 380; *Fox v. Central Silkstone Collieries*, [1912] 2 K. B. 597; *Sharpe v. Haggith* (1912), 106 L. T. 13; *Bates v. Gordon Hotels* (1913), 82 L. J. K. B. 441; *Christie v. Platt*, [1921] 2 K. B. 17; *Wilson v. Walters*, [1926] 1 K. B. 511; *Medway Oil & Storage Co. v. Continental Contractors* (1928), 45 T. L. R. 20.

2357. ———.]—An application by a party to a judge under R. S. C., Ord. 65, r. 27 (41), for an order for a review of taxation of a bill of costs as

to any item or part of an item contained therein, cannot be entertained unless the party applying has first carried in an objection in writing under R. S. C., Ord. 65, r. 27 (39), with respect to each such item or part of an item.—*STROUSBERG v. SANDERS* (1889), 38 W. R. 117, C. A.

*Annotation:—*Reid. *Bates v. Gordon Hotels* (1913), 82 L. J. K. B. 441.

2358. ———.]—In taxing a bill of costs in an action where judgment on a counterclaim had been given for pltf. with costs the master disallowed the whole of the costs incurred by pltf. in meeting the counterclaim upon the merits & in detail. Pltf. took out a summons to discharge the certificate of the master on the ground of misconstruction of principle without having previously carried in objections to the taxation:—*Held*: there was nothing in this case to prevent the ordinary rule as to carrying in objections from applying.—*CRASKE v. WADE* (1899), 80 L. T. 380, C. A.

2359. ——— General principle challenged.]—R. S. C., 1875, Ord. 6, rr. 30, 32 [now R. S. C., Ord. 65, r. 27 (39), (41)] apply only where particular items are objected to, not where the general principle of taxation is challenged.—*SPARROW v. HILL* (1881), 7 Q. B. D. 362; 50 L. J. Q. B. 410; 44 L. T. 146; 29 W. R. 490, D. C.; *on appeal*, 8 Q. B. D. 179, C. A.

*Annotations:—*Apld. *Re Castle* (1887), 36 Ch. D. 194. Consd. *Craske v. Wade* (1899), 80 L. T. 380. Reid. *Harley v. Hunt*, [1887] W. N. 184; *Jenkins v. Jackson*, [1891] 1 Ch. 89.

2360. ———.]—To enable the ct. to entertain a summons to review a taxing master's certificate, where the ground of objection is to the whole of the finding generally, it is not necessary that the objections raised by the summons to his finding should have been carried in before the signing of the certificate; R. S. C., Ord. 65, r. 27 (39), (41) being applicable only where particular items are objected to. Where under an order for taxation of a solr.'s bill of costs & cash account, the taxing master found that, in consequence of all accounts between the parties having been settled, there was nothing to tax, & certified accordingly, but no objections to the finding were carried in before the certificate was signed:—*Held*: the ct. had jurisdiction to entertain a summons to review the certificate.—*Re CASTLE* (1887), 36 Ch. D. 194; 56 L. J. Ch. 753; 57 L. T. 76; 35 W. R. 621.

*Annotations:—*Reid. *Craske v. Wade* (1899), 80 L. T. 380; *Re Fletcher & Dyson*, [1903] 2 Ch. 688.

2361. ———.]—*Re JOHNSTON, MILLS v. JOHNSTON*, No. 2305, *ante*.

2362. Form of—Whether grounds of objection need be stated.]—Where a party carries in an objection in writing to the certificate of a taxing master under R. S. C., 1875, Ord. 6, r. 30, he is only bound to state the items to which he objects, not the reasons of his objection.—*SIMMONS v. STORER* (1880), 14 Ch. D. 154; 49 L. J. Ch. 121; 42 L. T. 291; 28 W. R. 408.

2363. ———.]—(1) Objections carried in to the taxation of costs should show the ground on which the items questioned are objected to. Objections to the taxation of a bill of costs were lodged, & a warrant to consider them was issued on Dec. 4. On the same day the solr. who lodged the objections received from the taxing master at 4.30 p.m. a notice that he had appointed 1 o'clock

appeared that a bill was exorbitant, & the items disallowed by the clerk, with trifling exceptions, illegally charged, the attorney applying for the review was ordered to pay the costs of dismissing the motion.—*DOE v. DOBSON* (1853), 2 All. 531.—CAN.

PART VI. SECT. 5, SUB-SECT. 11.—B.

*c. Application for review—Time for.]—*ROBINSON v. ENGLAND (1906), 11 O. L. R. 385; 7 O. W. R. 130.—CAN.

d. Jurisdiction of local master.]—

BROWN v. FEARY, [1925] 1 W. W. R. 494; 19 Sask. L. R. 259.—CAN.

PART VI. SECT. 5, SUB-SECT. 11.—C.

2354 i. Necessity for.]—SNOWDEN v. HUNTINGDON (1887), 12 P. R. 248.—CAN.

Sect. 5.—Taxation of costs: Sub-sect. 11, C. & D. (a).]

on the following day to consider them:—*Held*: the notice was, under the circumstances, sufficient.

(2) By an order of the ct. the costs "properly incurred" by pltf.'s solr. "in recovering" a fund were directed to be taxed:—*Held*: the costs incurred by the solr. in establishing against pltf. his retainer as solr. in the matter were rightly included in the taxation.

(3) After the date of the order directing the taxation, an appeal by deft. against the order by which the retainer of pltf.'s solr. was established came on for hearing, & was dismissed, & the taxing master included in the taxation already directed the costs of pltf.'s solr. of this appeal:—*Held*: such costs, although incurred subsequently to the date of the direction for taxation, being costs incurred in resisting the continuation of the attempt to destroy the proceedings by which the fund had been recovered were properly included in the taxation.—*Re HILL* (1886), 33 Ch. D. 266; 55 L. T. 104, C. A.

Annotations:—As to (2) *Reid*. *Re Meter Cabs*, [1911] 2 Ch. 557. As to (3) *Reid*. *Re Eden, Watkins v. Eden*, [1920] 2 K. B. 333.

2364. Before whom carried in.—*MEDLICOTT v. HUBBARD* (1888), 32 Sol. Jo. 258.

2365. Hearing of—Proceedings commenced in Chancery Division—Subsequent transfer to King's Bench.—*ROSS v. ASHWIN*, [1884] W. N. 86; Bitt. Rep. in Ch. 49.

2366. — Notice to hear—Sufficiency of.—*Re HILL*, No. 2363, *ante*.

2367. Answer of master to objections—Statement of special reason.—Under Schedule 2 of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), prescribing a charge of 10s. for an "ordinary" attendance, & giving the taxing master power in "extraordinary cases" to increase or diminish that charge "if for any special reasons he shall think fit," it is a question for the discretion of the taxing master whether or not a case is "extraordinary" as being more simple or more difficult than a normal fair average case. In extraordinary cases, where the taxing master increases or diminishes the "ordinary" charge, he must have special reasons for so doing, but he is not bound to state his special reasons till he formally answers the objections to his taxation.—*Re MAHON*, [1893] 1 Ch. 507; 62 L. J. Ch. 448; 68 L. T. 189; 41 W. R. 257; 9 T. L. R. 230; 37 Sol. Jo. 234; 2 R. 337, C. A.

Annotation:—*Reid*. *Re Morgan*, [1915] 1 Ch. 182.

2368. Right to carry in objection—After signing of allocatur.—The certificate or allocatur referred to in the earlier part of R. S. C., Ord. 65, r. 27 (39), before the signing of which a party may & after the signing of which he may not carry in an objection to the allowance or disallowance by the taxing officer of any items in the bill of costs, is either a final certificate, or else an *interim* certificate specifically certifying the allowance or disallowance of these particular items.

Consequently, the signing of an *interim* certificate which merely gives a round sum on account of the items in the bill of costs which are not at that time the subject of objection does not prevent a party from carrying in, or the taxing master from considering, a subsequent objection in respect of items that had been allowed or disallowed without objection before the signing of that certificate.—*HARPER v. FIRBANK*, [1918] 2 K. B. 509; 87 L. J. K. B. 945; 119 L. T. 290, C. A.

— **Objection containing libellous matter—Whether privileged.**—*See* LABEL & SLANDER, Vol. XXXII., p. 108, No. 1404.

D. Order for Review.

(a) In General.

See R. S. C., Ord. 65, r. 27 (41).

2369. When court will entertain application—Taxing master acting under statute.—*Qu.*: whether the ct. has jurisdiction over a matter in which the taxing officer of the ct. is directed by an Act of Parliament to tax certain costs directed by such Act to be paid.—*Re LUDLOW CORPN.* (1847), 8 L. T. O. S. 510, L. C.

2370. — — — — ——A waterworks Act provided for the costs payable in respect of claims under the Act, being taxed & settled by a master of the superior ct. of law at Westminster, on the principles & according to the rules & on payment of the fees observed & paid on the taxation & settlement of costs in actions at law. The ct. refused to review the taxation of these costs by one of its masters, on the ground that the costs were in no sense given by an award of the ct., & that the master did not tax the costs in his capacity of officer of the ct., but merely as one of a class of persons named in the Act of Parliament.—*Re SHEFFIELD WATERWORKS ACT*, 1864, COLLIS' CLAIM, WRAITHBY'S CLAIM (1865), L. R. 1 Exch. 54; 35 L. J. Ex. 60; 13 L. T. 440; 11 Jur. N. S. 954; 14 W. R. 143; *sub nom.* *Re SHEFFIELD WATERWORKS ACT*, 1864, *Re WROTHLY'S CLAIM*, 4 H. & C. 74.

Annotation:—*Apld.* *Owen v. L. & N. W. Ry.* (1867), L. R. 3 Q. B. 54.

2371. — — — — — Interference with discretion of master.—The ct. will not interfere in any case with the discretion of the taxing master, unless some principle is involved.—*SEYMOUR v. SAUNDERS* (1872), 27 L. T. 241; 20 W. R. 832.

2372. — — — — ——Although the case was one of very great magnitude & complication & occupied twenty-nine days, the ct. declined to interfere with the discretion of the taxing master in disallowing extra fees paid by the solr. to his counsel for consultations.—*Re HARRISON* (1886), 33 Ch. D. 52; 55 L. J. Ch. 768; 55 L. T. 72; 50 J. P. 372; 34 W. R. 645; 2 T. L. R. 671, C. A.

Annotations:—*Consd.* *Stewart v. Weber* (1903), 89 L. T. 559. *Expld.* *Cavendish v. Strutt*, [1904] 1 Ch. 521.

2373. — — — — ——This was an action for damages for polluting the water in pltf.'s reservoir. At the hearing defts. were ordered to pay £83 damages & the costs of the action, except the costs of a motion for injunction. The costs were taxed,

PART VI. SECT. 5, SUB-SECT. 11.—D. (a).

2371 i. When court will entertain application—Interference with discretion of master.—The ct. does not as a general rule interfere with the discretion of the taxing officer, even though he may have disallowed the whole of certain costs claimed.—*ATHERTON TABLELAND MAIZE BOARD v. CLEMENTS & MARSHALL PROPRIETARY, LTD.*, [1927] S. R. Q. 176.—**AUS.**

2371 ii. — — — — ——*CAMPBELL v.* (1879), 8 L. R. 159.—**CAN.**

2371 iii. — — — — ——*Re FINDLAY, FINDLAY v. CUTHBERTSON* (1910), 44 L. L. T. 214.—**IR.**

2371 iv. — — — — ——*COOPER, Ex p. DE LAUTOUR & SIEVWRIGHT* (1894), 12 N. Z. L. R. 296.—**N.Z.**

e. — — — — — After allocatur—Allocatur signed under misapprehension.—There is a jurisdiction in a proper case to set aside the certificate of a taxing master, but such jurisdiction is to be sparingly exercised. Where it appeared probable that the taxing master had been under a misapprehension as to the nature &

course of proceedings, this misapprehension not being due to the fault of any party, & that little opportunity was allowed for bringing in objections, the certificate was set aside.—*Re BROUGHAM*, [1926] S. A. S. R. 423.—**AUS.**

f. — — — — — Time for appeal from master expired.—*HEASLIP v. HEASLIP* (1891), 14 P. R. 21, 165.—**CAN.**

g. — — — — — Time for notice of appeal.—*Re MCCARTHY, MCCARTHY v. WALKER* (No. 2) (1899), 4 Terr. L. R. 1.—**CAN.**

h. — — — — ——The notice of

& defts. took in objections (a) to the allowance by the taxing master of eleven witnesses, though only three were called; (b) the allowance of the costs of a photographer, who was brought up to prove certain photographs, but not called; the allowance to each professional witness of £1 1s. a day for hotel expenses, in addition to a daily sum for attendance as witness, which was, in each case, nearly the maximum allowed by the scale issued by the common law judges in 1853. The master replied that he had exercised his discretion in every case. On a summons to vary the taxing master's certificate:—*Held*: (a) & (b) were matters within the taxing master's discretion, & the ct. would not interfere.—*EAST STONEHOUSE LOCAL BOARD v. VICTORIA BREWERY CO.*, [1895] 2 Ch. 514; 64 L. J. Ch. 793; 73 L. T. 54; 43 W. R. 585; 39 Sol. Jo. 622; 13 R. 657.

2374. ———.]—A charge for instructions for brief is in the discretion of the taxing master, & cannot be reviewed by the ct. unless the taxing master has proceeded on a wrong principle.—*CARTER v. APFEL* (1912), 57 Sol. Jo. 97.

2375. ———.]—Pltf., who lived at Florence, recovered judgment in an action. Upon taxation of pltf.'s costs as between party & party the taxing master fixed a certain sum as proper to be allowed in respect of pltf.'s travelling & hotel expenses, etc., but made it a condition of its inclusion in his allocatur that pltf.'s solrs. should produce to him either a voucher acknowledging the receipt by pltf. from his solrs. of the sum or a letter from pltf. intimating that he had knowledge of the amount as allowed. The taxing master's allocatur not having in fact been given, pltf. was wrong in taking out a summons before a judge in chambers to set aside the decision of the taxing master in respect of the items complained of (*per cur.*).—*HARBIN v. GORDON*, [1914] 2 K. B. 577; 83 L. J. K. B. 322; 109 L. T. 794; 58 Sol. Jo. 140, C. A.

— **Compulsory purchase—Assessment of price & compensation.**—See *COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 202, 211, Nos. 806–808, 957–960.

2376. Application on motion.—(1) An application, that the officer of the ct. may be directed to review his certificate as to the taxation of costs, may be made by motion.

(2) It is not an objection to such application, that the amount of the taxed costs has not been paid into ct.; though it may be proper to make such payment one of the terms of the order for re-taxation.—*Re CONSETT & LEIGH, Ex p. RICHARDSON* (1834), 3 Deac. & Ch. 735, Ct. of R.

2377. Application by petition—With special leave—Setting forth grounds of complaint.—

(1) The master's certificate on taxation of costs cannot be questioned without the special leave of the ct. to be obtained by petition, setting forth the grounds of complaint, & the charges alleged to be erroneous.

(2) The master, on evidence before him, allowed a few items on the taxation of a solr.'s bill for

business, as to which there was a conflict whether the solr. had authority to perform it:—*Held*: this was not a sufficient reason for permitting a review of the taxation.

(3) On petition for liberty to file exceptions to the master's certificate of taxation, the ct. will sometimes decide the point in dispute without putting the parties to file their exceptions.

(4) It must be shown that there has been an erroneous principle upon which the master has acted (*LORD LANGDALE, M.R.*).—*Re CONGREVE* (1841), 4 Beav. 87; 49 E. R. 271.

2378. ——— **Decision by court forthwith.**—*Re CONGREVE*, No. 2377, *ante*.

2379. Affidavit in support—Necessary contents.—An affidavit to ground an order *nisi*, for the master to review his taxation, on account of overcharge, must point out the specific items thereof, & distinctly show that they are erroneous.—*DANIEL v. BISHOP* (1824), M'Cle. 61; 13 Price, 129; 148 E. R. 27.

2380. ——— **Necessity for.**—On an application to review taxation of costs, the facts on which it is made must be verified by affidavit.—*SMITH v. TIMS* (1862), 10 W. R. 301.

2381. Necessity for payment into court of taxed costs.—*Re CONSETT & LEIGH, Ex p. RICHARDSON*, No. 2376, *ante*.

2382. After payment required by & made to party seeking review.—The master having taxed a bill & reduced a particular item, the attorney intimated his intention of applying to the ct. for a rule to review, but at the same time required payment of the amount found due by the allocatur, which was accordingly paid:—*Held*: he could not afterwards apply for a rule to review the taxation.—*Re MARSHALL, Ex p. WOOLER* (1857), 29 L. T. O. S. 159; 21 J. P. Jo. 388; *sub nom. Re WOOLER, Ex p. MARSHALL*, 5 W. R. 652

2383. Taxation by master of different Divisions of High Court.—Where, in taxing costs at common law, the common law taxing master refers certain equity matters to a chancery taxing master, this ct. will not entertain any application in respect of what is done by such chancery taxing master.—*Re LETT, Ex p. PARRY* (1861), 5 L. T. 416; 10 W. R. 6.

2384. Review at instance of person not a party—Application to set aside taxation.—A person who is not a party to the making of an order for the taxation of costs, & who desires that the taxation under the order may be reviewed, ought not to apply by motion to review the taxing master's certificate, but ought to apply to have the order for taxation set aside.—*CHARLTON v. CHARLTON* (1882), 31 W. R. 237.

Annotation.—*Consd. Re Dillon, Ex p. Official Receiver* (1903), 88 L. T. 127.

2385. Admissibility of fresh evidence.—A firm of solrs., previously employed by first mtgees. in reference to a proposed sale, which fell through, of the mtged. property, subsequently, in May 1885, without any special authority from or communication with the first mtgees., perused &

appeal from a certificate of taxation of a solr.'s bill of costs by a local master, must be seven days, as required by G. O. 642.—*EXCHANGE BANK v. NEWELL* (1883), 9 P. R. 528.—*CAN.*

k. ———.] ——— **d. M'**
LUM v. ROE (1851), 7 N. B. R. (2 All.) 143.—*CAN.*

l. ———.]—*Re CROTHERS* (1892), 15 P. R. 92.—*CAN.*

m. ———.]—*Appeal from local registrar.*—Appeals from the taxation of costs by local registrars are subject

to the eight days' limit prescribed as to appeals from orders of masters & local judges, but the time for appealing may be enlarged by the master in chambers or a judge.—*QUAY v. QUAY* (1886), 11 P. R. 258.—*CAN.*

2376 i. Application on motion.—The proper mode of appealing from the master's certificate of taxation of a solr.'s bill of costs is by motion, & not by petition.—*Re PONTON* (1868), 15 Gr. 355.—*CAN.*

n. Jurisdiction of judge in chambers—*To entertain application.*—*GRAHAME*

v. ANDERSON, 2 Ch. Ch. 303.—*CAN.*

o. ———.]—*Power to delegate duty to review.*—A judge in chambers, upon an application to him under Rule 774 to review a taxation, has no jurisdiction to delegate the duty which the rule imposes upon him, to a taxing officer at Toronto, or to any one else. He may take the opinion of that officer as to any & all matters arising upon the application, for his own information, but the parties are entitled to have his opinion, & his alone, in determining the questions raised by the appeal.—*CAMPBELL v. BAKER*

SOLICITORS.

Sect. 5.—Taxation of costs: Sub-sect. 11, D. (a) & (b) i. & ii.]

altered on their behalf as vendors a new draft contract of sale, & on June 13, 1885, first communicated with the first mtgees. as to the proposed contract, & also gave them notice of election for remuneration on the old system, as altered by Schedule II, under rule 6 of the General Order of Aug. 1882, made under Solicitors Remuneration Act, 1881 (c. 41). The first mtgees. ratified what had been done, & on June 27 the contract for sale was completed & the property sold. The taxing officer taxed the costs of the solrs. on the footing of the scale fee in Schedule I. of the order:—*Held*: R. S. C., 1883, Ord. 65, r. 27 (42). of the precluded appls. at that stage of the proceedings from taking any objection to the taxation or adducing any evidence other than that which had been carried in & brought before the taxing officer.—*HESTER v. HESTER* (1887), 34 Ch. D. 607; 56 L. J. Ch. 247; 55 L. T. 862; 51 J. P. 438; 35 W. R. 233; 3 T. L. R. 308, C. A.

Annotations:—*Reid*. *Re Metcalfe, Metcalfe v. Blencowe* (1887), 57 L. J. Ch. 82; *Re Love, Hill v. Spurgeon* (1889), 40 Ch. D. 637; *Re Evans*, [1905] 1 Ch. 290.

2386. Review of bankruptcy master's review of county court taxation.—The review of a county ct. taxation by a bkpcy. master of the High Ct. under rule 124 of the Rules of 1886 amounts to a re-taxation which may be reviewed by the ct.—*Re ALISON, Ex p. JAYNES*, [1892] 2 Q. B. 587; 36 Sol. Jo. 526; *sub nom. Re ALLINSON, Ex p. JAYNES & BOARD OF TRADE*, 61 L. J. Q. B. 526; 40 W. R. 624; 9 Morr. 180; *sub nom. Re ALISON, Ex p. BOARD OF TRADE*, 66 L. T. 688.

Annotation:—*Reid*. *Re Beeston, Ex p. Board of Trade* (1899), 68 L. J. Q. B. 344.

(b) In What Circumstance Made.

i. In General.

See R. S. C., Ord. 65, r. 27 (41).

2387. Master acting on mistaken principle.—*FENTON v. CRICKETT*, No. 2415, *post*.

2388. —.]—The ct. refused to grant a rule to show cause why the master should not review his taxation of an attorney's bill of costs against his client, where he had allowed charges for signing interlocutory judgments, which were afterwards set aside with costs, & for opposing the motions made for that purpose, objecting that the party applying had not shown that the proceedings complained of had been resorted to *malâ fide* & from motives inconsistent with a fair intention & a due regard to the interests of the client.—*LLOYD v. CRUTCHLEY, LLOYD v. POWELL* (1824), 13 Price, 211; 147 E. R. 968.

2389. —.]—An agreement entered into by a client with his attorney, to pay him at a certain specified rate for business to be done, is not binding; but the charges made according to such agreement may be allowed on taxation, if the master, on inquiring into them, considers them proper. Where such charges had been allowed on taxation & paid, the ct., on application about four months after, refused to order a review of the taxation, it not being shown that the master had forborne to exercise his judgment on the charges, in consequence of the agreement between attorney & client.—*DRAX v. SCROOPE* (1831), 2 B. & Ad. 581; 1 Dowl. 169; 9 L. J. O. S. K. B. 291; 109 E. R. 1259.

Annotations:—*Consd. Re Eyre* (1848), 2 Ph. 368; *Philby v. Hayle* (1860), 8 C. B. N. S. 647.

(1905), 2 O. W. R. 504; 5 O. W. R. 372; 9 O. L. R. 291.—CAN.

p. Taxation by local master.—

When an order is obtained by a client referring the taxation of a solr.'s bill to the master in the county where the work was done, any review of the

master's conclusions must be obtained by way of appeal to a judge.—*Re BLEEKER & HENDERSON* (1882), 9 P. R. 182.—CAN.

2390. —.]—The master's decision on questions of taxation is final as to matters of fact & amount of charges, & is only reviewed by the ct. when the master acts upon a mistaken principle; & if the solr. negligently or ignorantly takes some unnecessary proceeding, it is the duty of the master to disallow the charge made in respect of such proceeding.—*ALSOP v. OXFORD* (LORD) (1833), 1 My. & K. 564; 2 L. J. Ch. 174; 39 E. R. 794.

Annotations:—*Follâ. Re Nicholson* (1861), 30 L. J. Ch. 796. *Consd. In the Estate of Ogilvie, Ogilvie v. Massey*, [1910] P. 243. *Reid. Russel v. Buchanan* (1838), 9 Sim. 167; *Re Congreve* (1841), 4 Beav. 87; *Macintosh v. G. W. Ry.* (1865), 11 Jur. N. S. 681.

2391. —.]—A solr. presented a petition, complaining that the master, in taxing his bill, had taken into consideration matters not referred to him, & praying for leave to except to the certificate. It was objected that the solr. ought to have filed exceptions to the certificate, but the ct. overruled the objection.

Under the common order for taxing a solr.'s bill, the master is bound to take a general account of receipts & payments by the solr., as agent to the client.

This was not a case in which particular items were objected to, but the conduct of the master in taxing the bills was quarrelled with (*per* CUR.).—*RUSSEL v. BUCHANAN* (1838), 9 Sim. 167; 59 E. R. 322.

Annotations:—*Consd. Cooper v. Ewart* (1847), 2 Ph. 362. *Apprvd. Re Le Brasseur & Oakley*, [1896] 2 Ch. 487, C. A. *Reid. Ottey v. Pensam* (1842), 1 Hare, 322.

2392. —.]—*Re CONGREVE*, No. 2377, *ante*.

2393. —.]—The directions to the taxing officers of Hilary Vacation, 1834, do not apply to the costs of debts; though, where the master has exercised a sound discretion in taxing debt's costs, according to the scale there given, the ct. will not interfere.—*RICHARDSON v. KENSIT* (1843), 6 Man. & G. 712; 7 Scott, N. R. 455; 13 L. J. C. P. 17; 7 Jur. 1062; 134 E. R. 1070.

2394. —.]—Two solr.'s, A. & B., dissolved partnership, & it was agreed that B. should be entitled to half the profits of a suit instituted by them. After some time, an order was made, by consent of both, for the taxation of the costs down to the date. Some of the costs had, unknown to B., been already taxed & received by A.:—*Held*: under the circumstances the order comprised all such costs, & the previous costs having been omitted in the master's certificate, the ct., upon a petition, to review the taxation, referred the matter back to the master.—*Re BAKER, GREENWOOD v. CHURCHILL* (1851), 14 Beav. 160; 18 L. T. O. S. 31; 51 E. R. 248.

2395. —.]—*Re CATLIN*, No. 2423, *post*.

2396. —.]—*R. v. SWABEY*, No. 2426, *post*.

2397. —.]—The ct. will not interfere with the taxation of costs, except to correct some error of principle into which the master may have fallen; therefore, where a rule for a new trial directed that the costs of the first trial should be paid by pltf., unless the second should have a certain event, & debt. had thereupon paid the debt under a judge's order which referred the costs to the "Court":—*Held*: this must be taken to mean the "Court" by its proper officer, & the taxation must go to the master without any further direction, under the rule already made.—*BURTON v. BURTON* (1860), 29 L. J. Ex. 291.

2398. —.]—The ct. will not interfere with the discretion of the registrar in respect of parti-

cular items allowed or disallowed on taxation, unless it can be shown that the taxation proceeded on an erroneous principle.—*COOKE v. COOKE* (1864), 3 Sw. & Tr. 374; 33 L. J. P. M. & A. 79; 10 L. T. 141; 164 E. R. 1320.

2399. ———.]—*SEYMOUR v. SAUNDERS*, No. 2371, *ante*.

2400. ———.]—*Re JOHNSTON, MILLS v. JOHNSTON*, No. 2305, *ante*.

2401. ———.]—*SLINGSBY v. A.-G.*, No. 1483, *ante*.

2402. Taxation in absence of material party.]—If a party, inadvertently, does not attend a taxation, the ct., if the master state that items might have been taken off by the presence of the party will order him to review his taxation.—*ANON.* (1822), 1 L. J. O. S. K. B. 56.

2403. ———.]—*Re FUNSTON, Ex p. PALMER* (1825), 2 Gl. & J. 34.

2404. ———.]—Before the orders in bkpcy. of 1852 came into operation the registrar of a district ct. taxed the bills of the solrs. to the assignees without any one attending on their behalf & a small payment was made on account of the bill. Two years afterwards the assigners applied to the commissioner for a relaxation on the grounds of extravagant charges in that they had only recently become aware of the contents of the bill:—*Held*: the commissioner ought under the then existing law to have reviewed the taxation.—*Re BURBURY, Ex p. BATEMAN* (1853), 5 De G. M. & G. 358; 2 Eq. Rep. 11; 23 L. T. O. S. 181; 18 Jur. 455; 2 W. R. 24; 43 E. R. 909; *sub nom. Re BARBARY, Ex p. BATEMAN*, 23 L. J. Bcy. 8, L. JJ.

Annotation:—*Mentd. Bettelcy v. Stainsby* (1862), 9 Jur. N. S. 440.

2405. Where solicitor unqualified.]—After plffs.' costs had been taxed & paid, it was discovered that their agent in the cause had never been admitted as a solr.; & an order was thereupon made that the master should review his taxation, & disallow all such items as did not consist of fees paid to the clerk in ct., with a view to having them refunded.—*COATES v. HAWKYARD* (1831), 1 Russ. & M. 746; 39 E. R. 286.

Annotation:—*Reid. Gordon v. Dalzell* (1852), 15 Beav. 351.

2406. ———.]—Where, after the taxation of the costs of one of the parties of the cause, it appeared that the name of the individual who had acted as his attorney in the suit was not upon the roll of attorneys, this ct. refused a rule to review the taxation, although some of the items allowed by the master were charges for attendances by such pretended attorney.—*COLES v. HAYMAN* (1844), 8 Jur. 495.

2407. On master's findings of fact.]—*ALSOP v. OXFORD (LORD)*, No. 2390, *ante*.

2408. That work done useless.]—Where a debt. obtains an order for the taxation of an attorney's bill, with the usual undertaking to pay what shall be found to be due, the ct. will not permit him to dispute his liability on the ground that the work done was useless.—*WALKER v. ROGERS* (1836), 5 L. J. Ex. 249.

2409. After transcript of record to Court of Appeal.]—(1) This ct. will not entertain an application to review the taxation of costs, after a transcript of the record has gone to the ct. of error.

(2) The ct. will not order a taxation to be reviewed, where the amount alleged to have been improperly allowed is less than 40s.—*NEWTON v. BOODLE* (1847), 4 C. B. 359; 9 L. T. O. S. 127; 136 E. R. 545.

Annotations:—*As to* (2) *N.F. Re Lewis* (1904), 49 Sol. Jo. 54. *Generally, Reid. Clarkson v. Waterhouse* (1860), 2 Sw. & Tr. 378; *Morris v. Freeman* (1878), 3 P. D. 65.

2410. After further reconsideration by master—Same conclusion arrived at.]—Acting upon the rule laid down in the preceding cases, where the master had been directed to review his taxation as to the disallowance, as between attorney & client, of the expenses of plff.'s attorney for attending at the trial (in London), & he had reconsidered the matter & again disallowed the charge, considering that it had not been sufficiently sustained, the ct. refused a rule directing him again to review his taxation.—*POBJOY v. RICH* (1857), 27 L. J. Ex. 10.

2411. Where retainer revoked.]—Where the taxing master had disallowed certain charges in the bill of the solr. appointed by the assignees, incurred in connection with the bkpcy., & it appeared that before these costs were incurred he had been discharged by the assignees by notice under their hand, the comr. refused to make an order for the master to review his taxation.—*Re HARDING, Ex p. TOWNE* (1859), 32 L. T. O. S. 303.

2412. ——— Coming of age of infant.]—On a motion to review the taxation of a bill of costs commenced during a client's minority, it was granted accordingly, on the ground that a continued employment when of age, might, under circumstances, amount to an undertaking to pay the prior bill.—*GUY v. BURGESS* (1803), 1 Smith, K. B. 117.

2413. ———.]—*Re SALMOND, RYDON v. WILLIAMS*, No. 2308, *ante*.

2414. Material insufficient for exercise of discretion.]—*SLINGSBY v. A.-G.*, No. 1483, *ante*.

ii. Appeals against Quantum.

2415. Whether order made.]—Exceptions do not lie to a master's report of costs, nor can there be a retaxation in respect of mere quantum; but on a special case made by petition, either of irregularity in the proceedings, or that the master, in his taxation, acted upon a mistaken principle, the ct. will interfere.—*FENTON v. CRICKETT* (1818), 3 Madd. 496; 56 E. R. 587.

Annotations:—*Consd. Bussel v. Buchanan* (1838), 2 Sim. 167. *Reid. McIntosh v. G. W. Ry.* (1865), 13 L. T. 84.

2416. ———.]—*ALSOP v. OXFORD (LORD)*, No. 2390, *ante*.

2417. ———.]—The ct. will not interfere where an objection is made to the quantum allowed by the master, in his taxation of a solr.'s bill.

PART VI. SECT. 5, SUB-SECT. 11.— D. (b) i.

2402 i. Taxation in absence of material party.]—A revision was granted, as debt.'s attorney was not present at the taxation, & some of the items were questionable.—*HALFPENNY v. KELLY* (1850), 1 C. L. Ch. 174.—*CAN.*

2402 ii. ———.]—*EASTMAN v. EASTMAN* (1867), 2 Ch. Ch. 325.—*CAN.*

2407 i. On master's findings of fact.]—*Re BEST & BEST*, [1915] 11 L. R. 58.—*IR.*

a. On proof of special circumstances.]—Where a bill has been taxed it will not again be referred, even with

other or subsequent costs, except on proof of special circumstances.—*BELL v. WRIGHT*, 2 Ch. Ch. 96.—*CAN.*

r. ——— Exorbitant charges.]—Rules 447–449 O. J. Act, are not necessarily applicable to a taxation had under 48 Vict. c. 13, s. 22, & where upon a taxation by a local officer these rules had not been complied with by the party objecting to the taxation, a revision was nevertheless ordered, the ct. thinking the bill so exorbitant as to show special circumstances.—*SNIDER v. SNIDER, SNIDER v. ORR* (1885), 11 P. R. 140.—*CAN.*

t. Where contradictory affidavits of disbursements.]—A revision of taxation was ordered on contradictory affidavits as to the payments sworn to in the affidavit of disbursements.—*SMITH v. MCKAY* (1853), 1 P. R. 178.—*CAN.*

PART VI. SECT. 5, SUB-SECT. 11.— D. (b) ii.

2415 i. Whether order made.]—A retaxation will not be ordered unless improper charges are specified & established.—*EASTMAN v. EASTMAN* (1867), 2 Ch. Ch. 325.—*CAN.*

Sect. 5.—Taxation of costs: Sub-sect. 11, D. (b) ii.; sub-sect. 12. Sect. 6: Sub-sects. 1 & 2, A.

The master having taxed a solr.'s bill, the client presented a petition, stating a rule, that in the taxation of bills there was a distinction in the amount allowed for attendances by solrs., & those by their clerks; that, for a number of attendances which had been made by the solr.'s clerk, the master had allowed the same amount as if they had been made by the solr. himself, & prayed liberty to except to the master's report, & for a retaxation. The ct., considering this a mere question of quantum, refused the application, with costs.—*STOCKEN v. DAWSON* (1836), 5 L. J. Ch. 123.

2418. —.]—The master having on taxation disallowed half the costs of preparing briefs, on the ground that pltf.'s attorney had prepared them with unnecessary haste. The ct. declined to interfere.—*BUCKNALL v. BOYDELL* (1839), 7 Scott, 171.

2419. —.]—Where, in a bill of costs, delivered pursuant to 37 Geo. 3, c. 90, several charges of a discretionary nature were entered, some too low & some too high, the latter of which the master, on taxation, reduced to their proper amount, but refused to raise the former to theirs, the ct. refused to review the taxation.—*EYRE v. SHELLEY* (1841), 8 M. & W. 154; 1 Dowl. N. S. 83; 10 L. J. Ex. 295; 5 Jur. 439; 151 E. R. 989.

2420. —.]—Where the master has disallowed certain costs on taxation between party & party, as being unnecessarily incurred, & the attorney afterwards sues his client for the same costs, which are again disallowed on taxation, the ct. will not inquire into the propriety of the master's decision.—*WILLIAMS v. NICHOLAS* (1842), 1 Dowl. N. S. 841; 6 Jur. 838; *sub nom.* *NICHOLS v. WILLIAMS*, 11 L. J. Q. B. 190.

2421. —.]—When by the taxation of an item it is simply reduced, the question being one of amount only, the taxation will not be disturbed.—*Re PRICE* (1845), as reported in 6 L. T. O. S. 343.

2422. —.]—*NEWTON v. BOODLE*, No. 2409, *ante*.

2423. —.]—The ct. will only determine questions on items in a bill of costs, which involve some principle, & not those relating to quantum only.—*Re CATLIN* (1854), 18 Beav. 508; 52 E. R. 200.

Annotations:—Apprvd. In the Estate of Ogilvie, Ogilvie v. Massey, [1910] P. 243. *Consd. Slingsby v. A.-G.*, [1918] P. 236. *Refd. McIntosh v. G. W. Ry.* (1865), 13 L. T. 84; *Re Morgan*, [1915] 1 Ch. 182.

2424. —.]—*Re Moss* (No. 2), No. 1251, *ante*.

2425. —.]—A petition of a solr. to review the taxing master's decision, as to specified items of charges for conferences, some of which had been reduced & others wholly disallowed, was dismissed with costs, the ct. declining to enter into the merits of such matters.—*Re HUBBARD* (No. 2) (1857), 23 Beav. 481; 53 E. R. 189.

2426. —.]—We do not interfere with the master's discretion as to particular items; the ct. will only interpose to lay down a rule where some principle is involved (*per CUR.*).—*R. v. SWABEY* (1859), 32 L. T. O. S. 285.

2427. —.]—*COOKE v. COOKE*, No. 2398, *ante*.

2428. —.]—*Re BROWN*, No. 1745, *ante*.

2429. —.]—*WORSLEY v. LABOUCHERE* (1893), 28 L. Jo. 879, D. C.

2430. —.]—As a general rule the ct. will not interfere with the decision of the taxing registrar upon a mere question of quantum.—*In the Estate of OGILVIE, OGILVIE v. MASSEY*, [1910] P. 243; 79 L. J. P. 113; 103 L. T. 154, C. A.

Annotations:—Apld. Bruty v. Edmundson, [1917] 2 Ch. 285; *Slingsby v. A.-G.*, [1918] P. 236.

2431. —.]—I cannot see any sufficient material for holding that the master has proceeded upon a wrong principle & if no question of principle is involved his decision on the quantum of such an item is conclusive (*EVE, J.*).—*BRUTY v. EDMUNDSON*, [1917] 2 Ch. 285; 86 L. J. Ch. 677; 61 Sol. Jo. 694; *on appeal*, [1918] 1 Ch. 112, C. A.

SUB-SECT. 12.—APPEAL.

2432. Whether appeal lies—From refusal of master to tax—Ambiguity in judgment—With reference to costs.—Where there is an ambiguity in the terms of a judgment with reference to costs, & the master refuses to tax the costs of one of the parties, the proper course is to apply to the judge who tried the cause to correct the ambiguity, & not to appeal against such refusal.—*ABBOTT v. ANDREWS* (1882), 8 Q. B. D. 648; 51 L. J. Q. B. 641; 30 W. R. 779, D. C.

2433. —.]—**To Court of Appeal—In respect of order to review.**—The master having taxed the attorney's bill, allowing him costs out of pocket only, a summons was taken out & heard before a judge at chambers, who directed the taxation to be as for costs out of pocket. Subsequently another summons to review the taxation was taken out, & heard before the same judge, who dismissed it:—*Held*: the attorney had a right to appeal from this decision to the ct.—*Re STRETTON* (1845), 14 M. & W. 806; 3 Dow. & L. 278; 15 L. J. Ex. 16; 153 E. R. 701.

2434. —.]—*DURELL v. KEARNS* (1851), 17 L. T. O. S. 66, 100.

2435. —.]—A summons for a review of taxation of a solr.'s bill of costs is a "matter of practice & procedure," in respect of which an appeal from a judge in chambers lies to the Ct. of Appeal, under Jud. Act, 1894 (c. 16), s. 1 (4), & not to a Div. Ct. under sub-sect. 5 or R. S. C., Ord. 54, r. 23.—*Re ODDY*, [1895] 1 Q. B. 392; 64 L. J. Q. B. 123; 71 L. T. 861; 43 W. R. 363; 39 Sol. Jo. 133; 14 R. 387, C. A.

Annotations:—Expld. Re Jackson, [1915] 1 K. B. 371. *Refd. Re A Debtor* (1906), 96 L. T. 131.

2436. —.]—**Necessary for leave.**—An order dismissing a summons to review the taxation of a solr.'s bill of costs under Solicitors Act, 1843 (c. 73), is not final, but interlocutory, & leave to appeal from such an order is necessary under Jud. Act, 1894 (c. 16).—*Re JEROME*, [1907] 2 Ch. 145; 76 L. J. Ch. 432; 96 L. T. 866; 51 Sol. Jo. 485, C. A.

2437. —.]—**From order for taxation.**—*SHIRREFF v. GRESLEY (LADY)*, No. 2236, *ante*.

2438. —.]—Where a solr. delivers to his client a bill of costs for work done in the

PART VI. SECT. 5, SUB-SECT. 12.

2433 i. Whether appeal lies—To Court of Appeal—In respect of order to review.—An order of a district ct. judge dismissing a motion for a review of the taxation of costs on an inter-

pleader issue as to the ownership of certain moneys is an interlocutory order within District Courts Act, 1920, c. 40, s. 56 (1) (a), & therefore an appeal therefrom does not lie to the Ct. of Appeal.—*BEVER LUMBER CO. v. CAIN*,

[1924] 4 D. L. R. 438; [1924] 3 W. W. R. 332; 19 Sask. L. R. 12.—CAN. a. *From refusal of master to stay execution pending appeal.*—*O'DONOHUE v. WHITTY* (1882), 9 P. R. 361.—CAN.

conduct of an action an order made by a judge at chambers for the taxation of the bill is a "matter of practice & procedure," & an appeal from such an order lies direct to the Ct. of Appeal.—*Re WINGFIELDS*, [1923] 2 K. B. 112; 92 L. J. K. B. 781; 129 L. T. 522, C. A.

2439. ——— **Effect of delay.**—*KEIR v. LEEMAN* (1845), 5 L. T. O. S. 171.

SECT. 6.—COSTS OF TAXATION—THE ONE-SIXTH RULE.

SUB-SECT. 1.—IN GENERAL.

2440. Rule not abrogated by Judicature Act—Or R. S. C., Ord. 65.—*Re CARTHEW, Re PAUL*, No. 1646, *ante*.

2441. Application only between solicitor & client.—Where the pltf.'s attorney, in an arrangement with deft., exacted from him the payment of costs as between attorney & client; & the bill was reduced on taxation from £27 to £9:—*Held*: it was not a case within the 2 Geo. 2, c. 23, in which the attorney could be ordered to pay the costs of the taxation.

Nor would the ct. introduce a precedent by exercising their jurisdiction, independent of the Act, over the attorney as one of their own officers.—*SUTCLIFFE v. CLEGG* (1830), 8 L. J. O. S. K. B. 280.

2442. Petition for costs of taxation after order for taxation—Necessity for certificate of master.—When an order has been made for the taxation of the solr.'s bill of costs; *semble*, a subsequent petition for the costs of the taxation cannot be heard, until the master has made his certificate, nor unless the original petition is also set down in the paper.—*Re JOYNER, Ex p. ELSEE* (1832), 2 Deac. & Ch. 332.

2443. How application made—In chambers.—Application for the costs of taxation of an attorney's bill of costs may be made before a judge at chambers.—*SYKES v. MACLISE* (1838), 1 Will. Woll. & H. 346.

2444. When security must be given—By client resident abroad.—Where a client, resident abroad, applies for the taxation of his solr.'s bill of costs, on his undertaking to pay, he must give security for the costs of the proceeding.—*Re PASSMORE* (1839), 1 Beav. 94; 48 E. R. 874; *sub nom. Re PASSMORE*, 8 L. J. Ch. 229.

2445. ———.—If a person out of the jurisdiction petitions for the taxation of his solr.'s bill, he must give security for the costs of the taxation, & also for the balance that may be found due from him.—*ANON.* (1841), 12 Sim. 262; 59 E. R. 1132.

Annotation:—*Reid. Re Dolman* (1847), 10 L. T. O. S. 262.

2446. Client giving false address.—*Re SMITH, Ex p. FOLEY*, No. 1672, *ante*.

2447. Certificate of taxation given by master—Subsequent order for costs of taxation—Validity—No application for relief from certificate.—A solr. was retained by A. B. & four other defts.; A. B. having withdrawn his retainer, the solr. delivered his bill against A. B. amounting to £19 19s. 6d. which was referred for taxation; the master, considering that A. B. was liable to one-fifth part only of several charges, struck off four-fifths thereof, & certified he had taxed the bill at £4 10s. 6d. The client then obtained an order of course for payment by the solr. of the costs of the taxation; a motion being made, on behalf of the solr., to discharge the latter order for irregularity, on the

ground that more than one-sixth had not been struck off within the rule, but no application being made to be relieved from the certificate, which warranted the second order, the motion was, on that ground, refused with costs.—*MUSKETT v. HILL* (1810), 3 Beav. 301; 49 E. R. 118.

Annotation:—*Reid. A.-G. v. Nethercoat* (1840), 3 Beav. 297.

2448. Power of judge to make second order for costs—Original order for taxation not mentioning costs of taxation.—Where an application has been made to a judge by a client, for an order to refer an attorney's bill to be taxed, & the judge omits to engraft thereon any clause respecting the payment of the costs of such taxation—it is not competent to him, or to any other learned judge, to make a second order to that effect. All applications under Solicitors Act, 1843 (c. 73), s. 37, must be entitled in the matter of the attorney; & though the application for the second order be made in the cause; yet the application to set aside that order must be entitled as the sect. directs.—*JONES v. JONES* (1844), 2 L. T. O. S. 331; 8 J. P. 412.

SUB-SECT. 2.—ASCERTAINMENT OF AMOUNT.

A. In General.

2449. Circumstances considered by court—Particulars of items.—Upon an application that the solr. may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the ct. will not enter into the particulars of the items of the bill.—*Re HUDSON, Ex p. MILLINGTON* (1835), 1 Deac. 114.

2450. ——— **Circumstances under which allocatur made.**—(1) On a rule *nisi* why an attorney should not pay the costs of taxation, more than one-sixth part having been taxed off his bill, the ct. will not re-open the master's allocatur unless there is a cross-motion to set it aside.

(2) However small the sum is beyond one-sixth, which is taken off in taxation, the attorney is equally liable.—*SWINBURN v. HEWITT* (1838), 7 Dowl. 314; 1 Will. Woll. & H. 413; 3 Jur. 10.

2451. ——— **Admission of affidavits.**—*LAURIE v. BARTLETT*, No. 2525, *post*.

2452. Allowance for additions.—A client of an attorney having applied to have the attorney's bill taxed, the master taxed off a certain amount, but deducted from this amount certain additions which he allowed to the bill. After this deduction, the sum taxed off was reduced to less than a sixth of the bill delivered. But, if the sum at first taxed off had been compared with the amount in the bill delivered, even augmented by the additions allowed, the deduction would have been more than one-sixth:—*Held*: the sum taxed off ought not to have been reduced by the addition allowed; & the costs of the taxation were to be paid by the attorney, under Solicitors Act, 1843 (c. 73), s. 37.

The proper course was to estimate the deductions by themselves, as constituting the sum taxed off, & not to reduce them by the addition made to the bill (*per CUR.*).—*R. v. EASTWOOD* (1856), 6 E. & B. 285; 119 E. R. 870; *sub nom. Re HARTLEY*, 2 Jur. N. S. 448.

Contents of bill of costs, generally.—See Sect. 4, sub-sect. 5, *ante*.

B. Disbursements.

2453. General rule.—*Re REMNANT*, No. 1533, *ante*.

2454. ———.—*Re MERCANTILE LIGHTERAGE CO., LTD.*, No. 1529, *ante*.

Sect. 6.—Costs of taxation—The one-sixth rule:
sect. 2, B., C., D. & E.; sub-sect. 3, A.]

2455. Whether included—When advanced by client.]—HINDLE v. SHACKLETON, No. 1554, *ante*.

2456. ———.]—HAYS v. TROTTER, No. 1543, *ante*.

2457. ———.]—An attorney employed to defend an action, & receiving from his client the debt & costs, for the purpose of being paid over to pltf., is not entitled to make that sum an item in his bill, so as to increase the amount of it.—WOOLLISON v. HODGSON (1834), 2 Dowl. 360; *subsequent proceedings*, 3 Dowl. 178.

*Annotations:—*Consd. Morris v. Parkison (1835), 3 Dowl. 744. *Distd. Re* Bedson (1845), 9 Beav. 5.

2458. ———.]—*Re* METCALFE, No. 1535, *ante*.

2459. ——— Extra fees for commissioners' travelling expenses.]—A solr. must pay the costs of the taxation of his bill reduced by the taxation more than one-sixth of the amount, which reduction arose from the master disallowing extra fees paid to the comrs. for travelling expenses.—*Re* INMAN, *Ex p.* INMAN, *Ex p.* WOOD (1817), Buck. 129.

2460. ——— Sum paid to proctor employed for client.]—FRANKLIN v. FEATHERSTONHAUGH, No. 1555, *ante*.

2461. ——— County allowance for witness's expenses.]—EDKINS v. JACKSON, No. 1556, *ante*.

2462. ——— Legacy duty.]—*Re* HAIGH, No. 1548, *ante*.

2463. ——— Stamps.]—*Re* HAIGH, No. 1548, *ante*.

2464. Necessity for distinguishing between disbursements & professional charges.]—*Re* REMNANT, No. 1533, *ante*.

2465. ———.]—*Re* MERCANTILE LIGHTERAGE CO., LTD., No. 1529, *ante*.

C. Items Wrongly Included.

2466. Items disallowed—Charges for work in which solicitor not employed.]—RIGBY v. EDWARDS (1820), Beames' Costs in Equity, 2nd ed., 255, L. C.; *reversd.*, 5 Madd. 20; 56 E. R. 801.

*Annotations:—*Consd. Pytches v. Revett (1821), Beames' Costs in Equity, 2nd ed. 257. *Folld.* Marshall v. Oxford (1832), 5 Sim. 456. *Refd.* *Re* Bracey (1845), 8 Beav. 266.

2467. ———.]—PYTCHES v. REVETT (1821), Beames' Costs in Equity, 2nd ed., 257, L. C.

*Annotation:—*Refd. Marshall v. Oxford (1832), 5 Sim. 456.

2468. ——— Client not liable for part disallowed.]—If, on a taxation of an attorney's bill, as between attorney & client, the master strike off a part of the charges, on the ground that the client is not the person liable for such part, the sum upon which the sixth is to be calculated, under 2 Geo. 2, c. 23, s. 23, is the original bill reduced by the part so disallowed; & the disallowance of such part is not a reduction upon taxation, within that clause.

Costs in a suit were taxed as between party & party, & the residue, after taxation, paid to the attorney of the successful party. The attorney afterwards delivered his bills to his client, under an order of ct. for such delivery, & for a general reference of the bills for taxation. They included, among other matters, the above costs as reduced, for which the attorney gave credit:—*Held*: he was entitled to insert the reduced, & not the original amount of costs, & on taxation of the bills, the client could not add the sum formerly

deducted from these costs to the sum taxed off from the general amount of the bills, in order to make the whole reduction exceed one-sixth of such amount.—MILLS v. REVERT (1834), 1 Ad. & El. 856; 3 Nev. & M. K. B. 767; 110 E. R. 1435.

*Annotation:—*Refd. Russell v. Yorke (1839), 7 Scott, 130.

2469. ———.]—Under Solicitors Act, items struck out of a bill of costs on taxation, as not chargeable against the person to whom the bill is delivered, must be taken into account in determining the costs of taxation.—*Re* CLARK (1851), 1 De G. M. & G. 43; 21 L. J. Ch. 20; 18 L. T. O. S. 130; 15 Jur. 1017; 42 E. R. 467, L. JJ.

*Annotations:—*Consd. *Re* Barrow (1853), 17 Beav. 547; *Re* Atkinson & Pilgrim (1858), 26 Beav. 151. *Refd.* *Re* Browne (1852), 21 L. J. Ch. 442.

2470. ——— Want of authority.]—(1) An application for the re-taxation of a solr.'s bill should be by petition, stating particularly the grounds of complaint, & not by motion.

(2) *Semble*: on taxation, charges disallowed for want of authority, & charges reduced by limiting to one of several debts, his aliquot part of a joint charge, ought not to be computed in determining on whom the costs of taxation should fall.—A.-G. v. NETHERCOAT (1840), 3 Beav. 297; 49 E. R. 116.

2471. ——— Items not properly chargeable against personal representatives.]—*Re* RUSSELL (1884), 19 Notes of Cases, 150.

2472. ———.]—A solr. had delivered to his client a bill of costs containing, among others, a charge which ought not to have been made. The client presented a petition for taxation & succeeded in reducing the bill by more than one-sixth. The items, other than the wrong charge, struck off or modified, did not amount to one-sixth of the bill, & the solr. sought to have the bill delivered to be taken as if the wrong item had not been inserted at all, by which means he would have escaped the costs of taxation; but his petition was refused with costs.—*Ex p.* BARLOW (1848), 12 L. T. O. S. 490.

2473. Claim against defendant on joint charge limited to aliquot part.]—A.-G. v. NETHERCOAT, No. 2470, *ante*.

D. Bill for Lump Sum.

2474. Whether one-sixth deducted on basis of lesser amount—Delivery of bill for lump sum.]—*Re* CARTHEW, *Re* PAULI, No. 1646, *ante*.

2475. ———.]—*Re* MACKENZIE, *Ex p.* SHORT, No. 2508, *post*.

2476. ———.]—Lessor's solrs. wrote a letter to lessee's solrs. stating the expenses of the lease at a lump sum of £7 11s. On application for items they furnished a document which they called "our bill," containing items amounting to £10 10s. 8d., but wrote at the foot of it "say £7 11s." The costs were taxed at £7 11s.:—*Held*: the letter stating the lump sum was the bill to be taxed, the so called "bill" of items being only explanatory, & the solrs. were entitled to the costs of the reference.—*Re* HELLARD & BEWES, [1896] 2 Ch. 229; 65 L. J. Ch. 550; 74 L. T. 457; 44 W. R. 475; 40 Sol. Jo. 461.

*Annotation:—*Refd. *Re* Webb, Still v. Webb, [1897] 1 Ch. 144.

2477. ——— Acceptance of sum less than sum allowed by master.]—This was a summons on

PART VI. SECT. 6, SUB-SECT. 2.—B.

2455.1. Whether included—When advanced by client.]—*Re* REES & DAY, *Ex p.* STEELE (1892), 11 N. Z. L. R. 419.—N.Z.

*b. Meaning of words "professional charges."—*The words "professional charges" in Ord. 65, r. 64 (40), mean professional charges properly so called, & so not include disbursements of any kind. The English practice to the con-

trary not followed.—CUNNINGHAM v. M'DONAGH, [1904] 2 I. R. 417.—IR.

PART VI. SECT. 6, SUB-SECT. 2.—D.

2474.1. Whether one-sixth deducted on basis of lesser amount—Delivery of bill

behalf of a client for review of taxation, & that the costs of taxation might be allowed to the client & disallowed to the solrs. The solrs. had paid themselves £20 out of money of their client in their hands in full discharge of their bill of costs. After this the client changed his solrs. & required a bill of costs, & obtained a common order to tax the costs of his former solrs. The bill was delivered to him, & soon after the solrs. moved the ct. to cancel the order, but the judge refused the motion. The bill delivered amounted to £26 8s. 3d. & was reduced on taxation to £20 16s. 7d., more than one-sixth being taxed off. The taxing master certified that the solrs. were entitled to all the costs of the taxation, on the ground that the sum allowed on taxation was greater than the sum accepted by the solrs. in full discharge:—*Held*: (1) one-sixth having been taxed off the bill, the solrs. were not entitled to the costs of the taxation; (2) no benefit having resulted from the taxation, no costs of the taxation would be allowed on either side, & no costs of the summons.—*Re ELWES & TURNER* (1888), 58 L. T. 580.

E. Several Bills.

2478. Whether total amount considered.]—An order was made for the taxation of four several bills of a solr. for various business done for the same assignee, under which more than a sixth part was taken off the gross amount of the four bills, but not off the amount of every one of the bills:—*Held*: as all the bills were incurred by the same person, in the same right, there was no need for a separate order of taxation for each bill, & as more than a sixth was taken off from the whole amount, the solr. must pay the costs of taxation.—*Ex p. BARRETT* (1834), 3 Deac. & Ch. 731; 1 Mont. & A. 447, Ct. of R.

Annotation:—*Reid. Barton v. Pyne* (1812), 1 Haro, 493.

2479. —.]—*R. v. VARTY* (1814), 2 L. T. O. S. 368.

2480. —.]—*BEARDSAIL v. CHEETHAM*, No. 1446, *ante*.

SUB-SECT. 3.—LIABILITY TO PAY.

A. In General.

See Solicitors Act, 1843 (c. 73), ss. 37–39, 41.

2481. General rule.]—*Re REMNANT*, No. 1533, *ante*.

2482. Solicitor paying part of costs—Proceedings creating useless expense.]—Solr. allowed costs of taxation, the reduction of his bill being less than a sixth, charged with costs of proceedings before the master, creating useless expense.—*YEA v. FRERE* (1807), 14 Ves. 154; 33 E. R. 480.

Annotation:—*Reid. Barton v. Pyne* (1812), 1 Haro, 493.

2483. Each party paying own costs—Bill reduced by less than one-sixth—Credit allowed for sum making reduction more than one-sixth.]—On the taxation of deceased attorney's bill, in an action brought by his exors., who had acted improperly in other respects, instead of his surviving partner, the master having deducted less, but having allowed credit for a sum, which, with the deduction, amounted to more than a sixth; the court left each party to pay their own costs of the taxation.—*GALE v. PAKINGTON* (1825), M'Cle. & Yo. 354; 148 E. R. 450.

for lump sum.]—Where a lump sum was originally charged to a client, & on an order for taxation being obtained the solr. obtained leave to deliver a detailed bill, & did so showing charges much

exceeding the lump sum, but claiming only the lump sum, & on taxation more than one-sixth of the charges shown in the detailed bill was taxed off, but more was allowed than the lump

sum charged & claimed:—*Held*: the client must pay the costs of the taxation.—*Re BROWN* (1895), 14 N. Z. L. R. 8.—N.Z.

2484. No benefit resulting from taxation.]—

Re ELWES & TURNER, No. 2477, *ante*.

2485. Orders for taxation—Omission to insert submission of client to pay, what is found due—Effect of subsequent submission to taxation.]—Where in a judge's order referring an attorney's bill to be taxed under 2 Geo. 2, c. 23, s. 23, the usual submission of the client to pay what is found due was omitted, the ct. refused to refer it to the master to tax the costs of the taxation, more than one-sixth having been taxed off, even though the attorney had submitted, to the taxation, & a balance had been found due by him to the client.—*HOWARD v. GROOM* (1835), 4 Dowl. 21; 1 Har. & W. 355.

Annotations:—*Consd. Peters v. Sheehan* (1842), 10 M. & W. 213; "*Howard v. Groom*, must be considered as being overruled since the case of *Williams v. Griffith*, 6 M. & W. 32" (ALDERSON, B.). *Reid. Russell v. Yorke* (1839), 7 Scott, 130; *Doe d. Goodland v. Frankland* (1843), 12 L. J. Q. B. 249.

2486. — No direction to master as to costs of reference—Reservation of questions as to disputed items.]—A judge's order to tax an attorney's bill, contained a clause reserving to the client the right to dispute his liability, on the ground of want of retainer & of negligence, & directed the master to tax the items disputed on the latter ground separately. It contained no direction to the master to tax the costs of the reference as required by Solicitors Act, 1843 (c. 73), s. 37. The master having taxed off less than a sixth of the whole bill, & having taxed the attorney the costs of the reference:—*Held*: the client was liable for the costs of the taxation, whatever might be the event of the questions so reserved.—*Re SHAW* (1851), 2 L. M. & P. 214; 20 L. J. Q. B. 280.

2487. — Right of party to apply subsequently for order for costs.]—Solrs. who had acted for trustees in the administration of a trust estate, & had delivered their bills of costs to the trustees, who desired to have the bills taxed under an order for taxation providing for the payment by the solrs. of the costs of the reference if more than one-sixth of the amount of the bills was taxed off, presented a petition in the names of the trustees for the taxation of the bills indorsed with their, the solrs., consent, & obtained an order of course by consent in the form given in *Seton's Judgments & Orders*, 6th edit., vol. I., p. 269, which provides that the taxing master is to tax the costs of the reference & certify the amount thereof, & whether more than one-sixth of the amount of the bills has been taxed off, but contains no order for payment by either party of the costs of the reference. The trustees were represented at the taxation by a separate solr., who attended on two occasions, upon which more than one-sixth of the amount of the bills was provisionally disallowed.

The question as to the payment of the costs of the taxation was then raised, & the trustees moved for an order for taxation under Solicitors Act, 1843 (c. 73), s. 37, providing that if the bills when taxed should be less by a sixth part than the bills as delivered, the solrs. should pay the costs of the taxation:—*Held*: the order for taxation obtained by the solrs. left it open, when the taxing master had taxed & certified, for either party to apply for & obtain an order, that the other party should pay the costs of the taxa-

Sect. 6.—Costs of taxation—The one-sixth rule: Sub-sect. 3, A., B. & C.]

tion, & did not give the solrs. their right to their costs of the taxation in any event.—*Re BURN & BERRIDGE* (1908), 99 L. T. 606.

2488. Effect of non-attendance of party.]—*Exp. Woollett*, No. 2540, *post*.

2489. — What constitutes attendance—Letters to taxing master.]—Solrs. proceeding under the common order for taxation, which is in accordance with Solicitors Act, 1843 (c. 73), s. 37, must pay the costs of reference if the party chargeable does not attend the taxation. A person does not attend by writing letters to the taxing master.—*Re UPPERTON* (1882), 30 W. R. 840.

2490. Effect of Judicature Acts.]—*Re Carthew*, *Re Paull*, No. 1646, *ante*.

2491. Effect of R. S. C., Ord. 65.]—*Re Carthew*, *Re Paull*, No. 1646, *ante*.

B. Bill Reduced by One-Sixth or More.

See Solicitors Act, 1843 (c. 73), ss. 37–39, 41.

2492. Whether court has a discretion.]—Where an attorney's bill is reduced on taxation by a sixth part, the client is entitled to the costs of taxation. They are not in the discretion of the ct.—*Higgins v. Woolcott* (1826), 5 B. & C. 760; 108 E. R. 283; *sub nom.* *Dickens v. Woolcot*, 8 Dow. & Ry. K. B. 589.

Annotation :—*Consd.* *Morris v. Parkinson* (1835), 5 Tyr. 772.

Special circumstances.]—*See* Nos. 2506–2510, *post*.

2493. Whether solicitor or client liable.]—*Higgins v. Woolcott*, No. 2492, *ante*.

2494. —.]—In a suit for the administration of the estate of testator, a solr. carried in a claim for his bills of costs, which, on taxation, were reduced by more than one-sixth:—*Held*: the solr. ought to pay the costs of the taxation.—*Silvertop v. Ramsay* (1838), 1 Beav. 434; 48 E. R. 1008.

Annotation :—*Consd.* *Barton v. Pyne* (1812), 1 Hare, 493.

2495. —.]—On the taxation of an attorney's bill as between attorney & client, more than one-sixth of the amount was struck off in consequence of all charges being disallowed previous to July 15, 1837, when Solicitors Act, 1837 (c. 56), came into operation, by reason of the attorney not having been an attorney of this ct.:—*Held*: the attorney was liable to pay the costs of taxation, under 2 Geo. 2, c. 23, s. 23.—*Newton v. Harland* (1841), 2 Man. & G. 886; 9 Dowl. 641; *Drinkwater*, 213; 3 Scott, N. R. 230; Woll. 203; 10 L. J. C. P. 227; 133 E. R. 1003.

Annotation :—*Refd.* *Wise v. Newton* (1846), 7 L. T. O. S. 138.

2496. —.]—*Re Carew* (1845), 5 L. T. O. S. 142.

2497. —.]—*Re Carthew*, *Re Paull*, No. 1646, *ante*.

2498. — Deduction due to whole branch of costs being disallowed.]—An attorney is not liable to pay the costs of taxing his bill, under the stat. 2 Geo. 3, c. 23, s. 23, where the deduction of one-sixth is occasioned, not by the particular

items being taxed, but by a whole branch of it being disallowed.—*White v. Milner* (1794), 2 Hy. Bl. 357; 126 E. R. 593.

Annotations :—*Expld.* *Rigby v. Edwards* (1820), 5 Madd. 20. *Folld.* *Pytches v. Revett* (1821), Beames' Costs in Equity, 2nd ed. p. 257. *Apld.* *Mills v. Revett* (1834), 1 Ad. & El. 856. *Expld.* *Morris v. Parkinson* (1835), 2 Cr. M. & R. 178. *Distd.* *Newton v. Harland* (1841), 2 Man. & G. 886; *Re Clark* (1851), 13 Beav. 173.

2499. —.]—Where the master on taxation decided that one of the actions in which the costs had been incurred, had been improperly brought, & disallowed those costs, by which more than one-sixth of the bill was taken off:—*Held*: the attorney was bound to pay the costs of taxation.—*Morris v. Parkinson* (1835), 2 Cr. M. & R. 178; 3 Dowl. 744; 1 Gale, 160; 5 Tyr. 772; 4 L. J. Ex. 220; 150 E. R. 77.

Annotation :—*Folld.* *Newton v. Harland* (1841), 2 Man. & G. 886.

2500. — Plaintiff's solicitor obtaining costs from defendant.]—*Sutcliffe v. Clegg*, No. 2441, *ante*.

2501. — Defendant undertaking to pay plaintiff's costs on compromise of action.]—*Sadler v. Palfreyman*, *Chambers v. Sadler*, No. 1760, *ante*.

2502. — Unnecessary payment of additional sum to other party's solicitor.]—Where a writ was indorsed pursuant to 2 Reg. Gen. H. T., 1831, with a certain amount of debt & costs, & that amount, together with 5s. more was paid within the four days prescribed by the rule, & more than one-sixth of the costs, including the 5s., was disallowed on taxation:—*Held*: not within the rule, & debt. was not entitled to the costs of taxation under it.

There was no necessity to pay the 5s., for pltf. would have proceeded at his peril, after the payment of the debt & costs claimed by the indorsement on the process. I think the meaning of the clause in the rule is merely, that debt. may have the costs taxed notwithstanding such payment (*Coleridge, J.*).—*Ward v. Gregg* (1837), 5 Dowl. 729; Will. Woll. & Dav. 351.

Annotation :—*Consd.* *Flatau v. Cullen* (1899), 81 L. T. 402.

2503. — Trifling excess over sixth.]—*Swinburn v. Hewitt*, No. 2450, *ante*.

2504. — Proceeding upon unsigned bill—Signature waived.]—Where on a reference of an attorney's bill to taxation, the parties agree to waive the delivery of a signed bill, *prima facie* they waive the operation of 2 Geo. 2, c. 23, as to payment of the costs of taxation.—*Gerrard v. Arnold* (1838), 6 Dowl. 336; 1 Horn & H. 18; 2 Jur. 112.

Annotations :—*Consd.* *Peters v. Sheehan* (1842), 10 M. & W. 213. *Refd.* *Russell v. Yorke* (1839), 7 Scott, 130.

2505. — Solicitor agreeing to or acting upon order for taxation.]—Where an attorney has agreed to, or acted upon, an order for the taxation of his unsigned bill, the ct. has authority to order him to pay the costs of the taxation, if more than one-sixth be taxed off.—*Peters v. Sheehan* (1842), 10 M. & W. 213; 1 Dowl. N. S. 943; 12 L. J. Ex. 177; 6 Jur. 739; 152 E. R. 446.

Annotation :—*Apld.* *Re Pender* (1846), 2 Ph. 69.

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c. Whether solicitor or client liable—Offer by solicitor to reduce bill—Whether one-sixth to be deducted on basis of original bill.]—Where a solr. offered to make a deduction from his bill, the ct. held that the master should not charge the solr. with the costs of taxation unless the bill had been reduced one-sixth independently of the voluntary deduction.—*Re Freeman*, *Cragie & Proudfoot* (1861), 1 Ch. Ch. 102.—*CAN.*

d. —.]—*Re Cameron* (1889), 13 P. R. 173.—*CAN.*

e. — Abandonment of item—Whether one-sixth to be deducted on basis of original bill.]—Where one item had been abandoned by an attorney after a summons taken out for the taxation, but before actual taxation, & one-sixth was afterwards struck off the whole bill, including such item:—*Held*: the attorney was properly ordered to pay the costs of taxation.—*Re Davy* (1869), 5 P. R. 55.—*CAN.*

f. —.]—Where an attorney obtains leave to amend his bill after taxation commenced, it is improper to strike out any items in the bill. The charges alleged to be omitted should be added, & if one-sixth be taxed off the bill as amended, the attorney must pay the costs.—*Re Martin* (1877), 7 P. R. 90.—*CAN.*

g. — Attendance of client at taxation immaterial.]—Under Legal Professions Act, s. 79, as to the payment of the costs of a reference for

2506. — Discretion of court—Special circumstances.]—In a suit against a solr. for an account, in the taking of which the bills of costs of the deft. are taxed, & reduced more than one-sixth in amount, the ct. has jurisdiction to give or withhold the costs of taxation, according to the circumstances & justice of the case.

The ct., by analogy to the rule which 2 Geo. 2, c. 23, lays down, throws upon the solr. the costs of the taxation, where his bill is reduced by more than one-sixth of the amount (WIGRAM, V.-C.). —BARTON v. PYNE (1842), 1 Hare, 493; 66 E. R. 1126.

2507. — — — — —.]—*Re* CARTHEW, *Re* PAULL, No. 1646, *ante*.

2508. — — — — —.]—Solrs. sent in a bill of costs for £44 2s. 8d. & there was added at the foot, "By allowance, £7 2s. 8d." The taxing master disallowed £10 19s. 4d. from the bill, but stated in his certificate that he treated the bill as one for £37, as he considered the £7 2s. 8d. allowance to be unconditional: & he certified under Solicitors Act, 1843 (c. 73), s. 37, that in his opinion the solrs. were entitled to the costs of taxation:—*Held*: the bill was properly taxable on £44 2s. 8d. & further the facts were sufficient to justify the discretion exercised by the ct. below in allowing the solrs. the costs of the taxation.—*Re* MACKENZIE, *Ex p.* SHORT (1893), 69 L. T. 751; 41 W. R. 530; 37 Sol. Jo. 480; 2 R. 478, C. A.

2509. — — — — —.]—*Re* LEWIS (1904), 49 Sol. Jo. 54.

2510. — — — — —.]—Where the effect of a taxation of a bill of costs under Solicitors Act, 1843 (c. 73), s. 37, is to reduce the bill by a sixth part or more of the total amount, & the taxing master certifies specially any circumstances relating to the bill or taxation, the discretion of the ct. to make an order as to the costs of the taxation not in accordance with the one-sixth rule may be exercised in favour of either the solr. or the client.

In his bill of costs as delivered a solr. entered in the disbursements column certain counsel's fees. These fees had been paid by cheques of the client, but the cheques had been returned by counsel to the solr., who had sent them back to the client. In one instance there was a note in the bill that the cheque had been returned by counsel, but in no case was the client credited with the amount in the bill, although in a cash account delivered with the bill the amounts were all credited to the client. The result of the taxation was that a little more than one-sixth of the total amount of the bill was taxed off, & the taxing officer taxed the costs of the reference payable to the client, but specially certified the circumstances & stated that if he had been at liberty to strike out the counsel's fees the effect would have been that less than one-sixth would have been taxed off. The insertion of the fees was by a blunder of the solr. or his clerk. The solr. applied, on the special circumstances certified that the taxing master should be directed to tax the costs of the taxation payable to the solr. instead

of to the client, & that the certificate should be varied accordingly:—*Held*: the costs of the taxation must be borne by the client, but the solr. must pay the costs of the client of the application to the ct. as between solr. & client.—*Re* RICHARDS, [1912] 1 Ch. 49; 81 L. J. Ch. 165; 105 L. T. 750; *sub nom.* *Re* R., 56 Sol. Jo. 74.

— Effect of proceedings for recovery of costs—Order obtained after commencement of action.]—*See* Nos. 2534–2541, *post*.

— Action for account.]—*See* Nos. 2546, 2547, *post*.

C. Bill Reduced by Less than One-Sixth.

See Solicitors Act, 1843 (c. 73), ss. 37–39, 41.

2511. Whether solicitor or client liable.]—Costs ordered the attorney on taxing his bill, a sixth part not being taken off.—*HIRST v. DIXON* (1732), Cooke, Pr. Cas. 78; 125 E. R. 908.

2512. — — — — —.]—*Re* SHAW, No. 2486, *ante*.

2513. — — — — —.]—*Re* BURN & BERRIDGE, No. 2487, *ante*.

2514. — Discretion of court.]—*BARKER v. LONDON (BP.)* (1755), Barnes, 147; 94 E. R. 849.

Annotation:—*Appld.* *Baker v. Wills* (1831), 4 Tyr. 279.

2515. — — — — —.]—Where less than one-sixth has been taxed off an attorney's bill under 2 Geo. 2, c. 23, s. 23, the ct. is bound to exercise their discretion as to allowing the attorney the costs of taxation, according to the reasonableness of the bill.—*RUSSELL v. YORKE* (1839), 1 Arn. 507; 7 Scott, 130; 8 L. J. C. P. 135; 3 Jur. 74.

2516. — — — — —.]—*CARPENTER v. CALVERT*, No. 2556, *post*.

2517. — — — — — Bill reduced by nearly one-sixth.]—Where nearly a sixth was taken off an attorney's bill upon taxation the ct. refused to allow him the costs of taxation.—*ELWOOD v. PEARCE* (1831), 8 Bing. 83; 1 Dowl. 251; 1 Moo. & S. 159; 1 L. J. C. P. 41; 131 E. R. 332.

Annotations:—*Consd.* *Baker v. Wills* (1834), 2 Cr. & M. 415. *Appld.* *Davidson v. Allen* (1840), 8 Dowl. 673; *Hodge v. Bird* (1844), 6 Man. & G. 1020. *Refd.* *Holderness v. Barkworth* (1838), 3 M. & W. 311.

2518. — — — — —.]—Where less than a sixth part of an attorney's bill is taken off on taxation, it is discretionary with the ct. to allow him the costs of taxation; & where a sum amounting very nearly to a sixth part was taken off on taxation, the ct. refused to do so.—*BAKER v. WILLS* (1834), 2 Cr. & M. 415; 4 Tyr. 279; 149 E. R. 822; *sub nom.* *BAKER v. MILLS*, 2 Dowl. 382; 3 L. J. Ex. 92.

Annotation:—*Refd.* *Russell v. Yorke* (1839), 7 Scott, 130.

2519. — — — — —.]—This ct. will not compel the client to pay the costs of taxation of an attorney's bill when the amount taxed off approaches to one-sixth of the total amount of the bill.—*DAVIDSON v. ALLEN* (1840), 8 Dowl. 673; 4 Jur. 859.

2520. — — — — — Charges made bonâ fide.]—The ct. disallowed an attorney his costs of taxation under 2 Geo. 2, c. 23, s. 23, where his bill had been reduced by nearly one-sixth, £20 18s. 4d. being taken off a bill of £160 18s. 2d. though the charges

taxation of a solr.'s bill, where one-sixth is taxed off the bill, the solr. must pay the costs of the reference, no matter whether the client attends upon the taxation or not.—*Re* SOLICITOR (B. C.) (1913), 25 W. L. R. 433; 14 D. L. R. 778.—CAN.

h. — Action stayed pending taxation—On client undertaking to pay balance found due.]—*BOWER v. NAGLE* (1840), Fl. & K. 78.—IR.

k. — — — — —.]—Where, in a minor matter, upon a reference to the master

to ascertain what lien the solr. of the father of the minor had upon the several documents, etc., in his possession for costs incurred in the lifetime of the father, the costs claimed were reduced upon taxation by more than one-half:—*Held*: the solr. should pay his own costs of the taxation, as well as those incurred by the guardian of the minor in reducing the amount of the costs claimed.—*Re* LAWLER (1810), Fl. & K. 73.—IR.

l. — — — — —.]—The rule disallowing the

costs of taxation, where more than one-sixth is struck off, applies to all taxations, whether under Solrs. Act or otherwise.—*Re* MORTIMER (1870), 1 R. 4 Eq. 96.—IR.

m To what references rule applicable.]—Legal Professions Act, s. 79, as to the payment of costs of reference when one-sixth is taxed off, applies to all references provided for in sects. 76, 77 & 78 of the Act.—*Re* DUNCAN & CARSCALLEN (1913), 18 B. C. R. 374.—CAN.

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were made *bonâ fide*.—HODGE v. BIRD (1844), 6 Man. & G. 1020; 7 Scott, N. R. 993; 13 L. J. C. P. 87; 2 L. T. O. S. 402; 134 E. R. 1205.

2521. — Solicitor delivering altered bill.]—WEBB v. STONE (1794), 1 Anst. 260; 145 E. R. 866.

2522. — Delay of solicitor in bringing bill.]—Where the solr. was guilty of great delay in bringing in his bills, the ct. will not give him his costs of the taxation, although less than one-sixth part is taken off.—YEA v. YEA (1795), 2 Anst. 589; 145 E. R. 975; *previous proceedings* (1794), 2 Anst. 494.

2523. — Items inserted in error.]—MARSHALL v. OXFORD, No. 1584, *ante*.

2524. — Improper charge by solicitor.]—If in a short cause an attorney wilfully make a charge, however small, to which he is not entitled, the ct. will not allow him the costs of taxation, though less than one-sixth is taken off.—HOLDERNESSE v. BARKWORTH (1838), 3 M. & W. 341; 6 Dowl. 392; 1 Horn & H. 21; 7 L. J. Ex. 107; 150 E. R. 1176; *sub nom.* HOLDERNESSE v. MACWORTH, 7 L. J. Ex. 107.

Annotations.—**Consd.** Carpenter v. Calvert (1868), 17 L. T. 578. **Refd.** Hodge v. Bird (1844), 6 Man. & G. 1020.

2525. — Agreement between parties as to amount.]—(1) If an attorney's bill be referred for taxation, & after a discussion before the master, the parties come to an arrangement as to the amount, & the master makes his allocatur upon such arrangement, for more than five-sixths of the original amount of the bill, the attorney is not entitled to the costs of taxation.

(2) On an application by an attorney for the costs of taxation, the ct. will admit affidavits to explain the circumstances under which the master made his allocatur.—LAURIE v. BARTLETT (1843), 1 Dow. & L. 730; 13 L. J. Q. B. 145; 8 Jur. 494.

2526. — Lessor's solicitor including other solicitor's costs in own bill—More than one-sixth deducted from total amount.]—On taking a lease from a lessor & concurring parties represented by separate solrs. the lessee, in the absence of agreement express or implied, is only liable for one set of costs.

If the lessor's solr. includes the costs of the concurring parties' solrs. in his own bill, & more than one-sixth is taxed off the total amount, he must pay the costs of taxation, although less than one-sixth is taxed off his own costs.—*Re* FLETCHER & DYSON, [1903] 2 Ch. 688; 72 L. J. Ch. 791; 89 L. T. 473; 52 W. R. 27; 19 T. L. R. 682; 47 Sol. Jo. 769.

— **Effect of proceedings for recovery of costs—Order obtained after commencement of action.]—**See No. 2543, *post*.

— **Action for account.]—**See No. 2548, *post*.

D. Personal Representatives.

See EXECUTORS, Vol. XXIV., p. 632, Nos. 6590–6593.

2527. Whether solicitor's representative liable—Where assets admitted.]—The ct. has no jurisdiction to order the exor. of deceased solr. to pay the costs of taxing the solr.'s bill, nor to order the exor. to refund as balance found due from the deceased solr., if the exor. does not admit assets. *Qu.*: if assets are admitted.—*Re* PHILLIPS, *Ex p.* SPACKMAN (1836), 3 Mont. & A. 135, Ct. of R.

Annotation:—**Distd.** *Re* Jackson, *Ex p.* Hammond (1838), 8 L. J. Bey. 26.

2528. — Where assets not admitted.]—*Re* PHILLIPS, *Ex p.* SPACKMAN, No. 2527, *ante*.

2529. — Order for taxation obtained after solicitor's death.]—Where an order for the taxation of a solr.'s bill is not obtained until after his death, his administratrix is not liable to the costs of taxation, although more than a sixth is taken off; nor are such costs the subject of set-off.—*Re* JACKSON, *Ex p.* HAMMOND (1839), 4 Deac. 48; 1 Mont. & Ch. 136, Ct. of R.

E. Trustees.

2530. Liability of co-trustee.]—*Re* H. P. DAVIES & SON, No. 1717, *ante*.

F. Bankruptcy Practice.

See BANKRUPTCY, Vol. IV., pp. 231, 522, 523, Nos. 2162, 4765–4780.

G. Effect of Proceedings for Recovery of Costs.

(a) Order Obtained Before Commencement of Action.

2531. Whether solicitor or client liable.]—QUARMAN v. VEALE (1828), 7 L. J. O. S. K. B. 42.

(b) Order Obtained After Commencement of Action.

2532. General rule.]—A client, on a special petition, obtained an order for taxation. The taxation having been completed, the client presented a petition for the consequential directions. The solr. then objected, that the common order would have been sufficient, & he asked the costs beyond those of a common order:—*Held*: the objection came too late.

Where a taxation is ordered after action brought, the general rule is, that if anything is found due, the client must pay the costs of the action.—*Re* HAIR (1848), 11 Beav. 96; 50 E. R. 753; *sub nom.* *Re* HAIR, *Ex p.* COX, 17 L. J. Ch. 247; 11 L. T. O. S. 316.

2533. Whether solicitor or client liable—Bill reduced by one-sixth or more.]—Costs of taxing an attorney's bill not allowed to a party who succeeds in striking off a sixth, where the order for taxing is not obtained till after the action on the bill has been commenced.—BENTON v. BULLARD (1828), 4 Bing. 561; 6 L. J. O. S. C. P. 115; 130 E. R. 884.

—**Folld.** Jay v. Coaks (1828), 8 B. & C. 635. **Apld.** Robinson v. Powell (1839), 5 M. & W. 479.

2534. — — — — —.]—Where a judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, deft. is not entitled to the costs of taxation, although more than one-sixth is taken off by the master.—JAY v. COAKS (1828), 8 B. & C. 635; 3 Man. & Ry. K. B. 35; 7 L. J. O. S. K. B. 32; 108 E. R. 1178.

2535. — — — — —.]—Where a judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, deft. is not entitled to the costs of taxation, although more than one sixth is taken off by the master.—HARBIN v. MILES (1829), 9 B. & C. 755; 7 L. J. O. S. K. B. 336; 109 E. R. 281.

Annotations:—**Apld.** Robinson v. Powell (1839), 5 M. & W. 479. **Refd.** *Re* Schlesinger, *Ex p.* Watts (1836), 5 L. J. Bey. 31.

2536. — — — — —.]—A party is not entitled to the costs of the taxation of his attorney's bill, though one-sixth is taken off, if the taxation is not applied for till after an action brought on the bill.—WATKINS v. MAHON (1836), 5 Dowl. 178; 1 M. & W. 722; 2 Gale, 129; Tyr. & Gr. 1023; 5 L. J. Ex. 247; 150 E. R. 624.

2537. — — — — —.]—*Re* SCHELINGSER, *Ex p.* WATTS, No. 1726, *ante*.

2538. — — — — —.]—Where an attorney's bill is reduced more than a sixth, on a reference to

taxation after action brought, the attorney is not compellable to pay the costs of taxation.—*ROBINSON v. POWELL* (1839), 5 M. & W. 479; 9 L. J. Ex. 17; 3 Jur. 1033.

2539. ———.]—Where taxation is directed after action brought, this ct. does not give the client the costs of taxation, though more than one-sixth be taxed off.—*Re BOORD, TOGHILL v. GRANT* (1843), 6 Beav. 348; 49 E. R. 860; *previous proceedings* (1840), 2 Beav. 261.

2540. ———.]—Where an attorney's bill is referred to taxation after action brought upon it, the attorney is liable, under Solicitors Act, 1843 (c. 73), s. 37, to pay the costs of taxation, if more than one-sixth is struck off.

Where the party does not attend the taxation he is not liable to pay those costs (*PARKE, B.*).—*Ex p. WOOLLETT* (1844), 12 M. & W. 504; 1 Dow. & L. 593; 13 L. J. Ex. 121; 2 L. T. O. S. 331; 8 J. P. 412; 8 Jur. 130, Ex. Ch.

Annotation:—*Refd. Lumsden v. Shipcote Land Property Co.* (1906), 95 L. T. 17.

2541. ——— **Application for taxation before action refused.**]—Where a party cannot obtain an order to tax an attorney's bill before action commenced, he is entitled to the costs of taxation if more than one-sixth be taxed off after the commencement of the action. Thus, a judge at chambers having refused to make an order on the assignees of an attorney to tax his bill delivered to pltf., deft., after the assignees had commenced an action, on taxation, took off more than one-sixth:—*Held*: that the master was wrong in allowing the assignees the costs of taxation.—*FEATHERSTONHAUGH v. REEN* (1833), 1 Cr. & M. 495; 149 E. R. 495; *sub nom. FEATHERSTONEHAUGH v. REECE*, 2 Dowl. 30; 2 L. J. Ex. 232; *sub nom. FEATHERSTONHAUGH v. KEEN*, 3 Tyr. 540.

2542. ——— **Action brought to avoid costs of taxation.**]—Where an attorney brings an action to recover the amount of his bill, & after action brought his bill is taxed, he is not bound to pay the costs of taxation, unless it appears that the action was brought to avoid those costs.—*TOOMER v. FULLER* (1833), 2 Dowl. 195.

2543. ——— **Bill reduced by less than one-sixth.**]—Where an action is brought on an attorney's bill which before trial is reduced on taxation by less than one-sixth, & deft. afterwards succeeds in the cause on a plea of set-off, deft. is not entitled to the costs of the taxation as costs in the cause.—*WILSON v. KNAPP* (1840), 8 Dowl. 426; 4 Jur. 220.

2544. Payment into court by client—Money taken out by solicitor—Whether costs of taxation are costs in the cause.]—Where an order is obtained to tax an attorney's bill, after action brought thereon, & deft. then pays the amount found to be due into ct., which pltf. takes out, the costs of the taxation of the bill are rightly taxed to pltf. as costs in the cause.—*THOMAS v. SWANSEA CORPN.* (1843), 11 M. & W. 83; 2 Dowl. N. S. 1003; 12 L. J. Ex. 281; 132 E. R. 725.

2545. Order for taxation after verdict in action—Whether one-sixth rule applicable.]—*LUMSDEN v. SHIPCOTE LAND CO.*, No. 1572, *ante*.

H. Action for Account.

2546. Whether solicitor or client liable—Bill reduced by one-sixth or more.]—A bill was filed by the exors. & devisees in trust under a will, to have the trusts of the will established, & the usual accounts taken. J. F. acted as the solr. of pltf. as well as of defts., & conducted the proceedings in the suit subsequently to the decree, until the

conduct of it was taken from him by pltf., & a new solr. appointed by them. J. F. having delivered up the documents relating to the suit to the new solr., a paper writing was discovered amongst them, purporting to be a copy of a charge which had been carried in by J. F. under the decree, in the joint names of certain persons, of whom J. F. was one, as creditors of testator: the charge thereby made by J. F., for himself amounted to the sum of £57, alleged to be the balance due from testator's estate for business done by J. F. for testator & his son, as partners in business, on testator's retainer, after deducting from the aggregate amount of his several bills of costs the sums received by him from testator on account of such business. On the copy of the charge found amongst the documents so delivered up by J. F. was indorsed a memorandum, in the handwriting of J. F.'s town agent, to the effect that the charge had been allowed, subject to the approval thereof by defts.' solr.: the copy also bore a subsequent indorsement, in the same handwriting, to the effect that the charge had been afterwards absolutely allowed, but no entry to any such effect was to be found in the master's books. The master having referred the bills of costs to be taxed, J. F. withdrew his charge. On application to the ct. by pltf. by petition, the bills of costs of J. F. were ordered to be taxed, & an account was directed to be taken of the moneys received by J. F. on account thereof, & more than one-sixth part of the amount of the bills having been taken off on taxation, J. F. was ordered to pay the costs of petitioners' occasioned by his charge, & also the costs of petitioners' application to the ct. relative to the charge & bills of costs, & consequential thereon.—*ACEY v. SIMPSON* (1843), 12 L. J. Ch. 449.

2547. ——— **Discretion of court.**]—*BARTON v. PYNE*, No. 2506, *ante*.

2548. ——— **Bill reduced by less than one-sixth—More than one-sixth taken off in action.**]—(1) Less than one-sixth was taken off a bill of costs on taxation, but more than one-sixth was taken off in the suit, which was one for a general account between the solr. & client, on other grounds, into which the taxing master could not enter. The costs of taxation were allowed to the solr.

(2) A solr. took up his client's bills:—*Held*: these payments could only be treated in the same light as any other ordinary cash advances made by the solr. for the benefit of his client, & the solr. was not entitled to charge interest thereon.—*MAY v. BIGGENDEN, CHEESEMAN v. MAY* (1857), 24 Beav. 207; 53 E. R. 337.

Annotations:—*Refd. Hill v. South Staffordshire Ry.* (1874), L. R. 18 Eq. 154; *Mozley v. Cowie* (1878), 26 W. R. 854.

I. Party and Party Taxation.

See R. S. C., Ord. 65, rr. 19a., 27 (28), (38B), (55).

2549. Whether solicitor liable—More than one-sixth taxed off—"Costs payable out of a fund or estate"—Personal liability of party to pay costs.]—*SIMMONS v. SIMMONS* (1895), 30 Sol. Jo. 673.

Annotation:—*Refd. Buchan v. Ayre*, [1915] 2 Ch. 474.

2550. ——— **Agreement for indemnification out of property.**]—A trustee of leasehold property, on which at the request of his *cestuis que trust* he had created incumbrances involving a personal liability on his part, brought this action claiming to be indemnified by them personally & also out of the property. By the order made in the action the ct. declared that pltf. was entitled to be indemnified out of the property against this personal liability & costs, including the costs of the action, & gave pltf. liberty to apply for giving

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effect to his indemnity, if not completed within six months, & directed taxation of pltf.'s costs. Pltf.'s solrs.' bill was reduced on taxation by more than one-sixth, & the taxing master, holding that the case fell within R. S. C., Ord. 65, r. 27 (38B), disallowed the solrs. their costs of drawing & copying the bill & of attending the taxation. On a summons to review:—*Held*: pltf.'s costs were not payable out of a "fund or estate, real or personal," within R. S. C., Ord. 65, r. 27, (38B), & the taxing master was wrong in disallowing these costs.—*BUCHAN v. AYRE*, [1915] 2 Ch. 474; 85 L. J. Ch. 72; 113 L. T. 1151; 60 Sol. Jo. 45.

SUB-SECT. 4.—ENFORCEMENT OF ORDER.

2551. By solicitor—Time for application—At taxation.]—Where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time; & cannot recover them by motion after making a subsequent settlement.—*WHITFIELD v. JAMES* (1823), 1 Bing. 207; 8 Moore, C. P. 40; 1 L. J. O. S. C. P. 65; 130 E. R. 84.

2552. ——— Settlement after taxation— Subsequent motion for recovery.]—*WHITFIELD v. JAMES*, No. 2551, *ante*.

2553. By client—Promise by attorney to pay costs if account rendered—No account rendered—Liability of solicitor for costs of client's application.]—An attorney liable to pay the costs of a taxation of his bill, having promised to pay those costs if an account were given him, not liable to the costs of an application to the ct., made without sending such account.—*KEELING v. HEUDE* (1831), 9 L. J. O. S. C. P. 225.

2554. ——— Attachment.]—An order was made against a solr. for taxation of his bill of costs & payment, within four days of certificate, of the balance, if any, due from him, costs of taxation being reserved. A balance was found due from him. A subsequent order directed that the costs of taxation should be paid by the solr.:—*Held*: both sums were payable by the solr., as an officer of the ct., within the exception in Debtors Act, 1869 (c. 62), s. 4, & on default in payment, a writ of attachment might issue against him in respect of both sums.—*Re A SOLICITOR*, [1895] 2 Ch. 66; 64 L. J. Ch. 467; 43 W. R. 490; 39 Sol. Jo. 399; *sub nom. Re W.*, 72 L. T. 679.

Annotation:—*Folld. Re N.* (1917), 61 Sol. Jo. 445.

SUB-SECT. 5.—APPEAL.

2555. Effect of delay in applying for rescission.]—It is too late to rescind an order allowing to pltf.'s attorney the costs of taxing the costs on the back of a writ, for which more than a sixth was taken off after the order has been made a rule of ct. & an attachment obtained upon it.—*THOMPSON v. CARTER* (1835), 3 Dowl. 657.

Annotation:—*Refd. Gibbs v. Flight* (1853), 13 C. B. 803.

2556. Whether granted—Where objection should have been taken before master.]—Deft. in an action paid within four days the amount of debt & costs indorsed upon the writ under the C. L. P.

Act, 1852 (c. 76), s. 8, but afterwards had the costs taxed. Upon taxation two items, amounting to less than one-sixth of the whole amount, were taxed off. An order was afterwards made by a master of the ct. sitting at chambers for payment of the costs of taxation by deft. Upon the hearing of the summons no objection on the part of deft. was made to the payment of the costs of taxation, on the ground of the nature of the items so charged & taxed off. Deft. having moved to rescind the order:—*Held*: though there was a discretion in the ct. to allow or disallow the costs of taxation to pltf., the ct. would not now rescind the order on the ground that the items taxed off were such as pltf.'s attorney must have known to be not allowable, no objection having been made before the master on that ground.—*CARPENTER v. CALVERT* (1868), 17 L. T. 578.

SECT. 7.—MODERATION OF COSTS.

See R. S. C., Ord. 65, r. 27 (26).

2557. Moderation distinguished from taxation.]—In 1882 trustees were appointed by a private Act of Parliament, with powers to raise sums not exceeding £350,000 by mtge. of the Aylesford settled estates in fee, for the purpose, among other things, of paying the seventh earl's debts. The seventh earl had created charges upon his life estate to the amount of £192,000 all of which had become vested in the Eagle Insurance co. The trustees borrowed £232,000 from the same co. on mtge. of the fee of the settled estates, of which £192,000 was retained by the co. in discharge of their charges on the life estate, & the remaining £40,000 paid to the trustees. After the seventh earl's death an order was made in an action brought by the eighth earl against the trustees for an account. The account taken in by the trustees included a great number of bills of costs, which they had paid to their own solrs. & to the solrs. of mtgees. in respect of their dealings with the settled estates. Seventeen of these bills were referred by the chief clerk to the taxing master for taxation under R. S. C., Ord. 65, r. 27 (26). From three bills, amounting to (a) £413 2s. 6d., (b) £385 3s. 6d., & (c) £343, the taxing master taxed off only (a) £7 2s. 6d., (b) £3 1s., & (c) £6 11s. In the bill (d) relating to the mtge. to the E. Insurance co. for £232,000 the mtgees.' solrs. had charged, & the trustees paid, the scale fee upon the whole sum (£1,255). The taxing master disallowed this, & allowed by way of compromise, instead of the proper charges under Sched. II., the scale fee on £40,000 only, regarding the transaction as a further advance. The trustees took out a summons to review the taxation:—*Held*: a reference to the taxing master under R. S. C., Ord. 61, r. 27 (26), is for moderation, not taxation, & the fact that the reductions obtained in such a reference were less than the costs of taxation would have been did not show that the trustees were justified in paying the bills (a), (b), & (c) without taxation.—*AYLESFORD (EARL) v. POULETT (EARL)*, [1891] 1 Ch. 248; 63 L. T. 519; 39 W. R. 106; *revsd.* on other grounds, [1891] 1 Ch. 254, C. A.

Annotations:—*Refd. Re Smith, Hands v. Andrews*, [1893] 1 Ch. 1; *Goodchild v. Roberts*, [1925] Ch. 592.

PART VI. SECT. 6, SUB-SECT. 4.

n. By solicitor—Attachment—Costs of taxation included in certificate without authority—Refusal to set aside attachment where undue delay by client.]—*McGILL v. SEXTON* (1850), 1 Gr. 311.—*CAN.*

PART VI. SECT. 7.

2557 i. Moderation distinguished from taxation.]—Moderation of a bill of costs by the registrar of probate is not taxation & does not deprive a client of his right of taxation.—*Re CREAGH v. WILLIAMS, Ex p. HUME* (1895), 17

N. S. W. L. R. (Eq.) 6; 12 N. S. W. W. N. 85.—*AUS.*

2557 ii. ———.]—Moderation is a well understood term, & is more liberal than taxation even as between solr. & client.—*BEATTY v. HILDAN* (1884), 6 O. R. 715.—*CAN.*

2558. —.]—GOODCHILD v. ROBERTS, No. 1563, *ante*.

2559. When moderation directed—Payment by executor or trustee—Charges appearing irregular or excessive.]—An exor. or trustee is not entitled to be allowed without question the amount of bills of costs which he has paid *bonâ fide* to the solr. to the trust: & the master, without regularly taxing the bills, will moderate their amount.

The principle of moderating the bill by a deduction from charges, which, upon the face of them, are irregular or excessive, instead of submitting the bill to taxation, is great liberality towards an exor. (*per* CUR.).—JOHNSON v. TELFORD (1827), 3 Russ. 477; 38 E. R. 654.

Annotations:—*Reid*. Brown v. Burdett (1888), 40 Ch. D. 244; Aylesford v. Poulett (1890), 63 L. T. 519; Goodchild v. Roberts, [1925] Ch. 592.

2560. —.]—A solr. who was one of the exors. of testator paid himself out of the assets a bill for business done for testator. Twenty-six years after the death of testator, & ten years after the death of the solr., a decree was made directing the usual accounts of testator's personal estate. The exor. of the solr., in bringing in his accounts under the decree, inserted the bill of costs as one of his items of discharge:—*Held*: although as between solr. & client the bill was no longer subject to taxation, yet, as against the exor., the persons beneficially interested were entitled to question its amount as an item of discharge, but that an order referring it for taxation was not proper, the right course being to direct the taxing master to state whether any items objected to were fair & proper to be allowed, & to what amount.—ALLEN v. JARVIS (1869). 4 Ch. App. 616; 17 W. R. 943; *sub nom.* ALLEN v. JARVIS, JARVIS v. ALLEN, 21 L. T. 280, L. JJ.

Annotations:—*Appld.* *Re* Park, Cole v. Park (1889), 41 Ch. D. 326. *Reid*. Brown v. Burdett (1888), 40 Ch. D. 244; *Re* Miller, Chapman v. Miller (1889), 58 L. J. Ch. 728; Aylesford v. Poulett (1890), 63 L. T. 519; Goodchild v. Roberts, [1925] 1 Ch. 592.

2561. —.]—The amount of costs allowed by a taxing master as between the client & his solr. is not conclusive of the amount which the ct. will allow out of the estate.

An administration action, which was commenced in May, 1875, came on in Nov. 1887, upon second further consideration. The judge finding that the costs would probably amount to nearly the whole value of the estate, & believing that there had been unreasonable delay in the conduct of the proceedings, directed the taxing master under R. S. C., Ord. 65, r. 11, to inquire & report as to the delay & the costs occasioned thereby. The taxing master reported that there had been great delay in the suit caused by the conduct of the solr. for pltf., & disallowed considerable sums from the costs as between the various solrs. & their clients. The judge ordered that only a portion of the costs allowed by the taxing master to the several parties, including the costs of pltf., who was a trustee, should be paid out of the estate; & the Ct. of Appeal affirmed this decision.

It was suggested that pltf.'s costs as taxed ought to be allowed against the estate, & that the taxation should be taken as conclusive on that point. But on being pressed with the consequences of such a rule counsel very fairly admitted that it could not be maintained in all cases. Costs which a trustee may be bound to pay to his own solr.

might be very improper costs as against the trust estate. Suppose a trustee, having little or no interest in the estate, were to allow a solr. to use his name as pltf. in an administration action, & were to encourage or permit him to carry it on in an unusually costly manner, although he might be liable for all such costs to the solr. so employed, it would be impossible to maintain that the ct. would be bound to permit such costs to be paid even out of a trust estate from which the trustee was entitled to the usual indemnity. The rule is thus stated in *Lewin on Trusts*, 8th ed., p. 636: "A trustee will have no claim to reimbursement out of the trust fund where the legal proceedings were occasioned by his own negligence in the first instance; or were improperly instituted by himself; & a trustee will not be allowed, without question, whatever sums by way of costs he may have paid his solr., for the bill, as between trustee & *cestui que trust*, though not submitted to a regular taxation, which is between solr. & client, will be moderated by the ct. by a deduction of such charges as may appear irregular & excessive." I think this is an accurate statement of the practice, & that the rule applies to costs occasioned by the improper conduct of a suit (KAY, J.).—BROWN v. BURDETT (1888), 40 Ch. D. 244; 60 L. T. 520; 37 W. R. 533; 5 T. L. R. 88, C. A.

Annotation:—*Reid*. *Re* Burn & Berridge (1908), 99 L. T. 606.

2562. Costs occasioned by improper conduct of suit.]—BROWN v. BURDETT, No. 2561, *ante*.

2563. — Bill no longer subject to taxation.]—ALLEN v. JARVIS, No. 2560, *ante*.

2564. —.]—*Re* PARK, COLE v. PARK, No. 1710, *ante*.

2565. — Action on bill—Verdict obtained.]—LUMSDEN v. SHIPCOTE LAND CO., No. 1572, *ante*.

2566. — Bill delivered to testator more than twelve months before death—Testator making no objection to charges—Executor alleging charges unreasonable.]—*Re* PARK, COLE v. PARK, No. 1710, *ante*.

2567. — Abandoned proceedings for recovery of settled land—Costs paid by tenant for life—Direction for reimbursement out of capital.]—The ct. has jurisdiction under Settled Land Act, 1882 (c. 38), s. 36, to approve of proceedings once proposed to be taken for the recovery of land alleged to be subject to a settlement & to direct the costs to be reimbursed out of capital notwithstanding that at the date of the application the proceedings have been abandoned & the costs paid by the tenant for life.

In order that the costs of proposed proceedings should be allowed, it is not necessary that they must be proceedings proposed to be taken at the date when the order is made. The bill of costs in the present case must be referred to a taxing master for moderation, & I will make the order in respect of the amount to be so ascertained (SARGANT, J.).—*Re* WILKIE'S SETTLEMENT, WADE v. WILKIE, [1914] 1 Ch. 77; 83 L. J. Ch. 174; 109 L. T. 927; 58 Sol. Jo. 138.

2568. Form of reference where moderation directed—Taxing master to state whether items allowable—& to what amount.]—ALLEN v. JARVIS, No. 2560, *ante*.

2569. —.]—*Re* PARK, COLE v. PARK, No. 1710, *ante*.

2559 i. When moderation directed—Payment by executor or trustee—Charges appearing irregular or excessive.]—Where an exor. has in good faith paid

his solr.'s bill of expenses incurred in administering the estate the master may without taxing the bill, moderate by it deducting charges which ap

pear not to be proper.—McCARGAR v. MCKINNON (1870), 17 Gr. 525.—CAN.

Sect. 7.—Moderation of costs. Sect. 8: Sub-sect. 1, A., B. (a) & (b), C. & D.; sub-sect. 2.]

2570. Objections on moderation—Before whom made—Taxing master to whom costs referred.]—MEDLICOTT v. HUBBARD (1888), 32 Sol. Jo. 258.

2571. Reductions on moderation less than probable costs of taxation—No justification for payment of untaxed bill.]—AYLESFORD (EARL) v. POULETT (EARL), No. 2557, *ante*.

2572. Allowance on moderation—R. S. C., Ord. 65, r. 27 (29A).]—GOODCHILD v. ROBERTS, No. 1563, *ante*.

SECT. 8.—INTEREST ON COSTS.

SUB-SECT. 1.—INTEREST PAYABLE BY CLIENT.

A. In General.

See Civil Procedure Act, 1833 (c. 42), s. 28; Solicitors Acts, 1843 (c. 73), s. 43; 1860 (c. 127), s. 27; Attorneys & Solicitors Act, 1870 (c. 28), s. 17; Remuneration Order, 1882, clause 7.

2573. Application of Solicitors Act, 1860 (c. 127), s. 27.]—Above Act only applies to solrs., & a party to a suit cannot claim under it interest on his costs.—JENNER v. MORRIS, WEBSTER v. JENNER (1863), 2 New Rep. 479; 11 W. R. 943.

2574. Demand for interest.]—*Re* BENTWICH, WATKIN, WILLIAMS & CO. (1899), 44 Sol. Jo. 60, C. A.

2575. — Sufficiency—Letter inclosing account.]—Notwithstanding the definition of the word "client" in Attorneys & Solicitors Act, 1870 (c. 28), s. 3, that Act does not apply to accounts between country solrs. & their town agents. The Act is not retrospective, & therefore interest cannot be allowed under sect. 17 on disbursements made prior to the passing of the Act.

In May, 1872, a country solr. commenced a suit against his London agent, claiming an account & taxation of the bills of costs between them. Deft. filed his answer in Oct. 1872, & thereby alleged a large balance due to him & claimed interest thereon. He had also, in 1869, furnished pltf. with an account which contained items for interest. In 1875 a copy of the account was inclosed in a letter which referred to the account, but made no formal demand of payment, & which was signed by a firm of solrs. as his agents:—*Held*: neither the answer nor the letter inclosing the account was a sufficient demand in writing or notice within Civil Procedure Act, 1833 (c. 42), s. 28.

Attorneys & Solicitors Act, 1870 (c. 28), which says that interest may be allowed on disbursements . . . seems to me to deal entirely with cases arising between solrs. & their clients, & not those between country solrs. & their London agents. I think the relation between these parties was not the common relation of a solr. to an ordinary client, but the relation of a London agent & a country solr. (JAMES, L.J.).—WARD v. EYRE (1880), 15 Ch. D. 130; 49 L. J. Ch. 657; 43 L. T. 525; 28 W. R. 712, C. A.

Annotations.—**Consd.** Reid v. Burrows, [1892] 3 Ch. 413. **Refd.** Ward v. Lawson (1890), 43 Ch. D. 353; Sheba Gold Mining Co. v. Trubshawe, Ryley v. Master (1892), 61 L. J. Q. B. 219; Tautz v. Archdale (1895), 11 T. L. R. 452; *Re* Wilde, [1910] 1 Ch. 100.

2576. — Delivery of bill.]—By General Order VII. under Solicitors Remuneration Act, 1881 (c. 44), s. 5 . . . the interest which a solr. is entitled to recover under the Order on the amount due on business transacted by him is

not to commence till the amount due is ascertained, either by agreement or taxation—& it is provided that a solr. may charge interest at 4 per cent. *per annum* on his disbursements & costs, whether by scale or otherwise, from the expiration of one month from demand from the client.

A solr. delivered his bill to a client without claiming interest. The bill was taxed, & the client paid the amount allowed on taxation. On such amount being paid the solr. claimed interest thereon at 4 per cent. from one month from the date of the delivery of the bill:—*Held*: the solr. was entitled to such interest.

The words "from demand" mean "from sending in the bill" (LORD ESHER, M.R.).—BLAIR v. CORDNER (1887), 19 Q. B. D. 516; 56 L. J. Q. B. 642; 36 W. R. 109; 3 T. L. R. 796.

2577. — Action for account—Statement of claim claiming interest.]—WARD v. EYRE, No. 2575, *ante*.

2578. — Defence claiming interest.]—WARD v. EYRE, No. 2575, *ante*.

2579. — From whom to be made—When client deceased—Personal representative.]—The legal personal representative of deceased client is the proper person from whom to demand payment of a bill of costs as the person liable, so as to make the costs carry interest.

In the administration by the ct. of an insolvent estate, a bill of costs due from deceased had been delivered, by direction of the chief clerk, to the solr. of a creditor having the conduct of the cause:—*Held*: there had been no demand for payment on the person liable, & the costs did not carry interest.—*Re* McMURDO, PENFIELD v. McMURDO, [1897] 1 Ch. 119; 66 L. J. Ch. 67; 75 L. T. 576; 45 W. R. 244; 41 Sol. Jo. 114.

2580. — Solicitor of creditor having conduct of suit for administration.]—*Re* McMURDO PENFIELD v. McMURDO, No. 2579, *ante*.

2581. Whether contract to pay interest implied.]—*Re* BENTWICH, WATKIN, WILLIAMS & CO. (1899), 44 Sol. Jo. 60, C. A.

Interest on judgments & orders, generally.]—*See* JUDGMENTS & ORDERS, Vol. XXX., pp. 172 *et seq.*

Interest on costs, generally.]—*See* MONEY & MONEY-LENDING, Vol. XXXV., pp. 187, 188, Nos. 158-160.

B. When Interest Payable.

(a) In General.

See Civil Procedure Act, 1833 (c. 42), s. 28; Solicitors Acts, 1843 (c. 73), s. 43; 1860 (c. 127), s. 27; Attorneys & Solicitors Act, 1870 (c. 28), s. 17; Remuneration Order, 1882, clause 7.

2582. Judgment in favour of solicitor affirmed on appeal.]—If judgment for pltf. on an attorney's bill be affirmed in the Exch. Chamber, that ct. will not allow interest.—WALKER v. BAYLEY (1800), 2 Bos. & P. 219; 126 E. R. 1245, Ex. Ch.

2583. After taxation—Subsequent to recovery of costs.]—After action brought an attorney's bill was referred to taxation on the usual terms; previous to the commencement of the suit, pltf. had given written notice that he should claim interest:—*Held*: after a taxation upon such an order, on which the master allowed no interest, the ct. could not enable pltf. to recover it, either by a review of the taxation, or by sending the cause to a jury.—BERRINGTON v. PHILLIPS (1836), 1 M. & W. 48; 4 Dowl. 758; 1

PART VI. SECT. 8, SUB-SECT. 1.—A.

25741. Demand for interest.]—Interest may be allowed on a solr.'s bill of costs, if a demand in writing is made for it. *Re* MCCLIVE (1882), 9 P. R. 213.—CAN.

Gale, 404; Tyr. & Gr. 322; 5 L. J. Ex. 127; 150 E. R. 341.

Annotation:—*Re* *Geake v. Ross* (1875), 41 L. J. C. P. 315.

2584. Pending taxation.—Interest on a bill of costs while under taxation not allowed.—*Re* *SMITH* (1846), 9 Beav. 342; 8 L. T. O. S. 2; 50 E. R. 375.

2585. Solicitor taking up client's bills.—*MAY v. BIGGENDEN, CHEESEMAN v. MAY*, No. 2548, *ante*.

2586. Payment out of fund—Fund not belonging wholly to client.—Attorneys & Solicitors Act, 1870 (c. 28), s. 17, which enables the taxing master upon a taxation of costs to allow interest on moneys disbursed by a solr. for his client, is intended to apply only as between a solr. & his own client, & does not apply to a taxation of costs to be paid as between solr. & client out of a fund in ct. belonging wholly or partly to other persons than the client.—*HARTLAND v. MURRELL* (1873), L. R. 16 Eq. 285; 43 L. J. Ch. 94; 28 L. T. 725; 21 W. R. 781.

2587. — Administration action—Necessity for special direction as to interest.—*Re* *MARSDEN'S ESTATE, WITHINGTON v. NEUMANN*, No. 2593, *post*.

2588. Interest on untaxed costs—Necessity for special agreement.—*TEMPLEMAN v. DAY* (1881), 16 L. J. N. C. 91.

(b) On Disbursements.

See Attorneys & Solicitors Act, 1870 (c. 28), s. 17; Remuneration Order, 1882, clause 7.

2589. Application of Attorneys & Solicitors Act, 1870 (c. 28)—Accounts between country solicitors & town agents.—*WARD v. EYRE*, No. 2575, *ante*.

2590. Advances made to client.—*TEMPLEMAN v. DAY* (1881), 16 L. J. N. C. 91.

2591. Whether solicitor may appropriate payments to costs—In order to claim interest on disbursements.—A solr. who has made disbursements for his client, & who has received from the client sums paid generally on account, but sufficient to cover those disbursements, is not entitled to appropriate the sums so received to costs for which he has not delivered a bill, in order that he may, under Attorneys & Solicitors Act, 1870 (c. 28), s. 17, claim interest on the disbursements.—*Re* *HARRISON* (1886), as reported in 33 Ch. D. 52; 2 T. L. R. 545; *on appeal*, 33 Ch. D. p. 68.

Annotations:—*Re* *Stewart v. Weber* (1903), 89 L. T. 559; *Cavendish v. Strutt*, [1904] 1 Ch. 524.

C. When Interest Commences.

See Civil Procedure Act, 1833 (c. 42), s. 28; Remuneration Order, 1882, clause 7.

2592. Non-contentious business—One month from delivery of bill.—*BLAIR v. CORDNER*, No. 2576, *ante*.

2593. Contentious business—Date of judgment.—(1) Where in an administration action, costs have been directed to be taxed, & when taxed to be paid by the trustees out of testator's estate, with a direction for division of the balance of the fund after such payment amongst the persons beneficially entitled, interest is not, in the absence of special direction, payable on the costs.

PART VI. SECT. 8, SUB-SECT. 1.—B. (a).

2584 i. Pending taxation.—Where a security is given for the payment of untaxed costs, interest is to be computed only from the date of the certificate of taxation.—*Re* *BLOOMFIELD'S ESTATE* (1878), 3 L. R. Ir. 82.—*IR*.

o. Before bill of costs delivered.—*BREMNER v. MABON* (1837), 16 Sh. (Ct. of Sess.) 213, 13 Fac. Coll. 223.—*SCOT*.

PART VI. SECT. 8, SUB-SECT. 1.—D.

2598 i. Agreement between client & solicitor—Duty of solicitor.—A security

(2) The Rules, under the Judicature Act, 1883, Ord. 41, r. 3, & Ord. 42, r. 16, the effect of which, combined with Judgments Act, 1837 (c. 110), ss. 17, 18, in the case of an ordinary action where costs are ordered to be paid adversely, is to give solr. the right to interest from the date of the judgment (*CHITTY, J.*).—*Re* *MARSDEN'S ESTATE, WITHINGTON v. NEUMANN* (1889), 40 Ch. D. 475; 58 L. J. Ch. 260; 37 W. R. 525; *sub nom. Re* *MARSDEN'S ESTATE, WILLINGTON v. NEUMANN*, 60 L. T. 696.

D. Agreements to Pay Interest.

2594. Agreement of assignee in bankruptcy to allow interest—Whether bankrupt's estate bound.—An agreement of the assignee to allow the solr. interest on the amount of his bill of costs, does not bind the bkpt.'s estate; nor does a resolution of creditors, at a meeting held for this purpose, bind those who are absent.—*Re* *PHILIPPS, Ex p. PHILIPPS* (1836), 1 Deac. 368, Ct. of R.

2595. Resolution of creditors to allow interest—Whether binding on absent creditors.—*Re* *PHILIPPS, Ex p. PHILIPPS*, No. 2594, *ante*.

2596. Agreement between client & solicitor—Whether taxation ordered as of course.—*Re* *MOSS* (No. 2), No. 1251, *ante*.

2597. — — — — ——*Re* *FANSHAW* (1905), 49 Sol. Jo. 404.

2598. — Duty of solicitor.—An agreement between a solr. & a client without the intervention of any other solr., to allow the solr. interest on his bill of costs cannot be maintained independently of subsequent acquiescence, unless it appears that he informed the client that the law allowed no such charge.

Where the relation of solr. & client had ceased after such an agreement had been made, & the client subsequently, having in the meantime had proper advice upon the subject of the agreement, entered into a second agreement with the solr. in part founded on the former, which she did not seek to impeach till fourteen years after its date:—*Held*: there had been such delay & acquiescence as to preclude any title to relief.—*LYDDON v. MOSS* (1859), 4 De G. & J. 104; 33 L. T. O. S. 170; 5 Jur. N. S. 637; 7 W. R. 433; 45 E. R. 41, L. JJ.

Annotations:—*Consd. Re* *Haslam & Hier-Evans*, [1902] 1 Ch. 765. *Re* *Ward v. Sharp* (1884), 53 L. J. Ch. 313.

2599. — Validity of.—*LYDDON v. MOSS*, 2598, *ante*.

2600. — — — — ——*Re* *BENTWICH, WATKIN, WILLIAMS & Co.* (1899), 44 Sol. Jo. 60, C. A.

Agreements as to costs, generally.—See Sects. 3, *ante*.

SUB-SECT. 2.—INTEREST PAYABLE BY SOLICITOR.

2601. Overpayment of costs—Money retained to meet costs—Delay of parties in having costs taxed—No fraud or laches imputable to solicitor.—Where a solr. engaged in various suits, obtain payment out of ct. of a sum of money standing in trust in the cause, & retained it towards his costs, & upon a subsequent taxation of his bill it appeared that at the time he obtained payment of the money, he had, in fact, been already overpaid; the ct.

taken for untaxed costs gives a solr. no right to interest on them. There may, however, be a contract to pay such interest, if it be made with full knowledge, sufficient advice, & necessary warning; but, in the absence of these, it will be of no force between solr. & client.—*SHANNON v. CASEY* (1874), 8 I. R. Eq. 307.—*IR*.

Sect. 8.—Interest on costs: Sub-sect. 2. Sect. 9: Sub-sects. 1 & 2.]

refused, upon a motion for that purpose, to charge him with interest, the parties having made considerable delay before they taxed the costs, & there being no fraud or laches imputable to the solr.—*WRIGHT v. SOUTHWOOD* (1827), 1 Y. & J. 527; 148 E. R. 779.

2602. Interest on amount taxed off bill—Amount deducted to be refunded.]—If, after payment, a solr.'s bill be referred for taxation, & more than one-sixth is taxed off, interest will not be allowed on the sum so taxed off, & to be refunded by the solr.—*Re WATTS* (1845), 5 L. T. O. S. 474.

2603. Mixing trust moneys with ordinary account of firm at bank—Liability to compound interest.]—Mixing the money with the ordinary account of a firm of solrs. at a bankers is not such employment in business as will render a member of the firm liable to compound interest.—*BURDICK v. GARRICK* (1870), 5 Ch. App. 233; 39 L. J. Ch. 369; 18 W. R. 387, L. C. & L. J.

Annotations:—Reid. Gilroy v. Stephens (1882), 51 L. J. Ch. 834. *Mentd. Gray v. Bateman* (1872), 21 W. R. 137; *Boatwright v. Boatwright* (1873), 43 L. J. Ch. 12; *Watson v. Woodman* (1875), L. R. 20 Eq. 721; *Banner v. Berridge* (1881), 18 Ch. D. 254; *Re Exchange Banking Co., Fliccroft's Case* (1882), 21 Ch. D. 519; *Re Bell, Lake v. Bell* (1886), 34 Ch. D. 462; *Charles v. Jones* (1887), 35 W. R. 615; *Dooby v. Watson* (1888), 39 Ch. D. 178; *Lyell v. Kennedy, Kennedy v. Lyell* (1889), 14 App. Cas. 437; *Phillips v. Homfray* (1890), 44 Ch. D. 694; *Re Sharpe, Re Bennett, Masonic & General Life Assce. v. Sharpe*, [1892] 1 Ch. 151; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Friend v. Young*, [1897] 2 Ch. 421; *Silkstone & Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167; *North American Land & Timber Co. v. Watkins*, [1904] 1 Ch. 242; *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A. C. 555; *Henry v. Hammond*, [1913] 2 K. B. 515; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1; *Nocton v. Ashburton*, [1914] A. C. 932; *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423; *Taylor v. Davies*, [1920] A. C. 636; *Dominion Coal Co. v. Ma. kinonge S.S. Co.*, [1922] 2 K. B. 132.

SECT. 9.—SECURITY FOR COSTS.

SUB-SECT. 1.—IN GENERAL.

See Attorneys & Solicitors Act, 1870 (c. 28), s. 16; Solicitors' Remuneration Act, 1881 (c. 44), s. 5; Remuneration Order, 1882, clause 7.

2604. Security for costs already due—General rule.]—C. for many years employed D. as his attorney, & in the course of those years became largely indebted to D. for business done & money lent. From time to time D. delivered accounts to C., but received no payments of any considerable amount from his client. C. afterwards employed other attorneys. Ultimately, C. being threatened with an execution by a judgment creditor, applied to D. for his assistance, who procured the money for him by way of mtge., but stipulated that the mtge. should stand as a security for his own debt, as well as the judgment debt. C. having assented to this arrangement, executed the mtge. deed, & also a deed of trust of even date, which was prepared jointly by D. & the attorneys of C., by which it was agreed that the mtge. should stand as a security for the amount of D.'s debt, to be settled by arbn., & that in such settlement no prejudice should arise to D. by reason of the lapse of time:—*Held*: this transaction did not amount to the receiving of a gratuity by an attorney from his client, & consequently, in the absence of any fraud, was sustainable in a ct. of equity.

PART VI. SECT. 9, SUB-SECT. 1.

2604 i. Security for costs already due—General rule.]—A solicitor may take security from a client for costs incurred though the relationship between them

has not been terminated & the costs not taxed but the amount charged against the client must be made up of nothing but a reasonable remuneration for services & necessary disbursements.

A security which has been given to an attorney by his client for a debt really due, or as a reward for services already rendered, will not be set aside in equity.—*CHESLYN v. DALBY* (1836), 2 Y. & C. Ex. 170; 160 E. R. 357; *subsequent proceedings* (1840), 4 Y. & C. Ex. 238.

2605. ———.]—S. having paid off a debt secured by mtge. upon real estates, in the equity of redemption of which his wife was, at the date of their marriage, entitled to a life interest to her separate use, afterwards, without her privity, assigned the mtge. to the solr. of himself & wife as security for a debt due to such a solr. for costs principally incurred in a suit in which he acted, first for the wife before her marriage & afterwards for both the husband & wife.

The solr., having subsequently purchased from the original mtgee. for £40 a debt, for costs, of £175, which the latter would have been entitled to have added to his mtge. debt, was held entitled, as against the wife to the benefit of such purchase, but to the extent only of securing himself in respect of the debt due to him from the husband.—*NELSON v. BOOTH* (1857), 27 L. J. Ch. 110; 3 Jur. N. S. 951; 5 W. R. 722; *subsequent proceedings* (1858), 3 De G. & J. 119, L. JJ.

2606. — Assignment of land.]—After verdict, but before judgment, W., a pltf. in ejectment, on July 11, assigned a field of potatoes, with the crop growing on it, which he held under a lease, the subject-matter of the action, to his attorney in the action, as a security for money advanced by the attorney, & for the amount due for costs already incurred in the action. One of defts., a sheriff's officer, on July 17, seized the crop of potatoes, under a *fi. fa.* against W. On the same day, but afterwards, possession was delivered by another sheriff's officer of the field in question, under a *habere facias possessionem*, to W., who immediately transferred the possession to an agent attending for the attorney. On July 30 the first sheriff's officer sold the potatoes, by auction, as a separate lot, after notice given him of pltf.'s title, to J., who, after taking an assignment of the lease from the sheriff entered & took the potatoes:—*Held*: the assignment to the attorney was not void by reason of the statutes against maintenance & champerty, or as being against public policy, since it was not an absolute sale of the subject-matter of the ejectment, but only a security for past advances: & an action *quare clausum fregit* lay for the attorney against the sheriff & his officers as his title related back to the time when it accrued.—*RADCLIFFE v. ANDERSON* (1860), L. B. & E. 819; 120 E. R. 715; *sub nom. ANDERSON v. RADCLIFFE & WALKER*, 29 L. J. Q. B. 128; 1 L. T. 487; 6 Jur. N. S. 578; 8 W. R. 283, Ex. Ch.

Annotations:—Reid. Guy v. Churchill (1888), 40 Ch. D. 481; *Dunlop v. Macodo* (1891), 8 T. L. R. 43; *Alabaster v. Harness & Medical Battery Co.* (1894), 64 L. J. Q. B. 76; *Ocean Accident & Guarantee Corpn. v. Ilford Gas Co.*, [1905] 2 K. B. 493. *Mentd. Dickinson v. Burrell, Stourton v. Burrell* (1866), L. R. 1 Eq. 337.

2607. — Deposit of policy—Subsequent assignment of policy to secure advances—Whether policy secures costs & advances.]—A solr. took a deposit of a policy from his client, under a parol agreement that it was to secure his then existing costs. Afterwards he made advances & took an assignment of the policy to secure them; the deed saying nothing about the costs:—*Held*: the deed expressing no

—*KNOCK v. OWEN* (1904), 35 S. C. R. 168.—CAN.

2604 ii. ———.]—There is no rule which prevents an attorney from taking security or otherwise arranging with

agreement that it was to include the costs, the possession under it merged the possession under the deposit, & the policy was only a security for the advances.—*VAUGHAN v. VANDERSTEGEN* (1854), 2 Drew. 289; 61 E. R. 730; *sub nom.* *VAUGHAN v. VANDERSTEGEN, Re ANNESLEY*, 2 Eq. Rep. 1257; 23 L. T. O. S. 328.

Annotations:—*Mentd.* *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *London Chartered Bank of Australia v. Lemprière* (1873), L. R. 4 P. C. 572.

2608. Costs due & to become due.—*WILLIAMS v. PIGGOTT*, No. 2616, *post*.

2609. Security for future costs—Whether allowed.—A solr. cannot receive a deposit of title deeds as security for future bills.—*Re DUDDERIDGE, Ex p. LAING* (1835), 2 Mont. & A. 381, Ct. of R.

2610. ———.]—A security taken by a solr. for future costs is not valid.—*BOOTH v. CRESWICK* (1844), 13 L. J. Ch. 217; 2 L. T. O. S. 493; 8 Jur. 323, L. C.

2611. ———.]—*PARSONS v. SPOONER*, No. 1271, *ante*.

——— **Mortgage for costs.**—*See* Nos. 2614–2621, *post*.

2612. ——— **Promissory note obtained under protest—Whether solicitor compelled to give up note.**—Where during the imprisonment of a person he employed an attorney to conduct an application for his discharge by the Insolvent Ct., & the attorney refused to proceed until he had signed a promissory note, which he did, under protest; & after the discharge of prisoner, an action was brought upon the note in the name of the clerk of the attorney, who, it was sworn, was believed not to be interested in it, the ct. refused to grant a rule, calling upon the attorney to give up the note, upon the ground of its having been obtained by duress & fraud.—*WATTS v. BLAYNEY* (1813), 1 Dow. & L. 203; 7 Jur. 854.

2613. Undertaking by solicitor's clerk—To pay money into court as security—Whether binding on solicitor.—*GUEBERT v. MOIR* (1881), 25 Sol. Jo. 392, C. A.

SUB-SECT. 2.—MORTGAGE FOR COSTS.

2614. Whether mortgage valid — For future costs.—An attorney cannot take from his client a mtge., *ab ante*, for the amount of his future bill, for business to be done. But for disbursements, & money to be advanced he may.—*PITCHER v. RIGBY* (1821), 9 Price, 79; 147 E. R. 27.

Annotations:—*Folld.* *Williams v. Piggott* (1825), Jac. 598.

Consd. *Booth v. Creswicke* (1844), 13 L. J. Ch. 217.

2615. ———.]—An attorney cannot take a mtge. from his client for securing future costs.—*JONES v. TRIPP* (1821), Jac. 322; 37 E. R. 873, L. C.
Annotation:—*Folld.* *Booth v. Creswicke* (1844), 13 L. J. Ch. 217.

2616. ———.]—Mtge. by client to attorney for costs due & to become due, held, a valid security for the costs then due only.—*WILLIAMS v. PIGGOTT* (1825), Jac. 598; 37 E. R. 976.

Annotation:—*Consd.* *Booth v. Creswicke* (1844), 13 L. J. Ch. 217.

his client for the payment of costs which have actually become due.—*MONOHUR DOSS v. ROMANAUT LAW* (1878), 1 L. R. 3 Calc. 473.—**IND.**

p. ——— **Assignment of lease.**—*GALBRAITH v. IRVING* (1885), 8 O. R. 751.—**CAN.**

q. ——— **Bonds on penalties payable with interest.**—*FOWLER v. MOORE* (1837), 2 Jo. Ex. Ir. 415.—**IR.**

2609 i. Security for future costs—Whether allowed.—*PERMANENT TRUSTEE CO. OF NEW SOUTH WALES, LTD. v. CAMPBELL* (1907), 7 S. R. N. S. W.

863; 21 N. S. W. W. N. 213.—**AUS.**

2609 ii. ———.]—A security taken from a client by an attorney or counsel for costs to accrue in respect of services to be rendered to the client is invalid & cannot be enforced.—*HOPE v. CALDWELL* (1871), 21 C. P. 241.—**CAN.**

2609 iii. ———.]—A security for costs to be incurred is void as being against public policy, & therefore incapable of confirmation after the subsequent costs have been incurred, although a valid security for such costs may thus be given.—*WILLENS v.*

2617. ——— **Equitable mortgage.**—*Re EVANS, Ex p. BOVILL* (1826), 2 Mont. & A. 382, n.

2618. ——— **For business to be done.**—*PITCHER v. RIGBY*, No. 2614, *ante*.

2619. ——— **For disbursements.**—*PITCHER v. RIGBY*, No. 2614, *ante*.

2620. ——— **For money to be advanced.**—*PITCHER v. RIGBY*, No. 2614, *ante*.

2621. ——— **For costs due.**—*WILLIAMS v. PIGGOTT*, No. 2616, *ante*.

2622. ——— **Mortgage by trustees of turnpike roads.**—The trustees being indebted to their clerk in £81, for business done as a solr., gave him a mtge. for £80, which recited the consideration to be money advanced by him to them:—*Held*: the mtge. was valid under Turnpike Roads Act, 1822 (c. 126), s. 81, the transaction being equivalent to money "borrowed & taken up at interest" by the trustees.—*DOE d. JONES v. JONES* (1850), as reported in 5 Exch. 16; 19 L. J. Ex. 284; 155 E. R. 7.

2623. ——— **Issue of debentures by company.**—*Semble*: it is in the "ordinary course of business" for a co. which has power under its memorandum & arts. of assocn. to issue debentures, to issue debentures to its solr. as security for his costs of defending an action brought by debenture holders.—*Re HUBBARD & CO., LTD., HUBBARD v. HUBBARD & CO., LTD.* (1898), 68 L. J. Ch. 54; 79 L. T. 665; 5 Mans. 360.

2624. Mortgage to secure present & future advances—Costs incurred after notice of subsequent incumbrance.—(1) An attorney held an assignment of two terms to attend the inheritance of an estate recovered by him for his client. On a rule being made to tax his costs, it was part of the rule that the master should decide whether, & if so, upon what terms, the attorney should execute to his client assignments of these terms. The master having made his allocatur, directed that the attorney should, on payment of what was due, or on security for the same being given to his, the master's, satisfaction, execute assignments of these terms at the cost of the client:—*Held*: this did not constitute a charge on the estate so as to give the attorney a priority from the date of the allocatur; for the master had no power to direct that these terms should stand as a security for the amount of the costs.

(2) An indenture was executed by N. to R., at that time N.'s attorney, to secure what was then due to R., & also future advances. This indenture was made a first charge on N.'s property. S., who had previously been N.'s attorney obtained against N. a rule absolute for payment of costs found due on the master's allocatur; he registered this rule, & thus became a second incumbrancer. R. then became largely N.'s creditor for costs subsequently incurred:—*Held*: on an order allowing S. to redeem R., these subsequent costs could not be taken into the account.—*SHAW v. NEALE* (1858), 6 H. L. Cas. 581; 27 L. J. Ch. 444; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 6 W. R. 635;

TANDY (1842), 5 I. Eq. R. 1.—**IR.**

PART VI. SECT. 9, SUB-SECT. 2.

2614 i. Whether mortgage valid—For future costs.—*LOCKING v. HALSTEAD* (1888), 16 O. R. 32.—**CAN.**

2618 i. ——— **For business to be done.**—*MILLER v. STITT* (1867), 17 C. P. 559.—**CAN.**

r. ——— **For costs due—Valid as to amount taxed.**—If an attorney take a bond or a mtge. for his costs, the ct. will only suffer it to stand as a security for so much as shall appear to be due

Sect. 9.—Security for costs: Sub-sects. 2, 3 & 4, A. & B.]

10 E. R. 1422, H. L.; *reusg.* (1855), 20 Beav. 157.

Annotations:—As to (1) Refd. *Turner v. Lettis* (1855), 20 Beav. 185; *Briscoe v. Briscoe*, [1892] 3 Ch. 543; *Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368; *Meguerdit-chian v. Lightbourn*, [1917] 2 K. B. 298. *As to (2) Refd.* *Hopkinson v. Rolt* (1861), 9 H. L. Cas. 514; *Menzies v. Lightfoot* (1871), L. R. 11 Eq. 459. *Generally, Mentd.* *Beavan v. Oxford* (1855), 6 De G. M. & G. 492; *North v. Stewart* (1890), 15 App. Cas. 452.

2625. Whether property recovered may be directed to stand as security.]—*SHAW v. NEALE*, No. 2624, *ante*.

2626. Bankruptcy of client—Application by assignee to set aside mortgage—& for taxation—Waiver of objection to taxation.]—Property was mortgaged by a client to his solr. as security for costs incurred & to be incurred. The client became bkpt., & his assignee applied by summons to set aside the mtge. & to have all the bills taxed. The judge refused the application, on the ground that a solr. might arrange with his client to accept a stated sum for costs, & so avoid the expense of taxation: but a letter being produced, which was read as a waiver of any objection to a taxation:—*Held*: that order must be discharged, & general taxation directed. *Seem*: but for the waiver, there would have been no right in the client to procure taxation, except upon a bill filed.—*Re THOMPSON* (1866), 14 L. T. 6, L. J.J.

2627. Mortgage by husband to secure costs in divorce suit—Whether determined by order for variation of marriage settlement.]—Although the ct., in directing a variation of settlements after a decree dissolving a marriage, has power under Matrimonial Causes Act, 1859 (c. 61), s. 5, to make an order affecting the interests of third parties created before the date of the petition for variation of the settlements, the interests of mtgees. created before that date will, as a general rule, be respected.

An ante nuptial settlement of a sum of £40,000, gave the husband a first life interest in £15,000, & a second life interest in the remainder of the fund. All the settled property was derived from the wife, the husband having no property of his own, except a military pension of £120 *per annum*. There was no issue of the marriage. The wife obtained a decree *nisi* for a dissolution of her marriage on the ground of her husband's adultery & cruelty. Shortly before the decree *nisi* was pronounced, resp., who had previously borrowed £4,200 upon the security of his life interest under the settlement & of certain policies of insurance upon his own life, executed a further mtge. of his life interest in favour of his solrs., to secure their costs in the divorce suit. After the decree *nisi* had been made absolute, petitioner presented a petition for variation of the settlement. The ct., although it had ordered that resp.'s interest in the settled property should be extinguished, refused to make an order, declaring that the interest of resp.'s solrs. under the second mtge. was thereby determined.—*WIGNEY v. WIGNEY* (1882), 7 P. D. 228; 51 L. J. P. 84; 47 L. T. 129; 31 W. R. 140.

Annotation:—Consd. *Nevill v. Nevill* (1893), 69 L. T. 463.

Enforcement of security.]—*See* Nos. 2628, 2629, *post*.

Relief by the court—Whether security valid to extent of proper charges.]—*See* Nos. 2633, 2634, *post*.

to him on taxation—*KENNEY v. BROWNE* (1796), 3 Ridg. Parl. Rep.

*Costs not ascertained or bill delivered.]—**BRISTOWE v. WARNER*

(1847), 10 I. Eq. R. 246.—*IR.*

*a. Bankruptcy of client—Right of trustee to balance.]—**Re WRIGHT* (1906), 3 Tas. L. R. 1.—*AUS.*

— On what grounds granted.]—*See* Nos. 2636–2638, 2644, 2645, *post*.

SUB-SECT. 3.—ENFORCEMENT OF SECURITY.

2628. Foreclosure of mortgage—Cross-action alleging negligence.]—A solr. files his bill for foreclosure of an estate pledged as a security for costs. The client files a cross-bill, alleging the costs demanded to have been occasioned by negligence & want of skill; demurrer overruled on ground of equitable set-off.—*PIGGOTT v. WILLIAMS* (1821), 6 Madd. 95; 56 E. R. 1027.

Annotations:—Refd. *Montrieu v. Curvick* (1841), 1 Jur. 97; *Rawson v. Samuel* (1841), Cr. & Ph. 161; *Great Western Insco. v. Cunliffe* (1874), 9 Ch. App. 525.

2629. — Order for taxation obtained against solicitor—No bill of costs delivered—Effect of Solicitors Act, 1843 (c. 73).]—(1) Where a solr. has taken a mtge. from his client to secure the payment of costs, he is entitled to maintain a bill for foreclosure, though an order for taxation has been obtained against him at the Rolls, & no bill of costs delivered. Above Act is no bar to such a suit.

(2) An offer to pay made by deft. six months before the filing of the bill, which is not repeated in the answer, does not disentitle plff. to his costs of the suit.

(3) Independently of the want of legal service of the order, above Act, s. 37, which applies to the ordinary contract between solr. & client, has no application to the prohibition of a suit brought to enforce a special contract deliberately entered into between the parties.—*THOMAS v. CROSS* (1864), 5 New Rep. 148; 11 L. T. 430; 29 J. P. 4; 10 Jur. N. S. 1163; 13 W. R. 166, L. C.

Annotation:—As to (1) Consd. *Badeley v. Consolidated Bank* (1886), 34 Ch. D. 536.

2630. Necessity for taxation—Action on bill of exchange.]—A bill of exchange was given by A. to a solr. on account of his bill of costs. A afterwards became bkpt. The bill of costs had not been taxed:—*Held*: the solr. was entitled to prove on the bill of exchange, without taxation of the costs.—*Re EMERSON, Ex p. WEBB* (1851), 18 L. T. O. S. 35.

SUB-SECT. 4.—RELIEF BY THE COURT.

A. In General.

2631. Whether security valid to extent of proper charges.]—*SAUNDERSON v. GLASS*, No. 1235, *ante*.

2632. —.]—Solr. in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from his grandmother giving other moneys in trust for the infant, & directing that he should not be so chargeable. Stated accounts set aside: the items being very gross, & the settlement obtained from a person just come of age under a misrepresentation. Bond obtained from the infant's grandmother for the amount of bill of fees & disbursements, directed to stand as a security for moneys justly due on account, & the bill ordered to be taxed.—*BROWN v. PRING* (1750), 1 Ves. Sen. 407; 27 E. R. 1109, L. C.

2633. —.]—A solr. may validly settle his account with his client; he may also make an arrangement with his client for accepting a gross sum as a remuneration for professional services,

PART VI. SECT. 9, SUB-SECT. 4.—A.

2631 i. Whether security valid to extent of proper charges.]—*GOMLEY v. WOOD, WOOD v. GOMLEY* (1846), 1 I. Eq. R. 418; 3 Jo. & Lat. 678.—*IR.*

without the delivery of full & particular bills of costs. But in either of these cases, unless the solr. takes the precaution to preserve evidence to show that the settlement was a just one, the ct. will not allow the transaction to stand.

A client executed & gave a mortgage to his solr. to secure the payment of the sum of £2,500. The deed recited that the former was indebted to the latter in a large sum, both for professional services & for money advanced on account, the amount of which was not at that time precisely ascertained, or immediately ascertainable, but which was computed, & was agreed to be taken, at the above sum, as the parties thereto thereby admitted. In consideration of the sums mentioned in the deed, & also of the sum of £2,500 expressed to be justly due & owing from the client to the solr., certain estates of the former were conveyed to the latter, but subject to a proviso for redemption. In the transactions the sole professional adviser of the client, who was a sufferer from disease, & lived in very close retirement, was the solr., & it was not shown that any third person was called in upon the occasion. The exors., after the client's death, filed a bill, praying for a declaration that the deed ought to stand as a security for such amount as could be shown & proved to be justly due, & that the solr. might be ordered to make out & deliver proper bills of costs. By his answer the solr. set forth accounts of receipts & payments made by him, but showed no balance due to him on the cash account; & he submitted that from lapse of time he could not set forth full & accurate bills of costs, & that, by the terms of the deed, he was not lawfully bound to set forth any:—*Held*: (1) as the relation of solr. & client was subsisting between the parties, that relation constituted an imperfection in the ability of the client to consent to the transaction; (2) as there were no circumstances occurring in the case to remove the pressure arising from the existence of that relation, plffs. were entitled to the relief prayed.—*MORGAN v. HIGGINS* (1859), 1 Giff. 270; 32 L. T. O. S. 290; 5 Jur. N. S. 236; 7 W. R. 273; 65 E. R. 915.

Annotations:—As to (2) *Refd.* *Watson v. Rodwell* (1879), 39 L. T. 614. *Generally*, *Refd.* *Davies v. Parry* (1859), 33 L. T. O. S. 197.

2634. —.]—A mtge. of freehold hereditaments was made by pltf. to deft., his solr., to secure two sums of money & interest. Of these, the larger sum was made up of several items, an account of which was stated & shown to deft. at the execution of the deed. One of the items was for professional charges, as to which no bill of costs was tendered to pltf. As to another item, an erroneous statement as to the payment of the sum therein expressed was made by deft. on the pleadings, & afterwards corrected by him. It was admitted that, as to these two items, the deed could stand as a security for such an amount only as should be found to be justly due to deft. Two other items were in respect of sums, secured by two promissory notes in favour of deft., signed by pltf., on two former occasions, with interest. It was proved that on the occasion when the first of these two notes was signed, a memorandum was also signed by pltf., to the effect "that an account had been that day settled of all the notes of hand held by deft. of pltf., & a balance was found to be due." It was not, however, recited or proved in evidence that any statement of accounts had been drawn up between pltf. & deft. At the time

of signing the second note, it was alleged by deft. that pltf. having again become indebted, a fresh settlement of accounts was come to, but it was not shown that any statement of accounts was made:—*Held*: the notes could not be held to be *prima facie* evidence that the sums mentioned in them were due: & as to these two items as well as the former there must be an inquiry of what was justly due, & a declaration that the deed could stand as a security for such amount only; with costs up to the hearing to be paid by deft.—*DAVIES v. PARRY* (1859), 1 Giff. 174; 33 L. T. O. S. 197; 5 Jur. N. S. 758; 65 E. R. 874.

Annotation:—*Refd.* *Watson v. Rodwell* (1878), 7 Ch. D. 625.

2635. Effect of laches & acquiescence.—A client executed a mtge. to his solr. for a specified sum, being the amount at which past costs in a suit had been estimated, without the bills having been delivered, the solr. undertaking to deliver the bills by a certain time, which he did. Four years afterwards the client changed his solr. & obtained an order for taxation of subsequent costs, but declined the offer of the solr. to have the costs secured by the mtge. included in the taxation, & obtained the order without prejudice to any question as to those costs. Two years afterwards the client filed a bill against the solr., to have the latter costs investigated & the account between the parties re-opened, but did not allege any specific overcharge or error:—*Held*: the suit was precluded by length of time & acquiescence.—*BLAGRAVE v. ROUTH* (1856), 8 De G. M. & G. 620; 26 L. J. Ch. 86; 28 L. T. O. S. 111; 3 Jur. N. S. 399; 5 W. R. 95; 44 E. R. 529, L. JJ.

Annotations:—*Consd.* *Eyre v. Wynn-Mackenzie*, [1894] 1 Ch. 218. *Refd.* *Morgan v. Higgins* (1859), 1 Giff. 270; *Watson v. Rodwell* (1879), 39 L. T. 614; *Ward v. Sharp* (1881), 50 L. T. 557.

B. On What Grounds Relief Granted.

2636. Undue influence.—*WALMESLEY v. BOOTH*, No. 2037, *ante*.

2637. —.]—An account settled, & a security taken by a solr. from his client, though to be viewed with jealousy, is not to be treated as a nullity.

A solr. & client settled an account, & the client gave a mtge. & covenant to pay. The solr. sued on the covenant, & the client filed a bill, impeaching the transaction on the ground of surprise, undue influence & error. This being denied by the answer, a motion for an injunction to stay proceedings on the covenant was refused.—*JONES v. ROBERTS* (1846), 9 Beav. 419; 50 E. R. 405.

Annotation:—*Consd.* *Blagrove v. Routh* (1856), 8 De G. M. & G. 620.

2638. —.]—Bill to set aside a security for a sum therein expressed to be due, but which was in fact the estimated amount of past costs in a suit, executed by a client in favour of his then solr. pending the suit, & without the intervention of another legal adviser, dismissed with costs; there being no evidence of pressure or improper conduct on the part of the solr., & no evidence or averment of any specific error in the bill of costs; & it appearing that deft. had delivered the bill of costs at the time agreed on between him & pltf., five years & a half before bill filed, & that pltf. had had ample opportunity for discovering the errors, if any.

The proposition in *Lawless v. Mansfield* (1841), 1 Dr. & W. 611, that a general charge is sufficient to

PART VI. SECT. 9, SUB-SECT. 4.—B.

2636 i. Undue influence.—In a suit of foreclosure on a mtge. taken by a solr.

from his client to secure advances & costs, the ct. refused to direct taxation, there being no overcharge pointed out,

or any undue pressure shown.—*SHAW v. DRUMMOND* (1867), 13 Gr. 662.—**CAN.**

Sect. 9.—Security for costs: Sub-sect. 4, B. Part VII. Sect. 1: Sub-sects. 1 & 2, A.]

open accounts between a solr. & his client is in conflict with the rule of the Ct. of Ch. in England, which is that, if the party seeking to set aside a security for the amount of a bill of costs relies on fraud, or error amounting to evidence of fraud, in the bill of costs, he must aver & prove the specific items, upon which he means to rely, to be fraudulent or erroneous.—**BLAGRAVE v. ROUTH** (1856), 2 K. & J. 509; 69 E. R. 884; *affd.*, 8 De G. M. & G. 620, L. JJ.

Annotations:—**Reid**. **Morgan v. Higgins** (1859), 1 Giff. 270; **Watson v. Rodwell** (1879), 39 L. T. 614; **Ward v. Sharp** (1884), 50 L. T. 557 **Eyre v. Wynn-Mackenzie**, [1894] 1 Ch. 218.

2639. —.]—**MORGAN v. HIGGINS**, No. 2633, *ante*.

2640. —.]—A great deal has been said about the stipulation in the last mtge. deeds which constitute pltf. receiver of the rents, & allow him to charge a commission for that purpose. It was truly said that the older decisions upon the subject had in view the usury laws, & **LORD ELDON**'s expression is that such a stipulation would tend to usury, but he says also it would be oppressive. Well, if the ct. finds that from the relation of the parties one of them has the means of oppressing the other it would come clearly within the very expression which he uses . . . I must assume that pltf. took upon himself, all through this matter of contract, the duty of advising his clients what deed they should execute. If an independent solr. had been employed he would at once have objected to any such stipulation, at least he ought to have done so (**BACON, V.-C.**).—**EYRE v. HUGHES** (1876), 2 Ch. D. 148; 45 L. J. Ch. 395; 34 L. T. 211; 24 W. R. 597; 2 Char. Pr. Cas. 33.

Annotation:—**Distd.** **Jones v. Linton** (1881), 44 L. T. 601.

2641. Fraud or misrepresentation.—**SAUNDERSON v. GLASS**, No. 1235, *ante*.

2642. —.]—**BROWN v. PRING**, No. 2632, *ante*.

2643. —.]—**BLAGRAVE v. ROUTH**, No. 2638, *ante*.

2644. Doubt as to accuracy of bill—Inquiry into reasonableness of charges—Evidence as to whether business actually done.—Where an attorney had taken a mtge. from his client for his bill of costs in preparing that & another mtge., & the client, before the attorney's mtge. was executed, assented to the bill, but afterwards, on coming to redeem, questioned its accuracy, the ct. directed the master to examine the bill with a view to ascertaining the reasonableness of the charges, without entering into evidence as to whether the business charged for had been actually done.—**WRAGG v. DENHAM** (1836), 2 Y. & C. Ex. 117; 6 L. J. Ex. Eq. 38; 160 E. R. 335.

2645. No proper statement or examination of accounts.—**MORGAN v. HIGGINS**, No. 2633, *ante*.

2646. —.]—**DAVIES v. PARRY**, No. 2634, *ante*.

2647. Unusual provisions in mortgage.—By a deed of mtge. entered into between a solr. & his client, it was stipulated that the debt should remain on the security of the hereditaments for twenty years & the client covenanted that he would not pay or tender payment of the sum, or institute proceedings for the redemption of the lands for that period. There was a power of sale, which was not to be exercised until the expiration of the twenty years, or until two months' default should have been made in the payment of interest.

Upon a bill to redeem being filed, within four years after the date of the deed, redemption was decreed; it being held, as between solr. & client, that where the former takes a security from the latter, the ct. will not allow the solr. to enforce a stipulation of an unusual kind, & disadvantageous to the client.—**COWDRY v. DAY** (1859), 1 Giff. 316; 29 L. J. Ch. 39; 1 L. T. 88; 5 Jur. N. S. 1199; 8 W. R. 55; 65 E. R. 936.

— **Power of sale without qualification.**—See **MORTGAGE**, Vol. XXXV., pp. 490, 491, Nos. 2221–2223.

Part VII.—Amount of Costs Recoverable.

SECT. 1.—NON-CONTENTIOUS BUSINESS.

SUB-SECT. 1.—IN GENERAL.

See **Solicitors' Remuneration Act, 1881 (c. 44)**, ss. 1–7; **Remuneration Orders, 1882, 1919, 1920, 1925.**

2648. To what matters Solicitors' Remuneration Act, 1881 (c. 44) & Remuneration Orders apply—"Other business" not being conveyancing business.—(1) Solrs. who transact conveyancing business in an action will, under the **Solicitors' Remuneration Act, 1881 (c. 44)**, & the **General Order of August, 1882**, be allowed taxed costs & charges for such business, according to the scales set forth in the schedules to the **General Order**.

(2) The proper construction of the language of **Solicitors' Remuneration Act, 1881 (c. 44)**, s. 2, is that it refers to conveyancing matters which take place in an action as well as to those out of ct., & that the exception is only from "other business" not being conveyancing business; & accordingly where the taxing master had disallowed certain charges made for conveyancing business in an action, & under the scales of charges

contained in the schedules to the **General Order of August, 1882**, he was directed to review his taxation.—**STANFORD v. ROBERTS** (1884), 26 Ch. D. 155; 53 L. J. Ch. 338; 50 L. T. 147; 48 J. P. 692; 32 W. R. 404.

Annotations:—As to (1) **Apld.** **Fleming v. Harcastle** (1885), 33 W. R. 776. As to (2) **Apprvd.** **Humphreys v. Jones** (1885), 31 Ch. D. 30; **Re Merchant Taylors' Co.** (1885), 30 Ch. D. 28. **Foll.** **Re Morgan** (1911), 84 L. J. Ch. 219. **Reid.** **Re Macgowan**, **Macgowan v. Murray**, [1891] 1 Ch. 105; **Hall v. Minter**, [1922] 1 Ch. 191. **Generally**, **Mentd.** **Bean v. Wade** (1885), Cab. & El. 519.

2649. —.]—**Re MERCHANT TAYLORS' Co.**, No. 2732, *post*.

2650. — Conveyancing business—Work done in an action.—**STANFORD v. ROBERTS**, No. 2648, *ante*.

2651. —.]—**FLEMING v. HARCASTLE**, No. 2731, *post*.

2652. — Out of court.—**STANFORD v. ROBERTS**, No. 2648, *ante*.

2653. —.]—**FLEMING v. HARCASTLE**, No. 2731, *post*.

2654. — Whether scale affected by reduced bankruptcy scale.—**Bkpcy. Rules, 1886**,

PART VII. SECT. 1, SUB-SECT. 1.

b. Statutory scale directory & prohibitory.—**R. S. N. 1900**, c. 185, in respect to the amount of fees payable to solrs. & others, are not merely directory but prohibitory.—**COOKSON v. DRISCOLL** (1916), 50 N. S. R. 1.—**CAN.**

r. 112 (2), which reduces a solr.'s charges by two-fifths "in all proceedings under the Act in which costs are payable out of the estate" where the estimated assets do not exceed £300, does not apply to conveyancing business, & the charges in respect of such business are regulated by rule II. of the General Regulations in the Appendix to those Rules.—*Re* PARFITT (1889), 23 Q. B. D. 40; *sub nom. Re* PARFITT, *Ex p.* BOARD OF TRADE, 58 L. J. Q. B. 428; 61 L. T. 88; 37 W. R. 751; 5 T. L. R. 506; 6 Morr. 166.

Annotations:—Distd. Re Procter (1891), 65 L. T. 348. *Folld. Re* Weighell, [1909] 1 K. B. 92.

Costs in administration of small estates in bankruptcy, see BANKRUPTCY, Vol. IV., p. 507, Nos. 4573–4577.

2655. — Business pending when rules come into operation.]—*Re* LACEY & SON, No. 2721, *post*.

2656. — —.]—In June, 1882, D. contracted to sell a piece of land for £375 upon the terms of the purchaser paying to the vendor "all reasonable & proper costs" of making & verifying his title & executing the conveyance. In Jan. 1883, the General Order under Solicitors' Remuneration Act, 1881 (c. 44), came into operation. That Order provides that the costs of the vendor's solr., with respect to such a sale, shall be according to an *ad valorem* scale of 30s. per cent. In Apr. 1883, D., who had previously employed a country solr., transferred the business to a London solr. In May, 1884, the London solr. sent in his bill of costs to the purchaser's solr. made out on the old system. The purchaser's solr. objected that the bill ought to be made out according to the scale prescribed by the General Order. On a summons by the purchaser for a declaration to this effect:—*Held*: the costs payable by the purchaser were regulated by that Order.—*Re* DENNE & SECRETARY OF STATE FOR WAR (1884), 54 L. J. Ch. 45; 51 L. T. 657; 1 T. L. R. 23; *sub nom. Re* SECRETARY OF STATE FOR WAR & DENNE, 33 W. R. 120.

2657. —.]—FLEMING v. HARCASLE, No. 2731, *post*.

2658. —.]—*Re* FIELD, No. 2688, *post*.

2659. —.]—*Re* STEWART, No. 2663, *post*.

2660. —.]—*Re* LOVE, HILL v. SPURGEON, No. 2698, *post*.

2661. — Business completed before rules come into operation.]—*Re* STEWART, No. 2663, *post*.

— Sales.]—*See* Sub-sect. 3, *post*.

— Purchases.]—*See* Sub-sect. 3, *post*.

— Mortgages.]—*See* Sub-sect. 4, *post*.

— Leases.]—*See* Sub-sect. 5, *post*.

— Conveyances reserving rent.]—*See* Sub-sect. 5, D., *post*.

2662. Work done by solicitors under same retainer—Delivery of separate bills of costs for various branches of work—Whether operation of remuneration order excluded.]—*Re* STEWART, No. 2663, *post*.

SUB-SECT. 2.—REMUNERATION ORDERS AND SCHEDULES.

A. Scope of Schedules.

See Solicitors' Remuneration Act, 1881 (c. 44), s. 7; Remuneration Orders, 1882, 1919, 1925, Schedules I. & II.

2663. What covered by Schedule I.—Grant of

easement.]—The General Order under Solicitors' Remuneration Act, 1881 (c. 44), is, by virtue of sect. 7 of the Act, applicable to business completed before the Order came into operation. The expression "undertaking any business" in rule 6 of the Order, means not merely accepting the retainer, but rather entering upon the work, that is, doing something for which the solr. is entitled to make a charge, whether such charge is or is not covered by the scale fee under the Order. Solrs. were employed by a corp. in purchases of property for a waterworks scheme effected under statutory powers. The employment commenced before, & continued after, the date when the General Order under Solicitors' Remuneration Act, 1881 (c. 44), came into operation. After that date the solrs. gave the corp. notice, under rule 6 of the Order, that they elected to charge for the business done after the commencement of the Act according to the old system as altered by Sched. II. to the Order. The solrs. delivered bills of costs relating (a) to business completed before the Order came into operation; (b) to business pending when the Order came into operation in which work was done after the Order came into operation & before the notice of election was given, & (c) to business so pending in which no work was done after the Order came into operation until after the notice of election was given:—*Held*: (1) as to the completed business the Order applied, & the taxation must be according to the scale in Sched. I.; (2) as to the pending business in which work was done before notice of election, whether or not of a kind covered by the scale fee, the notice was ineffectual, & the taxation must therefore be according to the scale; (3) as to any separate matters of conveyancing in which no work was done until after the notice of election, the notice, according to the decision in *Re Love, Hill v. Spurgeon*, No. 2698, *post*, was effectual, & the taxation must therefore be according to the old system as altered by Sched. II.; (4) *Qu.*: whether where work is done by solrs. under one & the same retainer it is competent for them, by delivering separate bills of costs for various branches of the work, to exclude the operation of the Order as to some of such bills; (5) the exception contained in rule 11 of Sched. I., Part I. of the General Order, whereby in the case of sales under Lands Clauses Act, 1845 (c. 18), the scale is rendered inapplicable, extends only to vendors' costs & not to the costs of the purchasers.

(6) Grants by way of sale of rights & easements of laying & maintaining pipes in land are not "conveyances of property" within Sched. I. Part I., & consequently the scale is not applicable to solrs.' charges in respect of such grants.—*Re* STEWART (1889), 41 Ch. D. 494; 60 L. T. 737; 37 W. R. 484; 5 T. L. R. 368.

Annotations:—As to (5) *Refd. Re* Burdekin, [1895] 2 Ch. 136. *As to* (6) *Consd. Re* Earnshaw-Wall, [1894] 3 Ch. 156. *Folld. Re* Sanders' Settlement, [1896] 1 Ch. 480. *Generally, Refd. Re* Evans, [1905] 1 Ch. 290.

2664. —.]—A grant of a new easement is not a "conveyance of property" within the meaning of Sched. I., Part I., to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), & consequently the scale fee prescribed

PART VII. SECT. 1, SUB-SECT. 2.—A.

a. Scope of regulations & schedules—Solicitor acting as notary—Pension secured for client from foreign government.]—A solr., who is also a notary, & acting in the latter capacity obtains for a client the allowance of a pension from the United States govt., is entitled

to charge for his services such sum as may be agreed upon, & is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed.—*OSTROM v. BENJAMIN* (1893), 20 A. R. 336.—CAN.

d. — Whether scale fixed as maximum.]—NORTHERN CROWN BANK

v. WOODCRAFTS, LTD., Re VARLEY TAXATION OF COSTS (Alta.), [1919] 2 W. W. R. 917.—CAN.

e. — Advice to trustees & arrangements for investments.]—*Ex p. O'HAGAN* (1887), 19 L. R. Ir. 99.—IR.

f. — Preparation of scheme for erection of cottages for local authority.]—

Sect. 1.—Non-contentious business: Sub-sect. 2, A. & B. (a) & (b), & C. (a).]

by Part I. of that Sched. does not govern the remuneration of a solr. in relation to such a transaction. Sched. I., Part I., applies to cases in which an existing property or right is transferred, not to cases in which a new right or easement is created for the first time.—*Re SANDERS' SETTLEMENT*, [1896] 1 Ch. 480; 65 L. J. Ch. 426; 74 L. T. 261; 44 W. R. 385; 12 T. L. R. 232; 40 Sol. Jo. 318, C. A.

2665. — Sale of land out of England.]—The General Order under Solicitors' Remuneration Act, 1881 (c. 44), fixing a scale charge does not apply to a sale of land not situated in England. Thus, where an English solr. carried out a sale under Purchase of Land (Ireland) Act, 1885 (c. 73), of land in Ireland belonging to a client, & employed an Irish solr. to do so much of the work as had necessarily to be done in Ireland:—*Held*: the English solr.'s remuneration was not regulated by Sched. I., Part I., to the General Order under Solicitors' Remuneration Act, 1881 (c. 44).—*Re GREVILLE'S SETTLEMENT* (1888), 40 Ch. D. 441; 58 L. J. Ch. 256; 60 L. T. 43; 37 W. R. 150.

2666. — Sale under Lands Clauses Act, 1845 (c. 18) — Costs of purchaser's solicitor.]—*Re STEWART*, No. 2663, *ante*.

2667. — Voluntary sale.]—The exception contained in rule 11 of Sched. I., Part I., of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), whereby the scale charge is made inapplicable to sales of land under Lands Clauses Act, 1845 (c. 18), or any other Act under which the vendor's charges are paid by the purchaser, extends to purchase by agreement by a public body under the powers of such an Act, although the vendor is absolute owner, & although the agreement contains a special clause stipulating that the purchasers shall bear all the vendor's costs as between solr. & client.

A voluntary purchase by a local authority under the powers of the Public Health Act, 1875 (c. 55), which incorporates Lands Clauses Act, 1845 (c. 18), held to be within the rule.—*Re BURDEKIN*, [1895] 2 Ch. 136; 64 L. J. Ch. 561; 72 L. T. 629; 43 W. R. 534; 39 Sol. Jo. 452; 12 R. 243, C. A.

2668. — Abortive negotiations.]—The remuneration of a lessor's solr. prescribed in the General Order under the Solicitors' Remuneration Act, 1881 (c. 44), Sched. I., Part 2, does not cover negotiations carried on by the solr. as to the letting of the property with persons other than the person to whom the lease is ultimately granted. The solr. is entitled to remuneration for such negotiations as business "which is not in fact completed" under Rule 2 (c) of the same General Order.—*Re MARTIN* (1889), 41 Ch. D. 381; 58 L. J. Ch. 478; 60 L. T. 555; 37 W. R. 497; 5 T. L. R. 426, L. J.

2669. — Sale of advowson.]—An advowson in gross though an incorporeal hereditament in freehold property within Sched. I., Part I., to the order made in pursuance of Solicitors' Remuneration Act, 1881 (c. 44), & on a purchase &

sale the scale charge applies.—*Re EARNSHAW-WALL*, [1894] 3 Ch. 156; 63 L. J. Ch. 836; 71 L. T. 173; 42 W. R. 567; 38 Sol. Jo. 549; 8 R. 558.

Annotation:—*Apprvd. Re Sanders Settlement*, [1896] 1 Ch. 480.

2670. — Sale of property other than freehold, copyhold, or leasehold—Goodwill & lease.]—*Re COE* (1894), 38 Sol. Jo. 421.

2671. — Sale carried out by underlease.]—Leasehold property held with other property under one lease was sold by auction subject to a condition that the purchaser should accept an underlease for the whole of the unexpired term less three days at an apportioned ground rent. The vendors' solrs., by virtue of rule 5 of Part II. of Sched. I. to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), claimed to be entitled to a scale charge in respect of the price & to a further scale charge in respect of the rent:—*Held*: the transaction though carried out by an underlease was in fact a sale, & the solrs. were not entitled to a charge in respect of the rent; but *qu.* whether this was not business not provided for by Sched. I., & therefore to be charged for according to the old system as modified by Sched. II.—*Re WEBB, STILL v. WEBB*, [1897] 1 Ch. 144; 66 L. J. Ch. 163; 75 L. T. 478; 45 W. R. 170; 41 Sol. Jo. 129.

Annotations:—*Consd. Re Walker & Oakshott's Contract*, [1901] 2 Ch. 383. *Apld. Re Judd & Poland & Skelcher's Contract*, [1906] 1 Ch. 684.

2672. — Loan on property other than freehold, copyhold, or leasehold.]—The scale fee to "mtgee.'s solr. for negotiating loan" provided for by Sched. I. to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), is applicable to all cases of loans on mortgage, & is not confined to loans upon mtge. of freehold, copyhold, or leasehold property exclusively.—*Re FURBER*, [1898] 2 Ch. 538; 47 W. R. 184; *sub nom. Re FURBER, Ex p. FURBER*, 67 L. J. Ch. 593; 70 L. T. 266; *sub nom. Re FURBER, Ex p. WATKINS*, 42 Sol. Jo. 718.

B. Item and ad valorem Charges.

(a) Election by Solicitor.

See Sub-sect. 2, C., *post*.

(b) Particular Cases.

See Remuneration Orders, 1882, 1919, 1925, Sched. II.

2673. Fair copy—When second copy allowed.]—According to the new practice, under 15 & 16 Vict. c. 86, s. 56, in cases of sale by the ct., an abstract of title is submitted to counsel to prepare the conditions of sale. Counsel having made certain queries upon four sheets of the abstract, the vendor's solr. charged £1 1s. for perusing same, etc., & £4 6s. 8d. for a second fair copy of the abstract for the purchaser's solr. The taxing master disallowed the first item & reduced the second to 13s. 4d., which he allowed for recopying the four spoiled sheets of the abstract, to render it fit to be sent to the purchaser's solr. On a petition to review:—*Held*: the taxing master was right, & they were matters entirely within the discretion of the taxing master.

Ex p. STRANGE (1888), 21 L. R. Ir. 529.—IR.

g. — Preparation of sanitary regulations for town commissioners.]—*Re ATKINSON* (1888), 24 L. R. Ir. 182.—IR.

h. Costs payable out of trust funds—Scale directory only.]—*ARIHI-TE NAHU v. LOCKE* (1887), 5 N. Z. L. R.

408 (S. C.).—N.Z.

k. —*Re BROWN* (1895), 14 N. Z. L. R. 8.—N.Z.

PART VII. SECT. 1, SUB-SECT. 2.—B. (b).

1. Perusal fee—Documents of title—On compulsory purchase.]—Under

an order to tax the costs awarded to the owner of lands compulsorily taken by a co., his solr. is not entitled to 1s. per folio for penning deeds referred to in the abstract of title furnished. The General Order made in pursuance of Solicitors' Remuneration Act, 1881, Sched. II., does not apply to such taxation.—*Re BANN NAVIGATION ACT*,

The solr. usually charges for drawing the conditions of sale, though they are really drawn by counsel, & he is thereby remunerated for the trouble of answering counsel's queries.

A second fair copy of abstract is not allowed, except under special circumstances, as where the notes of counsel render the copy laid before him wholly unfit to go to the purchaser.—*RUMSEY v. RUMSEY*, *Ex p.* *RUMSEY* (1855), 21 Beav. 40; 25 L. T. O. S. 241; 3 W. R. 589; 52 E. R. 773.

2674. Letters from solicitor to client—Superfluous to requirements.—Letters written by a solr. to his client which are not properly required for the interests of the client in the business for which the solr. is engaged will not be allowed on taxation.—*Re BRADY* (1867), 15 W. R. 632.

2675. Perusal fee—Abstract of title.—Upon the construction of Sched. II. of the General Order, containing scales of charges, made in pursuance of Solicitors' Remuneration Act, 1881, (c. 44), abstracts of title are not included in the words "deeds, wills, & other documents," the charge for perusing which is therein fixed at 1s. per folio; but the old scale of 6s. 8d. for perusal of every three brief sheets of eight folios each remains unaltered.—*Re PARKER* (1885), 29 Ch. D. 199; 51 L. J. Ch. 959; 52 L. T. 686; 33 W. R. 511.

Annotation:—*Consd. Re Robertson* (1887), 19 Q. B. D. 1.

2676. — Documents of title—By solicitor making advances.—A solr. making advances to a client upon the security of real property & perusing for that purpose the title deeds of such property, is not entitled to charge at the rate of 1s. per folio "for perusing" under Sched. II. of the General Order of Aug. 1882, made in pursuance of Solicitors' Remuneration Act, 1881 (c. 44).—*Re ROBERTSON* (1887), 19 Q. B. D. 1; 56 L. T. 859; 35 W. R. 833, D. C.

2677. What are "other documents"—Conditions of sale.—In an administration action, to which mtgees. of leaseholds were not parties, plffs. obtained an order to sell the leaseholds, & that the money should be paid into ct. The order was made without the knowledge of the mtgees. Plffs. wrote to the mtgees. sending draft particulars & conditions of sale as settled by the conveyancing counsel to the ct. "for your perusal." The mtgees. undertook to concur in the sale on condition that their mtge. debt & costs & expenses were provided for out of the proceeds of sale in ct., & they returned the conditions approved. The taxing master disallowed the fees charged at the rate of 1s. a folio for perusing the conditions of sale, but allowed a fee of one guinea for reading them. One of the grounds of disallowance was that conditions of sale were not such documents as were intended by the word "documents" in Sched. II. of the General Order made in pursuance of Solicitors' Remuneration Act, 1881 (c. 44). On summons to vary the taxing master's certificate:—*Held*: while not deciding that conditions of sale did not come within the word "documents," this was an extraordinary case where the taxing master had a discretion.—*Re REES, REES v. REES* (1887), 58 L. T. 68.

2678. — Particulars of sale.—*Re READE, SALTHOUSE v. READE* (1889), 33 Sol. Jo. 219.

2679. — Case for opinion of counsel.—*Re MAHON*, No. 2806, *post*.

2680. — — — — ——*Re MORGAN (R. P.) & Co.*, No. 2879, *post*.

2681. Attendances — Discretion of master.—*Re MAHON*, No. 2805, *post*.

2682. — Attendance on several clients—Method of charging costs.—*Semble*: when a solr. makes an attendance which can be charged against several clients he should charge a larger sum than for one attendance & divide it up among the several clients, & not charge an attendance to each client.—*Re WARD, BOWIE & Co.* (1910), 102 L. T. 527; *affd.*, 102 L. T. 881, C. A.

2683. Charge for schedule of documents handed over on change of solicitors.—*Re MORGAN (R. P.) & Co.*, No. 2879, *post*.

C. Election as to Remuneration.

(a) In General.

See Solicitors' Remuneration Act (c. 44), ss. 1-7; Remuneration Orders, 1882, 1920.

2684. When right to election exists—Reinvestment of proceeds of compulsory purchase.—Where money is paid into ct. under statutes incorporating Lands Clauses Consolidation Act, 1845 (c. 19), s. 80, the solr. for the vendor may entitle himself to detailed charges, provided that he signifies his election "before undertaking the business."

A sum of money was paid into ct. by the Metropolitan Board of Works for lands belonging to the governors of a certain hospital. The hospital proposed to purchase certain ground rents out of the fund in ct., & instructed their solr. accordingly. The solr. wrote saying that he elected that his remuneration for all business connected with the purchase should be in accordance with the system in force previously to the coming into operation of Solicitors' Remuneration Act, 1881 (c. 44), as altered by Schedule II. of the General Order made under that Act, & he requested the clerk of the hospital to inform the solr. of the board of his intention. The solr. of the board replied by saying that they required that the remuneration should be according to Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881 (c. 44). The ct. approved of the proposed investment, & made an order that the board should pay to the governors of the hospital their costs, including all reasonable charges & expenses incident thereto of the reinvestment of the amount payable under the agreement for purchase & of obtaining the order, & all proceedings relating thereto, such costs, charges, & expenses to be taxed in case the parties differed. On delivering the bill the solr. had charged in detail for the conveyancing business. The taxing master upon taxation decided that the election made by the solr. was binding on the board, & allowed the detailed charges. The board carried in objections, which the taxing master overruled. The board then took out a summons to review the taxation, & raised the question, Whether upon a reinvestment in land of purchase-money paid into ct. by promoters under Lands Clauses Consolidation Act, 1845 (c. 19), the solr. for the landowners obtaining the reinvestment could, as against the promoters, elect to be paid otherwise than according to the scale in Schedule I., Part I., of the General Order made pursuant to Solicitors' Remuneration Act, 1881 (c. 44):—*Held*: there was no ground for introducing any exception into rule 6 of the kind

Ex p. *OLPHERTS* (1886), 17 L. R. Ir. 168.—*IR.*

m. — Draft deed.—*WESTBY v. GREENE* (1843), 5 I. Eq. R. 449.—*IR.*

2679 l. What are "other documents"—

Case for opinion of counsel.—Drawing a case for counsel in contemplation of litigation comes within the expression "drawing . . . other documents" in General Order, 1884, Sched. 2, made in

pursuance of Solrs.' Remuneration Act, 1881, & is properly charged for at 2s. a folio.—*Re RATHMINES & RATHGAR IMPROVEMENT COMRS. & FIELD*, [1922] 1 I. R. 13.—*IR.*

Sect. 1.—Non-contentious business: Sub-sect. 2, C. (a), (b) & (c); sub-sect. 3, A. (a).]

contended for by the board.—*Re BRIDEWELL HOSPITAL & METROPOLITAN BOARD OF WORKS* (1887), 57 L. T. 155.

2685. — Client being public body.—The right of a solr. under r. 6 of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), to elect to charge according to the old system as altered by Sched. II. to the order, instead of by scale, is not taken away by the fact that his clients are a public body or persons in a fiduciary capacity; nor is it the duty of public bodies or persons in a fiduciary capacity to prevent their solrs. from so electing.

A school board instructed a solr. to act for them in the matter of a purchase of a school site for £350. The solr. duly signified to the board his election under r. 6 of the General Order to charge on the old system as altered by Schedule II. The board consented. The matter was completed, & the solr. sent in a bill for £50 2s. On taxation the taxing master reduced the bill to £13, the amount of the scale charge & disbursements, & stated in answer to objections that the school board, being a public body charged with the administration of public funds, were in a fiduciary position, & it was their duty not to employ a solr. who insisted on the more expensive mode of payment:—*Held*: no such duty was cast on a public body or persons in a fiduciary position, & the bill must be referred back to be taxed according to the solr.'s election.—*Re EVANS*, [1905] 1 Ch. 290; 74 L. J. Ch. 204; 92 L. T. 151; 69 J. P. 104; 3 L. G. R. 169.

Annotation:—*Refd. Re Porter, Amphlett & Jones*, [1912] 1 Ch. 98.

2686. Client being person in fiduciary capacity.—*Re EVANS*, No. 2685, *ante*.

2687. Sufficiency of notice of election—Sending in bill of costs in old form.—*FLEMING v. HARDCASTLE*, No. 2731, *post*.

2688. Whether notice effectual after rules come into operation—In respect of pending business.—Negotiations for a lease were carried on through the lessor's solr. for two years before the rules under Solicitors' Remuneration Act, 1881 (c. 44), came into operation. After they came into operation terms were come to, & a lease executed. The solr. in his bill charged for the negotiations, & also charged the amount fixed by Sched. I., Part II., to the rules, as remuneration "for preparing, settling, & completing lease & counterpart." The taxing master disallowed all the items for negotiations, & the judge affirmed his decision. The solr. appealed:—*Held*: (1) though the business had been commenced before the rules came into operation, the taxation must be conducted according to the rules, the solr. not having declared his election to the contrary. *Qu.*: whether he might on the rules coming into operation have effectually declared such election; (2) having regard to rule 2, the amount fixed by Sched. I., Part II., included the charges for negotiations, & the appeal must be dismissed.—*Re FIELD* (1885), 29 Ch. D. 608; 54 L. J. Ch. 661; 52 L. T. 480; 49 J. P. 613; 33 W. R. 553, C. A.

Annotations:—*As to* (1) *Appld. Fleming v. Hardcastle* (1885), 52 L. T. 851. *Consd. Re Love, Hill v. Spurgeon* (1889), 40 Ch. D. 637. *Refd. Re Stewart* (1889), 41 Ch. D. 494; *Wellby v. Still*, [1895] 1 Ch. 524. *As to* (2) *Appld. Re Emanuel & Simmonds* (1886), 33 Ch. D. 40. *Distd. Re Martin* (1889), 41 Ch. D. 381. *Apprvd. Savery v. Enfield L. B.*, [1893] A. C. 218. *Refd. Re Allen* (1887), 34 Ch. D. 433; *Re Newbould* (1887), 20 Q. B. D. 204; *Re Robson* (1890), 45 Ch. D. 71; *Re Horn & Francis*, [1896] 2 Ch. 797; *Re Thomas, Evans v. Griffiths*, [1900] 1 Ch. 454; *Re Gray*, [1901] 1 Ch. 239.

2689. —.]—*Re LOVE, HILL v. SPURGEON*, No. 2698, *post*.

2690. —.]—*Re STEWART*, No. 2663, *ante*.

2691. — In respect of separate matters in which no work done until after notice.]—*Re STEWART*, No. 2663, *ante*.

2692. Upon whom notice binding—Notice of election properly given to first mortgagee—Mortgagor.—An election only puts the solr. in the position in which he was before the scale was adopted; if an election is properly made as between the solr. & his own client, a first mtgee., it is binding as against the mtgor. & a subsequent mtgee.—*HESTER v. HESTER* (1886), 34 Ch. D. 607; 55 L. T. 669; *on appeal* (1887), 34 Ch. D. at p. 614, C. A.

Annotations:—*Consd. Re Metcalfe, Metcalfe v. Blencowe* (1887), 57 L. J. Ch. 82; *Re Evans*, [1905] 1 Ch. 290. *Refd. Re Love, Hill v. Spurgeon* (1889), 40 Ch. D. 637.

2693. — Subsequent mortgagee.] — *HESTER v. HESTER*, No. 2692, *ante*.

2694. When sanction of judge required—Election by devisee having conduct of sale in action.—*Re RACKHAM, CARTER v. RACKHAM* (1889), 34 Sol. Jo. 97.

Annotation:—*Refd. Re Evans*, [1905] 1 Ch. 290.

2695. One notice comprising several matters in action—Determination of validity of notice—Necessity for treating each matter separately.—*Re LOVE, HILL v. SPURGEON*, No. 2698, *post*.

(b) Time for Giving Notice of Election.

See Solicitors' Remuneration Act, 1881 (c. 44), ss. 1-7; Remuneration Orders, 1882, 1920.

2696. "Before undertaking any business."—*Re BRIDEWELL HOSPITAL & METROPOLITAN BOARD OF WORKS*, No. 2684, *ante*.

2697. —.]—The notice of election under rule 6 of the General Order to Solicitors' Remuneration Act, 1881 (c. 44), must be given by the solr. before he undertakes any business at all in the particular matter for his client. After having done any work in the matter for which he could charge his client if the scale under the Order did not apply, it is too late for him to elect. A solr. who acted for a mtgee. in relation to the mtged. property received from the solrs. of the persons entitled to the equity of redemption a request that the mtgee. would sell under his power of sale, & in pursuance of this he, without any express authority from his client, did work in relation to the contract for sale for which if authorised he would, apart from the rules, under Solicitors' Remuneration Act, 1881 (c. 44), have been entitled to be paid, & which would be covered by the scale fee. The sale was completed:—*Held*: (1) a notice of election to be remunerated according to the old system, which was given by the solr. after work of the above description had been done, was too late, although given before the contract was signed, for as the client had ratified his proceedings he stood in the same position as if he had received previous authority, & must be treated as having undertaken the business as soon as he did any work of the above description.

(2) The taxing master having taxed according to the scale, an objection was taken, solely grounded on the notice to elect:—*Held*: the ct. could not enter upon the question whether there had been an agreement between the mtgee. & his solr. that the latter should be remunerated according to the old system. *Qu.*: whether, if the right to elect was gone, any such agreement would bind the parties entitled to the equity of redemption.—*HESTER v. HESTER* (1887), 34 Ch. D.

607; 56 L. J. Ch. 247; 55 L. T. 862; 51 J. P. 438; 35 W. R. 233; 3 T. L. R. 308, C. A.

Annotations:—As to (1) *Folld. Re Metcalfe, Metcalfe v. Blencowe* (1887), 57 L. J. Ch. 82; *Re Love, Hill v. Spurgeon* (1889), 40 Ch. D. 637. *Consd. Re Evans*, [1905] 1 Ch. 290.

2698. ———.]—(1) The right of a solr., under rule 6 of the General Order to the Solicitors' Remuneration Act, to elect that his remuneration shall be according to the old system, as modified by Schedule II., applies to pending business.

(2) In the case of pending business, the time for election is the date when the rules come into operation, & it is essential to the validity of the notice of election that no work should have been done after that date to which the scale would apply.

(3) Where one notice of election comprised several matters of conveyancing arising in an action which were the subject of separate orders:—*Held*: in determining the validity of the notice each matter ought to be treated separately.—*Re LOVE, HILL v. SPURGEON* (1889), 40 Ch. D. 637; 58 L. J. Ch. 272; 60 L. T. 254; 37 W. R. 475; 5 T. L. R. 210.

Annotation:—As to (1) *Folld. Re Stewart* (1889), 41 Ch. D. 491.

2699. ———.]—*Re RACKHAM, CARTER v. RACKHAM* (1889), 34 Sol. Jo. 97.

Annotation:—*Distd. Re Evans*, [1905] 1 Ch. 290.

2700. ——— *Accepting retainer.*]—A solr. must be treated as "undertaking business" as soon as he accepts the retainer of his client & agrees to do the business covered by the retainer, & consequently the election under rule 6 cannot be made after that time.—*Re ALLEN* (1887), 34 Ch. D. 433; 56 L. J. Ch. 487; 56 L. T. 6; 35 W. R. 218; 3 T. L. R. 280, C. A.

Annotations:—*Folld. Hester v. Hester* (1887), 31 Ch. D. 607; *Re Metcalfe, Metcalfe v. Blencowe* (1887), 57 L. J. Ch. 82; *Re Love, Hill v. Spurgeon* (1889), 40 Ch. D. 637.

2701. ———.]—*Re STEWART*, No. 2663, *ante*.

2702. ——— *Conferring with client as to sale.*]—In Mar. 1886, two trustees of real estate instructed their solr. to prepare a summons to obtain an order for sale of part of the property. The solr. prepared & attended the summons, & in Apr., after some correspondence had passed between the trustees & the solr., a conference took place, at which the mode of sale & the title were discussed. On June 21, the solr. gave notice under rule 6 of the General Order to the Solicitors' Remuneration Act, 1881 (c. 44), to one of the trustees of his election to be remunerated according to Schedule II.:—*Held*: the notice was not given before the business was undertaken, & the solr. was only entitled to charge according to Schedule I.

(2) *Semble*: the notice was also bad on the ground that it should have been given to both the trustees.—*Re METCALFE, METCALFE v. BLEN-COWE* (1887), 57 L. J. Ch. 82; 57 L. T. 925; 36 W. R. 137.

Annotation:—As to (1) *Refd. Re Evans*, [1905] 1 Ch. 290.

2703. ——— *Doing something for which charge may be made.*]—*Re STEWART*, No. 2663, *ante*.

2704. *In case of pending business—When rules come into operation.*]—*Re LOVE, HILL v. SPURGEON*, No. 2698, *ante*.

(c) *To Whom Notice must be Given.*

See Solicitors' Remuneration Act, 1881 (c. 44), ss. 1–7; Remuneration Order, 1882.

2705. *Where assigns of renewable lease liable to pay costs of renewal—Lessor.*]—The solrs. of the assigns of a lease of copyhold land wrote to P., the copyholder, asking for renewed leases to their clients under a covenant in the original lease. On

July 25, P.'s solrs. wrote to the solrs. of appcts. stating that P. had called on them with the letter, & that the matter therein referred to should have their attention, & asking for evidence of the title of appcts. The evidence required was furnished. Some delay took place in consequence of the necessity of P. being admitted, & obtaining a licence to demise. On Oct. 16 P.'s solrs. were informed by the steward of the manor that P. could be admitted, & that licence to demise would be given. On Oct. 19 P.'s solrs. gave him written notice of their election to be remunerated according to the old system as modified by Schedule II. to the rules under Solicitors' Remuneration Act, 1881 (c. 44). In the books of the solrs. was an entry under that date, "instructions for drawing new leases," but there was no evidence as to the circumstances under which it was made. On Oct. 21 P.'s solrs. sent to appct. draft leases. The leases were granted, & the lessees, who were bound to pay the costs of the lessors' solrs., insisted that the remuneration must be according to the scale in Schedule I.:—*Held*: (1) the election on Oct. 19 where, under a lease containing a power of renewal, the assigns are liable to pay the costs of a new lease, the only person to whom any notice of election under rule 6 need be given by the lessor's solr. is the lessor himself: the assigns not being "clients" of the solicitor within sect. 1 (3) of Solicitors' Remuneration Act, 1881 (c. 44), so as to make any notice to them necessary.—*Re ALLEN* (1886), 34 Ch. D. 433; 56 L. J. Ch. 6; 55 L. T. 630; 51 J. P. 325; 35 W. R. 100; *on appeal* (1887), 34 Ch. D. p. 442, C. A.

Annotations:—*Consd. Re Metcalfe, Metcalfe v. Blencowe* (1887), 57 L. J. Ch. 82. *Refd. Hester v. Hester* (1887), 34 Ch. D. 607; *Re Love, Hill v. Spurgeon* (1889), 40 Ch. D. 637.

2706. *Where more than one trustee — All trustees.*]—*Re METCALFE, METCALFE v. BLEN-COWE*, No. 2702, *ante*.

SUB-SECT. 3.—PURCHASES AND SALES.

A. *Vendor's Solicitor.*

(a) *Negotiation Fee.*

2707. *Scale fee only chargeable if whole work done by solicitor—Commission paid to surveyor.*]—An agreement for sale of certain leasehold property was entered into, whereby the purchasers, who were a public body, agreed to pay the vendor's solrs. preliminary costs, & also the costs of title & conveyance, & the fees of the vendor's surveyor.

A surveyor was employed, who, according to the vendor's solrs.' statement, merely valued the property, though it was alleged by the purchasers that he also negotiated the price. The purchasers who had become owners of the reversion, did not require any abstract or copy of the vendor's lease to be furnished to them on being informed by the vendor's solrs. that the title consisted of the lease only. The purchase was completed, & the purchasers paid the fee of the vendor's surveyor. The vendor's solrs. sent in a bill of costs to the purchasers consisting of two items only, the first being the charge allowed by the scale in Sched. I, Part I, of the General Order to Solicitors' Remuneration Act, 1881 (c. 44), for negotiating a sale by private contract, & the second being the charge allowed by the same Sched. for deducing title to leasehold property & perusing & completing conveyance. Upon taxation the taxing master held that the vendor's solrs. were not entitled to costs calculated upon the scale in Sched. I, Part I, but to costs calculated under Sched. 2 only:—*Held*:

Sect. 1.—Non-contentious business: Sub-sect. 3, A. (a), (b) & (c).]

upon summons to review taxation, the solrs. were not entitled to the scale charge for negotiating a sale by private contract, as the surveyor's fee was a commission to "an auctioneer or estate or other agent" within Sched. I, Part I, rule 11, of the General Order, & they were not entitled to the scale charge for deducing title & perusing & completing conveyance, as no title was deduced.—*Re HARRIS, POWELL & GOODALE* (1887), 56 L. T. 477.

2708. ———.]—S. employed H. as general agent with a view to developing an estate as a building property, on the terms of his having a commission of 2½ per cent. on the purchase-money of all lands sold during his agency, & on the capitalised value of the rents of all leases granted during the same period. An offer was made for purchase at a time when H. was too ill to attend at his office, & the negotiation was conducted by W., the solr. of S., but H. was consulted repeatedly & gave advice as to the sale which was ultimately completed. On completion H. was paid 2½ per cent. on the purchase-money. W., in his bill of costs, claimed the scale fee for negotiating the sale, which claim was resisted on the ground that the vendor had paid a commission to an estate agent. The taxing master allowed the scale fee, being of opinion that as the commission paid to H. was not a payment in respect of this particular transaction but for general services, & would have been paid all the same if he had not intervened at all in the sale, it was not a commission within the meaning of Solicitor's Remuneration Order, Sched. I, Part I, r. 11:—*Held*: if H. had not been called in at all in this transaction, the payment of the commission, which would in that case have been a payment entirely in respect of other work, would not have been a payment of commission within the rule, but as H. had assisted in the negotiation, he was paid for his assistance by the commission, although the commission also covered other work; a commission, therefore, had been paid within the meaning of the rule, & the scale fee for negotiation ought not to be allowed.—*Re WITTHALL*, [1891] 3 Ch. 8; 61 L. J. Ch. 14; 64 L. T. 704; 39 W. R. 529, C. A.

Annotation.—*Apld. Re Romain*, [1903] 1 Ch. 702.

2709. ——— **Commission paid to agent.**—F. & D. introduced certain property to L. for purchase by him, & introduced him to X., who shortly afterwards purchased from L. at an increased price. A commission was paid to F. & D. on each transaction. F. & D. also introduced L. to R. who, acting as the solr. of L., concluded the contracts between L. & X. The property was conveyed direct from the original vendor to X., L. joining in the conveyance. The abstract was sent to R., who copied it & forwarded it to the solrs. of X.; on receiving the requisitions he copied them & sent them to the original vendor's solrs., & a similar operation took place with reference to observations & further requisitions on title:—*Held*: (1) even if R. was employed to negotiate at all, he had not in substance entirely negotiated either the purchase or the resale, & moreover, that commissions on both the purchase & resale had been paid to agents within rule 11 of Sched. I, Part I, to the Order under Solicitors' Remuneration Act, 1881 (c. 44), & therefore the scale fee for negotiating a purchase or sale was not chargeable; (2) the scale fees (a) for investigating the title & preparing & completing the conveyance on the purchase, & (b) deducing the title & perusing the

conveyance on the resale, were not chargeable.—*Re ROMAIN*, [1903] 1 Ch. 702; 72 L. J. Ch. 309; 88 L. T. 125; 51 W. R. 346; 47 Sol. Jo. 300.

2710. ——— **Sale preceded by unsuccessful offer at auction.**—*Re READE, SALTHOUSE v. READE* (1889), 33 Sol. Jo. 219.

2711. **Sale by liquidator of company—Liquidator's name used only for convenience.**—The property of a co. in liquidation was sold by the solrs. of the official liquidator for £24,000, subject to a mtge. for £900, & after the satisfaction of the claims of former successive owners a sum of £1,750 remained for the official liquidator. The sale was confirmed by an order made in the liquidation, & the parties to the conveyance were the co., the official liquidator, the original owners, & certain intermediate purchasers who had claims for unpaid purchase-money. The solrs. on taxation included in their bill of costs scale charges as upon a sale for £24,900 as follows: Negotiating, £102 5s.; deducing title & completing, including contract, £107 5s. The taxing master disallowed the negotiating fee, & only allowed the scale charge upon the £1,750. On summons to review taxation:—*Held*: the ct. could look not only at the contract but at the substance of the transaction, & having regard to the whole of the matters with reference to the provisional contract coupled with the order, the liquidator's name was only used for the purpose of convenience, & the taxing master's decision was right.—*Re GREY'S BREWERY Co.* (1887), 56 L. T. 298.

2712. **On what sum percentage payable—Gross value—Property sold subject to incumbrances.**—Where the property of a bkpt. is sold subject to incumbrances, the solr. of the trustee in bkpcy. is, under rule 9 of Sched. I. of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), & the Bankruptcy Rules, 1886. General Regulations, Part VII., rule 2, entitled to a percentage on the gross amount of the purchase-money & not merely on the amount realised from the equity of redemption.—*Re GALLARD, Ex p. HARRIS* (1888), 21 Q. B. D. 38; 57 L. J. Q. B. 528; 59 L. T. 147; 36 W. R. 592; 5 Morr. 123.

Annotation:—*Consd. Re Garner, Ex p. Pedley*, [1906] 2 K. B. 213.

2713. ——— **Sale by second mortgagee.**—Rule 9 of Sched. I. of the General Order to Solicitors' Remuneration Act, 1881 (c. 44), which provides that "where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money," applies to the case of a sale by a second mtgee. under his power of sale.—*FORTESCUE v. MERCANTILE BANK OF LONDON*, [1897] 2 Q. B. 236; 66 L. J. Q. B. 591; 76 L. T. 645; 45 W. R. 529, C. A.

2714. ——— **Sale & sub-sale.**—(1) Purchasers of land for £2,550 employed a solr. to act for them. The solr. perused the contract on their behalf, received from the purchasers an abstract of title, & duly investigated the same. After the title had been investigated the purchasers sold part of the land to a sub-purchaser for £1,800, & the solr., at their request, prepared the contract with the sub-purchaser, & delivered to his solr. an abstract of title, consisting of the abstract furnished by the vendors, together with a statement of the equitable title of the purchasers. The transaction was carried out by two conveyances—one by the vendors by the direction of the purchasers of part of the land to the sub-purchaser in consideration of £1,800, & the other by the vendors direct to the purchasers of the rest of the land in consideration of £750. The solr. delivered two bills of costs, charging in one a scale fee under Solicitors' Remu-

neration Act, 1881 (c. 44), on a purchase by his clients for £2,550, & in the other a scale fee on a sale by his clients for £1,800. On taxation a scale fee was allowed only in respect of a contract for £750. On summons to review the taxation:—*Held*: the conveyance to the sub-purchaser was substantially a conveyance by the vendors to the purchasers, that the solr. had done all that was necessary for the completion of a conveyance under the original contract for £2,550, & that he was entitled to two scale fees—one on a purchase by his clients for £2,550, & the other on a sale by his clients for £1,800.

(2) One of the bills of costs included, amongst “disbursements,” an item of 10s. for law stationer’s charges for the preparation of a plan indorsed on one of the deeds. The plan was a copy of one already in existence, & the preparation of it did not require the skilled labour of a surveyor:—*Held*: this charge was covered by the scale fee, & was rightly disallowed on taxation.—*Re READ*, [1894] 3 Ch. 238; 63 L. J. Ch. 831, 71 L. T. 189; 42 W. R. 601; 38 Sol. Jo. 581; 8 R. 489.

Annotations:—*As to* (1) *Distd. Re Baillie* (1899), 15 T. L. R. 277; *Re Romain*, [1903] 1 Ch. 702.

2715. ———.—*Re BAILLIE & Co.* (1899), 15 T. L. R. 277, C. A.

Annotation.—*Reid. Re Romain*, [1903] 1 Ch. 702.

2716. What covered by negotiation fee—Cost of sworn valuations to obtain approval of court.]—The solr. to the trustees of property which was the subject of an action in the Ch. Div. negotiated a sale thereof, & prepared, & procured the due signature of, a contract of sale & purchase conditional upon the sanction of the ct. being given to it. In the course of the negotiation & for the purpose of obtaining evidence to induce the ct. to sanction the sale, he procured the opinions of two valuers, to whom fees were paid for reporting as to the value of the property, but who took no further part in the negotiation. The contract was sanctioned by the ct. without alteration:—*Held*: the solr. had negotiated the sale within the meaning of rule 11 in Sched. I., Part I., to the General Order, & was entitled to the scale fee for negotiating a sale by private contract.—*Re MACGOWAN, MACGOWAN v. MURRAY*, [1891] 1 Ch. 105; 60 L. J. Ch. 118; 63 L. T. 793; 39 W. R. 227, C. A.

Annotations:—*Consd. Mawdsley v. Beesley* (1891), 36 Sol. Jo. 63. *Distd. Prieisina v. Manifold*, [1894] 3 Ch. 100; *Re Romain*, [1903] 1 Ch. 702.

2717. ———.—Copy of plan.]—*Re READ*, No. 2714, *ante*.

(b) Conduct of Sale by Auction.

See Sub-sect. 3, C., *post*.

(c) Deducing Title.

2718. What costs allowed on taxation—Charges for getting in outstanding terms.]—(1) Where a vendor’s attorney disclosed outstanding terms upon an abstract, although a marketable title might have been shown by taking it up at a subsequent date:—*Held*: upon taxation of the attorney’s costs he was entitled to be paid his charges incurred in getting in the outstanding terms.

(2) The attorney will not be allowed his charges for attested copies of a will, which by the con-

ditions of sale were to be given at the vendor’s expense, such a condition being unusual.—*Ex p. QUICKE* (1835), 1 Hodg. 202; 2 Scott, 184.

2719. ———.—Charges for attested copies of will—Condition providing that copies should be given at vendor’s expense.]—*Ex p. QUICKE*, No. 2718, *ante*.

2720. ———.—Number of folios to be contained in abstract.]—In taxation, abstracts are ordinarily passed if they contain eight folios on an average; but the strict rule is that they should contain ten folios.

Taxation of a paid bill, sought on the ground of overcharge in abstracts containing less than ten folios refused, the practice being in uncertainty, & there being no pressure or surprise.—*Re WALSH* (1850), 12 Beav. 490; 50 E. R. 1148.

2721. Scale fee not chargeable unless whole work done by solicitor—Abstract not required.]—A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor’s costs gave notice in Dec. 1882 of his exercise of the option, & stated that he should not require an abstract of title. The time for completion was Mar. 25, 1883, but it was arranged for the tenant’s convenience that the completion should be six weeks earlier & that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of Dec. On Feb. 2, 1883, the vendor’s solrs. sent in their bill of costs in which they charged 30s. per cent. on the purchase-money of each lot considering that this was the proper charge under Schedule I. to the general rules under the Solicitors’ Remuneration Act, 1881 (c. 44), which provides that amount of remuneration to a vendor’s solr. “for deducing title to freehold copyhold or leasehold property & perusing & completing conveyance, including preparation of contract or conditions of sale, if any.” The purchaser’s solrs. objected to these charges but the vendor’s solrs. refused to allow completion unless they were paid, & on Feb. 14 the purchaser paid them under protest & completed the purchase. After this he applied for taxation of the bill:—*Held*: (1) the case was governed by the new Rules, but the bill was framed on an erroneous footing, for the *ad valorem* remuneration authorised by Schedule I. was chargeable only where the whole of the business in respect of which it was imposed, viz.: the deducing title & perusing & completing conveyance was done; here as there was no deducing of title, but only perusal & completion of the conveyances, Sched. I. did not apply, but under the General Order, rule 2 (c), the solr.’s remuneration was to be regulated by the old system as modified by Sched. II.; (2) having regard to the dates there was no pressure, & there was no overcharge amounting to fraud, & there were therefore no special circumstances to authorise taxation after payment.—*Re LACEY & SON* (1883), 25 Ch. D. 301; 53 L. J. Ch. 287; 49 L. T. 755; 32 W. R. 233, C. A.

Annotations:—*As to* (1) *Apld. Re Denne & Secretary of State for War* (1884), 54 L. J. Ch. 45. *Consd. Re Hickley & Steward* (1885), 54 L. J. Ch. 608. *Extd. Re Faulkner* (1887), 36 Ch. D. 566. *Apld. Re Keeping & Gloag* (1888), 58 L. T. 679. *Distd. Re Read*, [1894] 3 Ch. 238. *Apld. Re Baillie* (1899), 15 T. L. R. 277; *Re Romain*, [1903] 1 Ch. 702. *Reid. Re Field* (1885), 29 Ch. D. 608; *Fleming v. Hardcastle* (1885), 52 L. T. 851; *Re Peace & Ellis* (1887), 57 L. T. 753; *Re Greville’s Settlement*, (1888), 40

PART VII. SECT. 1, SUB-SECT. 3.— A. (c).

n. Scale fee not chargeable unless whole work done by solicitor—Deduction of title—Searches must be made.]—To entitle a solr. to the percentage charges

under Sched. I. Parts I. & II. of the General Orders under Solicitors’ Remuneration Act, 1881, he must have deduced title to the premises, & of such deduction of title furnishing searches is an essential part.—*Ex p. FERGUSON & Co. TO BUCKLEY* (1888),

21 L. R. Ir. 392.—IR.

o. Several fee farm grants according to form approved by grantee—Only one title deduced.]—A solicitor prepared a series of fee farm grants, following a printed form previously approved by the grantee, & annexed to the

election by the solrs. to charge according to Sched. II. of the Order, but they were entitled to charge for preparation of the contract in addition to the scale charge, because the scale assumes the contract to be prepared by the vendor's solr., & they were entitled to 1 per cent. for negotiating the purchase as well as to the 1½ per cent. for completion.

The Act & Order apply to conveyancing work transacted in an action equally with other conveyancing work (PEARSON, J.).—FLEMING v. HARDCASTLE (1885), 52 L. T. 851; 29 Sol. Jo. 472.

Annotation:—*Re*ld. *Re* Merchant Taylors' Co. (1885), 33 W. R. 693.

2732. Costs of investigating title, etc.—Purchase under direction of court.—Money arising from the sale of land belonging to a corpn., & taken by a railway co. under their statutory powers, was reinvested in land under the direction of the ct. The solr. of the corpn. charged the *ad valorem* scale fee prescribed by the rules under Solicitors' Remuneration Act, 1881 (c. 44), Sched. I., Part I. "for investigating title & preparing the completing conveyance":—*Held*: (1) the exception in Sched. I., Part I., rule 11, which provides that the scale shall not apply in case of sales under the Lands Clauses Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, was not applicable to the case; (2) the words of rule 2 "not being business in any action or transacted in any ct. or in the chambers of any judge or master," apply only to the "other business" mentioned immediately before, *i.e.* to business not being conveyancing business, & do not exclude from the scale conveyancing business done under the direction of the ct.; (3) as the purchaser's solr. had had to do all the things which he would have had to do in a purchase not under the direction of the ct., the case was not taken out of the scale by the fact that, in a purchase under the direction of the ct., he did not incur as much responsibility as in a private purchase, therefore, the scale fee was properly chargeable.—*Re* MERCHANT TAYLORS' Co. (1885), 30 Ch. D. 28; 54 L. J. Ch. 867; 52 L. T. 775; 33 W. R. 693, C. A.

Annotation:—*As to* (2) *Re*ld. *Re* Morgan, [1915] 1 Ch. 182.

2733. — Entire work must be done by solicitor.—On a purchase of property, to which the sanction of the ct. was requisite, the vendors, who were a public body, did not furnish any evidence of title, but referred the purchaser to a sect. in a public Act of Parliament, by which the property was vested in them "to be appropriated to such purposes as the Lord Chancellor should direct." The purchasers' solr., considering it doubtful whether the sect. enabled the vendors to sell, asked for the Lord Chancellor's direction, which was afterwards procured, & a copy sent to him. On receiving it he caused a summons which he had taken out for the ct.'s sanction to be amended by omitting a request for an inquiry into the title, as he expected to be able to satisfy the chief clerk that it was a good title. The chief clerk, on production of the Lord

Chancellor's direction, sanctioned the purchase without referring the title to the conveyancing counsel, & the purchase was completed.

The bill of costs of the purchase, which was payable by a railway co., included the *ad valorem* charge on the purchase-money prescribed in Schedule I., Part I., to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), for "investigating title" to property. This was objected to on the ground that no title had been furnished or investigated:—*Held*: there had been an "investigation of title" by the solicitor, & he was entitled to be paid the scale fee.—*Ex p.* LONDON CORPN. (1887), 34 Ch. D. 452; 56 L. J. Ch. 308; 56 L. T. 13; 35 W. R. 210, C. A.

Annotation:—*Consd.* *Re* Coward, Chance, [1928] Ch. 379.

2734. — — ——*Re* ROMAIN, No. 2709, *ante*.

2735. Amount of purchase-money—Sale & sub-sale by purchaser.—*Re* READ, No. 2714, *ante*.

2736. Costs of preparing & completing title—Land situate in register county—Includes costs of registering memorial.—On a purchase of lands, the scale fee allowed to the purchaser's solr. by Sched. I., Part I., to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), for "preparing & completing conveyance," covers & includes his costs, other than money out of pocket, in respect of the registration of a memorial of the conveyance in cases where the land purchased is situated within a register county.—GREY v. CURTICE, [1899] 1 Ch. 121; 68 L. J. Ch. 60; 79 L. T. 713; 47 W. R. 294; 43 Sol. Jo. 78, C. A.

C. Conduct of Sale by Auction.

(a) In General.

See Remuneration Order, 1882, Sched. I., Part I.

2737. Whether bankruptcy scale applicable—Auctioneer employed by vendor's solicitor.—A solr. had employed an auctioneer to sell some property for his client. He, however, made no previous arrangement as to the amount of his remuneration, & the auctioneer had retained, out of the deposits, more than would be allowed under the bkpcy. scale:—*Held*: the whole charge ought to be allowed to the solr.—*Re* PAGE (No. 3) (1863), 32 Beav. 487; 8 L. T. 231; 27 J. P. 309; 9 Jur. N. S. 1116; 11 W. R. 584; 55 E. R. 191.

2738. Scale fee not chargeable unless all work done by solicitor—Employment of surveyor.—Property of a lunatic in Lancashire was put up for sale by auction under an order in lunacy, but was not sold. The solr. charged £16 12s. 6d. remuneration according to the scale in the order under Solicitors' Remuneration Act, 1881 (c. 44), on £8,300, the amount of the reserved prices. He also paid the auctioneer £5 5s., which was allowed against the estate, & the surveyor's bill of £40 3s. was allowed at £31 10s. against the estate, but the Taxing Master disallowed the £16 12s. 6d., & only allowed £2 2s. for instructing the auctioneer & surveyor, & £3 3s. for particulars, etc. His reasons were, (a) that the solr. had not in fact conducted the sale, the auctioneer & surveyor having done most of the work, & been paid by the client; & (b) the scale did not apply, for a

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2733 i. Costs of investigating title, etc.—Entire work must be done by solicitor.—A purchaser's solr. is not entitled to the scale fee unless he has completely or substantially done all the work in connection with the purchase, including the perusal of the contract or conditions of sale, investigating the title & searches, & preparing, completing, & registering the conveyance.—O'DOHERTY v. O'HANRAHAN, [1921] 1

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I. R. 281.—IR.

p. — On compulsory purchases.—FRASER v. HALIFAX & CAPE BRETON RY. Co. (1885), 18 N. S. R. (6 R. & G.) 23; 6 C. L. T. 138.—CAN.

q. — Under Land Clauses Consolidation Act.—The scale in Sched. I., Part I., of the Irish General Order of 1884, made under Solicitors' Remuneration Act, 1881, does not apply to the costs of the solr. for the purchaser in sales under Lands Clauses Consolida-

tion Act.—*Re* FITZGERALD, [1915] 1 I. R. 185.—IR.

r. Taking counsel's opinion.—Taking counsel's opinion as to the effect of an existing lease is not conveyancing business, & the costs thereof are taxable under the ordinary scale of costs, & not under the conveyancing scale in Appendix N. of Rules of Supreme Ct. 1906.—*Re* SKINNER & Co.'s BILL OF COSTS, [1915] V. L. R. 116.—AUS.

Sect. 1.—Non-contentious business: Sub-sect. 3, C. (a), (b) & (c).]

commission had been paid to the auctioneer by the client within the meaning of rule 11 to Part I. of Sched. I. to the General Order:—*Held*: as the bill of the surveyor contained charges for various things which it was the duty of the person conducting the sale to do, the solr. had not done the whole of the work for which the *ad valorem* remuneration was provided, & the scale did not apply. *Seemle*: the case was taken out of rule 4 by the specific provision of rule 11 to Part I. of Sched. I. to the Order, which provides that the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer.—*Re WILSON* (1885), 29 Ch. D. 790; 55 L. J. Ch. 627; 53 L. T. 406; 1 T. L. R. 432, C. A.

Annotations:—*Folld.* *Wood v. Calvert* (1886), 55 L. T. 53. *Consd.* *Re Faulkner* (1887), 36 Ch. D. 566. *Appld.* *Re Sykes, Sykes v. Sykes* (1887), 56 L. J. Ch. 238; *Burd v. Burd* (1889), 40 Ch. D. 628; *Re Withall* (1891), 39 W. R. 529. *Refd.* *Re Merchant Taylors' Co.* (1885), 30 Ch. D. 28; *Re Peace & Ellis* (1887), 57 L. T. 753; *Drielsma v. Manifold*, [1894] 3 Ch. 100; *Cholditch v. Jones*, [1896] 1 Ch. 42.

2739. ———.]—An estate was sold under the ct., the auctioneer & surveyor being appointed in chambers. The solrs. sent in a bill for taxation, claiming the fees they had paid to the auctioneer & the surveyor, & also the scale charges for conducting the sale, under Solicitors' Remuneration Act, 1881 (c. 44), General Order, rule 4, Sched. I., Part I., rule 11, & subsequently withdrew the charge in respect of the auctioneer. The taxing master disallowed the scale charges, & eventually the trustees of the estate took out a summons to review the taxation, seeking to have the scale charges allowed against the estate. The solrs. did not appear:—*Held*: the application being made by the trustees, whose duty it was to protect the estate not to seek to charge it, made the application too objectionable to be entertained, & apart from this, the application would have to be refused, in accordance with the principle of *Re Wilson*, No. 2738, *ante*, which governed this case, as the work charged for by the surveyor included dividing the property into lots & fixing the reserves, which was part of the work the solrs. were bound to do in return for the commission they had charged.—*WOOD v. CALVERT* (1886), 55 L. T. 53; 34 W. R. 732.

——— **Payment of auctioneer's fees.**—*See* Sub-sect. 3, C. (b), *post*.

2740. Sale in partition action—Costs of solicitors of parties other than party with conduct of sale.—In a partition action an order was made for the sale of the estate & payment of the costs of all parties out of the proceeds. Pltf. who was the owner of one-fourth of the estate had the conduct of the sale, & his solr. was paid his costs in accordance with rule 2 (a) of the General Order under Solicitors' Remuneration Act, 1881 (c. 44):—*Held*: the solrs. of defts. who were the owners of the other three-fourths of the estate, were entitled to be paid the costs of perusing the conveyance & obtaining its execution by their clients under rule 2 (c).—*HUMPHREYS v. JONES* (1885), 31 Ch. D. 30; 55 L. J. Ch. 1; 53 L. T. 482; 34 W. R. 1, C. A.

2741. Ineffectual attempted sale—Subsequent sale by different solicitor.—Sched. I., Part I., rule 2 of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), applies only to cases where the attempted ineffectual sale & the subsequent effectual sale therein mentioned are conducted by the same solrs. If there is a change of solrs. after an attempted ineffectual sale, the taxation of the costs of such sale must be made

under General Order, rule 2 (c).—*Re DEAN, WARD v. HOLMES* (1886), 32 Ch. D. 209; 55 L. J. Ch. 420; 54 L. T. 266.

Annotation:—*Folld.* *Re Stead, Smith v. Stead*, [1913] 1 Ch. 240.

2742. ——— **No probability of sale being effected.**]

—The costs of an attempted ineffectual sale of property, when there is no probability of the sale being effected for some years to come, should be taxed under rule 2 (c) of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881 (c. 44).—*Re SMITH, PINSENT & Co.* (1890), 44 Ch. D. 303; 59 L. J. Ch. 590; 38 W. R. 685.

Annotation:—*Folld.* *Re Stead, Smith v. Stead*, [1913] 1 Ch. 240.

2743. ——— **Meaning of "uncompleted business."**—By General Orders 2 (a) & (c) to Solicitors' Remuneration Act, 1881 (c. 44), fees for completed business are to be scale fees regulated by Sched. I., Part I. of the General Order; fees for uncompleted business are to be item fees regulated by Sched. II. The passage in rule 2 of Sched. I., Part I. providing for scale fees "where the property is not sold"—i.e. for uncompleted business, refers to an abortive attempt to sell when the property is ultimately sold.

A solr. trustee of a will, with power to charge for work done, incurred certain costs in an ineffectual auction sale of the trust property. He delivered his bill of costs charging (*inter alia*) the following sums: No. 1240, to charges for conducting attempted sale by auction, £12 5s.; Nos. 1241–1244, perusing abstract of title & preparing special conditions of sale, lots 1–4, £14 14s. The taxing master allowed No. 1240, but disallowed Nos. 1241–1244. The solr. sent in objections that No. 1240 ought not to have been allowed, & that Nos. 1241–1244 ought to have been allowed. His reasons were that all charges were in respect of an uncompleted sale by auction, the costs of which are regulated by the General Order to Solicitors' Remuneration Act, 1881 (c. 44), which provides in General Order, sect. 2 (a), that costs of completed sales shall be scale charges regulated by Sched. I., & in sub-sect. (c) that costs of uncompleted sales shall be item charges regulated by Sched. II.; that in his bill No. 1240 was a scale charge & therefore wrong, & that Nos. 1241–1244 were also wrong charges. With his objections he delivered a new bill of costs charging item charges for the same transactions. The master overruled the objections & the solr. then issued this summons to have the master's certificate reviewed. It was contended by resp. that rule 2 of Sched. I. provided for scale charges "where the property is not sold":—*Held*: the solr.'s objections were good & that the taxing master's certificate must be varied by allowing item charges in the substituted bill not exceeding the amount of the charges in the original bill.—*Re STEAD, SMITH v. STEAD*, [1913] 1 Ch. 240; 82 L. J. Ch. 143; 108 L. T. 28; 57 Sol. Jo. 187.

(b) *Fees of Auctioneer.*

See Remuneration Order, 1882, Sched. I., Part I., r. 11.

2744. Whether such fee applicable—Fee paid by vendor.—*Re WILSON*, No. 2738, *ante*.

2745. ———.]—A solr. was employed by the vendor in connection with a sale of property by public auction. An auctioneer was employed to sell the property, & was paid commission by the client:—*Held*: though the solr. was not entitled to the scale fee "for conducting the sale" prescribed by Part I. of Sched. I. to the Remuneration Order, he was entitled to his proper charges,

according to Sched. II. to the Order, in respect of any work which he had done for which the auctioneer had not been paid, & which would have been included in the "conducting" fee, if the fee had been payable.—*Re FAULKNER* (1887), 36 Ch. D. 566; 56 L. J. Ch. 1011; 57 L. T. 342; 36 W. R. 59; 3 T. L. R. 796.

Annotations:—*Apprvd.* *Parker v. Blenkhorn, Newbould v. Bailward* (1888), 58 L. J. Q. B. 209. *Refd.* *Re Peace & Ellis* (1887), 57 L. T. 753; *Burd v. Burd* (1889), 40 Ch. D. 628; *Mawdsley v. Beesley* (1891), 36 Sol. Jo. 63; *Cholditch v. Jones*, [1896] 1 Ch. 42.

2746. ———.]—Solrs. employed in a sale of property by auction where the auctioneer's commission was paid by the client delivered a bill in which they charged the scale fee for conducting the sale & deducing the title, & mentioned items of solrs.' work not included in the scale fee for deducing the title. The taxing master disallowed the fee for conducting the sale because of the auctioneer's charge being paid by the client, & did not allow any fee for items mentioned in the bill of solrs.' work not included in the scale fee for deducing the title, on the ground that the bill was made up on a wrong footing & could not be altered by adding charges:—*Held*: the taxing master was right in disallowing the scale fee for conducting the sale, but he ought to have allowed the solrs. a *quantum meruit* for solrs.' work done by them & mentioned in their bill, & which was not covered by the scale fee for deducing the title.—*Re PEACE & ELLIS* (1887), 57 L. T. 753; 36 W. R. 61.

Annotations:—*Folld.* *Drielsma v. Manifold*, [1894] 3 Ch. 100. *Refd.* *Mawdsley v. Beesley* (1891), 36 Sol. Jo. 63; *Cholditch v. Jones*, [1896] 1 Ch. 42.

2747. ———.]—On a sale by auction of property in Yorkshire, under an order made in an administration action, the chief clerk, previously to sale, settled a sum for auctioneer's fees. In accordance with the mode of business in Yorkshire the auctioneer merely offered the property for sale, & the solr. having the conduct of the sale paid all other expenses of the auction, including those of preparing & distributing the particulars & conditions of sale, advertisements, printer's bills, & the costs of lithographed plans:—*Held*: under Solicitors' Remuneration Act, 1881 (c. 44), General Order, Sched. I., Part I., rule 2, the solr. was not entitled to scale fees for conducting the sale by auction.—*Re SYKES, SYKES v. SYKES* (1887), 56 L. J. Ch. 238; 56 L. T. 425; 36 W. R. 234.

2748. ———.]—Part I. of Sched. I. to the General Order of 1882 made in pursuance of Solicitors' Remuneration Act, 1881 (c. 44), prescribes an *ad valorem* scale fee for conducting the sale of property by public auction, & rule 11 provides that "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." Where the auctioneer's commission is paid by the client:—*Held*: rule 11 does not deprive the solr. of all remuneration for work done in respect of the conduct of the sale, but under the General Order, sect. 2 (c), he was entitled to a *quantum meruit* for such work, the remuneration to be regulated according to the old system as altered by Sched. II.—*PARKER v. BLENKHORN, NEWBOULD v. BAILWARD* (1888), 14 App. Cas. 1; 58 L. J. Q. B. 209; 59 L. T. 906; 37 W. R. 401; 5 T. L. R. 98, H. L.; *revsq.* S. C. *sub nom.* *Re NEWBOULD* (1887), 20 Q. B. D. 204, C. A.

Annotations:—*Consd.* *Burd v. Burd* (1889), 40 Ch. D. 628. *Folld.* *Mawdsley v. Beesley* (1891), 36 Sol. Jo. 63. *Refd.* *Re Keeping & Gloag* (1888), 58 L. T. 679; *Re Martin* (1889), 41 Ch. D. 381; *Re Robson* (1890), 45 Ch. D. 71; *Drielsma v. Manifold* (1894), 63 L. J. Ch. 653.

2749. ———.]—*MAWDSLEY v. BEESLEY* (1891), 36 Sol. Jo. 63.

2750. ———.]—Solrs. employed in a sale of property by auction conducted all the business connected with the sale, except taking the bids in the auction room, for which the solrs. paid the auctioneer two guineas for each lot sold, & one guinea for each lot unsold. The solrs. claimed both the sum paid to the auctioneer & the scale fee for conducting the sale:—*Held*: the payment to the auctioneer was a commission under r. 11 of Sched. I., Part I. of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), & the solrs. were not entitled to charge for remuneration under the scale, but only for a *quantum meruit*.—*DRIELSMA v. MANIFOLD*, [1894] 3 Ch. 100; 63 L. J. Ch. 653; 71 L. T. 62; 42 W. R. 578; 38 Sol. Jo. 547; 7 R. 368, C. A.

Annotation:—*Consd.* *Cholditch v. Jones*, [1896] 1 Ch. 42.

2751. ———.]—*In lump sum.*—Before the General Order under Solicitors' Remuneration Act, 1881 (c. 44), came into operation, property which was the subject of an administration action was offered for sale by auction & bought in, the auctioneers' remuneration for the attempted sale being paid by the client in a lump sum. After the Order came into operation the property was sold by private contract. The same solrs. acted throughout & they made out their bill of costs, as to the attempted sale by auction, under the old system, & as to the sale by private contract, under the old system, as altered by Sched. II. to the General Order. The taxing master, in taxing this bill, disallowed all the charges other than disbursements contained therein with regard to the attempted sale by auction, & with regard to the sale by private contract; & he substituted for the latter the scale charges for negotiating the sale & for deducing the title & perusing & completing the conveyance:—*Held*: the taxing master had taxed the bill upon a wrong principle, & the bill must be referred back to him to be dealt with upon the principles laid down by the House of Lords in *Parker v. Blenkhorn, Newbould v. Bailward*, No. 2748, *ante*. The word "commission" in rule 11 of Sched. I., Part I., must be construed as including a lump sum paid by the client to the auctioneer as his remuneration.—*BURD v. BURD* (1889), 40 Ch. D. 628; 58 L. J. Ch. 170; 60 L. T. 228; 37 W. R. 428.

2752. ———.]—*Fee paid by purchaser—Under conditions of sale.*—If the purchaser in pursuance of a condition of sale pays a fee to the auctioneer the solr. is not entitled to the scale fee for conducting a sale by auction.

If the solr. himself pays the auctioneer the solr. is entitled to the scale fee.

To treat the sale of each lot as a separate sale & charge a separate minimum fee in each case was wholly unjustifiable. It was not authorised by the rules & was in direct opposition to the decision in *Re Onward Building Society*, No. 2754, *post* (NORTH, J.).—*CHOLDITCH v. JONES*, [1896] 1 Ch. 42; 65 L. J. Ch. 83; 73 L. T. 528; 59 J. P. 793; 44 W. R. 124; 12 T. L. R. 49; 40 Sol. Jo. 70.

Annotation:—*Refd.* *Re Thomas, Evans v. Griffiths* (1900), 48 W. R. 299.

2753. ———.]—*Solicitor employing auctioneer to bid.*—*CHOLDITCH v. JONES*, No. 2752, *ante*.

(c) Sale in Lots.

See Remuneration Order, 1882, Sched. I., Part I., rr. 1, 8.

2754. *Whether scale fee charged on aggregate realised—Or on lots as separate transactions.*—The commission payable to a vendor's solr. under Sched. I. of the General Order under Solicitors'

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Remuneration Act, 1881 (c. 44), "for conducting a sale of property by public auction . . . when the property is sold," is chargeable upon the total amount realised by the sale, even though the property be sold in lots & though the lots be held by the vendor under different titles, & be sold to different purchasers.—*Re ONWARD BUILDING SOCIETY*, [1893] 1 Q. B. 16; 68 L. T. 443; 57 J. P. 439; 41 W. R. 107; 5 R. 19; *sub nom. Re ONWARD BUILDING SOCIETY, Ex p. WATSON*, 62 L. J. Q. B. 80, D. C.

*Annotations:—***Refd.** *Cholditch v. Jones*, [1896] 1 Ch. 42; *Re Thomas, Evans v. Griffiths* (1900), 48 W. R. 299.

2755. ———.]—*CHOLDITCH v. JONES*, No. 2752, *ante*.

2756. ———.]—Statute barred costs are under common order to tax, subject to taxation. Stat. Limitations does not bar debt but only the remedy, & such costs are recoverable from the client by reason of his unusual submission to pay what shall appear to be "due" on taxation. If client desires to raise the question whether certain items are statute barred, he should do so by applying for a special order to tax. A solr. acted for purchaser of several small lots of land all purchased at same time though not from same vendor, at prices varying from £100 to £10. The lots were comprised in one mtge. but each had separate & distinct title, separate abstract for each being delivered:—*Held*: solr. was entitled under rule 8, Sched. I., Part I. of the rules under Solicitors' Remuneration Act, 1881 (c. 44), to minimum charge for each lot & was not restricted to one charge for the business as a whole.—*Re MARGETTS*, [1896] 2 Ch. 263; 65 L. J. Ch. 479; 74 L. T. 309; 44 W. R. 462; 40 Sol. Jo. 404.

*Annotations:—***Refd.** *Re Thomas, Evans v. Griffiths* (1900), 48 W. R. 299; *Re Brockman*, [1909] 2 Ch. 170.

2757. ———.]—On a sale by auction in lots of property held under one title, each sale of one or more lots to a different purchaser forms a separate transaction within the meaning of rule 8 of the rules annexed to Sched. I., Part I. of the General Order under Solicitors' Remuneration Act, 1881 (c. 44); so that where the scale charge for deducing title on any of the lots sold to different purchasers does not amount to £5, the solr. is entitled to charge the minimum fee prescribed by rule 8 in respect of each separate sale.—*Re THOMAS, EVANS v. GRIFFITHS*, [1900] 1 Ch. 454; 69 L. J. Ch. 219; 82 L. T. 105; 48 W. R. 299; 16 T. L. R. 196; 44 Sol. Jo. 245.

2758. Election by solicitor to charge under Schedule I., Part II.]—Where property is offered by a tenant for life for sale in lots the tenant for life is vendor in respect of each contract of sale into which he eventually enters, & in such a case it is competent to the vendor's solr., who, before entering upon the business, has given the necessary notice under rule 6 of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), of his

intention to charge the ordinary detailed charges & not the scale fee in the case of sales under a certain amount, to treat the sale of each lot as a separate transaction, & to charge his costs accordingly.—*Re SIR ROBERT PEEL'S SETTLED ESTATES*, [1910] 1 Ch. 389; 79 L. J. Ch. 233; 102 L. T. 67; 26 T. L. R. 227; 54 Sol. Jo. 214.

SUB-SECT. 4.—MORTGAGES.

A. Mortgagor's Solicitor.

See Remuneration Orders, 1882, 1925, Sched. I., Part I.

2759. Charge for negotiating loan—Overcharge amounting to fraud.]—The charge by a mtgor.'s solr. to his client of a scale fee "for negotiating loan" in addition to the procuration fee according to the scale paid to mtgee.'s solr., is an overcharge amounting to fraud so as to entitle the client to an order to tax on application more than a year after delivery of the bill; especially when coupled with the fact that the solr. by whom the overcharge was made had not complied with his client's instructions to get the bill taxed.—*Re PYBUS* (1887), 35 Ch. D. 568; 56 L. J. Ch. 921; 57 L. T. 362; 35 W. R. 770.

2760. Deducing title—Delivering particulars of leases.]—On a mtge. of leasehold property held under several leases by the original lessee, his solrs. furnished the mtgee.'s solrs. with a short statement of dates & particulars of the leases, which were all in the same form, & a form of the covenants:—*Held*: no title had been deduced, & the solrs. were not entitled to the scale fee under the General Order to Solicitors' Remuneration Act, 1881 (c. 44), for deducing title & perusing & completing mtge.—*WELBY v. STILL*, [1894] 3 Ch. 641; *sub nom. WELBY v. STILL*, 63 L. J. Ch. 931; 71 L. T. 426; 8 R. 658.

*Annotation:—***Fold.** *Re Webster & Jones' Contract*, [1902] 2 Ch. 551.

B. Mortgagee's Solicitor.

(a) In General.

2761. Copies of draft deed of transfer—How many allowed on taxation.]—A firm of solrs. acting for a number of sets of persons, five in all, interested in moneys secured upon mtge., on the mtge. being paid off, in their bill of costs charged the exors. of the mtgor. with the cost of five copies of the draft deed of transfer, & the taxing master having disallowed the charge for four such copies:—*Held*: the taxing master was right in allowing the costs of only one copy.—*Re WADE & THOMAS* (1881), 17 Ch. D. 348; 50 L. J. Ch. 601; 44 L. T. 599; 29 W. R. 625.

(b) Negotiation Fee.

See Remuneration Order, 1882, Sched. I., Part I.

2762. Whether scale fee chargeable—Lender introduced by third party.]—A mtgee.'s solr. is

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t. Securing release of outstanding incumbrance.]—The costs of obtaining the release of an outstanding incumbrance on property sold are not covered by the scale charges allowed to a solr. for a vendor by Sched. I., Part I., of the General Order under Solicitors' Remuneration Act, 1881.—*Re PURCELL* (1891), 27 L. R. Ir. 375.—**IR.**

a. Mortgage for past debt.]—The word "loan" in Sched. I., Part I., of the General Order under Solicitors' Remuneration Act, 1881, means "mortgage" & does not imply that there

must necessarily be a fresh advance on the occasion of a mtge. Accordingly, when a mtge. is effected by a solr. to secure a past debt the scale fee applies.—*D'ARCY TO WHITE* (1893), 31 L. R. Ir. 112.—**IR.**

b. Security for present & future advances.]—The remuneration of solrs. by way of scale fee, as provided by Solicitors' Remuneration Act, 1881, Sched. I. & the General Order thereunder, does not apply to work done as to securities for loans, which consist partly of present & partly of future possible advances.—*BAKTON TO IRVINE*, [1899] 1 L. R. 515.—**IR.**

PART VII. SECT. 1, SUB-SECT. 4.—B. (a).

c. Securing postponement of sale to benefit of mortgagee.]—*Re MCCARTHY, MCCARTHY v. WALKER* (No. 3) (1899), 4 Terr. L. R. 9.—**CAN.**

d. Deducing title on transfer of mortgage.]—The solr. for the transferor of a mtge. is to be remunerated for showing any title required & for approving of the transfer under the old system, as altered by Sched. II. of the General Order, 1884.—*Re BRISCOE & SMITH*, [1903] 1 L. R. 29.—**IR.**

entitled to charge in his bill of costs for "negotiating" a mtge. as provided by Solicitors' Remuneration Act, 1881 (c. 44), r. 11, s. (5), even though the mtge. may have been introduced to the mtgee. by another person.—*Re WEDDALL, PARKER & PARKER* (1884), 1 T. L. R. 73; 29 Sol. Jo. 85.

2763. — Lender's name mentioned by solicitor to borrower—Mortgage arranged without recourse to solicitor.]—A solr. mentioned to a borrower the name of a client of his as likely to lend. A mtge. was arranged without further action on the part of the solr., who then acted for both parties in the matter of the mtge.:—*Held*: the solr. was not entitled to a negotiating fee.—*Re ELEY* (1887), 37 Ch. D. 40; 56 L. J. Ch. 905; 57 L. T. 253; 36 W. R. 96.

2764. — Solicitor lending own money.]—Property belonging to D. was in mtge. N., a solr., arranged that the mtge. should be paid off, that the property should be reconveyed to D., & that N. should lend his own money to D. on mtge. of the same property; & this was done. N. had not a partner with him in his business as a solr.:—*Held*: N. was entitled to charge the scale fee for negotiating the loan.—*Re NORRIS*, [1902] 1 Ch. 741; 71 L. J. Ch. 187; 86 L. T. 46, 616; 50 W. R. 316; 46 Sol. Jo. 248.

2765. — Loan agreed as compromise of action—Fee included in costs of action.]—A contract having been entered into for the sale of a freehold estate for £65,000 the purchaser refused to complete upon the appointed date, & the vendors commenced an action for specific performance. After considerable negotiations both by correspondence & interviews the action was ultimately compromised upon terms which were in effect that half the purchase-money should be left secured upon mtge. of the property for a term of two years, & that the purchaser should pay the balance in cash, together with pl'tfs.' taxed costs of the action, upon the footing of affording them a complete indemnity. Upon the taxation of the costs the purchaser objected to an item of £75 charged as a fee for negotiating the loan of the amount to be left upon mtge.:—*Held*: the charge must be disallowed, as all the negotiations for the settlement of the action were properly charged by items in the bill of costs, & it was impossible to sever the terms of negotiation for the settlement of the action & to make a separate charge for the mtge.—*HALL v. MINTER*, [1922] 1 Ch. 191; 91 L. J. Ch. 212; 126 L. T. 655; 66 Sol. Jo. 157.

(c) *Investigation of Title and Completion.*

See Remuneration Order, 1882, r. 2 (a), Sched. I., Part I.

2766. Investigation of title—Mortgage to secure balance of purchase-money.]—When part of the purchase-money is allowed to remain on mtge. of the property sold, the solr. of the vendor-mtgee. cannot charge the scale fee under Sched. I., Part I., of the General Order under Solicitors' Remuneration Act, 1881 (c. 44) for investigating the mtgor.'s title. But where a fee of £95 was charged for such investigation, under a common mistake of the parties that the scale applied, the ct. refused to accede to an application, made after payment, for taxation.—*Re GLASCODINE & CARLYLE* (1885), 52 L. T. 781, C. A.

2767. Completion of mortgage—What is com-

pleted mortgage—Mortgage for future advances.]—A trust or covering deed was executed by a limited co. to trustee in the usual form for securing debentures intended to be issued to ascertain amount but the debentures were never issued & the deed therefore became inoperative:—*Held*: the covering deed so executed was not a completed mtge. within rule 2 (a) and Part I. of Sched. I. to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), & therefore the solr. to the trustees was not entitled to charge a scale fee for "preparing & completing mtge." under that rule.

Qu.: whether, if the deed had become operative by the issue of the debentures, it would have been a "mtge." within the rule.

Qu.: whether a mtge. for future advances is a completed mtge. within the rule.—*Re BIRCHAM*, [1895] 2 Ch. 786; 64 L. J. Ch. 768; 73 L. T. 129; 43 W. R. 673; 11 T. L. R. 547; 39 Sol. Jo. 693; 12 R. 443, C. A.

2768. — Agreement for advance of definite sum—At future date.]—Rule (2) (a) & Part I. of Sched. I. to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), apply not only to legal mtges., but also to equitable mtges. and memoranda of charge, though in some of those cases questions may arise, under particular circumstances, whether they fall within the scale, on the ground that the whole of the business in respect of which the scale imposes fees has not been done.

Although the scale only applies where the transaction has been "completed," the question in every case is whether there has been completion in substance; & although the scale does not apply where a mtge. is given to secure money which may or may not be advanced, at the option of the lender, yet where mtgees. have agreed to advance a certain fixed sum, & everything contemplated by the scale has been done except actually paying over the money, postponement of the payment of the money at the request of the mtgor. will not take the transaction out of the scale, although the mtge. itself, as in the ordinary case of a mtge. to a bank by a customer, does not state the amount secured.

The ct. is not tied down by the form which the security takes, but is entitled to look at the substance of the transaction.—*Re BAKER*, [1912] 2 Ch. 405; 81 L. J. Ch. 805; 106 L. T. 1012.

2769. — On what sum fee computed—Gross amount raised.]—The tenant for life of settled estates had created charges on his life estate for sums amounting in the whole to £192,000, & the charges had all become vested in an insurance co. A private Act was passed which empowered the trustees of the settlement to raise, by mortgaging the settled estates in fee, any sum not exceeding £350,000, for the purpose of paying the debts of the tenant for life. The trustees executed a mtge. of the estates in fee to the co. to secure £232,000. Of this sum £192,000 was retained by the co. in satisfaction of the charges on the life estate (which were released by a separate deed), & £40,000 was paid to the trustees:—*Held*: the transaction was a new mtge., & not a further charge, & therefore did not fall within rule 10 in Part I. of Sched. I. to Solicitors' Remuneration Order, 1882, & the mtgees.' solr. was entitled to the scale fee on a mtge. for £232,000.

PART VII. SECT. 1, SUB-SECT. 4.—
B. (b).

2764 i. Whether scale fee chargeable—Solicitor lending own money.]—Where a solr. lends a client's money on the security of a mtge., he is not entitled,

in the absence of an express agreement, to charge the mtgor. a procuration fee. Such a charge when included in a bill of costs is a taxable item.—*Re BROWN-ING* (1887), 5 N. Z. L. R. 485 (S. O.).—*N.Z.*

PART VII. SECT. 1, SUB-SECT. 4.—
B. (c).

a. Preparation of abstract of title—On decree for sale.]—*SCOTT v. KING* (1845), 7 I. Eq. R. 483.—*IR.*

Sect. 1.—Non-contentious business: Sub-sect. 4, B. (c): sub-sect. 5, A., B., C. & D.]

—*AYLESFORD (EARL) v. POULETT (EARL)*, 1 Ch. 248; 60 L. J. Ch. 204; 64 L. T. 336; 39 W. R. 241, C. A.

Annotation:—Reid. Goodchild v. Roberts, [1925] Ch. 592.

2770. ————*—*].—In 1897 the trustees of the will of Captain J. & Mrs. J. executed a consolidating mtge. to the Commercial Union upon certain securities to secure a certain amount. In 1924 & 1926 the Commercial Union made further advances to Mrs. J., who was the owner in fee, upon the same securities. Mrs. J. died in 1926. In Jan. 1927, her trustees applied for & were granted a further advance on the same securities by the Commercial Union, whose solrs. had attended to the previous transactions. The deed secured an immediate advance, & it also secured all the previous existing securities, although the old securities had been kept on foot for the purpose of preserving priorities, & there was a new proviso for redemption. The solrs. to the Commercial Union carried in a bill for taxation, the charges being according to the scale in Sched. I., Part I. of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), for "investigating title & preparing & completing deed of security." The taxing master took the view that Sched. I. did not apply, & taxed the bill accordingly.

On a summons by the solrs. to review the taxation:—*Held*: there had been an "investigation of title" within the meaning of Sched. I., & the matter must be referred back to the taxing master.—*Re COWARD, CHANCE & CO.*, [1928] 1 Ch. 379; 97 L. J. Ch. 234; 139 L. T. 113; 72 Sol. Jo. 225.

2771. ———— *Equitable mortgage.*—*Re BAKER*, No. 2768, *ante*.

SUB-SECT. 5.—LEASES.

A. In General.

See Solicitors' Remuneration Act, 1881 (c. 44); Remuneration Orders, 1882, 1925, Sched. I., Part II.

2772. Work must be substantially done—Form of lease scheduled to another document—*Verbatim copy.*—In July, 1881, W. instructed his solrs. to prepare a building agreement with form of lease to be granted on completion set out in the schedule. In June, 1883, the premises having been completed, W. gave further instructions for a lease, which, as prepared, was, except as to parties, a verbatim copy of that contained in the schedule. In Nov. 1883, the solrs. delivered their bill of costs, in which under date July, 1881, were various items amounting to £17 in relation to preparing the agreement; & under date June, 1883, "to costs of preparing, engrossing, executing, & completing lease & counterpart, as *per* Sched. I. of Solicitors' Remuneration Act, 1881 (c. 44), £59 10s." On taxation this item was objected to, on the ground that the Act did not apply, as the substantial part of the work done was previous to Jan. 1, 1883, & had been already charged for in the costs of preparing the agreement. The taxing master disallowed the objection, but deducted £20 from the £59 10s., & directed a detailed bill of costs in relation to the preparation of the lease to be brought in. This bill was delivered, but was not taxed. On

summons to review taxation:—*Held*: the taxing master ought to have taxed the detailed bill for the actual preparation of the lease, & not have allowed the *ad valorem* scale even to the extent he did; the *ad valorem* scale applied only where the solr. had substantially done the work specified in Sched. I.; as the scale charges did not apply, the taxing master ought to have taxed their charges in accordance with rule 2 (c), & Sched. II.—*Re HICKLEY & STEWARD* (1885), 54 L. J. Ch. 608; 52 L. T. 89; 33 W. R. 320.

Annotations:—Appl. Wellby v. Still, [1895] 1 Ch. 524. *Reid. Re Robson* (1890), 45 Ch. D. 71.

2773. ———— *Form copied in substance.*—*Re POOLE & ROBINSON* (1900), 44 Sol. Jo. 628.

2774. Printed form of lease.—Leases following a general printed form & requiring in each case only to be filled in with the names of the parties, the parcels, a plan, the rent, & so forth, are not subject to the scale charges in Part II. of Sched. I., to the rules under Solicitors' Remuneration Act, 1881 (c. 44).—*WELBY v. STILL*, [1895] 1 Ch. 524; 64 L. J. Ch. 495; 13 R. 165; *sub nom. WELBY v. STILL*, 72 L. T. 108; 43 W. R. 73; 38 Sol. Jo. 667.

Annotation:—Reid. Re Thomas, Evans v. Griffiths, [1900] 1 Ch. 454.

2775. Estimation of costs payable by lessee to lessor's solicitor—Whether cost of counterpart deducted from scale fee.—The costs of the lessor's solr. "for preparing, settling, & completing" an agreement for a tenancy for less than three years at a rack rent are to be taxed according to the scale prescribed for "Leases or Agreements for Leases at a Rack Rent" in Schedule I., Part II. to the General Order under Solicitors' Remuneration Act, 1881 (c. 44).

In estimating the costs properly payable by the lessee to the lessor's solr., the cost of the counterpart or duplicate agreement must be deducted from the scale fee when ascertained.—*Re NEGUS*, [1895] 1 Ch. 73; 64 L. J. Ch. 79; 71 L. T. 716; 43 W. R. 68; 39 Sol. Jo. 29; 13 R. 85.

Annotations:—Appl. Re Gray, [1901] 1 Ch. 239. *Reid. Re McGarel* (1897), 45 W. R. 321; *Re Longbotham*, [1904] 2 Ch. 152; *Re Cohen & Cohen*, [1905] 2 Ch. 137.

Costs of lease, generally.—See LANDLORD & TENANT, Vol. XXX., pp. 449–452, Nos. 1110–1136.

B. "Preparing, Settling, and Completing."

See Solicitors' Remuneration Act, 1881 (c. 44); Remuneration Order, 1882, Sched. I., Part II., First Scale.

2776. What matters included—General rule—All business connected with the granting of a lease.—*Re FIELD*, No. 2688, *ante*.

2777. ———— *Negotiations.*—*Re FIELD*, No. 2688, *ante*.

2778. ————*—*].—The scale fee prescribed by Part II. of Sched. I. to the General Order made under Solicitors' Remuneration Act, 1881 (c. 44), to be paid to a lessor's solr. "for preparing, settling, & completing lease & counterpart" includes the solr.'s remuneration in respect of negotiations which lead up to, & the preparation of the agreement which precedes the lease, & the solr. cannot charge in respect of those negotiations or of the preparation for the agreement in addition to the scale fee.—*SAVERY v. ENFIELD LOCAL BOARD*, [1893] A. C. 218; 62 L. J. Ch.

PART VII. SECT. 1, SUB-SECT. 5.—B.

1. What matters included—Whether costs of deducing title.—*Re MECREDY & SOLICITORS' REMUNERATION ACT*, 1881, [1920] 1 I. R. 93.—*IR.*

674; 68 L. T. 722; 57 J. P. 581; 42 W. R. 33; 1 R. 160, H. L.

Annotations:—*Reid. Re Negus*, [1895] 1 Ch. 73; *Re Horn & Francis*, [1896] 2 Ch. 797; *Re Gray*, [1901] 1 Ch. 239.

2779. ———.]—*Re HORN & FRANCIS*, No. 2794, *post*.

2780. ——— Agreement for lease—"Agreement for lease" defined.]—(1) The scale fee prescribed by Part II. of Sched. I. to the General Order of August, 1882, under Solicitors' Remuneration Act, 1881 (c. 44), to be paid to a lessor's solr. "for preparing, settling, & completing lease & counterpart," includes the solr.'s remuneration for the preparation of a prior agreement for the lease, & the solr. cannot charge for the preparation of the agreement in addition to the scale fee. An agreement for a lease provided that the lessor should at his own expense do certain repairs to the property & deliver possession to the lessee as soon as they were done, which was to be not later than a certain day, time to be of the essence of the contract, & that, on the lessor complying with these conditions, the lessor should grant & the lessee accept a lease in the form thereto annexed:—*Held*: these stipulations did not relate to collateral matters, so as to make the agreement something more than a step towards the granting of the lease, but related only to the terms on which the lease was to be granted, & the preparation of the agreement was "business connected with" the lease within the meaning of rule 2 of the General Order, & could not be separately charged for. (2) "Agreements for leases" in Sched. I., Part II. mean agreements for leases intended to be relied on as regulating the tenancy without any formal lease, & the scale fee is payable in respect of them.—*Re EMANUEL & SIMMONDS* (1886), 33 Ch. D. 40; 55 L. J. Ch. 710; 55 L. T. 79; 51 J. P. 22; 34 W. R. 613; 2 T. L. R. 681, C. A.

Annotations:—*As to* (1) *Appld. Re Newbould* (1887), 20 Q. B. D. 204. *Consd. Re Martin* (1889), 41 Ch. D. 381. *Apprvd. Savery v. Enfield L. B.*, [1893] A. C. 218. *Reid. Re Allen* (1887), 34 Ch. D. 433. *As to* (2) *Consd. Re Negus*, [1895] 1 Ch. 73. *Generally, Reid. Re Gray*, [1901] 1 Ch. 239.

2781. ———.]—*SAVERY v. ENFIELD LOCAL BOARD*, No. 2778, *ante*.

2782. ——— Investigation of title of applicant for renewal of lease.]—A perpetually renewable lease granted by the City Corpn. contained a covenant that the lessors would make the renewals "at the request, costs, & charges of the lessee." The lessors incurred certain costs of investigating the title of appcts. for a renewal, & these were disallowed on a taxation:—*Held*: (1) the words of the covenant meant that the lessors were to be at no cost & therefore the lessors were entitled to the costs which were reasonably & necessarily incurred in such investigation of title; (2) such costs were not covered by the scale fee charge "for preparing, settling, & completing lease & counterpart" under the General Order made under the Solicitors' Remuneration Act, 1881.

(3) Until it was ascertained that appct. for a renewal was entitled thereto, the "business connected with" the lease referred to in r. 2 of the General Order had not been reached.—*Re BAYLIS*, [1907] 2 Ch. 54; 76 L. J. Ch. 358; 96 L. T. 812.

2783. "Business connected with" the lease—Preparation of agreement for lease.]—*Re EMANUEL & SIMMONDS*, No. 2780, *ante*.

2784. ——— Abortive negotiations.]—*Re MARTIN*, No. 2668, *ante*.

2785. ——— Investigation of title of applicant for renewal of lease.]—*Re BAYLIS*, No. 2782, *ante*.

2786. Part only of work done—Necessity for delivery of itemised bill—Solicitors Act, 1843 (c. 73), s. 37.]—A solr. who has done part only of the work entitling him to the scale fee under Part II. of Schedule I. of Solicitors' Remuneration Order, 1882, must deliver a bill a month before bringing an action for his costs, particularising the items of work & disbursements, pursuant to above sect.—*LOMAS v. JOSEPH* (1909), 53 Sol. Jo. 271.

C. "Lease at Rack Rent."

See Solicitors' Remuneration Act, 1881 (c. 44); Remuneration Order, 1882, Sched. I., Part II., First Scale.

2787. General rule.]—*Re NEGUS*, No. 2775, *ante*.

2788. What constitutes rack rent—Rent representing full annual value of property.]—The object of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), is to introduce a short & simple method of ascertaining the cost of ordinary conveyancing matters, including leases, & the scale of fees is based on the bargain actually made between the lessor & lessee as appearing on the face of the document.

A sub-lease of a messuage in London for sixty-one & a half years at a rent of £525 contained (*inter alia*) full repairing covenants by the lessees. The rent was the full market rent obtainable upon the terms of the lessees undertaking the obligations in the lease. Upon a summons by the lessors' solrs. to review the taxation of their bill of costs, made under a third party order obtained by the lessees, the solrs. claimed that the lease in question was a long lease not at rack rent, & came under the second set of scale charges in Sched. I., Part II. of the General Order, & that the scale fee chargeable was £42 15s.:—*Held*: the lease was a long lease at rack rent within the first set of scale charges under the order, & the scale fee was £17 10s.—*Re SAWYER & WITTHALL*, [1919] 2 Ch. 333; 88 L. J. Ch. 474; 122 L. T. 158; 35 T. L. R. 611; 63 Sol. Jo. 662.

2789. Annual rent exceeding one hundred pounds—Charge on fractions of one hundred pounds.]—In the case of leases at a rack rent to which the scale of charges in Sched. I., Part II. of the General Order under Solicitors' Remuneration Act, 1881 (c. 44), is applicable, the solr. of the lessor is not entitled, where the annual rent exceeds £100, to charge any percentage on fractional amounts of £100 in the rental.—*Re MCGAREL*, [1897] 1 Ch. 400; 66 L. J. Ch. 185; 76 L. T. 70; 45 W. R. 321; 13 T. L. R. 210; 41 Sol. Jo. 276, C. A.

D. "Building Lease Reserving Rent."

See Solicitors' Remuneration Act, 1881 (c. 44); Remuneration Orders, 1882, 1925, Sched. I., Part II., Second Scale.

2790. Whether restricted to leases for long term of years.]—Pltf. demised three-quarters of an acre of agriculture land to defts. for fourteen years at a rental of £150 a year. The lease contained covenants by the lessees to erect on the land with all reasonable speed a cinema house, the plans to be approved by the lessor, to keep the premises

PART VII. SECT. 1, SUB-SECT. 5.—D. g. What amounts to building lease.]—In determining whether a lease is or is not a building lease within the General Order, regard must be had to

the circumstances of the contract, the subject-matter of the demise, & the nature & extent of the expenditure to be made.—*Re HOGAN'S ESTATE*, [1894] 1 I. R. 503.—IR.

h. ——— Lease for long term with covenant to spend money on building repairs within limited time.]—Loan for seven hundred years, at the yearly rent of £50, with a covenant on the

Sect. 1.—Non-contentious business: Sub-sect. 5, D. & E.; sub-sect. 6. Sect. 2: Sub-sect. 1, A. & B. (a).]

in repair, & at the expiration of the lease, if so required by the lessor, to remove the building; it contained also a proviso that the lessor might purchase the buildings at a valuation, & that if she did not purchase them the lessees might remove them. The lessees agreed to pay the costs of the lessor's solrs. in connection with the lease:—*Held*: the lease was a "building lease reserving rent" within the meaning of the Second Scale in Sched. I., Part II. of the General Order made in pursuance of Solicitors' Remuneration Act, 1881 (c. 44), & pltf.'s solr.'s costs were taxable under that scale & not under the First Scale in Sched. I., Part II., nor under Sched. II. of the Order.

It is a scale of charges in respect of "building leases reserving rent," & this is such a lease; "or other long leases not at rack rent," that is to say, other long leases not being building leases. That is, in my opinion, the true construction of these words, which were not intended to restrict building leases to long terms of years; any building lease reserving rent comes within the meaning of the language (SWINFEN EADY, L.J.).—*HILLYARD v. McDONALD*, [1917] 2 K. B. 248; 86 L. J. K. B. 118; 115 L. T. 741; *sub nom.* *HILLYARD v. McDONALD*, 61 Sol. Jo. 171, C. A.

E. Lease in Consideration of Premium and Rent.

See Solicitors' Remuneration Act, 1881 (c. 44); Remuneration Order, 1882, Sched. I., Part II., r. 5.

2791. Whether solicitor entitled to scale fee—In respect of premium—Abstract of lessor's title not furnished to lessee.]—When a lease is granted in consideration partly of a premium & partly of a rent, the lessor's solr. is, under rule 5 in Part II. of Sched. I. to the Solicitors' Remuneration Order, 1882, entitled to the scale fee mentioned in that rule in respect of the premium, even though no abstract of the lessor's title to the property has been furnished to the lessee.—*Re ROBSON* (1890), 45 Ch. D. 71; 59 L. J. Ch. 627; 63 L. T. 372; 38 W. R. 556; 6 T. L. R. 334.

Annotation:—*Folld. Re Horn & Francis*, [1896] 2 Ch. 797.

2792. ———.]—A lease for ninety-nine years, determinable on three lives, was granted at an annual rent of 12s. 1d. & a premium or fine of £12 1s. 8d.:—*Held*: the lessor's solrs. were entitled to a fee of £5 in respect of the rent under Sched. I., Part II., second scale, to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), & to an additional fee of £3 in respect of the premium by virtue of rule 5 in Part II. & rule 8 in Part I. of Sched. I.—*Re HELLARD & BEWES*, [1896] 2 Ch. 229; 65 L. J. Ch. 550; 74 L. T. 457; 41 W. R. 475; 40 Sol. Jo. 461.

Annotation:—*Reid. Re Webb, Still v. Webb*, [1897] 1 Ch. 144.

2793. ——— In respect of rent.]—*Re HELLARD & BEWES*, No. 2792, *ante*.

2794. Whether scale fee covers fee for negotiations.]—Where a lease is granted in consideration

of a fine or premium as well as of a rent, the lessor's solr. is not entitled to charge a further fee for negotiating in addition to the scale fee in respect of rent chargeable under Part II. of Sched. I. to the General Order under Solicitors' Remuneration Act, 1881 (c. 44), & the deducing fee chargeable on the premium under rule 5 of the rules to Part II., Sched. I. The negotiation fee is included in the scale fee chargeable in respect of rent.—*Re HORN & FRANCIS*, [1896] 2 Ch. 797; 66 L. J. Ch. 15; 75 L. T. 370; 45 W. R. 72; 13 T. L. R. 8; 41 Sol. Jo. 31.

Annotation:—*Reid. Re Gray*, [1901] 1 Ch. 239.

SUB-SECT. 6.—TRANSFER OF STOCKS, SHARES AND OTHER SECURITIES.

2795. What costs allowed on taxation—Inquiries as to distringas.]—(1) An attorney, employed to transfer stock, found that a *distringas* had been entered at the bank to prevent the transfer. He thereupon made several inquiries respecting the transactions, on behalf of his client, & prepared a notice to the solr. of the bank, to file a bill in consequence of the writ being entered:—*Held*: his charges for this business were not taxable items, between him & his client, it not appearing that the *distringas* originated in any suit, or that the business had reference to any proceeding in a ct.

(2) Charges for inquiries made, & attendances in the course of such inquiries, relating to a suit of which another attorney had the management, & in which, after such inquiries, the attorney making them did not further interfere, are not taxable items.—*NICHOLAS v. HAYTER* (1834), 2 Ad. & El. 348; 4 Nev. & M. K. B. 882; 4 L. J. K. B. 63; 111 E. R. 135.

Annotations:—*Generally, Reid. Robinson v. Whitehead* (1838), 1 Will. Woll. & H. 67. *Mentd. Beare v. Plunkus* (1835), 4 L. J. K. B. 163.

2796. ——— Journey to procure transfer—Intimation that journey will be fruitless.]—A solr. who, without consulting his client undertakes a journey for the purpose of procuring a transfer of a security of importance to his client, though he has had an intimation, which ultimately turns out to be correct, that his journey would be fruitless, is not entitled to his expenses of the journey.—*Re PRICE* (1845), 9 Beav. 234; 6 L. T. O. S. 343; 50 E. R. 333.

SECT. 2.—CONTENTIOUS BUSINESS.

SUB-SECT. 1.—WHAT COSTS ALLOWED ON TAXATION.

A. In General.

2797. Unauthorised charge by solicitor—Burden of proof.]—(1) A charge in a solr.'s bill "for attending a great many times" is too vague, & on taxation the charge will be disallowed.

(2) The costs of an abstract of a deed prepared to accompany a case submitted to counsel, disallowed, under the circumstances.

(3) A considerable portion of a charge for the

part of the lessee to expend within five years the sum of £500 in building & effecting permanent improvements in repair, & a covenant to insure:—*Held*: such a lease was a building lease within the General Order, 1881, made under Solicitors' Remuneration Act, 1881.—*HALL TO SUTTON*, [1900] 1 I. R. 137.—*IR.*

k. ——— Lease of house for thirty-five years with covenant to spend money in alterations & repairs.]—*Re KIL-*

KENNY CORPN., Ex p. SHORTAL, [1904] 1 I. R. 570.—*IR.*

PART VII. SECT. 1, SUB-SECT. 5.—E.

2792 1. Whether solicitor entitled to scale fee—In respect of premium.]—A firm of solrs. acting for the lessor, prepared, settled, & completed a lease of premises for a term of one hundred years in consideration of a fine of £500, & a rent of £30 per annum. No abstract of title was made out:—

Held: the solrs. were entitled to charge £10, being the scale fee on the rent reserved, & also £7 10s. being the scale fee on the fine, the fine being treated as if it were the purchase-money paid on a sale.—*Re CONOLLY TO SHERIDAN & RUSSELL*, [1900] 1 I. R. 1.—*IR.*

PART VII. SECT. 2, SUB-SECT. 1.—A.

1. Right to costs outside tariff fees.]—*Re RYERSON ESTATE* (1896), 29 N. S. R. 81.—*CAN.*

attendance of a solr. in town, at the request of his client, disallowed, on the ground that the solr. had failed to prove that the whole time was required for the business.

(4) Where a solr. makes against his client any charge not authorised in the usual & regular mode of proceeding, the burden of proof is upon the solr.; &, in a case, where, for the interest of a client, the solr. had advanced money to put in the answer of co-deft., it was disallowed, on the ground that it was not clearly made out that the client authorised or acquiesced in it.

(5) Brief of pleadings made before the case was at issue disallowed.

Fee of counsel for settling a special affidavit for leave to amend disallowed in a taxation between solr. & client.—*Re PENDER* (1847), 10 Beav. 390; 2 New Pract. Cas. 343; 10 L. T. O. S. 49; 50 E. R. 632.

Annotation:—*As to* (1) *Apld. Re Tilleard* (1863), 32 Beav. 476.

2798. Proceedings materially assisted by solicitor's expedition—Whether costs on higher scale allowed—Administration action.]—*Re LEEUW, REIN v. WRATHALL* (1892), 36 Sol. Jo. 715.

Annotation:—*Consd. Rivington v. Garden*, [1901] 1 Ch. 561.

2799. Petition action.]—*MARRIOTT v. COBBETT* (1894), 38 Sol. Jo. 620.

Annotation:—*Consd. Rivington v. Garden*, [1901] 1 Ch. 561.

2800. —.]—The fact that the title to an estate dealt with in a partition action was a complicated & difficult one, & that the action had been conducted by the solrs. in an exceptionally able & diligent manner, whereby much time & expense had been saved, is not a special ground "arising out of the nature & importance, or the difficulty of the case," sufficient to enable the ct. to order costs to be paid on the higher scale under R. S. C., Ord. 65, r. 2.—*RIVINGTON v. GARDEN*, [1901] 1 Ch. 561; 70 L. J. Ch. 282; 84 L. T. 197; 49 W. R. 279; 45 Sol. Jo. 259.

m. —.]—*Re SOLICITOR, Ex p. DAY & HENWOOD* (Alta.) (1908), 8 W. L. R. 536.—**CAN.**

n. —.]—A solr. cannot, in the absence of a special agreement such as is provided for by Law Society Act, R. S. M. 1902, c. 95, s. 65, recover against his client, for work in connection with an action in the ct., any fees or charges other or greater than those set forth in the tariff of costs promulgated under King's Bench Act.—*Re PHILLIPS & WHITLA* (1913), 21 W. L. R. 10; 4 W. W. R. 311; 23 Man. L. R. 92; 12 D. L. R. 106.—**CAN.**

o. *Costs charged under wrong item—Right to justify under other item.*—A charge on a bill of costs, although not justified in the item under which it is framed, may nevertheless be allowed if it can be sustained under any other item of the tariff.—*Re COWAN* (1900), 7 B. C. R. 353.—**CAN.**

p. *In criminal matters—Remuneration fixed on quantum meruit.*—*SMITH v. DONNELLY*, [1924] 2 D. L. R. 514; 42 Can. Crim. Cas. 49; 54 O. L. R. at p. 286.—**CAN.**

q. *Work must actually be done.*—*Re SOLICITORS* (Ont.), [1926] 4 D. L. R. 1182.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 1.—**B. (a).**

r. *Discretion of taxing master—Attendance on taxation.*—A master or a single judge has no discretion to allow a solr. more than \$1 per hour for attendance on the taxation of a bill of costs, either between solr. & client, or party & party; the tariff being fixed at that rate by G. O. 608.—*Re TOTTEN*

(1880), 8 P. R. 385.—**CAN.**

t. —.]—In the matter of *per diem* allowance, the taxing officer must be governed to some extent by the importance of the case, the less or greater necessity for attendance, & generally by the value of the time of the attorney engaged.—*R. v. ELLIS, Ex p. BAIRD* (1895), 33 N. B. R. 141.—**CAN.**

a. *What charges allowable.*—Charges for consultation with & advice to a client previous to suing, as to the right of action for consultation on being instructed to retain counsel, also in preparing for trial; for consultations & attendance in connection with appealing to Supreme Ct. of Canada; attending judge to obtain amendment of an order made by him in the cause; attending ct. no cause being made, a *remand* & consultation with client relative thereto; attending ct. to procure jury panel, & attending to tax costs & sign judgment are taxable as between attorney & client, & the clerk may allow a reasonable amount for such services, apart from the ordinance of fees.—*FERGUSON v. TROOP* (1892), 31 N. B. R. 241.—**CAN.**

b. *Attendance on counsel.*—Time spent by the attorney in consultation with counsel is taxable.—*R. v. ELLIS, Ex p. BAIRD* (1895), 33 N. B. R. 141.—**CAN.**

c. *Attending trial Outside usual limits of practice.*—A solr. attending on a record for trial at Assizes in a county where he does not usually practice, is entitled, upon taxation between solr. & client, to £2 2s. for each day necessarily occupied, irrespective of the number of days the

B. Particular Instances.

(a) Attendances.

2801. Charge "for attending a great many times."—*Re PENDER*, No. 2797, *ante*.

2802. Attendance in town—At request of client—No proof that whole time was required for the business.—*Re PENDER*, No. 2797, *ante*.

2803. Attendance to file certificate of taxation.]—(1) Under an order for taxation, £2 2s. was allowed to the solr. then acting for the client for perusing the bill of his predecessor, it having led to a compromise.

(2) An item of £1 6s. 8d., for drawing out for the receiver a scheme of the property & the holding of the tenants, was properly disallowed, & it ought not to have been struck out from the bill of costs.

(3) Only one fee of 6s. 8d. is allowed for attending for & to file a certificate of taxation, & not 6s. 8d. to bespeak for same, & 6s. 8d. for attending filing same.

(4) Charge of 13s. 4d. for a list of deeds, handed over by a solr., under an order for taxation, disallowed.

(5) A solr. is entitled to charge for the costs of the affidavit made by him, on delivering up the papers, under an order for taxation.

(6) Where no fee is paid to counsel on a consultation, no charge can be allowed to the solr. for the attendance.—*Re CATLIN* (1851), 18 Beav. 508; 52 E. R. 200.

Annotations:—*As to* (2) *Reid. M'Intosh v. G. W. Ry.* (1865), 13 L. T. 81. *As to* (4) *Distd. Re Morgan*, [1915] 1 Ch. 182. *As to* (6) *Consd. Slingsby v. A.-G.*, [1918] P. 236; *Generally, Reid. In the Estate of Ogilvie, Ogilvie v. Massey*, [1910] P. 243.

2804. Attendance at consultation—No fee paid to counsel.—*Re CATLIN*, No. 2803, *ante*.

2805. Discretion of taxing master—When exercisable.]—Under Sched. II. to Solicitors' Remuneration Order the taxing master has a discretion in a case, which is not an "ordinary" one, *i.e.* is more or less difficult than an average case, to

case may be actually at hearing, or of its being settled without a trial.—*M'NAMARA v. MALONE* (1886), 18 L. R. Ir. 269.—**IR.**

d. —. *Necessity for special agreement—Whether discretion of master ousted by agreement.*—Where a solr. attends personally at the hearing of an action on the written instructions of his client, & thereby incurs expenses for which he charges in his bill of costs:—*Held*: the taxing master has discretion in making disallowances. To entitle the solr. to such costs he must not only show a special contract with his client, but that they were just & reasonable. The authority given by the client must be regarded as qualified by the discretion in the Taxing Master to disallow.—*DONNELLY v. MALONE* (1913), 47 I. L. T. 208.—**IR.**

e. *Proof of attendance.*—On taxation, as between solr. & client, it is not necessary that the solr. should prove attendances on his client by contemporaneous entries in his books, provided that he gives other satisfactory evidence thereof.—*Re BRAY ELECTRIC TRAMWAY* (1889), 23 L. R. Ir. 116.—**IR.**

f. *Attendance on several clients—Where separate defences filed.*—An agent who conducted a case for several defenders, in which separate defences were necessary, held entitled only to charge once for attendances & professional services applicable in common to the whole defenders, although entitled to charge for all the additional trouble & expense occasioned by the necessity for separate defences.—*GREENHILL v. GLADSTONE* (1861), 23

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increase or to diminish the fee for attendance in that schedule prescribed, according to the circumstances. The discretion must be exercised for "special reasons," but the taxing master is not bound to state these reasons until his decision is impeached.—*Re MAHON*, [1893] 1 Ch. 507; 62 L. J. Ch. 448; 68 L. T. 189; 41 W. R. 257; 9 T. L. R. 230; 37 Sol. Jo. 234; 2 R. 337, C. A.

Annotation:—Mentd. Re Morgan, [1915] 1 Ch. 182.

2806. What constitutes attendance—Attendance for merely formal purpose.]—(1) An attendance of a solr. or his clerk for a merely formal purpose, such as delivering briefs or papers at counsel's chambers, is not an "attendance" within Sched. II. of Solicitors' Remuneration Act, 1881 (c. 44), & the practice of the taxing master to allow a fee of 3s. 4d. for such an attendance is correct.

(2) A case for the opinion of counsel is a "document" within Sched. II. of Solicitors' Remuneration Act, 1881 (c. 44), & the practice of the taxing masters to allow a fee of only 1s. per folio as the ordinary fee for the drawing of such a case is wrong.—*Re MAHON*, [1893] 1 Ch. 507; 62 L. J. Ch. 65; 68 L. T. 189; 41 W. R. 37; 9 T. L. R. 24; 37 Sol. Jo. 13; *on appeal*, [1893] 1 Ch. p. 518, C. A.

Annotation:—As to (2) Apld. Re Morgan, [1915] 1 Ch. 182.

Solicitor appearing in person.]—See Nos. 2846, 2847, *post*.

Solicitor acting for plaintiff & some defendants.]—See No. 2831, *post*.

(b) Counsel's Fees.

2807. Third counsel.]—The solr. for pl'tfs. employed three counsel, two of whom were Queen's Counsel, to appear for his clients at the hearing of a cause, & the master, in taxing the solr.'s bill as between solr. & client, under an order obtained by one of pl'tfs., disallowed the fees of the second counsel. The ct. referred it back to the master to review his report, there being nothing to show that it was unnecessary to employ more than two counsel.—*WASTELL v. LESLIE* (1844), 14 Sim. 84; 13 L. J. Ch. 368; 3 L. T. O. S. 117; 8 Jur. 1001; 60 E. R. 289.

Annotation:—Refd. Horsley v. Cox (1869), 17 W. R. 603.

2808. Fee for settling special affidavit—For leave to amend.]—*Re PENDER*, No. 2797, *ante*.

2809. Refreshers—R. S. C., Ord. 65, r. 27 (48).]—(1) The special allowances & scale of fees mentioned in R. S. C., 1883, Ord. 65, r. 27 (48), are applicable to all taxations, whether in an action in the Supreme Ct., or under the common order, or under a special order obtained by a client against his solr. under the jurisdiction given by Solicitors

Act, 1843 (c. 73). But Ord. 65, r. 27 (48), does not prevent the client from giving the solr. authority, which may be express or implied, to employ a particular leader, & to give him such special fees by way of refresher or otherwise, though of far larger amount than the maximum fixed by r. 27 (48), as may be necessary to secure his services; & such authority having been shown by the evidence to have been clearly & distinctly given by the clients, a board of directors, to their solr.:—*Held*: the taxing master was not precluded from allowing more than the maximum scale fee fixed by r. 27 (48), & he must exercise his discretion as to the quantum, having regard to the authority given by the clients to their solr.

(2) There is no recognised rule that where special fees have been paid to the leader, the fees paid to his juniors must be according to the same rate; & accordingly, in the absence of proof that the clients had authorised payment of special refresher fees to the junior counsel proportionate to those paid to the leader, the disallowance by the taxing master of special refresher fees to the junior counsel was upheld.

(3) Although the case was one of very great magnitude & complication, & occupied twenty-nine days, the ct. declined to interfere with the discretion of the taxing master in disallowing extra fees paid by the solicitor to his counsel for consultations.

(4) A solr. who has made disbursements for his client, & who has received from the client sums paid generally on account, but sufficient to cover those disbursements, is not entitled to appropriate the sums so received to costs for which he has not delivered a bill, in order that he may, under Attorneys & Solicitors Act, 1870 (c. 28), s. 17, claim interest on the disbursements.—*Re HARRISON* (1886), 33 Ch. D. 52; 55 L. J. Ch. 768; 55 L. T. 72; 50 J. P. 372; 34 W. R. 645; 2 T. L. R. 671, C. A.

Annotations:—As to (1) Consd. Cavendish v. Strutt, [1901] 1 Ch. 524. *Refd. Stewart v. Weber* (1903), 89 L. T. 559.

2810. — Of leader.]—*Re HARRISON*, No. 2809, *ante*.

2811. — Of junior counsel—Whether in same proportion as refreshers of leader.]—*Re HARRISON*, No. 2809, *ante*.

2812. Special fees—In excess of scale fees.]—*Re HARRISON*, No. 2809, *ante*.

2813. Counsel employed against client's instructions.]—A solr. cannot rely upon the Rules as to employing counsel of 1892, so as to justify himself, as between himself & the client, in employing particular counsel contrary to the express instructions of the client, & if counsel is employed in defiance of the client's instructions, although

Dunl. (Ct. of Sess.) 1006; 33 Sc. Jur. 509.—SCOT.

g. Attendance as witness.]—Where an attorney claims for attendance as a witness, he must prove that he is a material & necessary witness, & would not have attended except as a witness. He cannot claim for attendance in ct. in the same case as a witness & as attorney but must elect between the two.—*ROSENTHAL v. BARNARD* (1893), 7 E. D. C. 120.—S. AF.

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2807 i. Third counsel.]—*Re BARNHILL* (1893), 29 L. R. Ir. 396.—IR.

h. Second counsel.]—*BELL v. BELL* (1900), 20 C. L. T. 20.—CAN.

k. Fourth counsel—Necessity for special agreement.]—A brief to a fourth

counsel at the trial of an action will tax against the client where special instructions have been given by the client to employ such fourth counsel, but not otherwise.—*LYNCH TO CHANCE* (1892), 30 L. R. Ir. 278.—IR.

l. Retaining fee.]—*Re McBRIDE, FARLEY v. DAVIS* (1867), 2 Ch. Ch. 153.—CAN.

m. Whether trial fees allowed.]—An attorney is entitled to recover against his client fees paid to counsel conducting the case at the trial.—*BROCK v. BOND* (1846), 3 U. C. R. 349.—CAN.

n. —.]—*HAMILTON v. McNEILL* (No. 2) (1894), 2 Terr. L. R. 151.—CAN.

o. —.]—In review of taxation of costs between attorney & client *Held*: counsel's services, being in their nature gratuitous, are not taxable items; nor is there any legal authority

to warrant a judge in making a flat for counsel fees.—*R. v. ELLIS, Ex p. BAIRD* (1895), 33 N. B. R. 141.—CAN.

p. —.]—*Re SOLICITOR* (1902), 7 Terr. L. R. 262.—CAN.

q. —.]—*Prima facie* the costs of counsel disallowed between party & party should not be allowed as between solr. & client.—*Re BARNHILL* (1893), 29 L. R. Ir. 396.—IR.

r. — Necessity for judge's flat.]—In taxing costs between attorney & client, counsel fees may be allowed without the judge's flat; but it is the duty of the clerk to decide on the authority to make the payment, & the reasonableness of the charge.—*Ex p. JAMES* (1856), 1 All. 286.—CAN.

t. — Outside tariff charges.]—*PECK v. TINGLEY* (1869), 1 Han. 418.—CAN.

a. — Solicitor acting as solicitor

under r. 20 he may as a matter of etiquette be entitled to a brief at the trial by reason of his having advised during the progress of an action on behalf of the client, his fees & the costs incidental to his employment will be disallowed on taxation.—*Re HARRISSON*, [1908] 1 Ch. 282; 77 L. J. Ch. 143; 97 L. T. 902; 24 T. L. R. 118; 52 Sol. Jo. 79.

2814. Fees not paid before commencement of proceedings—When proceedings for taxation commence—Within R. S. C., Ord. 65, r. 27 (29A).—A solr. issued a specially indorsed writ & a summons for judgment against his client upon a bill of costs. On Mar. 23, 1921, an order was made under R. S. C., Ord. 14, that the bill should be referred to the master to be taxed pursuant to Solicitors Act, 1843 (c. 73), & that the solr. should be at liberty to sign judgment against the client for the amount found due to the solr. by the master's allocatur. The bill expressly stated that certain fees to counsel had not then been paid, & these fees were set out under a separate heading in the bill as indicated by R. S. C., Ord. 65, r. 27 (29A). On Apr. 1, 1921, the fees were paid. On Apr. 9, 1921, the taxation commenced. The client objected to the fees being allowed as disbursements, & the taxing master upheld the objection:—*Held*: the order of Mar. 23 represented the result of two proceedings; (a) a summons for judgment by the solr.; (b) a summons by the client for taxation of the bill under Solicitors Act, 1843 (c. 73), s. 37; therefore "proceedings for taxation" had been "commenced by the client" within the meaning of R. S. C., Ord. 65, r. 27 (29A), & consequently the taxing master had power to allow the fees.—*SMITH v. HOWES*, [1922] 1 K. B. 590, 91 L. J. K. B. 388; 126 L. T. 625; 66 Sol. Jo. 367, C. A.

Unpaid fees—Action brought in form *pauperis*.—See No. 2914, *post*.

See, also, Nos. 2856–2860, *ante*.

(c) Journeys.

2815. Whether express instructions of client necessary.]—Charges by a country solr. for attending the cause in London are to be allowed in some cases; but the circumstance of their being undertaken by the direction of the client, is not alone a sufficient ground for allowing them, as the solr. himself is better able to judge of their necessity.—*CROSSLEY v. PARKER* (1820), 1 Jac. & W. 460; 37 E. R. 443.

Annotations:—*Refd.* *Horlock v. Smith* (1837), 2 My. & Cr. 495; *Sayer v. Wagstaff*, *Re Sanders*, *Ex p. Wagstaff* (1814), 14 L. J. Ch. 116.

2816. —.]—Upon a summons by a solr. for an order directing the taxing master to review his taxation of a bill of costs:—*Held*: the journeys of a country solr. to town to attend counsel & otherwise to conduct the proceedings in an action ought to be allowed where the solr. had authority from his client to make these charges, but that such journeys to town ought not to be allowed simply on the principle that the country solr. would probably be better acquainted with the subject-matter than his London agent.—*Re STORER* (1884), 26 Ch. D. 189; 53 L. J. Ch. 872; 50 L. T. 583; 32 W. R. 767.

Annotations:—*Consd.* *The Metropolis* (1899), 81 L. T. 236. *Refd.* *The Soto*, [1893] P. 73.

for partner.—*ARNOLD v. GOLDSTEIN*, [1920] 2 W. W. R. 424.—*CAN.*

b. Counsel's opinion—Solicitor re-opening case without justification.]—On taxation between solr. & client, the costs of a case laid before counsel for an opinion on a point decided by a decree disallowed, on the ground that the solr. was not justified in endeavour-

ing to re-open the question.—*NEWBY v. DREW* (1848), 12 I. Eq. R. 24.—*IR.*

c. Refreshers.]—A refresher fee paid by a solr. to counsel on an interlocutory motion will not be allowed against the client on client & solr. taxation.—*LYNCH TO CHANCE* (1892), 30 L. R. Ir. 278.—*IR.*

2817. — Information collected while travelling for another client.]—A solr. had a retainer to act generally for a co., & also a special retainer to conduct a Chancery suit on behalf of the co. Being employed by another client to go to America, he collected information on behalf of the co. in furtherance of their suit, but without special instructions from the co. to do so. On his return to England he reported to the co. what he had done, & they made use of the information he had obtained. He afterwards took three journeys to Paris to conduct negotiations for a compromise of the same suit, without instructions from the co., but with the knowledge of some of the directors, & on two of them he was accompanied by the chairman:—*Held*: under the special circumstances of the case, the solr. was entitled to charge the co. for his professional services in America, & also for his professional services & expenses on his journeys to Paris.

A solr. has no right to take special journeys or to go to foreign countries at the expense of his client without specific instructions: nothing is better settled: otherwise the client, in giving a retainer to a solr., would thereby authorise him to travel all over the world at his expense (*JESSEL, M.R.*).—*Re SNELL* (1877), 5 Ch. D. 815; 36 L. T. 534; 25 W. R. 736, C. A.

Annotations:—*Consd.* *Re Hill* (1886), 55 L. J. Ch. 871. *Refd.* *The Soto*, [1893] P. 73.

2818. — Conduct of negotiations for compromise of suit—Solicitor acting with knowledge of some of directors of client company.]—*Re SNELL*, No. 2817, *ante*.

2819. Country solicitor attending proceedings in London.]—*CROSSLEY v. PARKER*, No. 2815, *ante*.

2820. —.]—A country solr. personally attending an appeal instead of employing his London agent will on taxation be allowed the additional charges & expenses thereby occasioned.—*Re FOSTER, Ex p. DICKENS* (1878), 8 Ch. D. 598; 48 L. J. Bcy. 32; 26 W. R. 915.

Annotations:—*Distd.* *Re Sherwell, Ex p. Snow*, [1879] W. N. 22. *Consd.* *Re Storer* (1884), 26 Ch. D. 189. *Refd.* *The Soto*, [1893] P. 73.

2821. —.]—*Re SHERWELL, Ex p. SNOW*, [1879] W. N. 22.

Annotation:—*Refd.* *The Soto*, [1893] P. 73.

2822. —.]—*Re STORER*, No. 2816, *ante*.

2823. —.]—PRACTICE NOTE, [1928] W. N. 145.

2824. — London agent also attending cause.]—Where a London agent has been employed to attend the trial of a cause, it is a matter within the discretion of the master, whether the costs of a journey to London by the country attorney to attend the trial of the cause shall be allowed.—*PARSLOE v. FOY* (1833), 2 Dowl. 181.

Annotation:—*Expld.* *Archer v. Marsh* (1839), 7 Dowl. 541.

2825. —.]—It is a matter for the discretion of the master, & with which the ct. will not interfere, whether the expenses of a country attorney attending a reference, besides his town agent, shall be allowed.—*ARCHER v. MARSH* (1839), 7 Dowl. 541; 1 Will. Woll. & II. 577.

2826. Journey of forty-eight miles to give evidence—Journey charged for as three days.]—An attorney's expenses for travelling forty-

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d. Whether express instructions of client necessary—Necessity for good faith & reasonable grounds.]—*GOUGH v. PARK* (1881), 8 P. R. 492.—*CAN.*

e. Country solicitor attending proceedings in Dublin.]—*Re CRAMSIE & GREER*, [1894] 1 I. R. 135.—*IR.*

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eight miles to give evidence, was charged as for three days:—*Held*: exorbitant, & reduced to two.—*LUCAS v. ROBERTS* (1855), as reported in 3 C. L. R. 987; 25 L. T. O. S. 101; 3 W. R. 415; *sub nom. ROBERTS v. LUCAS*, 19 J. P. 359.

2827. Journey to Paris to obtain execution of deed.]—Costs of a journey to Paris to obtain the execution of a deed disallowed, beyond the expense of doing it through an agent.—*Re BEVAN* (1855), 20 Beav. 146; 52 E. R. 558.

2828. Journeys to expedite administration proceedings.]—*Re LEEUW, REIN v. WRATHALL* (1892), 36 Sol. Jo. 715.

Annotation:—*Consd. Rivington v. Garden*, [1901] 1 Ch. 561.

(d) Negligent or Unnecessary Proceedings.

2829. Functions of taxing master.]—On a taxation between solr. & client of the costs of a cause objections were taken on behalf of the client to charges occasioned by the postponement of the trial & the amendment of the pleadings, on the ground that the postponement of the trial & the amendment of the pleadings had been rendered necessary by the negligence of the solr.; the registrar refused to disallow the items, on the ground that it was not within his province as Taxing Master to inquire into the question of negligence:—*Held*: on motion in ct. to review the taxation, the ruling of the registrar was right.—*THE PAPA DE ROSSIE* (1878), 3 P. D. 160; 27 W. R. 367.

2830. —.]—The taxing master in taxing the costs of an action has jurisdiction to disallow the costs of proceedings which were rendered necessary only by the negligence or mistake of the solr. charging such costs.—*Re MASSEY & CAREY* (1884), 26 Ch. D. 459; 53 L. J. Ch. 705; 51 L. T. 390; 32 W. R. 1008, C. A.

2831. Allowance by way of compensation for services inadequately remunerated.]—By the practice of the ct., solrs. are often not paid at all, or very ill paid, for very important services, & therefore they ought not to be deprived of any lawful fees which the practice warrants, upon the notion that the business charged may have been of no practical benefit. Thus, where a solr. acts for a pltf. & for some defts., he is entitled to charge such defts. for pltf.'s warrants served on his clients defts., & for attendance thereon, & for separate copies of the proceedings.—*LUCAS v. PEACOCK* (1844), 8 Beav. 1; 50 E. R. 1.

2832. — Distinguished from fictitious charges for important business which has been neglected.]—I have been informed, that solrs. frequently do charge for particular acts of business, which, upon the occasion to which they relate, may not have been necessary or required for the interests of their client, & this, because, in the taxation of costs for the whole business done, such charges are allowed, whilst the charges allowed for other services of the utmost value & importance, truly rendered to their clients, are so inadequate, that unless some compensation were allowed in another way, no

adequate remuneration would, upon taxation, be given for the transaction of the whole business.

But doing & charging for some things not required for the interest of the clients, & for which the client has, or is supposed to have compensation by the undercharge which is allowed against him for services truly rendered, is a very different thing, from making a fictitious charge, as for business done on a most important occasion, when, in fact, such business was not done, & the interest of the client was wholly neglected (*LORD LANGDALE, M.R.*).—*DAVENPORT v. STAFFORD* (1845), 8 Beav. 503; 14 L. J. Ch. 414; 5 L. T. O. S. 428; 9 Jur. 801; 50 E. R. 198.

Annotations:—*Mentd. Turner v. Turner* (1852), 11 De G. M. & G. 28; *Purcell v. Manning* (1857), 30 L. T. O. S. 50; *Stannard v. Harrison* (1871), 24 L. T. 570; *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273; *Ainsworth v. Wilding*, [1896] 1 Ch. 673.

2833. Preparation of conveyance—Where title deeds in possession of adverse party.]—A solr. employed in the sale of an estate knew that the title deeds were in the possession of an adverse party; he however proceeded to prepare & obtained the execution of the conveyance & memorial. The sale went off, in consequence of the absence of the title deeds. He was disallowed the costs of the proceeding, & the deed being a cloud on the title, he was also ordered to deliver it without being paid the costs thereof.—*POTTS v. DUTTON* (1845), 8 Beav. 493; 5 L. T. O. S. 343; 50 E. R. 194; *subsequent proceedings*, 6 L. T. O. S. 363.

2834. Two actions brought instead of one.]—An attorney, under the advice of a special pleader, caused two actions of ejectment to be brought where the Court thought that one would clearly have sufficed. The Court refused to interfere with the Master's taxation, who, in his discretion, had disallowed the costs relating to one of the actions.—*DOE d. HAMMOND v. ROE* (1847), 9 L. T. O. S. 124.

2835. Action improperly brought.]—In the taxation of costs the taxing master has authority under Solicitors Act, 1843 (c. 73), to disallow the charges for an action which he in his discretion considers to have been improperly brought.—*Re CLARK* (1851), 1 De G. M. & G. 43; 21 L. J. Ch. 20; 18 L. T. O. S. 130; 15 Jur. 1017; 42 E. R. 467, L. JJ.

Annotations:—*Consd. Re Barrow* (1853), 17 Beav. 517. *Reid. Re Brown* (1852), 21 L. J. Ch. 442, *Re Atkinson & Pilgrim* (1858), 26 Beav. 151.

2836. Attempt to enforce sale—Sale unenforceable because particulars incorrect.]—A solr. inserted an inaccurate statement in the particulars of a sale, which he attempted to cover by a condition. An intending purchaser refused to complete on discovering the inaccuracy, but counsel advised vendor's solr. that the condition in question bound the purchaser, & advised a summons under the Vendor & Purchaser Act, which was accordingly taken out; & the chief clerk & ct. of first instance agreed with counsel, but the Ct. of Appeal reversed their decision, & held that the said condition could not get rid of the positive statement in the particulars, so that the purchaser could not be compelled to complete.

PART VII. SECT. 2, SUB-SECT. 1.—B. (d).

f. Onus of proof of negligence.]—Where services are rendered by a solr. at the instance of a client, possessing the like knowledge of the matters of fact as the solr., the onus is on the client to establish negligence, ignorance, or want of skill, by reason of which alone & entirely the services have been utterly worthless, if he resist the taxation of costs incurred by such services.

v. WHITTY (1883), 2 O. R. 424; 20 C. L. J. N. S. 146.—*CAN.*

g. Action improperly brought—Suit in chancery within county court jurisdiction.]—Where a solr. incurs useless & unnecessary costs by instituting in chancery a suit within the jurisdiction of the county ct., the surplus of the costs in chancery over the inferior ct. tariff will not be allowed to him against his client.—*Re HARDY, POOLE v. POOLE* (1871), 3 Ch. Ch. 179.—*CAN.*

h. — Proceedings by action instead of summary.]—*Re ALLENBY & WEIR* (1891), 14 P. R. 227.—*CAN.*

k. Continuance of proceedings after object obtained.]—Costs of proceedings in a cause, after the object of it had, with the knowledge of the solr., been otherwise obtained, not to be allowed, on a taxation between solr. & client, except under special circumstances.—*LANGFORD (LADY) v. MAHONY* (1845), 3 Jo. & Lat. 97.—*IR.*

In the taxation of the vendor's costs as between him & the solr. the taxing master disallowed the solr. his costs in connection with the abortive attempt at a sale & with the summons, & the Vice-Chancellor affirmed his disallowance.—*Re X.* (1886), 54 L. T. 634.

(e) *Solicitor Acting for More than One Party.*

2837. Solicitor acting for plaintiff & some defendants—Plaintiff's warrants served on defendants.]—LUCAS v. PEACOCK, No. 2831, *ante*.

2838. — Attendance.]—LUCAS v. PEACOCK, No. 2831, *ante*.

2839. — Copies of proceedings.]—LUCAS v. PEACOCK, No. 2831, *ante*.

2840. Whether client liable for proportion of costs.]—Where the same solr. has been employed in a suit by two or more parties, he will be allowed in the taxation of his bill of costs, against each of his clients, only such client's proportion of the general costs of the suit.—*Re COLQUHOUN, Ex p. FORD* (1854), 5 De G. M. & G. 35; 2 Eq. Rep. 304; 23 L. J. Ch. 515; 22 L. T. O. S. 299; 2 W. R. 286; 43 E. R. 781, L. JJ.

*Annotations:—***Expld.** *Frazer v. Thompson* (1860), 1 Giff. 337. **Distd.** *Watson v. Row* (1871), L. R. 18 Eq. 680; *Burridge v. Bellew* (1875), 32 L. T. 807. **Apld.** *Re Allen, Davies v. Chatwood* (1879), 11 Ch. D. 244. **Consd.** *Mortgage Insee. Corpn. v. Canadian Agricultural Coal & Colonisation Co.*, [1901] 2 Ch. 377. **Apld.** *Ellingsen v. Det Skandinaviske Compani*, [1919] 2 K. B. 567. **Consd.** *Terry v. Gould* (No. 2) (1921), 69 Sol. Jo. 212. **Refd.** *Re Salaman*, [1891] 2 Ch. 201.

2841. — Where retainers separate.]—Separate retainers were given to an attorney by deft. & two other persons, as defts. in a Chancery suit, to conduct their defence thereto; but a joint appearance was entered, & a joint answer put in; one set of counsel only was employed, to whom one set of briefs was delivered, & joint affidavits were made, & joint consultations obtained, the defence throughout being conducted as a joint defence. In an action by the attorney to recover the whole costs of the Chancery suit from deft., the only defence set up at the trial was a special agreement by the attorney that deft. should not be liable for any of the costs of the suit, which agreement, however, the jury negatived. Thereupon, at the suggestion of the judge that it was unnecessary to go into evidence of the reasonableness of the charges, which pltf. was prepared to give, inasmuch as the bill would be taxed in the usual way, a verdict was entered for pltf. for the amount of his bill, "subject to taxation." Upon the bill, which consisted entirely of Chancery charges, coming before the common law master for taxation, he referred it, under Solicitors Act, 1843 (c. 73), s. 42 to a Chancery taxing master, who accordingly taxed the whole bill at a certain sum; but, on the authority of *Re Colquhoun, Ex p. Ford*, No. 2840, *ante*, apportioned & allotted one-third part only of such sum as against deft. for his proportionate share of the whole. That apportionment the common law master, on the bill coming back to him for his allocatur, repudiated, & taxed the whole bill at the total sum taxed by the Chancery master, & for that amount judgment was signed by the pltf.:—*Held*: the view taken by him was right, & pltf. was entitled to recover the whole of his costs from deft.; for, though the retainers were separate, there was evidence, if the case had gone to the jury on that point, that they had merged into one joint litigation; & not having raised the question of separate liability at the trial, it was not open to deft., nor competent to the Chancery master, to raise it on taxation.

There is no difference in the law, as administered in a ct. of equity, & as administered in a ct. of common law, with regard to the question of the joint or separate liability of several defts. The rule is the same in both cts. If there be separate contracts with the attorney, each deft. is liable for his own share only of the costs, & if the contract be joint, then each is liable for the whole.—*BURRIDGE v. BELLEW* (1875), 32 L. T. 807.

*Annotations:—***Expld.** *Re Allen, Davies v. Chatwood* (1879), 11 Ch. D. 244. **Refd.** *Ellingsen v. Det Skandinaviske Compani*, [1919] 2 K. B. 567.

2842. —]—In a suit by a shareholder against the seven directors, the secretary & the co., to restrain an action for calls, to be relieved of his shares on the ground of misrepresentation in the prospectus, & to be indemnified by the directors, defts., having all appeared by A., the same solr. put in a joint & several answer, signed by one counsel, & joined in their defence, signed three separate retainers to A., all in the following terms:—"You having up to the present time conducted the defence of this suit on behalf of all defts., & in pursuance of their instructions in that behalf, we the undersigned do hereby confirm such instructions, & request you to continue such defence, & to take such steps as you may consider necessary in the matter":—*Held*: the retainers were separate & not joint, & the assets of the co. in liquidation were liable for one-ninth only of the costs.—*Re ALLEN, DAVIES v. CHATWOOD* (1879), 11 Ch. D. 244; 48 L. J. Ch. 358; 40 L. T. 187; 27 W. R. 485.

*Annotations:—***Consd.** *Mortgage Insee. Corpn. v. Canadian Agricultural Coal & Colonisation Co.*, [1901] 2 Ch. 377. **Refd.** *Re Salaman* (1891), 70 L. T. 772.

(f) *Solicitor Appearing in Person.*

2843. General rule.]—(1) Where an attorney succeeds in a suit to which he is a party, it is customary to allow him on taxation the same costs as if he were employed for another person.

(2) An action was brought against an attorney, wherein pltf. was nonsuited. Deft. acted as his own attorney in the cause & attended the assizes, but his London agent was the attorney on the record:—*Held*: deft. was entitled to the usual costs for such attendance at the assizes, & also to the charges of his London agent.—*JARVIS v. DEWES* (1836), Tyr. & Gr. 240.

2844. —]—Where an action is brought against a solr who defends it in person & obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solr., except in respect of items which the fact of his acting directly renders unnecessary.—*LONDON SCOTTISH BENEFIT SOCIETY v. CHORLEY* (1884), 13 Q. B. D. 872; 53 L. J. Q. B. 551; 51 L. T. 100; *sub nom.* *LONDON PERMANENT BUILDING SOCIETY v. THORLEY*, 32 W. R. 781, C. A.

*Annotations:—***Apld.** *Re Donaldson* (1884), 27 Ch. D. 544; *Bidder v. Bridges*, [1887] W. N. 208. **Expld.** *Re Wallis, Ex p. Lickorish* (1890), 25 Q. B. D. 176. **Consd.** *Stone v. Lickorish*, [1891] 1 Ch. 363. **Apld.** *Tolputt v. Mole*, [1911] 1 K. B. 87. **Refd.** *Carson v. Pickersgill* (1885), 54 L. J. Q. B. 484; *Tolputt v. Mole*, [1911] 1 K. B. 836.

2845. —]—*BIDDER v. BRIDGES*, [1887] W. N. 208.

*Annotation:—***Consd.** *Tolputt v. Mole*, [1911] 1 K. B. 87.

2846. Charge for attendance.]—An attorney who is party to a suit is not entitled to charge a guinea a day for attending the trial, though he acts as his own attorney, unless it appears that it was necessary that he should attend in person.—*LEAVER v. WHALLEY* (1833), 2 Dowl. 80.

*Annotation:—***Expld.** *London Scottish Permanent Benefit Soc. v. Chorley* (1884), 50 L. T. 265.

2847. —]—*JARVIS v. DEWES*, No. 2843, *ante*.

Sect. 2.—Contentious business: Sub-sect. 1, B. (f), & (i).]

2848. Registrar of county court—Appearing as party in that court.]—County Courts Act, 1888 (c. 43), s. 41, which provides that a registrar of a county ct. shall not be engaged as solr. for any party in any proceeding in the registrar's ct., does not prevent a registrar, who is a solr., from defending himself in person in an action brought against him in his own ct., or from recovering from pltf's. in the action such costs as a solr. deft. is entitled to on taxation, under C. C. R., 1903–1908, Ord. 53, r. 25, & by reason of s. 118 of the Act, which provides that all costs shall be taxed by the registrar of the ct. in which they were incurred, the registrar's bill of costs must, of necessity, be taxed by the registrar himself.

Deft. was the registrar of a county ct. & was also a practising solr. Pltf's. brought an action against him in that ct., alleging, negligence by him in his official capacity. Deft. acted as his own solr. in the action & was represented by counsel at the trial. The county ct. judge gave judgment for deft. with costs. Deft. brought in his bill of costs for taxation & gave notice of a taxation before himself. Pltf.'s solr. attended the taxation under protest, & on the taxation, deft. disallowed several items. Pltf's. applied to the county ct. judge to review the taxation, & on the review the judge taxed off two further items:—*Held*: the taxation had to take place of necessity before deft. himself: deft. appeared in person & did not lose his costs because he was also registrar & a solr.; the county ct. judge had not taxed on any wrong principle: & further, that by their application to the county ct. judge pltf's. had waived their objection to the jurisdiction.—*TOLPUIT (H.) & Co., LTD. v. MOLE*, [1911] 1 K. B. 836; 80 L. J. K. B. 686; 104 L. T. 148; 55 Sol. Jo. 293, C. A.

Expense of journey.]—See No. 2824, *ante*

(g) *Statute-Barred Items.*

2849. When allowed—Common order to tax.]—*Qu.*: whether under the common order obtained by a client to tax his solr.'s bill of costs, the taxing master ought to strike out, without taxing them, all statute-barred items.—*CURVEN v. MILBURN* (1889), 42 Ch. D. 424; 62 L. T. 278; 38 W. R. 49; *on appeal*, 42 Ch. D. p. 432, C. A.

Annotations—*Consd.* *Budgett v. Budgett*, [1895] 1 Ch. 202; *Re Brockman*, [1909] 1 Ch. 354. *Refd.* *Re Margetts*, [1896] 1 Ch. 263; *Smith v. Betty*, [1903] 2 K. B. 317. *Mentd.* *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252.

2850. ———.]—*Re MARGETTS*, No. 2756, *ante*.

2851. ———.]—(1) The amount to be allowed for copy correspondence is in the discretion of the taxing master, but his answer must show that he has ascertained what portion of the correspondence, having regard to all the circumstances of the case, was necessary & proper for the due consideration of the case.

(2) The practice of disallowing statute-barred items under a common order to tax a solr.'s bill, or under a special order not expressly dealing with the question of statute-barred items, is not applicable to a case where there is an order containing an express direction to ascertain the costs, charges, & expenses properly incurred by trustees.—*BUDGETT v. BUDGETT*, [1895] 1 Ch. 202; 64 L. J.

Ch. 209; 71 L. T. 632; 43 W. R. 167; 39 Sol. Jo. 61; 13 R. 1.

Annotations:—*As to* (2) *Refd.* *Re Margetts*, [1896] 2 Ch. 263; *Re Brockman*, [1909] 2 Ch. 170. *Generally, Refd.* *Oliver v. Robbins* (1894), 13 R. 63.

2852. ——— Special order.]—*BUDGETT v. BUDGETT*, No. 2851, *ante*.

2853. ———.]—*Re MARGETTS*, No. 2756, *ante*.

2854. ——— Order containing express direction to ascertain costs properly incurred—Costs properly incurred by trustees—Costs paid.]—*BUDGETT v. BUDGETT*, No. 2851, *ante*.

2855. ——— Costs payable.]—*BUDGETT v. BUDGETT*, No. 2851, *ante*.

Effect of statute on solicitor's lien.]—See Part VIII., Sect. 2, sub-sect. 7, *post*.

(h) *Unusual Expenses.*

2856. Duty of solicitor—To inform client that costs may not be allowed—As between party & party.]—*GARRARD v. ARNOLD* (1838), as cited in 2 Q. B. at p. 938; 114 E. R. 363.

Annotation:—*Fold.* *Foy v. Cooper* (1842), 2 Q. B. 937.

2857. ———.]—An attorney employing counsel on a writ of trial cannot charge the fees in his bill, unless, before employing counsel, he distinctly warned the client that, even if successful, he would not be allowed such fees on taxation of costs. Although the client knew of, & acquiesced in, the retaining of counsel.—*FOY v. COOPER* (1842), 2 Q. B. 937; 6 Jur. 128; 114 E. R. 363.

Annotation:—*Refd.* *Barker v. Fleetwood Improvement Comrs.* (1890), 62 L. T. 831.

2858. ———.]—*EDKINS v. JACKSON* (1844), as reported in 2 L. T. O. S. 312.

2859. ———.]—Where a solr. proposes to incur unusual expense in the course of an action, such as taking shorthand notes of the evidence, or procuring the attendance of experts & scientific witnesses, it is his duty to point out to his client that such expense might not be allowed on taxation as between party & party, & might therefore have to be borne by the client whatever might be the result of the trial. Therefore, where the solr. had omitted such duty, he was not allowed on taxation as between solr. & client the cost of shorthand notes of the evidence, although the client authorised him to employ a shorthand writer to take such notes, & used & otherwise availed himself of them after they had been so taken.—*Re BLYTH & FANSHAWE, Ex p. WELLS* (1882), 10 Q. B. D. 207; 52 L. J. Q. B. 186; 47 L. T. 610; 31 W. R. 283, C. A.

Annotations:—*Apld.* *Re Broad & Broad* (1885), 15 Q. B. D. 420. *Distd.* *Osmond v. Mutual Cycle & Manufacturing Supply Co.*, [1899] 2 Q. B. 488. *Apld.* *Re Roney*, [1914] 2 K. B. 529. *Refd.* *Re Nation, Nation v. Hamilton* (1887), 57 L. T. 648; *Re Cohen & Cohen*, [1905] 2 Ch. 137.

2860. ———.]—The rule laid down in *Re Blyth & Fanshawe, Ex p. Wells*, No. 2859, *ante*, applies to the costs of employing a third counsel on the hearing of an appeal, the expense being an unusual one. Therefore, even if a solr. has obtained his client's sanction to the employment of a third counsel on an appeal, the costs will not be allowed on taxation between solr. & client, unless the solr. has also explained to the client that the costs will probably not be allowed as between party & party, & that, even if he succeeds on his appeal,

PART VII. SECT. 2, SUB-SECT. 1.—
B. (h).

1. *General rule.]—*Where a solr. conducts his own litigation he is entitled

to include in his bill of costs profit costs as such solr., although prior to the commencement of the litigation he was not holding himself out as a solr. or practising as one.—*OGIER v. NORTON*

(1904), 29 V. L. R. 536.—*AUS.*

m. ———.]—A solicitor prosecuting or defending an action in person should be allowed the same costs as if he had employed a solr., except as to such

q. Work not ordinarily falling upon solicitors—Work of meritorious character.]—DAHIBAI v. SOONDERJI (1907), I. L. R. 31 Bom. 430.—IND.

Sect. 2.—Contentious business: Sub-sect. 1, B. (i); sub-sects. 2, 3 & 4.]

he appeared & acted.—*Re TOBY* (1850), 12 Q. B. 694; 1 L. M. & P. 426; Rob. L. & W. 361; Cox, M. & H. 324; 19 L. J. Q. B. 503; 15 L. T. O. S. 225; 14 Jur. 719; 116 E. R. 1030.

Annotations:—Expld. Vorlander v. Eddolls (1881), 51 L. J. Q. B. 55. *Dbtd. Re Emanuel* (1882), 9 Q. B. D. 408.

— **Costs in county court actions where solicitor employed.**—*See, generally, COUNTY COURTS, Vol. XIII., pp. 521, 522, Nos. 708–718.*

2877. Drawing up case for counsel's opinion—Abstract of deed prepared to accompany case submitted.—*Re PENDER*, No. 2797, *ante*.

2878. — Power of taxing master to vary prescribed charge.—*Re MAHON*, No. 2805, *ante*.

2879. — Whether "other business" within Solicitors' Remuneration Act, 1881 (c. 44).—A client took out a summons to review taxation of a solr.'s bill of costs. The following were among the items in dispute: (a) drawing case for the opinion of counsel at 2s. per folio, the matter was not in conveyancing business, & was previous to an action; (b) making a schedule of the documents which were handed over to a new solr. upon the occasion of withdrawal of retainer to the old solr.; (c) perusal of particulars at a charge of 6s. 8d. The particulars were particulars of defence, & if they had been treated as part of the defence, a charge for perusal of 4d. per folio would have come to much less than 6s. 8d.:—*Held*: (1) drawing a case for the opinion of counsel not being in a conveyancing matter, & not being in action, was "other business" within above Act, s. 2; (2) the charge for the schedule of documents was rightly allowed, as it was for the benefit of the new solr., & not of the old solr.; (3) particulars were separate "pleading" within the meaning of Appendix N to R. S. C., & a charge of 6s. 8d. for perusal was rightly allowed.

Perusal of particulars delivered in an action under an order may be equivalent to perusal of an amendment of the pleadings & may be charged for as such. It is a matter in the discretion of the taxing master.—*Re MORGAN (R. P.) & Co.*, [1915] 1 Ch. 182; 84 L. J. Ch. 249; 112 L. T. 239; 59 Sol. Jo. 289.

2880. Expedition money paid to stationer.—(1) An order was made for the division & a transfer of a fund in ct., but before it could be completed, the fund became altered, & the solr. presented a petition for a similar object:—*Held*: it could not be considered as unnecessary, it appearing that the solr., using his best exertions, was unable to act on the first order, by reason of a difficulty as to the legacy duty; the solr. was therefore allowed the costs upon taxation.

(2) Expedition money, paid by a solr. to a stationer or writing clerk employed in the registrar's office, disallowed upon taxation.

(3) A gratuity paid to the clerks of the Accountant-General's office was disallowed to the solr. on taxation, as was also a fee paid upon bespeaking an order for transfer which could not be made available.—*Re BEDSON & RUSHTON* (1846), 9 Beav. 187; 15 L. J. Ch. 189; 7 L. T. O. S. 42; 10 Jur. 213; 50 E. R. 315.

2881. Fee on bespeaking order for transfer—Transfer afterwards useless.—*Re BEDSON & RUSHTON*, No. 2880, *ante*.

2882. Gratuity to clerks of Accountant-General's office.—*Re BEDSON & RUSHTON*, No. 2880, *ante*.

2883. Inquiries & attendance relating to cause conducted by other solicitor—No further interference in cause.—*NICHOLAS v. HAYTER*, No. 2795, *ante*.

2884. Lists & schemes—List of documents handed over by solicitor.—*Re CATLIN*, No. 2803, *ante*.

2885. — — — — ——*Re MORGAN (R. P.) & Co.*, No. 2879, *ante*.

2886. — Scheme of property & holding of tenants for receiver.—*Re CATLIN*, No. 2803, *ante*.

2887. Perusal of documents—Bill of predecessor.—*Re CATLIN*, No. 2803, *ante*.

2888. — Exhibits to affidavits.—Order made that the taxing master should be at liberty to allow a special charge for the perusal of exhibits to affidavits, the amount thereof, if any, to be in his discretion.—*Re DE ROSAZ, RYMER v. DE ROSAZ* (1883), 24 Ch. D. 684; 53 L. J. Ch. 448; 49 L. T. 133.

2889. — Particulars delivered in an action—Whether equivalent to perusal of amendment of pleadings—Discretion of taxing master.—*Re MORGAN (R. P.) & Co.*, No. 2879, *ante*.

2890. Production of will—Expenses of obtaining.—*EDKINS v. JACKSON* (1844), as reported in 2 L. T. O. S. 312.

2891. Service—How many calls allowed.—The costs of two calls only, made on the service of a writ of summons, are to be allowed on taxation.—*TAPPING v. GREENWAY* (1841), 9 M. & W. 224; 11 L. J. Ex. 93; 152 E. R. 95.

2892. — Unsuccessful attempt at service—On express instructions.—Country solrs. incurred considerable disbursements, & made a substantial charge in respect of an unsuccessful attempt to effect service on behalf of a London solr. against a client of the latter. Upon taxation the whole of these disbursements & charges were disallowed, on the ground that they were unreasonably incurred:—*Held*: the taxation was between solr. & client, & the service having been attempted upon express instructions, the master had no discretion to disallow the items entirely.—*Re EDDOWES & SONS* (1908), 52 Sol. Jo. 600.

2893. Settling minutes of order—Although order never in minutes.—A solr. is entitled to charge for settling the minutes of an order actually made, although such order never was in minutes.—*Re REECE'S ESTATE, GOULD v. DUMMETT* (1866), L. R. 2 Eq. 609; 14 L. T. 881; 14 W. R. 1008; *sub nom. Re REECE'S ESTATE, GOULD v. GOULD*, 35 L. J. Ch. 794; *sub nom. Re REECE, GOULD v. DUMMETT*, 12 Jur. N. S. 614.

Annotations:—Consd. Underwood v. Secretary of State for India (1868), 16 W. R. 926. *Mentd. Re Sanderson* (1877), 7 Ch. D. 176.

2894. Shorthand notes.—*Re BLYTH & FANSHAW, Ex p. WELLS*, No. 2859, *ante*.

2895. — Three copies.—*RYMILL v. NEAL* (1886), 2 T. L. R. 879, C. A.

2896. — — — — ——An insurance on goods against fire was effected with three insurance cos. A fire occurred & a claim was made in respect thereof which was referred to arbn. One of the cos., called the leading co., was entrusted with the conduct of the defence on behalf of all the cos. At the commencement of the arbn. it was agreed between counsel & solrs. on both sides that one shorthand writer should be employed to take a note of the proceedings, the expense to be shared equally by both parties, & that a transcript should be supplied day by day to the arbitrator, who said that it "is in most cases very desirable; it shortens the case." There was no agreement or order by the arbitrator that the costs of the shorthand notes should be costs in the cause, nor were the clients told that the costs might not be allowed on taxation as between party & party. The case lasted several days & a number of expert witnesses were called,

Sect. 2.—Contentious business: Sub-sect. 4. Part VIII. Sects. 1 & 2: Sub-sect. 1.]

Quinn, Dixon v. Madden, [1923] A. C. 566; M'Combe v. Bent Colliery Co. (1924), 17 B. W. C. C. 349; Cushion v. Tredegar Iron & Coal Co. (1927), 20 B. W. C. C. 454; Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw, [1928] 1 K. B. 20.

2908. ——— Cost of obtaining certificate.]—RICHARDSON v. RICHARDSON & PLOWMAN, No. 2905, *ante*.

2909. ——— Profit costs & charges—Other party acting unreasonably.]—LANDI v. CARL ROSA OPERA CO., LTD., [1919] W. N. 273.

2910. Whether counsel's or solicitor's fees allowed.]—DOOLY v. GREAT NORTHERN RY. CO., No. 2903, *ante*.

2911. ———.]—By reason of 11 Hen. 7, c. 12, & Reg. Gen. Hil. 1853, r. 121, where a pltf. sues *in formā pauperis*, & obtains a verdict & the judge's certificate for costs, whatever be the amount recovered, nothing is to be allowed on taxation of costs in respect of fees to pltf.'s counsel, or by way of remuneration for the services of pltf.'s attorney. In a case where the ct. had previously so held, the ct. now refused an application by pltf. for a rule to enter a suggestion on the roll to deprive pltf. of costs; the object of the application being that error might be brought on the former decision, & the ct. holding that error could not be brought.—DOOLY v. GREAT NORTHERN RY. CO. (1860), 2 E. & E. 576; 29 L. J. Q. B. 83; 1 L. T. 368; 6 Jur. N. S. 145; 121 E. R. 217.

2912. ———.]—CARSON v. PICKERSGILL & SONS, No. 2902, *ante*.

2913. ———.]—JOHNSON v. LINDSAY & CO., No. 2904, *ante*.

2914. ——— Unpaid counsel's fees.]—Deft., who was claimant in a Chancery suit, in Mar. 1851, retained pltf., an attorney, to conduct it upon the ordinary terms. In July an order was obtained from the Master of the Rolls, by which deft. was made a pauper. In Dec. following, an order was obtained from the Master of the Rolls, by which claimant was dispaupered from Oct. 31, preceding:—*Held*: (1) the order of Dec. operated between the parties only to the Chancery suit, & not as between attorney & client; & therefore that the attorney was not entitled to charge for services rendered by him whilst the first order was in force, viz. between July & Dec.; (2) the attorney was entitled to recover for payments made to the law stationer for parchment and paper, but not for copying; (3) he could not recover for counsel's fees which had not been paid.—HOLMES v. PENNEY (1854), 9 Exch. 584; 2 C. L. R. 1004; 23 L. J. Ex. 132; 22 L. T. O. S. 276; 2 W. R. 256; 156 E. R. 249. *Annotation*:—Generally, *Reid*. Sadd v. Griffin, [1908] 2 K. B. 510.

2915. Copying.]—HOLMES v. PENNEY, No. 2914, *ante*.

2916. Parchment & paper.]—HOLMES v. PENNEY, No. 2914, *ante*.

2917. Plaintiff in default—Request for indul-

gence—On what terms granted—Payment of costs incurred by other party by reason of default.]—

Where a person admitted to sue *in formā pauperis* is in default, & asks for indulgence, he may be required, as a condition of such indulgence being granted, to pay the costs incurred by the other party by reason of such default.—JACOBS v. CRUSHA, [1894] 2 Q. B. 37; 63 L. J. Q. B. 526; 70 L. T. 524; 42 W. R. 387; 38 Sol. Jo. 337; 9 R. 392, C. A.

2918. Security for costs—Necessity for.]—A party who has sued or defended *in formā pauperis* in the ct. below is entitled to appeal as a pauper without either giving security for costs or obtaining special leave so to appeal.—BIGGS v. DAGNALL, [1895] 1 Q. B. 207; 64 L. J. Q. B. 221; 15 R. 252, D. C.

Annotation:—*Reid*. Smith v. Smith & Rutherford, [1920] P. 206.

2919. ——— Whether order discharged by order giving leave to proceed in formā pauperis.]—An order in the usual form requiring an applt. to give security for the costs of the appeal on the ground of poverty, & containing a stay of proceedings until security is given, ceases to operate if, within the time limited for giving security, applt. obtains an order for leave to prosecute the appeal *in formā pauperis*.—WILLIAMS v. ST. JOHN, [1910] 1 Ch. 701; 79 L. J. Ch. 239; 102 L. T. 383; 26 T. L. R. 405; 54 Sol. Jo. 457, C. A.

Annotation:—*Reid*. Smith v. Smith & Rutherford, [1920] P. 206.

2920. ———.] —BYRON v. COMPAGNIE GENERALE TRANSATLANTIQUE (1925), 60 L. Jo. 547, C. A.

2921. Proceedings in House of Lords—Ordinary retainer of solicitor.]—There is nothing in the R. S. C. to prevent a litigant, who is suing in the House of Lords *in formā pauperis*, from retaining a solr. in the ordinary way; & when this has been done, the solr. will be entitled to have his costs of the proceedings paid, after taxation, as between solr. & client.—*Re* RAPHAEL, *Ex p.* SALOMON (1899), 68 L. J. Ch. 765; 81 L. T. 479; 44 Sol. Jo. 41, C. A.; *reversg.*, [1899] 1 Ch. 853.

2922. ———.]—M'ALINDEN v. NIMMO (JAMES) & CO., LTD., No. 2907, *ante*.

2923. Order of Judicial Committee giving leave to appeal in formā pauperis—Effect on costs incurred before order made.]—An order of the Judicial Committee giving special leave to appeal *in formā pauperis* takes effect from the date upon which it is made, & has no effect upon costs incurred before that date. A successful applt. *in formā pauperis* is consequently entitled to recover the costs of the petition for special leave to appeal upon the ordinary scale as between party & party.—LEVINE v. SERLING (No. 2), [1914] A. C. 665; 83 L. J. P. C. p. 298; 111 L. T. p. 357, P. O.

2924. Costs of petition for special leave to appeal—On what scale recoverable—Ordinary scale as between party & party.]—LEVINE v. SERLING (No. 2), No. 2923, *ante*.

Part VIII.—Solicitor's Lien.

SECT. 1.—KINDS OF LIEN.

Lien generally.]—See LIEN, Vol. XXXII., pp. 212 *et seq.*

Retaining lien.]—See Sect. 2, *post.*

Common law lien on property recovered or preserved.]—See Sect. 3, *post.*

Statutory lien.]—See Sect. 4, *post.*

SECT. 2.—RETAINING LIEN.

SUB-SECT. 1.—NATURE OF LIEN.

2925. A general lien—Applying to all costs.]—

If a solr., whom his client has ceased to employ, by the production of a deed in his hands belonging to the client, & upon which he claims a lien as solr., enables the client to recover a fund in a suit, his lien over the fund so realised is confined to the costs of that suit, but is a lien which he is entitled actively to enforce. *Secus* as to his general lien upon his client's papers, which applies to all his bills of costs, but is merely a right to retain the papers, & cannot be actively enforced.—*BOZON v. BOLLAND, HUSBAND v. BOLLAND* (1839), 4 My. & Cr. 354; 9 L. J. Ch. 123; 4 Jur. 763; 41 E. R. 138, L. C.

*Annotations:—***Apld.** *Hall v. Laver* (1842), 1 Hare, 571. **Fold.** *Re Faithfull, Re L. B. & S. C. Ry.* (1868), L. R. 6 Eq. 325. **Expld.** *Re Wadsworth, Rhodes v. Sugden* (1886), 34 Ch. D. 155. **Apld.** *Mackenzie v. Mackintosh* (1891), 64 L. T. 706. **Refd.** *Perkins v. Bradley* (1842), 1 Hare, 219; *Belaney v. French* (1873), 8 Ch. App. 919, n.; *Smith v. Betty*, [1903] 2 K. B. 317.

2926. ———.]—*PELLEY v. WATHEN*, No. 3011, *post.*

2927. ———.]—Although a solr. who discharges himself cannot set up a lien for costs as a reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate, yet a solr. who has been discharged by the client may set up such lien, & will not be ordered to produce or deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claims. Such lien is a general one, & extends to all costs due from the client to the solicitor.—*Re FAITHFULL, Re LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1868), L. R. 6 Eq. 325; 18 L. T. 502.

*Annotations:—***Consd.** *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. **Refd.** *Robins v. Goldingham* (1872), L. R. 13 Eq. 440; *Re Hanbury, Whitting & Nicholson* (1896), 75 L. T. 449.

2928. Equivalent to security created by contract.]—A lien is equivalent to a security created by contract, & there is no distinction, in point of law, between the lien of a solr. & that of any other party; & where, therefore, a solr. has a lien, in respect of his bill, upon documents in his possession belonging to his client, he cannot be compelled to deliver them up until the bill is paid. *Semble*: the ct. would take care that the lien of a solr., on a document, should not be productive of injury

to or loss of the property to which the document related, & would direct it to be delivered up, if such a step were necessary for the preservation of the property, but without prejudice to the solr.'s lien thereon, & in the case of a policy of assurance, would order the proceeds arising therefrom to be paid into ct., subject to the same right of lien thereon as previously existed on the policy.—*RICHARDS v. PLATEL* (1841), 1 Cr. & Ph. 79; 10 L. J. Ch. 375; 5 Jur. 834; 41 E. R. 419, L. C.; *subsequent proceedings* (1842), 11 L. J. Ch. 409, L. C.

*Annotations:—***Consd.** *Re South Essex Equitable Investment Advance Co.* (1882), 46 L. T. 280; *Re Galland* (1885), 31 Ch. D. 296. **Refd.** *Cooper v. Hewson* (1843), 12 L. J. Ch. 446.

2929. Lien can be assigned.]—A solr.'s lien is a dormant security, in which it differs from a mtge.; but a solr. may assign a debt due to him for costs, with the benefit of any lien he may have upon any documents for such costs. The claim is equally valid, whether the deeds are in the actual possession of the solr. or of his assignee; & such lien may pass to the solr.'s assignee, if the deeds were handed over in the solr.'s presence & at his request to his assignee, without his actually touching them.—*BULL v. FAULKNER* (1848), 2 De G. & Sm. 772; 12 L. T. O. S. 331; 13 Jur. 93; 64 E. R. 346.

2930. Available to extent of debt.]—An attorney has no lien on his client's money in his hands, beyond the amount in which the latter is indebted to him.—*MILLER v. ATLEE* (1849), 3 Exch. 799; 13 L. T. O. S. 121; 13 Jur. 431.

*Annotation:—***Mentd.** *Sinclair v. Brougham*, [1914] A. C. 398.

2931. Whether enforceable by action.]—On a bill filed by a solr., seeking to establish a lien for costs upon a policy of assurance which a client had placed in his hands professionally, & upon which the ct. had in another cause directed an action to be brought, a special injunction was obtained, restraining all proceedings upon the policy; but this injunction was dissolved upon appeal; the Lord Chancellor holding that pltf.'s proper course was to make an application in the other cause.

Qu.: whether such a lien could be enforced by suit; & if so, to what extent.—*STEDMAN v. WEBB* (1839), 4 My. & Cr. 346; 3 Jur. 213; 41 E. R. 135; *sub nom.* *STEDMAN v. WEBB*, 8 L. J. Ch. 193.

2932. ———.]—*BOZON v. BOLLAND, HUSBAND v. BOLLAND*, No. 2925, *ante*.

2933. ———.]—The ct. will entertain a bill by a solr., seeking to enforce a lien against certain title deeds in respect of his bills of costs, a decree for an account having been made in a suit instituted by the client against the solr., but under which decree the master was not at liberty to take into the general account what was due to the solr. in respect of his bills of costs.—*HECTOR v. JOLLIFFE* (1842), 1 Jur. 120; *previous proceedings, sub nom.* *JOLLIFFE v. HECTOR* (1841), 12 Sim. 398.

2934. Lien distinguished from mortgage.]—*BULL v. FAULKNER*, No. 2929, *ante*.

PART VIII. SECT. 2, SUB-SECT. 1.

2931 i. Whether enforceable by action.]—A solr.'s retaining lien over documents of title to land is merely a passive lien & gives the solr. no right of, or interest in, the land, & nothing can be done by the solr. to convert it into a legal property in the land.—*MCLEISH v. PALMER* (1921), 21 S. R. N. S. W. 382; 38 N. S. W. W. N.

115.—AUS.

2931 ii. ———.]—A solr.'s general lien is limited to documents in his hands for the purpose of business, but includes all documents which have so come into his hands, & is a retaining lien incapable of being actively enforced.—*GREEN ISLAND CEMENT CO., LTD. v. DEACON, LOOKER & DEACON* (1912), 7 Hong Kong L. R. 10.—**HONG KONG.**

*r. Dependant on circumstances of termination of relationship of solicitor & client.]—*The right to be exercised by a solr. claiming a lien largely depends upon the circumstances under which he has ceased to act for his client, the test being whether the solr. has discharged himself or has been discharged by the client.—*AISHABIBI v. AHMED BIN ESSA* (1910), 1 L. R. 35 Bom. 352.—**IND.**

Sect. 2.—Retaining lien: Sub-sect. 2, A., B. & C.]**SUB-SECT. 2.—IN RESPECT OF WHAT PROPERTY.****A. In General.**

2935. All papers in hands of solicitor.]—ANON. (1685), Comb. 43; 90 E. R. 333.

2936. ———.]—An attorney has a lien on paper in his hands.—ANON. (1701), 12 Mod. Rep. 554; 88 E. R. 1514.

2937. ———.]—Pltf. was decreed to pay an attorney his bill, before the Lord Chancellor would oblige him to deliver up the title deeds, because pltf. enjoyed the estate under an appointment of the attorney's client, from whom he received them.—HIDE v. WIGMORE (1726), Mos. 14; 25 E. R. 242.

2938. ———.]—An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment.

Where C. gave his attorney a specific sum for the purpose of satisfying a debt for which an execution had issued against his goods at the suit of B., & the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by C. with B. as a security for the debt:—**Held**: the attorney has a lien on it for his general balance due from C.—**STEVENSON v. BLAKELOCK** (1813), 1 M. & S. 535; 105 E. R. 200.

Annotations:—Distd. Gibson v. May (1853), 4 De G. M. & G. 512. **Refd.** Horncastle v. Farran (1819), 2 Stark. 590. **Re** Taylor, Stileman & Underwood, [1891] 1 Ch. 590. **Mentd.** Crawshaw v. Homfray (1820), 4 B. & Ald. 50. The Alan Ker, How v. Kirchner (1857), 30 L. T. O. S. 296; Kirchner v. Venus (1859), 12 Moo. P. C. C. 361.

2939. ———.]—The ct. will not order an attorney to deliver up papers in his hands before his bill is taxed on the payment of money on account.—DYER v. BOWLEY (1824), 2 L. J. O. S. C. P. 41.

2940. ———.]—A solr. who had been employed by an administratrix in the administration of deceased's estate was also employed as her solr. in a suit subsequently instituted by creditor of deceased. Pending the suit, the administratrix went to reside abroad, & forbade the solr. to proceed any further with the suit. Afterwards creditor obtained a decree, & a receiver of the estate was appointed. Papers relating to the estate had come into the solr.'s possession, not for the purposes of the suit merely, but for those & other purposes, & he claimed a lien on them for his costs of the suit, & other business. A petition by creditor praying for a reference to ascertain whether the solr. had any lien on the papers, & that he might be ordered to deliver them up to the receiver, was dismissed.—WARBURTON v. EDGE (1830), 9 Sim. 508; 8 L. J. Ch. 111; 3 Jur. 166; 59 E. R. 454.

Annotations:—Consd. Re Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1. **Refd.** Stedman v. Webb (1839), 4 My. & Cr. 346; Hope v. Liddell (1855), 7 De G. M. & G. 331. **Mentd.** Olding v. Poulter (1855), 23 Beav. 143.

2941. ———.]—(1) The ct. will not order an attorney to deliver up papers on which he has a lien for balance of a bill, although an offer is made to pay the amount into ct., subject to the verdict of a jury.

(2) The lien of an attorney remains although the claim is barred by Stat. Limitations.—Re BROOMHEAD (1847), 5 Dow. & L. 52; 16 L. J. Q. B. 355.

2942. ———.]—The trustee of bkpt.'s estate appointed a solr. whose appointment was duly confirmed, & who transacted considerable pro-

fessional business for the trustee as such. After several years the trustee was removed by creditors, & a new trustee appointed, who called upon the solr. to hand over all documents relating to the estate to himself or his solr. The solr. of the old trustee opposed this application on the ground that he had a lien on them for his costs:—**Held**: the solr. had a lien upon all documents, the fruits of his own labour or expense.—**Re AUSTIN, Ex p. YALDEN** (1876), 4 Ch. D. 129; 46 L. J. Bey. 59; 35 L. T. 720; 25 W. R. 134, C. A.

Annotations:—Consd. Re Rapid Road Transit Co., [1909] 1 Ch. 96. **Refd.** Re Watson (1884), 53 L. J. Ch. 305; **Re** Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1.

2943. ——— In absence of special agreement.]—Attorney's lien generally on papers in his possession: not limited to the occasion, on which they were delivered, without special agreement.—Ex p. STERLING (1809), 16 Ves. 258; 33 E. R. 982. **Annotation:—Folld.** Colmer v. Ede (1870), 40 L. J. Ch. 185.

2944. ———.]—A solr. is entitled to a general lien for costs on papers deposited with him by his client for a particular purpose only, unless that general lien is excluded by special agreement.—COLMER v. EDE (1870), 40 L. J. Ch. 185; 23 L. T. 884; 19 W. R. 318.

Annotation:—Apld. Re Messenger, *Ex p.* Calvert (1876), 3 Ch. D. 317.

2945. ———.]—J. wrote a letter to her solrs. authorising them to sell a property of hers of which they were legal mtgees. by transfer, & to pay off the money due thereon & on the transfer to them, & "all expenses due to you":—Held**: this memorandum gave the solrs. no charge in respect of their general bill of costs not relating to the mtge.—CHAMPNEY v. BURLAND** (1871), 19 W. R. 913, L. JJ.

2946. ——— Documents delivered for special purpose—Failure of special purpose.]—Deeds deposited with a solr. for a particular purpose, & after that has failed, permitted to remain with him, subject to the general lien.—Ex p. PEMBERTON (1810), 18 Ves. 282; 34 E. R. 324.

2947. ——— Constructive delivery.]—Bkpt., upon consulting his solr. before his bkpcy. but after an act of bkpcy. committed, of which the solr. had no notice, as to the state of his affairs, told him that his cash book contained all his receipts & payments, & that anything else he wanted would be found in the office. He afterwards sent by post the key of a drawer in the office to his solr., who subsequently removed the papers & documents in the drawer, & also a tin box containing papers, etc., from bkpt.'s office to his own. The bkpcy. occurred a few days after the removal, whereupon the solr. claimed a lien upon the papers & documents for his bill of costs:—Held**: he was entitled to such lien for his taxed costs down to the date of the filing of the petition.—Re MARKBY, *Ex p.* MARKBY ASSIGNEES** (1864), 11 L. T. 250.

2948. ——— Security largely in excess of debt.]—DU BOISON v. MAXWELL, [1876] W. N. 146.

2949. Documents deposited in court for inspection.]—An infant tenant in tail filed a bill by his next friend against his trustee, who was in possession of the title deeds of the estate. Deft. deposited the deeds in ct. for the inspection of pltf. No decree was made, & when the infant came of age he repudiated the suit. Deft. then moved to have the deeds delivered up to him.

Deft., having obtained possession of the deeds,

PART VIII. SECT. 2, SUB-SECT. 2.—A.

2935 i. All papers in hands of solicitor.]—An attorney has a lien on all documents of his client in his possession to meet his general costs.—Re SUTTON

(1890), 11 N. S. W. L. R. (L.) 401; 7 N. S. W. W. N. 83.—**AUS.**

t. ——— For purpose of business.]—A solr.'s general lien is limited to documents in his hands for the purpose

of business, but includes all documents which have so come into his hands.—**GREEN ISLAND CEMENT CO., LTD. v. DEACON LOOKER & DEACON** (1912), 7 Hong Kong L. R. 10.—**HONG KONG.**

gave them up to pltf., who immediately mortgaged them. After they had been delivered to the mtgee., pltf.'s solr. on the record presented a petition claiming a lien on the deeds for the costs incurred in the suit on behalf of pltf. :—*Held* : he had no such lien.—*DUNN v. DUNN* (1855), 7 De G. M. & G. 25 ; 24 L. J. Ch. 581 ; 24 L. T. O. S. 227 ; 1 Jur. N. S. 122 ; 3 W. R. 199 ; 44 E. R. 10, L. JJ.

2950. Money in hands of solicitor.]—MILLER v. ATLEE, No. 2930, *ante*.

2951. — For special purpose—Failure of special purpose.]—Pltf., as execution creditor, applied to attach money in the hands of defts., the garnishees. The money had been deposited by judgment debtor with defts. for a special purpose that had failed. Defts. claimed that judgment debtor was indebted to them for law costs in a larger sum than that deposited with them, & that they would be entitled to counterclaim for the amount due to them :—*Held* : since, on the failure of the special purpose for which it was deposited with defts., the money remained in their hands subject to a trust to repay it to judgment debtor, they could not have set up their claim to costs in answer to a demand for the return of the money, & it was a debt due from them to judgment debtor which could be attached.—*STUMORE v. CAMPBELL & Co.*, [1892] 1 Q. B. 314 ; 61 L. J. Q. B. 463 ; 66 L. T. 218 ; 40 W. R. 101 ; 8 T. L. R. 99 ; 36 Sol. Jo. 90, C. A.

Annotations :—*Reid. Runtz v. Longbourne* (1892), 8 T. L. R. 568. *Mentd. Levi v. Anglo Continental Gold Refs of Rhodesia*, [1902] 2 K. B. 481 ; *Kinnaird v. Field*, [1905] 2 Ch. 361. *Shatpe v. Haggith* (1912), 106 L. T. 13 ; *Akt. Ocean v. Harding*, [1928] 2 K. B. 371.

Particular documents.]—See Sub-sect. 2, C., post.

B. Property Held in Professional Capacity.

2952. Papers received as steward.]—Solr. has a lien on papers delivered to him in that character, for all professional business, but no lien as a solr. on papers delivered to him as steward.—*CHAMPERNOWN v. SCOTT* (1821), 6 Madd. 93 ; 56 E. R. 1026.

2953. Papers received as town clerk.]—A town clerk has a lien on papers of the corpn. with respect to which he has done work as attorney or solr., but not on such as he holds merely as town clerk.—*R. v. SANKEY* (1836), 5 Ad. & El. 423 ; 6 Nev. M. K. B. 839 ; 5 L. J. K. B. 255 ; 111 E. R. 1226 ; *sub nom. R. v. WILLIAMS*, 2 Har. & W. 275.

Annotation :—*Consd. Nowington L. B. v. Eldridge* (1879), 12 Ch. D. 319.

2954. Papers received as mortgagee.]—VAUGHAN v. VANDERSTEGEN, ANNESLEY'S CASE, No. 3000, *post*.

2955. Money received as trustee.]—The creditors of a liquidating debtor agreed to accept a composition payable by instalments. The amount required for the payment of the second instalment was received by the debtor's solr., who issued a circular to the creditors stating that he would be prepared to pay the instalment on a certain date. The solr. having afterwards claimed a lien upon the money for payment of his costs,

charges, & expenses :—*Held* : he had constituted himself a trustee for the creditors, & could claim no lien upon the fund.—*Re CLARK, Ex p. NEWLAND* (1876), 4 Ch. D. 515 ; 35 L. T. 916 ; 25 W. R. 275.

Annotation :—*Distd. Mackenzie v. Mackintosh* (1891), 61 L. T. 318.

2956. Papers received as trustee.]—A solr. practising in partnership with another solr., acted as the solr. of a purchaser of property, in carrying out the purchase, &, at the request of the purchaser, the property was conveyed to the solr. as if he were the sub-purchaser thereof. The title deeds of the property were handed over to the solr., & continued to remain in his possession. Three years afterwards the partnership between the solr. & his partner was dissolved, but the solr. retained the title deeds in his possession. The purchaser died within six years of the date of the purchase. An action was brought for the administration of the purchaser's estate, & the solr. on behalf of the old firm & himself claimed against the purchaser's estate a considerable sum for general costs, some of which were incurred previously to the purchase. The chief clerk, however, allowed only the sum claimed for costs incurred within six years of the purchaser's death, the remainder being barred by Stat. Limitations. The solr., when asked to deliver up the title deeds, claimed to have a lien on them for the amount of costs disallowed by the chief clerk as statute-barred. On a summons for the determination of the right of the solr. to the lien he claimed :—*Held* : he was not entitled to the lien, as the costs of the purchase of the property had been allowed by the chief clerk, & the solr., to whom the property had been conveyed was not entitled to a lien on the title deeds handed to & retained by him personally for the general costs of the old firm.—*Re GOUGH, LLOYD v. GOUGH* (1894), 70 L. T. 725 ; 8 R. 290.

2957. Papers not received for party charged.]—A mtge. deed & the title deeds to the mtged. property were deposited by the mtgees. with their solrs. for safe custody. Afterwards the mtgor. instructed the same solrs. to sell the property, & they employed an auctioneer for the purpose, & made use of the deeds in preparing particulars & conditions of sale. The property was put up for sale, but was not sold. The mtgor. then filed a liquidation petition, & the trustee contracted to sell the mtged. property :—*Held* : the solrs. had no lien on the deeds as against the trustee in respect of their costs of the abortive sale.

No lien can attach on that which never was held by the solrs. by contract or in any other way as solrs. of the person against whom the lien is claimed (*BACON, C.J.*).—*Re LONG, Ex p. FULLER* (1881), 16 Ch. D. 617 ; 50 L. J. Ch. 448 ; 44 L. T. 63 ; 29 W. R. 448.

C. Particular Documents.

2958. Allocatur of taxing master.]—Where an order is obtained for taxing an attorney's bill, & delivering up all papers, etc., upon the back of which the prothonotary, according to the usual

a. — — — Except papers in cause in which demand made.]—A solr. has a lien for his costs, upon all papers that come into his hands for the purpose of business, though not papers in the cause in which he makes the demand.—*Ex p. NESBITT* (1805), 2 Sch. & Lef. 279.—*IR.*

PART II. SECT. 2, SUB-SECT. 2.—B.

b. Deed received by solicitor on

promise to return—Subsequent employment of solicitor by depositor.]—A law agent obtained from a party her title deeds, on an express promise to return them the following day. The titles were not returned, & the agent was employed thereafter by the owner to effect a loan over the property :—*Held* : the subsequent employment of the agent imported a waiver of the promise to return the titles, & the

agent had a lien over them for his account.—*KERR v. BECK* (1849), 11 Duul. (Ct. of Sess.) 510 ; 21 Sc. Jur. 149.—*SCOT.*

PART VIII. SECT. 2, SUB-SECT. 2.

—*C.*

c. Letters of administration.]—In the Goods of MARTIN (1883), 13 L. R. 1r. 312.—*IR.*

Sect. 2.—Retaining lien: Sub-sect. 2, C.; sub-sect.

practice, indorses his allocatur, the attorney is entitled, in the first instance, to the possession of it, for the purpose of enforcing payment of his bill.—*ALGER v. HEFFORD* (1807), 1 Taunt. 38; 127 E. R. 744.

2959. Original will.]—Qu.: whether an attorney's lien upon papers extends to the original will of his client. Ordered to produce it before the examiner, & for the hearing of the cause without prejudice.—*GEORGES v. GEORGES* (1811), 18 Ves. 294; 34 E. R. 328, L. C.

2960. —.]—A solr. has no lien upon the will of his client, & cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, & a power of revocation. Where a deed is sought to be impeached, pltf. is entitled to have it produced, & deft. cannot resist the production upon the ground of lien. In a suit instituted against a solr., who had also acted in the capacity of steward, for an account & for delivery of title deeds, the ct. upon motion ordered the deeds to be delivered up to pltf., upon payment into ct. of so much of the balance claimed by the answer as was not covered by any security.—*BALCH v. SYMES* (1823), Turn. & R. 87, 92; 37 E. R. 1028, L. C.

*Annotations:—*Consd. *Robartes v. Jefferys* (1830), 8 L. J. O. S. Ch. 137. *Expld. De Bay v. Griffin* (1875), 10 Ch. App. 292, n.; *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590; *Re Morris*, [1908] 1 K. B. 473. *Reid. Angus v. McLachlan* (1883), 23 Ch. D. 330. *Mentd. A.-G. v. Thompson* (1849), 8 Hare, 106; *Costa Rica Republic v. Erlanger* (1874), L. R. 19 Eq. 33.

2961. —.]—Testator died, indebted to an attorney for law expenses, including the preparation of his will, which was left in the custody of the attorney: the Prerogative Ct. having cited the attorney, at the instance of the personal representatives, to bring in the will, & leave it in the registry of that ct., the Ct. of K. B. refused, in this stage of the proceedings, to interfere by prohibition, on the ground of the attorney's claim to a lien on the will.—*Ex p. LAW* (1834), 2 Ad. & El. 45; 111 E. R. 18; *sub nom. Re Wood*, *Ex p. LAW*, 4 Nev. & M. K. B. 7; 4 L. J. K. B. 18.

2962. Letters of administration—Will subsequently proved.]—Letters of administration to the estate of testatrix were taken out by deft., her son, on his allegation that she had died intestate. It was subsequently discovered that she had duly made & executed a will, of which probate was granted to pltf., as her exor. The letters of administration were in the possession of the proctors who had taken them out, & who claimed to have a lien upon them. The ct. ordered the letters of administration to be revoked, but held that it had no power to order the proctor who held them to bring them in. As deft. was shown to have been aware of the existence of the will when he took out the letters of administration, the ct. condemned him in the costs of the application.—*BARNES v. DURHAM* (1869), L. R. 1 P. & D. 728; 38 L. J. P. & M. 46; 20 L. T. 545; 33 J. P. 451.

2963. Policy of assurance.] —*RICHARDS v. PLATEL*, No. 2928, *ante*.

2964. —.]—A solr.'s lien on a policy of

assurance is not lost by want of notice to the obligee against assignees who give notice.—*WEST OF ENGLAND BANK v. BATCHELOR* (1882), 51 L. J. Ch. 199; 46 L. T. 132; 30 W. R. 364.

Annotation:—Mentd. Fairfield Shipbuilding & Engineering Co. v. Gardner, Mountain & Co. (1911), 104 L. T. 288.

2965. Exhibits.]—A solr.'s lien for costs is not confined to deeds & papers, but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action.—*FRISWELL v. KING* (1846), 15 Sim. 191; 60 E. R. 590.

2966. Order of court.]—The lien of a solr. in the cause held not to entitle him to withhold an original order of the ct. in which there was an accidental error that required correction.—*BIRD v. HEATH* (1848), 6 Hare, 236; 12 Jur. 861; 67 E. R. 1154.

2967. —.]—*CLIFFORD v. TURRILL*, No. 3392, *post*.

2968. Bill of exchange.]—On a lease being granted, the lessee deposited it with the lessor's solr., who acted for the lessor & lessee, together with a bill of exchange as a security for the costs of preparing the lease, which the lessee was to pay. The lessee afterwards mortgaged the term, & defts., who were his solrs. on that occasion, in order to obtain the lease, paid the bill of costs of the lessor's solrs., & received from them, without any authority from the lessee, the lease & the bill of exchange:—*Held*: (1) without express contract defts. acquired no lien on the bill of exchange beyond the amount which they had paid to the lessor's solrs.; (2) evidence of an express contract would not support such a lien without proof that defts. had explained to their client, the lessee, his rights independently of express contract.—*GIBSON v. MAY* (1853), 4 De G. M. & G. 512; 43 E. R. 607, L. JJ.

2969. Cheques.]—A cheque having been deposited by H. in the hands of a solr., to be applied by him in payment of any such amount as might be recovered by F., his client, in an action then pending against H., the action proceeded to trial, & F. recovered a sum of money against H., & entered up judgment for the debt & costs. Before the exact amount due on the judgment was ascertained F. became bkpt., & H., having a cross-claim against his estate for a larger amount than was due on the judgment, was admitted to prove for the difference, the rest being set off against the judgment debt under Bankrupt Law Consolidation Act, 1849 (c. 106), s. 171:—*Held*: the solr. had a lien upon the proceeds of the cheque for his costs, to the extent of the sum found due upon the judgment, & such lien was not displaced by the set-off under the proceedings in F.'s bkpcy.—*HANSON v. REECE* (1857), 27 L. J. Ch. 118; 30 L. T. O. S. 130; 3 Jur. N. S. 1204; 6 W. R. 46.

Annotation:—Reid. Re Bank of Hindustan, China & Japan, Ex p. Smith (1867), 3 Ch. App. 125.

2970. —.]—H. having employed deft., a solr., to take proceedings in respect of certain shares of which H. was holder, deposited with deft. the certificates of such shares as security for the costs. H. afterwards transferred to pltf. his interest in the shares, with notice of the lien of deft., & deft. accepted the retainer of pltf. to continue the proceedings, & obtained certain

2968 i. Bill of exchange.]—*RITCHIE v. MALCOM* (1892), 25 N. S. R. 119.—CAN.

d. Crown grants.]—*McLEISH v. PALMER* (1921), 22 S. R. N. S. W. 53.—AUS.

e. Writs of execution—*Withdrawn on settlement of suit for alimony.*—*FRIEDRICH v. FRIEDRICH* (1884), 10

P. R. 308, 516.—CAN.

f. Translation of document.]—A solr. who is discharged by his client holds the papers entrusted to him subject to his lien for costs, & has the same lien upon translations as he has upon other documents, & the fact that they have been made by the ct.'s interpreters

makes no difference.—*BAI KESSERBAI v. NARANJI WALJI* (1880), L. L. R. 4 Bom. 353.—IND.

g. Letter from debtor to client undertaking to bring no action for imprisonment.]—*M'INTOSH v. CHALMERS* (1883), 11 R. (Ct. of Sess.) 8; 21 Sc. L. R. 7.—SCOT.

cheques in exchange for the shares; pl'ts. claimed to have their shares delivered to them:—*Held*: deft. was entitled to retain these cheques as security for his costs due from H., notwithstanding that he had accepted a retainer from pl'ts.—*GENERAL SHARE TRUST CO. v. CHAPMAN* (1876), 1 C. P. D. 771; 46 L. J. Q. B. 79; 36 L. T. 179.

Books of companies.]—*See COMPANIES*, Vol. IX., pp. 551, 552, Nos. 3641–3651.

Debenture trust deeds.]—*See COMPANIES*, Vol. X., p. 749, Nos. 4685, 4686.

SUB-SECT. 3.—IN RESPECT OF WHAT COSTS.

A. Work done in Professional Capacity.

2971. General rule.]—*WORRALL v. JOHNSON*, No. 3066, *post*.

2972. —.]—The ct. has jurisdiction, upon payment into ct., or giving security for a sum sufficient to answer the solr.'s demand, to order before taxation delivery up by a solr. of the client's papers, where retention by the solr. of the papers on which he claims a lien would embarrass the client in the prosecution or defence of pending actions.

Qu.: whether the jurisdiction is not extended by R. S. C., Ord. 50, r. 8.

This lien is confined to what is due to the solr. in that character, & does not extend to general debts. Accordingly the lien of the solr. of a railway co. for his costs does not include costs incurred in relation to the promotion of the co. before incorporation, such costs by the usual clause in the Act having been made a statutory debt to be paid by the co.—*Re GALLAND* (1885), 31 Ch. D. 296; 55 L. J. Ch. 478; 53 L. T. 921; 34 W. R. 158, C. A.

Annotations:—*Refd.* *Boden v. Hensby* (1891), 61 L. J. Ch. 171; *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590; *Re Hanbury, Whitting & Nicholson* (1896), 75 L. T. 449.

2973. Confined to taxable costs, charges & expenses.]—*Re TAYLOR, STILEMAN & UNDERWOOD*, No. 3052, *post*.

2974. — Costs of recovering costs.]—An attorney has a lien upon papers belonging to a bkpt., not only for his bill for business done, but for the costs of an action brought against the bkpt., subsequently to the issuing of the commission, to recover the amount of his bill.—*LAMBERT v. BUCKMASTER* (1824), 2 B. & C. 616; 4 Dow. & Ry. K. B. 125; 2 L. J. O. S. K. B. 93; 107 E. R. 513.

Annotations:—*Distd.* *Turner v. Deane* (1849), 3 Exch. 836.

Refd. *Gray v. Graham* (1855), 26 L. T. O. S. 111.

2975. —.]—*GRAY v. GRAHAM*, No. 3047, *post*.

2976. — Costs of taxation.]—*Re GALLAND*, No. 2972, *ante*.

2977. —.]—*Re HANBURY, WHITTING & NICHOLSON*, No. 2990, *post*.

2978. — Expenses incurred in respect of applications for deeds.]—Trover against an attorney for deeds; cause referred; award a nonsuit, & each party to pay his own costs:—*Held*: the attorney had no lien on the deeds for the expenses incurred by him in consequence of applications made to him for the deeds.—*Re SHARPE* (1832), 1 Dowl. 432.

2979. — Costs incurred while unqualified.]—An attorney of another ct., who conducts an action in the Exchequer in his own name, can bring no action for his fees, & has no lien for such fees; & the ct. will allow one judgment to be set off against another, without regard to his claim of a lien for such fees.—*LATHAM v. HYDE, HYDE v.*

LATHAM (1832), 1 Cr. & M. 128; 3 Tyr 143; 2 L. J. Ex. 72; 149 E. R. 343.

Annotations:—*Distd.* *Jones v. Jones* (1837), 2 M. & W. 323. *Refd.* *Humphrys v. Harvey* (1834), 4 Moo. & S. 500.

2980. — Costs incurred as mortgagee.]—A client mortgaged property, which was at the time subject to a first mtge. to his solrs., who prepared the mtge. deed to themselves. Afterwards the mtgor. made a third mtge. to another person. In an action by the solrs. against the first & third mtgees. & the mtgor.:—*Held*: they were entitled only to their ordinary costs as mtgees., & they had no lien on the mtge. deed for the costs of its preparation or other costs due to them from the mtgor.—*SHEFFIELD v. EDEN* (1878), 10 Ch. D. 291; 40 L. T. 283; 27 W. R. 477, C. A.

2981. — Costs incurred as land agent.]—By indentures of assignment testator assigned to M. two policies on the life of testator. Testator lived in England, but M. for many years acted as solr. & land agent for testator on his estate in Ireland. The policies were assigned by testator to M. as trustee to secure to mtgees. the repayment of a loan on the Irish property. M. acted as solr. both for testator & the mtgees. M. died on July 19, 1889, & testator died on Mar. 14, 1890. C., widow & extrix. of M., claimed in a creditor's action, to have a lien on the proceeds of the policies in ct. for two sums of money: (a) in respect of professional charges of M. acting as solr. to testator; (b) partly for work done as a land agent, & partly for two insurance premiums paid by M. for testator. The chief clerk allowed a claim made by the mtgees., but disallowed the claim of C. to be entitled to a lien on the proceeds of the policies. On summons by C. to vary the chief clerk's certificate:—*Held*: (1) the solr.'s lien could not be extended to the claim in respect of land agency; (2) as to the professional charges as solr., M.'s lien was preserved subject to the mtge., & the chief clerk's certificate must be varied by finding that C. was entitled to be paid the two sums, except in respect of the land agency, & must have her costs.—*Re WALKER, MEREDITH v. WALKER* (1893), 68 L. T. 517; 3 R. 455.

2982. — Advances by solicitor.]—The solr. of the extrix. & devisee, paying a sum of money in exoneration of an adverse claim on part of testator's estate, does not, as against creditors of testator, necessarily & by force of the transaction alone, acquire a lien upon the estate, or on the title deeds, for the sum which he so paid.

The solr. of the extrix. having paid a sum which was due to a third party, who had a lien on title deeds belonging to testator's estate for the amount, gave a receipt for the deeds in the name of the extrix., & as her solr., carried into the master's office her examination, in which the sum he had so paid was stated to have been paid by the extrix. & was allowed accordingly:—*Held*: the solr. must, in such circumstances, be presumed to have made the payment on the behalf & on the personal security of his client; & he could not claim a lien upon the deeds for the amount.—*CHRISTIAN v. FIELD* (1842), 2 Hare, 177; 5 Jur. 1130; 67 E. R. 74; *sub nom.* *CHRISTIAN v. CHAMBERS, CHRISTIAN v. FIELD*, 11 L. J. Ch. 97.

Annotations:—*Refd.* *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

2983. —.]—F., during his infancy, deposited a deed to secure advances by H., some of which were for providing necessaries. After he had attained twenty-one, F. assigned the property, to which the deed related to H. for value. In an action by W. against H.:—*Held*: H. was not

Sect. 2.—Retaining lien: Sub-sect. 3, A. & B.; sub-sect. 4, A., B., C., D. & E.]

entitled to retain the deed either for the advances or as having a lien for costs.—*WALKDEN v. HARTLEY & CAVELL* (1886), 2 T. L. R. 767.

2984. ———.—*Re TAYLOR, STILEMAN & UNDERWOOD*, No. 3052, *post*.

B. Work done with Authority of Party Charged.

2985. Work done for partnership—Lien on private deeds of partner.]—An attorney has no lien on the private deed of one partner in respect of business done for the firm.—*TURNER v. DEANE* (1849), 6 Dow. & L. 669; 3 Exch. 836; 18 L. J. Ex. 343; 154 E. R. 1083.

2986. Administration action—Solicitor acting for defaulting trustee.]—In taking the accounts of the estate of S. who died insolvent, the master found that C. who also died insolvent & intestate, had, as exor. & trustee, received & paid several sums, & that there remained a large balance due from C.'s estate. R. was appointed administrator of the estate of C., & in that capacity he received £446 18s. & paid £142 10s. 11d. & the balance he claimed to retain in part payment of a judgment recovered by him against C. for a large sum & costs, but which had not been registered. C. handed over to plff.'s solr. the title deeds relating to the estates of S. which were free from incumbrances, but C.'s solr. claimed a lien upon them from his costs incurred by C. since the death of testator:—*Held*: (1) on the question of lien C.'s solr. was only entitled to his costs incurred in the administration & trusteeship of S.'s estate antecedent to the suit, but not subsequent thereto; (2) on the question of costs deft. R., the administrator of C., who was a defaulting trustee, was, under the circumstances, entitled to his costs of the supplemental suit out of the estate of S.—*HORNE v. SHEPHERD, HORNE v. DENDY* (1857), 26 L. J. Ch. 817; 3 Jur. N. S. 806.

2987. Solicitor acting in unauthorised business of company.]—*Re PHOENIX LIFE ASSURANCE CO., HOWARD & DOLIMAN'S CASE*, No. 3042, *post*.

2988. Solicitor preparing composition deed on instructions of debtor—Liability of trustees.]—A solr., on the sole retainer of debtor, prepared creditors' deed, the first trust of which was to pay the costs of its preparation. The trustees acted & employed the same solr. in the trust. Upon a taxation between the solr. & the trustees:—*Held*: the solr. was entitled to charge the costs of preparing the deed, though he had not been retained by the trustees for that purpose.—*Re SADD* (1865), 34 Beav. 650; 34 L. J. Ch. 562; 12 L. T. 817; 11 Jur. N. S. 774; 13 W. R. 1009; 55 E. R. 786.

Annotation:—*Refd. Re Mason & Taylor* (1878), 10 Ch. D. 729.

2989. Promotion expenses of company subsequently incorporated by special Act.]—*Re GAL- LAND*, No. 2972, *ante*.

2990. Costs of defending proceedings for habeas corpus.]—A firm of solrs. were discharged by

their client. The new solr. obtained the usual order for delivery of a bill of costs & taxation & afterwards tendered to them, but not in settlement, the amount claimed & requested delivery up of papers. Both the tender & request were refused on the grounds as to the tender, that the solrs. were entitled first to their balance in settlement & as to the papers, that they had a lien on them for their costs including those of certain *habeas corpus* proceedings commenced against them, & others on behalf of the client, & which they were defending, that they were entitled to have a sum paid into ct. to answer the costs of taxation, & also to an undertaking to return the papers in case any balance was found due on the taxation to them. On a motion for an order for delivery up:—*Held*: (1) in the circumstances the solrs. were wrong in refusing to accept the tender; (2) it was their duty to deliver up on a proper receipt being given, which had not been refused; (3) they were entitled to an undertaking to return in case any sum was found due to them on taxation; (4) the costs relating to the *habeas corpus* not being taxable costs, charges, & expenses incurred by them as solrs. for the client could not be included in the lien; (5) they were entitled to the payment into ct. of a proper sum to answer the costs of taxation; (6) the motion having been rendered necessary by the solrs. taking up a wrong ground, they must bear the costs thereof.—*Re HANBURY, WHITTING & NICHOLSON* (1896), 75 L. T. 449; 13 T. L. R. 91; 41 Sol. Jo. 114.

SUB-SECT. 4.—RIGHTS AND LIABILITIES OF SOLICITOR AND CLIENT.

A. In General.

In respect of what property.]—*See* Sub-sect. 2, *ante*.

In respect of what costs.]—*See* Sub-sect. 3, *ante*.

Production & inspection of documents.]—*See* Sub-sect. 6, *post*.

B. Bankruptcy of Client.

Jurisdiction of courts of bankruptcy.]—*See* BANKRUPTCY, Vol. IV., p. 44, Nos. 376–380.

2991. Lien enforceable against assignee.]—*Ex p. BUSH* (1734), 2 Eq. Cas. Abr. 109; 22 E. R. 93, L. C.

2992. ———.—*Official assignee cannot, under 1 & 2 Will. 4, c. 56, s. 22, take bkpt.'s money out of the hands of a solr. without discharging his lien.*—*Re BUSH, Ex p. BOWDEN & ABBOTT* (1832), 2 Deac. & Ch. 182; 2 L. J. Bcy. 18, Ct. of R.

2993. ———. Solicitor refusing to continue to act.]—*Bkpts.*, before their bkpcy., deposited their books with a solr., with a view to his effecting for them a compromise with their creditors. Terms were arranged, but bkpts. were unable to comply with them, & the solr. refused to act further in the matter. Adjudication in the bkpcy. followed, & the solr., although ordered to deliver up to the official assignee the books of bkpts. in his hands,

of his accounts.—*GRAY v. WARDROP'S TRUSTEES* (1851), 23 Sc. Jur. 450.—*SCOT*.

PART VIII. SECT. 2, SUB-SECT. 4. —B.

2991 i. Lien enforceable against assignee.]—S. & M., solrs., obtained possession in the course of business of certain deeds & documents, the property of W., whose solrs. they were, & retained possession of same, subject to a lien for costs due by W. to them.

PART VIII. SECT. 2, SUB-SECT. 3. —B.

h. For work for which specially employed.]—A deed ordered to be executed under a decree was sent by the vendor's solr., after being executed by him, to defts. to be executed by them, which they did before their attorney employed by them for that purpose:—*Held*: such attorney was not entitled to a lien upon the deed beyond his disbursements & for preparing the affidavit of execution.—

CROOKS v. STREET (1864), 1 Ch. Ch. 220.—*CAN*.

k. Business not of strictly professional nature.]—*PAUL v. DICKSON* (1839), 1 Dunl. (Ct. of Sess.) 867.—*SCOT*.

l. For work done after termination of employment—Costs of recovering payment of account.]—*Held*: a law-agent's right to retain his client's title-deeds, does not extend to the expense of judicial proceedings instituted by him, after the termination of his agency, for the purpose of recovering payment

refused to do so, alleging a lien on them for costs. The comr. in bkpcy. ordered him to be committed for contempt:—*Held*: the solr. was entitled to the lien which he claimed.—*Re LEAH, Ex p. JABET* (1860), 2 L. T. 72; 6 Jur. N. S. 387, L. J.J.

2994. ———.]—*Re Moss*, No. 3393, *post*.

2995. **No lien on papers acquired after bankruptcy.**—Upon an act of bkpcy., by lying two months in prison, joint & separate commissions; the former being established, the latter superseded the attorney employed by bkpt., & in sustaining the latter against the former has no lien upon papers delivered to him by bkpt. after the arrest; upon petition of joint creditors, he was ordered to deliver them up.

On a bkpcy. by lying two months in prison, no possible lien can be acquired, after the first arrest.—*Ex p. LEE* (1793), 2 Ves. 285; 30 E. R. 636, L. C.

2996. **Right of assignee to copies.**—The right of assignees to inspect or take a copy of a title deed of bkpt.'s property in the hands of his solr., is no higher than the right of bkpt. himself, & therefore, where the assignees petitioned that the solr. might produce or give an attested copy of such document, on being paid only the portion of his costs relating thereto, & the costs of the production or copy, the petition was dismissed with costs.—*Re HEMS-WORTH, Ex p. UNDERWOOD* (1845), De G. 190; 9 Jur. 632.

Loss of lien by proof in bankruptcy.—See Subsect. 8, E., *post*.

C. Winding Up.

See COMPANIES, Vol. X., pp. 880, 899, 952, 953, Nos. 5978–5981, 6137, 6138, 6525–6527.

D. Death of Solicitor.

2997. **Lien passes to personal representative.**—The ct. will not order the personal representative of a deceased solr. to deliver the papers in the cause to another solr., without payment, or security for payment, of the solr.'s bill. It seems that the summary jurisdiction of the ct. extends to the representatives of a solr.—*REDFEARN v. SOWERBY, BOLTON v. TATE* (1818), 1 Swan. 84; 1 Wils. Ch. 96; 36 E. R. 307, L. C.

Annotation:—*Consd.* *Griffiths v. Griffiths* (1843), 2 Hare, 587.

2998. ———.]—The extrix. of a deceased solr. who, prior to his death, had carried on suits for a client, but who had declined to prosecute them, on the ground of advances for the necessary expenses not having been furnished to him by the client, but who had not discharged himself from being the client's solr., will not be ordered to deliver up to a new solr., all books, deeds, papers, & writings relating to the suits in her custody as extrix. to the deceased solr., without the bills of costs of the late solr. being first paid.—*SWABY v. DICKON, SWABY v. HAMER* (1848), 11 L. T. O. S. 308.

W. was subsequently adjudicated bkpt., & his assignees applied for an order that S. & M. should deliver up to them the deeds & documents so in their possession. The ct. refused the application.—*Re WATTERS* (1881), 7 L. R. 1r. 531.—*IR.*

m. ———.]—*Not for costs of act of bankruptcy to which solicitor is party.*—A solr., who is instrumental in assisting a client in the preparation of deeds which were afterwards deemed acts of bkpcy., has not, as against the assignees of that client who becomes bkpt., a lien on the deeds of that client for costs incurred after the act, to

which the solr. is a party.—*Re CLENDENNING* (1854), 23 L. T. O. S. 347.—*IR.*

PART VIII. SECT. 2, SUB-SECT. 4.—D.

2997 i. **Lien passes to personal representative.**—The attorney for pltf. died during the progress of the suit, & a new attorney was thereupon appointed. More than six years afterwards funds were brought into ct. by the receiver in the cause.—*Held*: the personal representative of deceased attorney had a lien on the funds for the costs of the suit due to the attorney

E. Change or Dissolution of Partnership.

2999. **Dissolution of partnership—Whether lien continues.**—Where a party has employed, as his solrs. in a cause, a firm of two solrs. in partnership, the retirement from the business of one of such partners, under an arrangement with the other, operates as a discharge of the client by the solrs., & the client is thereupon entitled to require that the papers in the cause necessary for its prosecution shall be delivered up to his new solr., upon the usual undertaking for saving the lien, of the discharged solrs.—*GRIFFITHS v. GRIFFITHS* (1843), 2 Hare, 587; 12 L. J. Ch. 397; 1 L. T. O. S. 56; 7 Jur. 573; 67 E. R. 242.

Annotations:—*Consd.* *Wilson v. Emmett* (1851), 19 Beav. 233; *Re Faithfull, Re L. B. & S. C. Ry.* (1868), L. R. 4 Eq. 325. *Refd.* *Rawlinson v. Moss* (1861), 25 J. P. 661; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

3000. ———.]—A. & B., solrs. in partnership, had a bill of costs against C. On their dissolution of partnership those costs were transferred to A. Afterwards A., at the request of the client, paid a debt for which she had deposited title deeds, & took possession of & afterwards retained the title deeds. He afterwards continued to act as her solr., & costs were incurred:—*Held*: as to the joint bill of costs, there could be no lien in favour of A.; if otherwise, there would have been lien; & as to his separate bill of costs, he had taken the deeds as mtgee. & not as solr., & therefore had no lien for costs.—*VAUGHAN v. VANDER-STEIGEN, ANNESLEY'S CASE* (1854), 2 Drew. 408; 2 W. R. 642; 61 E. R. 777.

Annotations:—*Apld.* *Re Gough, Lloyd v. Gough* (1891), 70 L. T. 725. *Mentd.* *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *Beocher v. Major* (1865), 6 New Rep. 370; *Sharpe v. Foy* (1868), 4 Ch. App. 35.

3001. ———.]—A dissolution of a firm of solrs. amounts to a discharge of the client.

If the solrs. discharging the client has a lien on the papers relating to a matter in progress, such papers must nevertheless be given up to his successors, the lien reviving on the completion of the business.—*RAWLINSON v. MOSS* (1861), 30 L. J. Ch. 797; 4 L. T. 619; 25 J. P. 661; 7 Jur. N. S. 1053; 9 W. R. 733.

3002. ———.]—A. was appointed solr. of a co. B. entered into partnership with him, & they acted as joint solrs. for the co. until it was wound up, when they acted for the liquidators. After the dissolution of their partnership, B. acted separately for the liquidators:—*Held*: B. had no lien for costs on the documents of the co. in his possession.—*Re COUNTY LIFE ASSURANCE CO.* (1869), 38 L. J. Ch. 231.

3003. **Admission of new partner—Whether lien continues.**—After A. had employed B. & C. as his solrs., they took D. into partnership with them, & A. employed the new firm. In the course of that employment papers belonging to him came into their possession:—*Held*: B. & C. had no lien on the papers for costs which A. owed them before they took D. into partnership.—*Re FORSLAW*

at the time of his decease.—*KELLETT v. KELLY* (1812), 5 L. Eq. R. 34.—*IR.*

PART VIII. SECT. 2, SUB-SECT. 4.—E.

2999 i. **Dissolution of partnership—Whether lien continues.**—*Re SOLICITORS (Alta.)* (1917), 37 D. L. R. 763.—*CAN.*

2999 ii. ———.]—Where a firm of attorneys dissolved partnership after the death of a client, there being at that time papers & documents belonging to the client in their hands & a debt due in respect of costs from the

Sect. 2.—Retaining lien: Sub-sect. 4, E., F. & G.; sub-sect. 5, A., B. & C.]

(1847), 16 Sim. 121; 17 L. J. Ch. 61; 10 L. T. O. S. 262; 60 E. R. 818.

Annotation:—*Consd. Pelly v. Watham* (1851), 1 De G. M. & G. 16.

3004. — ——.]—Solr. does not acquire a lien for costs due to himself solely upon documents which came into the joint possession of himself & his partner or partners but he does not lose his lien for such costs upon documents which having come into his own possession are afterwards continued in the possession of himself & his partner or partners.

A question was argued with reference to the continuance of the lien after the successive alterations in the firm of solrs. by whom the deeds were held. On this point I am clearly of opinion that the lien once acquired would not be affected by the circumstance that the party entitled to it afterwards admitted a partner or partners in his business; but I also think that the deeds which first came to the joint possession of the firm did not thereby become subject to a lien for costs due to some or one of the partners separately who may have acted as solr. for the mtgor. before the constitution of the firm to which the deeds were delivered (*WIGRAM, V.-C.*).—*PELLEY v. WATHEN* (1849), 7 Hare, 351; 18 L. J. Ch. 281; 13 L. T. O. S. 43; 14 Jur. 9; 68 E. R. 144; *affd.* (1851), 1 De G. M. & G. 16, L. JJ.

Annotations:—*Reid. Re Long, Ex p. Fuller* (1881), 44 L. T. 63; *Re Llewellyn*, [1891] 3 Ch. 145; *Brunton v. Electrical Engineering Corpn.*, [1892] 1 Ch. 434. **Mentd.** *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Hallett v. Furze* (1885), 31 Ch. D. 312.

Change of solicitors.]—See Sect. 5, post.

F. Change of Solicitors.

See Sect. 5, post.

G. Incapacity of Solicitor to Continue Proceedings.

3005. Lien not affected.]—A solr., who had been the solr. of pltf. in the cause, being detained in prison for debt, ordered to deliver up to another solr. appointed by pltf. the proceedings in the cause, notwithstanding he had become a mtgee. of three-fourths of the fund in question in the suit.—*SCOTT v. FENNING* (1845), 15 L. J. Ch. 88; 9 Jur. 1085.

3006. — ——.]—A solr., in custody for debt, being by Solicitors Act, 1843 (c. 73), s. 31, incapacitated from practising, was ordered to deliver up his client's papers in pending suits without payment of his costs, but to be held subject to his lien.—*Re WILLIAMS* (1860), 28 Beav. 465; 30 L. J. Ch. 609; 2 L. T. 764; 25 J. P. 85; 6 Jur. N. S. 908; 8 W. R. 645; 54 E. R. 444; *subsequent proceedings* (1861), 3 De G. F. & J. 104, L. JJ.

3007. — ——.]—Where a solr. fairly carries on a suit, & there is no proof of misconduct or refusal on his part to proceed, although he becomes embarrassed & is changed, before final decrec, that does not disentitle him to his lien for costs.—*Re SMITH* (1861), 9 W. R. 396.

SUB-SECT. 5.—AVAILABILITY AGAINST THIRD PARTIES.

A. In General.

3008. Solicitor's right not greater than client's.]—A solr. may detain title deeds as against client till

client to them:—*Held*: the dissolution of partnership operated as a discharge by the firm, & the attorneys were not entitled to retain the papers & documents until their costs were paid, but were bound to hand them over to the administrator of the

client.—*Re McCORKINDALE* (1880), 1 L. R. 6 Calc. 1; 6 C. L. R. 406.—**IND.**

PART VIII. SECT. 2, SUB-SECT. 5.

—A.

3008 i. Solicitor's right not greater than

payment of his bill, but [not] against persons who have antecedent rights.—*MARSH v. BATHOE* (1744), *Ridg. temp. H.* 256; 27 E. R. 822, L. C.

3009. — ——.]—The lien which an attorney has on the papers in his hands is only commensurate with the right which the party delivering the papers to him has therein. Every one, whether attorney or not, has by the common law a lien on the specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien be an attorney or solicitor.—*HOLLIS v. CLARIDGE* (1813), 4 Taunt. 807; 128 E. R. 549.

Annotations:—*Apld. Pratt v. Vizard* (1833), 5 B. & Ad. 808; *Wakefield v. Newbon* (1844), 6 Q. B. 276. **Reid.** *Steadman v. Hockley* (1846), 10 Jur. 819; *Keene v. Thomas* (1904), 74 L. J. K. B. 21. **Mentd.** *Castellain v. Thompson*, *Thompson v. Castellain* (1862), 1 New Rep. 97.

3010. — ——.]—Deft. was decreed to deliver up certain deeds to pltf. The deeds were in the possession of deft.'s solr., who claimed a lien on them for costs; but the ct., on motion, ordered him to deliver them up, & to pay the costs of the motion.—*BELL v. TAYLOR* (1836), 8 Sim. 216; 59 E. R. 87.

Annotations:—*Distd. Warburton v. Edge* (1839), 9 Sim. 508. **Consd.** *Re Hichens, Francis v. Francis* (1852), 2 De G. M. & G. 73. **Reid.** *Rider v. Jones* (1843), 1 Y. & C. Ch. Cas. 329; *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.

3011. — ——.]—A purchaser of property, subject to a mtge., made, before the completion of his purchase, a second mtge. of it. He afterwards created a third mtge., with respect to which the second mtgee.'s conduct was such as to give it priority over his. Then the purchase was completed, the purchaser paying off the first mtge., & taking a conveyance to a trustee for himself. On this occasion the title deeds were handed to his solrs., who afterwards took a transfer of the third mtge. One of them was the trustee for the purchaser in the conveyance. The second mtgee. did not give them, nor had they any notice of his security:—*Held*: nevertheless, their lien, either for their general bill of costs, or for their costs relating to the conveyance, could not prevail against the second mtgee., the rights of a solr. in respect of his lien for his bill of costs being no greater than those of the client, & the circumstances of the case not exempting it from the scope of this rule.

Qu.: whether the lien of a solr. is affected by his taking a partner.

The general lien of a solr. is merely a right to keep from his client the deeds & papers which he holds as solr. until his bill of costs is satisfied. It is a right derived through the client, & therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the solr. is absolute, so will be the right of the solr. If they are subject to the rights of third parties, such rights will follow them. These consequences flow from the nature of the relationship existing between the client & his solr. A solr. can have no lien of a higher nature than the interest the client himself has in the deeds (*LORD CRANWORTH*).—*PELLEY v. WATHEN* (1851), 1 De G. M. & G. 16; 21 L. J. Ch. 105; 18 L. T. O. S. 129; 16 Jur. 47; 42 E. R. 457, L. JJ.

Annotations:—*Apld. Re Long, Ex p. Fuller* (1881), 44 L. T. 63; *Re Llewellyn*, [1891] 3 Ch. 145. **Consd.** *Brunton v. Electrical Engineering Corpn.*, [1892] 1 Ch. 434. **Mentd.** *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Hallett v. Furze* (1885), 31 Ch. D. 312.

client's.]—*SAWYERS v. KYTE* (1870), 1 V. R. 91.—**AUS.**

3008 ii. — ——.]—*MOLESWORTH v. ROBBENS* (1845), 8 I. Eq. R. 223.—**IR.**

3008 iii. — ——.]—As against third parties, a solr.'s lien on documents gives

3012. ———.]—A trustee under a will committed a breach of trust by lending trust moneys to his co-trustee upon a mtge. for a term of years. An administration suit was instituted, & he was ordered to pay the money into ct. He sold part of the mtged. property under a power of sale in the mtge., & on the application of two of the *cestuis que trust*, the proceeds were paid into ct., subject to an order that they were not to be paid out without the consent of the purchaser. The trustee's solrs. refused to give up the mtge. deeds unless upon payment of their bill of costs:—*Held*: the circumstances of the realisation of the trust fund by the trustee's solrs., & of the *cestuis que trust* availing themselves of that realisation, did not entitle the trustee's solrs. to a lien on the deeds or on the fund in ct., as against the *cestuis que trust*, but they could have no higher claim against the trustee.—*FRANCIS v. FRANCIS* (1854), 5 De G. M. & G. 108; 43 E. R. 811, L. JJ.; *previous proceedings* (1852), 2 De G. M. & G. 73, L. JJ.

3013. ———.]—It is no answer to an action of detinue by the rightful owner of a deed, for debt, to say the deed is in the possession of his attorney, who has a lien upon it, & claims to hold it for money due to him from debt.—*JORDAN v. ROBERTS* (1862), 7 L. T. 68.

B. Vendor and Purchaser.

3014. Lien of vendor's solicitor against purchaser—On conveyance.—Pltf. having contracted to purchase an estate of B., had the deeds of conveyance prepared at his own expense, & sent them to B. for execution. B. executed & gave them to a servant to be sent back. The servant delivered them to debt., an attorney, who had a demand upon B. for business done in his profession. No directions were given to debt. to retain the deeds until the purchase-money should be paid. Some necessary parties refused to execute the deeds, & pltf. having abandoned the contract, demanded the deeds from debt., who refused to deliver them up, claiming to have a lien for his demand against B. In trover for deeds & stamped pieces of parchment:—*Held*: pltf. was entitled to recover the deeds at all events, in a cancelled, if not in an uncanceled state.—*ESDAILE v. OXENHAM* (1824), 3 B. & C. 225; 5 Dow. & Ry. K. B. 49; 107 E. R. 717; *subsequent proceedings, sub nom. OXENHAM v. ESDAILE* (1825), M'Cle. & Yo. 540.

Annotation:—*Consd. Goode v. Burton* (1847), 1 Exch. 189.

3015. ———.]—The lien of a vendor upon the land, & upon the title deeds, until the purchase-money be paid to him, does not apply to a conveyance to the purchaser, executed by some but not all the parties, where the contract has gone off by the vendor's default; & if there be any lien on such conveyance, it is vested in the purchaser

as a security for his deposit.—*OXENHAM v. ESDAILE* (1829), 3 Y. & J. 262, 148 E. R. 1177; *previous proceedings* (1828), 2 Y. & J. 493.

C. Mortgagor and Mortgagee.

3016. Right of mortgagee's solicitors against mortgagor—Title deeds handed to intended mortgagee—Mortgage not completed—Costs of investigating title.—A. wishing to borrow money on a mtge. of land, delivered the title deeds to B., the intended mtgee., for examination, & said that he would pay all expenses. B. handed the deeds to his own attorneys to be investigated. The negotiation went on, & the attorneys being requested by A. to return his deeds, refused to do so till he paid their bill of costs. On *assumpsit* brought by A. against the attorneys to recover back the money so paid:—*Held*: debts. could not be considered as having acted for both parties in the negotiation, & therefore, had not a lien against A. as his attorneys; supposing A. liable to B. for the costs incurred, B. could not communicate to his own attorneys a lien upon A.'s deeds, by handing them to the attorneys for investigation; the undertaking of A. to B., if it amounted to a promise to pay these costs, did not entitle B.'s attorneys to detain the deeds, as it established no privity between them & A.; & A. might have brought trover for the deeds, & was entitled to recover in this action.—*PRATT v. VIZARD* (1833), 5 B. & Ad. 808; 2 Nev. & M. K. B. 455; 3 L. J. K. B. 7; 110 E. R. 989.

Annotations:—*Consd. Hallett v. Chamberlayne* (1848), 12 L. T. O. S. 272. *Refd. Webb v. Rhodes* (1837), 4 Scott, N. R. 497; *Smith v. Sleaf* (1814), 12 M. & W. 585; *Wakefield v. Newbon* (1814), 13 L. J. Q. B. 258; *Oates v. Hudson* (1851), 6 Exch. 346; *Re Foster, Barnato v. Foster*, [1920] 3 K. B. 306.

3017. Title deeds in hands of mortgagee's solicitor—Extent of lien on repayment & reconveyance.—A. purchased premises which were mortgaged to B., with a proviso for reconveyance, at the costs of the mtgor. on payment of principal & interest. A. sold the premises & was to pay off the mtge. on the completion of the purchase; but B.'s attorney who held the title deeds, would not deliver them to A. till his own bill was also paid. The bill contained some items fairly chargeable on the occasion as costs due from the mtgor. & others which were probably payable by the mtgee.:—*Held*: the attorney might enforce his lien on the deeds against A. to the whole extent of the bill; & A., having been obliged to pay it for the purpose of releasing the deeds, could not recover back from the attorney the amount unduly charged.—*OGLE v. STORY* (1833), 4 B. & Ad. 735; 1 Nev. & M. K. B. 474; 2 L. J. K. B. 110; 110 E. R. 632.

Annotations:—*Consd. Wakefield v. Newton* (1843), 1 L. T. O. S. 227; *Re Llewellyn*, [1891] 3 Ch. 145.

no higher right to the solr. than his client himself possesses.—*RATH v. M'MULLAN*, [1916] 1 I. R. 349.—*IR.*

PART VIII. SECT. 2, SUB-SECT. 5. —B.

n. Lien of purchaser's solicitor against vendor.—A party who purchased an estate under burden of the price, employed, on the death of the seller, a law agent to make the sale effectual against the heir, & placed the title-deeds in his hands; & the purchaser was infett:—*Held*: in a ranking & sale of the estate, the agent, in virtue of his hypothec, was preferable for his account to the parties having right to the price.—*CAMPBELL & CLASON v. GOLDIE* (1822), 2 Sh. (Ct. of Sess.) 16.—*SCOT.*

PART VIII. SECT. 2, SUB-SECT. 5. —C.

o. Right of mortgagee's solicitor against mortgagor—Continuation of lien against purchaser from mortgagor.—A solr.'s lien on title deeds for his professional services attaches & continues, although the property to which they relate has passed from the ownership of the client for whom the services were performed, by sale & purchase under a power of sale contained in a mtge. The purchaser takes the interest of the mtgor. subject to the lien.—*GILL v. GAMBLE* (1867), 2 Ch. Ch. 135; 13 Gr. 169.—*CAN.*

p. ———.—*WEIR & WILSONS, LTD. (LIQUIDATOR) v. TURNBULL & FINLAY*, [1911] S. C. 1006; 48 Sc. L. R. 818; [1911] 2 S. L. T. 78.—*SCOT.*

q. Rights of mortgagor's solicitor against mortgagee.—The attorney for the mtgor., to whom pending a suit to foreclose the mtge. the title deeds of the mtged. premises have been delivered by the mtgor. for the purpose of procuring a loan of money, has no lien upon them for his costs in that transaction, as against the mtgee.—*HUTCHISON v. JOYCE* (1836), 1 Jo. Ex. Ir. 122.—*IR.*

r. ———.—*TOMB v. ORR* (1837), 6 Ir. L. Rec. N. S. 40.—*IR.*

t. ———.—A mtgee. is entitled to the possession of the title deeds of the mtged. estate; & the mtgor. cannot, by depositing the deeds with his solr., with a view of creating a lien, thereby defeat the right of the

Sect. 2.—Retaining lien: Sub-sect. 5, C., D. &

3018. —.]—The attorney of a mtgee. held the mtge. deed claiming a lien upon it against his client to an amount at least equal to the value of the security. The mtgee. took the benefit of Insolvent Debtors' Act. Upon a bill filed by the mtgor. to set aside the security or to redeem, the ct., on the application of the mtgor. ordered the attorney though not a party to the suit, but who appeared on a petition, to deliver the deed to the mtgor., upon payment of what was due from the mtgor. under the security, in satisfaction of the lien.—*RIDER v. JONES, RIDER v. STURGIS* (1843), 2 Y. & C. Ch. Cas. 329; 63 E. R. 145.

3019. —.]—The mtgee. of lands handed over the deeds to his attorney. The mtgor. paid the principal & interest, & the lands were reconveyed to him:—*Held*: the attorney could not retain the deeds against him, as a security for the expenses of the transaction due from the mtgee. to the attorney: & the mtgor., having, under protest, paid such expenses to the attorney in order to get the deeds back, might maintain *assumpsit* for money had & received against the attorney for the money so paid: & the attorney was a principal in the transaction, & could not allege that the action should have been brought against the mtgee.—*WAKEFIELD v. NEWBON* (1844), 6 Q. B. 276; 13 L. J. Q. B. 258; 3 L. T. O. S. 160; 8 Jur. 735; 115 E. R. 107.

Annotations:—*Refd. Phillips v. Broadley* (1816), 11 Jur. 264; *Re Mason v Taylor* (1878), 48 L. J. Ch. 193; *Re Llewellyn*, [1891] 3 Ch. 115.

3020. —.]—*Work previously done for mortgagor.*—A solr. acting for a mtgee. must deliver up the title deeds of the mtgor. which he holds for the mtgee. on payment of the mtge. debt & mtgee.'s costs, & cannot claim a general lien on such deeds for costs due to him from the mtgor. in respect of business previously done by him as solr. for the mtgor.—*Re MOSELY* (1867), 15 W. R. 975.

Annotation:—*Refd. Re Long, Ex p. Fuller* (1881), 50 L. J. Ch. 418.

3021. —.]—Where a mtgee. has been paid by the mtgor., his principal, interest, & costs, & has given the mtgor. a release, the mtgee.'s solr. has no right to retain the deeds as against the mtgor., even for costs due to the mtgee.'s solr. for work done relating to the mtged. property during the continuance of the mtge. the equitable right of the mtgor. to have back from the mtgee. his deeds on payment of principal, interest, & costs, prevails against the solr.'s lien claimed in right of the mtgee.—*Re LLEWELLYN*, [1891] 3 Ch. 145; 60 L. J. Ch. 732; 65 L. T. 249; 39 W. R. 713; *sub nom. Re A SOLICITOR*, 7 T. L. R. 742.

Annotations:—*Refd. Brunton v. Electrical Engineering Corp.* (1891), 61 L. J. Ch. 256, *Re Dec Estates, Wright v. Dec Estates*, [1911] 2 Ch. 85.

3022. Rights of mortgagor's solicitor against mortgagee.—Title deeds borrowed from equitable

mtgee.—*SMITH v. CHICHESTER* (1842), 2 Dr. & Wal. 393.—*IR.*

a. —.]—*TAYLOR v. GORMAN* (1844), 7 L. Eq. R. 259.—*IR.*

b. —.]—*Mortgaged ship arrested in salvage action & sold—No right of solicitor to lien on fund in which mortgagor's interest determined.*—*BOWRING v. THE GASPESIA* (1900), 8 Nfld. L. R. 421.—*NFLD.*

c. —.]—*Title deeds borrowed to raise further loan—Right to return after loan repaid.*—*CRAWFORD v. HODGE* (1831), 10 Sh. (Ct. of Sess.) 11.—*SCOT.*

3023 i. Solicitor acting for both par-

ties—Whether entitled to lien for costs due from mortgagor.—*PATERSON v. CURRIE* (1846), 8 Dunl. (Ct. of Sess.) 1005; 18 Sc. Jur. 503.—*SCOT.*

3023 ii. —.]—*Held*: a writer who had acted as agent for both borrower & lender in transacting a loan upon heritable security, & who had not communicated to the lender that he held the borrowers titles hypothecated to him in security of a large professional account, was not entitled to claim a preference over the lender's bond in virtue of his hypothec.—*GRAY v. WARDROP'S TRUSTEES* (1851), 13 Dunl. (Ct. of Sess.) 963.—*SCOT.*

mortgagee.]—A mtgor., who had borrowed the title deeds from an equitable mtgee., to enable him to sell the property, handed them to his solr., in order to complete. The mtgee. acquiesced in the sale:—*Held*: the solr. had a lien on the deeds for his costs of the transaction only, but not for his other claims for costs against the mtgor.—*YOUNG v. ENGLISH* (1843), 7 Beav. 10; 13 L. J. Ch. 76; 49 E. R. 965.

3023. Solicitor acting for both parties—Whether entitled to lien for costs due from mortgagor.]—A solr. was instructed to prepare a mtge., & the title deeds of the property were deposited with him for this purpose by the mtgor. He was also acting as solr. for the mtgee., & when the mtge. was executed he continued to hold the deeds on behalf of the mtgee. The mtgor. filed a liquidation petition, & the solr. was employed on behalf of the trustee. The trustee sold the equity of redemption, & the solr. received the purchase-money:—*Held*: the solr. had a lien on the deeds against the mtgor., & was entitled to retain out of the purchase-money the amount of costs due to him from the mtgor.—*Re MESSENGER, Ex p. CALVERT* (1876), 3 Ch. D. 317; 45 L. J. Bey. 134; 34 L. T. 920.

Annotations:—*Consd. Mackenzie v. Mackintosh* (1891), 61 L. T. 318; *Re Walker, Meredith v. Walker* (1893), 68 L. T. 517.

3024. Company issuing debentures.]

A co. having issued a debenture loan, a deed was prepared by their solr. mortgaging their property to two of the directors as trustees for the debenture holders, the same solr. acting also for the trustees. The mtge. contained a power of sale & the usual covenant against incumbrances. The co. afterwards passed a resolution for a voluntary winding-up, whereupon the trustees acting under their power of sale contracted to sell the mtged. property to a purchaser & applied to the solr. for the co.'s title deeds, which were in his possession. He, however, refused to give them up, claiming a lien upon them for costs incurred by the co. prior to the mtge. Upon a petition by the trustees & a debenture holder praying that the solr. might be ordered to deliver up the title deeds to them:—*Held*: the solr. was not entitled to a lien on the deeds, & they must be delivered up to petitioners. A solr. acting for mtgee. as well as mtgor. in the preparation of a mtge. thereby loses his lien on the title deeds in his possession for costs due to him from the mtgor., unless such lien is expressly reserved, even though the mtgee. may have known that the solr. had such lien as against the mtgor.—*Re SNELL* (1877), 6 Ch. D. 105; 46 L. J. Ch. 627; 37 L. T. 350; 25 W. R. 823.

Annotations:—*Folld. Re Mason & Taylor* (1878), 10 Ch. D. 729. *Distd. Macfarlane v. Lister* (1887), 37 Ch. D. 88, *Brunton v. Electrical Engineering Corp.*, [1892] 1 Ch. 434; *Re Dec Estates, Wright v. Dec Estates*, [1911] 2 Ch. 85. *Refd. Re Walker, Meredith v. Walker* (1893), 68 L. T. 517; *Re Lawrence, Bowker v. Austin*, [1894] 1 Ch. 556.

3025. —.]—*Solrs. of a co. who, upon the occasion of the directors conveying all the property of the co. to two of their body upon*

3023 iii. —.]—A law-agent, who, acting for both borrower & lender, has negotiated a loan over property belonging to the borrower, does not thereby renounce, or diminish his right of retention of the title-deeds of the property, except that he cannot plead it to the prejudice of the lender.—*DRUMMOND v. MUIRHEAD & GUTHRIE SMITH* (1900), 2 F. (Ct. of Sess.) 585; 37 Sc. L. R. 433; 7 S. L. T. 401.—*SCOT.*

d. *Right of solicitor to purchaser from mortgagor against mortgagee.*—A mtgor., after foreclosure, having retained the title deeds, delivered them

trusts to secure the repayment of moneys borrowed upon debentures, prepare a mtge. deed & act for the co. & the trustees, have no right of lien for the payment of their costs.—*Re MASON & TAYLOR* (1878), 10 Ch. D. 729; 48 L. J. Ch. 193; 27 W. R. 311.

Annotations:—**Distd.** *Re Dee Estates*, *Wright v. Dee Estates*, [1911] 2 Ch. 85. **Refd.** *Brunton v. Electrical Engineering Corp.*, [1892] 1 Ch. 434; *Re Lawrance*, *Bowker v. Austin*, [1894] 1 Ch. 556.

3026. ———.—**]**—A corp. issued debentures charging all its property, present & future, by way of "floating security, but so that the corp. is not to be at liberty to create any mtge. or charge in priority to the said debentures." Default having been made on the debentures, a debenture holder's action was commenced, in which the solr. of the corp. claimed to have a retaining lien on papers & documents of the corp. for costs incurred by the corp. after the issue of the debentures, but before the commencement of the action:—*Held*: the lien was valid as against the debenture holders & their receiver.

The solr. of a co. who acts in the issue of debentures is not debarred from setting up a retaining lien for costs due to him as solr. of the co. against the debenture holders in respect of documents which, if two solrs. had been employed, would not have been handed over to the solr. acting for the debenture holders.—*BRUNTON v. ELECTRICAL ENGINEERING CORPN.*, [1892] 1 Ch. 434; 61 L. J. Ch. 256; 65 L. T. 745; 8 T. L. R. 158.

Annotations:—**Refd.** *Re Walker*, *Meredith v. Walker* (1893), 68 L. T. 517; *Robson v. Smith*, [1895] 2 Ch. 118; *Taunton v. Warwickshire*, [1895] 1 Ch. 731.

3027. ———.—**]**—A solr. acting for mtgee. as well as mtgor. in the preparation of a mtge. thereby loses his lien on the title deeds in his possession for costs due to him from the mtgor., even though the costs were incurred prior to the mtge. & the title deeds never left the solr.'s office.—*Re NICHOLSON*, *Ex p. QUINN* (1883), 53 L. J. Ch. 302; 49 L. T. 811; 32 W. R. 296.

D. Trustees.

3028. Lien created by trustee personally—Ineffective against remainderman.]—A. devised certain estates to trustees, upon trust to pay a part of the rents & profits to his widow, & the residue towards the maintenance & education of his son, until he reached twenty-one; & after that time to him, during the lifetime of the widow; & upon her death he devised the estates to his son in fee. The trustees having occasion to employ debt., an attorney, to defend certain causes & suits in carrying into effect the trusts of the devise, incurred a debt to him for certain costs & expenses, for which they deposited the title deeds with him as a security:—*Held*: debt. had no lien upon them against the son, after the decease of his mother, as the debt was the personal debt of the trustees.—*LIGHTFOOT v. KEANE* (1836), 1 M. & W. 745; 2

to a third party to whom he had sold, whose solr. claimed a lien as against such third party, & declined to deliver them to the mtgee. On a motion for that purpose, an order was made for their delivery.—*SIENNETT v. ARUYN* (1868), 2 Ch. Ch. 218.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 5.

—D.

3030 i. Solicitor employed by trustees—No lien against trust estate.]—A solr. employed by trustees to act as their solr. in respect of the trust estate is not retained or employed by the trust estate, but by the trustees personally, who are liable to pay his costs, & the solr. has no lien upon the

trust estate for his costs; & although the trustees have a lien on the trust estate for all expenses properly incurred by them, including the costs of employing a solr., *qu.* whether the doctrine applies to such a right in favour of the solr.—*STAFFORD v. HUTT PARK COMMITTEE* (1908), 28 N. Z. L. R. 318.—**N.Z.**

PART VIII. SECT. 2, SUB-SECT. 5.

—E.

3032 i. Lien created by tenant for life—Not available against remainderman.]—If a tenant for life give deeds into an attorney's hands, the attorney has no lien on them for his costs against the remainderman, for that would

Gale, 138; Tyr. & Gr. 1004; 5 L. J. Ex. 257; 150 E. R. 634.

3029. Lien created in execution of trusts—Effective against beneficiaries.]—A widow & extrix. of testator was entitled, under his will, to a residue for life. The person entitled in remainder to the residue filed a bill against her for the administration of the estate. The extrix. died, at which time title deeds of testator's estate were in the hands of their solr. She was insolvent, & it was not clear that she was not indebted to the estate. The suit was revived against the administrator *de bonis non*, & a common administration decree was made. The administrator *de bonis non* filed another bill against solr. of the extrix. for the delivery up of the title deeds, upon which he claimed a lien for his costs:—*Held*: the solr. had a lien on the deeds for the costs of the suit, inasmuch as the extrix. had herself such lien for costs incurred by a trustee in the execution of the trust.—*TURNER v. LETTS* (1855), 7 De G. M. & G. 243; 3 Eq. Rep. 846; 24 L. J. Ch. 638; 25 L. T. O. S. 151; 1 Jur. N. S. 1057; 3 W. R. 494; 44 E. R. 95, L. J.J.

Annotations:—**Consd.** *Belaney v. French* (1873), 8 Ch. App. 919, n. **Apld.** *Re Austin*, *Ex p. Yalden* (1876), 4 Ch. D. 129. **Consd.** *Re Dee Estates*, *Wright v. Dee Estates*, [1911] 2 Ch. 85.

3030. Solicitors employed by trustees—No lien against trust estate.]—As a general rule, solrs. employed by trustees in matters relating to the trust estate are retained by the trustees personally, & have no claim against, or lien upon, the trust estate for their costs. They can, therefore, only obtain payment by such means as a charging order in respect of recovery or preservation of the property, or through the trustees when the latter are entitled to their costs out of the trust estate. The solrs.' right to costs, therefore, is no defence to an application for payment into ct. of money received with notice that it is trust money.—*STANJAR v. EVANS*, *EVANS v. STANJAR* (1886), 34 Ch. D. 470; 56 L. J. Ch. 581; 56 L. T. 87; 35 W. R. 286; 3 T. L. R. 215.

Annotations:—**Consd.** *Re Blundell*, *Blundell v. Blundell* (1888), 40 Ch. D. 370. **Refd.** *Re Humphreys*, *Ex p. Lloyd-George & George*, [1898] 1 Q. B. 520. **Mentd.** *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Re Calgary & Medicine Hat Land Co.*, *Pigeon v. The Co.*, [1908] 2 Ch. 652.

E. Other Cases.

3031. Conveyance prepared & attested by solicitor—Not available against purchaser.]—*LORD v. WARDLE* (1837), 3 Bing. N. C. 680; 4 Scott, 402; 1 Jur. 382; 132 E. R. 572.

3032. Lien created by tenant for life—Not available against remainderman.]—Where a trustee, at the request of the tenant for life, lends the trust deed to the solr. of such tenant for life, he not being the trustees' solr., such loan gives no lien to the solr. for his costs due from his client.—*Re MAYHEW* (1859), 7 W. R. 351.

3033. Lien created by representative—Available

enable the tenant for life to charge the remainderman.—*Ex p. NESBITT* (1805), 2 Sch. & Lef. 279.—**IR.**

3032 ii. ———.—**]**—*Re STANNARD'S ESTATE*, [1897] 1 I. R. 415.—**IR.**

e. Lien created by tenant in tail—Not available against specially creditor of testator—Costs incurred before deeds in solicitor's possession.]—*MORGAN v. SCOTT* (1839), 1 I. Eq. R. 128.—**IR.**

f. Against judgment creditor—For costs due after judgment.]—Where a judgment was obtained against the client, subsequently to the deposit of his deeds with the solr., & costs had become due for professional services rendered to the client, both

Sect. 2.—Retaining lien: Sub-sect. 5, E.; sub-sects. 6, 7 & 8, A., B. & C.]

against subsequent administrator de bonis non.]—Where a solr. has acted professionally for testator & for his exor. or administrator, & papers belonging to the estate have come into his possession, &, after the death of the executor or administrator, an administrator *de bonis non* has been appointed, the administrator *de bonis non* is not entitled to reclaim from the solr. the papers in his possession without first paying the costs due to him, not only in respect of work done for testator, but also in respect of work done for the exor. or administrator.—*Re WATSON* (1884), 53 L. J. Ch. 305; 50 L. T. 205; 32 W. R. 477.

3034. Marriage settlement prepared on instructions of husband—No lien against trustees.]—A solr. preparing a marriage settlement on the instructions of the husband, & subsequently retaining it in his possession, has no lien upon it, as against the trustees, for his unpaid bill, but is bound to deliver it up to the trustees upon their requesting him to do so.—*Re LAWRENCE, BOWKER v. AUSTIN*, [1894] 1 Ch. 556; 63 L. J. Ch. 205; 70 L. T. 91; 42 W. R. 265; 8 R. 102.

Annotation:—*Consd. Re Dee Estates, Wright v. Dee Estates*, [1911] 2 Ch. 85.

SUB-SECT. 6.—PRODUCTION, INSPECTION, ETC., OF DOCUMENTS SUBJECT TO LIEN.

3035. Production to client.]—*Re BIGGS & ROCHE* (1897), 41 Sol. Jo. 277.

Production to third parties—Production on subpoena duces tecum.]—*See EVIDENCE*, Vol. XXII., p. 432, Nos. 4473–4479.

Production & inspection before trial.]—*See DISCOVERY*, Vol. XVIII., pp. 113–116, Nos. 650–669.

Production to trustee in bankruptcy.]—*See BANKRUPTCY*, Vol. V., p. 622, No. 5606.

SUB-SECT. 7.—EFFECT OF STATUTE OF LIMITATIONS.

3036. Statute not applicable.]—*Re BROOMHEAD*, No. 2941, *ante*.

3037. —.]—*Re MURRAY*, [1867] W. N. 190.
Annotation:—*Consd. Budgett v. Budgett*, [1895] 1 Ch. 202.

before & after the date of the entry of the judgment:—*Held*: the lien of the solr. could not prevail against the judgment creditor for any portion of the costs which became due, after the date of the rendition of the judgment.—*BLUNDEN v. DESART* (1842), 2 Dr. & War. 405.—**IR.**

g. — In face of executions already out against the property.]—Where debt. was a law agent who claimed a lien in respect of title deeds handed to him with a view to a sale of the property as against plff. who had several executions against the owner & had actually sold the property under a judgment:—*Held*: no lien could arise in face of the executions already out against the property.—*CANNELL v. HARRIS* (1843). *Blutt*, 274.—**I. of M.**

h. Lien on title deeds in hands of agent of previous proprietor.]—Agent's hypothec attaches to title deeds in hands of agent of previous proprietor, in security of any business account of the proprietor, incurred after the date of deposition, even though the estate is transferred to another proprietor, & the said transfer was carried out by the said agent.—*GUTHRIE v. OGIL-*

VIE, DYKES, ETC. (1830). 2 Sc. Jur. 193.—**SCOT.**

k. Lien created by ground lessee—Not available against ground landlord.]—*SMITH v. LAMONT* (1858), 20 Dunl. (Ct. of Sess.) 912.—**SCOT.**

l. Lien created by grantor of mortis causa deed—Available against purchaser from grantor.]—*PAUL v. MEIKLE* (1868), 7 Macph. (Ct. of Sess.) 235; 41 Sc. Jur. 136.—**SCOT.**

m. Bond received on behalf of third party—No lien against proprietor.]—*NATIONAL BANK OF SCOTLAND v. WHITE & PARK*, [1909] S. C. 1308; 46 Sc. L. R. 948; [1909] 2 S. L. T. 234.—**SCOT.**

PART VIII. SECT. 2, SUB-SECT. 6.

n. Production to client—Production on subpoena duces tecum.]—*DEADMAN v. EWEN* (1868), 27 U. C. R. 176.—**CAN.**

o. — On payment of account into court by client.]—*MEDICINE HAT v. BANNAN*, [1921] 2 W. W. R. 271; 16 Alta. L. R. 517; 59 D. L. R. 625.—**CAN.**

p. Production to third parties—Pro-

3038. —.]—*Re CARTER, CARTER v. CARTER*, No. 3050, *post*.

3039. —.]—*CURWEN v. MILBURN*, No. 2840, *ante*.

SUB-SECT. 8.—DISCHARGE OF LIEN.

A. Payment.

See, generally, LIEN, Vol. XXXII., pp. 232, 233, Nos. 172–177.

3040. Effect of payment—Duty to deliver documents to client.]—On payment of his costs a solr.'s lien on documents of his client in his possession ceases; he is then bound to deliver them up on his client's demand, & cannot refuse delivery because third persons claim an interest in them.—*Re EMMA SILVER MINING CO., Re TURNER* (1875), 24 W. R. 54.

Annotation:—*Refd. Ex p. Cobeldick* (1883), 12 Q. B. D. 149.

B. Loss of Possession.

See, generally, LIEN, Vol. XXXII., pp. 229–232, Nos. 142–171.

3041. General rule.]—Where an attorney gives up his client's papers without payment of costs he cannot obtain an attachment for the non-payment of them.—*HENDY v. COLLETT* (1839), 2 Will. Woll. & H. 63; 3 Jur. 870.

3042. —.]—(1) Where the directors of a joint stock co. carry on a business not authorised by the deed of settlement, & costs are thereby increased, the solrs. of the co. have no lien for their costs on the papers of the co.

(2) Where, in such a case, moneys have been recovered in any of the actions, although the solrs. would have had a lien for their costs on such moneys while in their hands, yet, after they have paid over such moneys to the co., & allowed them to be incorporated with the general assets, they have no lien on those assets in respect of such costs.—*Re PHOENIX LIFE ASSURANCE CO., HOWARD & DOLLMAN'S CASE* (1863), 1 Hem. & M. 433; 2 New Rep. 548; 8 L. T. 728; 11 W. R. 984; 71 E. R. 189.

3043. What amounts to parting with possession—Execution of deed.]—If an attorney suffers a deed he has prepared to be executed before he is paid for it he cannot afterwards detain it for his fees.—*ANON.* (1694), 1 Ld. Raym. 738; 91 F. R. 1393.

Annotation:—*Refd. Turner v. Deane* (1849), 3 Exch. 836.

duction to trustee in bankruptcy.]—*Re MOTHERWELL, LTD., Ex p. MORRISON* (Ont.) (1921), 62 D. L. R. 130; 2 C. B. R. 128.—**CAN.**

q. — To mortgagee.]—*ST. GEORGE v. WYNNE* (1830), 4 Ir. L. Rec. 1st ser. 66.—**IR.**

r. Order to deposit deeds in court without prejudice to lien.]—An attorney who claims a lien for his costs upon the title deeds of a freehold estate decreed to be sold, which lien was acquired by him prior to the institution of the suit, will be ordered to deposit them in ct. without prejudice to his lien, or to his making it available against the purchase money of the lands: & having established his claim, he is entitled to be paid it out of the purchase money of the estate.—*LITTLE v. LITTLE* (1836), 2 Jo. Ex. Ir. 270.—**IR.**

PART VIII. SECT. 2, SUB-SECT. 8.

—B.

3041 i. General rule.]—*WORRALL v. WHITE* (1851), 17 L. T. O. S. 21.—**IR.**

3043 i. What amounts to parting with possession—Execution of deed.]—*Re SPROULE* (1865), 1 Ch. Ch. 396.—**CAN.**

3044. ———.]—*WATSON v. LYON*, No. 3059, *post*.

3045. ——— **Delivery to arbitrator—For purpose of arbitration.**]—Where an attorney, having a lien on papers, delivers them to an arbitrator to examine for the purposes of the arbn., he may maintain trover, in case the arbitrator refuse to redeliver them, although, at the time of giving them up, he has not expressly reserved his lien.—*WHALLEY v. HALLEY* (1829), 8 L. J. O. S. K. B. 6.

3046. ——— **Deed produced by witness.**]—The ct. has no power to retain a deed which has been produced by a witness merely out of courtesy to facilitate proceedings. P., a witness, [a solr.] having a lien upon a deed, was asked by the ct. to produce it. The deed was, upon its production, impounded by the ct.:—*Held*: the ct. had no power to retain the deed, even though it might be fraudulent.—*Re TILL, Ex p. PARSONS* (1871), 19 W. R. 325.

3047. ——— **Lien extending over title deeds over several estates—Title deeds of one estate parted with—Whether lien reduced pro tanto.**]—(1) Where a solr. has a lien upon his client's deeds for costs incurred by him, & the client upon application refuses to pay those costs, & the solr. is driven to bring an action for them, the lien extends as well to the costs of enforcing the bill of costs as to the costs incurred by the client himself.

(2) Though a solr. who had a lien for his costs on his client's deeds, has in an action for the untaxed bill of costs obtained judgment, & thereafter acquired the rights of a real creditor, yet in a question between the solr. & other real creditors having otherwise a prior security on the same estate, the latter are not precluded even after the lapse of a considerable time from insisting upon taxation of the bill of costs.

(3) Where a solr. has a lien in respect of his costs over all the title deeds of his client, the client having several estates, the solr., in parting with the title deeds of one of those estates, does not lose his lien in the proportion which the value of such estate bears to the value of the whole estates, but he preserves the lien entire upon the remaining estates.

(4) A solr., having a lien upon the title deeds of his client's estate, being retained by a lender to prepare a security for money to be advanced to the client on such estate, is bound to inform such lender of the existence of his own lien.—*GRAY v. GRAHAM* (1855), 2 Macq. 435; 26 L. T. O. S. 111, H. L.

3048. ——— **Delivery subject to lien.**]—*WATSON v. LYON*, No. 3059, *post*.

3049. ——— **Delivery upon undertaking to pay costs due.**]—In May, 1849, an order was made to wind up a co., & in the ensuing Oct. the solrs., who had acted for the co., carried in a claim against them for costs. In Nov. 1850, the solrs., on the application of the official manager, delivered to him the company's books & papers, on which they

had a lien for their costs, upon the official manager at the same time undertaking, in writing, to pay them the amount of their bill out of the first funds which might come into his hands. That undertaking received the sanction of the master. In 1859 the official manager recovered a sum of money, & the solicitors subsequently thereto sent in to him a larger bill of costs against the co.:—*Held*: having regard to the undertaking of the official manager of Nov. 1850, the solrs.' claim was not barred by the Stat. Limitations; & an order was made to tax their bill of costs, without prejudice to the question whether they were entitled to have a call made to pay the same when taxed.—*Re GLOUCESTER, ABERYSTWTH & CENTRAL WALES RY. CO.* (1860), 2 Giff. 47; 29 L. J. Ch. 383; 8 W. R. 175; 66 E. R. 20; *sub nom. Re GLOUCESTER, ABERYSTWTH & CENTRAL WALES RY. CO., Ex p. OFFICIAL MANAGER*, 1 L. T. 320; 6 Jur. N. S. 116.

3050. ——— **Removal by one partner on dissolution of partnership.**]—(1) One of the partners in a firm of solrs. left the firm, taking with him, unknown to the other partners, documents upon which they were entitled to a lien for costs:—*Held*: the lien of the firm was not destroyed by reason of the documents having gone out of their possession.

(2) The claim in respect of which the lien existed was barred by the Stat. Limitations:—*Held*: the lien was not thereby affected.—*Re CARTER, CARTER v. CARTER* (1885), 55 L. J. Ch. 230; 53 L. T. 630; 34 W. R. 57.

C. Waiver.

See, generally, LIEN, Vol. XXXII., pp. 235–237, Nos. 196–212.

3051. **Security taken for general costs.**]—Solr.'s lien on papers superseded by taking security.—*COWELL v. SIMPSON* (1809), 16 Ves. 275; 33 E. R. 989, L. C.

Annotations:—*Distd.* *Stevenson v. Blakelock* (1813), 1 M. & S. 535. *Expld.* *Balch v. Symes* (1823), Turn. & R. 87. *Consd.* *Robartes v. Jefferys* (1830), 8 L. J. O. S. Ch. 137. *Distd.* *Lloyd v. Mason* (1845), 4 Hare, 132. *Consd.* *Angus v. McLachlan* (1883), 23 Ch. D. 330; *Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590. *Distd.* *Re Lumley* (1892), 37 Sol. Jo. 83. *Expld.* *Re Morris*, [1908] 1 K. R. 473. *Refd.* *Hewison v. Guthrie* (1836), 2 Bing. N. C. 755; *Pinnock v. Harrison* (1838), 3 M. & W. 532; *Macnee v. Gorst* (1867), L. R. 4 Eq. 315; *Hoppe v. Glendinning*, [1911] A. C. 419. *Mentd.* *Chase v. Westmore* (1816), 5 M. & S. 180; *Crawshaw v. Homfray* (1820), 4 B. & Ald. 50; *Spartall v. Benecke* (1850), 10 C. B. 212; *Thames Iron Works v. Patent Derrick Co.* (1860), 1 John. & H. 93; *Re Bodega Co.* (1903), 52 W. R. 249.

3052. ——— **Unless lien reserved.**]—A firm of solrs. received for some years on behalf of a lady the income payable to her under the trusts of a will, & from time to time made advances to her & payments on her account. On being applied to for delivery up of her papers, they sent in an account of their receipts & payments showing a balance of £81 due to them, & claimed a lien for that sum. The only item in the account of such a nature that the taxing master could have moderated it was "Our costs to date, £20." She

3047 i. ——— **Lien extending over title deeds over several estates—Title deeds of one estate parted with—Whether lien reduced pro tanto.**]—An agent holding the titles of two properties belonging to his client hypothecated for his business accounts, having, after his client's insolvency, & the execution of a trust-deed for behoof of creditors, in the knowledge of heritable securities affecting the properties, parted with the titles of one of them:—*Held*: he could avail himself of his hypothec over the titles of the other for a proportion only of his account effecting to the value of that property, compared with the value of the other, as if the burden had been rateably

apportioned over both properties.—*CLARK v. MORRISON* (1837), 16 Sh. (Ct. of Sess.) 133; 13 Fac. Coll. 108.—*SCOT*.

3047 ii. ———.]—*GRAY v. GRAHAM* (1855), 18 Dunl. (Ct. of Sess.) (H. L.) 52; 2 Macq. 435; 27 Sc. Jur. 821.—*SCOT*.

t. ——— **Constructive change of possession.**]—*ENGLISH v. CLARK* (1862), 12 C. P. 451.—*CAN*.

a. ——— **Delivery to solicitor of intending purchaser on undertaking to return.**]—*Re MACKERRICH* (1875), 15 B. L. R. A. C. 15.—*IND*.

b. ——— **Delivery to another solicitor at request of client—Receipt as "borrowed"**

—*Both solicitors subsequently employed by client.*]—*ALISON v. SMART* (1840), 2 Dunl. (Ct. of Sess.) 676; 15 Fac. Coll. 703.—*SCOT*.

KEMP (1841), 3 Dunl. (Ct. of Sess.) 1134; 16 Fac. Coll. 1217.—*SCOT*.

PART VIII. SECT. 2, SUB-SECT. 8.

—C.

3051 i. **Security taken for general costs.**]—*KENNIN v. MACDONALD* (1892), 22 O. R. 484.—*CAN*.

3052 i. ——— **Unless lien reserved.**]—*LINNING v. DOUGLAS* (1821), 20 Fac. Coll. 413; 1 Sh. (Ct. of Sess.) 87.—*SCOT*.

Sect. 2.—Retaining lien: Sub-sect. 8, C., D. & E.
Sect. 3: Sub-sect. 1.]

applied for an order for delivery of her papers on payment of £20 into ct. The judge refused the application, holding that the £81 ought to be paid into ct. :—*Held*: a solr.'s lien extends only to his taxable costs, charges, & expenses, which category includes all disbursements which can be moderated by the taxing master & are not necessarily allowed in full on being vouched, but does not include ordinary advances; there, therefore, was no lien for anything more than so much of the £20 as should be allowed on taxation, & the order asked for ought to have been made.

Whether the taking security by a person having a lien is an abandonment of the lien depends on the intention, whether expressed or to be gathered from the circumstances of the case.—*Re TAYLOR, STILEMAN & UNDERWOOD*, [1891] 1 Ch. 590; 60 L. J. Ch. 525; 7 T. L. R. 262; *sub nom. Re TAYLOR, STILEMAN & UNDERWOOD, Ex p. PAYNE COLLIER*, 64 L. T. 605; 39 W. R. 417, C. A.

Annotations:—Consd. Re Lumley (1892), 37 Sol. Jo. 83. *Apld. Bissill v. Bradford & District Tram. Co.* (1893), 9 T. L. R. 337; *Re Hanbury, Whitting & Nicholson* (1896), 75 L. T. 419. *Folld. Re Douglas Norman*, [1898] 1 Ch. 199. *Consd. Re Morris*, [1908] 1 K. B. 473. *Reid. Re Kingdon & Wilson*, [1902] 2 Ch. 242.

3053. ———.]—*BISSILL v. BRADFORD & DISTRICT TRAMWAY CO., LTD.* (1893), 9 T. L. R. 337; 37 Sol. Jo. 343, C. A.

Annotation:—Consd. Re Morris, [1908] 1 K. B. 473.

3054. ———.]—Where securities are given by a client to a solr., to secure the payment of particular costs, the solr.'s general lien is unaffected.

Where a solr. takes any security for his general costs which is inconsistent with the retention of his general lien, since it gives him some special advantage which the enforcement of the payment of his costs by the exercise of his right of lien would not give, that lien is gone unless he gives the client express notice of his intention to retain the lien. *Semble*: if a solr. when taking from his client any security for general costs intends to retain his lien, he ought, either to express words or by necessary implication, to make that intention known to his client.—*Re MORRIS*, [1908] 1 K. B. 473; 77 L. J. K. B. 265; 98 L. T. 500; 52 Sol. Jo. 78, C. A.

Annotations:—Mentd. Hill v. London Central Markets Cold Storage Co. (1910), 102 L. T. 715; *Yourell v. Hibernian Bank*, [1918] A. C. 372.

3055. ——— *Promissory note.*]—If a solr. takes a promissory note for his costs payable on demand, he loses his lien.—*ROBARTS v. JEFFERYS* (1830), 8 L. J. O. S. Ch. 137.

Annotation:—Apld. Re Taylor, Stileman & Underwood, [1891] 1 Ch. 590.

3056. ——— *Mortgage.*]—*VAUGHAN v. VANDER-STEEN, ANNESLEY'S CASE*, No. 3000, *ante*.

3055 i. ——— *Promissory note.*]—A law-agent does not lose his hypothec by taking a promissory note for the amount of his account.—*SKINNER v. PATERSON* (1823), 2 Sh. (Ct. of Sess.) 351.—*SCOT*.

3056 i. ——— *Mortgage*]—*Re HARVEY'S ESTATE* (1886), 17 L. R. Ir. 165.—*IR*.

d. ——— *Bill of exchange.*]—A law-agent received from his client a bill at three months, & granted a receipt for the bill in payment of a business & cash account. He discounted the bill, but it was dishonoured at maturity. In an action brought against the law-agent by the client's singular successor in certain heritable property for delivery of the title deeds.—*Held*: the fact of the agent

taking in payment of his account a bill at a short date & granting a receipt therefor did not imply a resignation of his lien over the title-deeds.—*PALMER & DALL v. LEE* (1880), 7 R. (Ct. of Sess.) 651; 17 Sc. L. R. 450.—*SCOT*.

e. ——— *Assignment of costs due to client.*]—*HOGAN v. BAATZ, HOGAN v. BAATZ & TAYLOR* (Y. T.) (1905), 1 W. L. R. 513.—*CAN*.

f. ——— *Assignment of a judgment.*]—A solr. who takes an assignment of a judgment as a security for his costs, waives his lien upon his client's papers, but not his right of action.—*MEAGHER v. O'BRIEN* (1830), 3 Ir. L. Rec. 1st ser. 102.—*IR*.

g. *Assignment of bills of costs.*]—An attorney has no lien on his client's

3057. ——— *Charging order.*]—*Re LUMLEY* (1892), 37 Sol. Jo. 83.

3058. ——— *Charge upon reversionary interest.*]—A client, on retaining a solr. to negotiate for her a loan, upon the security of a reversionary interest to which she was entitled, signed a document by which she charged that interest with the payment of the solr.'s costs :—*Held*: by taking this security the solr. had waived his right to a lien in respect of his costs upon the documents belonging to the client which were in his possession.—*Re DOUGLAS NORMAN & Co.*, [1898] 1 Ch. 199; 67 L. J. Ch. 85; 77 L. T. 552; 46 W. R. 421.

Annotation:—Consd. Re Morris, [1908] 1 K. B. 473.

3059. *Security taken for part of debt.*]—A mtgor. instructed his solrs., to whom he was indebted in a bill of costs, to prepare a reconveyance of the mtged. property. They did so, & sent the engrossment to the mtgees.' solrs., with an intimation that they had a lien on it, & a request that the mtgee.'s solrs. would hold it on account of the mtgor.'s solrs. The engrossment was executed by the mtgees. The mtge. money was not paid, but the mtgor. sold the property to purchasers who agreed to pay it :—*Held*: the mtgor.'s solrs. had a lien on the engrossment, & such lien was not prejudiced by their having parted with the engrossment under the above circumstances, nor by the execution of it as a deed, nor by a promissory note delivered to the solrs. not covering their whole demand, & the purchaser had been properly restrained by injunction from proceeding at law to recover the deed.—*WATSON v. LYON* (1855), 7 De G. M. & G. 288; 24 L. J. Ch. 754; 25 L. T. O. S. 230; 3 W. R. 543; 41 W. R. 113, L. J.

3060. ———.]—*Re MORRIS*, No. 3054, *ante*.

3061. *Acts inconsistent with subsistence of lien—Deposit of deeds as security for payment of legacies.*]—A solr., who was employed by an administrator as well in the affairs of the administration as on his private account, having in the course of that employment obtained possession of several documents relating to the intestate's leasehold estate, & having by the direction of his client deposited certain deeds relating to a portion of such property with the exor. of deceased party who was entitled to a distributive share of the intestate's estate, for the purpose of securing the payment of certain legacies given by her will, claimed for his bill of costs, due from the administrator, a lien on other documents in his possession relating to the same property as that to which the deeds related, which were so deposited :—*Held*: the security having been effected through the agency of the solr., without any reservation on his part in favour of his lien, he had no right to derogate from that security by withholding any document necessary to give effect to it, & therefore he had no lien on the documents in his possession as against the

papers after he has assigned his bills against him.—*REESOR v. ELLA* (1878), 7 P. R. 371.—*CAN*.

h. *Agreement to accept part of sum of money in court.*]—*RAYMOND v. FAULKNER* (Y. T.) (1905), 1 W. L. R. 461.—*CAN*.

k. *Security taken for costs with interest.*]—*BROWNLOW v. KEATINGE* (1830), 2 I. Eq. R. 213.—*IR*.

l. *Money raised for client on security of deeds retained.*]—*FITZGERALD v. BIRMINGHAM* (1842), 1 Con. & Law. 405.—*IR*.

m. *Judgment recovered for costs.*]—A solr. does not lose his retaining lien by suing his client & obtaining judgment for his costs.—*Re AIKIN'S ESTATE*, [1894] 1 I. R. 225.—*IR*.

party entitled to the benefit of the security.—*HICKS v. KEATE* (1839), 3 Jur. 1024.

D. Claim to Retain on Different Ground.

See, generally, LIEN, Vol. XXXII., pp. 233, 234, Nos. 178–191.

3062. No mention of lien.]—A lien may be waived by the party's setting up a claim to retain the chattel upon a different ground, & making no mention of the lien.—*WEEKS v. GOODE* (1859), 6 C. B. N. S. 367; 141 E. R. 499; *sub nom.* *WICKS v. GOOD*, 33 L. T. O. S. 93.

E. Proof in Bankruptcy.

3063. General rule.]—When solrs. had obtained an order to have their bill taxed & to prove for the amount:—*Held*: they had relinquished their lien upon the papers in their hands belonging to bkpt.—*Re TARLETON, Ex p. HORNBY* (1819), Buck, 351.

Annotations:—*Reid, Re Firth, Ex p. Schofield* (1879), 12 Ch. D. 337. *Mentd.* *Stammers v. Elliott* (1867), L. R. 4 Eq. 675; *Re West Coast Gold Fields, Rowe's Trustee's Claim*, [1906] 1 Ch. 1.

3064. —.]—Creditor [a solr.] having a lien on property of bkpt. for his debt:—*Held*: to be concluded by proving his debt, & ordered to deliver up the property on which he had a lien.—*Re AUBUSSON, Ex p. SOLOMON* (1821), 1 Gl. & J. 25.

Annotations:—*Reid, Stammers v. Elliott* (1867), L. R. 4 Eq. 675; *Re Firth, Ex p. Schofield* (1879), 12 Ch. D. 337; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905.

3065. —.]—Where a solr., who is creditor for costs against a co. in liquidation, claims a lien on documents of the co. in his possession, but omits to mention the lien in his proof of the debt due to him, & subsequently acts as an unsecured creditor, he will not be allowed as a matter of right under 53 & 54 Vict. c. 63, sched. 1. (8), to withdraw or amend his proof so as to claim his lien.—*Re SAFETY EXPLOSIVES, LTD.*, [1901] 1 Ch. 226; 73 L. J. Ch. 184; 90 L. T. 331; 52 W. R. 470; 11 Mans. 76, C. A.

Annotations:—*Mentd. Re Pawson, Ex p. Trustee, Re Pawson, Ex p. Bewicke* (1917), 86 L. J. K. B. 1285; *Re Maxson, Ex p. Trustee, Re Maxson, Ex p. Lawrence & Lawrence*, [1919] 2 K. B. 330.

SECT. 3.—COMMON LAW LIEN ON PROPERTY RECOVERED OR PRESERVED.

SUB-SECT. 1.—NATURE OF LIEN.

See, generally, LIEN, Vol. XXXII., pp. 247–252, Nos. 311–385.

3066. Particular or general lien.]—*Qu.*: whether a solr.'s lien, for his costs on a fund in ct. is general, or is confined to the costs of the particular suit. Solr. having in his possession the instrument on which his client's right to the fund rests, he has a general lien on the fund.

This lien does not extend to general debts, but only what is due to him in the character of attorney (*PLUMER, M.R.*).—*WORRAL v. JOHNSON* (1820), 2 Jac. & W. 214; 37 E. R. 609.

Annotations:—*N.F. Bezon v. Bolland* (1839), 4 My. & Cr. 354. *Consd.* *Stedman v. Webb* (1839), 1 My. & Cr. 346.

PART VIII. SECT. 3, SUB-SECT. 1.

3070 i. Claim to equitable jurisdiction of court—To hold judgment as security.]—An attorney has not a lien, strictly so called, upon the fruits of a judgment in favour of his client, for his costs; but he has an equitable right, which the ct. will enforce if the parties to the cause are obliged to apply to the ct. for its assistance. The ct. will not interfere, except in cases of collusion, to deprive the attorney of his costs.—*RUTHERFORD v. POWELL* (1878), J.—VOL. XLII.

1 V L. R. (L.) 384.—AUS.

3070 ii. —.]—A solr.'s particular lien over property recovered in proceedings conducted by him on behalf of his client is a right to the equitable interference of the ct. to enable the solr. to retain, or to get a charge on, the fund recovered, & is therefore limited to the costs incurred in the suit.—*GREEN ISLAND CEMENT CO., LTD. v. DEACON, LOOKER & DEACON* (1912), 7 Hong Kong L. R. 10.—HONG KONG.

Apld. Re Galland (1885), 31 Ch. D. 296. *Consd. Re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590. *Reid. R. v. Sankey* (1836), 5 Ad. & El. 423.

3067. —.]—*LUCAS v. PEACOCK*, No. 3119, *post*.

3068. —.]—*VERITY v. WYLDE, Re DOWNES*, No. 3133, *post*.

3069. —.]—A difference exists between the lien of a solr. on a fund recovered for his client in an action & on deeds coming into his possession, inasmuch as in the former case he has no lien for all costs due to him from his client, but only for the costs of recovering that particular fund; & even where the solr. actually gets the fund into his possession he obtains no greater lien than if it had remained in ct. A. having threatened to sue B. on a dishonoured bill of exchange. B. agreed to give him a charge on certain money which B.'s solrs. were taking proceedings to recover from two insurance cos., on two separate policies of insurance on a ship. The charge was prepared by B.'s solrs. after an interview at which A. & B. were also present & the solrs. sent it to A. in a letter, in which, "in pursuance of the inclosed written charge," they undertook out of any moneys received by them from either the S. Assocn. or the M. Assocn. under the policies to hand over to A., "after payment of the legal charges," so much of the amount recovered from the said assocn. (*sic*) as might be sufficient to repay him the amount secured by the charge. The proceedings against the M. Assocn. were compromised on the assocn. agreeing to pay a certain sum. Some time afterwards the S. Assocn. obtained judgment in their favour:—*Held*: the undertaking given by B.'s solrs. could not be construed as entitling them to payment of their legal charges in respect of the proceedings relating to both policies; so that the undertaking was not inconsistent with the general principle as to a solr.'s right of lien.—*MACKENZIE v. MACKINTOSH* (1891), 64 L. T. 706; 7 Asp. M. L. C. 53, C. A.

3070. Claim to equitable jurisdiction of court—To hold judgment as security.]—An attorney's lien on a judgment being merely a claim to the equitable interference of the ct. to have the judgment held as a security for his costs, he has no authority over the execution of a writ of *ca. sa.*, so as to carry it into effect against the order of pltf., even though pltf. & deft. should collude to deprive him of his lien.—*BARKER v. ST. QUINTIN* (1844), 12 M. & W. 441; 1 Dow. & L. 542; 13 L. J. Ex. 144; 2 L. T. O. S. 330; 152 E. R. 1270.

Annotations:—*Apld. Hough v. Edwards* (1856), 1 H. & N. 171. *Consd. Brunson v. Allard* (1859), 2 E. & E. 19. *Apld. Ex p. Games* (1861), 3 H. & C. 294. *Consd. The Leader* (1868), L. R. 2 A. & E. 311; *Mercer v. Graves* (1872), L. R. 7 Q. B. 499. *Reid. Lloyd v. Mansell* (1853), 22 L. J. Q. B. 110; *Langley v. Headland* (1865), 19 C. B. N. S. 42; *Butler v. Knight* (1867), 15 L. T. 621. *Mentd. Hunt v. Hooper* (1844), 1 Dow. & L. 626; *Walker v. Hunter* (1845), 2 C. B. 324; *Hooper v. Lane* (1857), 6 H. L. Cas. 413; *Shaw v. Kirby* (1888), 4 T. L. R. 314.

3071. —.]—*HOUGH v. EDWARDS*, No. 3236, *post*.

3072. —.]—*MERCER v. GRAVES*, No. 3213, *post*.

n. For protection of solicitor not for benefit of client.]—A solr.'s common law lien for costs is given him for his protection, not for the benefit of his client, & the ct. will not interfere to enforce the lien where it is not shown, at least *prima facie*, that the solr. cannot collect his costs from his client.—*Re FORT FRANCES PULP & PAPER CO. v. TELEGRAM PTG. CO., PHILIPPS & SCARTH v. LONDON GUARANTEE & ACCIDENT CO.*, [1927] 4 D. L. R. 77; [1927] 2 W. W. R. 570, 36 Man. L. R. 584.—CAN.

Sect. 3.—Common law lien on property recovered or preserved: Sub-sects. 1 & 2, A. & B.]

3073. ———.]—*ROSS v. BUXTON*, No. 3166, *post*.

3074. Lien actively enforceable.]—*BOZON v. BOLLAND, HUSBAND v. BOLLAND*, No. 2925, *ante*.

SUB-SECT. 2.—IN RESPECT OF WHAT PROPERTY.
A. In General.

3075. Must be recovered for party charged.]—A solr. who receives rents in a cause without the authority of the ct. will be ordered to pay them over to the receiver, & cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from pltf.

A person can have no right of lien over property which he acquires in an assumed character or by tortious means (*LORD LYNDHURST, C.*).—*WICKENS v. TOWNSHEND* (1830), 1 Russ. & M. 361; 30 E. R. 140, L. C.

Annotations:—Appld. Re Birt, Birt v. Burt (1883), 22 Ch. D. 604. *Consd. Mackenzie v. Mackintosh* (1891), 64 L. T. 318.

3076. —.]—Solr. to the fiat receiving the proceeds of a sale of goods belonging to bkpt. which the solr. freed from an execution, by giving his own personal security to the sheriff by way of indemnity, has no lien on those proceeds by way of counter indemnity to himself, even though the proceeding should have taken place with the assent of the assignee.—*Re HALLIN, Ex p. WHITE* (1843), 3 Mont. D. & De G. 7, L. C.

3077. —.]—B. brought an action against A. for the benefit of F., to whom he assigned all moneys owing from A., whereof A. had due notice; the action was referred, & £299 4s. 8d. were awarded, together with £17 6s. for costs. A second action was brought on the award by B., for the benefit of F., to which A. pleaded a set-off of matters that had not been brought forward at the time of making the award:—*Held*: the solrs. of F. had no lien as against A. on the costs given by the award.—*BAKER v. ALEXANDER* (1866), 35 L. J. C. P. 217; 12 Jur. N. S. 692; 14 W. R. 612.

3078. —.]—Solrs. have no right to look for their costs to a fund in ct. not belonging to their clients.

Where, therefore, in an administration suit the estate in ct. was exhausted by creditors so that nothing was left for testator's representative, & she became insolvent, a motion that her costs of suit might be retained out of the fund in ct., so that her solrs. might be paid, was refused.—*CHICK v. NICHOLLS* (1877), 26 W. R. 231.

3079. —.]—Defts., a firm of solrs., were instructed by Z. to obtain the restitution by B. of certain documents, & took various steps with that object. Z. became bkpt. & pltf. was appointed

receiver in the bkpcy. He then instructed defts. to take steps to obtain the documents, & eventually as the result of negotiations conducted by them, an agreement was made between pltf. & the representatives of B., who had in the meantime died, under which the documents were handed to defts. as pltf.'s solrs. Defts. claimed a lien on them for all their costs arising from the attempts to recover them as from the time of the instructions given them by Z., claiming that the documents were the fruits of their exertions. Pltf. admitted his liability for costs incurred on his instructions, & paid money into ct. to satisfy those costs, & claimed the return of the documents:—*Held*: (1) no lien exists on the fruits of a mere negotiation without litigation; (2) in any case the possession of the documents by defts. was obtained as the result of the fresh instructions given by pltf. & was not attributable to anything done on the instructions of Z., & therefore no lien on them existed in respect of the costs incurred on Z.'s instructions.—*MEGUERDITCHIAN v. LIGHTBOUND*, [1917] 2 K. B. 298; 86 L. J. K. B. 889; 116 L. T. 790; 61 Sol. Jo. 416; [1917] H. B. R. 176, C. A.

3080. Must be recovered by solicitor's exertions.]—*Semble*: where a solr. has a lien for costs on a fund in the hands of a third party, a notice of such lien is not alone sufficient to make the third party responsible for paying over the fund, without providing for the costs, if the solr. has had an opportunity of taking other proceedings to secure the fund, & has neglected to do so.

A solr. has a lien for the payment of his costs on a fund which is realised, & is the actual fruit of his exertions (*per CUR.*).—*TOWNSEND v. READE, DOOLEY v. READE* (1835), 4 L. J. Ch. 233.

3081. —.]—*Re SULLIVAN v. PEARSON, Ex p. MORRISON*, No. 3104, *post*.

3082. — Money paid ex gratia.]—In an action against a railway co. under Fatal Accidents Act, 1846 (c. 93), the presiding judge intimating a strong opinion that defts. were not liable, & the co. being willing to give pltf. £150 without admitting a liability on their part, it was agreed between the counsel that a juror should be withdrawn, & nothing more was done. *Semble*: the ct. could not, under the circumstances, give effect to pltf.'s attorney's claim of lien.—*STRETTON v. LONDON & NORTH WESTERN RY. CO.* (1855), 16 C. B. 40; 25 L. T. O. S. 84; 139 E. R. 669.

3083. — Not result of negotiations without litigation.]—*MEGUERDITCHIAN v. LIGHTBOUND*, No. 3079, *ante*.

B. Particular Cases.

3084. Fund in court.]—Solrs. have a lien on the fund.

Solrs. have this equity allowed them to be entitled to a satisfaction out of the fund for their expenses whether it was in the way of suit or

PART VIII. SECT. 3, SUB-SECT. 2. **— A.**

3080 i. Must be recovered by solicitor's exertions.]—Pltf. & defts., without the knowledge of defts.' solr., compromised a suit for foreclosure, in which the usual decree of reference had been made, defts. releasing their equity of redemption for \$200, which was paid by pltf. to them:—*Held*: there was no fund recovered by defts.' solr., & no lien for his costs had ever existed.—*Re FAIRBAIRN, BROWNSCOMB v. TULLY* (1870), 11 Ch. Ch. 71.—**CAN.**

3080 ii. —.]—*STRIEMER v. NAGEL* (Man.) (1911), 17 W. L. R. 189.—**CAN.**

3080 iii. —.]—A solr.'s lien attaches, not to the cause of action, or

to the ultimate balance due after all accounts are adjusted, but to the judgment itself which has been obtained by his efforts.—*PAULSON & GOODMAN v. MURRAY* (1922), 68 D. L. R. 643; 32 Man. L. R. 327; [1922] 2 W. W. R. 654.—**CAN.**

3080 iv. —.]—A solr. has at common law, & apart from any order of the ct. or statute, a lien for his costs over property recovered or preserved or the proceeds of any judgment obtained for the client by his exertions.—*TYABJI DAYABHAI & CO. v. JETHA DEVJI & CO.* (1927), 1 L. R. 51 Bom. 855.—**IND.**

3080 v. —.]—The general lien of a solr. for costs due by his client does

not extend to a fund which the client can reach, without the assistance of the solr., or the use of the papers in his possession.—*HODGENS v. KELLY* (1826), 1 Hog. 388.—**IR.**

o. — *Appointment of receiver obtained by solicitor to secure property from possible future danger.]*—*DAYKABAI v. JEFFERSON, BHAIHANKAR & DINSHA* (1886), 1 L. R. 10 Bom. 248.—**IND.**

PART VIII. SECT. 3, SUB-SECT. 2. **— B.**

3084 i. Fund in court.]—Deft.'s solr. as well as pltf.'s solr. may have a lien for costs on a fund in ct.—*WARDELL v. TRENOUTH* (1879), 8 P. R. 112.—**CAN.**

prosecution in lunacy or bkpcy. (LORD HARDWICKE, C.).—*Ex p. PRICE* (1751), 2 Ves. Sen. 407; 28 E. R. 260, L. C.

Annotation:—*Apld. Re Rutter, Chester v. Rolfe* (1853), 4 De G. M. & G. 798.

3085. —.].—*IRVING v. VIANA*, No. 3117, *post*.

3086. —.].—Until the ct. has made an order for the payment of costs out of a fund in ct., the solr. has no lien on such fund for such costs.

Where the solr. to a party in a suit assigned the costs due & to become due to him in the suit, & subsequently became insolvent, & an order was afterwards made for the payment of the costs out of a fund in ct., & the official assignee in insolvency of the solr. claimed the costs as against the person to whom they had been assigned, as being under the order & disposition clause, on the ground that, though notice had been given to the solrs. for pltf. in the suit, no stop order had been obtained on the fund in ct.:—*Held*: it was not necessary to get a stop order on the fund in ct.; & the person taking under the assignment was entitled to the costs.—*LORD v. COLVIN* (1862), 2 Drew. & Sm. 82; 6 L. T. 211; 10 W. R. 420; 62 E. R. 553.

3087. —.].—The Ct. of Appeal has jurisdiction to order the husband's costs of an unsuccessful appeal by the wife in divorce proceedings to be paid out of money which he has paid into ct. to defray the wife's costs of the hearing; but the ct. will not make such order to the prejudice of the lien of the wife's solr. unless he has so conducted himself as to justify so strong a measure.

A husband obtained a decree *nisi* for dissolution of marriage & the usual order was made for payment of the costs of the wife. The wife appealed, & the appeal was dismissed with costs as frivolous. The wife thereupon applied to have money which had been paid into ct. by the husband as security for her costs paid out to her solr., whose taxed costs under the decree *nisi* exceeded that amount, & the husband made a cross application that his costs of the appeal might be paid out of the money in ct.:—*Held*: though the wife's appeal was a hopeless one, there was no ground for affirming that her solr. acted vexatiously or oppressively in conducting it, & he ought not to be deprived of his lien on the fund for the costs of the wife's defence.—*HALL v. HALL*, [1891] P. 302; 60 L. J. P. 73; 65 L. T. 206; 7 T. L. R. 590, C. A.

Annotation:—*Consd. Russell v. Russell*, [1892] P. 152.

3088. *Proceeds of execution*.].—An attorney has a lien for his bill of costs, on money levied by the sheriff under an execution on a judgment recovered by his client, & is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued to retain the money in his hands, & that the ct. would be moved to set aside the judgment for irregularity; & notwithstanding a docket has been struck against the client becoming bkpt.—*GRIFFIN v. EYLES* (1789), 1 Hy. Bl. 122; 126 E. R. 74.

3089. —.].—The liquidators of a co. brought an action against S., in which deft. obtained judgment with costs. S. was indebted to the co. in a larger amount on a bill of exchange. The cost of S.'s attorneys in the action being unpaid, they proceeded in his name to levy execution. The execution was stayed under an *interim* order in the winding up, a sum being retained by the liquidators sufficient to meet the costs for which

the judgment had been signed:—*Held*: the solrs. had a lien on what could be recovered by the execution, & they had the same right against the sum set apart which represented the proceeds of the execution.—*Re BANK OF HINDUSTAN, CHINA & JAPAN, LTD., Ex p. SMITH* (1867), 3 Ch. App. 125; 37 L. J. Ch. 185; 17 L. T. 339; 16 W. R. 170, L. J.

Annotations:—*Refd. Re Trent & Humber Ship-Building Co. Bailey & Leatham's Case* (1869), L. R. 8 Eq. 94; *Re Home Investment Soc.* (1880), 14 Ch. D. 167; *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33; *Re London Metallurgical Co.*, [1895] 1 Ch. 758. *Mentd. Re Blundell, Blundell v. Blundell* (1890), 59 L. J. Ch. 269.

3090. *Payment under award*.].—*ORMEROD v. TATE*, No. 3169, *post*.

3091. —.].—The lien of the attorney cannot be affected by a reference of the cause & all matters in difference between the parties.

Two causes & all matters in difference between the respective parties were referred by an order of *Nisi Prius*; the costs to abide the event. The arbitrator directed a verdict to be entered for pltf. in the first cause, with £100 damages, & for deft. in the other. He further found that pltf. was indebted to deft. in the sum of £86 11s. 6d., which sum together with the costs of the second section he directed should be set off against the damages & costs in the first:—*Held*: the case was within the rule 93 of Hilary Term, 1831, & the set-off could not be allowed to the prejudice of pltf.'s attorney's right of lien upon the damages & costs in the first action, for his costs therein.—*COWELL v. BETTELEY, COWELL v. SNOW* (1834), 10 Bing. 432; 2 Dowl. 780; 4 Moo. & S. 265; 3 L. J. C. P. 148; 131 E. R. 972.

Annotations:—*Expld. Dunn v. West* (1850), 10 C. B. 420. *Consd. Little v. Philpotts* (1862), 3 B. & S. 383. *Expld. Pringle v. Gloag* (1879), 27 W. R. 574.

3092. —.].—An action of ejectment was referred by an order at *nisi prius*, & the arbitrator was empowered to award deft. a compensation for buildings erected on the premises. The arbitrator ordered a verdict to be entered for pltf., & awarded deft. a sum of money for buildings:—*Held*: this sum of money might be set off by pltf. against the costs which deft. was liable to pay him, but it was subject under rule 93 Hilary Term, 1831, to defts.' attorneys' lien for his costs.—*DOE d. SWINTON v. SINCLAIR* (1836), 5 Dowl. 26; 2 Hodg. 111; 3 Scott, 42; 5 L. J. C. P. 184.

3093. —.].—Pltf., a builder, & an uncertificated bkpt., sued for a balance due to him for repairs, & was nonsuited: the cause was referred, & the arbitrator found a sum due to pltf.:—*Held*: pltf.'s attorney had a claim, as against the assignees, to the amount of his lien on the award for the costs of the action & of the award.—*JONES v. TURNBULL* (1837), 2 M. & W. 601; 5 Dowl. 591; Murp. & H. 106; 6 L. J. Ex. 166; 1 Jur. 638; 150 E. R. 897.

Annotation:—*Consd. Re Meter Cabs*, [1911] 2 Ch. 557.

3094. —.].—An award ordered, amongst other things, that the costs of the reference should be paid by the parties thereto in a certain proportion, viz. three-fourths by deft., & one-fourth by pltf. In order to take up the award pltf. paid the whole of the costs, & pltf.'s attorney advanced the money for the purpose of taking up the award:—*Held*: the sum of money so advanced by pltf.'s attorney was a sum awarded, for which the attorney had a lien upon the whole costs of the reference.—

3084 II. —.].—*M'BRIDE v. CLARKE* (1839), 1 L. Eq. R. 203.—*IR.*

p. Money paid into court—Unless paid in with denial of liability & greater

sum awarded in costs against client.].—Pltf.'s solr. has no lien for costs upon moneys paid into ct. by the deft. when deft. at the same time pleads a denial

of liability & is eventually awarded costs against pltf. to a greater amount.—*MUDD v. MAIR* (1897), 16 N. Z. L. R. 75.—*N.Z.*

Sect. 3.—Common law lien on property recovered or preserved: Sub-sect. 2, B.; sub-sect. 3.]

DEES v. GREAT NORTH OF ENGLAND RY. CO. (1846), 7 L. T. O. S. 406.

3095. —.]—*Re METER CABS, LTD., No. 3120, post.*

3096. — Direct payment to attorney refused.]—On the reference of an action, the costs to abide the event, the arbitrator ordered deft. to pay pltf. a certain sum. Pltf. afterwards became insolvent. His attorney, whose bill of costs exceeded the amount awarded, & the costs taxed under the award, claimed a lien in respect of his bill on such amount & taxed costs, & called upon defendant to pay them to him for his own use, & in satisfaction of his lien:—*Held*: pltf.'s attorney was not entitled to a rule calling upon deft. to pay him the money.—*LLOYD v. MANSELL* (1853), Bail Ct. Cas. 130; 22 L. J. Q. B. 110; *sub nom. Re* —, 1 W. R. 150.

Annotation:—*Refd.* *Brunsdon v. Allard* (1859), 28 L. J. Q. B. 306.

3097. Costs directed to be paid to client.]—Though an order be made on a petition on bkpcy., directing costs to be paid to petitioner personally, this does not take away the lien of the solr. for his costs.—*Ex p.* *BRYANT* (1815), 1 Madd. 49; 56 E. R. 19.

Annotations:—*Consd.* *Lloyd v. Mason* (1845), 4 Hare, 132. *Mentd.* *Re Chambers, Ex p. Davy* (1834), 3 L. J. Bey. 57.

3098. —.]—The fund in ct. being decreed to the assignees of a party who in the course of the cause had become bkpt., the solrs. employed by him during part of the proceedings have a lien for their costs.

Where costs are ordered to be paid to the client, solrs. need not wait the result of process to compel the payment of such costs, but may insist upon the immediate benefit of their lien.—*POUNSET v. HUMPHREYS* (1837), Coop. Pr. Cas. 142; 47 E. R. 439, L. C.

3099. —.]—A solr. does not, by taking the body of his client in execution on a judgment obtained by him at law for his costs in a suit in equity, lose his lien for such costs upon the costs of the suit ordered to be paid by the opposite party to his client.—*O'BRIEN v. LEWIS* (1863), 3 De G. J. & Sm. 606; 2 New Rep. 536; 32 L. J. Ch. 665; 8 L. T. 683; 27 J. P. 532; 9 Jur. N. S. 764; 11 W. R. 973; 46 E. R. 772, L. JJ.

3100. Moneys directed to be paid to client.]—*SKINNER v. SWEET* (1818), 3 Madd. 244; 56 E. R. 499.

3101. Money secured by compromise.]—The lien of an attorney attaches upon money received by way of compromise; though the verdict & judgment be against his client. Upon an application to give effect to such lien, the affidavit should show the amount claimed by the attorney.—*DAVIES v. LOWNDES* (1847), 3 C. B. 808; 8 L. T. O. S. 240; 136 E. R. 324.

Annotations:—*Appld.* *Slater v. Sunderland Corpn.* (1863), 3 New Rep. 161, *Ross v. Buxton* (1889), 42 Ch. D. 190.

3102. —.]—*Ross v. BUXTON*, No. 3166, *post*.

3103. Money payable under judgment.]—*SLATER v. SUNDERLAND CORPN.*, No. 3134, *post*.

3101 i. Money secured by compromise.]—*REGAN v. FRANCIS* (1842), 4 L. L. R. 402.—*IR.*

3103 i. Money payable under judgment.]—An attorney has a lien on a judgment obtained by him for his costs, as between attorney & client.—*LINTON v. WILSON* (1841), 1 Kerr, 300.—*CAN.*

3106 i. Not on real estate.]—*WATERS v. CAMPBELL* (Alta.) (1914), 28 W. L. R. 227.—*CAN.*

3107 i. Alimony paid to wife's solicitor.]—Where in a suit by a wife for judicial separation petitioner appointed her proctor her trustee for receiving permanent alimony & her proctor as such received certain moneys as alimony.—*Held*: the proctor had no lien upon such moneys for his costs.—*WOOTEN v. WOOTEN* (1896), 21 V. L. R. 755.—*AUS.*

q. Property preserved for creditors after fraudulent transfer.]—Costs in-

3104. —.]—Pltf. recovered a verdict for £25 against deft. for personal injuries caused by the negligence of deft.'s servants. Pltf.'s attorney informed deft.'s attorney that he had a large claim against pltf. for costs, & had a lien for the same upon the damages recovered in the action. Subsequently a rule nisi for a new trial was granted on the ground that the verdict was against evidence. Pltf. & deft., without the knowledge of their respective attorneys, settled the action, deft. paying £10 to pltf. who was in great poverty, in discharge of all the claims for damages & costs:—*Held*: on the application by pltf.'s attorney that his costs should be paid by deft., pltf.'s attorney was not entitled to compel deft. to pay his costs, as the result of the proceedings was doubtful at the time of the settlement, & there was, therefore, no existing fund or security upon which any lien for the attorney's costs had attached, & as the settlement was not shown to be fraudulent.

There is no doubt at all that where an attorney has by his labour & his money obtained a judgment for his client, he has a lien upon the proceeds of such judgment & is entitled to have its proceeds pass through his hands (*BLACKBURN, J.*).—*Re SULLIVAN v. PEARSON, Ex p. MORRISON* (1868), L. R. 4 Q. B. 153; 9 B. & S. 960; 38 L. J. Q. B. 65; 19 L. T. 430.

Annotations:—*Appld.* *The Hope* (1883), 8 P. D. 144. *Consd.* *Ross v. Buxton* (1889), 42 Ch. D. 190.

3105. Royalties on patent.]—An undischarged bkpt. took out letters patent for an invention, & granted a licence to a co. to work the patented invention at a royalty of £10 per week. Two instalments of the royalty, *i.e.* £20 becoming payable were claimed by the trustee in bkpcy. as after-acquired property of bkpt. The co. took out an interpleader summons in the High Ct., which was remitted to a county ct. for decision. The county ct. judge held that the £20 was in the nature of personal earnings & belonged to bkpt., & refused leave to appeal. Subsequent royalties became due, & the trustee applied to the Bkpcy. Ct. for a declaration that they vested in him as after-acquired property of bkpt.:—*Held*: the solr. of bkpt. had as against the trustee a first charge for his costs of creating the fund, *i.e.*, his costs properly incurred in taking out & maintaining the letters patent & carrying through the arrangements with the co.—*Re GRAYDON, Ex p. OFFICIAL RECEIVER*, [1896] 1 Q. B. 417; 65 L. J. Q. B. 328; 74 L. T. 175; 44 W. R. 495; 12 T. L. R. 208; 40 Sol. Jo. 420; *sub nom. Re GRAYDON, Ex p. TRUSTEE*, 3 Mans. 5.

Annotations:—*Mentd.* *Shoolbred v. Roberts*, [1899] 2 Q. B. 560; *Mercer v. Vans Colina* (1897), [1900] 1 Q. B. 130, n.; *Re Roberts*, [1900] 1 Q. B. 122; *Re Hancock*, [1904] 1 K. B. 585; *Affleck v. Hammond*, [1912] 3 K. B. 162; *Hoystead v. Taxation Comr.*, [1926] A. C. 155.

3106. Not on real estate.]—*SHAW v. NEALE*, No. 3528, *post*.

3107. Alimony paid to wife's solicitor.]—An attorney retained by a married woman in a matrimonial suit has a lien for costs incurred on her account, including costs disallowed on taxation as between her & her husband, but allowed as

incurred in a creditors' action in preserving for creditors property which had been fraudulently transferred are a first lien upon the fund recovered, & are allowed as between solr. & client.—*Re JUDGMENT ACTS, HOOD, ALDRIDGE & Co. v. TYSON* (1902), 9 B. C. R. 233.—*CAN.*

r. Chattels personal not under control of court.]—Chattels personal, which were not under the control of the ct. or in the possession of pltf.'s solr., held

between attorney & client, upon all moneys received by him on her account in the course of the suit. This lien extends to alimony in the hands of the attorney.—*Ex p. BREMNER* (1866), L. R. 1 P. & D. 254; *sub nom. BREMNER v. BREMNER & BRETT*, 36 L. J. P. & M. 11; 15 L. T. 297; 15 W. R. 75.

Annotations:—*Distd. Leete v. Leete* (1879), 48 L. J. P. 61; *CROSS v. CROSS* (1880), 43 L. T. 533.

3108. —.—.]—The alimony allotted to the wife, petitioner, was, by the order of the ct., made payable to herself. Resp. paid the alimony to the wife's solr., who, from time to time, made payments on account to petitioner. Petitioner never authorised him, by nomination in writing, to receive the alimony, nor was it shown that she had acquiesced in his receiving it:—*Held*: the solr. had no lien for costs on the money which he had received as alimony.—*LEETE v. LEETE* (1879), 48 L. J. P. 61; 40 L. T. 788; 27 W. R. 921.

Annotation:—*Fold. Cross v. Cross* (1880), 43 L. T. 533.

3109. —.—.]—A solr.'s lien does not extend to alimony *pendente lite* paid over to him as such, i.e. for the purpose of the wife's maintenance, unless he holds her direct written authority to him to receive it as her agent under rule 94, Divorce Rules.—*CROSS v. CROSS* (1880), 43 L. T. 533.

SUB-SECT. 3.—IN RESPECT OF WHAT COSTS.

3110. Confined to costs incurred in action.—A solr. has no lien on a fund decreed to his client beyond his costs in that suit; he cannot claim the amount of other costs due to him in other suits.—*LANN v. CHURCH* (1820), 4 Madd. 391; 56 E. R. 749.

Annotations:—*Refd. Bozon v. Bolland, Husband v. Bolland* (1839), 4 My. & Cr. 354; *Hall v. Laver* (1842), 1 Hare, 571.

3111. —.—.]—Where one judgment is set off against another, the lien of an attorney does not extend beyond his costs in the particular cause.—*WATSON v. MASKELL* (1834), 1 Bing. N. C. 366; 1 Scott, 286; 131 E. R. 1158; *subsequent proceedings* (1835), 1 Bing. N. C. 727.

3112. —.—.]—*BOZON v. BOLLAND, HUSBAND v. BOLLAND*, No. 2925, *ante*.

3113. —.—.]—The employment of a solr. in business relating to a trust estate, by the authority of the trustee, or of some of several *cestui que trust*, gives the solr. no lien or charge upon the trust estate, or upon the shares of the other *cestui que trusts*.

The lien of the solr. upon a fund recovered in a suit which he has conducted, is confined to the costs of that particular suit; & therefore, *semble*, a solr. who, in relation to the same estate, in which the same parties are interested, has brought an

ejectment & a suit in equity, has no lien upon the fund recovered in the suit for his costs of the ejectment.—*HALL v. LAVER* (1842), 1 Hare, 571; 66 E. R. 1158.

Annotations:—*Consd. Re Becket, Purnell v. Paine*, [1918] 2 Ch. 72. *Refd. Burge v. Brutton* (1843), 2 Hare, 373; *McGregor v. Derbyshire, Staffordshire & Worcestershire Junction Ry.* (1849), 13 L. T. O. S. 445; *Norton v. Cooper, Re Manby & Hawksford, Ex p. Bittleston* (1856), 3 Sm. & G. 375.

3114. —.—.]—*MACKENZIE v. MACKINTOSH*, No. 3069, *ante*.

3115. —.—.]—The exor. of deceased solr. brought an action in 1902 to recover costs alleged to be due to his testator's estate from deft., of which a bill had been delivered to deft., together with a cash account, on Dec. 2, 1899. The items of the bill extended over a period from 1878 to 1899, & Stat. Limitations being pleaded, the judge at the trial gave judgment for deft. in respect of all items prior to 1893, as being statute barred. He referred the rest of the bill to a master for taxation, & to take the cash account from 1893, directing that credit should be given to deft. for all sums of money received by pltf.'s testator for or on account of deft., in respect of, or which ought to be treated as reducing or discharging, the bill of costs so taxed. Upon taxation deft. brought in a surcharge in respect of a sum of £66, which had been received by pltf.'s testator, as deft.'s solr. in an action brought by deft., in 1894, & not accounted for to deft. No cash account had been delivered by pltf.'s testator to deft., except the account of Dec. 2, 1899, which, through an inadvertence, contained no entry of the said sum of £66. Pltf. claimed that this sum should be treated as appropriated to payment or satisfaction of items which had accrued due from deft. to pltf.'s testator prior to 1893:—*Held*: the said sum of £66 could not be set off against the statute-barred items under the statutes of set-off; & assuming that pltf.'s testator would have had a right to appropriate the said sum to these items, yet, there having been no such appropriation, it was not, having regard to the terms of the judgment of the learned judge at the trial, open to pltf. so to appropriate the said sum subsequently to that judgment; & therefore the surcharge in respect of the said sum of £66, must be allowed.—*SMITH v. BETTY*, [1903] 2 K. B. 317; 72 L. J. K. B. 853; 89 L. T. 258; 52 W. R. 137; 19 T. L. R. 602, C. A.

Annotation:—*Refd. Seymour v. Pickett*, [1905] 1 K. B. 715.

3116. —.—.]—Where an application is made to set off costs & damages in one action against those recovered in a cross-action, an attorney has a lien on the judgment obtained by his client against the opposite party, to the extent of his costs of that cause only.—*STEPHENS v. WESTON* (1821), 3 B. & C.

not to be subject to a lien for his costs incurred in the suit by means of which they were recovered.—*SAVAGE v. JAMES* (1875), 11 L. R. Eq. 357.—*IR.*

t. Proceeds of estate of deceased person—*Notwithstanding debt to estate by client as executrix.*—A solr. was allowed a lien on the proceeds of the estate of a deceased person, realised by him under an order of the ct. notwithstanding that a balance was due to the estate by his client as executrix, which she was unable to bring into ct.—*Re WHITE* (1885), 17 L. R. Ir. 223.—*IR.*

PART VIII. SECT. 3, SUB-SECT. 3.

3110 i. *Confined to costs incurred in action.*—The so-called lien of an attorney upon moneys recovered in an action or suit does not extend beyond the costs of that particular action or suit which creates the fund.—*Re*

SUTTON (1890), 11 N. S. W. L. R. (Law) 401; 7 N. S. W. W. N. 83.—*AUS.*

3110 ii. —.—.]—Pltf. having recovered judgments against B. & his sureties on a replevin bond B. moved to have satisfaction entered. Pltf.'s attorney claimed a lien on the judgments for his costs as between attorney & client, not only in these suits, but in other actions between the parties upon the same subject:—*Held*: he was entitled only to the taxed costs as between attorney & client in the suits.—*BLETCHER v. BURN, BLETCHER v. MARSH* (1865), 25 U. C. R. 92.—*CAN.*

3110 iii. —.—.]—A solicitor's particular lien over property recovered in proceedings conducted by him on behalf of his client does not extend beyond the costs incurred in those proceedings.—*GREEN ISLAND CEMENT CO.,*

LTD. v. DEACON, LOOKER & DEACON (1912), 7 Hong Kong L. R. 10.—*HONG KONG.*

3110 iv. —.—.]—In Bombay, solrs. have a common law lien for their costs over property recovered or preserved or the proceeds of any judgments obtained for clients by their exertions. But this lien is a particular lien, & is not available for the general costs for all business done by them for the clients, but only extends to the costs of the suit in which the property has been acquired or preserved by their exertions.—*SANANAND PANDURANG MHATRE v. PARASHRAM PANDURANG MHATRE* (1927), 1 L. R. 52 Bom. 336.—*IND.*

3110 v. —.—.]—Where a solr., whom his client has ceased to employ, produces a deed of the client, upon which the solr. claims a lien for antecedent

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535; 5 Dow. & Ry. K. B. 399 3 L. J. O. S. K. B. 73; 107 E. R. 832.

Annotation:—*Reid*. Webber v. Nicholas (1826), 4 Bing. 16.

3117. — & costs immediately connected therewith—Costs of actions at law & equity.—A solr. has a lien for his costs on a fund in ct., produced by his exertions; & therefore, where, on a bill for discovery in aid of a defence at law, an injunction was granted, on terms, one of which was, the payment of money into ct., & an answer was afterwards filed, & the action at law being subsequently tried, a verdict was found for deft.:—*Held*: (1) the solr. for deft. in equity has a lien on the fund, for the costs of the discovery.

(2) Where the solr. putting in the answer was removed, & his demand paid, & another solr. employed, it was considered that the fund was exonerated to that extent, & that the latter solr. had not any lien for the costs of the former solr., though paid by him.—*IRVING v. VIANA* (1827), 2 Y. & J. 70; 148 E. R. 836.

Annotations:—As to (1) *Reid*. Taylor v. Cook (1830), You. 201. Generally, *Reid*. Duncombe v. Davis (1841), 1 Hare, 184.

3118. — — — — ——An order obtained under C. L. P. Act, 1854 (c. 125), s. 61, attaching a fund in the hands of a garnishee to answer a judgment debt, will not displace the prior lien for costs of a solr. who has given notice to the garnishee.

Qu.: if he had not given notice.

S. & W. acted as attorneys for P., pltf., in an action for damages, & also as his solrs. in a suit instituted against him in equity to restrain the proceedings in the action. The ct. made an order in the suit, directing payment to P. of a gross sum for damages & costs:—*Held*: S. & W. had a lien upon the fund for their costs, both in the action & in the suit.—*SYMPSON v. PROTHERO* (1857), 26 L. J. Ch. 671; 29 L. T. O. S. 325; 3 Jur. N. S. 711; 5 W. R. 814.

Annotations:—*Consd.* The Leader (1868), L. R. 2 A. & E. 314. *Reid*. Mercer v. Graves (1872), 41 L. J. Q. B. 212; Birchall v. Pugin (1875), L. R. 10 C. P. 397; Cole v. Eley (1894), 70 L. T. 892.

3119. — — — — — Costs of protecting lien.—A solr.'s lien upon the fund is not a general lien. It extends only to costs in the cause, & costs immediately connected with costs in the cause; as, for instance, the costs of successfully protecting a solr.'s right to the costs in a cause.—*LUCAS v. PEACOCK* (1846), 9 Beav. 177; 50 E. R. 311.

Annotation:—*Reid*. Mackenzie v. Mackintosh (1891), 64 L. T. 318.

3120. — — — — — Costs of establishing retainer.—A limited co. employed a solr. to establish a claim in an arbn. Pending the arbn. the co. went into liquidation, & shortly after, the solr. with the sanction of both liquidators compromised the claim for £29 which was paid to him & credited to the liquidators:—*Held*: (1) as the £29 was recovered by the exertions of the solr. in the arbn. he had a common law lien thereon for his costs of recovery, including the costs incurred prior to the liquidation; (2) the solr.'s lien extended to the

costs of establishing his retainer against one of the liquidators who disputed it.—*Re METER CABS, LTD.*, [1911] 2 Ch. 557; 81 L. J. Ch. 82; 105 L. T. 572; 56 Sol. Jo. 36; 19 Mans. 92.

Annotations:—As to (1) *Reid*. *Re* Eden, Watkins v. Eden, [1920] 2 K. B. 338. As to (2) *Reid*. Meguerditchian v. Lightbound, [1917] 1 K. B. 297.

3121. — — — — — Limited to final balance.—Where deft. has been entitled to certain costs, & these have been deducted from pltf.'s costs, & an allocatur given for the balance, if any money has been previously paid by pltf. to his attorney, such money must be deducted from the amount of the allocatur, & the lien of the attorney will be limited to the final balance.—*CAIN v. ADAMS* (1836), 2 Har. & W. 288; 5 L. J. K. B. 252.

Annotation:—*Reid*. Gort v. Rowney (1886), 17 Q. B. D. 625.

SUB-SECT. 4.—EFFECT OF COMPROMISE OF PROCEEDINGS.

A. In General.

3122. Right of client to compromise—Without knowledge of solicitor.—A release of all demands from pltf. to deft. will not deprive pltf.'s attorney of his lien upon the costs of an action awarded in favour of pltf.; nor can deft. set off the costs of an action awarded in his favour against those awarded for pltf. until the attorney's claim be satisfied.—*GIFFORD v. GIFFORD* (1801), For. 109; 145 E. R. 1128.

Annotation:—*Reid*. Lane v. Pearce (1823), 12 Price, 742.

3123. — — — — ——Pltf. may, without consulting his attorney, compromise an action with deft., & take on himself the payment of the costs to the attorney, if there be no fraudulent conspiracy to cheat the attorney of his costs.—*CHAPMAN v. HAW* (1808), 1 Taunt. 341; 127 E. R. 865.

3124. — — — — ——Where pltf.'s solr., with notice, suffers deft. to satisfy the demand of his client, without making effectual provision for the payment of his costs, the ct. will not suffer him to proceed in the suit against deft., for the purpose of recovering them. Therefore, where her debt had been paid by deft. to one pltf., & an undertaking had been given by him, though not to pltf.'s solr., to pay the costs of suit, & the other pltf. had died; the ct. set aside an attachment for want of answer issued against deft. for recovery of costs, on his undertaking to pay such costs as were unpaid.—*MORSE v. COOKE* (1824), M'Cle. 211; 13 Price, 473; 148 E. R. 89.

3125. — — — — ——Where, in an action of replevin, pltf. obtained a verdict, & afterwards directed satisfaction to be entered on the roll, the ct. would not cause such entry to be vacated on the application of pltf.'s attorney, on the ground that pltf. & deft. had combined together to deprive such attorney of his costs.—*ABBOTT v. RICE* (1825), 3 Bing. 132; 10 Moore, C. P. 489; 3 L. J. O. S. C. P. 202; 130 E. R. 463.

3126. — — — — ——*Re TOVERY v. PAYNE, Ex p. HART*, No. 3165, *post*.

—*Without knowledge of solicitor.*—It is competent for a client to settle his action behind the back of his solr., notwithstanding that the solr. has given notice to the client & to the opposite party not to settle except with the solr.'s consent.—*BELLAMY v. CONNOLLY* (1892), 15 P. R. 87.—CAN.

3122 II. — — — — ——*GENGE v. FREEMAN* (1891), 14 P. R. 330.—CAN.

3122 III. — — — — ——*WALKER v. GURNEY-TILDEN Co.* (1898), 18 P. R. 274, 471.—CAN.

costs & thereby enables the client to recover a fund in a suit in which the solr. has acted, his lien upon that sum is confined to the costs due to him in the suit in which the fund was so recovered.—*Re BAYLY'S ESTATE, Ex p. HUMPHREY* (1860), 12 I. Ch. R. 315.—IR.

3110 vi. — — — — ——*REEVES & WILLIAMS' OFFICIAL ASSIGNEE v. DORRINGTON*, [1918] N. Z. L. R. 702.—N.Z.

B. — — — — — & costs immediately connected therewith.—Solrs. have no lien

for the costs of an unsuccessful action upon the fund recovered in another, that fund not having been recovered or preserved by means of the costs incurred in the action which was lost, & the two actions not being so intimately connected as to be regarded as one.—*LONDON MUTUAL FIRE INSURANCE Co. v. JACOB & GORDON* (1889), 16 A. R. 392.—CAN.

PART VIII. SECT. 3, SUB-SECT. 4.—A.

3122 I. Right of client to compromise

3127. ———.]—A verdict was obtained in an action of trover for £200, subject to be reduced to 1s. upon the articles for which the action was brought being delivered up. Before they were delivered up, pltf. became insolvent; but deft., nevertheless, on the application of the assignee, delivered up the goods to him:—*Held*: pltf.'s attorney had no claim in respect of his lien for the costs, either against the assignee or deft., without either showing express notice, or making out a case of fraud.—*BLOOMFIELD v. BLAKE* (1833), 2 Dowl. 272.

3128. ———.]—An attorney has a lien upon the judgment for his costs, but not upon the action; & an arrangement between a pltf. & deft. to settle the action, is binding upon them, unless either party has been imposed upon, or unless the arrangement is made with a view to prevent the attorney from obtaining his costs in that particular action.—*M'PERSON v. AILLSOP* (1839), 8 L. J. Ex. 262.

3129. ———.]—The attorney of deft. has no such interest in the suit as to prevent the parties from compromising it without his consent.—*QUESTED v. CALLIS* (1842), 10 M. & W. 18; 11 L. J. Ex. 345; 6 Jur. 512; 152 E. R. 364.

3130. ———.]—Pltf. & deft. having settled an action, after verdict for pltf., without the knowledge of pltf.'s attorney, deft. gave notice of the compromise to the attorney, who afterwards signed final judgment.

The ct., upon affidavits denying any conspiracy to deprive the attorney of his costs, made a rule absolute to set aside the judgment.

It is quite clear, upon the affidavits, that the action was settled; & it is said that this was done for the purpose of defrauding the attorney of his costs. The burden, however, of proving that it was with this view, lies on the attorney (*per CUR.*).—*CLARK v. SMITH* (1844), 6 Man. & G. 1051; 1 Dow. & L. 960; 7 Scott, N. R. 946; 13 L. J. C. P. 97; 2 L. T. O. S. 347; 8 Jur. 406; 134 E. R. 1218.

3131. ———.]—It has been decided that the claim of the solrs. cannot interfere with the equities between the parties, & that the latter may compromise any matter wholly irrespective of them. But still, as I said before, I do not see any means of giving the relief here asked by way of set-off, & all the cases with respect to lien apply (*WOOD, V.-C.*).—*GRAND TRUNK OR STAFFORD & PETERBOROUGH RAILWAY OFFICIAL MANAGER v. BRODIE, Ex p. TURQUAND* (1853), 1 Eq. Rep. 64.

3132. ———.]—An attorney's right of lien for his costs, on a judgment recovered by his client, is subject to the right of the parties to the action to make a *bonâ fide* compromise. The result of such compromise is that the lien is lost. But the lien may prevail against a collusive compromise made by the parties with the express object of defeating it. The parties to cross actions, pltf. in each of which had obtained judgment, *bonâ fide* compromised the actions, after notice to one of them, & his attorney from the attorney of the other not to do so in prejudice of the latter's lien on his client's judgment:—*Held*: the attorney had no ground for claiming the equitable interference of the ct. to enforce his lien.—*BRUNSDON v. ALLARD* (1859), 2 F. & E. 19; 28 L. J. Q. B. 306; 33 L. T. O. S. 220; 5 Jur. N. S. 596; 7 W. R. 581; 121 E. R. 8.

Annotations:—*Consd.* *Mercer v. Graves* (1872), L. R. 7 Q. B. 499; *Price v. Crouch* (1891), 60 L. J. Q. B. 767. *Refd.* *Slater v. Sunderland Corpn.* (1863), 3 New Rep. 164; *Ex p. Games* (1864), 3 H. & C. 294; *The Hope* (1883), 32 W. R. 269; *Ross v. Buxton* (1889), 42 Ch. D. 190; *Cole v. Eley*, [1894] 2 Q. B. 180.

3133. ———.]—A solr.'s lien is not a general

lien on a fund in ct. though brought in by his exertions, but only on what may, on the issue of the suit, belong to his client. Therefore, where by the exertions of a pltf.'s solr. a fund was ordered to be brought into ct. on which defts. had a primary claim, & afterwards pltf. changed his solr., & the parties were proceeding without bringing the fund into ct. to divide it under compromise, without paying pltf.'s original solrs.:—*Held*: he had no lien on the fund, but it was ordered that no order should be made by compromise or otherwise for payment of any money to pltf. without notice to pltf.'s original solr.—*VERITY v. WYLDE, Re DOWNES* (1859), 4 Drew. 427; 28 L. J. Ch. 561; 32 L. T. O. S. 368; 7 W. R. 270; 62 E. R. 164.

Annotation:—*Refd.* *Re Wright's Trust, Wright v. Sanderson, Re Sanderson's Trust, Wright v. Sanderson*, [1901] 1 Ch. 317.

3134. ———.]—Though the ct. will not interfere as against defts. with a *bonâ fide* settlement of an action between pltf. & deft. with a view of enforcing pltf.'s attorney's lien for his costs of the action, they will, nevertheless, while the sum agreed upon as a compromise between pltf. & deft. remains unpaid, direct defts. to pay to pltf.'s attorney so much of the sum as is necessary to satisfy his charge.—*SLATER v. SUNDERLAND CORPN.* (1863), 3 New Rep. 164; 33 L. J. Q. B. 37; 9 L. T. 422.

Annotation:—*Consd.* *Ross v. Buxton* (1889), 42 Ch. D. 190.

3135. ———.]—*Re SULLIVAN v. PEARSON, Ex p. MORRISON*, No. 3104, *ante*.

3136. ———.]—*THE HOPE*, No. 3150, *post*.

3137. ———.]—Parties to litigation are at liberty to compromise without the intervention of their solrs., provided they do so honestly & without any intention to cheat the solrs. of their costs.

P. having retained M. as his solr. for the taxation of a bill of costs delivered by J., P.'s former solr., obtained the common order for taxation. Before the taxation was completed, J., without M.'s knowledge, & with the intention of stopping the taxation & so defeating M.'s lien for his costs, paid P., who was in distressed circumstances, a small sum in settlement of the taxation, which consequently dropped:—*Held*: M. was entitled to an order against J. for taxation & payment of the costs incurred by P. to him, M., up to the time when the taxation against J. dropped.—*Re MARGETSON & JONES*, [1897] 2 Ch. 314; 66 L. J. Ch. 619; 76 L. T. 805; 45 W. R. 645; 41 Sol. Jo. 625.

Annotations:—*Refd.* *Re Simmons' Contract*, [1908] 1 Ch. 452; *Yonge v. Toynbee*, [1910] 1 K. B. 215.

3138. ———.]—Pltf. brought an action to recover £400, the balance due under a building contract. Shortly before the action was expected to be in the paper for trial by an Official Referee, pltf. & deft. had an interview, the only other person present being deft.'s secretary, at which in spite of a written protest on the part of pltf.'s solr., they settled the action on certain terms, including the payment by deft. to pltf. of £200 in discharge of all claims including costs. Deft. gave pltf. a crossed cheque to order for £180 drawn on a country bank, & pltf., who was an undischarged bkpt., immediately indorsed it to one of his sons. On hearing of this, pltf.'s solr. required deft. to stop payment of the cheque, but deft. refused to do so. Thereupon, on an application by pltf.'s solr., the Official Referee made an order that deft. should pay pltf.'s solr. his costs on the ground that pltf. & deft. had settled the action behind the back of pltf.'s solr., knowing & intending that the settlement would have the effect of depriving the solr. of his costs:—*Held*: there was no evidence from

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which it could be inferred that deft. intended pltf.'s solr. to lose his costs.—**REYNOLDS v. REYNOLDS** (1909), 26 T. L. R. 104, C. A.

3139. — Client suing in formâ pauperis.]—Where a pauper pltf. settles the action behind the back of his attorney, it is entirely a question for the discretion of the ct., under the particular circumstances of the transaction, whether they will interfere & set aside the proceedings.

Where a pauper pltf. settled the action behind his attorney's back, by executing a release, but it appeared that he was the first to make the application, & that the arrangement was fair & reasonable, deft. having pleaded a plea of release *puis darrein continuance*, the ct. refused to set aside the deed & the plea at the instance of the attorney.—**JONES v. BONNER** (1848), 2 Exch. 230; 5 Dow. & L. 718; 17 L. J. Ex. 343; 154 E. R. 476.

3140. — The ct. will not interfere, even in the case of pltf. suing in formâ pauperis, to prevent effect being given to a settlement between the parties, although it be evident that the attorney will lose his costs, unless the settlement be clearly collusive.

In cases of this description the ct. requires a clear case of collusion to be made out before they will at the instance of pltf.'s attorney, interfere to prevent effect being given to an adjustment of the disputes between the parties themselves (WILDE, C.J.).—**FRANCIS v. WEBB** (1849), 7 C. B. 731; 137 E. R. 289.

Annotation:—Apld. *Brunsdon v. Allard* (1859), 5 Jur. N. S. 596.

3141. Solicitor agreeing to compromise on behalf of infant—Retention of lien.]—A solr. acting for infants in an action, in consenting to a judgment compromise whereby a specific fund brought into ct. in the action is ordered to be paid out to trustees for the benefit of the infants, is entitled to the ordinary solr.'s lien for his costs upon the interests of the infants in the fund as fully & effectually as he would have been entitled thereto had his clients been persons *sui juris*; & it is not necessary though it may be desirable, that his right under such lien should be expressly reserved by the judgment.—**Re WRIGHT'S TRUST, WRIGHT v. SANDERSON, Re SANDERSON'S TRUST, WRIGHT v. SANDERSON**, [1901] 1 Ch. 317; 70 L. J. Ch. 119; 83 L. T. 515, C. A.

B. Fraud or Collusion.

(a) In General.

3142. Must be clearly established.]—Where the parties settle a cause without the intervention of pltf.'s attorney, he cannot proceed to trial for his costs, unless he can clearly establish collusion between the parties to deprive him of his cost.—**NELSON v. WILSON** (1830), 6 Bing. 508; 4 Moo. & P. 385; 8 L. J. O. S. C. P. 226; 130 E. R. 1400.

Annotations:—Apld. *The Hope* (1883), 52 L. J. P. 63. **Refd.** *Hubert v. Steiner* (1835), 4 L. J. C. P. 233.

3143. — To entitle an attorney to proceed with a cause for the purpose of obtaining his costs,

after a settlement between the parties, he must show a clear case of collusion.—**ANON.** (1830), 9 L. J. O. S. Ex. 6.

3144. — An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, & that pltf. himself is not in a position to pay them; it must be shown affirmatively, that the settlement was come to for the purpose of cheating the attorney.—**JORDAN v. HUNT** (1835), 3 Dowl. 666; 1 Gale, 159.

3145. — Qu. : where in an action of trover, & verdict for pltf., proceedings are stayed, on deft. delivering up a chattel, & payment of costs, whether pltf.'s attorney has a lien for his costs on the chattel, so as to make deft. liable for the amount if, after notice, he delivers the chattel to pltf.

But to entitle pltf.'s attorney to issue execution for the damages recovered against deft., by reason of deft.'s enabling pltf. to get possession of the chattel, & thus to deprive the attorney of his lien, he must make out a case of collusion between the parties for that purpose.—**SMITH v. SMITH, Re CRAMOND** (1837), 6 L. J. C. P. 233; *sub nom. Ex p. CRAMOND, SMITH v. SMITH*, 1 Jur. 381.

3146. — FINCH v. GREGG (1843), 1 L. T. O. S. 167.

3147. — Motion to set aside the satisfaction entered on the roll, on ground of collusion between pltf. & deft. to deprive the attorney of his costs. In motions of this kind there must be gross fraud shown or the ct. will not interfere.—**PERRY v. ALLEN** (1845), 6 L. J. O. S. 174.

3148. — To warrant the ct. in setting aside a settlement of an action, even after final judgment signed, which has taken place between pltf. & deft. behind the back of the attorney, it is not enough that the consequence of such settlement will be that the attorney will be deprived of his costs, but it must be clearly shown that such a settlement was fraudulent & collusive.—**MOORE v. ANGELL** (1847), 2 New Pract. Cas. 191; 9 L. T. O. S. 131; 11 Jur. 455.

3149. — FRANCIS v. WEBB, No. 3110, *ante*.

3150. — An order will not be made upon deft. to pay to pltf.'s solr. the costs of an action for seaman's wages which has been settled by the parties without the intervention of pltf.'s solr., unless he can clearly establish collusion between the parties to deprive him of his costs.—**THE HOPE** (1883), 8 P. D. 144; 52 L. J. P. 63; 49 L. T. 158; 32 W. R. 269; 5 Asp. M. L. C. 126, C. A.

Annotations:—Consd. *Ross v. Buxton* (1889), 42 Ch. D. 190. **Refd.** *Re Margetson & Jones*, [1897] 2 Ch. 314; *Reynolds v. Reynolds* (1909), 26 T. L. R. 104.

3151. Onus of proof—On solicitor alleging collusion.]—**CLARK v. SMITH**, No. 3130, *ante*.

(b) Remedies of Solicitor.

3152. Attachment of money in court.]—Cash in the bank in the cause detained to answer the solr.'s bill of fees, & disbursements.—**FAIRLAND v. ENEVER** (1746), 1 Dick. 114; 21 E. R. 211.

PART VIII. SECT. 3, SUB-SECT. 4.—B. (a).

3142 i. Must be clearly established.]—**McFARLANE v. SMITH** (1887), 19 N. S. R. (7 R. & G.) 541; 8 C. L. T. 61.—**CAN.**

3142 ii. — Where a compromise of the action has been effected between the parties without the intervention of the solr., in order to entitle pltf.'s solr. to enforce his lien for costs upon the fruits of the litigation, by means of an order upon deft., collusion must

be shown, or the act complained of must have been done after notice from the solr. complaining.—**SANVIDGE v. IRELAND** (1890), 14 P. R. 29.—**CAN.**

3142 iii. — It is competent for a client to settle his action behind the back of his solr., notwithstanding that the solr. has given notice to the client & to the opposite party not to settle except with the solr.'s consent. Upon such a settlement, unless where collusion between the parties to defraud

ptf.'s solr. of his costs is clearly shown, a deft. will not be ordered to pay the costs of pltf.'s solr.—**BELLAMY v. CONNOLLY** (1892), 15 P. R. 87.—**CAN.**

3142 iv. — Where deft. pays money into ct. & afterwards compromises directly with pltf. by making a payment to him, pltf.'s solr. are not entitled to a charging order for their costs on the money in ct., unless there be proof of collusion between the parties to defraud the solr.—**TROPON v.**

3153. To proceed against bail.]—If pltf. collude with deft.'s bail & his attorney, to deprive pltf.'s attorney of his costs by settling a debt, & accepting a part payment without the intervention of pltf.'s attorney, the ct. will not restrain pltf.'s attorney from proceeding against the bail, in order to recover such costs.—*SWAIN v. SENATE* (1806), 2 Bos. & P. N. R. 99; 127 E. R. 561.

Annotations:—*Consd. Marr v. Smith* (1821), 4 B. & Ald. 466. *Distd. Dunn v. West* (1850), 15 Jur. 88.

3154. Execution of judgment.]—A pltf. compromising the debt with deft., & discharging an execution, without providing for his attorney's costs, the ct. will not permit the attorney of his own motion to sue out another execution for the costs. In such a case the attorney ought to apply to the ct. in the first instance.—*GRAVES v. EADES* (1814), 5 Taunt. 429; 1 Marsh. 113; 128 E. R. 755.

3155. —.]—*BARKER v. ST. QUINTIN*, No. 3070, *ante*.

3156. Order to restrain payment.]—The ct. will not order deft. not to pay the debt & costs to pltf., in fraud of pltf.'s attorney, although they may entertain a motion against deft., in case he should make such a fraudulent payment.—*ANON.* (1827), 5 L. J. O. S. K. B. 76.

3157. Order for delivery up of bill of exchange.]—When pltf. & deft. collude in the settlement of an action, in order to deprive pltf.'s attorney of his costs, & a bill for debt & costs is given by deft. in furtherance of that collusion, the ct. will compel the delivery up of that bill.—*GOULD v. DAVIS* (1831), 1 Cr. & J. 415; 1 Dowl. 288; 1 Tyr. 380; 9 L. J. O. S. Ex. 111; 148 E. R. 1484.

Annotations:—*Consd. Re Sullivan v. Pearson, Ex p. Morrison* (1868), L. R. 4 Q. B. 153. *Refd. Young v. Redhead* (1833), 2 Dowl. 119; *Clark v. Smith* (1844), 8 Jur. 406; *Dunn v. West* (1850), 15 Jur. 88; *Re Nymann v. Bray & Ward, Ex p. Jay* (1862), 7 L. T. 328; *Slater v. Sunderland Corp'n* (1863), 33 L. J. Q. B. 37; *Re Williams v. Lloyd, Ex p. Games* (1864), 3 H. & C. 294.

3158. Discharging order setting aside nonsuit.]—Where pltf. was nonsuited, & a rule was afterwards granted to set aside the nonsuit on payment of costs, & then the parties entered into an arrangement, without the intervention of deft.'s attorney, to settle the action, by deft.'s giving a bill of sale & warrant to pltf. for his debts & costs, but without providing for the costs due by deft. to his attorney & the attorney therefor got the rule discharged for setting aside the nonsuit:—*Held*: he was justified in so doing.—*YOUNG v. REDHEAD* (1833), 2 Dowl. 119, Ex. Ch.

Annotation:—*Apld. Bloomfield v. Blake* (1833), 2 Dowl. 272.

3159. Continuance of action.]—*Semle*: an

DRONEY, [1918] 1 W. W. R. 540; 39 D. L. R. 133; 13 Alta. L. R. 39.—*CAN.*

3142 v. —.]—*BICKLE v. MURRAY* (Alta.), [1924] 3 D. L. R. 214; [1924] 2 W. W. R. 369.—*CAN.*

3142 vi. —.]—*RAMANATH DUTT v. MATUNGINEE DOSSEE* (1873), 12 B. L. R. 110.—*IND.*

PART VIII. SECT. 3, SUB-SECT. 4.— B. (b).

3162 i. Setting aside release.]—The ct. will not set aside a release obtained, pending suit, by deft. from pltf., nor compel deft. to pay pltf.'s attorney his costs, where there has been no collusion.—*JOHNSTON v. MATHESON* (1853), 2 N. S. R. (James), 92.—*CAN.*

b. When court will interfere to protect solicitor.]—If, after notice by pltf.'s attorney to deft., a *bond fide* settlement, or without notice a collusive settlement be made by deft. with pltf., the ct. will interfere to pre-

vent the attorney being unjustly deprived of his costs.—*LANGLE v. FETTERLEY* (1849), 5 U. C. R. 628.—*CAN.*

3160. —.]—Where pltf. & deft. compromise an action with the knowledge that they are so acting as to deprive pltf.'s solr. of his costs, such solr. is entitled to an order for the payment of his taxed costs of the action by deft., or for continuance of the action for the recovery of such costs.—*PRICE v. CROUCH* (1891), 60 L. J. Q. B. 767.

Annotation:—*Folld. Re Margetson & Jones*, [1897] 2 Ch. 314.

3161. —.]—*Re MARGETSON & JONES*, No. 3137, *ante*.

3162. Setting aside release.]—The ct. will in general set aside a release, executed after action by a pltf. suing *in forma pauperis*, which would deprive the attorney appointed by the ct. of his costs.—*WRIGHT v. BURROUGHS* (1846), 3 C. B. 344; 4 Dow. & L. 226; 1 New Pract. Cas. 450; 15 L. J. C. P. 277; 7 L. T. O. S. 259; 10 Jur. 860; 136 E. R. 138.

Annotation:—*Consd. Jones v. Bonner* (1848), 2 Exch. 230.

3163. Resistance to stay of proceedings—Liberty to defendant to plead compromise.]—*SAUNDERSON v. CONSOLIDATED CREDIT & MORTGAGE CORPN., LTD.* (1890), 6 T. L. R. 404.

Where notice of lien disregarded.]—*See* Subsect. 4, C., *post*.

C. Effect of Notice.

3164. Necessity for express notice.]—If a pltf. compromise the debt & costs with deft. before pltf.'s attorney has been paid, the ct. will not oblige deft. to pay him, unless he gave notice to deft. not to settle with pltf. till his bill should be paid.—*WELSH v. HOLE* (1779), 1 Doug. K. B. 238; 99 E. R. 155.

Annotations:—*Apld. Griffin v. Eyles* (1789), 1 Hy. Bl. 122; *Graves v. Eades* (1814), 5 Taunt. 429. *Consd. Townsend v. Reade, Dooley v. Reade* (1835), 4 L. J. Ch. 233; *Barker v. St. Quintin* (1844), 12 M. & W. 441; *White v. Pearce* (1849), 7 Hare, 276; *Ross v. Buxton* (1889), 42 Ch. D. 190. *Refd. Read v. Dupper* (1795), 6 Term Rep. 361; *Brunsdon v. Allard* (1859), 7 W. R. 581; *Ex p. Games* (1864), 3 H. & C. 294. *The Leader* (1868), L. R. 2 A. & E. 311.

3165. — Damages unliquidated.]—In an action for excessive distress, deft. compromised with pltf., after notice from pltf.'s attorney not to do so without his consent.

The ct. refused to interpose on behalf of the attorney, the case being one of purely unliquidated

from deft. on the compromise, or that the compromise was not a *bond fide* one.—*Held*: pltf.'s attorney was not entitled to have the compromise set aside, on the ground that he might thereby be deprived of his costs.—*RAMANATH DUTT v. MATUNGINEE DOSSEE* (1873), 12 B. L. R. 110.—*IND.*

PART VIII. SECT. 3, SUB-SECT. 4.— —C.

3164 i. Necessity for express notice.]—Where a compromise of the action has been effected between the parties without the intervention of the solrs., in order to entitle pltf.'s solr. to enforce his lien for costs upon the fruits of the litigation, by means of an order upon deft., collusion must be shown, or the act complained of must have been done after notice from the solr. complaining.—*SANVIDGE v. IRELAND* (1890), 14 P. R. 29.—*CAN.*

3164 ii. —.]—Apart from any question as to there being fruits of the action & the absence of collusion, the

vent the attorney being unjustly deprived of his costs.—*LANGLE v. FETTERLEY* (1849), 5 U. C. R. 628.—*CAN.*

c. —.]—It is competent for a client to settle his action behind the back of his solr., notwithstanding that the solr. has given notice to the client & to the opposite party not to settle except with the solr.'s consent. The equitable interference of the ct. cannot be invoked on behalf of a solr. in an action settled in such a manner, unless there are fruits arising from such settlement upon which the solr.'s lien can attach; for there is no lien on the action.—*BELLAMY v. CONNOLLY* (1892), 15 P. R. 87.—*CAN.*

d. Setting aside compromise.]—Where the parties to a suit came to a compromise between themselves without the knowledge of pltf.'s attorney, when the suit was at such a stage that it did not appear that pltf. was entitled to recover anything, & there was no proof that he was to receive anything

Sect. 3.—Common law lien on property recovered or preserved: Sub-sect. 4, C.; sub-sect. 5, A.]

damages.—*Re TOVERY v. PAYNE, Ex p. HART* (1830), 1 B. & Ad. 660; 1 Dowl. 324; 1 D. L. J. O. S. K. B. 91; 109 E. R. 932.

Annotations:—Consd. Townsend v. Roade, Dooley v. Roade (1835), 4 L. J. Ch. 233. *Refd. Wright v. Burroughs* (1846), 15 L. J. C. P. 277.

3166. — To party charged.]—In an action for specific performance & damages deft. by his defence denied liability, but he paid into ct. £50 in satisfaction of all damages, if any, to which pltf. was entitled. He also counterclaimed for damages. After the reply had been delivered & notice of trial given, but before trial, pltf., without the knowledge or intervention of his solr., entered into negotiations with deft. & his solrs., which resulted in an agreement of Nov. 2, 1888, that the action should be settled on the terms that pltf. should receive the £50 paid into ct. in full discharge of all claim by him, deft. to do whatever might be necessary to enable pltf. to obtain payment out of ct. of the £50. On Nov. 3, 1888, pltf. signed a notice of his intention to appear in person, which was served upon his solr. On Nov. 4, pltf.'s solr. wrote to deft.'s solr., giving them notice not to pay pltf. any money until his costs in the action had been paid. On Nov. 10, deft.'s solrs. obtained payment out of ct. to themselves of the £50, & on Nov. 13 they paid it over to pltf.

There was no evidence that the compromise was entered into to deprive pltf.'s solr. of his costs:—*Held*: the £50 must be treated as the fruits of the action, & after express notice of pltf.'s solr.'s lien, neither deft., nor his solrs., were entitled to pay that money to pltf. in disregard of the notice. Inasmuch as the money did not come to deft.'s hands, & no notice was given to him, he was under no liability to pltf.'s solr.; but pltf. & deft.'s solrs. were liable to pay to pltf.'s solr. the £50 or such less sum as should satisfy his lien.

The solr.'s lien is merely in truth a claim for the equitable interference of the ct. on behalf of the solr. (*STIRLING, J.*).—*ROSS v. BUXTON* (1889), 42 Ch. D. 190; 58 L. J. Ch. 442; 60 L. T. 630; 54 J. P. 85; 38 W. R. 71.

Annotations:—Apld. The Paris, [1896] P. 77. Refd. Watts v. Hetley (1899), 44 Sol. Jo. 134.

3167. Liability where notice disregarded—Of opposing solicitor.]—If deft.'s attorney pay to pltf. the debt & costs recovered, after notice from pltf.'s attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt & costs of the suit.—*READ v. DUPPER* (1795), 6 Term Rep. 361; 101 E. R. 595.

Annotations:—Consd. Townsend v. Reade, Dooley v. Reade (1835), 4 L. J. Ch. 233; *Ross v. Buxton* (1889), 42 Ch. D. 190. *Refd. Taylor v. Watson* (1829), 4 Man. & Ry. K. B. 259; *The Araminta* (1856), Sw. 81.

3168. — — —.]—*ROSS v. BUXTON*, No. 3166, *ante*.

3169. — Of client.]—An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment: & if after notice to deft. the latter pay it over to pltf., pltf.'s attorney

may compel a repayment of it to himself, & he will not be prejudiced by a collusive release from pltf. to deft.—*ORMEROD v. TATE* (1801), 1 East, 464; 102 E. R. 179.

Annotations:—Consd. Slater v. Sunderland Corpn. (1863), 33 L. J. Q. B. 37; *Ross v. Buxton* (1889), 42 Ch. D. 190. *Refd. The Araminta* (1856), Sw. 81; *Moguerditchian v. Lightbound* (1917), 116 L. T. 790.

3170. — — —.]—A suit was compromised between pltf. & deft. by payment by the latter to the former of a certain sum. Deft. had notice of the lien of pltf.'s solrs. for the costs of the suit. Ordered, on the petition of the solrs., that pltf. & deft., or one of them, should pay the solrs. their taxed costs of the suit & of the petition not exceeding in the whole the sum paid by deft. to pltf. on the compromise.—*WHITE v. PEARCE* (1849), 7 Hare, 276; 18 L. J. Ch. 462; 14 L. T. O. S. 218; 13 Jur. 999; 68 E. R. 113.

Annotation:—Consd. Ross v. Buxton (1889), 42 Ch. D. 190.

3171. — — —.]—After declaration pltf. executed a release to deft. & gave his own attorney notice not to proceed; the release was pleaded; to this plea there was a replication confessing the release; judgment was signed for the costs, & writ of execution issued. Notice was then given to the sheriff by pltf. not to execute process on peril of being treated as a trespasser, & thereupon pltf.'s attorney obtained an order, calling on pltf. "or deft." to pay his costs:—*Held*: this was a proper case for the interference of the ct., & the form of the order was good.—*Ex p. GAMES* (1861), 3 H. & C. 294; 33 L. J. Ex. 317; 159 E. R. 543.

Annotations:—Consd. Ex p. Morrison (1868), L. R. 4 Q. B. 153. *Refd. Langley v. Headland* (1865), 6 New Rep. 173.

3172. — Of opposing party.]—*WHITE v. PEARCE*, No. 3170, *ante*.

3173. — — —.]—*Ex p. GAMES*, No. 3171, *ante*.

3174. — Of third party.]—*TOWNSEND v. READE, DOOLEY v. READE*, No. 3080, *ante*.

SUB-SECT. 5.—EFFECT OF SET-OFF OF JUDGMENT, COSTS, ETC.

A. Proceedings in Same Action.

See, now, R. S. C., Ord. 65, r. 14.

3175. Whether solicitor's lien displaced—Interlocutory costs.]—Pltf. is entitled to set off interlocutory costs in the same cause, payable by him to deft., against the debt & costs recovered by him on the final result of the cause; notwithstanding the objection, of deft.'s attorney on the ground of his lien, which only attaches on the general result of the costs, etc., of the cause.—*HOWELL v. HARDING* (1807), 8 East, 362; 103 E. R. 382.

Annotations:—Apld. Lang v. Webber (1815), 1 Price, 375. *Distd. Aspinall v. Stamp* (1824), 4 Dow. & Ry. K. B. 716. *Apld. R. v. Burke* (1829), 7 L. J. O. S. K. B. 330.

3176. — — —.]—*LANG v. WEBBER* (1815), 1 Price, 375; 145 E. R. 1434.

Annotation:—Consd. Redit v. Lucock (1833), 1 L. J. Ex. 16.

lien of a solr. for his costs of the action is dependent upon notice, which must be clear & explicit to the opposite party, that his costs are unpaid, & that he looks to the proceeds of the action for the payment thereof.—*DE SANTIS v. CANADIAN PACIFIC RY. CO.* (1907), 9 O. W. R. 331; 14 O. L. R. 108.—*CAN.*

3172 i. Liability where notice disregarded—Of opposing party.]—*CULLINANJI v. RAGHOWJI* (1904), 1 L. R. 30 Bom. 27.—*IND.*

e. — — —.]—If, after notice by pltf.'s attorney to deft., a *bond fide* settlement be made by deft. with pltf., the ct. will interfere to prevent the attorney being unjustly deprived of his costs.—*LANGLEY v. FETTERLEY* (1849), 5 U. C. R. 628.—*CAN.*

f. — — —.]—*HALL v. GRIFFITH* (1884), 5 O. R. 478.—*CAN.*

g. Sufficiency of notice — Notice after agreement but before payment.]—Where a compromise of the action has been effected between the parties

without the intervention of the — — — & pltf.'s solr. gave notice to deft.'s solr. after the agreement but before payment of the money agreed upon:—*Held*: this was sufficient notice.—*SANVIDGE v. IRELAND* (1890), 14 P. R. 29.—*CAN.*

PART VIII. SECT. 3, SUB-SECT. 5. — A.

3175 i. Whether solicitor's lien displaced—Interlocutory costs.]—*DAWSON v. MOFFATT* (1884), 10 P. R. 366.—*CAN.*

3177. ———.]—Pltf. after giving notice of trial withdrew his record, & deft. obtained a rule for payment of the costs of the day which were taxed. At the next assize, pltf. obtained a verdict, & a new trial was afterwards granted on payment of costs:—*Held*: deft. might set off the costs due to him against those payable on the rule for the new trial.—*DOE d. DANGERFIELD v. ALLSOP* (1829), 9 B. & C. 760; 7 L. J. O. S. K. B. 331; 109 E. R. 283.

Annotation:—*Apld.* *Marshall v. Geary* (1830), 9 L. J. O. S. K. B. 9.

3178. ———.]—A rule was obtained by deft.'s attorney to set aside the service of the writ for irregularity, with costs. Deft. afterwards became bkpt.:—*Held*: pltf. might set off his debt against the costs of that rule; & deft.'s attorney had no lien upon those costs.

The case of *Doe d. Dangerfield v. Allsop*, No. 3177, *ante*, confirmed the principle that the lien of the attorney does not extend to interlocutory costs (LITLEDAL, J.).—*MARSHALL v. GEARY* (1830), 9 L. J. O. S. K. B. 9.

3179. ———.]—Interlocutory costs due to one party may be set off against final costs due to the opposite party without regard to the attorney's lien.—*HOLLIDAY v. LAWES* (1837), 3 Bing. N. C. 774; 3 Hodg. 130; 132 E. R. 609; *sub nom.* *HALLIDAY v. LAWES*, 4 Scott, 475; *sub nom.* *HOLIDAY v. LAWES*, 6 L. J. C. P. 237.

3180. ———.]—Costs receivable & payable by two parties, ordered to be mutually set off, without regard to the lien of the solrs.—*CATTIEL v. SIMONS* (1843), 6 Beav. 304; 49 E. R. 843.

Annotations:—*Apld.* *Re Bank of Hindustan, China & Japan* (1867), 17 L. T. 193; *Roberts v. Buée* (1878), 8 Ch. D. 198. *Refd.* *Bryon v. Metropolitan Saloon Omnibus Co.* (1859), 4 Drew. 546.

3181. ———.]—Costs of issues in fact found for pltf., & costs of a judgment on demurrer given for deft., in the same suit, "are interlocutory costs," within the meaning of the 93rd rule of Hilary Term, 1831, & may be set off against each other, without regard to the attorney's lien.—*SCOTT v. DE RICHEBOURG (COUNT)* (1851), 11 C. B. 447; 20 L. J. C. P. 263; 15 Jur. 882; 138 E. R. 547.

Annotations:—*Refd.* *Melville v. Leeson* (1858), 27 L. J. Q. B. 318; *Little v. Philpotts* (1862), 2 B. & S. 383.

3182. ———.]—Unless payment made condition precedent.]—By a judge's order deft. was allowed to go to trial upon payment of a certain sum of money, together with the costs of the cause up to the date of the order; & deft. having recovered a verdict without previously complying with the terms of the order:—*Held*: the costs taxed in his favour on the *postea* could not be set off against the interlocutory costs, so as to deprive pltf.'s attorney of his lien.—*ASPINALL v. STAMP* (1824), 3 B. & C. 108; 4 Dow. & Ry. K. B. 716; 107 E. R. 674.

Annotation:—*Distd.* *Doe d. Dangerfield v. Allsop* (1829), 9 B. & C. 760.

3175 ii. ———.]—*WORDEN v. CAN.* (1897), 1 N. B. Eq. Rep. 450.

3175 iii. ———.]—*ELGIE v. BUTT* (1899), 18 P. R. 469.—*CAN.*

3175 iv. ———.]—Deft is entitled to a set-off of interlocutory costs in the same case, payable to him by pltf., against the damages & costs recovered against him in the final result of the cause; notwithstanding pltf.'s attorney's lien, which only attaches on the general result of the action.—*ANDERSON v. SHAW* (1901), 35 N. B. R. 280.—*CAN.*

3186 i. ———.]—*Costs of separate parties.*—One of the several defts. in a cause,

against all of whom a verdict had been recovered, was allowed, on a summary application after judgment, to set off the amount of a judgment, which he had recovered against pltf., against pltf.'s judgment against him & his co-defts., saving to the attorney his lien for costs.—*FORTUNE v. HICKSON* (1842), 1 U. C. R. 408.—*CAN.*

h. ———.]—*Lien for advance to client for amount of judgment.*—*CAMERON v. CAMPBELL* (1854), 12 U. C. R. 159; 1 P. R. 170.—*CAN.*

k. ———.]—*Con.* Rule 1164 is special authority for setting off the costs taxable to deft. against those taxable against him without any saving of the

3183. ———.]—Costs payable to the parties in the course of interlocutory proceedings in a cause, may be set off against each other, notwithstanding the attorney's lien. Thus, where in an indictment, both deft. & prosecutor gave notice of trial, both made default, & there were rules upon each to pay the costs of the day to the other, it was held, that the costs upon one of those rules might be set off against the costs of the other notwithstanding the lien of the attorney. But where the payment of such interlocutory costs is made a condition precedent to the party having the benefit of any proceeding, such costs cannot be set off against interlocutory costs which may become due to the party in a subsequent stage of the cause. They may, however, be set off against interlocutory costs due to the party before the costs which are to be paid as a condition precedent became payable.—*R. v. BURKE* (1829), 7 L. J. O. S. K. B. 330.

3184. ———.]—Interlocutory costs may be set off against final costs, subject to the attorney's lien.—*DOE d. HOPE v. CARTER* (1832), 1 Dow. 269; 1 Moo. & S. 516; 1 L. J. C. P. 97.

Annotation:—*Distd.* *Holliday v. Lawes* (1837), 3 Hodg. 130.

3185. ———.]—*Though change of solicitor.*—Sums of costs incurred in the same suit or proceedings, though payable under different orders, may be set off against each other; & this right of the parties is not affected by the solr.'s lien. So held, where deft., after becoming liable under orders in the suit to pay costs to pltf., had changed his solr., & subsequently under another order became entitled to receive a smaller sum of costs from pltf.; & although the application to set off was made by pltf. after notice from deft.'s solr. that he claimed a lien upon the smaller sum.—*ROBERTS v. BUÉE* (1878), 8 Ch. D. 198; 47 L. J. Ch. 414; 26 W. R. 303.

Annotations:—*Refd.* *Blakey v. Latham* (1889), 41 Ch. D. 518; *Hall v. Hall*, [1891] P. 302; *Westcott v. Bevan*, [1891] 1 Q. B. 774.

3186. ———.]—*Costs of separate parties.*—Where a verdict was found against one of three defts., & in favour of the other two, the ct. deducted the costs of the two out of pltf.'s costs & damages against the one, without regard to pltf.'s attorney's lien.—*GEORGE v. ELSTON* (1835), 1 Bing. N. C. 513; 3 Dow. 419; 1 Hodg. 63; 1 Scott, 518; 4 L. J. C. P. 167; 131 E. R. 1215.

Annotations:—*Consd.* *Starling v. Cozens* (1835), 2 Cr. M. & R. 445. *Apld.* *Lees v. Reffitt* (1835), 3 Ad. & El. 707; *Sidney v. Ranger* (1845), 6 L. T. O. S. 165; *Scott v. De Richebourg* (1851), 11 C. B. 447. *Refd.* *Eades v. Everett* (1835), 4 L. J. Ex. 221.

3187. ———.]—Where, in trespass against A. & B., the verdict is for A. & against B., the costs of A. may be set off against the costs payable by B. without regard to the lien of pltf.'s attorney although A. & B. plead separately, & appear by separate attorneys & counsel.—*LEES v. REFFITT*

solr.'s lien.—*LEVI BLUMENSTIEL & Co. v. EDWARDS* (1905), 11 O. L. R. 30; 5 O. W. R. 796; 6 O. W. R. 734.—*CAN.*

l. ———.]—A solr.'s lien upon costs, or upon a fund recovered through him by a party in an action is subject to the rights of the parties *inter se*, including the right of set-off or deduction of costs as between successful & unsuccessful defts.—*M CORMACK v. ROSS*, [1894] 2 I. R. 545.—*IR.*

m. *Discretion of court.*—Allowance of set-off for costs between parties under Rule 20 as to costs, notwithstanding solr.'s lien for costs, is a matter of the ct.'s discretion.—*SUTHERLAND v. SPRUCE GROVE No.*

K. B. Div. for payment by pltf. of the arrears of interest then due on the loan & recovered judgment with costs. On an application by deft. in the Chancery action that he might be at liberty to set off the costs ordered to be paid by him to pltf. against the sum ordered to be paid by pltf. to him in the K. B. action:—*Held*: (1) the ct. had a discretion to allow a set-off; (2) having regard to the fact that pltf.'s claim in the Chancery action might have been raised by counterclaim in the K. B. action, in which case a set-off would have been a matter of course, the ct. ought to allow the set-off notwithstanding pltf.'s solr.'s lien.—*PUDDEPHATT v. LEITH* (No. 2), [1916] 2 Ch. 168; 85 L. J. Ch. 543; 114 L. T. 1159; 60 Sol. Jo. 568.

Annotation:—As to (2) *Consd.* *Knight v. Knight*, [1925] Ch. 835.

3196. High Court & county court proceedings.—Costs in the High Ct. cannot be set off against costs obtained in the county ct. although the proceedings are between the same parties. R. S. C., Ord. 65, r. 14, does not apply to costs in independent proceedings.—*HASSELL v. STANLEY*, [1896] 1 Ch. 607; 65 L. J. Ch. 494; 74 L. T. 375; 44 W. R. 405; 40 Sol. Jo. 356.

Annotations:—*Consd.* *David v. Rees*, [1904] 2 K. B. 435. *Expld.* *Reid v. Cupper*, [1915] 2 K. B. 147.

3197. Whether solicitor's lien defeated.—If A. recover against C. & C. recover against A. & B. the ct. will permit C. on motion to set off the damages which he has recovered against those obtained by A. on his undertaking that the bill of A.'s attorney in the first action shall be satisfied, he having a lien on the judgment for his costs.—*MITCHELL v. OLDFIELD* (1791), 4 Term Rep. 123; 100 E. R. 929.

Annotations:—*Apld.* *Randle v. Fuller* (1795), 6 Term Rep. 156. *Expld.* *Howell v. Harding* (1807), 8 East, 362. *Mentd.* *Doc v. Darnton* (1802), 3 East, 149.

3198. —.]—Where there are costs in equity & at law due from the opposite parties, the ct. will not set off the costs at law against those in equity, if the solr. in equity claims his lien on the latter.—*SMITH v. BROCKLESBY* (1792), 1 Anst. 61; 145 E. R. 800.

Annotation:—*Consd.* *Lane v. Pearce* (1823), 12 Price, 742.

3199. —.]—*MORLAND & HAMMERSLEY v. LASHLEY* (1791), 2 Hy. Bl. 441, n.; 126 E. R. 638.

3200. —.]—*GABBIT v. CHAYTOR* (1793), 1 Anst. 279; 145 E. R. 872.

Annotation:—*Refd.* *Lane v. Pearce* (1823), 12 Price, 742.

3201. —.]—The ct. will allow the costs recovered by A. against B. in one action to be set off & deducted from the damages & costs recovered by B. against A., C. & E. in another action, notwithstanding the attorney of B. swears that he believes B. to be insolvent, & that there is no fund out of which the attorney's costs can be paid, but the damages & costs so recovered by B.—*DENNIE v. ELLIOTT* (1795), 2 Hy. Bl. 587; 126 E. R. 719.

3202. —.]—The lien of pltf.'s attorney upon the debt & costs recovered in the cause must be satisfied before deft. is entitled to set off the costs recovered by him in another cause against pltf.,

upon a summary application to the ct.—*RANDLE v. FULLER* (1795), 6 Term Rep. 456; 101 E. R. 646.

Annotations:—*Distd.* *Howell v. Harding* (1807), 8 East, 362; *Taylor v. Cook* (1830), You. 201.

3203. —.]—The lien of pltf.'s attorney upon the debt & costs recovered in the cause after affirmance upon writ of error, must be satisfied before defts. are entitled to set them off against a judgment recovered by them in another cause against pltf.; & costs in error are costs in the cause.—*MIDDLETON v. HILL* (1813), 1 M. & S. 240; 105 E. R. 90.

Annotations:—*Apld.* *Stephens v. Weston* (1821), 3 B. & C. 535. *Refd.* *Bull v. Faulkner* (1848), 2 De G. & Sm. 772.

3204. —.]—The ct. will not direct the costs of a suit & of an action between the same parties to be set off against each other.—*WRIGHT v. MUDIE* (1823), 1 Sim. & St. 266; 1 L. J. O. S. Ch. 136; 57 E. R. 107.

Annotations:—*Apld.* *Bake v. French*, [1907] 1 Ch. 428. *Consd.* *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168. *Refd.* *Re Adams, Ex p. Griffin* (1880), 14 Ch. D. 37.

3205. —.]—A bill in equity was dismissed with costs, & pltf. brought an action for the same cause, & recovered a verdict. The costs in equity may be set off against the judgment, subject to the lien of the attorney.—*HARRISON v. BAINBRIDGE* (1824), 2 B. & C. 800; 4 Dow. & Ry. K. B. 363; 2 L. J. O. S. K. B. 171; 107 E. R. 580.

Annotations:—*Expld.* *Stephens v. Weston* (1824), 3 B. & C. 535. *Apld.* *Webber v. Nicholas* (1826), 5 L. J. O. S. C. P. 19.

3206. —.]—Where an action is brought for a simple contract debt, which is not denied, the ct., on motion, will set off a judgment obtained by deft. against pltf. in that action; subject to the lien of the attorney in the judgment for his costs.—*RUSSELL v. MAY* (1828), 7 L. J. O. S. K. B. 88.

3207. —.]—No set-off of judgments will be allowed, even though they arise out of the same award, without satisfying the attorney's lien.—*DOMETT v. HELYER, HELYER v. DOMETT* (1834), 2 Dowl. 540.

Annotation:—*Consd.* *Little v. Philpotts* (1862), 2 B. & S. 383.

3208. —.]—A., in an action, became entitled to receive costs from B., & in a suit respecting the same matters, he became liable to pay costs to B. A., being unable to obtain payment, asked by petition that the costs might be set off, but the application was refused.

I must refuse the prayer of this petition. . . . I could not grant it without interfering with the solr.'s lien (*ROMILLY, M.R.*).—*COLLETT v. PRESTON* (1852), 15 Beav. 458; 51 E. R. 615.

Annotations:—*Consd.* *Throckmorton v. Crowley* (1866), L. R. 3 Eq. 196. *Distd.* *Roberts v. Buée* (1878), 8 Ch. D. 198. *Apld.* *Re Harald, Wilde v. Walford* (1883), 52 L. J. Ch. 435.

3209. —.]—An attorney conducting a cause for pltf., though not the attorney on the record, after verdict, but before judgment, *bond fide* purchased from his client the benefit of his verdict, & gave notice of this to deft. Afterwards same pltf. became nonsuited in another action against

3197 i. Whether solicitor's lien defeated.—When the ct. allows one judgment to be set off against another, it must be subject to the attorney's lien generally, & not merely to the extent of the taxed costs in the particular suit.—*ROGERS v. LEDDEN* (1842), 2 Kerr, 59.—CAN.

3197 ii. —.]—*REED v. SMITH* (1853), 1 P. R. 321.—CAN.

3197 iii. —.]—Where judgment was given for payment by pltf. to the insolvent deft. of the costs of the action, & deft.'s solrs. were by an order of ct. declared to have a lien upon such

judgment, & to have the sole right to control the judgment & execution to the extent of their costs between solr. & client, & pltf. became entitled against deft. to costs of garnishing proceedings upon the judgment, begun before the lien was declared:—*Held*: Rule 1205 did not apply to enable a set-off of the costs to be made.—*CLARKE v. CREIGHTON* (1890), 14 P. R. 100.—CAN.

3197 iv. —.]—*Semble*: when costs in a particular suit are payable to & by different parties to it there may be a set off, & no question of the solr.'s lien

will be entertained to prevent it.—*THOMPSON v. DIBION* (1891), 10 Man. L. R. 301.—CAN.

3197 v. —.]—There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solr.'s lien: that is the effect of Rule 1205.—*TURNER v. DREW* (1897), 17 P. R. 475.—CAN.

3197 vi. —.]—*Prima facie* a set-off of the costs of two actions should not be refused owing to a solr.'s lien for costs if as between the parties themselves it would be just to allow it & if no fraud or imposition has been

Sect. 3.—Common law lien on property recovered or preserved: Sub-sect. 5, B.; sub-sect. 6, A.]

same debts. A rule having been obtained to set off the one judgment against the other:—*Held*: the set-off was subject not only to the lien for costs, but to any equitable rights acquired in the judgment.—*SIMPSON v. LAMB* (1857), 7 E. & B. 84; 26 L. J. Q. B. 121; 28 L. T. O. S. 245; 3 Jur. N. S. 412; 5 W. R. 227; 119 E. R. 1179.

Annotations:—*Mentd.* *Smith v. Selwyn* (1857), 5 W. R. 682; *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Anderson v. Radcliffe* (1860), E. B. & E. 806; *Hilton v. Woods* (1867), L. R. 4 Eq. 432; *Davis v. Freethy* (1890), 24 Q. B. D. 519; *Pittman v. Prudential Deposit Bank* (1896), 13 T. L. R. 110.

3210. —.—.]—Where pltf. is ordered to pay costs on interlocutory applications, which are partly in respect of matters in the suit itself, & partly in other suits, deft. has a right to set off those costs against costs which he is ordered to pay, where pltf. is alone the applying party; but where he is not, but others join with him as to their interests, there is no such right of set-off.—*JENNER v. MORRIS, WEBSTER v. JENNER* (1863), 2 New Rep. 479; 11 W. R. 943.

3211. —.—.]—A. having obtained a verdict against B. & co., his bankers, for the amount of his cash balance & nominal damages for dishonouring his cheque, & B. & co. having brought actions against A. upon bills of exchange to a larger amount which they had discounted for him, the judge stayed the execution in A.'s action until the fifth day of the following term. B. & co.'s actions in the meantime ripened into judgments. The ct. allowed the judgments to be set off against each other, subject to the lien, if any, of A.'s attorney, notwithstanding A. had in the meantime become bkpt., & thus the interests of third parties had intervened.—*ALLIANCE BANK OF LONDON & LIVERPOOL, LTD. v. HOLFORD, HOLFORD v. ALLIANCE BANK OF LONDON & LIVERPOOL, LTD.* (1864), 16 C. B. N. S. 460; 143 E. R. 1207.

3212. —.—.]—An adjudication in bkpcy. obtained by D. against C. was set aside, & D. was ordered to pay C. his costs, for which, if not paid when taxed, C. was to be at liberty to issue execution. D. then executed an assignment to trustees for his creditors in the form of Bankruptcy Act, 1861 (c. 134), Sched. D. The costs were afterwards taxed. C. at the date of the deed owed D. a sum exceeding the amount of the taxed costs. If C., who had not acceded to the deed, was reckoned as a creditor of D. for the amount of taxed costs, the deed was not assented to by the requisite majority of creditors. C.'s solr. had not been paid his bill of costs in the bkpcy. proceedings, & claimed his lien on the costs payable by D.:—*Held*: C.'s solr. was entitled to a lien on the costs ordered to be paid by C. to D., & therefore the debt due from C. to D. could not be set off against them.—*Re DAVIES, Ex p. CLELAND* (1867), 2 Ch. App. 808; 36 L. J. Bey. 45; 17 L. T. 187; 15 W. R. 1160, L. J.

Annotations:—*Distd.* *Mercer v. Graves* (1872), L. R. 7 Q. B. 499. *Consd.* *Robert v. Buë* (1878), 8 Ch. D. 198. *Reid.* *Wilde v. Walford* (1883), 31 W. R. 518; *Re City Life Asso.*, *Grandfield's Case*, *Stephenson's Case*, [1926] Ch. 191.

3213. —.—.]—Declaration on orders having the

practised upon the solr. by collusion between them. This principle was applied where it did not appear that the solr. could not recover his costs from his client.—*UNION BANK OF CANADA v. BALLARD*, [1919] 3 W. W. R. 988, 49 D. L. R. 640.—CAN.

3197 vii. —.—.]—Where on an application by debts. that satisfaction of a decree obtained against them by pltf.

should be entered by setting-off a decree upon an award in their favour against pltf., it appeared that a prohibitory order had been made against pltf. in execution of a decree obtained by a third party, & the attorney for pltf. claimed a lien for costs on such decree:—*Held*: debts.' application to set-off was proper, but that this was not a case in which the ct. ought to hold that the solr.'s lien intercepts the

force of judgments of nonsuit, in suits which deft. had brought against pltf. in Ireland. Plea of set off on judgments recovered by deft. against pltf. in Ireland. Replication on equitable grounds, that deft. ought not to be allowed to set off against pltf.'s claim the amount mentioned in the plea, because pltf. retained one C. as his attorney to conduct his defence in the suits in the declaration mentioned, & pltf. owes him the full amount of the costs, & C. has a lien upon the orders, & the amounts are therefore due from deft. to pltf. as trustee for C., & pltf. sues as such trustee. On demurrer:—*Held*: the replication was bad, for the fact, that an attorney had obtained a judgment for a client, & that costs were due to the attorney, did not raise the relation of trustee & *cestui que trust* between the client & the attorney with respect to the proceeds of such judgment; & the so-called lien of the attorney was merely a claim to the protection of the ct. as to his costs when the equitable interference of the ct. is asked for the purpose of setting off one judgment against another.—*MERCER v. GRAVES* (1872), L. R. 7 Q. B. 499; 41 L. J. Q. B. 212; 26 L. T. 551; 20 W. R. 605.

Annotations:—*Expld.* *Robert v. Buë* (1878), 8 Ch. D. 198. *Consd.* *Heiron v. Hobson* (1878), 47 L. J. Ch. 574; *Blakey v. Latham* (1889), 41 Ch. D. 518; *North v. Stewart* (1890), 15 App. Cas. 452. *Reid.* *Re Knight*, *Knight v. Gardner*, [1892] 2 Ch. 368; *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168.

3214. —.—.]—A partnership suit having been compromised upon the terms (*inter alia*) of pltf. taking the assets, & covenanting to pay thereout & to the extent thereof the costs of the suit, etc., & deft. covenanting, as soon as the above liabilities had been discharged, to pay in a certain event a sum of money to pltf.; by an order in the suit the compromise was confirmed, & pltf. was ordered to pay the costs as covenanted out of assets to be received by him. An account was afterwards settled between the parties, which showed assets in excess of liabilities including the costs; but pltf., afterwards alleging that the moneys had become payable under deft.'s covenant, claimed to set them off against deft.'s costs. Upon an application by deft. & his solr. for an order for payment of his costs:—*Held*: apart from other considerations, the solr. intervening had such a lien on deft.'s costs payable under the order as precluded the set off.—*HEIRON v. HOBSON* (1878), 47 L. J. Ch. 574.

3215. —.—.]—*REID v. CUPPER*, No. 3194, *ante*.

3216. —.— **Actions consolidated.**—The provisions, as to set-off of costs of R. S. C., Ord. 65, rr. 14, 27, (21), have no application to costs in independent proceedings; & notwithstanding the consolidation order, the costs are in independent proceedings; as under the practice before those rules there could be no set-off in independent proceedings otherwise than subject to the solr.'s lien for costs.—*BAKE v. FRENCH*, [1907] 1 Ch. 428; 76 L. J. Ch. 299; 96 L. T. 496; 51 Sol. Jo. 326.

Annotations:—*Consd.* *Reid v. Cupper*, [1915] 2 K. B. 147. *N.F.* *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168.

3217. —.— **Solicitor allowing client to set up debt independently of lien.**—*SCOTT v. PEAK HILL GOLDFIELDS, LTD.* (1908), *Times*, Nov. 16, C. A.

set-off claimed.—*BRUPENDEA NATH BHOSSE v. SASSOON & Co.* (1916), I. L. R. 43 Calc. 932.—IND.

3197 viii. —.—.]—*JOHNSTON v. MACKENZIE*, [1911] 2 I. R. 118.—IR.

o. —.— **Cross-actions at law & equity.**—*WEBB v. MCARTHUR* (1872), 4 Ch. Ch. 63.—CAN.

p. *Whether counterclaim to be treated*

Claim in second action raiseable by counterclaim.]—PUDDEPHATT *v.* LEITH (No. 2), No. 3195, *ante*.

3219. — Practice in county court.]—By County Courts Act, 1888 (c. 43), s. 150, "if there shall be cross-judgments between the parties execution shall be taken out by that part only who shall have obtained judgment for the larger sum, & for so much only as shall remain after deducting the smaller sum, & satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; & if both sums shall be equal, satisfaction shall be entered upon both judgments":—*Held*: this sect. applied where there were cross-judgments in separate actions, & not merely where there were cross-judgments upon claim & counterclaim in the same action; also it applied where the party against whom judgment had been obtained for the larger sum had paid that sum into ct. so that no execution was taken out; also that the party against whom judgment had been obtained for the larger sum was entitled to have deducted from the sum paid into ct. the smaller sum for which he had obtained judgment, & the balance only between the larger & smaller sums should be paid out to the party who had obtained judgment for the larger sum, notwithstanding that the solr. for the party who had obtained judgment for the larger sum claimed a lien for his costs which exceeded in amount the sum paid into ct.—WARD *v.* HADDRILL, [1904] 1 K. B. 399; 73 L. J. K. B. 277; 90 L. T. 232; 52 W. R. 398; 48 Sol. Jo. 246, D. C.

Reference by court to arbitrator.]—See ARBITRATION, Vol. II., p. 612, Nos. 2430–2433.

SUB-SECT. 6.—AVAILABILITY AGAINST THIRD PARTIES.

A. In General.

3220. Solicitor's right no greater than client's.]—An attorney has only such a lien on the costs as is subject to the equitable claims of the parties in the cause.—SCHOOLE *v.* NOBLE (1788), 1 Hy. Bl. 23; 126 E. R. 15.

Annotations:—**Consd.** Nunez *v.* Modigliani (1789), 1 Hy. Bl. 217. **Folid.** Denme *v.* Elliott (1795), 2 Hy. Bl. 588; George *v.* Elston (1835), 1 Bing. N. C. 513. **Refd.** Holroyd *v.* Breare (1820), 4 B. & Ald. 43.

3221. —.]—The order, establishing the solr.'s lien for costs upon the fund of assets, appropriated to the client, subject to securing a debt, from him, & testator as his surety, & afterwards paid by the estate of the latter, was reversed; as being inconsistent with the decrees. In equity the costs are arranged according to the equities of the parties; & the solr.'s lien is only upon the balance under that arrangement.—TAYLOR *v.* POPHAM, MONKE *v.* TAYLOR (1808), 15 Ves. 72; 33 E. R. 682.

Annotations:—**Appld.** Lane *v.* Pearce (1823), 12 Price, 742. **Expld.** Wright *v.* Mudie (1823), 1 Sim. & St. 266. **Consd.** Re Jones & Roberts (1905), 74 L. J. Ch. 458. **Refd.** Angell *v.* Davis (1839), 4 My. & Cr. 360; Puddephatt *v.* Leith (No. 2), [1916] 2 Ch. 168. **Mentd.** Re Bradford, Thursby, Bradford & Farish (1883), 48 L. T. 765.

3222. —.]—The rights between party & party are paramount to the rights between one of the parties & his attorney. Therefore where

as separate action.—To protect solicitor's lien.]—CANADIAN PACIFIC RY. CO. *v.* GRANT (1885), 11 P. R. 208.—CAN.

q. —.]—Where pltf. obtains judgment for part of his claim with costs, except the costs of certain issues upon which deft. succeeds, the costs of which are given to deft., & deft. obtains judgment for part of his counterclaim with costs except the

costs of certain issues upon which pltf. succeeds, the costs of which are given to pltf., the counterclaim is not to be regarded as a separate action so as to give pltf.'s solr. a lien for costs upon the amount recovered for his client so as to defeat deft.'s right to a set-off.—LESPERANCE *v.* MOLLOT (1916), 34 W. L. R. 212; 10 W. W. R. 292.—CAN.

one party owing rent, had obtained a verdict on a variance, & had become insolvent, the ct. permitted the avowant to amend & to pay the costs of the former trial into ct. as a fund for payment of his rent, in derogation of pltf.'s attorney's lien.—BROWN *v.* SAYCE (1812), 4 Taunt. 320; 128 E. R. 353.

Annotations:—**Consd.** Lomas *v.* Mellor (1820), 5 Moore, C. P. 95. **Mentd.** Philpott *v.* Dobbinson (1829), 6 Bing. 104; Robson *v.* Fallows (1837), 4 Scott, 43.

3223. —.]—Where a pltf. brought two actions, trespass & detainue, arising out of the same transaction, for trifling causes, & obtained a verdict of 40s. in one, & a verdict was found for deft. in the other, the ct., upon motion on the part of deft., founded on affidavits stating the object, nature, & result of the actions & facts impeaching pltf., & that she was not to be found, ordered that the costs incurred by deft. in the action wherein he was successful, should be set off against those of the suit in which he had failed; & that notwithstanding the objection of pltf.'s attorney, who objected to it his claim for costs & his general lien:—*Held*: the attorney's lien was only on the balance, subject to the equitable rights of the parties *inter se*.—LANE *v.* PEARCE (1823), 12 Price, 742; 147 E. R. 863.

3224. —.]—Where deft. is entitled, as against pltf., to be relieved from a verdict obtained against him, the ct. will not abstain from interfering on the ground of the lien of the pltf.'s attorney upon the verdict for his costs.—SYMONS *v.* BLAKE (1835), 2 Cr. M. & R. 416; 1 Gale, 182; 5 Tyr. 840; 4 L. J. Ex. 259; 150 E. R. 179; *sub nom.* SIMONS *v.* BLAKE, 4 Dowl. 263.

3225. —.]—The lien of solrs. cannot interfere with the equities between the parties. The execution of a writ of attachment for costs, does not deprive the party issuing it, of any lien, or right of set-off he may possess for the payment of such costs.

A sum was found due from pltf. to deft.; & on the other hand, deft. was ordered to pay the costs of suit:—*Held*: the lien of deft.'s solr., for his costs, extended only to the ultimate balance due from pltf., after deducting the costs payable to him by deft.—BAWTREE *v.* WATSON (1838), 2 Keen, 713; 7 L. J. Ch. 183; 48 E. R. 804.

Annotations:—**Refd.** Cattell *v.* Simons (1843), 6 Beav. 304; Lloyd *v.* Mason (1845), 4 Hare, 132.

3226. —.]—FRANCIS *v.* FRANCIS, No. 3012, *ante*.

3227. —.]—The general principle that an official liquidator can retain no part of the co.'s estate without an order of the ct., applies equally to the lien of his solrs. for costs on the co.'s money recovered by his exertions. Such moneys must, in the first instance, be paid into ct.—Re UNION CEMENT & BRICK CO., LTD. (1872), 26 L. T. 240; 20 W. R. 361.

3228. —.]—Where a person, at the time of an order being made for the payment of his costs by trustees on a petition in the matter of a trust, is indebted to the trust estate, although, the amount is not then ascertained, he cannot get any of such costs until he has paid the amount due from him to the trust, & the trustees, therefore, can set off the costs payable by them against

PART VIII. SECT. 3, SUB-SECT. 6.—A.

3220 i. Solicitor's right no greater than client's.]—A solr.'s lien for costs in a suit is subordinate, & to be postponed to the equities between the parties.—GWYNN *v.* KROUS (1845), 7 I. Eq. R. 274.—IR.

3220 ii. —.]—TAWSE *v.* RIGG (1904), 6 F. (Ct. of Sess.) 544; 41 Sc. L. R. 391; 11 S. L. T. 748.—SCOT.

Sect. 3.—Common law lien on property recovered or preserved: Sub-sect. 6, A. & B.: sub-sect. 7.]

the amount due from him. His solr. cannot be in a better position than he is himself. *Secus*: as to the costs of the trustees incurred in recovering such amount.—*Re HARRALD, WILDE v. WALFORD* (1884), 53 L. J. Ch. 505; 51 L. T. 441, C. A.

Annotations:—*Consd.* Blakey v. Latham (1889), 41 Ch. D. 518. *Refd.* Bake v. French, [1907] 1 Ch. 428; Puddinghatt v. Leith (No. 2) (1916), 85 L. J. Ch. 543.

3229. ———.]—The acceptors of a bill of exchange, for whose accommodation it was drawn, handed it to the drawer with instructions to him to get it discounted. The drawer indorsed it in blank, & handed it to L., asking him to get it discounted. L. claimed to keep it, & the drawer thereupon sued him for detention of the bill. In this action the drawer obtained judgment, & the bill, which by this time was overdue, was handed over by L. to the drawer's solrs. The solrs. knew of the circumstances under which the bill had been drawn. They retained possession of the document, over which they claimed a lien in respect of their bill of costs in the action by the drawer against L. Afterwards they brought an action upon the bill against the acceptors, claiming so much as would satisfy their lien:—*Held*: the solrs. had no right of action against the acceptors.—*REDFERN & SONS v. ROSENTHAL BROTHERS* (1902), 86 L. T. 855; 18 T. L. R. 718, C. A.

3230. Rights against sheriff—Releasing debtor by order of creditor.]—Pltf.'s attorney directed the sheriff's officer, who had arrested deft., not to let him go at large without an express consent from him, the attorney, as he had a lien for his costs. The sheriff's officer did, by the authority of pltf. in the action, but without that of the attorney, let deft. go at large:—*Held*: the sheriff was not liable to the attorney for his costs.—*MARTIN v. FRANCIS* (1819), 2 B. & Ald. 402; 106 E. R. 413.

Annotation:—*Consd.* Marr v. Smith (1821), 4 B. & Ald. 166.

3231. Effect of statutes of limitation.]—Stat. Limitations bars the remedy only, not the debt, & therefore, where an attorney for a pltf. had obtained judgment, & deft. was afterwards discharged under Debtor's Imprisonment Act, 1758 (c. 28), but at a subsequent period a *fi. fa.* issued against his goods, upon which the sheriff levied the damages & costs; it was held, that the attorney, though he had taken no step in the cause, or to recover the amount of his bill of costs, within six years, had still a lien on the judgment for his bill of costs, & the ct. directed the sheriff to pay him the amount out of the proceeds of the goods.—*HIGGINS v. SCOTT* (1831), 2 B. & Ad. 413; 9 L. J. O. S. K. B. 262; 109 E. R. 1196.

Annotations:—*Refd.* Smith v. Betty, [1903] 2 K. B. 317. *Mentd.* Courtenay v. Williams (1814), 3 Hare, 539; Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726; *Re* Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385.

B. Priorities.

3232. Priority of solicitor—On death of client—Against creditors.]—A solr. who is in disburse for his client has a right to be paid out of a duty decreed to an administrator, & a lien upon it, before the bond creditors of deceased; nor can

the administrator controvert this rule, by insisting on applying the assets in a course of administration.—*TURWIN v. GIBSON* (1749), 3 Atk. 720; 26 E. R. 1212, L. C.

Annotations:—*Apld.* Griffin v. Eyles (1789), 1 Hy. Bl. 122. *Refd.* Gould v. Davis (1831), 1 Cr. & J. 415; Wild v. Simpson, [1919] 2 K. B. 544.

3233. ———.]—A solr. had attached his client for non-payment of costs, & had registered the order for payment of the costs under Judgments Act, 1838 (c. 110), ss. 16, 18:—*Held*: he had not thereby lost his lien for costs upon the fund recovered in the suit.

A solr., notwithstanding the death of his client, retains his lien for costs upon the fund recovered, & is not driven to come in as a general creditor on the estate of his client.—*LLOYD v. MASON* (1845), 4 Hare, 132; 14 L. J. Ch. 257; 9 Jur. 772; 67 E. R. 590.

Annotations:—*Apld.* O'Brien v. Lewis (1863), 3 De G. J. & Sm. 606. *Refd.* Morgan v. Taylor (1859), 5 C. B. N. S.

3234. ———.]—Deft. was taken in execution upon a *ca. sa.* at the suit of pltf., in June, 1841; in Aug. in the same year, pltf. left England, & was shortly afterwards seen at St. Petersburg, but had never been heard of since. Upon an affidavit of these facts, & showing reasonable ground to induce them to believe that pltf. was dead, & alleging that proper search had been made, & no trace of a will or grant of administration found; the ct., in 1849, ordered deft. to be discharged from custody, without regard to any supposed lien of the attorney for costs.—*CAMP v. POTTE* (1849), 8 C. B. 375; 14 L. T. O. S. 204; 137 E. R. 554.

Annotation:—*Refd.* Cox v. Pritchard (1850), 15 Jur. 427.

3235. ———.]—**Against heir.]**—Solr. prosecuting to a decree has a lien on the estate recovered in the hands of the person recovering for his bill, but not in the hands of the heir. Committee of lunatic has a lien on the lunatic's estate: the solr. employed by the committee declared to stand in his place.—*BARNESLEY v. POWELL* (1750), Amb. 102; 27 E. R. 63, L. C.

Annotations:—*Dbtd.* Shaw v. Neale (1858), 11 H. L. Cas. 581. *Refd.* *Re* Rutter, Chester v. Rolfe (1853), 1 De G. M. & G. 798; *Re* E. G., [1914] 1 Ch. 927.

3236. ———.]—**Against garnisher.]**—(1) The general lien of an attorney on a judgment, for costs due from his client, does not prevail over an attachment under the garnishee clauses of C. L. P. Act, 1854 (c. 125).

(2) The lien, not a very correct expression in this instance, which an attorney has on a judgment obtained by his client, is merely a claim to the equitable interference of the Ct. to have that judgment held as a security for his debt.—*HOUGH v. EDWARDS* (1856), 1 H. & N. 171; 26 L. J. Ex. 54; 2 Jur. N. S. 814; 156 E. R. 1164.

Annotations:—*As to* (1) *Expld.* Cole v. Eley, [1891] 2 Q. B. 180. *Generally, Refd.* North v. Stewart (1890), 15 App. Cas. 452; *Re* Knight, Knight v. Gardner, [1892] 1 Ch. 368.

3237. ———.]—*SYMPSON v. PROTHERO*, No. 3118, *ante*.

3238. ———.]—**On non-payment of certain sums due by way of alimony & costs, a writ of sequestration issued against resp.'s property, & an order was made on K. to pay into ct. a sum**

PART VIII. SECT. 3, SUB-SECT. 6.

—B.

3236 i. Priority of solicitor—Against garnisher.]—*UNION BANK v. STEWART & SMITH & BRIGHAM* (1895), 3 Terr. L. R. 342.—**CAN.**

3236 ii. ———.]—A solr.'s lien for costs on a fund not in his possession or control takes precedence over a

claim thereon under a order.—*Re* FORT FRANCES PULP & PAPER CO. v. TELEGRAM PTG. CO., PHILLIPS & SCARTH v. LONDON GUARANTEED & ACCIDENT CO., [1927] 4 D. L. R. 77; [1927] 2 W. W. R. 570, 36 Man. L. R. 584.—**CAN.**

r. ———.]—**Against attaching order.]**—An attorney's lien for costs as

between him & his client, the judgment debtor, will not be allowed to stand in the way of an attachment.—*R v. BENSON* (1858), 2 P. R. 350.—**CAN.**

t. ———.]—*COCK v. BLISS* (1876), 1 R. & C. 299.—**CAN.**

a. ———.]—The lien of a solr. upon a verdict recovered for his

of money awarded in an action in the Q. B. to be paid by K. to resp. On motion on behalf of petitioner to order such sum to be paid out in part satisfaction of her attorney's taxed costs & her own alimony, the ct. refused to make such order, H. & F. resp.'s attorneys in the action in the Q. B., having satisfied the ct., on affidavit, that they had a lien for costs in that cause exceeding the sum so paid into ct.—*MUNT v. MUNT* (1862), 2 Sw. & Tr. 661; 7 L. T. 438; 164 E. R. 1155; *previous proceedings*, 31 L. J. P. M. & A. 134.

3239. ———.]—A proctor's lien on a fund in ct. is not affected by a garnishee order, & he is entitled to be paid his costs in priority to the claim of the holder of the garnishee order.—*THE JEFF DAVIS* (1867), L. R. 2 A. & E. 1; 17 L. T. 151; 2 Mar. L. C. 555.

*Annotations:—***Appld.** *The Heinrich* (1872), L. R. 3 A. & E. 505. **Consd.** *Birchall v. Pugin* (1875), L. R. 10 C. P. 397; *The Livietta* (1883), 8 P. D. 209.

3240. ———.]—A judgment had been obtained in this ct. against debt. for a debt & costs. Certain judgment creditors of pltf.'s obtained a garnishee order against the amount. Debt. paid over the amount for which the garnishee orders had been obtained without having caused notice to be given to pltf.'s solrs., & without having, before the order was finally made, apprised the judge from whom it had been obtained, of the existence of this lien. Pltf.'s solrs. having moved for an order for payment of their costs by debt.:—*Held*: pltf.'s solr. had a lien on the fund recovered through his exertions, though he had made no application to this ct. under Solicitors Act, 1860 (c. 127), s. 28.—*THE LEADER* (1868), L. R. 2 A. & E. 314; 37 L. J. Adm. 57; 18 L. T. 767; 17 W. R. 61; 3 Mar. L. C. 118.

*Annotation:—***Refd.** *Watts v. Hetley* (1899), 44 Sol. Jo. 131.

3241. ———.]—An *ex p.* garnishee order under C. L. P. Act, 1854 (c. 125), s. 61, does not override an attorney's particular lien upon a judgment debt under Solicitors Act, 1860 (c. 127), s. 28.

P., having obtained an award in his favour in an action against M., to the effect that M. should pay him certain sums of money, the attorney of P. in the action obtained an order for his costs under Solicitors Act, 1860 (c. 127), s. 28, upon these sums. Three days afterwards B., who had recovered judgment against P., obtained an *ex p.* garnishee order binding the same sums in the hands of M.:—*Held*: the claim of P.'s attorney was to be preferred to the claim of B., & a rule calling on the garnishee to pay the debt to B., & to rescind an order of the judge in favour of P.'s attorney refused.—*BIRCHALL v. PUGIN* (1875), L. R. 10 C. P. 397; 44 L. J. C. P. 278; 23 W. R. 923 *sub nom.* *BURCHELL v. PUGIN*, 32 L. T. 495.

*Annotations:—***Expld.** *Cole v. Eley*, [1891] 2 Q. B. 180. **Consd.** *Farrant v. Caley* (1924), 68 Sol. Jo. 898. **Refd.** *Shippey v. Grey* (1880), 49 L. J. Q. B. 524; *Charlton v. Charlton* (1883), 49 L. T. 267; *The Marie Gartz* (No. 2), [1920] P. 460. **Mentd.** *Smelting Co. of Australia v. I. R. Comrs.*, [1896] 2 Q. B. 179.

client will prevail against an attaching order obtained by a creditor of the client.—*BERNESKI v. TOURANGEAU* (1898), 18 P. R. 263.—**CAN.**

b. ———.]—*VALENTINUZZI v. LENARDUZZI* (1906), 1 **CAN.**

c. ———.] *v. LEAR* (1911), 16 W. L. 20 **Man.**

d. ———.]—A sum of money been paid into ct. as admittedly due in a certain suit. Pltf. not satisfied in full his attorney's bill of costs, the attorney applied for payment out of the fund in ct. Previously to this application, the **J.—VOL. XLII.**

3242. ——— **Against assignee for value without notice.]**—The lien of a solr. for his costs on a fund recovered by his exertions, cannot be affected by an assignment of the fund by the client, nor by a stop order obtained by the assignee.

The solr. of a party to a suit has, independently of the Solicitors Act, 1860 (c. 127), a paramount lien for his costs of suit upon the interest of that party in a fund brought into ct., through the solr.'s exertions. *Semble*: notwithstanding the doubt suggested by the terms of the Act, this lien must prevail, even against an assignee for value without notice.

Where pltf. in a suit, to whom debt. had been ordered to pay costs, obtained a charging order *nisi* upon a share of funds in ct. belonging to debt.:—*Held*: it could only be made absolute, subject to the lien for the taxed costs of debt.'s solr.—*HAYMES v. COOPER*, *COOPER v. JENKINS* (1864), 33 Beav. 431; 3 New Rep. 627; 33 L. J. Ch. 488; 10 L. T. 87; 10 Jur. N. S. 303; 12 W. R. 539; 55 E. R. 435.

*Annotations:—***Appld.** *The Heinrich* (1872), L. R. 3 A. & E. 505. **Consd.** *Dallow v. Garrold* (1884), 14 Q. B. D. 543; *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q. B. D. 693; *Cole v. Eley*, [1894] 2 Q. B. 180. **Refd.** *Re Born*, *Curnock v. Born*, [1900] 2 Ch. 433.

On winding up of company.]—*See COMPANIES*, Vol. X., pp. 952, 953, Nos. 6524–6529.

On change of solicitors.]—*See* Sect. 5, subsect. 3, *post*.

SUB-SECT. 7.—ENFORCEMENT AND PRESERVATION OF LIEN.

3243. Enforcement—By Injunction.]—*BOVIL v. PODMORE* (1829), cited 7 De G. M. & G. at p. 27; *sub nom.* *BIRCH v. PODMORE*, cited in 1 Jur. N. S. at p. 123.

*Annotation:—***Mentd.** *Stocks v. Holdsworth* (1851), 2 W. R. 450.

3244. ———.]—By a decree made in an action for the recovery of some land it was declared that pltfs. in the action were entitled to one undivided third part thereof, & debts. to the remaining undivided two-thirds. The property was ordered to be sold, & the money paid into ct., & certain accounts & inquiries were ordered to be taken; & it was also ordered that pltfs.' costs of the action up to & including the hearing be costs in the action, & further consideration was adjourned with liberty to apply. Before the accounts had been taken, or the property sold, the solrs. of pltfs. presented a petition under Solicitors Act, 1860 (c. 127), alleging that pltfs. threatened to change their solrs., & compromise the action without making any provisions for petitioners' costs, & their share in the property not sufficient to pay those costs. They, therefore, proved for an order charging the whole of the property with their costs, as between party & party, & pltfs. one-third with their further costs chargeable only as between solr. & client:—

made by the mtgor. to a creditor of a portion of a fund in ct., as to which litigation was pending between mtgor. & mtgee. as to their respective shares:—*Held*: to the extent to which the solrs. of the mtgor. incurred costs in resisting & prevailing against the accounts brought in on behalf of the mtgee., to that extent their lien should precede the assignment.—*YEMEN v. JOHNSTON* (1884), 11 P. R. 231.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 7.

g. Enforcement—Discretion of judge as to sum to be allowed.]—Where solrs. claimed a lien for costs upon a judgment recovered, the amount of which was the

Sect. 3.—Common law lien on property recovered or preserved: Sub-sect. 7. Sect. 4: Sub-sects. 1 & 2, A. & B. (a).]

Held: petitioners' costs not having been taxed & ordered to be paid they were only entitled to a charge on pl'tfs.' one-third of the estate & rents, but an injunction was granted restraining pl'tfs. from receiving any money under any order in the action or under any compromise without previous notice in writing to petitioners.—**LLOYD v. JONES** (1879), 40 L. T. 514; 27 W. R. 655.

3245. — By attachment.]—The solr. is not deprived of his lien on the funds in ct., for his costs in the cause, by having issued an attachment against his client & committed him to gaol for non-payment of his bill; but the costs which he may receive in the cause are to be taken in discharge of the attachment, *pro tanto*.—**DAVIES v. BUSH** (1831), You. 358.

Annotations:—**Consd.** **O'Brien v. Lewis** (1863), 9 Jur. N. S. 764. **Reid.** **Lloyd v. Mason** (1845), 4 Hare, 132.

3246. — By stop order.]—Lien of a solicitor upon a fund in ct. for his costs of suit, protected by a stop order.

No effective proceedings could be taken in a suit, in consequence of the contempt of two defts.:—**Held:** pl'tf.'s solr. was entitled to a taxation of his costs, & to a stop order on the funds.—**HOBSON v. SHEARWOOD** (1845), 8 Beav. 486; 5 L. T. O. S. 19; 50 E. R. 191.

—**See Sect. 4, sub-sect. 5, post.**

3247. — Where costs trifling.]—A solr., who had successfully prosecuted a claim on behalf of a creditor, under the winding up of a co., applied to the ct. for a lien on the dividends payable to his client for the amount of his costs, which amounted to £1 15s. The application having been refused, the solr. appealed to the Lords Justices. The Lords Justices refused to entertain an appeal for so trifling an amount; although it was stated that it was a representative case, which would govern many others.—**Re NATIONAL ASSURANCE & INVESTMENT ASSOCN., Re CROSS** (1872), 7 Ch. App. 221; 41 L. J. Ch. 341; 26 L. T. 53; 20 W. R. 324, L. J.J.

—**Compromise in fraud of solicitor.]**—**See Sub-sect. 4, B., ante.**

—**Right of debtor to interplead.]**—**See INTERPLEADER, Vol. XXIX., p. 463, Nos. 119, 120.**

3248. Preservation—Right to be heard to show cause against a new trial.]—**SHOMAN v. ALLEN** (1838), 1 Man. & G. 96, n.; 133 E. R. 262.

Annotation:—Distd. **Thomas v. Dunn** (1845), 1 C. B. 139.

3249. — —.]—A. & S., solrs., acted for some time for pl'tf. in her action against def't., & subsequently retired from acting for her, retaining her papers, as a lien for the costs they had incurred. Pl'tf., in order to get her papers, charged any verdict she might get to the extent of £769, the amount of the costs of A. & S., in favour of A. & S. At the trial pl'tf. obtained a verdict for £300. Def't. entered a motion for a new trial. A. & S.

apprehended that pl'tf. would consent to the motion for a new trial as she had no interest in the verdict, & so defeat their charge, & they now applied to be heard in opposition to the motion for a new trial. The application was refused.—**WIEDEMANN v. WALPOLE** (1891), 56 J. P. 5; 7 T. L. R. 629, C. A.

SECT. 4.—STATUTORY LIEN AND CHARGING ORDERS.

SUB-SECT. 1.—JURISDICTION.

See Solicitors Act, 1860 (c. 127), s. 29.

3250. Power discretionary.]—**HARRISON v. HARRISON, No. 3304, post.**

3251. —.]—To bring a case within Solicitors Act, 1860 (c. 127), s. 28, property must be recovered or preserved in a proceeding in a ct. of justice.

Appls. were the solrs. to the trustee of a bkpt.'s estate. Bkpt. had sold his stock-in-trade, & gone with the proceeds of the sale to Australia. He was arrested there, & brought back to this country on a charge of offences against Debtors Act, 1869 (c. 62), preferred by order of a ct. of bkpcy. made under s. 16 of that Act upon the application of appls. on behalf of the trustee. On the bkpt.'s arrest a sum of money, the proceeds of the before-mentioned sale, was found upon him & taken possession of by the Australian police. Under a power of attorney prepared by appls., as solrs. to the trustee, this money was handed over by the police & remitted to appls. in this country:—**Held:** this money was not property recovered or preserved in the bkpcy. proceedings, or any other legal proceeding within Solicitors Act, 1860 (c. 127), s. 28, & therefore an order could not be made under that sect. charging appls.' costs upon it.

The power given by the sect. is discretionary; & *semble*, the cases in which it ought to be exercised by a ct. of bkpcy. must be rare.—**Re HUMPHREYS, Ex p. LLOYD-GEORGE & GEORGE, [1898]** 1 Q. B. 520; 67 L. J. Q. B. 412; 78 L. T. 182; 46 W. R. 322; 14 T. L. R. 263; 42 Sol. Jo. 328; 5 Mans. 11, C. A.; *affg.* S. C. *sub nom.* **Re HUMPHREYS, Ex p. ROBERTS, 77 L. T. 501.**

Annotations:—Reid. **Re Cook, Ex p. Cripps** (1899), 68 L. J. Q. B. 597; **Re Turner, Wood v. Turner, [1907]** 2 Ch. 126.

3252. —.]—**Re BORN, CURNOCK v. BORN, No. 3327, post.**

3253. —.]—**Re TURNER, WOOD v. TURNER, No. 3307, post.**

3254. —.]—**Re COCKRELL'S ESTATE, No. 3346, post.**

3255. Review or rescission of order—Judge of High Court sitting in bankruptcy.]—**Re SUFFIELD & WATTS, Ex p. BROWN, No. 3375, post.**

3256. Whether judge in bankruptcy has jurisdiction.]—**Re HUMPHREYS, Ex p. LLOYD-GEORGE & GEORGE, No. 3251, ante.**

subject of a garnishee suit in a division ct. —**Held:** the judge in the division ct. had power under Division Courts Act, R. S. O. 1887, c. 51, s. 197, to decide upon the proper sum to be allowed in respect of such lien, & was not bound to refer to it elsewhere.—**DAVIDSON v. TAYLOR** (1890), 14 P. R. 78.—**CAN.**

h. — By order for payment out of money in court.]—**CANADA CARRIAGE CO. v. LEA** (1913), 24 O. W. R. 976; 4 O. W. N. 1594; 12 D. L. R. 840.—**CAN.**

k. — By order for direct payment by opposite party.]—**HARNANDROY FOOLCHAND v. GOOTIRAM BHUTAR**

(1919), I. L. R. 46 Cal. 1070.—**IND.**

PART VIII. SECT. 4, SUB-SECT. 1.

3250 i. Power discretionary.]—The power given by Rule 1139 to make an order in favour of the solr. for a charge upon a judgment recovered by his exertions, is a discretionary one; the right given by the rule is ancillary to the solr.'s right to be paid on his retainer.—**NEVILLIS v. BALLARD** (1898), 18 P. R. 134.—**CAN.**

3250 ii. —.]—Neither the Imperial Act, 23 & 24 Vict. c. 127, nor the Ontario Rule 1129 founded upon it, gives a solr. an absolute right to a

lien for his costs upon property recovered or preserved through litigation, but only a discretionary power in the ct. to charge the property.—**TURRIFF v. McDONALD** (1901), 21 C. L. T. 545; 13 Man. L. R. 577.—**CAN.**

3250 iii. —.]—**MCGREGOR v. CAMPBELL** (1909), 19 Man. L. R. 38; 11 W. L. R. 153.—**CAN.**

3250 iv. —.]—**CROGHAN v. MAFFETT** (1891), 28 L. R. Ir. 97.—**IR.**

1. Whether judge in bankruptcy has jurisdiction—As judge of High Court.]—The Ct. of Bkpcy. is a "Ct. of Justice" within 39 & 40 Vict., c. 41, s. 3, & a judge of that ct. in any

3257. — As judge of High Court—Jurisdiction exercisable in chambers—Power to delegate to registrar in bankruptcy.]—The judge of the High Ct. in Bkpcy. has power as a judge of the High Ct. though not under his bkpcy. jurisdiction, to make charging orders under Solicitors Act, 1860 (c. 127), s. 28, & inasmuch as it is a power to be exercised in chambers, he can delegate that power to the registrar in bkpcy.—*Re WOOD, Ex p. FANSHAW*, [1897] 1 Q. B. 314; 66 L. J. Q. B. 69; 75 L. T. 387; 3 Mans. 299.

*Annotations:—*Consd. *Re Humphreys, Ex p. Lloyd-George* (1898), 67 L. J. Q. B. 412; *Re Deakin, Ex p. Daniell*, [1900] 2 Q. B. 489; *Re Prior, Ex p. Prior*, [1921] 3 K. B. 333.

3258. — As judge of Court of Bankruptcy alone—Property recovered or preserved in bankruptcy proceedings.]—*Re DEAKIN, Ex p. DANIELL*, No. 3333, *post*.

3259. — Property recovered in Chancery action—Represented by dividend in bankruptcy.]—A ct. exercising bkpcy. jurisdiction has no power under Solicitors Act, 1860 (c. 127), s. 28, to make a charging order on property recovered in a Chancery action because it is represented by a dividend in bkpcy. Nor has the ct. any power under Bkpcy. Act, 1883 (c. 52), s. 102, in the absence of the creditor to direct payment of the dividend to the creditor's solr. on the ground that such dividend represents property recovered by him even on an indemnity.—*Re COOK, Ex p. CRIPPS*, [1899] 1 Q. B. 863; 68 L. J. Q. B. 597; 80 L. T. 495; 47 W. R. 524; 6 Mans. 185; *sub nom. Re COOK, Ex p. CRIPPS v. TRUSTEE*, 43 Sol. Jo. 440, D. C.

See, also, Sub-sect. 5, B., post.

SUB-SECT. 2.—IN RESPECT OF WHAT PROPERTY.

A. In General.

3260. Real estate—Solicitor obtaining foreclosure decree—Death of client & decree for administration of estate.]—A solr. conducted a foreclosure suit, & other legal proceedings, to enforce the mtgee.'s claim. The mtgee. died, & by a decree in creditor's suit, his realty was ordered to be sold. On petition in the foreclosure suit:—*Held*: the solr.'s right was prior to any under creditor's decree, & made a charging order, but confined it to the costs of the foreclosure proceedings.—*WILSON v. ROUND* (1863), 4 Giff. 416; 3 New Rep. 288; 9 L. T. 675; 10 Jur. N. S. 34; 12 W. R. 402; 66 E. R. 769.

B. Property Recovered or Preserved.

(a) In General.

See Solicitors Act, 1860 (c. 127), s. 28.

3261. By instrumentality of solicitor—Employed to prosecute or defend suit—Property of any nature.]—The attorney for a successful litigant was declared by the ct. in which the action was brought to be entitled, pursuant to Solicitors Act, 1860 (c. 127), to a charge upon the property recovered through his instrumentality, for the amount of his taxed costs in the action, although

proceeding before him may, in a proper case, declare a solr. entitled to a charge upon property recovered or preserved through his instrumentality, to the extent of the solicitor's taxed costs, although such a declaration may be refused under special circumstances.—*Re T. B. AN ARRANGING DEBTOR* (1896), 30 L. L. T. 75.—*IR.*

PART VIII. SECT. 4, SUB-SECT. 2.

—A.

m. Real estate—Solicitor establishing

validity of mortgages.]—KEENAN v. ARMSTRONG (1891), 27 L. R. Ir. 371.—*IR.*

n. —.—.]—*DENNIS v. ADDY*, [1891] 1 L. R. 511.—*IR.*

PART VIII. SECT. 4, SUB-SECT. 2.—B. (a).

o. By instrumentality of solicitor—Employed to prosecute or defend suit.]—Rule 1129, which empowers the ct. or a judge to declare that a solr., who has been employed to prosecute or defend any case, etc., shall have a

the estate of his client, who had died since the action was being administered in the Ct. of Ch.—*WILSON v. HOOD* (1864), 3 H. & C. 148; 33 L. J. Ex. 204; 10 L. T. 345; 159 E. R. 484; *sub nom. Re WILSON & HOOD, Ex p. SEAMAN*, 10 Jur. N. S. 592; *sub nom. Ex p. SEEMAN*, 4 New Rep. 154; *sub nom. Ex p. SLEEMAN*, 12 W. R. 748.

*Annotations:—*Apld. *Heinrick v. Sutton, Re Fiddey* (1871), 40 L. J. Ch. 518; *Catlow v. Catlow* (1877), 2 C. P. D. 362. *Refd. Birchall v. Pugin* (1875), L. R. 10 C. P. 397.

3262. — — — — —.]—*FOXON v. GASCOIGNE*, No. 3289, *post*.

3263. — — — — —.]—*ROWLANDS v. WILLIAMS* (1885), 2 T. L. R. 72, C. A.

3264. — — — — — Not suit relating to easement only.]—*FOXON v. GASCOIGNE*, No. 3289, *post*.

3265. — — — — — Property of infant—Infant having attained majority—Solicitor employed by next friend to establish title.]—A suit was instituted by an infant, by his next friend to set aside a will of real estate, & a decree was made accordingly. In the course of the suit a sum of money was paid into ct., as the purchase money of part of the real estate. Deft. was ordered to pay the costs of the suit; but in consequence of his insolvency they could not be recovered. The next friend was a pauper. On a petition, presented for the purpose, the purchase-money paid into ct. was ordered to be applied *pro tanto* in payment of the solr.'s bill of costs; but the ct. refused to make an order under Solicitor's Act, 1860 (c. 127), declaring that the costs were a lien on the real estate recovered, that act applying only to cases in which the parties charged are *sui juris*.—*BONSER v. BRADSHAW* (1860), 30 L. J. Ch. 159; 3 L. T. 545; 25 J. P. 483; 7 Jur. N. S. 231; 9 W. R. 229; *on appeal* (1862), 10 W. R. 481, L. JJ.; *subsequent proceedings* (1863), 4 Giff. 260.

*Annotations:—*Consd. *Re Keane, Lumley v. Desborough* (1871), L. R. 12 Eq. 115. Apld. *Baile v. Baile* (1872), L. R. 13 Eq. 497.

3266. — — — — —.]—*BAILE v. BAILE*, No. 3286, *post*.

3267. — — — — — If infant represented.]—The charge declared in pursuance of Solicitors Act, 1860 (c. 127), s. 28, on the property recovered or preserved in favour of the solr. employed is in the nature of salvage, & may be made on the interest of persons who did not employ the solr., & who were not parties to the suit, if they adopt the benefit obtained in the suit. It makes no difference that the persons whose interests are charged are infants, but the ct. will not make the order until the infants have an opportunity of being heard on it. P. & Y. were trustees under the will of G. P. misapplied some of the trust funds & died. The suit of M v. P. was brought for the administration of P.'s estate, & a proof was carried in by Y. on behalf of the trust in respect of the breaches of trust by P. Afterwards the action of G. v. Y. was brought by some of the *cestuis que trust* under G.'s will to establish the liability of Y. & to appoint new trustees, in which a small dividend was recovered from Y.'s estate. The solr. who acted for plffs. in G. v. Y. applied for a charging order for his costs on the dividend recovered from P.'s & T.'s estates,

lien on the property recovered or preserved through his instrumentality, is construed liberally, so as not to deprive the solr. of his lien.—*O'FLYNN v. MIDDLETON* (1903), 23 C. L. T. 230; 5 O. L. R. 621.—*CAN.*

3267 i. — — — — — Property of infant—If infant represented.]—Where a suit has been brought by a minor through his next friend for declaration of the infant's title, & to possession of property, the attorney is entitled to have a charge declared on the properties

Sect. 4.—Statutory lien and charging orders: Subsect. 2, B. (a) & (b).]

which was opposed by the new trustees on behalf of the infant *cestuis que trust*:—*Held*: the solr. was entitled to a charge upon the dividend recovered in the action from Y.'s estate as against the infant *cestui que trust*, but not on the dividend recovered from P.'s estate, as it was not recovered in the action.—*GREER v. YOUNG* (1883), 24 Ch. D. 545; 52 L. J. Ch. 915; 49 L. T. 224; 31 W. R. 930, C. A.

Annotations.—*Consd.* Jackson v. Smith, *Ex p.* Digby (1884), 53 L. J. Ch. 972. *Apld.* Keeson v. Luxmoore (1889), 61 L. T. 199; Scholey v. Peck, [1893] 1 Ch. 709; *Ex p.* Tweed, [1899] 2 Q. B. 167; Ridd v. Thorne, [1902] 1 Ch. 344; *Re* Turner, Wood v. Turner, [1907] 2 Ch. 126. *Consd.* The Dirigo, [1920] P. 425. *Refd.* Charlton v. Charlton (1883), 52 L. J. Ch. 971; Harrison v. Harrison (1888), 13 P. D. 180; Pelsall Coal & Iron Co. v. J. & N. W. Ry. (No. 3) (1892), 8 Ry. & Can. Tr. Cas. 146; *Re* Thornhill, Thornhill v. Nixon (1892), 36 Sol. Jo. 218; *Re* Humphreys, *Ex p.* Lloyd-George & George, [1898] 1 Q. B. 520; Redfern v. Rosenthal (1901), 85 L. T. 313; *Re* Horne, Horne v. Horne, [1906] 1 Ch. 271.

3268. — **Whether client must have interest in property.**—A solr. is entitled, under Solicitors Act, 1860 (c. 127), to a charge upon property recovered or preserved, for his costs of the litigation by which it is recovered or preserved, irrespective of his client's interest in the property, & although it turns out that the latter has not & never had any interest therein.—*BAILEY v. BIRCHALL, BARNES v. RATCLIFFE, BAILEY v. RATCLIFFE* (1865), 2 Hem. & M. 371; 5 New Rep. 237; 11 Jur. N. S. 57; 71 E. R. 507.

Annotations.—*Consd.* Charlton v. Charlton (1883), 52 L. J. Ch. 971. *Refd.* *Re* Keane, Lumley v. Desborough (1871), L. R. 12 Eq. 115; Pinkerton v. Easton, *Re* Pinkerton (1873), 42 L. J. Ch. 878; Bulley v. Bulley (1878), 8 Ch. D. 479; Greer v. Young (1883), 24 Ch. D. 545; Harrison v. Cornwall Minerals Ry. (1884), 53 L. J. Ch. 596; Jackson v. Smith, *Ex p.* Digby (1884), 53 L. J. Ch. 972; *Re* Cockrell's Estate, [1911] 2 Ch. 318.

3269. — **Effect of termination of interest—Death of tenant in tail without issue & without disentailing.**—By virtue of the decree in a suit to set aside an appointment & uphold a settlement, A. became entitled to an estate in tail in certain property. A. died, before he had paid his solr.'s costs of the suit, without issue, & without having executed a disentailing deed, & the property devolved on certain persons under the settlement. On a petition by the solr. that he might be declared entitled to a charge on the property for the amount of his costs:—*Held*: he was not entitled to any charge on the property, as the interest of his client, on which alone he would have been entitled to a charge, had determined by his death.—*BERRIE v. HOWITT* (1869), L. R. 9 Eq. 1; 39 L. J. Ch. 119; 21 L. T. 414.

Annotations.—*Dbtd.* Bulley v. Bulley (1878), 8 Ch. D. 479. *N.F.* Charlton v. Charlton (1883), 52 L. J. Ch. 971. *Consd.* Greer v. Young (1883), 49 L. T. 224. *Refd.* *Re* Keane, Lumley v. Desborough (1871), L. R. 12 Eq. 115.

3270. — **Property of persons not employing solicitor.**—The right of a solr. under Solicitors Act, 1860 (c. 127), s. 28, to a charging order upon a fund recovered or preserved by his exertions, for his taxed costs, charges, & expenses in relation to such recovery or preservation, is in the nature of a salvage claim, & is enforceable against the whole of such fund, & not merely against such part of it as may appear to be the property of his own client.

Such charge ought to be a first charge, & may be made in respect of costs not already taxed, it being

in the power of the ct. to direct the taxation in the order giving the charge.

The charge should be for costs, charges, & expenses "properly incurred."—*CHARLTON v. CHARLTON* (1883), 52 L. J. Ch. 971; 49 L. T. 267; 32 W. R. 90.

Annotation.—*Refd.* Jackson v. Smith (1884), 51 L. T. 72.

3271. — **—**—*B.* was in possession of real estate as trustee of a will, under the trusts of which he was beneficially entitled to a share & pltf. to another share. By deed of Aug. 1867, pltf. conveyed her interest to B., who made a mtge. of the property to C. After this pltf. having discovered early deeds under which she claimed to be tenant in tail of the whole estate by a title paramount to the will, filed a bill against B. & C. praying that the deed of Aug. 1867, might be set aside, that she might be declared entitled as tenant in tail, & that the mtge., so far as it affected her interest, might be declared void. This bill was dismissed, & the dismissal was affirmed on appeal:—*Held*: the whole property was preserved for the persons entitled under the will by the defence conducted by B.'s solr.; & the solr. was entitled to a charging order for his costs upon the whole estate, & not merely upon B.'s beneficial interest in it.—*BULLEY v. BULLEY* (1878), 8 Ch. D. 479; 47 L. J. Ch. 841; 38 L. T. 401; 26 W. R. 638, C. A.

Annotations.—*Folld.* Charlton v. Charlton (1883), 52 L. J. Ch. 971. *Apld.* Greer v. Young (1883), 24 Ch. D. 545; *Ex p.* Tweed, [1899] 2 Q. B. 167. *Distd.* Wingfield v. Wingfield, [1919] 1 Ch. 462. *Consd.* The Dirigo, [1920] P. 425. *Refd.* Jackson v. Smith, *Ex p.* Digby (1884), 53 L. J. Ch. 972.

3272. — **Persons not parties to suit—If benefit adopted.**—*GREER v. YOUNG*, No. 3267, *ante*.

3273. — **Order for sale in partition suit—No order for costs out of proceeds of sale—Charge against plaintiff's share recovered.**—*LLOYD v. JONES*, No. 3214, *ante*.

3274. — **Recovery in ejectment proceedings.**—W. in 1862 brought an action of ejectment, in which he obtained a verdict. In this action S. was employed as his attorney. W. died in 1863, & a bill was filed in Chancery for the administration of his estate:—*Held*: under Solicitors Act, 1860 (c. 127), s. 28, S. was entitled to a lien for his costs on the property recovered in the action.—*Ex p.* SEEMAN (1864), 4 New Rep. 154.

3275. — **Annuity settled on wife—Suit by husband to set aside settlement.**—A suit was instituted by a husband against his wife to set aside a post-nuptial settlement whereby an annuity was settled by him on his wife to her separate use without power of anticipation. The wife retained a solr. who successfully conducted her defence, & the bill was dismissed with costs. The husband was unable to pay the costs, & thereupon the solr. presented a petition under Solicitors Act, 1860 (c. 127), for the purpose of charging the annuity with the taxed costs of the suit:—*Held*: petitioner was entitled to have the costs raised & satisfied by a sale of a sufficient portion of the settled property.—*Re* KEANE, LUMLEY v. DESBOROUGH (1871), L. R. 12 Eq. 115; 40 L. J. Ch. 617; 21 L. T. 57; 19 W. R. 498; *subsequent proceedings*, 24 L. T. 780.

Annotations.—*Expld.* Bulley v. Bulley (1878), 8 Ch. D. 479. *Consd.* *Re* Glanville, Ellis v. Johnson (1886), 31 Ch. D. 532. *Refd.* Charlton v. Charlton (1883), 52 L. J. Ch. 971; Greer v. Young (1883), 24 Ch. D. 545; Michell v. Michell (1891), 60 L. J. P. 46.

for the amount of costs incurred by him, & he is entitled to recover the same in a suit.—*KUMAR KRISHNA DUTT v. HARI NARAIN GANGULY* (1916), 1 L. R. 43 Cal. 676.—*IND.*

3270 i. — **Property of persons not employing solicitor.**—A solr. is entitled, under 39 & 40 Vict. c. 44, s. 3, to a charge for costs incurred in recovering or preserving property, not only

against his own client but against all persons entitled to the property.—*SHEVLIN v. McGRANE* (1886), 17 L. R. Ir. 271.—*IR.*

p. — **Purchase-money of estate sold**

3276. — Claim & counterclaim treated as one action—Charge in respect of balance recovered.]—WESTACOTT v. BEVAN, No. 3296, *post*.

3277. — Action for debenture-holders—Property sufficient for payment of debenture-holders in full—Improbability of recovering from clients.]—In a debenture-holder's action a receiver was appointed, & the same solr. acted for pltf. & for the receiver. In the course of realising the estate proceedings were taken at home & abroad with the sanction of the ct., & the solr. was employed by the receiver for these purposes. In the result property was recovered or preserved, & the funds paid into ct. were sufficient to pay all the debenture-holders in full & to leave a large surplus for the liquidator of the co. Pltf. being unable to pay the difference between party & party & solicitor & client costs of the action :—*Held* : (1) the solr. was entitled to a charging order for such difference upon so much of the funds as belonged to the debenture-holders ; (2) the solr. was also entitled to a charging order upon the balance of the funds that would be payable to the liquidator for his costs of recovering & preserving assets at home & abroad, which really were part of the receiver's costs of administration & might have been included in his accounts.—*Re HORNE (W. C.) & SONS, LTD., HORNE v. HORNE (W. C.) & SONS, LTD.*, [1906] 1 Ch. 271 ; 75 L. J. Ch. 206 ; 13 Mans. 165 ; 51 W. R. 278.

Annotation :—*Generally, Reid. Re Cockrell's Estate*, [1911] 2 Ch. 318.

3278. — Effect of property changing hands—Before charging order applied for—Mortgage of ship.]—(1) After the termination of an action *in rem* against the owners of a ship for wages & disbursements in which pltf. was partially successful, & after the release of the ship from arrest & its transfer to a limited co., the solrs. of original debt owners applied *ex p.* & obtained, under Solicitors Act, 1860 (c. 127), s. 28, a charging order upon the ship for their costs in the action. For the enforcement of this charge they also obtained, on notice to mtgees. to whom the vessel had been mortgaged by the limited co., a further order for the appointment of a receiver of freight, & conditionally, for the sale of the vessel. Both orders were subsequently set aside, & the solrs. admitting that the charging order must be postponed to the mtge., appealed as against the limited co. :—*Held* : the charging order was wrong in form & bad in substance, & together with the consequential order, must be set aside, for at most, the property, if any, preserved by the exertions of the solrs. was limited to the interest of those who instructed them to oppose the claims of the master in respect of his lien on the barque, & the vessel had not only ceased to be under the control of the ct., but had changed hands, & become subject to a mtge., before the charging order was applied for. Furthermore, the co. to whom the vessel was transferred could not be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solrs., even though the actual vendor & the promoter of the co. were one & the same person.

(2) The ct., when sitting in Admlty. should follow the practice of the Ch. Div. in requiring notice to the parties affected, & unless the circumstances are very exceptional, should not exercise, on an *ex p.* application, its discretionary power of

making charging orders under Solicitors Act, 1860 (c. 127).—*THE BIRNAM WOOD*, [1907] P. 1 ; 76 L. J. P. 1 ; 96 L. T. 140 ; 23 T. L. R. 58 ; 51 Sol. Jo. 51 ; 10 Asp. M. L. C. 325, C. A.

3279. — Unsatisfied judgment debt.]—An unsatisfied judgment debt is a proper subject-matter of a charging order under Solicitors Act, 1860 (c. 127), s. 28, which empowers the ct. to charge property recovered in any suit, matter, or proceedings, with the payment of the costs.—*FARRANT v. CALEY* (1924), 68 Sol. Jo. 898, C. A.

3280. Meaning of "property"—Includes both debt & costs recovered.]—DALLOW v. GARROLD, *Ex p. ADAMS*, No. 3366, *post*.

(b) *What Amounts to Property Recovered or Preserved.*

3281. Coal wagons subject to lien by railway company—Rates reduced by railway commission—Redemption of wagons by receiver for debenture-holders.]—PELSALL COAL & IRON CO. v. LONDON & NORTH WESTERN RY. CO. (No. 3) (1892), 8 Ry. & Can. Tr. Cas. 146 ; 8 T. L. R. 629.

3282. Claim by master of ship for wages & disbursements—Counterclaim for money due under agreement to purchase shares—Judgment leaving balance due from master—Charge on master's interest in ship.]—On a claim by a master for his wages & disbursements being referred to the registrar & merchants, a counterclaim was made by the registered owner of the whole ship, which counterclaim included money due from the master under an agreement to purchase certain shares in the ship. In the result it was found, that £103 7s. 8d. was due to pltf. on the balance of his account as master, & £173 11s. 1d. was due from him on account of the counterclaim, thus leaving a balance due from pltf. On a motion by pltf.'s attorney, under Solicitors Act, 1860 (c. 127), s. 28, that he might have a charge for his costs in the suit upon pltf.'s interest in the ship as being property "recovered or preserved" :—*Held* : as the result of the suit to pltf. was, that he was entitled to a transfer of the shares in the vessel for a less sum than he would have been if the suit had not been instituted, pltf.'s attorney had recovered or preserved the property to pltf., & was entitled to a charge upon it for his costs to an amount not exceeding the sum so preserved.—*THE PHILIPPINE* (1867), L. R. 1 A. & E. 309 ; 16 L. T. 34 ; 15 W. R. 462 ; 2 Mar. L. C. 476.

Annotations :—*Folld. Pelsall Coal & Iron Co. v. L. & N. W. Ry.* (No. 3) (1892), 8 Ry. & Can. Tr. Cas. 146. *Reid. Foxon v. Gascoigne* (1874), 9 Ch. App. 657, n.

3283. Mortgagor's right to redeem established in foreclosure suit.]—S. & D. were respectively entitled to one-third & two-thirds of a moiety of certain real estates subject to mtges. thereon. S. was also entitled to a charge on the other moiety in respect of certain judgment debts due to him. S. filed a bill of redemption & foreclosure, to which D. was deft. A decree was made whereby it was declared that certain sums ought to be charged on the moiety of S. & D. Upon an appeal by D., the decree was varied in his favour ; & he was also successful in resisting claims of S. in working out the decree. Before the general certificate in the suit was made, D. became bkpt., & his solrs. presented a petition praying for a declaration that they

under advice of solicitor—In administration proceedings.]—CROOKS v. CROOKS (1849), 1 Gr. 57.—CAN.

PART VIII. SECT. 4, SUB-SECT. 2.—
B. (b).

a. *Money paid into court—On wind-*

ing up of partnership.]—LEACOCK v. McLAREN, SHIELDS v. McLAREN, Re KENNEDY (1894), 9 Man. L. R. 599.—CAN.

r. — *As security for costs.]—*Money paid into ct. by pltf. in an action, as security for costs, is not property "recovered or preserved"

by the solr. for pltf. within Con. Rule 1129 on which the solr.'s lien for costs will attach as against an execution creditor who has obtained a stop order.—*GIBSON v. LE TEMPS PUBLISHING CO.* (1905), 10 O. L. R. 434 ; 6 O. W. R. 410.—CAN.

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were entitled to a charge on his estate & interest for the amount of their costs, & for a sale of such estate & interest, & application of the proceeds of sale in payment of the costs:—*Held*: the estate & interest of D. was property preserved in the suit within Solicitors Act, 1860 (c. 127), s. 28, & petitioners were entitled to a charge & sale as prayed for.—*SCHOLEFIELD v. LOCKWOOD* (1868), L. R. 7 Eq. 83; 38 L. J. Ch. 232; *sub nom.* *SCOLEFIELD v. LOCKWOOD*, 17 W. R. 184.

Annotations:—*Apld.* *Catlow v. Catlow* (1877), 2 C. P. D. 362. *Refd.* *Greer v. Young* (1883), 24 Ch. D. 545.

3284. Dividends payable under order in administration action—Though no real question at issue—Or decision wholly or partly in favour of opposite party.]—A solr. for a party in an administration suit who cannot otherwise obtain payment of his bill of costs may apply by petition to the ct. to have his costs taxed, & for a charge for same on dividends payable to his client under an order of the ct. made in the suit, although there may have been no real question at issue between the parties to the suit, or although, so far as there has been any such question, the decision of the ct. in the suit may have been given wholly or in part in favour of the opposite party.—*SMITH v. WINTER, Ex p. HARTLEY* (1870), 18 W. R. 447.

3285. Action for account against trustee—Appointment of receiver—Compromise between parties—Without knowledge of solicitor.]—In a suit by a *cestui que trust* against a trustee of landed estate, praying for an account & reconveyance, a receiver was ordered to be, & afterwards was, appointed, adversely to deft. Notice of motion for decree was served, but before the time for closing evidence had arrived, pltf., without consulting her solr., & without his knowledge, entered into an agreement with deft. for a compromise of the suit on the terms that a sum of cash should be paid to pltf., then that the mtges. on the property should be paid off, & then that the costs of all parties estimated at a fixed sum should be paid. Upon hearing of the compromise, pltf.'s solr. applied to pltf. & to deft.'s solrs. for the terms of it, but was refused all information. Upon petition under Solicitors Act, 1860 (c. 127):—*Held*: the solr. was entitled to a first charge for the amount of his taxed costs, as between solr. & client, upon the property of pltf., as having been recovered & preserved through his instrumentality.—*TWYNAM v. PORTER* (1870), L. R. 11 Eq. 181; 40 L. J. Ch. 30; 23 L. T. 551; 19 W. R. 151.

Annotations:—*Refd.* *Pilcher v. Arden, Re Brook* (1877), 7 Ch. D. 318; *Charlton v. Charlton* (1883), 49 L. T. 267; *Greer v. Young* (1883), 24 Ch. D. 545.

3286. Friendly suit instituted on behalf of infant—Appointment of guardian & provision for maintenance.]—The bill in this suit was filed on June 15, 1863, by M. J., as next friend of the then infant pltf., for a guardian, directions as to the maintenance of pltf. & his brothers & sisters, defts., accounts of the estate of testator, their grandfather, & for a receiver. Solr. employed by the next friend was Mr. J. On July 4, a decree was made, directing inquiries as to testator's real estate; & on Feb. 6, 1864, the chief clerk made his certificate that the real estate was worth about £350 *per annum*. On Mar. 2, 1864, an order was made for the appointment of a guardian & receiver, & allowing a sum of £220 *per annum* for the maintenance of pltf. & defts. On Aug. 10, 1866, Mr. J., the solr., died. On Oct. 14, 1867, the infant pltf. attained twenty-one years of age.

In Nov. 1867, he disentailed the real estate of which he was tenant in tail under his grandfather's will. In June, 1868, he obtained an order to discharge the receiver; & on Feb. 10, 1872, procured an order to change his solicitor. On a petition presented under Solicitors Act, 1860 (c. 127), by the personal representative of the solr., to establish a charge on the real estate for J.'s costs:—*Held*: the suit was properly instituted, & the solr. duly "employed" on behalf of the infant; the property was "preserved" in the suit for the benefit of the infant through the instrumentality of the solr.; the infant had, on attaining twenty-one, adopted the suit; Stat. of Limitations was not a bar to the claim: the personal representative of the solr. could present the petition; & an order must be made upon it.—*BAILE v. BAILE* (1872), L. R. 13 Eq. 497; 41 L. J. Ch. 300; 26 L. T. 283; 20 W. R. 534.

Annotations:—*Folld.* *Briscoe v. Briscoe*, [1892] 3 Ch. 513. *Apld.* *Re Turner, Wood v. Turner*, [1907] 1 Ch. 126.

3287. Successful suit against incumbrancer—Though incumbrance valueless.]—A solr. is entitled to a charge for his costs on property the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance be entirely valueless, provided it formed a cloud upon the title. It is no objection to an application for such a charge that it is made in a suit which is no longer pending, & which was never brought to a hearing, nor that the property has been sold before the application of the solr.—*JONES v. FROST, Re FIDDEY* (1872), 7 Ch. App. 773; 42 L. J. Ch. 47; 27 L. T. 465; 20 W. R. 1025, L. JJ.

3288. Administration suit against trustee—Decree with direction for appointment of new trustee—Suit abandoned by plaintiff.]—In a suit by a residuary legatee against the sole surviving trustee of testator's estate an administration decree was made, & it was ordered that a new trustee be appointed. The decree was carried into chambers & the accounts brought in, when pltf. stopped all further proceedings in the suit. On a petition by the solr. who had acted for pltf. in the suit, praying that his costs might be charged on pltf.'s interest in the estate, under Solicitors Act, 1860 (c. 127), s. 28:—*Held*: there had been no "property recovered or preserved" within the Act, & the solr. was not entitled to any charge.—*PINKERTON v. EASTON* (1873), L. R. 16 Eq. 490; 29 L. T. 364; 21 W. R. 943; *sub nom.* *PINKERTON v. EASTON, Re PINKERTON*, 42 L. J. Ch. 878, L. C. *Annotations*:—*Consd.* *Foxon v. Gascoigne* (1871), 11 Ch. App. 657, n.; *Greer v. Young* (1883), 24 Ch. D. 545. *Refd.* *Charlton v. Charlton* (1883), 52 L. J. Ch. 971; *Pierston v. Knutsford Estates Co.* (1884), 13 Q. B. D. 666; *Rowlands v. Williams* (1885), 2 T. L. R. 72; *Redfern v. Rosenthal* (1901), 85 L. T. 313.

3289. Refusal of mandatory injunction for pulling down buildings—Suit relating to easement only.]—A bill was filed alleging that deft. had built so as to obstruct pltf.'s ancient lights, & was proceeding to build so as further to obstruct them, & asking for an injunction against further building, & a mandatory injunction to pull down part of what had been built. An interlocutory injunction was granted against building higher, & the suit was afterwards compromised on the terms that the building should remain of its then height. Deft. having become bkpt., his solr. petitioned to have his costs made a charge on deft.'s property to which the suit related:—*Held*: no property had been recovered or preserved within Solicitors Act, 1860 (c. 127), s. 28. A suit which only relates to an easement is not a suit in which it can be said that property is recovered or preserved, even

though a mandatory injunction for pulling down buildings is refused.

No doubt it [sect. 28] applies to property of all kinds: personal property & real property, corporeal & incorporeal property, property in possession & property in remainder or reversion (MELISH, L.J.).—FOXON v. GASCOIGNE (1874), 9 Ch. App. 654; 43 L. J. Ch. 729; 31 L. T. 289; 22 W. R. 939, L. J.J.; *affg.* S. C. *sub nom.* FOX v. GASCOIGNE, 30 L. T. 743.

Annotations:—*Consd.* Rowlands v. Williams (1885), 2 T. L. R. 72. *Refd.* Pelsall Coal & Iron Co. v. L. & N. W. Ry. (No. 3) (1892), 8 Ry. & Can. Tr. Cas. 146.

3290. Action for detinue by administrator against next of kin—Failure to realise under execution—Proceeds subsequently lodged in administration action.—A., as administrator of his deceased mother, sued B. & C., his brother & sister, in the Common Pleas at Lancaster, in detinue for goods belonging to the estate of the intestate, & recovered a verdict & judgment against them, but was unable to levy. Afterwards B. & C. sued out a plaint in a county ct. for administration of the estate, & brought into ct. the proceeds of the goods of the intestate, which they had hitherto concealed:—*Held*: the solr. who acted for A. in the action of detinue was entitled to a charge or lien upon the fund in the hands of the registrar of the county ct. under Solicitors Act, 1860 (c. 127), s. 28, as "property recovered or preserved through his instrumentality," in respect of his costs incurred by him, to be taxed as between attorney & client, & this was the proper ct. in which to make the application.—CATLOW v. CATLOW (1877), 2 C. P. D. 362; 25 W. R. 866.

Annotations:—*Refd.* Greer v. Young (1883), 21 Ch. D. 545, *Ex p.* Tweed, [1899] 2 Q. B. 167.

3291 Action to recover sum invested in building society—On ground of fraudulent transfer—Judgment for defendants.—Under R. S. C., Ord. 51, r. 1A, a judge to whom an action has been transferred for trial, has authority to hear a petition by a solicitor under Solicitors Act, 1860 (c. 127), for costs incurred in recovering property in the action.

An action was brought by a husband against his wife & another person for a sum of money invested in a building society which the husband alleged to have been fraudulently transferred by his wife to the other person. The building society were also made defts. to the action & appeared. Judgment was given for defts. Upon petition presented under Solicitors Act, 1860 (c. 127), by the solr. to defts. other than the building society:—*Held*: he was entitled to a charge upon the whole sum invested, as being the amount "recovered or preserved" to them.—PORTER v. WEST (1880), 50 L. J. Ch. 231; 43 L. T. 569; 29 W. R. 236.

3292. Money paid into court—Plaintiff's solicitor declining to proceed—Change of solicitor by plaintiff.—Deft. having paid money into ct. in the action, pltf.'s solr. declined to proceed with the action, except on terms to which pltf. would not assent. Thereupon pltf. retained fresh solrs., & obtained an order for a change of solrs. After the order was made the late solr. obtained a judge's order at chambers, charging the money in ct. with his costs in the action:—*Held*: (1) when an action is pending a judge at chambers has jurisdiction to make such an order; (2) the money in ct. was "property recovered or preserved" within Solicitors Act, 1860 (c. 127), s. 28; (3) the order was valid, though pltf.'s solr. had ceased to be such when it was made; (4) though he had discharged himself from the position of pltf.'s solr., yet, as he had not done

so wrongfully or improperly, the order was right.

—CLOVER v. ADAMS (1881), 6 Q. B. D. 622.

Annotations:—*As to* (1) *Refd.* *Re* Thomas, [1893] 1 Q. B. 670. *As to* (4) *Refd.* *Re* Wadsworth, Rhodes v. Sugden (1885), 29 Ch. D. 517. *Generally, Refd.* Black v. Lovering (1886), 35 W. R. 232.

3293. — Action by undischarged bankrupt—Without knowledge of trustee—Defence denying liability.—EMDEN v. CARTE, No. 3315, *post*.

3294. — In bankruptcy proceedings—To abide result of action in High Court.—In an action in the High Ct. deft. counterclaimed for money due from pltf., & also took proceedings in bkpcy. against pltf. The bkpcy. proceedings were stayed, on payment of £300 into the Bkpcy. Ct. to abide the result of the action. The action & all matters in dispute were referred, & an award made in pltf.'s favour. Pltf.'s solr. applied for a charging order on the £300 for his costs. The Div. Ct. declined to make the order, on the ground that it had no power to do so, & also that no sufficient merit had been shown:—*Held*: the money was not "property preserved" within the meaning of Solicitors Act, 1860 (c. 127), s. 28, inasmuch as the right to it depended on the discretion of the Bkpcy. Ct., which might be affected by circumstances outside the litigation.—PIERSON v. KNUTSFORD ESTATES CO. (1881), 13 Q. B. D. 666; 53 L. J. Q. B. 181; 32 W. R. 451, C. A.

3295. — Under R. S. C., Ord. 14.—Pltf.'s solrs. obtained an order under above Ord. that deft. should, as a condition of leave to defend, pay the amount claimed into ct. Subsequently pltf., without the knowledge of his solrs. & without making any provision for their costs, compromised the action, & discharged them from their employment. Deft. then applied for an order for the payment out to him of the money in ct., & produced pltf.'s consent to such order being made; but the master being of opinion that the compromise was collusive refused to make the order. The solrs. then applied under Solicitors Act, 1860 (c. 127), s. 28, for a charging order upon the money in ct.:—*Held*: the money in ct. was under the circumstances "property preserved" within the sect., & there was jurisdiction to make a charging order.—MOXON v. SHEPPARD (1890), 24 Q. B. D. 627; 59 L. J. Q. B. 286; 62 L. T. 726; 38 W. R. 704, D. C.

Annotation:—*Refd.* Price v. Crouch (1891), 60 L. J. Q. B. 767.

3296. — Defence denying liability—Plaintiff proceeding with action.—Pltf. claimed £742 for work done under a contract to repair defts.' ship. Defts. paid £500 into ct., with a denial of liability, & counterclaimed damages for pltf.'s delay in completing the work according to the contract. Pltf. proceeded with the action, & in the result £165 was found to be due to him on his claim, & £210 to defts. on their counterclaim:—*Held*: (1) the sum paid into ct. was not property "recovered or preserved" by the exertions of pltf.'s solr. within Solicitors Act, 1860 (c. 127), s. 28, so as to entitle him to charge the whole sum with payment of his costs; (2) the claim & counterclaim must be treated as one action for the purpose of determining the solr.'s right to a charging order for his costs; the sum recovered in the action was the balance remaining in favour of pltf. after deducting from the amount found to be due on his claim the amount found to be due to defts. on their counterclaim, & therefore pltf.'s solr. was only entitled to a charging order in respect of that balance.—WESTACOTT v. BEVAN, [1891] 1 Q. B. 774; 60 L. J. Q. B. 536; 65 L. T. 263; 39 W. R. 363; 7 T. L. R. 290, D. C.

Annotations:—*As to* (2) *Consd.* Stumore v. Campbell, [1892] 1 Q. B. 314. *Refd.* Knight v. Knight, [1925] Ch. 835.

Sect. 4.—Statutory lien and charging orders: Sub-2, B. (b); sub-sect. 3.]

3297. — Security for costs of appeal—Appeal abandoned—Appeal against judgment of Prize Court.]—A sum of £500 was paid into ct. by claimants as security for the costs of their appeal to the Privy Council against a judgment of the Prize Ct. condemning their vessel for the carriage of contraband. The appeal was abandoned. Thereupon cross-summonses were issued: (a) by claimants' solrs. for payment out of the sum in ct.; (b) by the Procurator-General for a charging order on the sum in ct., on the ground that the unsecured balance of the taxed costs of the Crown in the proceedings in the Prize Ct. would absorb the whole sum remaining after taxation of the Crown's costs in the abandoned appeal. Claimants' solrs. contended that, at any rate so far as their own costs were concerned, they had a prior claim upon the fund in ct.:—*Held*: as the solrs. had neither recovered nor preserved the fund the equitable jurisdiction of the ct. did not apply in their favour, & the Procurator-General's application for a charging order upon the whole fund must be allowed.—*THE DIRIGO*, [1920] P. 425; 90 L. J. P. 48; 125 L. T. 113; 37 T. L. R. 93; 15 Asp. M. L. C. 343.

Annotation. — Distd. The Orange Nassau, [1921] P. 190.

3298. Action for breach of trust—Dividends received by new trustee.]—*GREER v. YOUNG*, No. 3267, *ante*.

3299. Whether appointment of receiver.] —*TURNBULL v. RICHARDSON* (1885), 1 T. L. R. 244, C. A.

3300. Dismissal of petition for winding up company—Compromise of subsequent action by shareholder—With sanction of liquidator—Under voluntary winding up.]—*Re UNITED SHEPHERD'S WHEAL ROSE CO., MEAD & DAUBENY'S CLAIM*, [1885] W. N. 15.

3301. Partnership action—Defendant claiming to be partner—Claim not disputed.]—*ROWLANDS v. WILLIAMS* (1885), 2 T. L. R. 72, C. A.

3302. Costs paid under order of court—Refunded by order of Court of Appeal.]—Costs paid under order of the ct. below & ordered by the Ct. of Appeal to be refunded are properly recovered within Solicitors Act, 1860 (c. 127), s. 28. An action was dismissed with costs, which were taxed at £298 & paid. On appeal this judgment was reversed, leave was given to amend the pleadings, & the action was ordered to proceed on the amended pleadings, & defts. were ordered to repay to pltfs. the costs they had received & to pay to pltfs. their costs of the appeal, which were taxed at £165. After this pltfs. became bankrupt. On the application of the solrs. who had acted for pltfs. in the appeal:—*Held*: they were entitled to receive from defts. the £165, & also to receive from defts. out of the £298 the difference between the £165 & pltfs.' costs of the appeal taxed as between solr. & client, & the balance only of the £298, after paying the above difference & the costs of the solrs. & defts. of the application, was to be paid to the trustee in the bkpcy.—*GUY v. CHURCHILL* (1887), 35 Ch. D. 489; 56 L. J. Ch. 670; 57 L. T. 510; 35 W. R. 706; 3 T. L. R. 600, C. A.

Annotation. — Consd. Re Meter Cabs, [1911] 2 Ch. 557.

3303. Defeat of hostile administration action—& motion for appointment of receiver.]—*Re DICKINSON, BUTE (MARQUIS) v. WALKER, Ex p. HOYLE, SHIPLEY & HOYLE*, [1888] W. N. 94.

3304. Annual sum secured to wife—On decree for dissolution of marriage—Costs appearing to be

recoverable from husband—Facts rebutting presumption of contract by wife.]—A decree for dissolution of marriage having been made on the wife's petition, an order was made under Matrimonial Causes Act, 1857 (c. 85), s. 32, directing her husband to secure to her for life the annual sum of £130. Upon application by the solrs. who had acted for the wife under the petition for an order under Solicitors Act, 1860 (c. 127), s. 28, charging their costs upon such annual sum of £130:—*Held*: such annual sum was "property recovered or preserved by the solrs.," & therefore liable to a charging order under s. 28; but the ct. refused, in the exercise of its discretion, to make the order, on the ground that upon the facts it could not be presumed that the wife had entered into a contract with the solrs. so as to bind her separate property; the husband was therefore *prima facie* responsible, & for anything that appeared the costs could be recovered from him.—*HARRISON v. HARRISON* (1888), 13 P. D. 180; 58 L. J. P. 28; 60 L. T. 39; 36 W. R. 748; 4 T. L. R. 646, C. A.

Annotations. — Consd. Re Wingfield & Blow, [1904] 2 Ch. 665. *Refd. Braumstein v. Lewis* (1891), 7 T. L. R. 246; *Everett v. Paxton* (1891), 65 L. T. 383; *Hood Barrs v. Cathcart*, [1891] 2 Q. B. 559. *Mentd. Leak v. Driffield* (1889), 24 Q. B. D. 98; *Bonner v. Lyon* (1890), 38 W. R. 541; *Pelton v. Harrison*, [1891] 2 Q. B. 122; *Re Tatham, Bensade v. Hastings* (1892), 37 Sol. Jo. 27; *Watkins v. Watkins*, [1896] P. 222; *MacLurcan v. MacLurcan* (1897), 77 L. T. 474; *Re Fieldwick, Johnson v. Adamson* (1908), 78 L. J. Ch. 153.

3305. Property devised & bequeathed by will—Action to establish validity of will.]—Testator by his will, after bequeathing his household furniture & effects to his wife, devised & bequeathed the residue of his real & personal estate to his wife for life, &, after her decease, to his two daughters, of whom one was his legitimate daughter by a former wife & the other was illegitimate, in equal shares. Probate of the will being opposed by testator's daughters, the exor. brought a probate action against them to establish its validity, with the result that probate of the will was decreed. The bulk of the estate was realty:—*Held*: the solr. who acted for the exor. was entitled under Solicitors Act, 1860 (c. 127), s. 28, to a charge for his costs in the action upon the property devised & bequeathed by the will as property preserved through his instrumentality.—*Ex p. TWEED*, [1899] 2 Q. B. 167; 68 L. J. Q. B. 794; 81 L. T. 1, 48 W. R. 5, C. A.

3306. Winding up & reconstruction of company.]—A limited co. being unable to meet its liabilities, executions were levied on the co.'s property by creditors, & other creditors threatened actions. An extraordinary meeting of the co. was then held, & resolutions were duly passed to wind up the co. voluntarily. It was further resolved that the liquidator should submit a proposal for the reconstruction of the co.

A scheme of arrangement, sanctioned by order of the court, under the Joint Stock Companies Arrangement Act, 1870 (c. 104), provided that a new co. should be incorporated; that one of its objects should be the acquisition & undertaking of the assets & liabilities of the co.; that the new co. should discharge the unsecured debts of the co. by allotting to the unsecured creditors fully paid-up shares in the new co. in full discharge of their claims against the co.; & that the shareholders of the co. should receive partly paid up shares in the new co. It was also provided that the new co. should pay all the costs of the winding up & of the scheme of arrangement.

In pursuance of this order an agreement, subsequently adopted by the new co., was made between the liquidator & the trustee of the future

new co. whereby it was provided that part of the consideration payable by the new co. to the liquidator should be cash. The new co. did not pay cash, & the assets of the co. accordingly were not transferred to the new co.:—*Held*: the co.'s assets purchased by the new co. & retained by the liquidator were to be charged with the costs of the co.'s solr. which had arisen in connection with the winding up & reconstruction of the co., the co.'s property having been "recovered or preserved" through the instrumentality of the solr. within Solicitors Act, 1860 (c. 127), s. 28.—*Re JOHN CLAYTON, LTD.* (1905), 92 L. T. 223; 49 Sol. Jo. 238.

3307. Compromise of administration action.]—

In an action by beneficiaries under a will against the trustees for (*inter alia*) execution of the trusts of the will, an account of testator's business, which had been carried on by the trustees under a power in that behalf, & administration, a receiver & manager of the business was appointed on motion, & the action was ultimately compromised at the trial, one of the terms of compromise being that the costs of all parties should be paid out of the estate, including in the costs of the trustees all costs, charges, & expenses incurred by them as exors. & trustees of the will. In the result the action proved disastrous to the trust estate, the business, which previously had been profitable, having to be closed down for want of capital, & the assets of the estate being insufficient to pay the costs of all parties. On an application by plffs.' solrs. for a charging order for their costs under Solicitors Act, 1860 (c. 127), s. 28, & by the trustees for a declaration of priority in respect of their costs, charges, & expenses:—*Held*: (1) inasmuch as the property had been managed & retained for the rightful owners, it had been "preserved" within the meaning of s. 28; it did not matter that in fact the property when it had been preserved for the benefit of the parties entitled yielded little or nothing for them; & in the circumstances plffs.' solrs. were entitled to a charging order for their costs; (2) having regard to the long-established practice of the Ch. Div. indemnifying trustees for all expenditure properly incurred in relation to their trust estate, & also to the express terms of the compromise, deft. trustees were entitled to payment of all their costs, charges, & expenses in priority to the charging order obtained by plffs.' solrs.

(3) The power of the ct. to make a charging order is discretionary, & it will not be made if the effect is to deprive trustees of their costs, charges, & expenses where they have done nothing to dis-entitle themselves to the consideration of the ct.—*Re TURNER, WOOD v. TURNER*, [1907] 2 Ch. 126, 539; 76 L. J. Ch. 492; 96 L. T. 798; 23 T. L. R. 524; 51 Sol. Jo. 485, C. A.

3308. Claim for declaration of title to premises—Appointment of receiver & manager—Discontinuance by plaintiff.]—In an action by a wife against her husband claiming as her property the

assets of a bridge club carried on by them jointly, the wife obtained an order for the appointment of a receiver & manager of the property. She subsequently abandoned her claim in the action. On an application by her solrs. for a charging order under Solicitors Act, 1860 (c. 127), s. 28, in respect of their costs of obtaining the receivership order:—*Held*: the property had neither been recovered nor preserved through the instrumentality of the solrs. & they were therefore not entitled to the order.—*WINGFIELD v. WINGFIELD*, [1919] 1 Ch. 462; 88 L. J. Ch. 229; 120 L. T. 588; 35 T. L. R. 308; 63 Sol. Jo. 372, C. A.

SUB-SECT. 3.—IN RESPECT OF WHAT COSTS.

3309. Costs in particular matter or suit—Not general costs.]—An attorney, under Solicitors Act, 1860 (c. 127), s. 28, can only have a charge upon property recovered or preserved for his client in respect of the costs in the particular matter or suit, not for general costs.—*Ex p. THOMPSON* (1860), 3 L. T. 317.

3310. ———.]—*WILSON v. ROUND*, No. 3260, *ante*.

3311. Proceedings for benefit of infant—Costs of establishing title—& costs of partition suit.]—The costs of proceedings under Declaration of Titles Act on behalf of an infant, together with the costs of a partition suit & of a suit to obtain a declaration of lien:—*Held*: to be costs for which the solr. had a lien on the fund recovered.—*PRITCHARD v. ROBERTS* (1873), L. R. 17 Eq. 222; 43 L. J. Ch. 129; 29 L. T. 883; 22 W. R. 259.

Annotation—*Refd. Steeden v. Walden*, [1910] 1 Ch. 393.

3312. Costs on further consideration.]—Solrs. who had obtained a charging order for costs due to them were not allowed their costs of appearing by counsel at the hearing on further consideration.—*MILDMAY v. QUICKE* (1877), 6 Ch. D. 553; 46 L. J. Ch. 667; 25 W. R. 788, C. A.

Annotations:—*Mentd.* *Belcher v. Williams* (1890), 45 Ch. D. 510; *Re Morgan, Smith v. May*, [1900] 1 Ch. 471; *Herbert v. Herbert*, [1912] 2 Ch. 268.

3313. Costs bonâ fide incurred —In recovering or preserving property.]—*EMDEN v. CARTE*, No. 3315,

3314. ——— Solicitor commencing partnership action—In ignorance of insolvency of partnership.]—

—If a solr. has *bonâ fide* commenced a partnership action & obtained the appointment of a receiver, who has got in assets, he is entitled to a charge on the assets recovered for his costs, unless, being aware that the partnership was insolvent, he commenced his action not *bonâ fide*, but merely to obtain costs where proceedings might have been taken in bkpy.—*Re NICHOLAS & PAINE, Ex p. LOVETT* (1889), 61 L. T. 87; 37 W. R. 715; 5 T. L. R. 581; 6 Morr. 173.

3315. Action by bankrupt without knowledge of trustee—Money paid into court—Subsequent intervention of trustee—Costs up to time of intervention.]—(1) An undischarged bkpt., without

3307 i. Compromise of administration action.]—*McLARNON v. CARRICKFERGUS URBAN DISTRICT COUNCIL*, [1904] 2 L. R. 44.—*IR.*

t. Judgment debt.]—A judgment debt is "property" within Rule 1129.—*ORFORD v. FLEMING*, 18 C. L. T. Occ. N. 142, 241.—*CAN.*

a. Sale under mortgage delayed by solicitor—To benefit of creditors of mort estate.]—*TREMEAR v. LAW* (1890), 20 O. R. 137.—*CAN.*

Award on arbitration.]—A re-ice to arbn. having been made in action, the arbitrator awarded that

a certain sum should be paid by plff. to deft., & the award was confirmed by the ct. An order was made on the application of defts.' solr. under 39 & 40 Vict. c. 44, s. 3, declaring him entitled to a lien for the costs of deft. in the action upon the amount awarded, as property recovered or preserved for deft. through the instrumentality of the solr.; & directing plff. to pay thereout to the solr. the amount of such costs when taxed.—*McALEAVEY v. McALEAVEY* (1882), 9 L. R. Ir. 165.—*IR.*

c. Property over which plaintiff

*appointed receiver—Equitable execution.]—**DUFF v. TUIE*, [1914] 2 I. R. 31.—*IR.*

PART VIII. SECT. 4, SUB-SECT. 3.

3309 i. Costs in particular matter or suit—Not general costs.]—A solr. is entitled under 39 & 40 Vict. c. 44, s. 3, to a charge for costs incurred in recovering or preserving property, not only against his own client, but against all persons entitled to the property. But the charging order must be confined to costs of proceedings in the ct. where it is made. It does not extend

Sect. 4.—Statutory lien and charging orders: Subsects. 3 & 4, A. & B.]

the knowledge of the trustee in his bkpcy., brought an action, claiming (*inter alia*) remuneration for services rendered by him as an architect to deft., & damages for wrongful dismissal. Def't., without admitting any legal liability to pl'tf. paid £360 into ct. Pl'tf. took out a summons to have the money paid out to him, but before the summons was heard the action came to the knowledge of the trustee, & he obtained an order joining him as co-pl'tf. in the action, on the ground that the remuneration & damages claimed were his property. The bkpt.'s solr. then applied for a charging order on the £360 in respect of his costs, charges, & expenses of or in reference to the action:—*Held*: the bkpt.'s solr. was entitled to a charging order for his costs up to the time of the intervention of the trustee.

(2) When the ct. makes an order under the Solicitors Act, 1860 (c. 127), s. 28, declaring a solr. entitled to a charge upon the property recovered or preserved in an action, it is the duty of the judge to limit the order to costs properly incurred in recovering or preserving the property.

Money paid into ct. by a def't., although accompanied by a defence denying legal liability, may be taken out of ct. by pl'tf., & is, therefore, property "recovered or preserved" within Solicitors Act, 1860 (c. 127), s. 28.—*EMDEN v. CARTE* (1881), 19 Ch. D. 311; 51 L. J. Ch. 371; 45 L. T. 328; 30 W. R. 17, C. A.

Annotations:—As to (1) *Appld.* *Re Moter Cabs*, [1911] 2 Ch. 557. As to (2) *Folld.* *Charlton v. Charlton* (1883), 49 L. T. 267. *Appld.* *Jackson v. Smith, Ex p. Digby* (1884), 53 L. J. Ch. 972. *Refd.* *Knight v. Knight*, [1925] Ch. 835. As to (3) *Distd.* *Westacott v. Bevan*, [1891] 1 Q. B. 774. *Generally, Consd.* *Wingfield v. Wingfield*, [1910] 1 Ch. 462. *Mentd.* *Coote v. Ford*, [1899] 2 Ch. 93; *Brown v. Feeney*, [1906] 1 K. B. 563.

3316. Costs of proceedings in court of justice—Not in respect of proceedings before arbitrator—Under Land Clauses Act, 1845 (c. 18).]—(1) A solr. is not entitled to a charge under Solicitors Act, 1860 (c. 127), upon property of his client "recovered or preserved" for costs in respect of proceedings taken before an arbitrator or jury under Lands Clauses Act, 1845 (c. 18), for compensation, such proceedings not being "proceedings in any Ct. of Justice."

(2) The London agents of a country solr. are not entitled to any such charge as against the original client. They are not the solrs. employed within the meaning of Solicitors Act, 1860 (c. 127), s. 28, their only right being as against the country solrs. who employed them, & who alone are entitled to the statutory charge.

(3) A solr. who acts both for a mtgor. & mtgee. in the same transaction does not by that fact alone lose his right to the statutory charge.—*MACFARLANE v. LISTER* (1887), 37 Ch. D. 88; 57 L. J. Ch. 92; 58 L. T. 201; 4 T. L. R. 106, C. A.

Annotations:—As to (2) *Refd.* *Re Becket, Purnell v. Paine*, [1918] 2 Ch. 72. As to (3) *Refd.* *Brunton v. Electrical Engineering Corpn.*, [1892] 1 Ch. 434; *Re Walker, Meredith v. Walker* (1893), 68 L. T. 517.

3317. Costs of appeal against refusal to make order.]—*WATERLAND v. SERLE* (1897), 42 Sol. Jo. 68, C. A.

3318. Counsel's fees not paid before delivery of bill of costs—Or commencement of taxation—Costs of preparing brief.]—For the purpose of taxation

of a solr.'s bill under Solicitors Act, 1860 (c. 127), s. 28, "costs, charges, & expenses" may include fees to counsel which have not been paid before the delivery of the bill or the commencement of the taxation.

A lady was involved in litigation with certain money-lenders. Her son was finding the money for the costs thereof. The lady & her son were being advised by different solrs. The son's solr. prepared the brief in the litigation & the lady's solr. perused & approved it. The litigation was settled, & the lady recovered certain property. Her solr. then applied for a charging order on the property recovered for his costs, charges, & expenses, & obtained by consent an order that his bill of costs as then delivered should be taxed & an undertaking that the amount found due should be paid. The bill of costs contained (a) a sum for counsel's fees which had not then been paid, & (b) a sum for preparing the brief in the litigation. Upon taxation of the bill:—*Held*: the counsel's fees, which were paid during the taxation, should be allowed as costs, charges, & expenses, though not paid before the commencement of the taxation, but the sum for preparing the brief should not be allowed.—*Re EDEN, WATKINS v. EDEN*, [1920] 1 K. B. 333; 90 L. J. K. B. 188; 123 L. T. 134; *sub nom.* *EDEN v. MILLER*, 64 Sol. Jo. 357, C. A. *Annotation*:—*Refd.* *Goodchild v. Roberts*, [1925] Ch. 592.

SUB-SECT. 4.—THE APPLICATION.

A. In General.

3319. Form of application—By summons or petition.]—On Dec. 4, 1878 def't.'s solrs. obtained upon a summons intituled in a partnership action an order charging all moneys in the hands of the receiver & payable to def't., with their costs of the action. On the previous day a judgment creditor of def't. obtained a garnishee order *nisi*, attaching all moneys in the hands of the receiver then or thereafter to become due to def't., & on Dec. 5, 1878 the garnishee order *nisi* was served on the receiver, & was subsequently made absolute:—*Held*: (1) the solr.'s charge had priority to the claim of the creditor under the garnishee order.

(2) A charging order under Solicitors Act, 1860 (c. 127), s. 28 may be obtained either on summons or petition, & is sufficient if intituled in the action or proceeding in which the property is recovered or preserved.—*HAMER v. GILES, GILES v. HAMER* (1879), 11 Ch. D. 942; 48 L. J. Ch. 508; 41 L. T. 270; 27 W. R. 834.

Annotations:—As to (1) *Consd.* *Jackson v. Smith, Ex p. Digby* (1884), 53 L. J. Ch. 972. *Generally, Mentd.* *Austin v. Jackson* (1879), 11 Ch. D. 942, n.; *Potter v. Jackson* (1880), 13 Ch. D. 845; *Rosher v. Crannis* (1890), 63 L. T. 272; *Ross v. White*, [1891] 3 Ch. 326.

3320. ———.]—An application by a solr. under Solicitors Act, 1860 (c. 127), s. 28, for an order charging his costs upon the interest of a party to an action in a fund in ct., is, notwithstanding Jud. Act, 1873 (c. 66), s. 39, properly made by a petition in the action. But the other parties to the action ought not to be served with the petition.—*BROWN v. TROTMAN* (1879), 12 Ch. D. 880; 48 L. J. Ch. 862; 41 L. T. 179; 28 W. R. 164.

3321. How intituled—In the matter of the suit.]—A petition for the purpose of obtaining a

to miscellaneous costs, or costs of proceedings in another ct., or of a proceeding, e.g. to remit an action to an inferior ct., which has been abandoned.—*SHEVLIN v. McGRANE* (1886), 17 L. R. Ir. 271.—IR.

PART VIII. SECT. 4, SUB-SECT. 4.—A.

3321 i. How intituled—In the matter of the suit.]—Where a petition was in the style of cause of the original suit, & also, "In the matter of T. S. K. a

solr.," & "In the matter of the Imperial Statute passed in the twenty-third & twenty-fourth years of the reign of Her Majesty Queen Victoria, & chaptered one hundred & twenty-seven";—*Held*: as the petition was in

declaration under Solicitors Act, 1860 (c. 127), s. 88 must be entitled in the suit, notwithstanding that the bill has been dismissed, & that the parties to the suit, whom it will thus become necessary to serve, are numerous.—*Re KEANE* (1871), 19 W. R. 429.

Annotation:—*Apld.* *Heinrich v. Sutton, Re Fiddley* (1871), 6 Ch. App. 865.

— & in the matter of the solicitor.]

—*HEINRICH v. SUTTON, Re FIDDEY*, No. 3330, *post*.

3323. ————.]—*HAMER v. GILES, GILES v. HAMER*, No. 3319, *ante*.

3324. On whom served—Person whose property to be charged.]—*BROWN v. TROTMAN*, No. 3320, *ante*.

3325. Time for making application—Decree for administration — On further consideration.]—A decree for administration of testator's estate was made at the suit of an infant who was entitled to a contingent reversionary share in the estate. R. was solr. for plff. & for J. & A., two of the persons entitled to the other shares. After decree he ceased to be solr. for these parties, & obtained an order directing taxation of his costs as their solr. in the action, including the costs of the application, & charging their shares in the estate with the payment of such costs, with liberty to apply to have them raised. He now, the cause not yet having been heard for further consideration, applied to have the costs raised by a sale of the shares raised:—*Held*: the application was premature, & no order ought to be made for raising the costs until the cause was heard for further consideration.—*Re GREEN, GREEN v. GREEN* (1884), 26 Ch. D. 16; 54 L. J. Ch. 54; 50 L. T. 513; 32 W. R. 373, C. A.

3326. — Effect of delay—Proceedings in lunacy.]—A lunatic died in June, 1853. In Feb. 1854 an order in lunacy was made, by which it was declared that the costs incurred in prosecuting the commission had been incurred for the benefit of the lunatic, & the bill was directed to be taxed. The taxation was completed in Feb. 1855, & after this the solr. who had been employed in prosecuting the commission delivered for the first time a signed bill of costs. In Oct. 1860 the solr. presented a petition to have his costs raised out of property of which the lunatic, who left issue, had been tenant in tail:—*Held*: under the proviso contained in Solicitors Act, 1860 (c. 127), s. 29, the application was too late.—*Re CUMMING* (1860), 2 De G. F. & J. 376; 6 Jur. N. S. 1129; 45 E. R. 666; *sub nom. Re CUMMING, Ex p. TURNER*, 30 L. J. Ch. 29; 3 L. T. 391; 9 W. R. 213, L. JJ.

3327. ———— No ground for refusing order—Unless other rights have arisen.]—Delay by a solr. in applying under Solicitors Act, 1860 (c. 127), s. 28, for an order charging his costs on property recovered by him is no ground for refusing the order unless other rights in respect of the property have arisen in the meantime.

Solrs. employed by a limited co. recovered a claim against an estate in course of administration by the ct. The co. was subsequently wound up by the ct. Shortly after the winding-up order was made, the solrs. applied for an order charging their costs on the co.'s share of the fund in ct. to the credit of the administration action:—*Held*: as the charging order in this case conferred no new

right, but was only a cheap & speedy mode of enforcing the common law lien on the co.'s share of the fund in ct., which lien existed prior to the winding up, the ct., in the exercise of its discretion under the statute, would make the order.—*Re BORN, CURNOCK v. BORN*, [1900] 2 Ch. 433; 69 L. J. Ch. 669; 83 L. T. 51; 49 W. R. 23; 44 Sol. Jo. 611.

Annotations:—*Apld.* *Re Meter Cabs*, [1911] 2 Ch. 557. *Refd.* *The Birnam Wood*, [1907] P. 1.

3328. Whether made *ex parte*.]—*THE BIRNAM WOOD*, No. 3278, *ante*.

B. To Whom Made.

3329. Whether to judge to whose court action attached.]—*WILSON v. HOOD* (1864), 3 H. & C. 148; 33 L. J. Ex. 204; 10 L. T. 345; 159 E. R. 484; *sub nom. Re WILSON & HOOD, Ex p. SEAMAN*, 10 Jur. N. S. 592; *sub nom. Ex p. SEEMAN*, 4 New Rep. 154; *sub nom. Ex p. SLIFEMAN*, 12 W. R. 748.

Annotations:—*Apld.* *Catlow v. Catlow* (1877), 2 C. P. D. 362. *Refd.* *Heinrick v. Sutton, Re Fiddley* (1871), 40 L. J. Ch. 518; *Burchall v. Pugin* (1875), L. R. 10 C. P. 397.

3330. ————.]—When a solr. makes an application to the Ct. of Ch. to have it declared that he is entitled to a charge upon property which has been recovered or preserved by him for his client in a suit in which he has been employed, he must make his application to the judge to whose ct. the suit is attached, & the application must be entitled in that suit as well as in the matter of the solr. *Semble*: the fact that a suit has been absolutely dismissed is no objection to such an order being subsequently made in the suit.—*HEINRICH v. SUTTON, Re FIDDEY* (1871), 6 Ch. App. 865; 25 L. T. 613; 19 W. R. 1075.

Annotation:—*Apld.* *Owen v. Henshaw* (1877), 47 L. J. Ch. 267.

3331. —In an action intitled in the Ch. Div. Liverpool District Registry, & tried before a judge & jury at Liverpool, a petition under Solicitors Act, 1860 (c. 127), s. 28, by a solr. for an order to charge the property recovered or preserved must be presented to the judge who tried the action, the judge of the Ch. Div., to whose ct. the action was attached, having no jurisdiction to hear the petition.—*OWEN v. HENSHAW* (1877), 7 Ch. D. 385; 47 L. J. Ch. 267; 26 W. R. 188.

3332. ————.]—The motion for a charging order under Solicitors Act, 1860 (c. 127), s. 28, must be made before the judge who tried the cause.—*HIGGS v. SCHRADER* (1878), 3 C. P. D. 252; 47 L. J. Q. B. 426; 26 W. R. 831.

3333. ————.]—Any judge of the High Ct., whether sitting in bkpcy. or not, can make a charging order under Solicitors Act, 1860 (c. 127), s. 28, & *semble*, so also can a judge who is a judge of the Ct. of Bkpcy. alone, where in the course of bkpcy. proceedings property has been "recovered or preserved."

A charging order under the sect. can be made by any judge of the Div. in which the "suit, matter or proceeding" has been heard, & the application for the order need not necessarily be made to the particular judge who heard the suit, matter or proceeding.

An application to discharge a charging order under the above sect., as in all cases in which it is sought to set aside *ex p.* proceedings, must be made promptly; for instance, an application

the proper style of cause of the original suit, the other two headings, even if unnecessary, might be considered as surplusage.—*LEACOCK v. McLAREN* (1892), 8 Man. L. R. 579.—CAN.

d. — In the matter of the Act.]—A solr.'s petition for a charging order

should be intitled in the matter of the Act. The petition or notice must show upon what material it is grounded.—*WISHART v. BONNEAU* (1887), 5 Man. L. R. 132.—CAN.

e. Notice of application—Necessity for statement of notice in affidavit.]

—Where an attorney applies to be paid his costs out of a fund allocated to his client he ought to state in his affidavit that he distinctly informed his client of his intention so to apply.—*REDMOND v. GORMLEY* (1842), 4 I. Eq. R. 698.—IR.

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made after the lapse of two months from the service of the order, without sufficient cause shown for the delay, is too late.—*Re DEAKIN, Ex p. DANIEL*, [1900] 2 Q. B. 489; 69 L. J. Q. B. 725; 82 L. T. 776; 48 W. R. 678; 44 Sol. Jo. 553; 7 Mans. 302, C. A.

3334. Judge to whom action transferred for trial.]—*PORTER v. WEST*, No. 3291, *ante*.

3335. Judge in chambers—Action pending.]—*CLOVER v. ADAMS*, No. 3292, *ante*.

3336. Action for detinue by administrator in High Court—Subsequent suit for administration by defendant in county court—Application to High Court.]—*CATLOW v. CATLOW*, No. 3290, *ante*.

C. By Whom Made.

3337. Solicitor employed.]—Solicitors Act, 1860 (c. 127) is intended for the benefit & protection of solrs. only, & the ct. will not sanction the use of it for the purpose of enabling parties to an action to charge the property recovered or preserved in the action with the payment of costs for which they themselves are liable & which they are able to pay.—*HARRISON v. CORNWALL MINERALS RY. CO.* (1884), 53 L. J. Ch. 596; 50 L. T. 452; 48 J. P. 724; 32 W. R. 748.

Annotation — *Consd. Re Horne, Horne v. Horne*, [1906] 1 Ch. 271.

3338. - - - Though ceasing to act—Employment of new solicitor.]—By an order made in an administration suit, the costs were ordered to be taxed, & pltf.'s costs to be paid to his solr., B., out of a specified fund in ct. Before the costs had been taxed pltf. obtained an order to change his solr., & B. no longer acted for any party in the suit:—*Held*: B. was entitled to a charging order, under Solicitors Act, 1860 (c. 127), upon the interest of his client in the funds in ct., notwithstanding the prior order for payment out of a certain specified fund; but such order ought not to extend to directing a sale, but must be limited to giving the parties liberty to apply. The fact that pltf. had in the meantime assigned his interest with the knowledge of B. made no difference.—*PILCHER v. ARDEN, Re BROOK* (1877), 7 Ch. D. 318; 47 L. J. Ch. 479; 38 L. T. 111; 26 W. R. 273, C. A.

Annotations:—*Folld. Bulley v. Bulley* (1878), 38 L. T. 95. *Refd. Cole v. Eley*, [1891] 2 Q. B. 180. *Mentd. Mathias v. Yetts* (1882), 46 L. T. 497.

3339. - - - *CLOVER v. ADAMS*, No. 3292, *ante*.

3340. - - - Acting for mortgagor & mortgagee in same transaction.]—*MACFARLANE v. LISTER*, No. 3316, *ante*.

3341. Personal representative of solicitor.]—*BAILE v. BAILE*, No. 3286, *ante*.

3342. Not by party to action.]—*HARRISON v. CORNWALL MINERALS RY. CO.*, No. 3337, *ante*.

3343. London agent.]—*MACFARLANE v. LISTER*, No. 3316, *ante*.

3344. Assignee of solicitor.]—Under Solicitors Act, 1860 (c. 127), s. 28, the assignee of a solr. employed by pltf. in an action may apply for & obtain a charging order on the property recovered in the action for the costs incurred to such solr. & assigned by him to appct.—*BRISCOE v. BRISCOE*, [1892] 3 Ch. 543; 61 L. J. Ch. 665; 67 L. T. 116; 40 W. R. 621; *sub nom. Re BRISCOE, BRISCOE v. AXWORTHY*, 36 Sol. Jo. 610.

D. Grounds for Granting or Refusing.

3345. Order obtained for order of costs—To London agent.]—An order had been made for the payment of the costs, charges, & expenses of all parties to a petition to appoint new trustees in the room of others who had disclaimed, such costs to be paid out of the trust estate to the London agent of petitioner's solr. On an application that the amount of these costs, which had been taxed, but not paid in consequence of the trust estate not having been realised, should be declared to be a charge on the trust property:—*Held*: petitioner having already obtained an order for the payment of these costs, the ct. could not under Solicitors Act, 1860 (c. 127), s. 28, declare the amount to be a charge on the estate.—*Re VINEY'S TRUST* (1868), 18 L. T. 851.

Annotation:—*Refd. Re Clarke's Settlement*, (1911), 55 Sol. Jo. 293.

3346. - - - In respect of costs for which charge sought.]—In a creditor's administration action the usual decree was made on July 1, 1907. In Jan. 1910, pltf. entered into a contract for the sale of the only outstanding asset for £383. Deft., the surviving extrix., opposed the confirmation of this contract on the ground of undervalue, & the property was ordered to be sold by auction. At this sale, of which deft. had the conduct, considerable expenses were incurred, & the property fetched £400, which was paid into ct. In Jan. 1911, on further consideration, an order was made that a sum of £64 found due from deft. to the estate should be set off against her costs, & that the residue of her costs & those of pltf. should be paid out of the £100. The solrs. who had acted for deft. throughout the proceedings applied for a charging order for the whole of their costs on the fund in ct. as being property recovered or preserved in the proceedings within Solicitors Act, 1860 (c. 127), s. 88:—*Held*: the order was in the discretion of the ct., & the ct. would not make it in this case, because the order on further consideration practically ordered the same costs as those for which the solrs. now asked for a charge to be paid to their client.—*Re COCKRELL'S ESTATE* [1912] 1 Ch. 23; *sub nom. Re COCKRELL'S ESTATE, PINKEY v. COCKRELL*, 81 L. J. Ch. 152; 105 L. T. 662, C. A.

3347. Action absolutely dismissed.]—*HEINRICH v. SUTTON, Re FIDDEY*, No. 3330, *ante*.

3348. Decree obtained in probate action—Client

PART VIII. SECT. 4, SUB-SECT. 4.
—D.

1. Delay in application—Limitation of action.]—Petition by a solr. for a charging order on a fund in ct. for his costs for services rendered two years previously to the four parties entitled to the fund, who objected that the claim was barred by Stat. Limitations:—*Held*: as to two of the parties, they could not rely on the Statute because they had, four years before, taken out an order to tax the same costs, & as to the other two, as they had never been residents of Manitoba, the Statute had never begun to run in their favour.—*SHIELDS v. McLAREN*,

13 C. L. T. Occ. N. 418.—CAN.

g. - - -—*ROCHE v. ROCHE* (1890), 29 L. R. Ir. 339.—IR.

h. Necessity for proof of no other means of recovery.]—The rule is not applicable to all cases that a solr. must *prima facie* establish that he cannot obtain payment for his services in any other way before a charging order will be made in his favour.—*Re HAMILTON (Man.)*, [1926] 4 D. L. R. 1155; [1926] 3 W. W. R. 411.—CAN.

k. - - - Onus of proof.]—Pltf.'s solrs. applied for a charging order upon a sum in ct. for their costs, on the ground that it had been preserved

through their instrumentality, & that it was uncertain whether their client had property within the jurisdiction available for the payment of costs, other than such share in the assets as she might prove entitled to on the taking of the account.—*Held*: it was for appcts. to satisfy the ct. that there was a real danger of their being unable to recover costs from their client.—*LI LAM SHI v. LI KU TSEUNG* (1916), 11 Hong Kong L. R. 106.—HONG KONG.

l. Judgment for pauper client.]—When a pauper obtains a decree for debt & costs, his solr. has a lien on the sum recovered for divers costs, though

taking out probate personally.]—HEAP *v.* JACKSON, [1886] W. N. 192.

3349. Security taken by solicitor.]—A solr. in an action accepted from a client a mtge. to secure his costs. The action was successful, & the solr. moved for a charging order for his costs upon the property recovered:—*Held*: the solr., having obtained a mtge. for his costs, was debarred from obtaining a charging order.—GROOM *v.* CHEESEWRIGHT, [1895] 1 Ch. 730; 64 L. J. Ch. 406; 72 L. T. 555; 43 W. R. 475; 13 R. 386.

Annotation:—*Reid. Re Douglas Norman*, [1898] 1 Ch. 199.

3350. Administration action—Solicitor obtaining benefit of assets recovered.]—*Re DREW, SIMMONS & SIMMONS v. DREW* (1913), 135 L. T. Jo. 323.

SUB-SECT. 5.—THE ORDER.

A. In General.

3351. Nature of charge—In nature of salvage.]—GREER *v.* YOUNG, No. 3267, *ante*.

3352. ———.]—CHARLTON *v.* CHARLTON, No. 3270, *ante*.

B. Effect of Order.

3353. Confers no new right.]—*Re BORN, CURNOCK v. BORN*, No. 3327, *ante*.

3354. On right to set off for damages in different actions.]—An order may be made allowing a judgment debtor to set off against the damages due from him damages due to him from the judgment creditor on a judgment in another action, notwithstanding the existence of an order under Solicitors Act, 1860 (c. 127), s. 28, charging the first-mentioned damages with a solr.'s costs.—GOODFELLOW *v.* GRAY, [1899] 2 Q. B. 498; 68 L. J. Q. B. 1032; 81 L. T. 314.

Annotation:—*Consd. Reid v. Copper*, [1915] 2 K. B. 147.

C. Priorities.

3355. Assignment of fund by client—Stop order obtained by assignee.]—HAYMES *v.* COOPER, COOPER *v.* JENKINS, No. 3242, *ante*.

3356. ——— Order for payment out of specified fund—Change of solicitor before taxation.]—PILCHER *v.* ARDEN, *Re Brook*, No. 3338, *ante*.

3357. ——— With notice of right to charge.]—An action of damage by collision was compromised on the terms that defts., the owners of the steamship *Paris*, should pay to pltf. 50 per cent. of the damages sustained by pltf.'s vessel, each party to bear their own costs of the action, & the amount of the damages to be ascertained by an arbitrator. Prior to the commencement of the action deft.'s solrs. had been pressing pltf. for a settlement of claims of clients of theirs against him, & for their own costs when acting for him; & pltf. after the compromise of the action but before the arbitrator made his award, wrote to deft.'s solrs. that he agreed to their settling the amount due to themselves & to certain named clients of theirs "out of the money coming in from *Paris* s.s."

By his award the arbitrator fixed the sum due from defts. to pltf., which, with the agreed costs of the reference, made a total of £405 11s. 8d., & defts.' solrs. forwarded to pltf.'s solrs. a cheque for "small" amount as being the balance out of the

above total sum after paying the named clients and themselves. Pltf.'s solrs. took out a summons under Solicitors Act, 1860 (c. 127), s. 28, for a charging order. It was admitted that there was no collusion, & it was agreed that the award should be treated as a decree:—*Held*: pltf.'s solrs. in the action were entitled to an order charging the sum recovered with the pltf.'s costs to be taxed as between solr. & client, on the ground that the fund recovered by the exertions of pltf.'s solrs. was fixed, though not worked out, at the date of the compromise, & the subsequent assignment of the fund was void under the statute as being an act done operating to defeat the right of the solrs. to a lien for costs, of which right, by reason of the fund being a sum recovered in the action, deft.'s solrs., & their clients through them, were affected with notice.—THE PARIS, [1896] P. 77; 65 L. J. P. 42; 73 L. T. 736; 8 Asp. M. L. C. 126.

Annotation:—*Apld. Watts v. Hetley* (1899), 41 Sol. Jo. 134.

3358. Judgment creditor.]—A receiver was appointed in a partnership action, & three judgment creditors obtained charging order in respect of the amounts of their judgments over the assets of the firm represented by money in ct. & in the hands of the receiver, & they undertook to deal with their charges according to order of the ct.:—*Held*: the lien of the solr. of the pltf. in the partnership action for his costs in respect of "property recovered or preserved" & his right to a charge in respect thereof took priority over the other charges, the persons entitled to them not being purchasers for value without notice, within Solicitors Act, 1860 (c. 127), s. 28.—RIDD *v.* THORNE, [1902] 2 Ch. 314; 71 L. J. Ch. 624; 86 L. T. 655; 50 W. R. 542; 46 Sol. Jo. 514.

3359. Ordinary creditor.]—WILSON *v.* ROUND, No. 3260, *ante*.

3360. ———.]—A foreign vessel was arrested in a suit instituted under Admiralty Court Act, 1861 (c. 10), s. 6. The master, who was a part owner, acting on behalf of himself & his co-owners, instructed solrs. to defend the suit. The solrs. defended the suit, & it was dismissed with costs. Afterwards suits were instituted against the vessel & freight in respect of claims for necessities; in these suits claims were made for necessities furnished after the institution of the former suit. The vessel having been sold, & the proceeds & freight having been brought into ct., & the solrs. for the owners of the vessel being unable to obtain payment of the costs incurred by them in defending the former suit:—*Held*: (1) the solrs. were entitled to be paid out of the proceeds in ct. such costs in priority to the claims in respect of necessities supplied after the institution of the first-mentioned suit. (2) the claim of the solrs. for such costs was entitled to take priority of a claim preferred by the master for his wages.—THE HEINRICH (1872), L. R. 3 A. & E. 505; 41 L. J. Adm. 68; 26 L. T. 372; 20 W. R. 759; 1 Asp. M. L. C. 260.

Annotation:—*As to (1) & (2) Expld. The Livietta* (1883), 8 P. D. 209.

3361. ——— Order not made in absence of creditors.]—Where in a partnership action a receiver, who was appointed at the instance of pltf., realised

for payment of
(1831), *Hog.* 240. *IR.*

PART VIII. SECT. 4, SUB-SECT. 5.—C.

3358 i. Judgment creditor.]—BIRD & Co. *v.* THE KARU (1927), 27 S. R. 44 N. S. W. W. N.

3358 ii. ———.]—Where there are

assets of a partnership in the hands of a receiver appointed in a partnership suit, the solrs. engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership.—A. HAJI ISMAIL & Co. *v.* RABIABAI (1909), 1 L. R. 31 Bom. 484.—IND.

3358 iii. ———.]—SMITH *v.* OGDEN (1890), 8 N. Z. L. R. 546.—N.Z.

3358 iv. ———.]—MURRAY *v.* ROYAL INSURANCE Co. (B. C.) (1905), 1 W. L. R. 8.—CAN.

m. ——— Garnisher.]—PALGRAVE *v.* McMILLAN (1899), 31 N. S. R. 488.—CAN.

n. Assignee of judgment—Implied notice of lien.]—A judgment debt is "property" within Rule 1129. On an assignment of a judgment the

Sect. 4.—Statutory lien and charging orders: Subsect. 5, C.]

the assets & paid into ct. a fund representing the proceeds of such realisation:—*Held*: the solrs. of pltf. were entitled to a lien on the fund for their costs in priority to the creditors of the partnership.

Semle: the ct. in such a case would not make an order declaring the lien in the absence of the creditors. But where one of the creditors was present & the case was argued on his behalf the ct. appointed him to represent all the creditors.—*JACKSON v. SMITH, Ex p. DIGBY* (1884), 53 L. J. Ch. 972; 51 L. T. 72.

Annotation:—*Consd.* *Ridd v. Thorne*, [1902] 1 Ch. 344.

3362. Garnisher.]—P. recovered from M. certain money in an action which was referred to arbn. P.'s attorney took out a summons under Solicitors Act, 1860 (c. 127), to charge that amount for his costs incurred in prosecuting the action. Before the summons could be heard pltf. in a suit against P. obtained an *ex p.* garnishee order against M. to attach the money due from the latter to P. to satisfy pltf.'s judgment:—*Held*: (1) the sum recovered from M. was property within the above-mentioned Act; (2) the attorney's claim had precedence over pltf.'s.—*BIRCHALL v. PUGIN* (1875), L. R. 10 C. P. 397; 44 L. J. C. P. 278; 23 W. R. 923; *sub nom.* *BURCHELL v. PUGIN*, 32 L. T. 495.

Annotations:—*As to* (1) *Appld.* *Farrant v. Caley* (1924), 68 Sol. Jo. 898. *Refd.* *Charlton v. Charlton* (1883), 49 L. T. 267; *Smelting Co. of Australia v. I. R. Comrs.*, [1896] 2 Q. B. 179; *The Marie Gartz* (No. 2), [1920] P. 460. *As to* (2) *Consd.* *Shippey v. Grey* (1880), 49 L. J. Q. B. 524. *Expld.* *Cole v. Eley*, [1894] 2 Q. B. 180.

3363. —.]—*HAMER v. GILES, GILES v. HAMER*, No. 3319, *ante*.

3364. —.]—The common form of charging order under Solicitors Act, 1860 (c. 127), declaring a charge upon the property recovered or preserved confers a charge in priority to existing claims.—*BADELEY v. CONSOLIDATED BANK, LTD.* (1886), as reported in 55 L. T. 635; 3 T. L. R. 60; *on appeal* (1888), 38 Ch. D. 238, C. A.

Annotations:—*Refd.* *Davis v. Freethy* (1890), 24 Q. B. D. 519; *Cole v. Eley*, [1894] 2 Q. B. 180; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727. *Mentd.* *Re Whiteley, Ex p. Smith* (1892), 66 L. T. 291; *Gray v. Stone & Funnell* (1893), 69 L. T. 282; *Davis v. Davis*, [1894] 1 Ch. 393; *King v. Whiclow* (1895), 61 L. J. Q. B. 801; *Norton v. Yates*, [1906] 1 K. B. 112; *Vacuum Oil Co. v. Ellis, Ellison, Howard*, [1914] 1 K. B. 693; *Re Beard, Ex p. Trustee*, [1915] H. B. R. 191.

3365. —.]—Pltfs. were the solrs. for W. in an action in which he recovered a sum of money. Deft. was a judgment creditor of W., & obtained *ex p.*, on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day pltfs. for the first time learned of deft.'s claim, & then gave notice to deft. in the action in which W. was pltf. of their claim of lien, & within five days applied for an order declaring that they were entitled to a charge on the money recovered by W.:—*Held*: pltfs. had a lien for their costs on the sum recovered by W.; they were entitled to the order sought for; and the garnishee order obtained by deft. did not take priority over that lien.—*SHIPPEY v. GREY* (1880), 49 L. J. Q. B. 524; 42 L. T. 673; 28 W. R. 877, C. A.

Annotations:—*Appld.* *Dallow v. Garrold, Ex p. Adams* (1884), 14 Q. B. D. 543; *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q. B. D. 693; *Cole v. Eley*, [1894] 2 Q. B. 180. *Refd.* *Charlton v. Charlton* (1883), 49 L. T. 267; *Watts v. Hetley* (1899), 44 Sol. Jo. 134.

3366. —.]—The amount of the debt & costs

recovered by pltf. in an action had been levied, & were in the hands of the sheriff, when a judgment creditor of pltf. took out a garnishee summons to attach this money. After the summons was taken out, but before any order was made thereon, the solr. who had acted for pltf. in the action, the proceeds of the judgment in which it was sought to attach, obtained under Solicitors Act, 1860 (c. 127), s. 28, from a judge at chambers, an order charging in his favour the money in the hands of the sheriff. The judgment creditor applied to set this order aside:—*Held*: the charging order had priority & ought not to be set aside, the judgment creditor who had taken out the garnishee summons was not a *bonâ fide* purchaser for value within Solicitors Act, 1860 (c. 127), s. 28, & the word "property" in that sect. included both the debt & the costs recovered in the action.—*DALLOW v. GARROLD, Ex p. ADAMS* (1884), 14 Q. B. D. 543; 54 L. J. Q. B. 76; 52 L. T. 240; 33 W. R. 219; 1 T. L. R. 114, C. A.

Annotations:—*Appld.* *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q. B. D. 693; *Cole v. Eley* (1894), 38 Sol. Jo. 533. *Consd.* *The Paris*, [1896] P. 77. *Refd.* *Watts v. Hetley* (1899), 44 Sol. Jo. 134; *Re Deakin, Ex p. Daniell*, [1900] 2 Q. B. 489; *The Marie Gartz* (No. 2), [1920] P. 460.

3367. —.]—*Appl.*, a domiciled Englishman, being deft. in an action in the Q. B. Div., obtained on Apr. 25, 1887, judgment for costs against W., pltf., who was a domiciled Scotsman. On May 26, resp. executed an arrestment *ad fundandam jurisdictionem* against W. of the amount due under the judgment, & his summons was served on applt. on the following day. On June 13, applt.'s solrs. in the action in the Q. B. Div. obtained a charging order under Solicitors Act, 1860 (c. 127), s. 28, upon the costs recovered by him in the action.—*Held*: even assuming that the charging order was retrospective in its operation, the arrestment was effectual for the purpose of founding jurisdiction, as such arrestment could in no way affect the operation of the charging order.—*NORTH v. STEWART* (1890), 15 App. Cas. 452; 63 L. T. 718, H. L.

Annotations:—*Expld.* *Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368. *Mentd.* *Re Low, Bland v. Low* (1893), 7 L. 346.

3368. —.]—Garnishee summons served before debt due or owing—*Voluntary payment.*—*WATTS v. HETLEY* (1899), 44 Sol. Jo. 134.

3369. Mortgagee.]—Pltfs. in a suit mortgaged their interests in the estate, the subject of the suit to two of defts. The mtge. was sent to the solr. of pltfs. for his perusal & approval on their behalf, & he sanctioned their executing it. Nothing was said by either party about any claim by pltf.'s solr. for the costs of suit. The solr. afterwards obtained a charging order for them under Solicitors Act, 1860 (c. 127), s. 28, on the interests of pltfs.:—*Held*: as the mtgees. had notice of the suit, they must be presumed to have known the rights of the solr. of pltfs. & his charge ought not to be postponed to the mtge. he not having been guilty of any misrepresentation or concealment.—*FAITHFUL v. EWEN* (1878), 7 Ch. D. 495; 47 L. J. Ch. 457; 37 L. T. 805; 26 W. R. 270, C. A.

Annotations:—*Appld.* *Shippey v. Grey* (1880), 49 L. J. Q. B. 524. *Consd.* *Charlton v. Charlton* (1883), 49 L. T. 267; *Dallow v. Garrold, Ex p. Adams* (1884), 14 Q. B. D. 543. *Distd.* *Pierson v. Knutsford Estates Co.* (1884), 13 Q. B. D. 666; *Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368. *Appld.* *Cole v. Eley*, [1894] 2 Q. B. 350. *Consd.* *The Paris*, [1896] P. 77. *Refd.* *Hamer v. Giles, Giles v. Hamer* (1879), 11 Ch. D. 942; *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q. B. D. 693.

assignee must be taken to have notice of the solr.'s lien, for the costs incurred in obtaining judgment, & the implied notice would be notice within the rule.

Consd. *McCormick v. FLEMING*, 18 C. L. T. Occ. N. 142, 241.—CAN.

o. Execution creditor.]—*TAYLOR v. ROBINSON* (1899), 19 P. R. 31.—CAN.

p. Official assignee in bankruptcy.]—R. brought action & recovered judgment against P. with costs. P. in the same action on counterclaim recovered

3370. ———.]—*Re THORNHILL, THORNHILL v. NIXON* (1892), 36 Sol. Jo. 218.

3371. ———.]—In 1868 D. mortgaged three leasehold houses to the trustees of M.'s settlement. In 1877 M. agreed to sell the three houses to S., the purchase-money being payable by instalments. In 1881 S. mortgaged his interest under the agreement to C. In 1891 the trustees, as mtgees., advertised the three houses for sale by public auction. At this time S. had paid the instalments for one house, & he brought an action against the trustees & M., claiming specific performance of the agreement, & an injunction to restrain the sale. At the trial, defts. were ordered to convey to S., or his mtgees., the one house in respect of which the purchase-money had been paid, & a set-off of costs was directed.

Pending the trial, C. had refused either to release her charge over the one house in question or to concur in any way with S. in the prosecution of his action. The solrs. of S. applied for a charging order on the house to secure to them their taxed costs of the action:—*Held*: they were entitled to the order, & it had priority over C.'s mtge.—*SCHOLEY v. PECK*, [1893] 1 Ch. 709; 62 L. J. Ch. 658; 68 L. T. 118; 41 W. R. 508; 3 R. 245.

Annotation—*Apld.* *Ridd v. Thorne*, [1902] 2 Ch. 314.

3372. Claim by foreign consul—Salvage action.]—Salvage actions were brought against an Italian vessel, & she was sold by order of the ct. After the salvors had been remunerated, the balance of the fund in ct. was insufficient to satisfy the costs of the solrs. who had appeared in the above actions for the parties interested in the ship, & who sought to enforce their claim for such costs by virtue of Solicitors Act, 1860 (c. 127), s. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy. It was proved that by the law of Italy such expenses & the keep of the master and crew ranked next to the salvage payments:—*Held*: the claim of the Italian consul had priority to that of the solrs.—*THE LIVIETTA* (1883), 8 P. D. 209; 52 L. J. P. 81; 49 L. T. 411; 5 Asp. M. L. C. 151.

3373. Bonâ fide purchaser for value—Who is bonâ fide purchaser—Judgment creditor obtaining garnishee order.]—*DALLOW v. GARROLD, Ex p. ADAMS*, No. 3366, *ante*.

3374. ———. Person with knowledge of action & solicitor's employment.]—Solicitors Act, 1860 (c. 127), s. 28, provides for the making of an order declaring a solr. employed in any suit, matter, or proceeding, in any ct. of justice, entitled to a charge upon the property recovered or preserved for his costs, & that all conveyances & acts done to defeat such charge shall, "unless made to a bonâ fide purchaser for value without notice," be void as against such charge.

A solr. had acted for pltf. in an action, which was compromised by deft.'s agreeing to pay a sum of money to pltf. by instalments. Pltf. assigned for valuable consideration the money payable to him under the compromise to a person who had been a witness in the action. It was not proved that express notice of the claim of pltf.'s solr. for costs had been given to the assignee. Subsequently to the assignment the solr. obtained a charging order upon the money recovered in the action for his costs:—*Held*: the assignee, being aware that the subject-matter of the assignment to him was money recovered in an action, in which the solr. had acted for pltf., must be taken to have had

notice of the solr.'s rights in respect of his costs, & therefore was not "a purchaser for value without notice" within the meaning of the Act; & consequently the solr. was entitled to a charge upon such money in priority to the assignee.—*COLE v. ELEY*, [1894] 2 Q. B. 350; 63 L. J. Q. B. 682; 70 L. T. 892; 42 W. R. 561; 10 T. L. R. 515; 38 Sol. Jo. 533; 9 R. 552, C. A.

Annotations:—*Consd.* *The Paris*, [1896] P. 77; *Ridd v. Thorne*, [1902] 2 Ch. 314; *Knight v. Knight*, [1925] Ch. 835. *Refd.* *Watts v. Hotley* (1899), 44 Sol. Jo. 134; *Edmunds v. Edmunds*, [1904] P. 362; *Levene v. Maton* (1907), 51 Sol. Jo. 532; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334.

3375. Landlord claiming rent—Not having distrained.]—In an action in the Ch. Div. by one partner against another for a dissolution of the partnership, judgment was given for a dissolution & the appointment of a receiver of the assets of the partnership. Both the partners were afterwards adjudged bkpt.; the action was transferred to the Q. B. Div. in bkpcy. & the judge having jurisdiction in bkpcy. made an order under Solicitors Act, 1860 (c. 127), s. 28, charging the costs of pltf.'s solr. on the funds in the hands of the receiver. Before this order was made, the landlord of the premises in which bkpts. had carried on their business had given notice to the receiver of a claim for rent due to him but had not attempted to distrain. The judge was not informed of this claim before he made the order & he subsequently made a further order, by which he directed the receiver to pay the rent due to the landlord & to pay the balance in his hands to the solr.:—*Held*: (1) the landlord not having distrained had no lien on the funds in the hands of the receiver in priority to the solr.; (2) the charging order was not made by the judge in the exercise of his bkpcy. jurisdiction & he had consequently no power to rescind or vary it under Bkpcy. Act, 1883 (c. 52), s. 104.—*Re SUFFIELD & WATTS, Ex p. BROWN* (1888), 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584; *sub nom. Re SUFFIELD & WATT, Ex p. WIGGINS*, 5 Morr. 83, C. A.

Annotations.—*As to* (1) *Apld.* *Cole v. Eley* (1894), 38 Sol. Jo. 533. *As to* (2) *Consd.* *Re Wood, Ex p. Fanshawe*, [1897] 1 Q. B. 314; *Re Deakin, Ex p. Daniell*, [1900] 2 Q. B. 489. *Refd.* *Re Humphreys, Ex p. Lloyd George* (1898), 67 L. J. Q. B. 412. *Generally, Merid.* *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Re Crown Bank* (1898), 44 Ch. D. 634.

3376. Trustee in bankruptcy.]—A suit was commenced in Jan. 1887, to establish a will & codicil. Pltf. was the surviving exor. appointed by the will, & deft. was a daughter of deceased, who contested the validity of the codicil only. A son of deceased who was the principal legatee under the codicil, obtained leave, on Mar. 8, 1887, to intervene in the suit, & propounded the codicil. On May 3, 1887, the trustees appointed under the bkpcy. of the legatee also obtained leave to intervene, & they, too, propounded the codicil. On Nov. 9, 1887, the case came before the President, who, by consent, pronounced for the will & codicil, & reserved all questions of costs & of the trustees & of other interveners. On Dec. 6, 1887, upon summonses for direction as to these costs, it was ordered that the costs of the bkpt. be paid "out of the residue of the estate, if any." It was stated that there would be no residue.

On Apr. 30, 1889, the judge in chambers made an order giving L.'s solr. a charge in respect of his costs in these proceedings upon the interest of his client under the codicil. This order was served upon the trustees in bkpcy, & upon the

—H., the amount of paid to P.'s solrs. P. had trial made an assignment to the official assignee for the benefit

of creditors:—*Held*: the sum paid by H. passed to the official assignee, not subject to any lien of P.'s solrs. for costs, but subject to a lien for

solr. & client costs of P.'s solrs., limited to the counterclaim against H.—*ROSS v. PARK*, [1920] 2 W. W. R. 663. —CAN.

Sect. 4.—Statutory lien and charging orders: Sub-sect. 5, C. & D.; sub-sects. 6 & 7. Sect. 5: Sub-sect. 1.]

surviving exor. The trustees thereupon issued a summons to set aside the order. That came before the judge in chambers, on May 14, & was by his direction adjourned into ct., whereupon after reargument:—*Held*: the trustees in bkpey. having intervened & propounded the codicil, & having obtained judgment thereon, the solr. for the bkpt. was only entitled to a charge upon any residue which might be found due to the bkpt. after his creditors had been satisfied.—KEESON v. LUXMOORE (1889), 61 L. T. 199.

3377. —.]—BAKER v. ABBOTT (1897), 41 Sol. Jo. 455.

3378. Trustee.]—*Re* TURNER, WOOD v. TURNER, No. 3307, *ante*.

3379. Over charge by former solicitor.]—The solr. who had acted for pltf. in the institution & conduct of an action to establish his right to a sum of money was discharged by the client shortly before the trial. The action was continued by new solrs. on behalf of pltf., & judgment was delivered in favour of pltf., ordering deft. to pay him the money. After the trial the former solr. obtained, under Solicitors Act, 1860 (c. 127), s. 28, a declaration of charge upon the sum recovered, "subject to the lien of the present solrs. of pltf. upon the said sum":—*Held*: the solr. who was solr. at the time the fund was recovered was entitled to a first charge thereon for all his taxed costs of the action, & subject thereto the discharged solr. was entitled to such lien as he obtained under his charging order.—*Re* WADSWORTH, RHODES v. SUGDEN (1886), 34 Ch. D. 155; 56 L. J. Ch. 127; 55 L. T. 596; 35 W. R. 75.

Annotations:—*Apld.* *Re* Knight, Knight v. Gardner, [1892] 2 Ch. 368. *Consd.* Goodfellow v. Gray, [1899] 2 Q. B. 498.

3380. — Fund insufficient.]—*Re* KNIGHT, KNIGHT v. GARDNER, No. 3436, *post*.

3381. Set-off—For damages.]—A collision took place in 1912 between the British steamship *K.* & the German steamship *M. G.* The *K.* was held alone to blame, & the damages were referred to the Registrar for assessment. Before the damages had been assessed war broke out & the reference was not held until after the conclusion of peace. During the war the owners of the *K.* lost a vessel by German submarine attack, & claimed that under annex 14 to Article 296 of the Treaty of Versailles they had a right to set-off that loss against the damages they had to pay to the owners of the *M. G.*, & that the right of set-off was superior to the right of the solrs. acting for the owners of the *M. G.*, who claimed a charging order on the damages for their costs.

Under art. 297 (*h*) provision is made (*inter alia*) for "the net proceeds of sales of enemy property, rights or interests . . . & in general all cash assets of enemies" to be dealt with through clearing offices:—*Held*: "assets" meant net assets, *i.e.* subject to the deduction of the cost of collection & realisation; assuming, without deciding, that annex 14 gave the owners of the *K.* a right of set-off, they would only be entitled to that set-off as against the net assets which would otherwise have to be credited to the Creditor Clearing Office; & the solicitors for the owners of the *M. G.* were entitled to a charging order upon the damages for their costs, the costs to be taxed as between solr. & client.—THE MARIE

GARTZ (No. 2), [1920] P. D. 460; 90 L. J. P. 88; 124 L. T. 255; 36 T. L. R. 864; 15 Asp. M. L. C. 190.

3382. — For costs of unsuccessful appeal.]—There is no general right to a set-off of resp.'s costs of pltf.'s unsuccessful appeal against money paid into ct. by deft. in the action & recovered by pltf. in respect of a claim not the subject of the appeal, & upon which money, subject to the set-off of deft.'s costs of action ordered by the ct. below, pltf.'s solr. had obtained a charging order.

The Ct. of Appeal has a discretion under R. S. C., Ord. 58, r. 4, as to the costs of the appeal, & the charging order having been properly obtained, the ct., in the exercise of that discretion, gave effect to the lien by ordering the costs of the appeal to be set off against the residue of the money in ct. remaining after satisfaction of the charging order.—KNIGHT v. KNIGHT, [1925] Ch. 835; 95 L. J. Ch. 33; 133 L. T. 259; 41 T. L. R. 421; 69 Sol. Jo. 459, C. A.

D. Discharge of Order.

3383. Application for—Must be prompt.]—*Re* DEAKIN, *Ex p.* DANIELL, No. 3333, *ante*.

SUB-SECT. 6.—ENFORCEMENT AND PROTECTION OF CHARGES.

3384. Protection of lien by interim injunction—Pending application for order.]—A solr. who had established in a suit the claim of his client to a sum of money, & was unable to obtain payment of his taxed costs or to serve a writ upon his client for that purpose, was held, upon application *ex p.*, to be entitled to an *interim* order to restrain the payment to the client by the Accountant-General of a dividend in the suit until a petition under Solicitors Act, 1860 (c. 127), to establish a lien for costs could be served & heard, the solr. giving the usual undertaking as to damages.—GERRARD v. DAWES, *Re* DAWES' ESTATE, DRYDEN v. DAWES (1869), 21 L. T. 322; 18 W. R. 32.

3385. —.]—LLOYD v. JONES, No. 3244, *ante*.

3386. Enforcement of order—Substituted service of summons—For payment out of court.]—A sum of money having been paid into ct. for the benefit of deft., M., his solr., obtained a charging order for costs upon it under Solicitors Act, 1860 (c. 127), s. 28. The costs had been taxed *ex p.* M. then took out a summons to show cause why the sum of money paid into ct. should not be paid out to him in part satisfaction of his taxed costs. This summons could not be served upon deft., who appeared to be wilfully evading service of it. L. had acted for deft. after M. had ceased to do so, & H. had introduced deft. to M.:—*Held*: substituted service of the summons should be allowed, a notice calling upon deft. to appear in one month should be put up at the master's office, & served upon L. & H., & advertised in *The Times* newspaper, & thereupon, if deft. did not appear, an order might be made on the summons.—HUNT v. AUSTIN, *Ex p.* MASON (1882), 9 Q. B. D. 598; 51 L. J. Q. B. 455; 47 L. T. 300, C. A.

Annotations:—*Folld.* Rowley v. Southwell, Southwell v. Rowley (1889), 61 L. T. 805. *Refd.* Pierson v. Knutsford Estates Co. (1884), 13 Q. B. D. 666.

3387. — For sale of property.]—An action was commenced for the execution of the trusts of a settlement. Pltfs. were one of the

PART VIII. SECT. 4, SUB-SECT. 6.

q. Protection of lien by stop order.]—NAWAB NAZIM OF BENGAL v. HEERALALL SEAL (1873), 10 B. L. R. 444.—IND.

trustees of the settlement, the tenant for life, & three of the four beneficiaries interested in remainder. The other trustee was the sole deft. The fourth beneficiary was not a party to the action. In Feb. 1883, judgment was given for the execution of the trusts of the settlement. In Mar. 1883, the solr. for pltf. obtained a charging order under Solicitors Act, 1860 (c. 127), s. 28, on the real estate comprised in the settlement for his taxed costs, & liberty was given to him to apply for a sale of the property to raise such costs. The fourth beneficiary was not a party to this order. The solr. took out a summons for a sale of the property under the liberty to apply. The summons was not served on the fourth beneficiary, as her address was not known:—*Held*: (1) no order for a sale could be made without notice to the fourth beneficiary; (2) substituted service on her might be allowed, & by means of advertisements; a notice calling upon her to appear within a certain time should be advertised, & thereupon, if she did not appear, an order might be made on the summons.—*ROWLEY v. SOUTHWELL, SOUTHWELL v. ROWLEY* (1889), 61 L. T. 805.

SUB-SECT. 7.—CHANGE OF SOLICITORS.

See Sect. 5, *post*.

SECT. 5.—EFFECT OF CHANGE OF SOLICITORS.

SUB-SECT. 1.—SOLICITOR DISCHARGED BY CLIENT.

3388. General rule—Production or delivery up refused.—A party changing his solr., the former solr. has a lien for his costs upon papers in his hands; but cannot otherwise stop the progress of the cause, till he is paid.—*MERREWETHER v. MELLISH* (1806), 13 Ves. 161; 33 E. R. 255, L. C. *Annotation*:—*Mentd.* *Cave v. Cork* (1813), 2 Y. & C. Ch. Cas. 130.

3389. — — — — —.]—Party may discharge his solr.; who has a lien for his costs upon papers in his possession; but cannot, except by retaining them, prevent the progress of the cause, until he is paid.—*TWORT v. DAYRELL* (1806), 13 Ves. 195; 33 E. R. 268, L. C.

3390. — — — — —.]—A solr. discharged by his client or his representatives is not bound to produce the papers in his possession for the purposes of the cause, his bill of costs not being paid.—*LORD v. WORMLEIGHTON* (1822), Jac. 580; 37 E. R. 969, L. C.

Annotations:—*Distd.* *Evans v. Delegal* (1835), 4 Dowl. 374. *Consd.* *Heslop v. Metcalfe* (1837), 3 My. & Cr. 183; *Bozon v. Bolland* (1839), 4 My. & Cr. 354; *Re Faithfull, Re L. B. & S. C. Ry.* (1868), L. R. 6 Eq. 325. *Distd.* *Simmonds v. G. E. Ry.* (1868), 3 Ch. App. 797. *Expld.* *Belaney v. Ffrench* (1873), 8 Ch. App. 919, n.; *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Consd.* *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96. *Refd.* *Re Lucas, Ex p. Shore* (1832), 1 L. J. Bey. 115; *Newington L. B. v. Eldridge* (1879), 12 Ch. D. 349; *Re Boughton, Boughton v. Boughton* (1883), 23 Ch. D. 169. *Mentd.* *Hunter v. Leathley* (1830), 10 B. & C. 858.

3391. — — — — —.]—*Re BUSH, Ex p. BOWDEN* (1832), 2 Deac. & Ch. 182; 2 L. J. Bey. 18, Ct. of R.

3392. — — — — —.]—A solr. for pltf. in a cause obtained an order, which he passed; he was then discharged by pltf., & a new solr. was appointed in his stead. The discharged solr. refused to produce the order to be entered, on the ground that

he had a lien for his costs in the same suit, & other costs. Upon motion by pltf. for production that the order might be entered:—*Held*: lien cannot be allowed to intercept the completion of an order of the ct. which has been passed, & the discharged solr. was directed to produce the order for entry, upon payment of 20s. costs.—*CLIFFORD v. TURRILL* (1848), 2 De G. & Sm. 1; 12 Jur. 428; 64 E. R. 1.

Annotation:—*Distd.* *Simmonds v. G. E. Ry.* (1868), 3 Ch. App. 797.

3393. — — — — —.]—Where a partner of a trading firm which has become bkpt. was also one of the firm of solrs. whom the trading co. had employed in the conduct of suits which were pending at the time of the bkpcy. & the assignees in bkptcy. had retained other solrs.:—*Held*: the assignees in bkptcy. were not entitled to an order for delivery up to the assignees of the papers in the solr.'s possession subject to their existing lien.—*Re Moss* (1866), L. R. 2 Eq. 345; 35 Beav. 526; 35 L. J. Ch. 554; 14 L. T. 536; 12 Jur. N. S. 557; 14 W. R. 814; 55 E. R. 1000.

Annotation:—*Consd.* *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

3394. — — — — —.]—*Re FAITHFULL, Re LONDON, BRIGHTON & SOUTH COAST RY. CO.*, No. 2927, *ante*.

3395. — — — — —.]—Documents in the possession of a former solr. of a pltf. who claimed a lien for costs upon them will not be ordered to be produced for deft.'s inspection.—*KETTLEWELL v. BARSTOW* (1872), as reported in 20 W. R. 621; *on appeal*, 7 Ch. App. 686, L. JJ.

Annotations:—*Refd.* *Lewis v. Powell* (1897), 45 W. R. 438. *Mentd.* *Minet v. Morgan* (1873), 28 L. T. 573.

3396. — — — — —.]—*Re AUSTIN, Ex p. YALDEN*, No. 2942, *ante*.

3397. — — — — —.]—By an order made in an administration suit, the costs were ordered to be taxed, & pltf.'s costs to be paid to his solr., B., out of a specified fund in ct. Before the costs had been taxed pltf. obtained an order to change his solr., & B. no longer acted for any party in the suit:—*Held*: B. had a right to retain the papers in the suit till his costs were paid.—*PILCHER v. ARDEN, Re BROOK* (1877), 7 Ch. D. 318; 38 L. T. 111; 26 W. R. 163; *on appeal*, 7 Ch. D. p. 321, C. A.

Annotations:—*Refd.* *Bulley v. Bulley* (1878), 38 L. T. 95; *Cole v. Eley*, [1894] 2 Q. B. 180. *Mentd.* *Mathias v. Yetts* (1882), 46 L. T. 497.

3398. — — — — —.]—*AUSTIN v. MACNAMARA & Co.* (1895), 40 Sol. Jo. 71, C. A.

3399. Exceptions to rule—Delivery ordered without prejudice to lien—Solicitor failing to render bill of costs.—Solr. in a suit who had been discharged by the client, but had not delivered his bill of costs within the proper time; ordered under the circumstances of the case to deliver the papers & documents in his possession relating to the suit, without prejudice to his lien, to the new solr.—*COOPER v. HEWSON* (1843), 2 Y. & C. Ch. Cas. 515; 12 L. J. Ch. 446; 1 L. T. O. S. 431; 7 Jur. 760; 63 E. R. 231.

3400. — — — — —.]—**Papers required for conduct of suit.**—Order made on a solr. who had been by an order of the ct. discharged from acting as pltf.'s solr. in the suit, to deliver up to pltf.'s new solr. all abbreviated & office copies of pleadings, & all other papers & documents & copies of papers & documents, & also all letters & copies of letters relating to or concerning the suit, or

VIII. SECT. 5, SUB-SECT. 1.

3388 i. General rule—Production or delivery up refused.—If a client, by J.—VOL. XLII.

his conduct, make it impossible for his solicitor to continue any longer connected with him, & the solicitor in

consequence refuses to continue the connection, he will be considered as if discharged by his client, & will not

Sect. 5.—Effect of change of solicitors: Sub-sects. 1 & 2.]

which may or might have been used in relation thereto, etc., without prejudice to any question of lien for costs, & upon an undertaking by pltf. & his new solr. not to part with any of them without the consent of the discharged solr. or the order of the ct., & to abide by such order as the ct. might make in respect thereto.—*NAINBY v. SOLOMONS* (1843), 7 Jur. 527.

3401. ————.]—Pltf. in a suit became bkpt., & the suit was revived by his assignee, who employed a different solr. A decree was afterwards made:—*Held*: the solr. of original pltf. must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, even though the documents were not strictly in evidence in the cause.—*SIMMONDS v. GREAT EASTERN RY. Co.* (1868), 3 Ch. App. 797; 38 L. J. Ch. 87; 19 L. T. 235; 16 W. R. 1100, L. JJ.

Annotations:—*Consd. Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

3402. ————.]—A solr. has no right to set up a lien acquired in the cause against the rights of other parties in the cause to production (*JAMES, L.J.*).—*VALE v. OPPERT* (1875), 10 Ch. App. 340; 44 L. J. Ch. 579; 33 L. T. 41; 23 W. R. 780, L. JJ.

Annotations:—*Consd. Lewis v. Powell*, [1897] 1 Ch. 678. *Refd. Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

3403. ————.]—*Re LEWIS* (1882), 17 L. Jo. 179, D. C.

3404. ————.]—The solr. for the parties to an administration action will not, on a change of solr., be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action. On the contrary, he must produce the papers when they are required for the carrying on of the proceedings.—*Re BOUGHTON, BOUGHTON v. BOUGHTON* (1883), 23 Ch. D. 169; 48 L. T. 413; 31 W. R. 517.

Annotations:—*Distd. Re Capital Fire Insee. Assn.* (1883), 24 Ch. D. 408. *Apld. Hutchinson v. Norwood* (1886), 54 L. T. 842; *Boden v. Hensby*, [1892] 1 Ch. 101. *Consd. Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Refd. Dessau v. Peters, Rushton*, [1922] 1 Ch. 1.

3405. ————.]—An action was brought for the administration of the estate of H. by his infant grandchildren. The action was brought with the approval of the infant's father, & the next friend was nominated & approved by him. The father having died pending the action, the mother of the infants, who was also their testamentary guardian, applied to be appointed next friend in the place of the existing next friend, & an order was made appointing her. She changed pltf.'s solrs., & the new solrs. applied to the old solrs. for delivery of the papers in the action. The original solrs. refused to deliver them till their costs were paid. Upon a summons:—*Held*: the old solrs. must deliver them over to the new solrs. without prejudice to their lien for costs. The action being a very heavy one, & the taxation of costs not likely to come on for some years, the costs of the original solrs. were under the special circumstances ordered to be taxed at once.—*HUTCHINSON v. NORWOOD* (1886), 54 L. T. 842; *sub nom. Re HUTCHINSON, HUTCHINSON v. NORWOOD*, 34 W. R. 637.

Annotation:—*Refd. Bolden v. Hensby* (1891), 65 L. T. 744.

be ordered to give up the client's deeds & papers until his costs are paid; but he must produce them to be used at

the hearing & for inspection.—*STEELE v. SCOTT* (1828), 2 Hog. 141.—*IR. r. Exception to rule—Solicitor dis-*

3406.

—.]—After decree in a partition action, pltf. & deft. being entitled in moieties to the property, an inquiry as to incumbrances having been directed, pltf. changed her solrs. The discharged solrs. claimed a lien for costs:—*Held*: they were bound to deliver up to the new solrs., subject to their lien, such documents as had come to their hands since the commencement of or for the purposes of the action.—*BODEN v. HENSBY*, [1892] 1 Ch. 101; 61 L. J. Ch. 174; 65 L. T. 744; 40 W. R. 205; 36 Sol. Jo. 153.

Annotations:—*Consd. Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Apld. Dessau v. Peters, Rushton*, [1922] 1 Ch. 1. *Refd. Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

3407. ————.]—The principle upon which the ct. will compel a former solr. to hand over his client's papers to his new solrs. upon an undertaking protecting his lien is that a solr., though able to assert his lien to the full extent against his own client, is not permitted to assert it so as to embarrass third parties. Accordingly, in a partnership action, where a receiver had been appointed & creditors might be embarrassed if the former solr. insisted on his lien to its full extent, the ct. made an order compelling the former solr. to deliver up the papers upon having the usual undertaking protecting his lien.—*DESSAU v. PETERS, RUSHTON & Co., LTD.*, [1922] 1 Ch. 1; 91 L. J. Ch. 254; 126 L. T. 648; 66 Sol. Jo. (W. R.) 14.

3408. ————.]—Papers required for purposes of administration.]—Solrs. for the trustees of an estate which is under the administration of the ct. have not, after their discharge, such a lien for costs & money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate.—*BELANEY v. FRENCH* (1873), 8 Ch. App. 918; 43 L. J. Ch. 312; 29 L. T. 706; 22 W. R. 177, L. J.

Annotations:—*Consd. Re Capital Fire Insee. Assn.* (1883), 24 Ch. D. 408. *Apld. Re Boughton, Boughton v. Boughton* (1883), 23 Ch. D. 169; *Hutchinson v. Norwood* (1886), 54 L. T. 842. *Consd. Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96. *Refd. Re Caudery, London Joint Stock Bank v. Wightman* (1910), 54 Sol. Jo. 444.

3409. New solicitor discharging former solicitor's bill—Lien does not enure to new solicitor.]—*IRVING v. VIANA*, No. 3117, *ante*.

SUB-SECT. 2.—SOLICITOR DISCHARGING HIMSELF.

3410. No lien on fund in court.]—A solr., having declined to act for his client, has no lien for his costs upon a fund in ct.—*CRESSWELL v. BYRON* (1807), 14 Ves. 271; 33 E. R. 525, L. C.

Annotations:—*Consd. Vansandau v. Browne* (1832), 9 Bing. 402; *Heslop v. Metcalfe* (1837), 3 My. & Cr. 183; *Underwood & Piper v. Lewis*, [1891] 2 Q. B. 306.

3411. Must allow inspection to client.]—A solr. declining to be further concerned in a cause is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands, or such production of them before the ct. or the master, as may be necessary in the conduct of the cause.—*COMMERELL v. POYNTON* (1818), 1 Swan. 1; 36 E. R. 273, L. C.

Annotations:—*Apld. Gregory v. Creswell* (1845), 14 L. J. Ch. 300. *Consd. Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Refd. Heslop v. Metcalfe* (1837), 3 My. & Cr. 183; *Re Faithfull, Re L. B. & S. C. Ry.* (1868), L. R. 6 Eq. 325.

missed for misconduct.]—*TERREBONNE ELECTION CASE* (1901), 1 Cout. Dig. 385-6.—*CAN.*

3412. .]—A solr., who had refused to act any longer for a party in the cause, was ordered to permit the party to inspect papers in his possession, at all reasonable times, without any undertaking, on her part to proceed to a taxation of his bill.—*MOIR v. MUDIE* (1823), 1 Sim. & St. 282; 1 L. J. O. S. Ch. 218; 57 E. R. 114.

3413. Production or delivery ordered—Subject to lien & undertaking to redeliver.—A solr., who has declined to proceed with a cause, will be ordered, though his bills of costs are not paid, to deliver up the papers to the present solr. of the party, the latter undertaking to hold them subject to the former solr.'s lien, for what shall be found due to him on the taxation of the bills. An offer on the part of the former solr., after the motion is made, to proceed with the cause, will not prevent the ct. from ordering him to deliver up the papers on the terms mentioned above.—*COLEGRAVE v. MANLEY* (1823), Turn. & R. 400; 37 E. R. 1155; *sub nom.* *COLEGRAVE v. —*, 2 L. J. O. S. Ch. 39, L. C.

Annotations:—*Apld.* *Heslop v. Metcalfe* (1837), 3 My. & Cr. 183. *Consd.* *Griffiths v. Griffiths* (1843), 2 Hare, 587. *Apld.* *Robins v. Goldingham* (1872), L. R. 13 Eq. 440. *Consd.* *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Refd.* *Bozon v. Bolland* (1839), 4 My. & Cr. 354; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

3414. .]—Order made on a solr., who withdrew from the conduct of pltf.'s cause, that he should deliver up to pltf.'s new solr. the briefs of the pleadings, counsel's opinions thereon, office copies of the several answers, & all such other papers & documents, connected with the cause as, upon inspection, such new solr. might deem necessary for the hearing; without prejudice to any right of lien for costs, & upon an undertaking to return them undefaced within ten days after the hearing.—*HESLOP v. METCALFE* (1837), 3 My. & Cr. 183; 8 Sim. 622; 7 L. J. Ch. 49; 40 E. R. 894, L. C.

Annotations:—*Apld.* *Cane v. Martin* (1840), 2 Beav. 584. *Consd.* *Bennett v. Baxter* (1840), 10 Sim. 417; *Griffiths v. Griffiths* (1843), 2 Hare, 587. *Apld.* *Gregory v. Cresswell* (1845), 14 L. J. Ch. 300. *Fold.* *Wilson v. Emmett* (1854), 19 Beav. 233. *Apld.* *Robins v. Goldingham* (1872), L. R. 13 Eq. 440. *Consd.* *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. *Refd.* *Bozon v. Bolland* (1839), 4 My. & Cr. 354; *Cooper v. Howson* (1843), 12 L. J. Ch. 446; *Rawlinson v. Moss* (1861), 25 J. P. 661.

3415. .]—After demurrer allowed, pltf.'s solr. refused to proceed until payment of his bill:—*Held:* he was bound to deliver over the papers to the new solr. of pltf. on the usual undertaking, as to lien & redelivery, but the party ought, under the circumstance, to undertake to prosecute the suit with due diligence.—*CANE v. MARTIN* (1840), 2 Beav. 584; 4 Jur. 500; 48 E. R. 1308.

Annotations:—*Apld.* *Gregory v. Cresswell* (1845), 14 L. J. Ch. 300. *Refd.* *Re Faithfull, Re L. B. & S. C. Ry.* (1868), L. R. 6 Eq. 325.

3416. .]—Agent of a solr. held, by the irregularity of his conduct, to have discharged himself, & ordered, before taxation or payment of his bills, to deliver up all papers, etc., on an undertaking of the principal to redeliver them, as the ct. should order.—*Re SMITH* (1841), 4 Beav. 309; 49 E. R. 358.

Annotations:—*Consd.* *Griffiths v. Griffiths* (1843), 2 Hare, 587. *Refd.* *Cooper v. Ewart* (1847), 2 Ph. 362; *Foley v. Smith* (1851), 20 L. J. Ch. 621; *King v. Savory* (1856), 25 L. J. Ch. 564; *Re Osborne* (1858), 27 L. J. Ch. 532; *Re Le Brasseur & Oakley*, [1896] 2 Ch. 487.

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or delivery ordered
undertaking to re-
solr. refused to
unless money was ad-
vanced, or to deliver up the
to a new solicitor until his

suit were paid, the ct. ordered a taxation, & directed the papers to be delivered up to the new solicitor upon his undertaking to hold them subject to the lien, if any, of the former solicitor, & to redeliver them within ten days after he ceased to have occasion for them for the purposes of the suit.—

3417. .]—*Griffiths v. Griffiths*, No. 2999, *ante*.

3418. .]—A dispute having arisen as to the mode & extent of a solr.'s remuneration, he refused to proceed in the cause until it had been settled. The solr. was ordered to deliver up the papers in the cause to the new solr., upon his undertaking to proceed with due diligence & to hold them subject to the existing lien thereon.—*WILSON v. EMMETT* (1854), 19 Beav. 233; 52 E. R. 338.

3419. .]—When solr. discharged himself from a suit he must deliver to the new attorney all the papers, on an undertaking to return them at the end of the suit.—*HUNTLEY v. ANGLO-CALIFORNIAN GOLD MINING CO.* (1858), 1 F. & F. 211, N. P.

3420. .]—*RAWLINSON v. MOSS*, No. 3001, *ante*.

3421. .]—Where a solr. agreed to conduct the suit of a client without requiring to be supplied with funds till the hearing, it was held to mean the original hearing, & the solr. was not bound to proceed on the appeal without being supplied with funds; but also, that he had no power, upon an order for change of solr., to withhold the papers from the new solr., although he was entitled to a lien upon them.—*WEBSTER v. LE HUNT* (1861), 25 J. P. 661; 9 W. R. 804.

3422. .]—Where a solr. had discharged himself from acting as solr. to a party to a cause, & retained the papers for the purpose of having his bill of costs taxed, & his former client refused to pay the bill of costs, the common order for delivery was made subject to lien, & on the undertaking to return them; but the order was made without costs on account of the former client's refusal to pay the bill of costs.—*Re H—*, *WALKER v. BEANLANDS*, *BEANLANDS v. WALKER* (1866), 15 W. R. 168.

3423. .]—*Re FAITHFULL, Re LONDON, BRIGHTON & SOUTH COAST RY. CO.*, No. 2927, *ante*.

3424. .]—The assigned solr. of a pauper, in consequence of delay in the prosecution of proceedings under the suit, ordered to be discharged & to deliver up to the new solrs. all the papers in the suit, subject to his lien for what might be found due to him for costs upon taxation.—*HANNAFORD v. HANNAFORD* (1871), 24 L. T. 86; 19 W. R. 429.

3425. .]—A solr. applied to his client for funds to carry on a suit, declining to continue the conduct of the litigation unless his costs, which were already considerable, were secured. The client neither furnished the funds nor gave the required security, but obtained an order appointing fresh solrs.:—*Held:* the solr. had discharged himself, & was bound to hand over to the new solrs. all the papers in his possession relating to the suit, on their undertaking to hold them without prejudice to his lien, & to return them to him within twelve days after the conclusion of the suit.—*ROBINS v. GOLDINGHAM* (1872), L. R. 13 Eq. 440; 41 L. J. Ch. 813; *sub nom.* *Re SUCKLING*, *ROBINS v. GOLDINGHAM*, 25 L. T. 900; 20 W. R. 277.

Annotations:—*Apld.* *Bluck v. Lovering* (1886), 35 W. R. 232; *Re Marie Rose Gold Mining Co.* (1896), 40 Sol. Jo. 637. *Refd.* *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.

LEY v. BROWN (1862), 1 Ch. Ch. 179.—*CAN.*

3418 ii. .]—*STRANGWAYS v. HARMAN* (1839), 1 I. Eq. R. 467.—*IR.*

3418 iii. .]—*RUTLEDGE v. RUTLEDGE* (1840), 2 I. Eq. R. 290.—*IR.*

Sect. 5.—Effect of change of solicitors: Sub-sects. 2 & 3. Part IX. Sect. 1: Sub-sects. 1, 2 & 3, A.]

3426. ———.]—Where a solr. has discharged himself of his retainer from acting further for his client, he will be compelled, if the client has resolved to further conduct his own case in person, to deposit the papers & documents in the cause which he has in his possession in the custody of the officer of the ct. for a certain period, in order that the client may have access to them, although the solr. has still a lien upon such papers & documents for his unpaid bill of costs.—*Re WONTNER & SONS, Ex p. SCHEYER* (1888), 52 J. P. 183, D. C.

3427. ———.]—Where a solr. applied to his client for funds to carry on a suit under a special stipulation in the retainer that such funds should be supplied, &, on the client refusing to pay, declined to continue the suit or deliver up the papers until his taxed costs were paid:—*Held*: this was a discharge by the solr., & he might be called upon to deliver to new solrs. the papers relating to the matters in question in the suit.—*BLUCK v. LOVERING & Co.* (1886), 35 W. R. 232, D. C.

3428. Deposit in court ordered.]—Upon motion that solrs. who had withdrawn themselves from the suit during its continuance should produce the deeds, etc., & deposit them in the master's office, it was objected by the solrs. that there were certain costs due to their predecessors, prior to the commencement of the suit, which had already been taxed, & that the deeds, etc., had come into their possession prior to the suit; that they had consequently a lien upon them. The ct. nevertheless ordered production.—*GREGORY v. CRESSWELL* (1845), 1 Holt, Eq. 17; 14 L. J. Ch. 300; 71 E. R. 655.

Annotation:—Distd. Re Forshaw (1847), 17 L. J. Ch. 61.

3429. ———.]—*Re MARIE ROSE GOLD MINING Co.* (1896), 40 Sol. Jo. 637.

SUB-SECT. 3.—PRIORITIES OF SUCCESSIVE SOLICITORS.

3430. Priority of former solicitor—Undertaking by new solicitor to hold subject to lien.]—Upon a change of attorneys under a rule of ct., the new attorney undertook to hold the record & papers in the case subject to the lien of the former attorney:—*Held*: the cause having been brought to a successful termination, the former attorney was entitled to call upon his successor to proceed with the taxation, issue execution, & pay him the amount of his lien out of the first proceeds, subject only to the costs necessarily incurred on such taxation.—*NEWTON v. HARLAND* (1842), 4 Scott, N. R. 769.

3431. ———. **Gross sum received by new solicitor—Lien of old solicitor destroyed.]**—At the hearing, pltf. obtained an order for taxation of his costs of suit, & payment out of the fund in court. Pltf. had in the progress of the suit employed three different sets of solrs. successively. Pltf. & his solrs. at the date of the decree agreed to accept a gross sum in full of all costs, instead of proceeding to taxation, & received the sum accordingly, for which they gave a receipt to that effect. They applied the money to their own use, & never paid the former solrs. the costs incurred during the

early period of the suit. The decree did not direct any distributive payment among the various solrs. of pltf.:—*Held*: (1) pltf. & his solrs. at the date of the decree had a right to waive taxation, & to accept of a gross sum in satisfaction of all costs, without consulting the former solicitors.

(2) It appearing that the gross sum was taken in satisfaction of all costs:—*Held*: the lien of the former solrs. upon the fund in ct. was gone.

(3) *Semble*: the remedy of the former solrs. was by action against the solrs. who received the money, as for money had & received to their use.—*WELLESLEY v. MORNINGTON (EARL)* (1857), as reported in 4 Jur. N. S. 6.

3432. ———. **New solicitor agreeing to compromise subject to payment of costs.]**—*GIBBS v. TREDWELL, Re ARMSTRONG* (1886), 30 Sol. Jo. 181, C. A.

3433. Priority of new solicitor—Payment received by old solicitor.]—By an order of the ct., the costs to be incurred by a married woman suing by her next friend in a future proceeding, were ordered to be paid to B., her solr. Pending the proceedings, B. was discharged, & C. appointed solr. B. received the whole costs:—*Held*: the ct. had jurisdiction, on petition, to order B. to pay over to C. his share of such costs; & B. could not set off, as against the amount, a debt due to him from the next friend.—*Re BARNARD, Ex p. BAILEY & HOPE* (1851), 14 Beav. 18; 18 L. T. O. S. 37; 51 E. R. 193.

3434. ———. **Deficiency of funds.]**—Where a solr. by arrangement with his client retired from the conduct of the suit, & another solr. conducted it thenceforth to its conclusion:—*Held*: on there being a deficiency in the fund applicable to the payment of costs, the latter solr. had priority.—*CORMACK v. BEISLY* (1858), 3 De G. & J. 157; 44 E. R. 1229, L. J.

Annotations:—Consd. Re Audley Hall Cotton Spinning Co. (1868), L. R. 6 Eq. 245. *Folld. Re Wadsworth, Rhodes Sugden* (1886), 34 Ch. D. 155. *Apld. Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368. *Reid. Re New York Exchange Co.*, [1893] 1 Ch. 371.

3435. ———.]—*Re WADSWORTH, RHODES v. SUGDEN*, No. 3379, ante.

3436. ———.] (1) The principle that the solr. last employed in an action is entitled to a charge for costs under Solicitors Act, 1860 (c. 127), s. 28, in priority to his predecessor, is unaffected by *North v. Stewart*, No. 3367, ante.

(2) *Semble*: where a receiver of rents has been appointed in an action & a new receiver is afterwards appointed in his place, the solr. by whom such last-mentioned appointment was obtained is entitled to priority of lien against any rents subsequently received.—*Re KNIGHT, KNIGHT v. GARDNER*, [1892] 2 Ch. 368; 61 L. J. Ch. 399; 66 L. T. 646; 40 W. R. 460; 36 Sol. Jo. 447.

3437. Costs in winding up—Costs paid pari passu—Unless undertaking given.]—In the winding up of a co. petitioner's costs are the first charge upon the estate, & must be paid in full in priority to the costs of the official liquidator. Where the official liquidator changes his solrs., & the assets are not sufficient to pay the whole of his costs, the bills of costs of the successive solrs. will, as a general rule, be paid rateably, so far as the assets will extend, but where the first solr. gave up documents to the second solr. upon an undertaking that his costs should be paid out of the estate, his costs were paid in full in priority to

PART VIII. SECT. 5, SUB-SECT. 3.

t. Priority of former solicitor.]—Where a deft. had changed his solr. after an adverse decision, & the Ct. of Appeal had reversed the decision, &

given the deft. the costs of the proceedings in the ct. below, the substituted solr., having levied the costs, was ordered to lodge them in ct. to meet the claims of the dismissed solicitor.—*EASTWOOD v. EASTWOOD*

(1868), 16 W. R. 942.—*IR.*

a. ———.]—*PRITCHARD v. WORTH* (1870), 18 W. R. 1200.—*IR.*

b. Priority of new solicitor.]—The general rule is that the solr. who

those of the second solr.—*Re AUDLEY HALL COTTON SPINNING Co.* (1868), L. R. 6 Eq. 245; 37 L. J. Ch. 904.

Annotations:—*Refd.* *Re Trueman, Hooke v. Piper* (1872), 41 L. J. Ch. 585; *Re New York Exchange Co.*, [1893] 1 Ch. 371.

3438. ———.]—(1) In the winding up of a co., the liquidator changed his solr. The first solr. claimed to be paid his costs. The liquidator set up in defence that he had, in pursuance of an order of the ct., paid away part of the assets in discharging the costs of an unsuccessful attempt to settle an alleged shareholder on the list of contributories, & that the only remaining assets amounted to £9, which was quite insufficient to pay appct., & which he claimed to retain for costs out of pocket:—*Held*: the successful litigant whose costs were ordered to be paid by the liquidator, was entitled to immediate payment of those costs in priority to the general costs of liquidation

including costs of realisation; & the remaining assets, amounting to £9, must be apportioned equally between the liquidator & appct.

(2) The order giving the costs to the successful litigant directed that they should be paid by the official liquidator, & that he should be at liberty to retain them out of the assets of the co.:—*Held*: this form of order gave the official liquidator the right to repay himself the costs out of the assets in priority to all other creditors. — *Re DOMINION OF CANADA PLUMBAGO Co.* (1884), 27 Ch. D. 33; 53 L. J. Ch. 702; *sub nom. Re DOMINION OF CANADA PLUMBAGO Co., Ex p. BEALL*, 50 L. T. 518; 33 W. R. 9, C. A.

Annotations:—*As to* (1) *Appl. Re Blundell, Blundell v. Blundell* (1890), 44 Ch. D. 1, *Re London Metallurgical Co.*, [1895] 1 Ch. 758. *As to* (2) *Refd. Re London Metallurgical Co.*, [1895] 1 Ch. 758. *Generally. Consd. Re Staffordshire Gas & Coke Co.*, [1893] 3 Ch. 523.

Priority of solicitor as against third parties.—*See Sect. 3, sub-sect 6, ante.*

Part IX.—Solicitor's Remedies for Costs.

SECT. 1.—ACTION.

SUB-SECT. 1.—IN GENERAL.

3439. Amount recoverable—Where bond given by client.]—*BOWMAN v. PAYNE* (circa 1796), cited in 5 Price at p. 56; 116 E. R. 535, L. C.

Annotation:—*Refd. Lewes v. Morgan* (1817), 5 Price, 42.

3440. Stay of action—Discretion of court.—Where a judge at chambers in the exercise of his discretion, in referring an attorney's bill for taxation, under Solicitors Act, 1863 (c. 73), s. 37, reserves to the client liberty to question the retainer & restrains the attorney from bringing an action upon the bill pending the reference, the ct. will not interfere, without strong ground for so doing.—*Re PYNE* (1848), 5 C. B. 407; 136 E. R. 936.

Annotations:—*Appl. Re Thurgood* (1854), 19 Beav. 541.

Refd. Re Jones (1887), 36 Ch. D. 105.

Action on account stated.—*See CONTRACT*, Vol. XII., pp. 573, 574, Nos. 4774–4778.

Right to sue in High Court.—*See Part III.*, Sect. 3, sub-sect. 5, *ante*.

Action in Ecclesiastical Courts.—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 321, Nos. 1221–1225.

conducts the action to a successful termination is entitled to be paid first.—*FORD v. MASON* (1893), 15 P. R. 392.—*CAN.*

c. ———.]—*CLARK v. ECCLES* (1871), 3 Ch. Ch. 324.—*CAN.*

PART IX. SECT. 1, SUB-SECT. 1.

d. Right of solicitor to sue—On special contract other than for professional work.—*SHARP v. SOUTHERN*, [1905] V. L. R. 223.—*AUS.*

e. ——— *Case not concluded.*—An attorney may sue for his fees in a cause which he does not conclude, if he can account satisfactorily for not proceeding.—*FORD v. SPAFFORD* (1837), 5 O. S. 440.—*CAN.*

f. ——— *For his moiety of costs where costs charged on land*—Where an administrator has recovered a chattel interest in lands, by a decree declaring his costs to be duly charged on the estate, his solr. cannot file a petition in his own name to realise his own portion of those costs.—*Re M'ALLISTER* (1865), 16 L. Ch. R. 134.—*IR.*

g. Right to recover under small debts procedure.—*UNION BANK v. STEWART & SMITH & BRIGHAM* (1895), 3 Terr. L. R. 342.—*CAN.*

h. Right of trial judge to interfere further with original judgment—*Pitf.* brought action on a bill of costs for services rendered as a barrister & solr. On the trial it was ordered that the bill of costs be referred to the registrar of the ct. to be taxed & that *pitf.* recover from *def.* the amount due on the taxation. The registrar refused to tax the bill on the ground of lack of jurisdiction. On the application of *pitf.* the trial judge then gave judgment for the full amount claimed.—*Held*: the judgment must be set aside as the trial judge had already disposed of the case & had no jurisdiction to interfere further with his original judgment.—*MURRAY v. GOLD* (1921), 31 B. C. R. 489.—*CAN.*

k. Necessity for filing agreement to pay out-fees advanced.—*Legal Practitioners Act* does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees advanced shall be sustainable, unless an agreement in writing for the same has been entered into with the client & filed in ct., but only that an agreement, if any, in respect thereto, shall be void, unless the same has been reduced to writing & filed in ct.—*SUBBA PILLAI v. RAMASAMI*

AYYAR (1904), I. L. R. 27 Mad. 512.—*IND.*

PART IX. SECT. 1, SUB-SECT. 2.

l. Assignee.—*DOUGALL v. OCKERMAN* (1852), 9 U. C. R. 351.—*CAN.*

m. ———.]—*DUFF v. CANADIAN MUTUAL FIRE INSURANCE CO.* (1882), 9 P. R. 292.—*CAN.*

n. ———.]—*KILLEY v. MODERMORT* (Man.), [1919] 1 W. W. R. 660.—*CAN.*

o. Solicitor acting as Parliamentary agent.—Where a solr. had obtained from the Speaker of the Legislative Assembly authority to act in any matter as a parliamentary agent, he can recover the amount due him for services, without being obliged to observe all the requirements of the English Act.—*KENNEDY v. AUSTIN* (1884), 1 Man. L. R. 362.—*CAN.*

p. Partnership.—*MACKAY, HANLEY & BOYD v. FRASER* (Alta.), [1922] 3 W. W. R. 421; 69 D. L. R. 348.—*CAN.*

PART IX. SECT. 1, SUB-SECT. 3.—A.

3442 i. Liability of.—The Comr. for Railways retained *pitfs.* as solrs. to represent the Railway Department at the sittings of a Royal Commission appointed to inquire into the working

SUB-SECT. 2.—WHO MAY SUE.

3441. Solicitor shareholder—Action against provisional committee.—*SMITH v. ARCHIBALD* (1849), 14 L. T. O. S. 174.

Bankrupt.—*See BANKRUPTCY*, Vol. V., p. 999, No. 8157.

Partner—Action against firm for work as solicitor.—*See PARTNERSHIP*, Vol. XXXVI., p. 425, No. 936.

— **Non-joinder of reputed partner.**—*See PARTNERSHIP*, Vol. XXXVI., pp. 401, 407, Nos. 748, 769.

SUB-SECT. 3.—WHO MAY BE SUED.

A. Person Retaining Solicitor.

3442. Liability of.—*Assumpsit* lies by a solr. against his client upon a general retainer.—*OSBOURN v. EDEN* (1800), Cro. Eliz. 760; 78 E. R. 992.

3443. ———.]—An attorney or solr. may have either debt or *assumpsit* for his fees against the agent by whom he was retained.—*BRADFORD v.*

Sect. 1.—Action: Sub-sect. 3, A., B., C., D., E. & F.]

WOODHOUSE (1619), Cro. Jac. 520; Jenk. 332; 79 E. R. 445.

*Annotation:—*Refd. Pierson v. Hughes (1672), Freem. K. B. 71.

3444. —.].—An attorney may have debt for his fees & disbursements against him who retained him; but for his bill in a cause for one at the request of another, *assumpsit* only lies.—SANDS v. TREVILIAN (1630), Cro. Car. 107, 193; 79 E. R. 695, 769.

*Annotations:—*Consd. Ambrose v. Roe (1684), Skin. 217. Distd. Spearman v. Moreland (1706), Holt, K. B. 20. Refd. Hart v. Langitt (1702), 2 Ld. Raym. 841.

3445. —.].—To an action for fees as a proctor or solr., it is no defence that debt. employed a third person, who employed pltf., by whom the business was done, unless the money was actually paid to such third person before action brought.—BROWN v. BROOKS (1795), 1 Esp. 388; 170 E. R. 394, N. P.

3446. —. —. **Action against joint defendants—Undertaking to pay by one.**].—In an action brought by an attorney against two debts., to recover the amount of his bill of costs, evidence was adduced to show that he was employed by both, but that one only undertook to pay; & the jury found that one only was liable, & accordingly found a verdict for the defendants; the ct. refused to set it aside, or grant a new trial.—HELLINGS v. GREGORY (1825), 10 Moore, C. P. 337, 3 L. J. O. S. C. P. 150.

3447. —. —. **Fees of mortgagee's solicitor—Liability as between mortgagor & mortgagor's solicitor.**].—Where B. being desirous of raising a sum of money upon mtge., employed an attorney for the purpose, who applied to A., an attorney, telling him, at the same time, the name of his principal, & A. agreed to advance the money on behalf of a client, but ultimately the negotiation failed, from a defect of title:—*Held*: A. could not maintain an action against B. for his fees, although it was proved to be the practice for the proposed borrower to pay the expenses of the proposed lender, the course being for the attorney of the latter to send his bill to the attorney of the former, who, if the bill were reasonable, recommended his client to pay it.—RIGLEY v. DAYKIN (1828), 2 Y. & J. 83; 148 E. R. 841.

*Annotation:—*Distd. Webb v. Rhodes (1837), 4 Scott, 497.

3448. —. —. **Expenses of deed of appointment—Sum appointed settled on marriage.**].—A., on the marriage of his daughter with B., executed a deed of appointment, under a power contained in his own marriage settlement, in favour of his daughter, appointing to his daughter a sum of £4,000. This B. settled on his marriage. The marriage settlement of B. & the deed of appointment were both prepared by C., who was originally the solr. of A.

of the Tasmanian State Railways. In an action by pltf. to recover the amount of their legal charges:—*Held*: the engagement of pltf. as solrs. was an act done by the Comr. within his powers under Railway Management Act, 1910, & therefore rendered the Comr. for Railways liable as such on the contract. Debt. was therefore not entitled to a nonsuit on the ground that such engagement was beyond the scope of his authority as Comr.—PAGE v. RAILWAYS COMR. (1924), 20 Tas. L. R. 55—AUS.

3442 ii. —.].—Exors. employing an attorney are personally responsible to him for the costs.—DICKSON v. CROOKS (1840), 2 Ont. Dig. 2709.—CAN.

3442 iii. —.].—Where a suit is commenced & carried on under instructions from a person who tells the attorney

that he is agent for pltf., but the attorney takes no trouble to ascertain the truth of this, & proceeds without any communication with pltf., the attorney will not be protected as to his costs where a settlement is made between the parties which has the effect of depriving him of his lien, but will be left to an action against pltf.—SMITH v. THOMPSON (1869), 5 P. R. 156.—CAN.

3442 iv. —.].—Where a skilled practitioner is, by law & the custom of his profession, entitled to claim & recover payment for his professional work, those who engage his services must be held to employ him upon the usual terms according to which such services are rendered, in the absence of any stipulation to the contrary; & where the contract of employment is silent as to remuneration it must be taken to

be an implied condition that he is to be remunerated for his services upon the same terms upon which they are usually rendered.—R. v. DOUTRE (1884), 51 L. T. 669, P. C.—CAN.

3442 v. —.].—A railway co. may be bound by the act of its managing director in employing a solr. at a stated yearly salary. Acceptance of the services of the solr. by the directors is evidence of ratification of the original hiring even though the managing director acted without authority.—ALBERT RY. CO. v. PECK (1885), 26 N. B. R. 191.—CAN.

3442 vi. —.].—CAMPBELL v. PRINGLE (1852), 1 W. R. 134.—SCOT.

3442 vii. —.].—SHAW v. FOCK (1903), 13 C. T. R. 843.—S. AF.

3442 viii. —.].—STANTON v. ALPORT, [1923] E. D. L. 155.—S. AF.

3442 ix. —.].—Where a skilled practitioner is, by law & the custom of his profession, entitled to claim & recover payment for his professional work, those who engage his services must be held to employ him upon the usual terms according to which such services are rendered, in the absence of any stipulation to the contrary; & where the contract of employment is silent as to remuneration it must be taken to

be an implied condition that he is to be remunerated for his services upon the same terms upon which they are usually rendered.—R. v. DOUTRE (1884), 51 L. T. 669, P. C.—CAN.

3442 x. —.].—CAMPBELL v. PRINGLE (1852), 1 W. R. 134.—SCOT.

3442 xi. —.].—SHAW v. FOCK (1903), 13 C. T. R. 843.—S. AF.

3442 xii. —.].—STANTON v. ALPORT, [1923] E. D. L. 155.—S. AF.

B. Bankruptcy of Client.

3452. Liability of assignee—Where no assets.]—*Re FRIEDMAN, Ex p. ADAMS* (1836), 2 Mont. & A. 706, Ct. of R.

3453. — Joint retainer by assignee & assignee of creditor.]—The official assignee of a bkpt. is liable to the costs of defending an action brought against him & the creditor's assignee, if he joined in retaining the attorney.—*SYDNEY v. BELCHER & ISAACS* (1840), 2 Mood. & R. 324, N. P.

3454. —.]—A deed of assignment for the benefit of creditors, assigned the estate & effects of the debtor to trustees, upon trust to sell the same, & out of the produce thereof, in the first place, to pay & satisfy themselves all costs & expenses which they should be put to in having the deed prepared, & in & about executing the trusts:—*Held*: a trustee, who had signed the deed & sold the property under it, was liable for the costs of preparing the deed, in an action of *indebitatus assumpsit* by the attorney, though not instructed by him, & though his consent to act had not been obtained before the preparation of the deed.—*CAMPION v. KING* (1842), 6 Jur. 35.

3455. Liability of estate—Bankrupt in partnership with infant—Bankrupt having no separate estate—Liability of joint estate.]—One of two partners filed a liquidation petition, his co-partner being an infant. By consent the joint estate was administered by the trustee in the liquidation. The liquidating debtor had no separate estate:—*Held*: the costs of his solr. up to the date of the appointment of the trustee must be paid out of the joint estate.—*Re MEW, Ex p. PEARCE* (1876), 2 Ch. D. 320; 45 L. J. Bcy. 144; 34 L. T. 705; 24 W. R. 808, C. A.

3456. Liability of debtor—Costs of composition proceedings.]—Creditors of a liquidating debtor accepted a composition of 20s. in the pound, payable by instalments, & the debtor executed a bill of sale of all his property to a trustee, as security for the composition, upon trust, in default of payment thereof, which happened, to sell, & out of the proceeds to pay the costs of & incident to the sale, & the costs of the liquidation proceedings, & then to pay the creditors. The county ct. judge having, on the application of debtor, restrained an action against him by his solr., for payment of his bill of costs:—*Held*: the solr. was entitled to bring such action, but the ct. had power to direct his bill of costs to be taxed.—*Re DIXON, Ex p. SHEPHERD* (1876), 2 Ch. D. 430; 45 L. J. Bcy. 103; 31 L. T. 743; 24 W. R. 931.

—.]—*See, also*, BANKRUPTCY, Vol. V., pp. 1189, 1190, No. 9606-9608.

C. Companies.

See COMPANIES, Vol. IX., pp. 549-551, Nos. 3629-3640.

D. Infants.

Liability of next friend.]—*See* INFANTS, Vol. XXVIII., p. 314, Nos. 1774-1777.

E. Lunatics.

See LUNATICS, Vol. XXXIII., pp. 130, 242, 244, Nos. 56, 1606, 1646.

F. Other Persons.

3457. Wife—Deceased husband leaving no assets—Costs of recovery property of wife.]—*SHARSTON*

v. HIPSLEY (1710), 2 Eq. Cas. Abr. 132; 4 Vin. Abr. 103; 22 E. R. 113, L. C.

— **Agreement to pay entered into by mistake—Rescission.]—***See* MISTAKE, Vol. XXXV., p. 126, No. 269.

3458. Executor—Deed delivered up to executor by solicitor.]—An attorney having delivered up deeds to an exor., which he was not obliged to do till his bill was paid, & these deeds being of great use to the exor. in several suits which were then carrying on; this is a sufficient consideration to make the exor. liable to the attorney's whole demand, whether there be assets or not.—*HAMILTON (DUCHESS) v. INCLEDON* (1719), 4 Bro. Parl. Cas. 4; 2 Eq. Cas. Abr. 456; 11 Vin. Abr. 279; 2 E. R. 3, H. L.

Annotation:—*Appld. Re Bentinck, Bentinck v. Bentinck* (1893), 37 Sol. Jo. 233.

3459. Members of vestry—Resolution to compel repair of road—Employment of solicitor by surveyor.]—Several inhabitants of a parish, attending a special vestry, signed resolutions, by which they ordered an indictment, brought against the inhabitants, to compel them to repair a road within the parish, to be opposed; & that the surveyor of the highways should take the necessary steps for carrying such order into effect. The surveyor having accordingly employed an attorney for that purpose:—*Held*: the persons who had signed the resolutions were not personally liable to the attorney for the charges incurred in resisting the indictment.—*SPROTT v. POWELL* (1826), 3 Bing. 478; 4 Dow. & Ry. M. C. 377; 11 Moore, C. P. 398; 4 L. J. O. S. C. P. 161; 130 E. R. 598.

Annotation:—*Mentd. Klenck v. Farris* (1901), 68 J. P. 321.

3460. Commissioners for passing private Act—Expenses to be paid out of tolls arising under Act—Necessity for proof of funds in hands of commissioners.]—By a private Act of Parliament, the expenses attending its passing were directed to be paid out of the tolls raised or levied, or to be raised, under it. The attorney who prepared & solicited the act, sued the clerk to the comrs. named in it, for the amount of his bill:—*Held*: he was bound to show that there were sufficient funds in the hands of the comrs., which had been raised or levied by tolls or otherwise, to satisfy his demand.—*ANDREWS v. DALLY* (1828), 4 Bing. 566; 1 Moo. & P. 490; 6 L. J. O. S. C. P. 117; 130 E. R. 886.

3461. Solicitor to bankrupt—Promise to pay assets to bankrupt's solicitor by solicitor conducting bankruptcy.]—Pltf., an attorney, conducting a commission of bkpt., having received a debt due to bkpt., undertook to pay deft., solr. of the bkpt., the surplus of the sum so received, should any remain, after defraying certain charges incurred by pltf., if deft. would pay pltf. his costs of conducting the commission:—*Held*: not a sufficient consideration to support an action against deft. on his promise to pay pltf.'s costs.—*HASLAM v. SHERWOOD* (1834), 10 Bing. 540; 4 Moo. & S. 434; 3 L. J. C. P. 176; 131 E. R. 1004.

3462. Members of committee—Appointed by subscribers for obtaining Act of Parliament.]—A committee appointed by the inhabitants of M., employed pltf.s., as their solrs., to apply to Parliament for an Act for constructing a dock. Pltf.s., in the course of their employment, paid consider-

PART IX. SECT. 1, SUB-SECT. 3.—B.

*q. Liability of assignee.]—**KAYSER & DE BEER v. LIEBENBERG ESTATE*, [1926] App. D. 91.—S. AF.

PART IX. SECT. 1, SUB-SECT. 3.—F.

*r. Executor—Alimony action—Solicitors costs deemed necessities.]—**KERR v. RICKARD*, 8 C. L. T. Occ. N. 335.—CAN.

*t. Municipal corporation.]—*A solr. who is a member of a municipal council cannot recover from the corpn. for services rendered them, he being a trustee under C. S. U. C. c.

Sect. 1.—Action: Sub-sect. 3, F.; sub-sect. 4, A., B. & C.; sub-sect. 5, A., B. & C. (a).]

able sums to engineers, witnesses, Parliamentary agents, & various other persons, & a large sum became due to them for their own costs, & several liabilities were existing against them. Pltfs. at different times received, through bankers & others, various sums on account of what was due to them, but were unable to obtain payment of the balance: upon which they filed a bill against some of the other members of the committee, alleging that, of the other members, some were out of the jurisdiction, & others were dead & their personal representatives unknown, & praying that debts might come to an account with them, & pay to them the balance which was stated to be £3,232 1s. 4d., or such balance as, on taking the account, should be found due, & also to indemnify them against the existing liabilities. A demurrer to the bill was allowed.—*ALLISON v. HERRING* (1839), 9 Sim. 583; 8 L. J. Ch. 223; 59 E. R. 483.

3463. Overseer.]—An overseer retaining an attorney to conduct parish business at the quarter sessions, is not personally liable, unless the retainer be specially worded, & he can neither be sued for the costs done in his year of office, or after it.—*WELBY v. BROWN* (1846), 8 L. T. O. S. 122; 11 J. P. 602.

*Annotation:—*Reid. *Marsh v. Davies* (1818), 1 Exch. 668.

See, now, Rating & Valuation Act, 1925 (c. 90), s. 62.

3464. One party where actions consolidated.]—Upon a taxation in equity, a question arose as to the liability of the client to pay the costs of a consolidated action at law. Leave was given to the solr. to bring his action to try the question.—*Re ANDERSON* (1847), 10 Beav. 399; 50 E. R. 636.

Husband.]—*See HUSBAND & WIFE, Vol. XXVII., pp. 206–209, Nos. 1787–1819.*

Lessee—Costs of preparing lease.]—*See LANDLORD & TENANT, Vol. XXX., p. 450, Nos. 1114–1117.*

SUB-SECT. 4.—TIME FOR COMMENCEMENT OF ACTION.

A. In General.

3465. Effect of repudiation of retainer.]—Pltf., a solr., employed by deft. a *prochein ami* in a suit in Chancery, sent in his bill before the termination of the suit. Deft. contended that he was not responsible. The solr. then wrote offering to go on if a certain sum was paid him, & if deft. would admit that he was personally responsible. Deft. not consenting to this:—*Held*: the solr. was entitled to sue for his costs without waiting for the termination of the suit.

The rule, that a solr. cannot sue for his costs till the termination of the suit in which he is employed, is subject to an exception where the client comes forward & disclaims his liability (*per CUR.*).—*HAWKES v. COTTRELL* (1858), 3 H. & N. 243; 27 L. J. Ex. 369; 157 E. R. 462.

B. Necessity for Delivery of Bill of Costs.

See Part VI., Sect. 4, sub-sect. 2, ante.

54, s. 217.—*PETERBOROUGH TOWN v. BURNHAM* (1862), 12 C. P. 103.—*CAN.*

a. *Assignee of contract sued on.]—*EARLE v. CONTINENTAL GUARANTY CORPN. OF CANADA, LTD. & LABELLE (B. C.), [1927] 4 D. L. R. 939; [1927] 3 W. W. R. 784.—*CAN.*

b. *Wife—In habeas corpus proceed-*

*ings.]—*MAOREDY v. TAYLOR (1872), 1 R. 7 C. L. 256.—*IR.*

PART IX. SECT. 1, SUB-SECT. 4.—C.

3466 i. Whether taxation condition precedent.]—*R. v. McLEOD, Re MILLER v. McLEOD* (1853), 10 U. C. R. 588.—*CAN.*

3466 ii. —.]—Where an action was

C. Necessity for Taxation.

3466. Whether taxation condition precedent.]—This ct. will not stay proceedings in an action on an attorney's bill, brought subsequent to the order of the judge of another ct. for its taxation, but previous to that taxation having taken place.—*STEVENTON v. WATSON* (1799), 1 Bos. & P. 365; 126 E. R. 955.

*Annotations:—*Dbtd. *Shirreff v. Gresley* (1835), 4 Ad. & El. 338; *Sheriff v. Gresley* (1836), 6 Nev. & M. K. B. 446.

3467. —. Death of solicitor after order for taxation—Action by personal representative of solicitor.]—Where an order was made for the taxation of a solr.'s bill, & for staying all proceedings at law till after the master's report, & the solr. died pending the taxation, & before any report, & no revived order for taxation being made, the solr.'s personal representative proceeded at law against the client:—*Held*: this was not a contempt.—*HOULDITCH v. HOULDITCH* (1818), 1 Wils. Ch. 17; 1 Swan. 58; 37 E. R. 8, L. C.

3468. —. Pending petition to allow costs of taxation.]—More than one-sixth part of an attorney's bill having been taken off on taxation, deft. presented a petition to the Vice-Chancellor to allow the costs of taxation. Pending this proceeding, the attorney brought his action for the residue of the bill:—*Held*: the action was well brought, 2 Geo. 2, c. 23, s. 23, having only prohibited an action being brought pending the reference & taxation.—*HEWITT v. BELLOTT* (1819), 2 B. & Ald. 745; 106 E. R. 537.

3469. —. Cost of taxation not ascertained.]—Injunction granted to restrain an action for the amount of a solr.'s bill, which had been taxed after the commencement of the action, & more than one-sixth had been taken off, but the costs of taxation had not been ascertained.—*WALTON v. JOHNSON, HESELTON v. JOHNSON* (1828), 2 Sim. 456; 57 E. R. 858.

3470. —.]—A solr., whose bill had been taxed & more than one-sixth taken off, brought an action against his client, before the costs of taxation were ascertained, for the amount so taxed; the ct. granted an injunction to restrain the action.—*BARR v. WIGGINS* (1830), 4 Sim. 125; 58 E. R. 48.

*Annotation:—*Reid. *Barton v. Pyne* (1812), 1 Hare, 493.

3471. —.]—A summons to refer an attorney's bill for taxation, followed by a judge's order for that purpose, will not prevent the attorney from commencing an action on his bill, or operate as a stay of proceedings.—*WILLIAMS v. ROBERTS* (1835), 1 Cr. M. & R. 676; 1 Gale, 56; 5 Tyr. 421; 4 L. J. Ex. 78; 149 E. R. 1252.

3472. —.]—Whilst proceedings are pending on an order to tax an attorney's bill, he cannot bring an action for the amount.—*SHERIFF v. GRESLEY (LADY)* (1835), 1 Har. & W. 588; 5 Nev. & M. K. B. 491; 5 L. J. K. B. 7; *sub nom. SHIRREFF v. GRESLEY (LADY)*, 4 Ad. & El. 338; *subsequent proceedings* (1836), 6 Nev. & M. K. B. 446.

3473. —.]—*Qu.*: whether, when an attorney obtains an order for the taxation of his own bill of costs, & serves an appointment to tax, he can afterwards abandon such order & bring his action.—*FITZPATRICK v. NIND* (1845), 6 L. T. O. S. 86.

brought on an attorney's bill together with another claim, an order was made referring the bill for taxation & reserving the right to raise any defence to the action, costs to abide the event of the taxation, not of the cause.—*Re GREEN* (1877), 7 P. R. 89.—*CAN.*

3466 iii. —.]—*Re BURDETT* (1883), 9 P. R. 487.—*CAN.*

3474. —.]—Where an order has been made by consent of all parties for taxation of costs, & payment to solrs. of a sum to be found due to them on such taxation, but the solrs. do nothing for a year to forward such taxation; they cannot then move to have the sum paid to them on the ground that the order was improperly obtained.—**BRANDING v. PLUMMER** (1853), 21 L. T. O. S. 178.

3475. — **Action against guarantor.**—It is not a condition precedent of a solr.'s right to sue a guarantor of costs to be incurred, that the costs should have been taxed.—**MOORE v. WALTON** (1884), 1 Cab. & El. 279.

— **County Court costs.**—See **COUNTY COURTS**, Vol. XIII., p. 523, Nos. 735-738.

SUB-SECT. 5.—DEFENCES.

A. Plaintiff Not Qualified.

See Part II., Sect. 6, sub-sect. 4, B., C., *ante*.

B. No Benefit from Services.

3476. General rule.—An attorney cannot recover a charge for conducting a suit in which the party charged has not had the benefit of the attorney's judgment & superintendence. Therefore, where, in an action on an attorney's bill, it appeared that pltf. lived at D., five miles from W., that deft. lived at H., fourteen miles from W., & applied to B., who resided at W., & who had been a clerk of pltf.'s, & practised in his name, to carry on the suit for which the bill in question was incurred; B. carried on the suit, & it did not appear that deft. ever saw pltf., or had the benefit of his judgment; the business done at the office at W. was for B.'s benefit, except one-third, which pltf. received for coming over once a week to show his face; Pltf.'s name was not on the door at W., nor was it employed by B. in soliciting business; but B. frequently consulted with pltf.; drafts were sometimes engrossed at D. for the office at W.; the draft of the brief in the suit, which B. had carried on for deft., was in the handwriting of pltf., as well as some items in B.'s books touching that suit; deft., when applied to, admitted the sum claimed, but required to set off a sum due to him from B., which was refused:—**Held**: a non-suit, directed by the judge who tried the cause, was proper.—**HOPKINSON v. SMITH** (1822), 1 Bing. 13; 7 Moore, C. P. 237; 130 E. R. 6.

Annotations:—**Distd.** Noel v. Hart (1837), 8 C. & P. 230. **Refd.** Gill v. Lougher (1830), 1 Cr. & J. 170; Armstrong v. Lewis (1833), 4 Moo. & S. 1.

3477. —.]—An attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience, & not with the design of imposing on the client.—**HILL v. FEATHERSTONHAUGH** (1831), 7 Bing. 569; 5 Moo. & P. 541; 131 E. R. 220.

Annotation:—**Refd.** Shaw v. Arden (1832), 9 Bing. 287.

3478. —.]—In considering an attorney's bill, a charge for work entirely useless may be rejected by the jury; *contra*, as to a charge for work partly useless, or in respect of which there has been any negligence; the client's remedy in that case being

by a cross action only.—**SHAW v. ARDEN** (1832), 9 Bing. 287; 1 Dowl. 705; 2 Moo. & S. 341; 2 L. J. C. P. 1; 131 E. R. 623.

3479. —.]—An action by an attorney for his charges incurred in selling or mortgaging the property of a party confined in prison for debt, after such party has petitioned the insolvent ct. for his discharge, cannot be resisted on the ground that such sale or mtge. was fraudulent as against the creditors of the insolvent. The only ground, it would seem, on which such an action can be defended is, that the insolvent could derive no benefit from pltf.'s skill.—**TABRAM v. WARREN** (1835), Tyr. & Gr. 153.

Loss of benefit due to negligence.—See Sub-sect. 5, C., *post*.

C. Negligence.

(a) In General.

3480. Whether a defence.—Negligence in the conduct of a cause cannot be set up as a defence to an action on the attorney's bill. At least unless it was negligence such as to deprive deft. of all possible benefit from the cause. *Qu.*: whether even in such case it can be used as a defence.—**TEMPLER v. M'LACHLAN** (1806), 2 Bos. & P. N. R. 136; 127 E. R. 576.

Annotations:—**Distd.** Allison v. Rayner (1827), 7 B. & C. 441. **Refd.** Gell v. Lougher (1830), 1 Tyr. 121; Mondel v. Steel (1841), 1 Dowl. N. S. 1.

3481. —.]—It is a good defence to an action on an attorney's bill, that the costs sought to be recovered were incurred through inadvertence & want of proper caution on the part of the attorney.—**MONTRIOU v. JEFFERYS** (1825), 2 C. & P. 113; Ry. & M. 317; 172 E. R. 51, N. P.

Annotation:—**Refd.** Edwards v. Cooper (1828), 3 C. & P. 277.

3482. —.]—**SHAW v. ARDEN**, No. 3478, *ante*.

3483. —.]—Where there appears to be negligence in ignorance of law on the part of an attorney, which creates unnecessary costs, the ct. will order those costs to be disallowed on taxation, without prejudicing his rights to bring an action for them.—**CLIFFE v. PROSSER** (1833), 2 Dowl. 21.

Annotation:—**Apld.** *Re* Massey & Carey (1884), 26 Ch. D. 459.

3484. —.]—An action having been brought against an attorney for negligence, in which action the jury gave a verdict for pltf., finding also that the attorney had been guilty of gross negligence, & then the attorney brought an action for his bill of costs, the ct. refused to interfere to stay proceedings in the latter action.—**SMITH v. ROLT** (1833), 2 Dowl. 62.

3485. —.]—In *assumpsit* on an attorney's bill, *qu.*, whether deft., under the plea of *non assumpsit*, may prove that the business done became ultimately useless through pltf.'s negligence.—**SYMES v. NIPPER** (1840), 12 Ad. & El. 377, n.; 113 E. R. 855.

3486. —.]—**BRACEY v. CARTER**, No. 3494, *post*.

3487. —.]—An attorney agreed to conduct a cause, & to charge his client only money out of pocket. The client paid money to the attorney during the cause, which was expended in carrying it on. The jury found that the cause subsequently failed by the neglect of the attorney:—**Held**:

PART IX. SECT. 1, SUB-SECT. 5.—B.

3476 i. General rule.—Where the defence to an action on an attorney's bill is that the costs were incurred in a suit which the attorney had settled without deft.'s authority, it is a material question for the jury, in determining whether deft. obtained any benefit from pltf.'s services, to ascer-

tain whether the previous suit was settled with his consent.—**DIBBLEE v. WOOD** (1872), 1 Pug. 137.—**CAN.**

PART IX. SECT. 1, SUB-SECT. 5.—C. (a).

3480 i. Whether a defence.—**VIDAL v. DONALD** (1861), 20 U. C. R. 507.—**CAN.**

3480 ii. —.]—Where services

charged for by an attorney were required only in consequence of his own mistake or neglect, which a careful person would not have been likely to fall into, a matter affording room for doubt or difficulty, he cannot recover; & such a defence is available under the general issue.—**BURNHAM v. BURNS** (1862), 21 U. C. R. 349.—**CAN.**

Sect. 1.—Action: Sub-sect. 5, C. (a) & (b), D., E.

(1) the attorney was not entitled to recover money out of pocket paid by him subsequent to the act of negligence, as money paid to deft.'s use; (2) the client was not entitled to set off the money advanced & expended previous to such negligence.—*LEWIS v. SAMUEL* (1846), 8 Q. B. 685; 1 New Pract. Cas. 424; 15 L. J. Q. B. 218; 7 L. T. O. S. 60; 10 Jur. 429; 115 E. R. 1031.

3488. —.].—Where a solr. has been retained for & has undertaken a particular business, his bill of costs for carrying that business through to its conclusion is but one bill; & where the business in question is the prosecution of a suit, & the solr. has, by his *crassa negligentia* in the conduct of the suit, caused the suit to be lost, he cannot recover any portion of his bill.

In a cause, commenced by information, the relators' solr. intending to cross-examine two defts. who had previously been examined in chief on behalf of a co. deft., such defts. were, by mistake, examined upon interrogatories for the examination of witnesses in chief on the part of the informant, & by reason of this mistake, the information was dismissed, with costs:—*Held*: the mistake was *crassa negligentia* on the part of the solr., & disentitled him to recover any portion of his bill of costs.—*STOKES v. TRUMPER* (1855), 2 K. & J. 232; 25 L. T. O. S. 140; 3 W. R. 503; 69 E. R. 766; *on appeal*, 25 L. T. O. S. 278, 1. JJ. *Annotations*—*Refd. Re Cartright* (1873), L. R. 16 Eq. 469; *Re Hall & Barker* (1878), 47 L. J. Ch. 621; *Re Nelson & Hastings* (1885), 30 Ch. D. 1, *Re Romer & Haslam*, [1893] 2 Q. B. 286.

What amounts to negligence.—*See* Sub-sect. C. (b), *post*.

(b) *What Amounts to.*

3489. No benefit resulting from services.—*TEMPLER v. M'LACHLAN*, No. 3480, *ante*.

3490. —.].—*SYMES v. NIPPER*, No. 3485, *ante*.

3491. —.].—*TAYLOR v. TENNANT* (1846), 6 L. T. O. S. 413.

3492. —.].—**Loss of benefit partly due to accident.**—It is no answer to an action on an attorney's bill for prosecuting a suit for deft., that no benefit has been derived by deft., where the failure does not result wholly from pltf.'s negligence, but partly from accident.—*DAX v. WARD* (1816), 1 Stark. 409; 171 E. R. 513, N. P.

3493. —.].—**Misrepresentation as to effect of bankruptcy.**—It is no defence to an action by a solr. against an assignee under a commission of bkpt., that the commission was sued out under a misrepresentation by pltf. that the commission would be operative in the Isle of Man, & that it has been wholly fruitless; for the commission cannot be treated as a mere nullity.—*PASMORE v. BIRNIE* (1817), 2 Stark. 59; 171 E. R. 572, N. P.

3494. —.].—**Question for jury.**—If an attorney, conducting a suit, commits an act of negligence by which all the previous steps become useless in the result, he cannot recover for any part of the business done. Whether or not, in such a case, the work became wholly useless by pltf.'s fault, is a question for the jury. Such failure of the work is a defence admissible on *non assumpsit*, in an action upon the attorney's bill.—*BRACEY v. CARTER* (1840), 12 Ad. & El. 373; 113 E. R. 853.

3495. —.].—In an action by attorneys for the costs of a defence, which failed, they having been absent on the day of trial, & some of the witnesses consequently not being in ct.:—*Held*: they were entitled to recover, notwithstanding the verdict had passed against their clients,

defts., unless the jury thought that the absence of the witnesses had caused the loss of the verdict, & so made pltf.'s services wholly valueless.—*DUNN v. HALLEN* (1861), 2 F. & F. 642, N. P.

3496. —.].—In an action by an attorney for the costs of an action to recover a chattel, the subject of a specific bequest, but claimed by the possessor as a gift from testator, the defence being that the action, which had failed, was only brought under the advice of the attorney, & that it was wholly useless; the proper course being to take out an administration summons in Chancery, the course it was ultimately found necessary to adopt:—*Held*: it was nevertheless for the jury on the whole case, not whether the course was proper, but whether it was so wholly useless as that deft. had derived no benefit from it; also, attorneys might be called & examined as skilled witnesses on that question.—*FLETCHER v. WINTER* (1862), 3 F. & F. 138.

—Compare Nos. 3476–3479, *ante*.

3497. Failure to inquire as to solicitor's authority—Arbitration proceedings.—A dispute between A., a married woman, & C. was referred to arbn. After the reference had proceeded for some time, an additional matter was submitted by the attorneys for the parties. C.'s attorney signed the submission in his presence. A.'s attorneys signed in the presence of C.'s attorney, but without any authority from their client. The award was afterwards set aside & C.'s attorney sued him for the expenses of the arbn.:—*Held*: he had not been guilty of such negligence, in not requiring to see the authority of A.'s attorneys, as would prevent his recovering the amount of his bill.—*EDWARDS v. COOPER* (1828), 3 C. & P. 277; 172 E. R. 419, N. P.

3498. Ignorance of sessions practice.—Where an attorney was employed by parish officers to conduct an appeal, which failed through the attorney's gross ignorance of sessions practice:—*Held*: he could not recover in an action on his bill for conducting it.—*HUNTLEY v. BULWER* (1839), 6 Bing. N. C. 111; 8 Scott, 325; 3 J. P. 787; 3 Jur. 1105; 133 E. R. 44.

3499. Delay in suing out writ.—If an attorney delays to sue a writ, in an action against a constable, until after the expiration of the time within which the action must be brought, or if he omits the words "by statute" in entering deft.'s plea upon the record, in consequence of which omission a verdict given for pltf. is subsequently set aside; these are such instances of negligence as will afford a good defence to an action brought for the recovery of his bill of costs.—*ANON.* (1845), 4 L. T. O. S. 454, N. P.

3500. —.].—Pltf. had been retained by deft. to bring an action for a false imprisonment against a constable & a person who had acted as a magistrate. The action was brought against the constable only, & not within the time limited by the statute. The constable pleaded not guilty, by statute, but the record was made up without the words "by statute" being inserted in the margin. The then pltf. in consequence obtained a verdict at the trial, but which was subsequently set aside by the ct., as it appeared that the plea had contained the words "by statute" in the margin. Pltf.'s attorney, the now pltf., had thereupon consented to a non-suit, & a moiety of the costs had been levied upon the now deft.

In an action by the attorney for his costs in that action, it was held, that he was not entitled to recover, on the ground of the gross negligence in the matter.—*SAFFERY v. WRAY* (1846), 7 L. T. O. S. 183.

3501. Plea inaccurately entered.]—ANON. (1845), No. 3499, *ante*.

3502. —.]—SAFFERY *v.* WRAY, No. 3500, *ante*.

3503. Effect of defendant's knowledge.]—HUSBAND *v.* CATLIN (1850), 14 L. T. O. S. 537.

3504. Examining in chief instead of cross-examining.]—STOKES *v.* TRUMPER, No. 3488, *ante*.

3505. Action necessitating taking evidence on commission—Commencing action in Court having no power to issue commission.]—Deft. instructed pltf., an attorney, to take proceedings on his behalf to recover a percentage, which he claimed to be due to him from the underwriters on certain policies of assurance. From the circumstances of the case it was clear that to establish his claim it would be necessary to take the evidence of witnesses at Calcutta. Pltf. first wrote letters, demanding payment from the underwriters, & this being refused, he then issued writs against them in the Lord Mayor's Ct., which Ct. he afterwards discovered had no power to issue a commission to examine witnesses, & so the proceedings were useless:—*Held*: pltf. had been guilty of such negligence in suing in the Lord Mayor's Ct. without first ascertaining whether that Ct. had power to issue a commission, as to disentitle him from recovering his charges in respect of the actions; but that he was entitled to recover for the letters written before action.—COX *v.* LEECH (1857), 1 C. B. N. S. 617; 26 L. J. C. P. 125; 28 L. T. O. S. 370; 3 Jur. N. S. 442; 5 W. R. 199; 140 E. R. 254.

3506. Absence from trial.]—DUNN *v.* HALLEN, No. 3495, *ante*.

D. Illegality.

3507. Costs of preparing & enforcing illegal agreements.]—In *assumpsit* by an attorney to recover his bill of costs, it cannot be objected under a plea of *non assumpsit*, that the costs were incurred in preparing & enforcing agreements which had been declared illegal.—PORTS *v.* SPARROW (1835), 1 Bing. N. C. 594; 3 Dowl. 630; 1 Hodg. 135; 1 Scott, 578; 4 L. J. C. P. 201; 131 E. R. 1246.

Annotations:—*Mentd.* Martin *v.* Smith (1838), 4 Bing. N. C. 436; Wagstaffe *v.* Sharpe (1838), 3 M. & W. 521; Henning *v.* Trener (1839), 9 Ad. & El. 926.

Maintenance & champerty.]—See ACTION, Vol. I., pp. 67, 84-88, Nos. 554, 686-715, Supp. III., No. 598a.

Election expenses.]—See ELECTIONS, Vol. XX., p. 119, No. 971.

E. Limitation of Action.

See LIMITATION OF ACTIONS, Vol. XXXII.,

PART IX. SECT. 1, SUB-SECT. 5.—F.

c. No retainer under seal.]—An attorney, acting for a municipal corp., cannot recover upon his bill of costs against such corp., unless his retainer was under seal; an appointment by restitution of the council is sufficient.—PRESIDENT, ETC. OF SHIRE OF COLAC *v.* BUTLER (1879), 5 V. L. R. (L.) 137.—AUS.

d. Charges not in tariff & claim rendered as barristers & solicitors.]—In an action for an account due ptfs. for professional services, as solrs., attorneys & barristers, one of the grounds of defence was that that claim was for services rendered as barristers & counsel, that the charges were not in the tariff, & therefore, not recognised by law:—*Held*: if the contention were sustained, it would revolutionise professional business in this Province, but English rule in its strictness is not applicable to the circumstances of this Province, where the division between attorney & barrister is not recognised; & the

Legislature would seem to have been of the same opinion, for, in the attorneys' fees, they allow counsel fees to be taxed which are taxed for the attorney, & cannot be considered in the light of honorariums. The English rule, that a barrister cannot maintain an action for remuneration for advice or advocacy in matters of litigation, does not apply to matters unconnected with & not ancillary to litigated business.—MOTTON *v.* BRENNAN (1881), 2 R. & G. 162; 1 C. L. T. 663.—CAN.

e. Excuses for delay.]—An action by solrs. to recover the amount of a bill of costs was begun & deft. appeared in Feb. 1883. No further step was taken till Feb. 1892, when ptfs. delivered a statement of claim. Pltf.'s reason for the delay was that deft. had no means to pay during the period of delay. Upon motion by deft. to dismiss & cross-motion by ptfs. to validate the delivery of the statement of claim:—*Held*: the action should be allowed to proceed.—FINKLE *v.* LUTZ (1892), 14 P. R. 446.—CAN.

pp. 324, 338-340, 363, 370, 375, 376, 379, 380, 383, 392, 393, 532, Nos. 98, 99, 222-233, 471, 542, 590, 624, 659, 729, 743, 1845.

F. Other Defences.

3508. Part of bill in respect of proceedings improperly undertaken.]—Motion to restrain a solr. from proceeding to recover the amount of a bill of costs refused, although much the greater part of the bill consisted of charges in respect of proceedings improperly taken by the solr.; some few of the items of trifling amount appearing to be due from & properly claimed against the client.—WIGGINS *v.* PEPPINS (1838), 2 Jur. 320, L. C.; *subsequent proceedings* (1839), 2 Beav. 403.

3509. Failure to communicate offer of compromise.]—If an attorney who is conducting a cause do not communicate to his client an offer of compromise made by the other party, but go on with the action to put costs in his own pocket he cannot after that charge his client with the costs incurred; but as it is the duty of an attorney to communicate such offer to his client, it must be presumed that he did so till the contrary is shown.—SILL *v.* THOMAS (1839), 8 C. & P. 762; 173 E. R. 707, N. P.

3510. Payment—Agreement in discharge of former action.]—To an action on an attorney's bill, deft. pleaded that, after the accrual of the causes of action, in the declaration mentioned, pltf. had entered a plaint against deft. in a county ct., & that deft., being an infant at the time of the accrual of the cause of action, sued on in the county ct., gave notice to defend on the ground of infancy, & that thereupon it was agreed between pltf. & deft. that pltf. should accept from deft. £30, & his costs of suit in the county ct., in full satisfaction & discharge of the cause of action in the county ct., & all other causes of action which pltf. then had against deft. Issue having been taken on this plea the judge at the trial told the jury that the only question was whether the agreement was only in respect of the county ct. action, or of all causes of action which pltf. then had against deft.:—*Held*: no misdirection; the averment in the plea, of infancy at the time of the accrual of the cause of action sued on in the county ct., being immaterial.—COOPER *v.* PARKER (1853), 14 C. B. 118; 2 C. L. R. 49; 23 L. J. C. P. 41; 22 L. T. O. S. 88; 2 W. R. 16; 139 E. R. 49; *affd.* (1855), 15 C. B. 822, Ex. Ch.

Annotations.—*Refd.* Cook *v.* Wright (1861), 1 B. & S. 559; Haywood *v.* Mower (1862), 7 L. T. 562. Foakes *v.* Beer (1884), 9 App. Cas. 605.

f. Set-off.]—In an action by a firm of attorneys for costs, defts. cannot set off a sum paid by one of them to one of the attorneys for special services to be rendered by him, there being no mutuality & the payment not being for the general services covered by the retainer to the firm.—McDOUGALL *v.* CAMERON, BICKFORD *v.* CAMERON (1892), 21 S. C. R. 379.—CAN.

g. Lack of instructions.]—LANE *v.* DUFF (N. S.) (1911), 9 E. L. R. 484.—CAN.

h. Special agreement as to payment.]—BEVAN *v.* O'GRADY & BEVAN (1833), 1 Ir. L. Rec. N. S. 30.—IR.

k. Bill not taxed in Transvaal.]—An attorney sued on a bill of costs incurred in a foreign action & duly taxed in the foreign country, the client being resident in the Transvaal:—*Held*: the fact that the bill had not been taxed in the Transvaal afforded no defence.—BARKER & Co. *v.* ZWARENSTEIN, [1908] T. S. 1161.—S. AF.

Sect. 1.—Action: Sub-sects. 6 & 7. Sect. 2.]**SUB-SECT. 6.—EVIDENCE.**

3511. What evidence sufficient.]—In an action on an attorney's bill, it is sufficient to give in evidence a judge's order to tax the bill, deft.'s undertaking to pay what should appear to be due & the master's allocatur thereupon.—*LEE v. JONES* (1810), 2 Camp. 496; 170 E. R. 1230, N. P. *Annotation:—Consd. Baker v. Meryweather* (1849), 3 Car. & Kir. 737.

3512. What must be proved—Tender by joint defendants—Necessity for proof of subsequent demand from both defendants.]—*PEIRSE v. BOWLES & SPIREY* (1816), 1 Stark. 323; 171 E. R. 486, N. P.

3513. — Costs of action by assignee in bankruptcy—Necessity for proof of consent of creditors.]—1 Geo. 4, c. 119, s. 11, enacts, that no suit in law be proceeded in further than an arrest on mesne process by any assignee of an insolvent's estate, without the consent of creditors & approbation of one of the comrs. of the Insolvent Ct.:—*Held*: in an action brought by an attorney to recover his bill of costs incurred in an action at the suit of such an assignee, it was incumbent on the attorney to prove that the consent of creditors & the approbation of one of the comrs. of the Insolvent Ct. had been obtained, or at all events that he had informed his client that such consent was necessary.—*ALLISON v. RAYNER* (1827), 7 B. & C. 441; 1 Man. & Ry. K. B. 241; 6 L. J. O. S. K. B. 85; 108 E. R. 788.

Annotation:—Distd. Gill v. Lougher (1830), 1 Tyr. 121.

3514. Defence of negligence—Whether solicitor compelled to produce counsel's opinion.]—In an action on an attorney's bill to which the defence was negligence, the ct. compelled pltf. to give deft. a copy of a case & opinion of counsel which had been obtained on his behalf, though it was intended to be used as evidence of their negligence.—*EVANS v. DELEGAL* (1835), 4 Dowl. 374; 5 L. J. Ex. 15.

3515. Order for taxation—Whether evidence against defendant.]—Where an attorney, who is suing his client for his bill, obtains an order to refer the bill for taxation, that order is no evidence against deft.—*KING v. KYPE* (1838), 1 Will. Woll. & H. 87.

3516. — — — — —.]—An order to refer an attorney's bill to taxation, & an allocatur thereon, after attendance on the master by the party's new attorney, are sufficient evidence of the business having been done, though there be not the usual undertaking to pay, in the order.—*WILSON v. KNAPPS* (1838), 2 Mood. & R. 160.

3517. — — — — — Of amount due.]—An attorney's bill having been taxed on a judge's order for changing the attorney in a cause, an action was afterwards commenced for the fees, & the client pleaded *nunquam indebitatus*:—*Held*: the client could not insist that the master's taxation was conclusive as to the amount due.—*BECK v. CLEAVER* (1840), Woll. 70.

Form of order.]—See Part VI., Sect. 5, sub-sect. 4, *ante*.

3518. Questions for jury—Action on note—

PART IX. SECT. 1, SUB-SECT. 6.

l. What evidence sufficient—Copy of bill from plaintiff's books.]—In an action by an attorney for his fees, proof by a copy made up from his books after delivery to deft., is sufficient.—*HALL v. SHANNON* (1838), 3 Ont. Dig. 6540.—**CAN.**

m. Onus of proof.]—In a claim on a taxation for costs by a solr. the onus of proof is on pltf.—*BOWCHER v.*

CLARK (Y.T.) (1907), 6 W. L. R. 433.—**CAN.**

n. — — — — —.]—On an appeal from the dismissal of an action brought by a solr. to recover an amount alleged to be due him for professional services wherein the defence of payment was set up:—*Held*: the appeal should be allowed & a new trial ordered because the trial judge had erred in law by not holding that the onus of proving

Whether note given in satisfaction of bill.]—It an action be brought on a note, & for business done as an attorney, the note not tallying in its amount with the business done at the date of it, & no evidence being given as to the consideration for it, it will be left to the jury to say whether the note was given in satisfaction of the bill for business done up to the time of its date, or whether it was an entirely distinct transaction.

It is very unusual for people to pay their bills to attorneys till they are regularly made out; & besides as this pltf. has delivered his bill a month before action brought, as he was bound to do, it was in the power of deft. to have had it taxed; & if it had appeared to the master that this note had been given for the fees, he would have deducted that amount from the bill (*LORD TENTERDEN, C.J.*).—*KING v. MASTERS* (1828), 3 C. & P. 347; 172 E. R. 450, N. P.

3519. Estoppel—Reasonableness of items—No application for taxation.]—After an attorney's bill has been delivered a month, & no application has been made to have it taxed by the master, deft. will not be permitted to question the reasonableness of the items before a jury. On notice to execute a writ of inquiry at a certain hour, the party is not tied down to the exact time fixed by the notice.—*WILLIAMS v. FRITH* (1779), 1 Doug. K. B. 198; 99 E. R. 129.

SUB-SECT. 7.—PRACTICE AND PLEADING.

3520. Security for costs — When ordered.]—Where an attorney sued for his bill of costs, & a judge's order was obtained, part of which required him to give security for costs, on the ground that he was insolvent & had assigned the debt, the ct. refused to set aside such part of the order.—*GOATLEY v. EMMOTT* (1854), 15 C. B. 291; 24 L. J. C. P. 38; 24 L. T. O. S. 96; 3 W. R. 64; 139 E. R. 434.

Annotations:—Consd. Lloyd v. Hathern Station Brick Co. (1901), 85 L. T. 158. *Refd. Smith v. Saunders* (1867), 16 L. T. 386; *Denton v. Ashton* (1869), L. R. 4 Q. B. 590; *Cowell v. Taylor* (1885), 31 Ch. D. 34; *Reader v. Kahn* (1906), 75 L. J. K. B. 660; *White v. Butt*, [1909] 1 K. B. 50.

3521. Application under R. S. C., Ord. 14—Right to sign judgment.]—In an action upon a solr.'s untaxed bill of costs, where deft. admits the retainer & the work done, & only disputes the propriety of the charges, an order giving leave to sign final judgment under above Ord., r. 1, may be made after appearance & before taxation of the bill, provided that the Ord. preserves the right of deft. under Solicitors Act, 1843 (c. 73), s. 37, to the costs of taxation of the bill, if more than one-sixth is taxed off it. Such an order should direct that the bill of costs be taxed pursuant to that statute, & that judgment be signed for the amount of the master's allocatur.—*SMITH v. EDWARDES* (1888), 22 Q. B. D. 10; 58 L. J. Q. B. 227; 60 L. T. 10; 37 W. R. 112; 5 T. L. R. 74, C. A.

Annotations:—Apld. Lumley v. Brooks (1889), 41 Ch. D. 323. *Consd. Re Debenham & Walker* (1895), 43 W. R. 699. *Apld. Smith v. Howes*, [1922] 1 K. B. 590. *Refd. Slater v. Cathcart* (1891), 8 T. L. R. 92.

payment was upon deft.—*BANTON v. AMAR CHAND (B. C.)*, [1922] 1 W. W. R. 929.—**CAN.**

o. Special agreement—How proved—Admissibility of parol evidence.]—In an action by a law-agent for payment of a business account, defender admitted the employment of pursuer, but averred a special agreement as to remuneration in lieu of the ordinary professional charges:—*Held*: it was

3522. — Form of order.]—SMITH v. EDWARDES, No. 3521, *ante*.

3523. — —.]—Solrs. brought an action against their client for the amount of their bill of costs delivered shortly before the commencement of the action. Deft. denied the retainer, alleged negligence, & counterclaimed for damages on the ground of negligence. At the trial deft. did not appear, & plffs. proved their case. The judge declined to make any other order than an order referring the bill for taxation under Solicitors Act, 1843 (c. 73), reserving the costs of the action & adjourning the further hearing:—*Held*: plffs. were entitled to have the counterclaim dismissed with costs, & to have judgment for the amount to be certified on the taxation, with costs of the action up to & including the hearing.—**LUMLEY v. BROOKS** (1889), 41 Ch. D. 323; 58 L. J. Ch. 494; 61 L. T. 172; 37 W. R. 454, C. A.

Annotation:—*Reid. Re Webster*, [1891] 2 Ch. 102.

Costs—When payable by solicitor.]—See Part X., Sect. 4, *post*.

3524. Pleading.]—It is no ground of demurrer to a declaration in an action by an attorney that he seeks to recover for "materials" supplied by him to his client.—FISHER v. SNOW (1834), 3 Dowl. 27.

3525. — —.]—Assumpsit for work & labour as an attorney. Plea, that, at the time of the accruing of the alleged causes of action, pltf. was not a solr. of the Ct. of Ch., where the business was done, duly admitted & enrolled according to the statutes, nor qualified or authorised according to law to practise as a solr. therein:—*Held*: a bad plea; (a) because it did not deny that pltf. was duly a solr., etc., when the work was done, in which case he was entitled to recover; (b) for duplicity,

competent to prove the special agreement by parol evidence.—**JACOBS v. MILLAN** (1899), 2 F. (Ct. of Sess.) 79; 37 Sc. L. R. 58.—**SCOT**.

PART IX. SECT. 1, SUB-SECT. 7.

3524 i. Pleading.]—Pleading non-delivery of a bill is not an issuable plea. A plea denying the retainer is—ECCLES v. JOHNSON (1878), 1 C. L. Ch. 93.—**CAN**.

3524 ii. —.]—Action for services as attorneys. Plea, that though plffs. did, before suit, to wit, on Sept. 10, 1851, deliver to deft. a bill, yet that a month from such delivery had not expired before suit. Replication, that a month from the delivery of the bill in the plea mentioned had expired before this suit:—*Held*: replication good.—**DRAPER v. STEEN** (1852), 8 U. C. R. 441.—**CAN**.

3524 iii. —.]—RUSSELL v. McDONALD (1895), 40 N. S. R. 611.—**CAN**.

3524 iv. —.]—To an action by pltf. to recover costs as between attorney & client, defts. pleaded *inter alia* that pltf. had not paid the fees required for the years 1893 & 1894, nor when the writ against them was issued.—*Held*: it was necessary for defts. to aver & prove that when the defence was set up pltf. was then actually practising.—GOURLEY v. MCALONEY** (1897), 29 N. S. R. 319.—**CAN**.**

3524 v. —.]—HARRINGTON v. PETERS (1900), 32 N. S. R. 461.—**CAN**.

p. Right of solicitor—To examine client as judgment debtor.]—A solr. whose costs have been taxed on the application of the client & not paid, a *fi. fa.* having been returned *nulla bona*, is entitled to an order for the examination of his client touching his estate & effects.—*Re BLAIN*, 1 Ch. Ch. 345.—**CAN**.

q. Whether new trial granted on alleged misdirection by judge.]—O'CON-

the defence that pltf. was not duly qualified or authorised letting in matter of defence beyond the answer that he was not duly admitted & enrolled. *Qu.*: whether defence that pltf. had not been duly admitted & enrolled was also double.—**WILLIAMS v. JONES** (1841), 2 Q. B. 276; 1 Gal. & Dav. 649; 6 Jur. 552; 114 E. R. 108.

3526. Execution—Failure to pay instalment—Necessity for taxation.]—By a *cognovit* it was declared that judgment should not be entered up till default should be made in payment of an instalment of the debt, with costs, to be taxed by the master as between attorney & client:—*Held*: on default in payment of an instalment, pltf. was entitled to sign judgment, notwithstanding he had not taxed costs.

It is clear that, under this agreement, pltf. was entitled to enter up judgment on deft.'s failing to pay any instalment. Before he issues execution, he must indeed tax the costs; but this judgment is in conformity with the *cognovit* (**TINDAL, C.J.**).—**BARRITT v. PARTINGTON** (1839), 5 Bing. N. C. 487; 2 Arn. 30; 7 Scott, 595; 132 E. R. 1187.

Reference to arbitration under Common Law Procedure Act, 1854 (c. 125).]—*See* **ARBITRATION**, Vol. II., p. 621, Nos. 2500, 2501.

SECT. 2.—PROCEEDINGS ON ALLOCATUR.

See Solicitors Act, 1843 (c. 73), s. 43.

3527. Property in allocatur.]—An allocatur is the property of the person in whose favour it is made.—DOE d. KING v. ROBINSON (1834), 2 Dowl. 503.

3528. Whether allocatur capable of registration as judgment.]—(1) A rule for taxation of costs, & an allocatur thereon, do not amount to a "rule"

his original bill allowed to his costs of action.—**VARLEY v. COMMONWEALTH TRUST CO.** (Alta.) (1916), 33 W. L. R. 421; 9 W. W. R. 912.—**CAN**.

c. Right to enter judgment—In default of defence.]—When in an action upon foot of a solr.'s untaxed bill of costs deft. does not deliver a defence, pltf. is entitled to enter judgment for the full amount claimed without a reference to tax such bill.—GILSENAN v. MCGOVERN (1892), 30 L. R. 1r. 300.—**IR**.

d. — Before costs taxed.]—It is an improper course to sign judgment by default for the recovery of a solr.'s bill of costs before having the costs taxed.—HAY v. PENEFAHA HUKA (1889), 7 N. Z. L. R. 575.—**N.Z.**

e. When stay of proceedings granted.]—When an action is brought in the Ct. of Queen's Bench by an attorney, for the recovery of his bill of costs, & it appears that there is one taxable item in the bill, although that be for business done in some of the other cts. of law, & none of the business has been done in the Ct. of Queen's Bench; the ct. will stay the proceedings, & refer the bill to be taxed, upon an undertaking by deft.'s attorney to pay same when taxed & ascertained, independent of 7 Geo. 2, c. 14, from the inherent jurisdiction which the ct. exercises over its own officers.—BASTABLE v. REARDON (1842), 4 L. L. R. 167; 2 Leg. Rep. 205; Jobb & B. 91.—**IR**.

PART IX. SECT. 2.

1. Production of allocatur—Right of client to dispute bill.]—A client, not having obtained a regular order for taxation before the trial, will not be allowed, by producing the master's allocatur at the trial, showing a less sum taxed than claimed, to dispute the items of the bill.—BROCK v. BOND (1846), 3 U. C. R. 349.—**CAN**.

NOR v. MCNAMEE (1823-1900), 3 Ont. Dig. 4806.—**CAN**.

r. Lapse of month.]—Where an attorney served his bill on May 20, & the *placita* on the record were instituted as of Trinity term, which commenced on June 16—not a lunar month after such service—but a memorandum was added, "to wit, July 11," & pltf. proved that his declaration was filed on that day, but did not produce the writ:—*Held*: sufficient, & if the writ were issued too soon, deft. should show it.—McMARTIN v. SPAFFORD** (1836), 4 O. S. 332.—**CAN**.**

t. Costs—When disallowed in part.]—Where plffs., suing as attorneys for the amount of a bill of costs, proceeded by an attorney, & not in person by attachment of privilege, & assessed damages at a sum under £10, the ct. refused to allow them full costs.—STRACHAN v. BULLOCK (1843), 2 U. C. R. 382.—**CAN**.

a. Construction of words "in summary way"]—An action on a solr.'s bill was stayed upon agreement providing for evidence to be given to an accountant named, & "in case of dispute, the matters disputed are to be referred in a summary way to—under R. S. O. (1897), c. 174 for decision".—*Held*: by "a summary way" the parties meant that the reference was to be without ceremony or delay, the words "under R. S. O. c. 174" merely introducing the procedure under that Act & not to be construed as providing for an appeal.—SALE v. LAKE ERIE & DETROIT RY. CO.** (1900), 32 O. R. 159.—**CAN**.**

b. Costs of taxation & of action on solicitor's bill.]—Where a solr. pltf. who, on a motion for summary judgment, is ordered to have his bill taxed; brings in a bill for a much larger amount than he has sued for, he should pay the costs of the taxation, but he is entitled upon getting the major part of

Sect. 2.—Proceedings on allocatur. Sect. 3. Part X. Sects. 1 & 2: Sub-sect. 1.]

or "order" within Judgments Act, 1838 (c. 110), s. 18, so as to be capable of being registered as a judgment. The rule absolute for payment of the costs does not come within the enactment.

(2) An attorney or solr. has no lien on an estate recovered for a client in respect of the costs & expenses incurred in recovering it. He has a lien only on the papers in his hands.—*SHAW v. NEALE* (1858), 6 H. L. Cas. 581; 27 L. J. Ch. 444; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 6 W. R. 635; 10 E. R. 1422, H. L.; *reversing*. (1855), 20 Beav. 157.

Annotations:—As to (2) Consd. North v. Stewart (1890), 15 App. Cas. 452. *Distd. Briscoe v. Briscoe*, [1892] 3 Ch. 543; *Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368. *Expld. Meguorditchian v. Lightbound*, [1917] 2 K. B. 298. *Reid. Turner v. Letts* (1855), 20 Beav. 185. *Generally. Mentd. Beavan v. Oxford* (1855), 6 De G. M. & G. 492; *Hopkinson v. Rolt* (1861), 9 H. L. Cas. 514; *Menzies v. Lightfoot* (1871), L. R. 11 Eq. 459.

3529. Affidavit—How entitled.]—On a motion for judgment under Solicitors Act, 1843 (c. 73), s. 43, the affidavit ought to be intituled in the matter of the attorney, & not in the name of the cause.—*Re HAIR* (1844), 7 Man. & G. 510; 8 Scott, N. R. 231; 135 E. R. 205; *sub nom. Re HARE*, 8 Jur. 577.

3530. ———.]—On an application for an order under Solicitors Act, 1843 (c. 73), s. 43, held that the affidavit might be intituled in the cause as well as in the matter of the attorney, the original order for taxation having been so intituled.—*Re VALLANCE, GREGORY v. BRUNSWICK (DUKE)* (1844), 7 Man. & G. 511; 8 Scott, N. R. 232; 135 E. R. 205.

3531. Whether order made—On common order for taxation.]—Where in the Ch. Div. the common order for the taxation of a solr.'s bill of costs is made on his own application, the order containing no direction for payment by the client & the taxing master certifies that a balance is due from the client, the solr. cannot enforce payment of the balance by summons but must proceed by action against the client.—*Re DEBENHAM & WALKER*, [1895] 2 Ch. 430; 64 L. J. Ch. 859; 73 L. T. 115; 43 W. R. 699; 13 R. 631.

3532. ———.]—If the solr. delivers a bill of costs & the client within one month applies for taxation the ct. restrains the solr. from commencing or prosecuting any action pending the reference for taxation, & assuming the reference results in a certificate in favour of the solr. he can without issuing a writ apply under Solicitors Act, 1843 (c. 73), s. 43, for an order for payment (*COZENS-HARDY, M.R.*).—*Re BROCKMAN*, [1909] 2 Ch. 170; 78 L. J. Ch. 460; 100 L. T. 821; 25 T. L. R. 595; 53 Sol. Jo. 577, C. A.

Annotation:—Consd. Re Plummer, [1917] 2 Ch. 432.

3533. What order may be made—Order for payment—Solicitor to abandon right to attachment.]—By rule of ct., the costs of an attorney against his client were referred to taxation by the master, on the usual undertaking to pay what should be found due. The master having made his allocatur, & the money not having been paid, the ct. made an order that the client should pay the money, but that the attorney should abandon his right to move for an attachment; the purpose of applying for such order being that the attorney might become a judgment creditor under Judgments Act, 1837 (c. 110), s. 18.—*NEALE v. POSTLETHWAITE* (1841), 1 Q. B. 243; 4 Per. & Dav. 623; Woll. 144; 10 L. J. Q. B. 134; 5 Jur. 747; 113 E. R. 1122.

Annotations:—Reid. Hodson v. Patterson (1842), 4 Man. & G. 333. *Mentd. Wilson v. Foster* (1843), 6 Man. & G. 149; *Doe d. Wood v. Hill* (1844), 2 L. T. O. S. 352; *Doe d. Harrison v. Hampson* (1847), 4 C. B. 745.

3534. Dispute as to retainer.]—Re CARPENTER (1847), 9 L. T. O. S. 251.

3535. ———.]—Claim against solicitor for negligence.—*Re C., Ex p. FORD* (1889), 33 Sol. Jo. 155, C. A.

3536. ———.]—Effect of order—Solicitor becomes judgment creditor.—*NEALE v. POSTLETHWAITE*, No. 3533, *ante*.

3537. ———.]—Condition precedent to execution.—Where an attorney obtains an order for the taxation of his bill of costs, under Solicitors Act, 1843 (c. 73), s. 43, he cannot proceed by attachment without first obtaining an order for payment of the amount certified to be due.—*Re WOODHOUSE* (1845), 2 C. B. 290; 135 E. R. 957.

3538. ———.]—Where an order, directing a solr.'s bill of costs to be taxed, goes on to direct payment of what shall be found due within twenty-one days from the date of the certificate, no further order for payment is necessary, & no subpoena for costs need be sued out. It is sufficient in order to found an attachment to serve a copy of the order properly indorsed, & a copy of the taxing master's certificate on the party thereby certified to be liable to pay; & the circumstance that the party to receive is a corpn. makes no difference if they, under their common seal, authorise any one to receive. But if the copy of the taxing-master's certificate which is served be not a true copy, however slight the error, the attachment will be discharged with costs.—*Re REYNOLDS* (1862), 10 W. R. 709.

3539. ———.]—Order made without authority & in absence of party liable.—An order was made for taxation, nominally on the petition & undertaking of A. & others. The certificate was made ten years after, & an order was then made on A. to pay. A. applied to discharge the order for payment, showing that the order had been obtained without his authority & during his absence from England:—*Held*: while the order for taxation stood, the order for payment was regular; but *qu.*: what his remedy might be.—*Re THOMPSON & DEBENHAM* (1858), 25 Beav. 245; 53 E. R. 630.

3540. ———.]—Enforcement of order—Whether personal service necessary.—A. obtained a common order for taxation of the costs of his former solr. B., the order directing payment by A. to B. of the amount of the taxed costs within twenty-one days after the service of the order & of the certificate of taxation. The order & certificate were served, not on A. personally, but on the solr. then acting for him in the taxation. A. failed to pay the amount within twenty-one days after service of the order & certificate on the solr., & B. applied for the issue of a writ of *fi. fa.* against A. for the amount; but the officer of the ct. refused to issue the writ, on the ground that A. had not been personally served with the order & certificate:—*Held*: B. might have the writ at his own risk, without service of the order & certificate on A. personally.—*Re ———* (1884), 33 W. R. 131.

3541. ———.]—Order for entry up of judgment—Dispute as to retainer.—Under Solicitors Act, 1843 (c. 73), s. 43, a judge has no power to order judgment to be entered up on the master's certificate for costs upon taxation, if the retainer is disputed, & where the party against whom the application was made had previously obtained an order for the delivery of the attorney's bill in all causes, etc. in which he was concerned for him," but the taxation itself was ordered upon the application of the attorney himself:—*Held*: there was nothing in these circumstances to preclude the party from

disputing the retainer.—*PARKES v. CANDIDATE Co. (DIRECTORS)* (1848), 3 New Pract. Cas. 9; 10 L. T. O. S. 371.

3542. ——— Agreement to submit question of retainer to taxing master.]—Upon the application of the client, a judge's order was made referring a bill of costs to be taxed, without prejudice to the client's disputing the retainer, & restraining the attorneys from commencing or prosecuting any action or suit touching their demand pending such reference. There was no undertaking on the part of the client, nor any order upon him, to pay what should be found due. At the request of both parties, the master entertained & decided the question of retainer; & he gave his allocatur for the balance due, & for the costs of the taxation:—*Held*: the decision of the master upon the question of retainer was conclusive; & the attorneys were entitled to have judgment entered up for them for the amount, under Solicitors Act, 1843 (c. 73), s. 43.—*Re LOWLESS & SON* (1848), 6 C. B. 123; 3 New Pract. Cas. 146; 17 L. J. C. P. 222; 11 L. T. O. S. 177; 12 Jur. 584; 136 E. R. 1198.

3543. ——— Absence of direction to pay.]—*Re LOWLESS & SON*, No. 3542, *ante*.

3544. ——— Effect of order.]—A judge's order made under Solicitors Act, 1843 (c. 73), s. 43, after taxation of an attorney's bill, ordering judgment to be entered up for the amount found by the master's allocatur, has the same effect as a rule of ct. made for payment of money under Judgments Act, 1837 (c. 110), s. 18. Accordingly if, after such an order, an action is brought for the amount of the taxed costs, the costs of the writ, etc., will be disallowed.—*GRIFFITHS v. HUGHES* (1847), 16 M. & W. 809; 4 Dow. & L. 719; 2 New Pract. Cas. 231; 16 L. J. Ex. 176; 9 L. T. O. S. 57; 11 Jur. 313; 153 E. R. 1418.

SECT. 3.—BANKRUPTCY PROCEEDINGS.

Right to present petition.]—See *BANKRUPTCY*, Vol. IV., pp. 125, 126, Nos. 1142–1148.

Right to prove.] See *BANKRUPTCY*, Vol. IV., pp. 244, 280, 323, 326, 367, Nos. 2307, 2617, 3030, 3058, 3405; *LIMITATION OF ACTIONS*, Vol. XXXII., p. 384, No. 671.

Part X.—Solicitors as Officers of the High Court.

SECT. 1.—IN GENERAL.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 215 (1).

3545. Solicitors officers of court.]—*BURTON'S CASE* (1667), 2 Keb. 318; 84 E. R. 198.

3546. .] Attorney's person under the power of the ct.—*BEAL'S CASE* (1698), 12 Mod. Rep. 251; 88 E. R. 1301.

3547. ———.]—*Re GREAVES* (1827), 1 Cr. & J. 374, n.; *sub nom. SENIOR v. BUTT*, 5 L. J. O. S. K. B. 136.

Annotations:—*Consd. Evans v. Duncombe* (1831), 1 Cr. & J. 372. *Apld. Re Paterson* (1832), 1 Dowl. 468. *Re Hilliard* (1845), 2 Dow. & L. 919.

3548. ———.]—*DOE d. PALMER v. ROE* (1835), 4 Dowl. 95; 1 Har. & W. 339.

3549. ———.]—*Re JAMES (A LUNATIC)* (1814), 4 L. T. O. S. 109, L. C.

3550. ———.]—*Re HAYNES, Ex p. NATIONAL MERCANTILE BANK*, No. 3559, *post*.

3551. ———.]—*BATTEN v. WEDGWOOD COAL & IRON Co.*, No. 4190, *post*.

3552. Solicitor to personal representative—Bound by order in administration.]—*HARRIES v. REES*, No. 4141, *post*.

3553. Duty to bring authorities to notice of counsel—With view of presenting authority to court.]—Upon the hearing of an appeal in the House of Lords, it is the duty of counsel to bring to the attention of the House any authority, statutory or other, within their knowledge which bears one way or the other upon the matters under debate, irrespectively of whether or not the particular authority assists the case of the party who is aware of it. It is likewise the duty

of those who instruct counsel, if they are aware of any such authority, to bring it to the attention of counsel, in order that they in turn may bring it to the attention of the House.—*GLEBE SUGAR REFINING CO., LTD. v. GREENOCK PORT & HARBOUR TRUSTEES* (1921), as reported in 125 L. T. 578; 37 T. L. R. 436; 65 Sol. Jo. 551, H. L.

SECT. 2.—SUMMARY JURISDICTION OF COURT.

SUB-SECT. 1.—IN GENERAL.

3554. Jurisdiction inherent in court.]—(1) Every ct. possesses inherent authority to prevent contempt of its proceedings, & exercises censorial power over its officers.

(2) The legal adviser is always responsible to the ct. for the character of the pleadings.—*HAMILTON v. ANDERSON* (1858), 3 Macq. 363; 6 W. R. 737, H. L.

Annotations.—*Generally. Mentd. Haggard v. Pellicier Frères*, [1892] A. C. 61; *Everett v. Griffiths*, [1921] 1 A. C. 631.

3555. Test for determining jurisdiction.]—The test for determining whether the ct. has or has not jurisdiction is, whether if the attorney had been called as a witness the ct. would or would not have held him justified in refusing to answer on the ground of privilege.—*Re CUTTS, Ex p. IBBETSON* (1867), 16 L. T. 715.

3556. Exercise of jurisdiction—By Chancery Division.]—If a solr. grossly neglects his client's concerns, this ct. will exercise its jurisdiction in a summary way by attachment, as at law.—*LLOYD v. NANGLE* (1747), 1 Dick. 129; 21 E. R. 217; *sub nom. FLOYD v. NANGLE*, 3 Atk. 568.

PART X. SECT. 1.

3545 i. Solicitors officers of the court.]—*Re CURRIE, GILLELAND v. WADSWORTH* (1878), 25 Gr. 338.—*CAN.*

3545 ii. ———.]—*BOWCHER v. CLARK* (1906), 1 W. L. R. 292.—*CAN.*

3545 iii. ———.]—*CRAIG v. A.-G.*, [1926] N. I. 218.—*IR.*

3545 iv. ———.]—*MURRAY v. SINCLAIR* (1847), 19 Sc. Jur. 509.—*SCOT.*

PART X. SECT. 2, SUB-SECT. 1.

3554 i. Jurisdiction inherent in court.]—The ct. will investigate a complaint made against an attorney by his client, & make such order therein as justice requires.—*Re LUGRIM* (1825–1897), N. B. Dig. 95.—*CAN.*

3554 ii. ———.]—If an attorney of this ct. is guilty of any misconduct in practising in an inferior ct., this ct. will take

cognizance of it on a summary application.—*GILBERT v. SONEY* (1848), 3 Kerr, 679.—*CAN.*

3554 iii. ———.]—*Re BUNKER'S ISLAND, WILKINS v. GEDDES* (1878), 3 It. & C. 367; 3 S. C. R. 203.—*CAN.*

3554 iv. ———.]—The ct. has a general & inherent power over barristers & solrs., (& there is no distinction between them in Alberta) as officers of the ct.—

Sect. 2.—Summary jurisdiction of court: Sub-sects.

3557. ———.]—The Ch. Div. will exercise the jurisdiction over solicitors conferred on it by Jud. Act, 1873 (c. 66), s. 87, according to the practice familiar to the Ch. Div., & will not grant a rule nisi.—*Re COPP* (1883), 32 W. R. 25.

3558. ——— According to equity.]—The jurisdiction of the ct. over its officers is to be exercised according to equity & conscience (LORD TENTERDEN, C.J.).—*Re HARPER, Ex p. BAYLEY* (1829), 9 B. & C. 691; 4 Man. & Ry. K. B. 603; 109 E. R. 257.

Annotations.—*Apld. Re Drake, Ex p. Haden* (1838), 3 Jur. 873; *Ex p. Edwards* (1881), 8 Q. B. D. 262; *Ferns v. Carr* (1885), 28 Ch. D. 409. *Reid. Ex p. Bennett* (1837), Will. Woll. & Dav. 210; *Whincup v. Hughes* (1871), 1 R. 6 C. P. 78; *Re Holland* (1872), L. R. 7 Q. B. 297.

3559. Penal in character.]—Bills of Sale Act, 1878 (c. 31), s. 10, though it requires that the attestation clause shall state that the effect of the bill of sale has before its execution been explained by the attesting solr. to the grantor, does not require that any such explanation should have in fact been given. *Semble*: a solr. who stated in the attestation clause to a bill of sale that he had explained the effect of it to the grantor when he had not in fact done so, would be liable to civil & penal consequences.

A solr. is an officer of the ct., & is liable to serious consequences if he neglects his duty. He is liable to an action by his client, as well as to proceedings of a penal character (JAMES, L.J.).—*Re HAYNES, Ex p. NATIONAL MERCANTILE BANK* (1880), 15 Ch. D. 42; 49 L. J. Bcy. 62; 43 L. T. 36; 44 J. P. 780; 28 W. R. 848, C. A.

Annotations.—*Consd. Re Roper, Ex p. Bolland* (1882), 21 Ch. D. 513. *Reid. Re Parker, Ex p. Charing Cross Advance & Deposit Bank* (1880), 16 Ch. D. 35; *Seal v. Claridge* (1881), 7 Q. B. D. 516, *Re Cowburn, Ex p. Firth* (1882), 19 Ch. D. 419; *Re Chapman, Ex p. Johnson* (1884), 26 Ch. D. 338; *Barron v. Potter, Potter v. Berry* (1914), 84 L. J. K. B. 751. *Mentd. Credit v. Potts* (1880), 6 Q. B. D. 295; *Re Rogers, Ex p. Challinor* (1880), 16 Ch. D. 260; *Hamilton v. Chaine* (1881), 7 Q. B. D. 319; *Re Spindler, Ex p. Rolph* (1881), 19 Ch. D. 98; *Throssell v. Marsh* (1885), 53 L. T. 321; *Richardson v. Harris* (1889), 22 Q. B. D. 268; *Re Smith, Ex p. Tarbuck* (1891), 72 L. T. 59; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

SUB-SECT. 2.—AGAINST WHOM EXERCISED.

3560. Officers of inferior courts.]—*ASHLEY v. SEAGRAVE* (1729), 1 Barn. K. B. 282; 94 E. R. 192.

3561. Representatives of solicitor.]—*RED-FEARN v. SOWERBY, BOLTON v. TATE*, No. 2997, *ante*.

3562. Solicitor not employed in cause.]—The ct. will exercise summary jurisdiction over an attorney, as one of its officers, though he was not employed in any action or suit.—*CRETWELL v. FOSBROOKE* (1837), 1 Jur. 755.

3563. Party ceasing to be solicitor—When application made.]—*SIMES v. GIBBS*, No. 3670, *post*.

3564. Solicitor to assignees in bankruptcy—Application by some assignees.]—The ct. will entertain jurisdiction over the solr. to a fiat, & will, upon the application of one of two assignees, proving misconduct on the part of the solr., remove the proceedings from out of his hands, although the other assignee is in favour of his

continuance.—*Re OAKES, Ex p. RANDALL, OAKES, Ex p. BEACH* (1841), 10 L. J. Bcy. 29; 5 Jur. 296.

3565. Partnership—Liability of all for acts of defaulting partner.]—*Re FORD & THOMAS*, No. 4066, *post*.

3566. ———.]—(1) A receiver, who had been appointed for pltf. in a cause, paid large sums of money to the solrs. of pltf., who were also the solrs. of the receiver. Some of these moneys were misappropriated by one of the firm, who absconded:—*Held*: the receiver was a necessary party to a motion that the other partners in the firm should bring the moneys so misapplied into ct.

(2) Where one of a firm of solrs. has become a defaulter, the other partners cannot be made liable for his acts, under the summary jurisdiction of the ct. over solrs., provided they have not been guilty of personal misconduct in the matters complained of.—*CHATER v. MCLEAN, Re LAWRENCE, CROWDY & BOWLBY* (1855), 3 Eq. Rep. 375; 25 L. T. O. S. 77; 1 Jur. N. S. 175; 3 W. R. 261.

3567. ——— Attachment.]—Where one of two partners attorneys in the country, directed that a particular rule of ct. should be served on the London agent of the firm, it was held that such service was not sufficient to bring the other partner into contempt, in case of disobedience to the rule, though it was sufficient as to the one who wrote the letter.—*Re HOLIDAY* (1841), 9 Dowl. 1020.

3568. Bankrupt solicitor.]—*Re N.*, No. 3638, *post*.

SUB-SECT. 3.—IN WHAT CIRCUMSTANCES EXERCISED.

A. Only When Acting as Officer of Court.

3569. General rule.]—*Re CUTTS, Ex p. IBBETSON*, No. 3555, *ante*.

3570. ———.]—In a debenture-holder's action against the co. the property comprised in the debentures was sold by pltf. & receiver under an order of the ct. which directed that the purchase-money should be lodged in ct. The purchase-money was in fact received by E., the solr. on the record acting for pltf. It was not paid into ct., but found its way into the hands of one J., an unqualified person, who paid it into his own banking account. J. was associated in business with E., who paid him £1 a week for the use of his offices. J. introduced business which was transacted by E., J. paying out of pocket expenses & participating in the profits of the business introduced by him. Among the business so introduced was the conduct of the action. All payments & receipts passed through J.'s banking account, upon which E. had no authority to draw. Proceedings to recover the purchase-money from E. having failed, pltf. moved before a judge for a seven-day order upon J. to lodge it in ct. Upon the hearing of the motion it was objected that the ct. had no jurisdiction to make a summary order against him.

The judge held that J. had assumed the privileges of a solr. & carried on legal proceedings as an officer of the ct., & was therefore amenable to the summary jurisdiction:—*Held*: on the

Re E. (Alta), [1922] 2 W. W. R. 1324; 66 D. L. R. 399.—CAN.

g. Exercise of jurisdiction—Referee in chambers.]—The referee in chambers has no power to exercise summary jurisdiction over solrs.—*Re L. & M.* (1873), 6 P. R. 21.—CAN.

PART X. SECT. 2, SUB-SECT. 3.—A.

3569 i. General rule.]—Where an attorney is employed in a matter wholly unconnected with his professional character, the ct. will not entertain a summary application against him for breach of duty; but, where the pre-

sumption is that he was employed on account of his professional character, he is liable to the summary jurisdiction of the ct.—*Re OSLER* (1877), *Temp. Wood*, 205.—CAN.

3569 ii. ———.]—A solr. who has obtained a transfer of property in fraud

evidence, J. had not obtained possession of the purchase-money by holding himself out as a solr., & the ct. could not therefore treat him as a solr., or a person holding himself out as such, & exercise their summary jurisdiction against him.—*Re HURST & MIDDLETON, LTD., MIDDLETON v. THE CO.*, [1912] 2 Ch. 520; 82 L. J. Ch. 114; 107 L. T. 502; 28 T. L. R. 500; 56 Sol. Jo. 652, C. A.

3571. Solicitor acting in private capacity.]—Where an attorney has not fulfilled his engagement with respect to the loan of money, independent of his character of attorney, the ct. will not summarily compel him to fulfil.—*Re CHITTY* (1833), 2 Dowl. 421.

3572. —.]—The ct. will not deal summarily with an attorney, except for misconduct in his character of attorney.—*Re —* (1843), 12 L. J. Q. B. 331; *sub nom. Re COOK, Ex p. STRATFORD*, 1 L. T. O. S. 311; 7 Jur. 512.

3573. — Trustee.]—The ct. refused to make any order on an attorney to deliver up a deed which he held as party & trustee.—*PEARSON v. SUTTON* (1814), 5 Taunt. 364; 128 E. R. 730.

3574. —.]—The ct. will not on motion compel a person not a party to the suit, to produce for inspection a deed which he holds as a mere trustee, where the individual praying the inspection is not an executing party to the deed, though he claims to be interested in it, & though he may, by operation of law, be affected by it. Nor will the ct. exercise their authority in this respect over an attorney, where the deed has not come into his hands by virtue of his professional character.—*COCKS v. NASH* (1833), 9 Bing. 723; 3 Moo. & S. 164; 2 L. J. C. P. 129; 131 E. R. 785.

Annotations — **Refd.** *Doe d. Egremont v. Dato* (1842), 11 L. J. Q. B. 220; *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. **Mentd.** *R. v. Westowe Overseers* (1836), 1 Nev. & P. K. B. 222.

3575. —.]—The general jurisdiction of the Ct. of Ch. over solrs. is exercised in respect of acts done by them as solrs., but not of acts done by them in a distinct & different character.—*Re BLANCHARD* (1861), 3 De G. F. & J. 131; 30 L. J. Ch. 516; 4 L. T. 426; 25 J. P. 661; 7 Jur. N. S. 505; 9 W. R. 617; 45 E. R. 828, L. J.

Annotations — **Mentd.** *Re Byrne's Trust* (1868), 18 L. T. 631; *Bristow v. Booth* (1869), L. R. 5 C. P. 80; *Coombes v. Brookes* (1871), L. R. 12 Eq. 61; *Re Bignold's Settlements* (1872), 7 Ch. App. 223; *Re Lightbody's Trusts* (1881), 52 L. T. 40.

3576. — Undertaking to pay legacy duties.]—*Re WEBB*, No. 4199, *post*.

3577. — As arbitrator.]—The ct. will exercise its summary authority over an attorney only with reference to his conduct in a cause.—*Re ANON.* (1849), 19 L. J. Ex. 219.

3578. Acting in ordinary course with client.]—The ct. will only exercise a summary jurisdiction over an attorney, when he is acting in the character of an officer of the ct., & not in an ordinary case between attorney & client.—*Re DITCHMAN, Ex p. BULL* (1833), 3 Deac. & Ch. 116; 2 L. J. Bcy. 76.

3579. — Negligence.]—The ct. will not interfere summarily to try the question of negligence on the part of an attorney towards his client's interest.—*BRAZIER v. BRYANT* (1834), 2 Dowl. 600.

of the transferor's creditors will be ordered to restore it or pay its value into ct. under pain of attachment.—*CENTRE STAR MINING CO. v. ROSSLAND MINERS' UNION* (1905), 11 B. C. R. 194.—CAN.

3571 i. Solicitor acting in private capacity.]—The ct. will not attach an

attorney for not paying over money received by him as agent, & not in his professional character; but if from the circumstances it appear that he is not trustworthy, the ct. would probably interfere on a motion to strike him off the roll.—*Re O'REILLY* (1840), 1 U. C. R. 392; 2 P. R. 198.—CAN.

3580. — Directions to obtain probate.]—Directing an attorney to employ a proctor to obtain probate of a will is not such an employment of him in the character of an attorney as will give the ct. summary jurisdiction over him as to money received by him to pay the proctor.—*Ex p. COWIE* (1835), 3 Dowl. 600.

3581. — No cause before court.]—The ct. will not interfere summarily between attorney & client, unless there has been a cause in ct.; especially where there is any fact in dispute.—*Re PHELPS & DODD* (1839), 3 Jur. 479.

3582. —.]—Where an attorney is guilty of misconduct towards his client, which amounts to felony, but the matter does not arise in a cause, this ct. will not in a summary way call upon him to answer the matters upon affidavit.—*ANON.* (1855), 25 L. T. O. S. 161.

3583. — Misappropriation of money.]—Where an award arising out of an action against a attorney was made against him, but he kept out of the way & did not pay the sum awarded, being money entrusted to him for investment which he had appropriated, a summary remedy against him was refused.—*Re AN ATTORNEY* (1856), 4 W. R. 617.

3584. — Excessive charges in bill of costs.]—Excessive & extortionate charges in a bill of costs as between attorney & client, form no ground for a summary application against the attorney, in the absence of evidence of wilful fraud, the suitor being sufficiently protected by the taxation of the bill. Nor is it any ground for calling upon the attorney to answer the matters, that he is unable to pay the amount found due from him to his client on such taxation.—*MEUX v. LLOYD* (1857), 2 C. B. N. S. 409; 140 E. R. 476.

3585. Not acting as officer of the court—Dealings with third party.]—*ANON.* (1729), 1 Barn. K. B. 246; 94 E. R. 168.

3586. — Failure to deliver up indemnity money.]—*v. SMITH* (1731), 2 Barn. K. B. 31; 94 E. R. 338.

3587. — Loss of annuity.]—An attorney cannot be called on summarily to make good the value of an annuity which he had lost through his neglect.—*Ex p. ANDERDON* (1837), Will. Woll. & Dav. 608.

3588. — Accountability to client in money account.]—The mere circumstance that a solr. is accountable to a client in a money account is not sufficient to subject him to the summary jurisdiction of the ct., & neither that jurisdiction nor the jurisdiction under the Act of Parliament can be raised on a summons at chambers, but either of them must be the subject of a special application to the ct.

F., a solr., had acted for a mtgor. & for first & second mtgees. The latter were about to sell the property, when G., a third mtgee, arranged to pay all that was due in respect of the mtges., & a lump sum for costs, the bills not having then been made out; & it was agreed that the accounts should be thereafter adjusted. The bill subsequently sent in exceeded the sum so paid, & it contained items properly chargeable against the mtgor. only. G. by summons under Solicitors Act, 1843 (c. 73), sought a taxation:—*Held*: he had no remedy upon this application, & as the

3578 i. Acting in ordinary course with client.]—*Re THIBEAudeau* (1877), Temp. Wood, 149.—CAN.

3578 ii. —.]—Where the employment of a solr. is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the

Sect. 2.—Summary jurisdiction of court: Sub-sect. 3, A., B. & C. (a).]

ct. would not exercise its general jurisdiction upon summons, *a fortiori* would it refuse when there was an agreement between the parties.—

Re FORSYTH (1865), 2 De G. J. & Sm. 509; 34 Beav. 140; 12 L. T. 687; 11 Jur. N. S. 615; 13 W. R. 932; 46 E. R. 472, L. JJ.

*Annotations:—*Consd. *Re Foster*, Barnato v. Foster, [1920] 3 K. B. 306. *Reid. Re Gold* (1871), 24 L. T. 9.

3589. — Misconduct unconnected with proceedings.]—*Re GREGG, Re PRANCE*, No. 3816, *post*.

3590. Allegation of indictable offences.]—The ct. will not call upon an attorney summarily to answer the matters of an affidavit, charging him with an indictable offence, but will leave the parties complaining to their prosecution for the offence.—*SHORT v. PRATT* (1822), 1 Bing. 102; 7 Moore, C. P. 424; 1 L. J. O. S. C. P. 9; 130 E. R. 42.

*Annotations:—*Consd. *Ex p. Hino* (1864), 3 New Rep. 502. *Reid. Re —* (1834), 5 B. & Ad. 1088.

3591. —.]—The ct. will not proceed summarily against an attorney on an affidavit charging him with an indictable offence.—*Re KNIGHT* (1823), 1 Bing. 142; 130 E. R. 58; *previous proceedings* (1822), 1 Bing. 91.

3592. —.]—The ct. will not proceed summarily against an attorney, for matters which amount to an indictable offence, where it appears that the facts are not exclusively in his own knowledge.—*ANON.* (1838), 2 Jur. 467.

B. Criminal Contempt.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 16–38.

3593. Issuing double process.]—*ANON.* (1586), Gouldsb. 30; 75 E. R. 974.

3594. —.]—If an attorney arrest excessively, he is liable to the jurisdiction of the ct. as one of its officers, though the case be not within 43 Geo. 3, c. 46, s. 3. But *semble*, the ct. will not exercise such jurisdiction where the arrest has been preceded by a bill delivered under the statute, a month before action, & deft. did not apply for a taxation until after action; at least they will not, unless it be a case of gross vexation.—*PRICE v. —* (1827), 5 L. J. O. S. K. B. 221.

3595. Inference with appointment of jury.]—*HANSON'S CASE* (1615), Moore, K. B. 882; 72 E. R. 972.

3596. Deception of court.]—In an action, not to determine a right or controversy, but to deceive the ct. & to raise a prejudice against a third person, is unlawful, & punishable as a contempt.—*COXE v. PHILLIPS* (1736), Lee *temp.* Hard. 237; 95 E. R. 152.

*Annotations:—*Mentd. *Da Costa v. Jones* (1778), 2 Cowp. 729; *Good v. Elliott* (1790), 3 Term Rep. 693; *Gilbert v. Sykes* (1812), 16 East, 150.

3597. — Falsification of case stated.]—A special case was stated for the opinion of the ct. The greater part of the statement was fictitious. The ct. fined the attorney.—*Re ELSAM* (1824), 3 B. & C. 597; 5 Dow. & Ry. K. B. 389; 3 L. J. O. S. K. B. 75; 107 E. R. 855.

*Annotation:—*Mentd. *Gurney v. Gurney* (1863), 1 Hem. & M. 413.

3598. Scandalous matter in pleadings—Inserted without counsel's consent.]—Solr. having inserted

scandalous matter in an answer & put counsel's name without authority, committed & ordered to pay costs.—*BISHOP v. WILLIS* (1749), 5 Beav. 83, n.; 49 E. R. 508.

3599. Publication of matter relating to cause—Wherein solicitor interested.]—*Re INGLES* (1740), Sanders Chancery Orders 552, L. C.

3600. —.]—While a suit was pending to restrain the infringement of a patent, in which one of the issues raised was as to the novelty of pltf.'s invention, a discussion having arisen in a newspaper as to the merits of the invention, deft.'s solr. wrote, under an assumed name, a letter, which was published in the newspaper, taking part in the discussion, & stating facts tending to disprove the novelty of the invention. Pltf. thereupon sent to the editor of the newspaper a letter, which the editor refused to insert on account of its personal imputations, in which he referred to the suit, & suggested that the writer of the letter was an interested party. The editor, not knowing that the writer was the solr. in the suit, but knowing that he was a solr., subsequently published a further letter from him disputing the novelty of the invention:—*Held*: the solr. had been guilty of a contempt of ct. in writing for publication letters tending to influence the result of the suit. A motion to commit the publisher of the newspaper for contempt of ct. in publishing the letters was refused without costs.—*DAW v. ELEY* (1868), L. R. 7 Eq. 49; 38 L. J. Ch. 113; 33 J. P. 179; *sub nom.* *DAW v. ELEY, Ex p. COLLETTE*, 17 W. R. 245.

*Annotations:—*Mentd. *Re Cheltenham & Swansea Ry. Carriage & Wagon Co.* (1869), L. R. 8 Eq. 580; *Vernon v. Vernon* (1870), 40 L. J. Ch. 118; *Brodribb v. Brodribb* (1886), 11 P. D. 66; *Gulding v. Morel Cobbett* (1888), 4 T. L. R. 198.

3601. Abuse of or assault on solicitors of opposite party—In solicitor's office.]—An order was made in the suit for the inspection of documents at the office of C., deft.'s solr. An order was also made to stay the proceedings in the suit till security was given for the costs. E., pltf.'s solr., called on C., offered him a bond as security, & left with him a draft copy of the bond for his perusal. E. then proposed to inspect the documents; C. refused to allow him to do so, & also declined to accept the security. E. then left the office, but soon after returned, & asked for the draft bond. C. refused to give it up, & used abusive language to, & assaulted, E., but afterwards apologised for his conduct. On a motion to commit C. for contempt:—*Held*: he had been guilty of a contempt, within the spirit, if not the letter of the above order; & as the motion to commit was originally sustainable, he must pay the costs of it; but upon appeal this decision was reversed.—*Re CLEMENTS, COSTA RICA REPUBLIC v. ERLANGER* (1877), 46 L. J. Ch. 370; 36 L. T. 332, C. A.

*Annotations:—*Reid. *Hunt v. Clarke* (1889), 58 L. J. Q. B. 490. Mentd. *Robertson v. Labouchere* (1878), 42 J. P. 710; *Re Davies* (1888), 21 Q. B. D. 236; *R. v. Payno & Cooper*, [1896] 1 Q. B. 577; *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860; *R. v. Davies*, [1906] 1 K. B. 32.

3602. — In precincts of court.]—A solr., who had attended the hearing of an application before a judge at chambers in the Royal Cts. of Justice immediately after such hearing & while the parties were on their way from the judge's room

client, the ct. will exercise its summary jurisdiction over him.—*Re McBRADY & O'CONNOR* (1899), 19 P. R. 37.—*CAN.*

*h. Allegation of indictable offences.]—*A rule will not be granted to compel an attorney to answer charges if they

may be made the subject of an indictment.—*Re R. A.* (1890), 6 Man. L. R. 398.—*CAN.*

PART X. SECT. 2, SUB-SECT. 3.—B. k. Contempt in face of court.]—Misconduct in the presence of the ct.

which shows disrespect of its authority & which obstructs & has a tendency to interfere with the due administration of justice is contempt. The principle is not limited to misconduct in the judge's presence, the ct. is deemed to be present in every part of the place

to the entrance gate of the building made use of grossly abusive expressions & threatening gestures to the solr. on the other side in relation to such application:—*Held*: such conduct in relation to proceedings before a judge at chambers was a contempt of ct. punishable by attachment.—*Re JOHNSON* (1887), 20 Q. B. D. 68; 57 L. J. Q. B. 1; 58 L. T. 160; 52 J. P. 230; 36 W. R. 51; 4 T. L. R. 40, C. A.

3603. ———.]—*KIRBY v. WEBB* (1887), 3 T. L. R. 763.

3604. Threats to litigant.]—The yearly tenant of a cottage & land, adjoining a highway & forming part of a settled estate, issued a writ against the local authority for an injunction to restrain an alleged trespass on his land. The solr. of the tenant for life of the estate wrote to the local authority with a view to arrange the matter, & at the same time wrote to the tenant that the tenant for life required him to withdraw the writ, & that, if he did not comply, his tenancy would be determined. On motion by the tenant to commit the solr. for contempt of ct. for sending him letters calculated to deter him from prosecuting the action & to prevent the administration of justice:—*Held*: the solr. had not committed a contempt of Ct.—*WEBSTER v. BAKEWELL RURAL DISTRICT COUNCIL*, [1916] 1 Ch. 300; 85 L. J. Ch. 326; 114 L. T. 545; 80 J. P. 251; 32 T. L. R. 306; 60 Sol. Jo. 307; 14 L. G. R. 547.

Unauthorised signing of documents.]—*See CONTEMPT OF COURT*, Vol. XVI., pp. 37, 38, Nos. 394-397.

C. Contempt in Procedure.

(a) In General.

See, generally, *CONTEMPT OF COURT*, Vol. XVI., pp. 38-46.

3605. Failure to obey order of court.]—The first step, when a solr. neglects to obey an order of the ct., is to move for his attachment.—*Re A SOLICITOR* (1877), 36 L. T. 113, D. C.

3606. Abuse of process of court.]—*ANON.* (1677), 1 Vent. 298; 86 E. R. 192.

3607. ———.]—*VARLEY v. ELLIS*, *Re AN ATTORNEY*, No. 4572, *post*.

3608. ———.]—**Extortion of money.**]—*Re A SOLICITOR* (1903), 47 Sol. Jo. 656, D. C.

3609. Deception of court—Action founded on criminal engagement.]—*EVERETT v. WILLIAMS* (1725), cited in [1899] 1 Q. B. at p. 826; 68 L. J. Q. B. at p. 519.

Annotations.—**Mentd.** *Ashurst v. Mason*, *Ashurst v. Fowler* (1875), L. R. 20 Eq. 225; *Hegarty v. Shino* (1878), 14 Cox, C. C. 124; *Sykes v. Beadon* (1879), 11 Ch. D. 170; *Thwaites v. Couthwaite*, [1896] 1 Ch. 496; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *La Soc. Anon. des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513; *Jeffrey v. Bamford*, [1921] 2 K. B. 351.

3610. Neglect of duty.]—*GARNER v. LANSON* (1728), 1 Barn. K. B. 101; 94 E. R. 70.

3611. Improperly bringing action.]—An attachment against an attorney for bringing an action in his own name after he was forejudged.—*COWPER v. SAYER* (1735), Cooke, Pr. Cas. 117; 125 E. R. 994.

set apart for its use & for the use of its officers, jurors, & witnesses & therefore misbehaviour in such places is misconduct in the ct.'s presence.—*Re RASIK LAL MAG* (1917), 1 L. R. 44 Calo. 639.—*IND.*

PART X. SECT. 2, SUB-SECT. 3.— C. (a).

1. Expenses vexatiously incurred.]—Where expenses have been vexatiously incurred in conducting a suit by the attorneys on both sides, the ct.,

to protect the client, will order an attachment, though regularly issued, to be stayed without costs, upon payment of the money due.—*R. v. CAMERON, PLAYTER v. CAMERON* (1847), 4 U. C. R. 165.—*CAN.*

m. Suppression of facts.]—*PARSONS v. FERRIBY* (1867), 26 U. C. R. 380.—*CAN.*

n. Making improper affidavit.]—The ct. will attach an attorney for defrauding his client, & endeavouring to impose upon the ct. by making

3612. Making improper affidavit.]—*BURTON v. MALOON* (1740), Barn. Ch. 401; 27 E. R. 695, L. C.

3613. Refusal to give evidence of attestation—On subpoena.]—If deft.'s attorney, who is a subscribing witness to an agreement upon which pltf. brings his ejectment, refuses to give evidence of his attestation, etc., upon service of a subpoena upon him in ct. for that purpose, the ct. out of which the record issues will grant an attachment against him.—*DOE d. JUPP v. ANDREWS* (1778), 2 Cowp. 845; 98 E. R. 1393.

Annotation.—*Consd. Greenough v. Gaskell* (1833), 1 My. & K. 98.

3614. Refusal to assist medical attendant to lunatic—According to directions of court.]—*Re JAMES* (1844), 4 L. T. O. S. 109, L. C.

3615. False statements in affidavit of increase of costs.]—An attorney who, in his affidavit of increase on taxing costs, represents that he has paid money to witnesses in the cause when he has not in fact paid it, though he may have taken steps for doing so, or who, without proper ground, makes statements tending to heighten the costs payable to witnesses, with intent to favour such witnesses or to oppress the opposite party, commits an offence for which, on a timely application, he may be punished by the ct.—*DOE d. MENCE v. HADLEY* (1851), 17 Q. B. 571; 18 L. T. O. S. 93; 117 E. R. 1400.

3616. Answering matters of affidavit—Answer of incredible nature.]—If an attorney, required to answer the matters of an affidavit, swear in his exculpation to an incredible story, the ct. will grant an attachment against him though he positively deny the malpractices imputed to him.—*Re CROSSLEY, CLARKE & BRIERLEY* (1796), 6 Term Rep. 701; 101 E. R. 780.

3617. ———.]—Failure to answer.]—An attorney not appearing pursuant to a rule calling on him to answer the matters of the affidavit, on being called three times in open ct., a writ of attachment was ordered to be issued against him.—*EASTON v. NEVILLE* (1856), 18 C. B. 518; 139 E. R. 1484.

Annotation.—*Folld. Re Solicitor* (1877), 36 L. T. 113.

3618. ———.]—Where an attorney does not appear to show cause against a rule calling on him to answer the matters of an affidavit, the ct. will grant a rule to answer within a certain time, & in default, will issue an attachment & strike him off the rolls.—*Re WORMAN* (1862), 1 H. & C. 636; 1 New Rep. 29; 32 L. J. Ex. 83; 158 E. R. 1039; *sub nom. EATON v. WORMAN*, *Re WORMAN*, 7 L. T. 249; 11 W. R. 26.

3619. ———.]—A rule having been obtained ordering an attorney to answer the matters in a certain affidavit, which charged him with a receipt of money of his client, which he had denied, but had not accounted for, the attorney made, & after long delay filed, an affidavit, not denying the receipt of the money nor that he had denied the receipt of it, & not satisfactorily accounting for it:—*Held*: the ct. could not, on this rule without some further & substantive application, either attach him for not answering or order him

an equivocal affidavit.—*ANON.* (1801), Rowe, 550.—*IR.*

o. Contempt in procuring writ of replevin.]—An attachment granted against an attorney & his clients for contempt in procuring a writ of replevin, to be issued by the then sheriff of Antrim, to take goods lying under execution, & in the custody of the late sheriff of the same county.—*MACLAUGHLAN v. SEED* (1828), 1 Ir. L. Rec. 1st ser. 483.—*IR.*

p. Making use of sham pleas.]—

Sect. 2.—Summary jurisdiction of court: Sub-sect. 3, C. (a) & (b), D., E., F., G. & H.]

to pay the money.—*Re EVEREST* (1862), 11 W. R. 114.

3620. Failure to notify settlement of action.]—PRACTICE NOTE, [1919] W. N. 262.

Bankruptcy offences—Default by solicitor.]—See BANKRUPTCY, Vol. V., pp. 1029–1032, Nos. 8414–8434.

Contempt by one member of partnership—Whether attachment lies against all members.]—See No. 3567, *ante*.

(b) Default in Payment of Money.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 38–46, Debtors Act, 1869 (c. 62), s. 4 (4); Debtors Act, 1878 (c. 54), s. 1.

3621. Pursuant to consent.]—An attachment lies against an attorney who neglects to pay money into ct. pursuant to consent.—*ELVIS v. MERCATO* (1702), 7 Mod. Rep. 48; 87 E. R. 1086.

3622. Under order of court—Master's allocatur.]—PAYNE v. JOHNSON (1787), 1 Cr. & J. 373, n.; 148 E. R. 1465.

3623. ———.]—ANON. (1821), cited in 10 Jur. at p. 198.

*Annotation.—*Reid. *Re* ——— (1846), 10 Jur. 198.

3624. ———.]—The proper mode of enforcing orders made in the taxing master's office is by an attachment under Consolidated Order 29, r. 2.—*Re SAUL'S ESTATE* (1864), 3 New Rep. 701.

3625. ———.]—Pltf. applied for leave to issue a writ of attachment against deft., a solr., for his non-payment of a balance certified by the taxing master to be due from him, after deducting certain costs due to him.

Part of the costs claimed by deft. had been disallowed by the taxing master, & deft. intended to take out a summons to vary the taxing master's certificate. It was contended on behalf of deft. that pending the summons to vary, an attachment ought not to be issued:—*Held*: leave to issue the writ, but directed that it should lie in the office for a fortnight.—*Re FASSETT, WELLS v. DEARLE* (1887), 32 Sol. Jo. 129, C. A.

3626. ——— Demand made only by clerk.]—Attachment for contempt in not paying money pursuant to the master's allocation cannot be supported on an affidavit stating a demand of the money by a clerk.—*HARTLEY v. BARLOW* (1819), 1 Chit. 229.

*Annotation:—*Distd. *Dennett v. Pass* (1835), 1 Bing. N. C. 638.

3627. ——— No undertaking to pay.]—Where in an order to refer an attorney's bill for taxation the usual undertaking to pay the amount when taxed is omitted, the ct. will not grant an attachment for non-payment in pursuance of the master's allocatur.—*Ex p. WARD* (1835), 1 Har. & W. 212.

3628. ——— Order requiring client to pay money.]—If a rule of ct. requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its non-payment.—*POOLE v. WATKINS* (1835), 4 Dowl. 11.

3629. ———.]—Where a sum of money was ordered by the ct. to be paid by one party, & his

attorney, or one of them, the ct., upon an affidavit that the party had not paid it, & that the attorney had been applied to, granted an attachment against the attorney.—*DOE d. HUMPHRIES v. ALLEN* (1823), 1 L. J. O. S. K. B. 153.

3630. ———.]—Where an attorney neglects to comply with a judge's order directing him to pay over money, the proper remedy is to apply for an attachment against him.—*Re* ——— (1855), 3 W. R. 181.

3631. ———.]—*Ex p. DAVIS* (1855), 24 L. T. O. S. 237.

3632. ———.]—*THOMPSON v. BARRETT* (1885), 29 Sol. Jo. 707.

3633. ———.]—*Re A SOLICITOR* (1895), 39 Sol. Jo. 761.

3634. ——— Application of Debtors Act, 1869 (c. 62), s. 4.]—Default by a solr. in payment of a bill of costs found on taxation to be due by him to another solr. whom he had employed to act for him, is "default by a solr. in payment of a sum of money, when ordered to pay the same in his character of an officer of the ct. making the order," within the meaning of the fourth exception to above sect., & an attachment may be issued against him.—*Re BARFIELD* (1871), 24 L. T. 248; 19 W. R. 466.

3635. ———.]—*Re HOPE*, No. 4035, *post*.

3636. ———.]—A solr., the London agent of a country solr., made default in payment of a sum ordered to be paid by him in an action for an account of his agency:—*Held*: deft. was liable to imprisonment under above sect., sub-sect. 3, as a person acting in a fiduciary capacity, but not liable under above sect., sub-sect. 4, as a solr. ordered to pay in his capacity of officer of the ct.—*LITCHFIELD v. JONES* (1887), 36 Ch. D. 530; 57 L. J. Ch. 100; 58 L. T. 20; 36 W. R. 397.

*Annotations.—*Reid. *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190; *Reid v. Burrows*, [1892] 2 Ch. 413.

3637. ———.]—An order for the taxation of a solr.'s bill, the amount of which he had retained out of money belonging to his client directed that, in case it should appear that the bill was overpaid, the solr. should, within four days after service of the order & of the taxing master's certificate, repay to the client the amount certified to be overpaid. The costs of the taxation were reserved. The taxing master found that the bill had been over paid. By a subsequent order it was directed that the solr. should pay the taxed costs of the taxation of the bill:—*Held*: the costs of the taxation, as well as the amount found due from the solr. upon the taxation, were within the exception of above sect., sub-sect. 4, as being due from him "in his character of an officer of the ct.," & he could be attached for his default in payment of both.—*Re A SOLICITOR*, [1895] 2 Ch. 66; 64 L. J. Ch. 467; 43 W. R. 490; 39 Sol. Jo. 399; *sub nom. Re W.*, 72 L. T. 679.

*Annotation:—*Fold. *Re N.* (1917), 61 Sol. Jo. 445.

3638. ———.]—(1) Where a solr. was ordered to pay the costs of a taxation of costs of an originating summons taken out by his client for (a) the solr. to deliver his bill of costs, & for (b) an account to be taken of moneys due to the client, & on such order both costs & such moneys were found due, & the solr. made default

The ct. will grant an attachment against an attorney who makes use of sham pleas (no matter for what purpose), & of other dilatory proceedings, in order to render abortive the process of the ct.—*M'LOUGHLIN v. PALMER* (1834), 2 Ir. L. Rec. N. S. 169.—IR.

PART X. SECT. 2, SUB-SECT. 3.—
C. (b).

3629 i. Under order of court.]—*Re HARRIS* (No. 2) (1898), 3 Terr. L. R. 105.—CAN.

3629 ii. ———.]—*PRITCHARD v. PRITCHARD* (1889), 18 O. R. 173, 178.—CAN.

q. ——— *Witness fees where solicitor did not attend ordered to be returned.]—**Re WETMORE* (1880), 19 N. B. R. 639.—CAN.

r. *Refusal of attachment — Money lost by accident.]—*An attachment was refused to compel an attorney to pay over money which had in fact been

in payment of the same, & the client moved to attach him:—*Held*: the costs were due from the solr. in his character as an officer of the ct., & were within exception 4 of above sect., & accordingly it was an order for the disobedience of which the solr. might be attached.

(2) The fact that a solr. has been adjudicated bkpt. does not interfere with the punitive jurisdiction of the ct. over him.—*Re N.* (1917), 61 Sol. Jo. 445.

3639. Pursuant to promise—Previous rule requiring payment.]—A rule for an attachment against an attorney for non-payment of money pursuant to his promise cannot be obtained; but a previous rule requiring the payment of the money must have been made absolute.—*Twiss v. Fry* (1836), 5 Dowl. 157.

3640. Failure to show cause for non-payment.]—If a rule be obtained against an attorney to answer matters in affidavits & to show cause why he should not pay a sum of money, & he do not answer the matters or show cause why he should not pay, the ct., on an affidavit of service, will make absolute the rule to pay & grant an attachment for not answering.—*Re Bluck* (1862), 31 L. J. Q. B. 262.

Bankruptcy of solicitor.]—See *BANKRUPTCY*, Vol. V., pp. 1029–1032, Nos. 8414–8434.

D. Undertakings.

See Sect. 3, *post*.

E. Liability for Costs.

See Sect. 4, *post*.

F. Liability to Third Persons.

See Part XI., Sect. 2, sub-sect. 5, *post*.

G. Liability to Clients.

See Sect. 5, *post*.

H. Other Cases.

3641. Procuring disturbance of quiet possession—Attachment.]—An attachment will not lie in the first instance against an attorney for procuring one to be turned out of quiet possession.—*HOLDERSTAFFE v. SAUNDERS* (1703), 6 Mod. Rep. 16; 87 E. R. 780; *sub nom.* *SAUNDERS v. MELHUISS*, 6 Mod. Rep. 73; Holt, K. B. 136.

3642. Order to furnish copies of agreement—To parties for whom drawn up.]—*Semble*: an attorney, who has drawn an agreement between two parties, will be ordered, upon motion to the ct., to give over to either of them a copy thereof, to the best of his power, when the same shall be requisite, upon payment of the costs thereof.—*CLARK v. TERREL* (1804), 1 Smith, K. B. 399.

Delivery up of papers.]—See Sub-sect. 4, *post*.

To compel payment of money—To third party.]—See Part XI., Sect. 2, sub-sect. 5, B., *post*.

—— **To client.]**—See Sect. 5, sub-sect. 1, *post*.

—— **Retention by London agent.]**—See No. 4356, *post*.

3643. To answer matters of affidavit.]—The ct. will not grant a rule against an attorney as a

forwarded, but lost by accident.—*RADCLIFFE v. SMALL* (1826), Tay. 308.—CAN.

i. Judgment recovered against attorney by client.]—The ct. refused to proceed summarily against an attorney for not paying over to his client moneys received by him as such attorney, where the client had sued him & recovered judgment for the money so received.—*Re KERTSON, Ex p. WHITE SEWING MACHINE CO.* (1892), 31

N. B. R. 237.—CAN.

PART X. SECT. 2, SUB-SECT. 3.—H.

a. Indictable offence shown by contradictory affidavits.]—The ct. will not proceed summarily on a complaint of matters for which (if the charge were true) the attorney might be indicted; especially where the affidavits are contradictory.—*Re PATTERSON v. MILLER* (1844), 1 U. C. R. 256.—CAN.

b. Alternative punishments where

country agent to answer the matters in an affidavit, unless the conduct complained of be flagrant; the mere fact of not serving a writ sent by the London attorney & not returning the writ when requested by the London attorney is not such misconduct that the ct. will interfere.—*RUSCO v. POYNTON* (1849), 12 L. T. O. S. 379.

3644. —.]—The ct. will interfere to restrain an action at law, the bringing which is against the spirit, although not within the letter, of a former injunction. A solr. assisting his client in bringing such an action may be called upon by the ct. to answer the matters of the affidavits.—*BRENAN v. PRESTON* (1853), 1 W. R. 172, L. JJ.

3645. —.]—The ct. will not grant a rule calling on an attorney to answer the matters in an affidavit on the grounds of his having acted without authority, when there is any doubt whether he may not have done so erroneously, & not fraudulently.—*Re* — (1861), 10 W. R. 86.

3646. —.]—*Re WRIGHT, Ex p. THOMAS* (1862), 12 C. B. N. S. 705; 142 E. R. 1319.

Annotations.—*Folld, Re H.* (1875), 31 L. T. 730; *Re J. M., Ex p. Fairchild* (1875), 23 W. R. 213. *Refd. Re Poole* (1869), L. R. 4 C. P. 350.

3647. —.]—A rule having been obtained calling on an attorney to answer the matters contained in an affidavit, & his answer being unsatisfactory, the ct. made the rule absolute that he should answer peremptorily on the first day of the following term, & pay the costs of the rule within a week.—*Re J. M., Ex p. FAIRCHILD* (1875), 23 W. R. 213.

See, now, Solicitors Act, 1919 (c. 56), s. 5; Statutory Rules & Orders, 1924, No. 1582.

3648. To enforce statute-barred claim.]—*SITTINGBOURNE & SHEERNESS RY. CO. v. LAWSON*, No. 4096, *post*.

3649. Order restraining negotiating bill of exchange—Attachment for disobedience.]—An order was made in an action restraining deft. from negotiating, pledging, or disposing of certain bills of exchange payable to his order. At the date of the order the bills were unindorsed, & were in the possession of deft.'s solr., with whom they had been deposited as security for a debt. Subsequently deft., at the request of the solr., indorsed one of the bills. Upon motion to commit deft. & the solr. for contempt of ct.:—*Held*: prior to the time when the bill was indorsed, the solr. was neither the "holder" nor "bearer" of the bill within the meaning of Bills of Exchange Act, 1882 (c. 61), s. 2; until that time the bill had not been negotiated; by indorsing the bill deft. converted the solr. from a mere transferee into the "holder" of the bill, & thereby the bill was for the first time negotiated; deft. & the solr. had committed a contempt of ct.; under sect. 31 (4) the solr. had a right to call for an indorsement by deft., but that did not justify him in violating the order of the ct.—*DAY v. LONGHURST* (1893), 62 L. J. Ch. 334; 68 L. T. 17; 41 W. R. 283; 37 Sol. Jo. 175; 3 R. 234.

Annotation:—*Consd. Seaward v. Paterson*, [1897] 1 Ch. 545.

3650. To prevent breach of trust.]—*Re A SOLICITOR, Ex p. HALES*, No. 3736, *post*.

solicitor practises in name of another.]—Where an attorney who is not a solr. in Chancery, practised in the name of a solr., he is guilty of contempt, & also liable; but the ct. will not take notice of the contempt, but leave him to be subject to the penalty.—*LAWRENCE v. SHARP* (1824), 1 Hog. 84, 89.—IR.

c. Whether court will compel performance of champertous agreement.]—*MILLS v. ROGERS* (1899), 18 N. Z. L. R. 291.—N.Z.

Sect. 2.—Summary jurisdiction of court: Sub-sect. 4, A. & B. (a) & (b).]

SUB-SECT. 4.—DELIVERY UP OF PAPERS.

A. In General.

3651. Necessity for demand by person authorised to give receipt—After order for delivery.]—An order was made for the delivery of papers after a demand had been made for them by a person duly qualified to give a receipt; delivery of the papers was refused; no other regular demand being made, an order was pronounced, either for the delivery of the papers or commitment; & on motion the order for commitment was dismissed with costs.—*Re DICAS* (1831), 9 L. J. O. S. Ch. 183.

3652. ——— Authority must be produced.]—The ct. will not issue an attachment against an attorney for not delivering up papers pursuant to a rule of ct., unless it appear that the demand was by a party duly authorised to make it, & that the authority of the party making the demand, was shown at the time of making it.—*DOE d. HICKMAN v. HICKMAN* (1840), 8 Dowl. 833; 1 Man. & G. 566; 1 Scott, N. R. 398; 4 Jur. 746; 133 E. R. 457.

Annotation:—Apld. Re Catlin (1849), 7 C. B. 136.

3653. Order made at instance of party depositing them.]—The ct. can only interfere to compel an attorney to deliver up deeds in his possession at the instance of the party who deposited them with him.—*Re THORNTON* (1833), 2 Dowl. 156.

3654. On winding up of company—Necessity for notice.]—An order was made *ex p.* by the master that a solr. should, on a day named, deliver up certain documents in his possession to the official manager:—*Held*: the order should not have been made without notice.—*Re WARWICK & WORCESTER RY. CO., PELL'S CASE* (1850), 3 De G. & Sm. 170; 19 L. J. Ch. 164; 14 L. T. O. S. 484; 14 Jur. 428; 64 E. R. 430.

3655. By unqualified person.]—*Re HULM & LEWIS*, No. 4082, *post*.

B. To Client.

(a) In General.

3656. Delivery up ordered.]—*BENSON'S CASE* (1670), 1 Sid. 452; 82 E. R. 1212.

3657. ———.]—Attorney ordered to deliver up papers.—*ANON.* (1701), 12 Mod. Rep. 516; 88 E. R. 1488.

3658. ———.]—Attorney ordered by rule to deliver writings.—*STRONG v. HOWE* (1725), 1 Stra. 621; 8 Mod. Rep. 339; 93 E. R. 738.

Annotations:—Folld. Russel's Case (1754), Say. 125; *Hughes v. Mayre* (1789), 3 Term Rep. 275; *Ex p. Uxbridge* (1801), 6 Ves. 425. **Apld.** *Re Aitkin* (1820), 4 B. & Ald. 47. **Consd.** *Cocks v. Nash* (1833), 2 L. J. C. P. 129; *Stephens v. Hill* (1842), 10 M. & W. 28.

3659. ———.]—The ct. granted a rule against an attorney, that he should show cause for the detention of deeds which had been confided to his care.—*v. RUSSELL* (1754), 1 Keny. 129; 96 E. R. 940; *sub nom.* *RUSSEL'S CASE*, Say. 125.

3660. ——— On payment of costs due to solicitor.]—*ANON.* (1685), Comb. 43; 90 E. R. 333.

3661. ———.]—The ct. under circumstances will entertain summary jurisdiction over an attorney of the ct. in obliging him to deliver up deeds, etc., on satisfaction of his lien, though they came into his hands as steward of a ct., & receiver of rents.—*HUGHES v. MAYRE* (1789), 3 Term Rep. 275; 100 E. R. 572.

Annotations:—Folld. Ex p. Uxbridge (1801), 6 Ves. 425. **Distd.** *Cocks v. Harman* (1805), 6 East. 404; *Re Lowe* (1807), 8 East. 237. **Folld.** *Ex p. Grubb* (1813), 5 Taunt. 206. **Apld.** *Rawes v. Rawes* (1836), 7 Shm. 624. **Expld.** *Re Jennings*, [1903] 1 Ch. 906.

3662. ———.]—Solr. bound to produce papers of his client for him, or in case of his bkpcy. for his assignees, though not employed by them, in the cause, for the purposes of which he received them; but not bound without payment to deliver them up, or produce them in any other business.—*ROSS v. LAUGHTON* (1813), 1 Ves. & B. 349; 35 E. R. 136, L. C.

Annotations:—Consd. *Bozon v. Bolland* (1839), 4 My. & Cr. 354; *Griffiths v. Griffiths* (1843), 12 L. J. Ch. 397. **Consd. & Apld.** *Simmonds v. G. E. Ry.* (1868), 3 Ch. App. 797. **Expld.** *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. **Distd.** *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

3663. ———.]—Though there is no cause pending, the ct. will order a solr. to deliver up deeds & writings in his possession, the party undertaking to pay him the costs justly due to him; & as incident to that jurisdiction, it will order the costs to be taxed, though no part of the costs relates to suits or actions.—*Re MURRAY* (1826), 1 Russ. 519; 38 E. R. 200; *sub nom.* *Re ———*, 4 L. J. O. S. Ch. 207.

Annotations:—Consd. *Re Barker* (1834), 6 Sim. 476. **Apld.** *Re Rice* (1837), 2 Keen, 181.

3664. ———.]—An attorney, upon receiving the amount of his bill, is bound to deliver up to his client, not only original deeds, etc., belonging to him, but also the drafts & copies.—*Ex p. HORSFALL* (1827), 7 B. & C. 528; 108 E. R. 820; *sub nom.* *Re HORSFALL*, 1 Man. & Ry. K. B. 306; 6 L. J. O. S. K. B. 48.

Annotation:—Refd. *Gibbon v. Pease*, [1905] 1 K. B. 810.

3665. ———.]—Where a solr. refuses to deliver up deeds & papers in his possession, except upon payment of his bill of costs, the ct. has jurisdiction to order taxation of such bill, & the delivery up of the deeds & papers, upon payment of the taxed costs, though the costs have been incurred in respect of conveyancing & other general business, & not in respect of the prosecution or defence of any suit or action.—*Re RICE* (1837), 2 Keen, 181; 6 L. J. Ch. 291; 1 Jur. 351; 48 E. R. 597.

3666. ———.]—On payment of a solr.'s bill, the client is entitled to the possession of letters written to the solr. by third parties, but not to copies of letters written by the solr. to third parties, unless they are paid for by the client.

Semble: a solr. is entitled to retain the original letters written to him by his client.—*Re THOMSON* (1855), 20 Beav. 545; 24 L. J. Ch. 599; 25 L. T. O. S. 138; 1 Jur. N. S. 718; 3 W. R. 474; 52 E. R. 714.

3667. ———.]—Where deeds were left with an attorney one day for safe custody until the next, & the attorney refused to deliver them up until a claim which he had against the party leaving them was satisfied, the ct. refused to interfere summarily.—*Ex p. MORRIS* (1856), 27 L. T. O. S. 111.

3668. ——— No cause before court.]—Order, without a cause in ct., upon the general jurisdiction over a solr., that he shall deliver his bill; for the purpose of getting from him title deeds deposited with him for suffering recoveries, etc.—*Ex p. UXBRIDGE (EARL)* (1801), 6 Ves. 425; 31 E. R. 1126, L. C.

Annotations:—Distd. *Ex p. Partridge* (1817), 2 Mer. 500. **Apld.** *Re Murray* (1826), 1 Russ. 519. **Consd.** *Re Barker* (1834), 6 Sim. 476. **Refd.** *Re Vines, Ex p. Shackell* (1852), 2 De G. M. & G. 842.

3669. ———.]—*Re MURRAY*, No. 3663, *ante*.

3670. Mode of proceeding—Summons—Affidavit in support—How intitled.]—One who has been an attorney remains liable to the summary jurisdiction of the ct., for his conduct whilst he was an attorney, although he may have taken his name

off the roll & ceased to be an attorney; & on an application against him for a matter springing out of a cause in which he acted as an attorney, the affidavits must be intitled in the cause, though judgment has been signed & execution issued.—*SIMES v. GIBBS* (1838), 6 Dowl. 310; 1 Will. Woll. & H. 40; 2 Jur. 418.

3671. ——— Time for service.]—By R. S. C., Ord. 71, r. 1, an “originating summons” means “a summons by which proceedings are commenced without writ”:—*Held*: this definition means a summons by which proceedings which under the old practice would have been commenced by bill in Chancery or by writ are commenced without writ.

Consequently a summons calling upon a solr. to deliver up his client's papers is not an “originating summons” & it is sufficient if it is served two clear days before the day appointed for hearing & it is not necessary that an appearance should be entered to it.—*Re HOLLOWAY, Ex p. PALLISTER*, [1894] 2 Q. B. 163; 63 L. J. Q. B. 672; 70 L. T. 615; 42 W. R. 433; 10 T. L. R. 411; 38 Sol. Jo. 398; 9 R. 384, C. A.

3672. ——— Necessity for appearance to.]—*Re HOLLOWAY, Ex p. PALLISTER*, No. 3671, *ante*.

3673. ——— Not by special interrogatory—During taxation.]—On a reference to the master to tax a bill of costs, leave to exhibit a special interrogatory to solrs., “whether they or either of them had or have any & what papers, documents, etc., in their or his custody or possession,” will not be granted. If they do not deliver up the papers their production must be the subject of another kind of proceeding.—*Re BURR, Ex p. NASH* (1845), 5 L. T. O. S. 190.

3674. Loss of right to order—Successful defence to action by solicitor for costs—Retainer repudiated.]—If a party successfully resists an action by an attorney plff. for costs, on the ground of his never having been employed as his attorney, he cannot afterwards summarily compel the attorney to give up documents which have come to his possession in the course of the business, for the doing which the action was brought.—*Ex p. MAXWELL* (1835), 4 Dowl. 87.

3675. Application in Chancery — After order obtained in King's Bench.]—Petition for delivery of documents, after an order upon the same subject obtained from the ct. of Q. B., dismissed.—*NEALE v. POSTLETHWAITE* (1838), 2 Jur. 987.

3676. Time for delivery up.]—Where the ct. made an order upon a solr. to deliver up papers, the time for delivering up was fixed at three days from the date of the order, & for their return ten days after the purpose for which they were delivered up was answered.—*WEBSTER v. LE HUNT* (1861), 25 J. P. 662; 9 W. R. 827.

3677. Condition of documents on delivery up—Delivery in reasonable condition.]—It is the duty of an attorney or solr., when duly called upon by his client to deliver to him the papers of which he has the charge, to deliver them in a reasonable condition. The question, whether the condition in which they are delivered is reasonable, is for the jury.—*NORTH WESTERN RY. CO. v. SHARP* (1854), 10 Exch. 451; 3 C. L. R. 52; 24 L. J. Ex. 44; 24 L. T. O. S. 82; 18 Jur. 964; 156 E. R. 514; *sub nom.* *LONDON & NORTH WESTERN RY. CO. v. SHARP*, 3 W. R. 12.

See *COPYHOLDS*, Vol. XIII., pp. 37, 45, Nos. 400–402, 533–535.

(b) *In respect of What Documents.*

3678. Papers held by solicitor for perusal—For preparation of deed—Papers relating to solicitor's

own title.]—The ct. will compel an attorney to redeliver writings left with him to peruse though they concern himself & his title.—*TYACK'S CASE* (1681), 2 Show. 165; 89 E. R. 864; *sub nom.* *DAVY v. TIACK*, Skin. 1.

3679. Papers delivered to solicitor for particular purpose—Purpose fulfilled by solicitor.]—The ct. will not order an attorney to deliver up deeds which he swears were delivered to him for a special purpose, which he has fulfilled.—*SMITH v. COTTERELL* (1781), 4 Doug. K. B. 205; 99 E. R. 812.

3680. Lease deposited with solicitor for assignment.]—The ct. will not compel an attorney upon a summary application to deliver up, on payment of his demand, a lease put into his hands for the purpose of making an assignment of it; there being no cause in ct., nor any criminal conduct imputed to him in respect of it.—*Re LOWE* (1807), 8 East, 237; 103 E. R. 333.

Annotations — **Consd.** *Re Knight, Ex p. Hall* (1822), 7 Moore, C. P. 437; *Re Murray* (1826), 1 Russ 519. **Dbtd.** *Re Barker* (1834), 6 Sim. 476. **Apld.** *Re Phelps & Dodd* (1839), 8 Jur. 479.

3681. Deeds held for co-defendants—Settlement of action by one.]—Where an attorney has in his custody muniments of two co-defts., the ct. will not refer it to the prothonotary to ascertain which of them he shall deliver over to one deft., paying the debt & costs.—*DUNCAN v. RICHMOND* (1817), 7 Taunt. 391; 1 Moore, C. P. 99; 129 E. R. 156.

3682. Drafts of deeds—As well as originals.]—*Ex p. HORSEFALL*, No. 3664, *ante*.

3683. Solicitor for several parties in same suit—Change of solicitor by majority of parties—Joint papers held by original solicitor.]—When the majority of several parties who have employed the same solr. substitute another solr., they are entitled to the custody of the joint papers.—*JANSON v. DAVISON* (1837), 1 Jur. 352.

3684. Deed held by solicitor as trustee—Draft of marriage settlement.]—A judge at chamber having made an order requiring an attorney to deliver up to the husband, who had paid for it, the draft of a marriage settlement under which he, the attorney, was a trustee. The ct. refused to set aside the order.—*Ex p. HOLDSWORTH* (1838), 4 Bing. N. C. 386; 6 Scott, 170; 1 Arn. 189; 7 L. J. C. P. 225; 132 E. R. 836.

3685. Suit to recover annuity—Papers relating to suit in hands of solicitor—Solicitor assignee of moiety of annuity.]—A solr. being employed to prosecute a suit for the recovery of an annuity, afterwards took an assignment of a moiety thereof. Plff. in the cause employs another solr., & gives notice to the former solr. to deliver his bill to be taxed, & obtains an order upon payment to deliver up books & papers. Objected that the books & papers belonged to the solr., the assignee of the moiety of the annuity, as much as to plff.; that he could employ & hand them over to another solr. to prosecute the suit for his interest, & that they could not be given up without his consent:—*Held*: the assignment of the moiety did not assign books & papers.—*FRASER v. PIPPARD, FRASER v. RUDD* (1839), 3 Jur. 815.

3686. Papers retained by solicitor's executor—Executor deceased solicitor's son—Not adopted as solicitor by client of deceased.]—The ct. refused to grant a rule, calling upon an attorney to deliver up papers, when it appeared that the documents had come into his possession as exor. to his father, who had been attorney to appct., but where appct. did not adopt the son as his professional agent.—*Ex p. NICHOLLS* (1842), 2 Dowl. N. S. 423; 12 L. J. Q. B. 103; 7 Jur. 374.

3687. Deed handed to trustees of beneficiary—Draft claimed by settlor client—Draft previously

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destroyed by solicitors.]—*Ex p. SIMCOX* (1843), 2 L. T. O. S. 169.

3688. Letters—To solicitor from third parties.]—*Re THOMSON*, No. 3666, *ante*.

3689. — From solicitor to third parties—Copies thereof.]—*Re THOMSON*, No. 3666, *ante*.

3690. — From client to solicitor.] —*Re THOMSON*, No. 3666, *ante*.

3691. — — —.]—A solr. is entitled to retain as his own property letters addressed to him by his client & copies in his letter book of his own letters to the client, after the client has transferred the business to which such letters related to other solrs.—*Re WHEATCROFT* (1877), 6 Ch. D. 97; 46 L. J. Ch. 669; 26 W. R. 69.

3692. Copies of letters—From solicitor to client.]—*Re WHEATCROFT*, No. 3691, *ante*.

3693. Papers held by solicitors of association—Claim by member of committee of association.]—Solrs. appointed & instructed, by the committee of an assocn., to carry on various matters of business for & on behalf of the assocn., having sued & recovered judgment against one of the committee, for the amount of their bills of costs in respect of the said matters, cannot be made to deliver up, to such deft., the judgment in the action after it has been paid & satisfied by deft., or other securities connected with the said debt held by them, on motion on behalf of deft., either in virtue of the general jurisdiction of the ct. over solrs. as its officers, or under Mercantile Law Amendment Act, 1856 (c. 97), s. 5, deft. can only proceed by way of action.—*PHILLIPS v. DICKSON* (1860), 8 C. B. N. S. 391; 29 L. J. C. P. 223; 2 L. T. 185; 6 Jur. N. S. 401; 8 W. R. 390; 141 E. R. 1217.

Annotation.—*Refd.* *The Englishman*, *The Australia*, [1895] P. 212.

(c) *Attachment for Disobedience to Order.*

Contempt of court, attachment & committal generally, *see* CONTEMPT OF COURT, Vol. XVI, pp. *¶ et seq.*

3694. Necessity for separate application for attachment—Not joined with application for delivery.]—The ct. will not grant a rule requiring an attorney to deliver up papers, & in the alternative for an attachment in case of a non-delivery, but each branch must be made the subject of a separate motion.—*ROSCOE v. HARDMAN* (1836), 5 Dowl. 157; 2 Har. & W. 118.

3695. Disobedience to order—Deed lost by solicitor.]—*COURT v. GILBERT* (1733), 2 Barn. K. B. 263; 94 E. R. 489.

3696. — Papers retained by agent of solicitor.]—*Re ANDREW*, No. 4372, *post*.

3697. — Order for delivery to new solicitor.]—*Re GREGG, Re PRANCE*, No. 3816, *post*.

3698. Service of order—On each partner—Disobedience by firm.]—An attachment for disobedience of a judge's order cannot issue against two partners, unless each has served with the order. An order having been made directing an attorney to deliver up certain deeds to a client, the ct.

granted an attachment against him, for refusing to deliver them up unless the client would pay him for a schedule thereof, to be kept by the attorney.—*Ex p. WILLAND* (1851), 11 C. B. 544; 138 E. R. 585.

3699. — Without indorsement—Reservice after date for compliance.]—*Re GREGG, Re PRANCE*, No. 3816, *post*.

C. To Third Parties.

Summary jurisdiction generally.]—*See* Part X., Sect. 2, *ante*.

3700. Whether summary order made—Own marriage settlement prepared by solicitor—Delivery up to trustee.]—Where an attorney has drawn his own marriage settlement, under which he takes no interest, but is mentioned in it, & it is deposited with him for safety, the ct. will not compel him to give it up at the instance of a trustee under it.—*Ex p. MOXON* (1830), 1 Dowl. 6.

Annotation.—*Consd.* *Ex p. Clifton* (1836), 2 Har. & W. 296.

3701. — Solicitor ordered to deliver bond to claimant—Demand by clerk of claimant's solicitor.]—*Ex p. FORTESCUE* (1834), 2 Dowl. 448.

Annotation.—*Consd.* *Dennett v. Pass* (1835), 3 Dowl. 632.

3702. — Will given to solicitor for destruction—Claimed by legatee.]—*Ex p. CRISP* (1834), 2 Dowl. 455.

3703. Deeds held by solicitor of testator—Claim by executors—Objection by one executor & beneficiaries.]—By a deed of settlement estates were conveyed to trustees to the use of A. for his life, remainder to such uses as he should direct by his will, the deed giving the usual powers for appointing new trustees in case of death, etc. A. devised all the real estates of which he had power to dispose, & all his personalty, to trustees, whom he also made his exors. to sell, & invest the produce, & pay the interest to his widow during her life, & afterwards to stand possessed of the funds in trust for B. & C., share & share alike. A. died, leaving his widow surviving. Two of the exors. proved the will. The last surviving trustee under the settlement died, leaving a son, to whom, as his heir-at-law, the legal estate in the settled property descended, but who never was appointed a trustee. Before & after testator's death, an attorney was employed in business relating to the settled & devised estates, for which a sum of money was due to him; & he held the title deeds.

After testator's death, the son of the trustee under the settlement & one of the exors. joined in an application to the ct. that the attorney might account for all sums received by him in respect of the estates, & deliver up the deeds to the trustees for the estates, on payment to him of anything that might appear to be due from them. The other exor., & all the parties beneficially interested, objected to the application. The ct. refused to interpose, the rights of the parties not being clear, & one exor. not concurring in the motion.—*Re BUNTING* (1835), 2 Ad. & El. 467; 111 E. R. 181.

3704. — Deed obtained for execution by client—Delivery up to other party to deed.]—The ct. refused to order an attorney to deliver up a deed which had been given him by one of the parties to it to get executed by his client, who was to be

PART X. SECT. 2, SUB-SECT. 4.—
B. (c).

d. *Disobedience to order—Whether attachment granted.]—*A solr. had been paid for preparing a deed, & failed to give it up to his clients. He had been ordered by the ct. to give it up, & had disobeyed the order. His defence was that it was lost, & he had paid counsel's fees for settling it. The ct. granted an attachment, with a stay on its issuing if within ten days he paid petitioners

the amount paid him less by three guineas.—*POPE v. AMBROSE* (1901), 35 I. L. T. Jo. 302.—IR.

PART X. SECT. 2, SUB-SECT. 4.—C.

e. *Whether summary order made—Solicitor claiming lien on documents.]—**JAMIESON v. ALLEN* (1863), 2 W. & W. (L.) 47.—AUS.

f. — — —.]—Whenever a client is bound to produce a deed, for the benefit of a third person, so also is

his solr., though the latter may have a lien on it for costs against his client.—*FURLONG v. HOWARD* (1804), 2 Sch. & Lef. 115.—IR.

g. — — — *Promissory notes in hands of solicitors.]—**BUNTIN v. WILLIAMS* (1894), 16 P. R. 43.—CAN.

h. — — —.]—Except against the personal representative of the solr., the ct. has no summary jurisdiction to take the client's deeds lodged with the solr. out of his hands upon an offer to

another party.—*Ex p. SMART* (1835), 1 Har. & W. 526.

3705. — Bond obtained on prosecution of obligee—Delivery up to obligee on acquittal.]—A charge was preferred before a grand jury for obtaining a bond under false pretences, & the bill was ignored. After this the attorney for the prosecution obtained the bond from the constable, who had it to produce before the grand jury on giving him an indemnity. The ct. refused to make a rule absolute which called on the attorney to deliver it up to the obligee.—*Ex p. MORRIS* (1837), Will. Woll. & Dav. 59; 1 Jur. 151.

3706. — Deed obtained from client—Claim for copy by party interested.]—If an attorney receives possession of a deed from A., his client, in which B. also is interested, the ct. cannot compel the attorney, in an action brought against him by B. to give B. a copy of the deed.—*MIERS v. EVANS* (1839), 3 Jur. 170.

3707. — Client's life insured by solicitor - Policy claimed by administrator of client.]—An application by a client for the delivery of his attorney's bill of costs, containing taxable items, must be made to a ct. in which some of the business was done.

Where an attorney for the purpose of securing payment of a balance due to him from a client, effected a policy of insurance on the life of the client, & charged the premiums to him, & on the client's death received the amount of the policy; the ct. refused to interfere summarily to compel the attorney to account with the administrator of the client, & deliver up the policy.—*Re CARDROSS (LORD)* (1839), 5 M. & W. 545; 7 Dowl. 861; 9 L. J. Ex. 36; 4 Jur. 8; 151 E. R. 231.

3708. — Deeds held as solicitor of cestuis que trust—Claim by one trustee—Objection by other trustee.]—Where an attorney is employed by certain *cestuis que trust*, the ct. will not compel him to deliver up deeds to one of several trustees, one of such trustees objecting to the application.—*Re GREGORY & HITCH* (1842), 6 Jur. 282.

3709. — Papers of deceased client—Delivery up to representatives—On payment of taxed costs.]—The omission by a client to file a certificate of taxation of a solr.'s bill within the four days prescribed by the Order of October 29, 1692, does not render the order a nullity, but the client's representatives, after his death, may, notwithstanding the omission, obtain an order under the summary jurisdiction, for the delivering up of the client's papers on payment of the amount

of the bill as taxed, & an action by the solr. on the bill, after such taxation, is a contempt, & will be restrained by injunction at the instance of the representatives.—*Re CAMPBELL* (1853), 3 De G. M. & G. 585; 22 L. J. Ch. 865; 21 L. T. O. S. 38; 17 Jur. 1171; 1 W. R. 204; 43 E. R. 230, L. JJ.

SUB-SECT. 5.—ATTACHMENT AND COMMITTAL.

Criminal contempt.]—See Sub-sect. 3, B., *ante*.

Contempt in Procedure.]—See Sub-sect. 3, C., *ante*.

Enforcing liability for costs.]—See Sect. 4, sub-sect. 4, *post*.

Procuring disturbance of quiet possession.]—See No. 3641, *ante*.

To compel payment of money—Improperly detained.]—See No. 4390, *post*.

—— **To client.]—**See Sect. 5, sub-sect. 1, *post*.

To compel delivery up of papers.]—See Nos. 3652, 3655, *ante*.

—— **To client.]—**See Sub-sect. 4, B. (c), *ante*.

Disobedience to order restraining negotiation of bill of exchange.]—See No. 3649, *ante*.

Practice & procedure in attachment & committal.]—See CONTEMPT OF COURT, Vol. XVI., pp. 48-88.

Attachment of unqualified person acting as solicitor.]—See Part XV., Sect. 3, sub-sect. 2, C., *post*.

Against partnership—One partner defaulting.]—See No. 3567, *ante*.

SECT. 3.—LIABILITY UPON UNDERTAKINGS.

SUB-SECT. 1.—SUMMARY ENFORCEMENT.

A. In General.

3710. How application made.]—*Re KERLY, SON & VERDEN*, No. 3783, *post*.

3711. Terms must be clear—Damages capable of measurement.]—The attorney for deft. in a cause in this ct. signed an undertaking, whereby, in consideration of pltf.'s agreeing to suspend execution on the judgment, he undertook to make an arrangement with him respecting the payment of the debt & costs, prior to deft.'s being discharged from prison on other detainers; or, in the event of pltf.'s not agreeing to the terms offered, to inform him in sufficient time of deft.'s intended discharge, so that pltf. might not be deprived of his power of lodging a detainer against him:—

pay all costs due: as such an order can only be made upon a person with whom the ct. may settle. If any other person have the deeds, the client must file a bill against him.—*ASHLEY v. BUSTEED* (1825), 2 Mol. 489.—IR.

PART X. SECT. 2, SUB-SECT. 5.

k. Attachment—Costs allowed not sanctioned by law.]—Where an attorney on the Queen's Bench practising in an inferior ct. has charged & the judge has allowed costs clearly not sanctioned by law, the Queen's Bench will punish by fine or attachment.—*R. v. WHITEHEAD & WARD* (1827), Tay. 476.—CAN.

l. — Malpractice.]—The ct. will not attach on a charge of malpractice, where the alleged conduct has been merely inadvertent, & the party complaining has a remedy by action.—*Re STUART* (1836), 5 O. S. 70.—CAN.

m. — Non-payment of money under judgment.]—*CALVERT v. FORBES* (No. 5) (1896), 3 Torr. L. R. 353.—CAN.

n. — — —.]—Where a solr. made default in the payment of a sum of

money which he received on behalf of his client, & an order for payment within a certain date was obtained from the ct., petitioner undertaking to give credit for any sums due by her, on non-payment of the sum, within the fixed period, an order for attachment was obtained. The solr. not having made any affidavit of credits due from petitioner was not allowed to treat them as a set-off against the sum for non-payment of which the attachment was sought.—*Re W.* (1874), 22 W. R. 479.—IR.

o. — Responsibility for payment of deposit.]—A solr. who attends a sale, & bids for his client, is responsible for the payment of the deposit, & will be attached if it is not paid.—*HOBHOUSE v. HAMILTON* (1826), 1 Hog. 401.—IR.

p. — Using language likely to provoke breach of peace.]—An attachment will be granted at the instance of one solr. against another, for using language tending to provoke a breach of the peace immediately after coming out of the master's office.—*LAWDER v. DEMPSTER* (1829), 2

Ir. L. Rec. 1st ser. 462.—IR.

q. — When conditional order granted.]—A conditional order for an attachment granted against an attorney for not lodging money, but not for not paying costs, as it did not appear by the affidavit that there had been a demand for the costs.—*ANON.* (1829), 2 Ir. L. Rec. 1st ser. 481.—IR.

r. — Intention of contempt denied.]—When an attorney had been subpoenaed to give evidence on a trial, & excused his absence on the ground that he was attending a motion in the rolls ct., & denied any intention of contempt, the ct. would not grant an attachment at the instance of pltf. against whom there had been a verdict.—*COLLINS v. GREENE* (1840), 3 I. L. R. 17.—IR.

t. — Failure to bring in assets.]—A solr., executor of a will, who failed to obey an order to bring the assets into ct., was attached.—*Re T.* (1899), 33 I. L. T. 37.—IR.

a. Contempt—Obstructing litigation—Locus standi of applicant.]—*Re O'BRIEN* (1889), 16 S. C. R. 197; 14 A. R. 184.—CAN.

Sect. 3.—Liability upon undertakings: Sub-sect. 1, A., B. & C. (a) & (b).]

Held: this was not such an undertaking as the ct. could enforce summarily, inasmuch as they could not measure the damages sustained by the non-performance of it.—*THOMPSON v. GORDON* (1846), 15 M. & W. 610; 15 L. J. Ex. 344; 4 Dow. & L. 49.

3712. — Conflict of evidence.]—*Re A SOLICITOR* (1888), 33 Sol. Jo. 76.

*Annotation:—***Reid.** *United Mining & Finance Corpn. v. Becher*, [1910] 2 K. B. 296.

3713. Whole agreement must be before court.]—Upon the compromise of a suit, an agreement was entered into between the respective solrs. of pltf. & defts., from which certain benefits were to be derived by defts., & defts.' solr. undertook to pay to pltf.'s solr. the amount of his bill of costs, & to indemnify pltf. against the costs of other defts. It was not stated by either party whether the other parts of the agreement had or had not been performed. Upon motion in the cause & in the matter of defts.' solr., he was ordered to pay the bill of costs of pltf.'s solr. within two days. But upon appeal to the Lord Chancellor the order was discharged.

This is a contract of various parts, entered into between two parties, & I can no more carry it into effect, as to a particular limb, without knowing what has taken place with respect to others, than I could entertain a suit for one provision of a complicated contract without being informed of the whole. The result is, I think, that the order should be discharged, that the ct. may be put in possession of the whole grounds of the case, & give the other party an opportunity of showing that the jurisdiction should not be exercised (*LORD COTTENHAM, C.*).—*GILBERT v. COOPER* (1848), 17 L. J. Ch. 265; 11 L. T. O. S. 169, L. C.

3714. Client dying after undertaking given.]—An attorney who stay proceedings upon an undertaking to pay costs is bound to fulfil his engagement, although his client dies before bail is put in.—*HELLINGS v. JONES* (1825), 3 Bing. 70; 10 Moore, C. P. 360; 3 L. J. O. S. C. P. 164; 130 E. R. 440.

3715. —.] —Pltf.'s attorneys gave deft.'s attorneys an undertaking to pay the costs in the event of deft.'s obtaining a verdict. Deft. obtained a verdict & died; & judgment was entered up within two terms:—*Held:* pltf.'s attorneys were liable to pay the costs, although no *sci. fa.* had been sued out by the personal representatives.—*CHAUVEL v. CHIMELLI* (1833), 4 B. & Ad. 590; 1 Nev. & M. K. B. 731; 110 E. R. 577.

3716. Performance waived.] —Where defts. attorney, on their being sued by pltf., undertook, by letter, to procure their signature to a *cognovit*, for the payment of debt & costs, which he failed to do, but pltf. afterwards said that he would proceed with the action:—*Held:* this was virtually a waiver of the attorney's undertaking, & he could not be called on by the ct. to perform it.—*MILLER v. JAMES* (1823), 8 Moore, C. P. 208.

*Annotation. —***Consd.** *The Borre*, [1921] P. 390.

3717. Discharge from undertaking.]—Where an attorney undertook to pay the sum which should be awarded to be paid by his client in a particular reference, the arbitrator being to make his award by a particular day, but did not do so, & a judge's order for enlarging the time was made by consent, the attorney acting on that occasion for his client, the ct. held him discharged from his undertaking, he not having recognised it after the original time for making the award had expired.—*STAITE v. HADDON* (1841), 9 Dowl. 995.

3718. Conditional undertaking—Fulfilment of condition requisite.]—Deft. obtained a judge's order in the following terms:—"It is ordered that pltf. do forthwith give security for costs to the satisfaction of the master, no stay of proceedings in the meantime, the attorney for pltf. hereby undertaking to find such security":—*Held:* the proper construction of the order was, that the attorney should give the security in case further proceedings were taken, & therefore, he was not liable to an attachment for not giving the security, no further proceedings having been taken.—*HILL v. FLETCHER* (1850), 5 Exch. 470; 1 L. M. & P. 518; 19 L. J. Ex. 320; 15 L. T. O. S. 258; 155 E. R. 205.

3719. Client instructing solicitor not to perform undertaking—Entering appearance to writ.]—*Re KERLY, SON & VERDEN*, No. 3783, *post*.

3720. Client changing solicitor after undertaking given.] —When the ct. makes an order in reference to which a solr. gives his personal undertaking, the fact that his undertaking is not embodied in the order, as subsequently drawn up by the Crown Office, does not release him from liability, nor is his responsibility altered by the fact that since the order of the ct. was made he has ceased to act as solr. to the client.—*WILLIAMS v. WILLIAMS & PARTRIDGE* (1910), 54 Sol. Jo. 506, C. A.

B. Basis of Jurisdiction.

3721. Maintenance of honesty of officers of court—No misconduct need be suggested.]—The ct. has jurisdiction, on the application by a person to whom a solr. gives an undertaking in his capacity as a solr., to exercise its summary procedure to compel the solr. to carry out the undertaking, even though appet. is not the client of the solr. & the undertaking was not given in the course of legal proceedings, & there is no suggestion of dishonourable or discreditable conduct on the part of the solr.—*UNITED MINING & FINANCE CORPN., LTD. v. BECHER*, [1910] 2 K. B. 296; 79 L. J. K. B. 1006; 103 L. T. 65; *on appeal*, [1911] 1 K. B. 840, C. A.

3722. — Nice points of law disregarded.]—*Re ROBERTS* (1856), 26 L. T. O. S. 239.

3723. — Undertaking void at law.] —*Re GREAVES* (1827), 1 Cr. & J. 374, n.; *sub nom. SENIOR v. BUTT*, 5 L. J. O. S. K. B. 136.

*Annotations:—***Appld.** *Evans v. Duncombe* (1831), 1 Cr. & J. 372. **Follgd.** *Re Paterson* (1832), 1 Dowl. 468. **Appld.** *Re Hilliard* (1845), 2 Dow. & L. 919.

3724. — — — —.]—*Seemle:* the ct. will compel an attorney to perform an undertaking entered into by him, notwithstanding it is void by Stat. Frauds, & no action can be brought upon it.—*EVANS v. DUNCOMBE* (1831), 1 Cr. & J. 372; 1 Tyr. 283; 9 L. J. O. S. Ex. 82.

3725. — — — —.] —Where an attorney of one ct. gives his undertaking as an attorney for a debt & costs in an action in another ct., the ct. of which he is an attorney will compel him to fulfil his undertaking, though void by Stat. Frauds.—*Re PATERSON* (1832), 1 Dowl. 468.

3726. — — — —.]—When an attorney, in his character of attorney, gives an undertaking to pay the debt of another, the ct. will on motion compel the attorney to perform it, notwithstanding it is void at law; the object of the interference of the ct. being to ensure the honesty of its officers.—*Re HILLIARD, Ex p. SMITH* (1845), 1 New Pract. Cas. 185; 2 Dow. & L. 919; 14 L. J. Q. B. 225; 5 L. T. O. S. 58, 59; 9 Jur. 664.

*Annotations:—***Consd.** *United Mining & Finance Corpn. v. Becher*, [1910] 2 K. B. 296. **Reid.** *Swyny v. Harland*, [1894] 1 Q. B. 707.

3727. — Lapse of time no bar.]—It is no

answer to a rule, calling upon an attorney to pay money pursuant to his undertaking, that more than two years have elapsed since the undertaking was given.—*Re SWAN* (1846), 15 L. J. Q. B. 402; *sub nom.* TITTERTON v. SHEPPARD, 3 Dow. & L. 775; 1 Saund. & C. 99; 10 Jur. 715.

C. Conditions Precedent to Summary Enforcement.

(a) *Undertaking Must be Given Personally.*

3728. General rule.—The solr. of the assignees of a bkpt. tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking: "We, as solrs. to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained":—*Held*: they were personally liable.—*BURRELL v. JONES* (1819), 3 B. & Ald. 47; 106 E. R. 580.

Annotations—*Appld.* *IVERSON v. CONINGTON* (1823), 1 B. & C. 160. *Consd.* *Norton v. Herron* (1825), 1 C. & P. 648; *Hall v. Ashurst* (1833), 1 Cr. & M. 714. *Refd.* *Spittle v. Lavender* (1821), 2 Brod. & Bing. 452; *Kennedy v. Gouvier* (1823), 3 Dow. & Ry. K. B. 503; *Gaby v. Driver* (1828), 2 Y. & J. 549; *Dewers v. Pike* (1837), Murp. & H. 131; *Harper v. Williams* (1843), 4 Q. B. 219; *Maybery v. Mansfield* (1846), 9 Q. B. 754; *Burton v. Langham* (1848), 5 C. B. 92; *Lewis v. Nicholson* (1852), 18 Q. B. 503.

3729. —.—.]—Where the attorneys for pltf. & deft., in a cause which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by pltf. & deft., & that costs should be taxed for deft. in a certain manner:—*Held*: the attorney for pltf. was personally bound to pay the costs when taxed in the mode specified.—*IVERSON v. CONINGTON* (1823), 1 B. & C. 160; 2 Dow. & Ry. K. B. 307; 1 L. J. O. S. K. B. 71; 107 E. R. 60.

Annotations—*Consd.* *Norton v. Herron* (1825), Ry. & M. 229. *Distd.* *R. v. Colls* (1844), 8 J. P. 455. *Refd.* *Harper v. Williams* (1843), 4 Q. B. 219.

3730. —.—.]—If the attorneys on both sides, on an indictment against a parish for not repairing a road, enter into an agreement, in which one "agrees, on the part of the parish to pay the costs," this agreement is personally binding on the attorney; & if it is agreed that A. shall tax the costs, it is no answer to an action for the costs, that deft. had no notice to attend the taxation; if he did not object to that, when he was first apprised of the taxation having taken place in his absence.—*WATSON v. MURREL* (1824), 1 C. & P. 307; 171 E. R. 1207, N. P.; *subsequent proceedings*, 2 L. J. O. S. K. B. 155.

Annotation—*Consd.* *Lewis v. Nicholson* (1852), 18 Q. B. 503.

3731 —.—.]—The solr. for petitioning creditor, on the commission being superseded, writes to bkpt., "I am ready, & hereby offer, to allow & pay the costs" incurred by bkpt. in petitioning for the supersedeas:—*Held*: the solr. was personally liable on this undertaking, & bkpt. might petition for an order on the solr. to pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate, his assignees disclaiming all interest in the matter.—*Re BENTLEY, Ex p. BENTLEY* (1833), 2 Deac. & Ch. 578; 2 L. J. Bcy. 39.

3732. —.—.]—*HALL v. ASHURST*, No. 3760, *post*.

3733. —.—.]—As to whether an attorney for the prosecution was "personally" liable to pay the costs of the day on an agreement to pay the

costs of the day not having on it the word personally.—*R. v. COLLs* (1844), 8 J. P. 455.

3734. —.—.]—Where a cause was referred to arbn., & pltf.'s attorney, on taking up the award, gave his personal undertaking to the arbitrator to pay over to him all moneys which he should receive from deft.; & the attorney having received £30, paid over £15 to the arbitrator:—Rule nisi granted for the attorney to pay over the other £15.—*BRANDON v. SMITH* (1853), 1 W. R. 130.

3735. —.—.]—After issue joined in an action, an agreement was signed by pltf.'s attorneys, deft.'s attorneys, & deft., which, after providing that the record in the action should be withdrawn, & that certain things should be done by deft. within a specified time, stipulated that, if these things were not so done by him, his plea should be withdrawn by his attorneys, so as to allow judgment to be signed by pltf.s:—*Held*: deft.'s attorneys, who had signed the agreement without professing to sign on his behalf, were personally liable in respect of the plea not having been withdrawn.—*LEEDHAM v. BAXTER* (1856), 26 L. T. O. S. 234; 4 W. R. 241.

3736. —.—.]—Where a solr. in the course of legal proceedings makes a statement to a person, even though not his client, that funds have been put into his hands for the purpose of payment to that person upon a certain event happening, & that upon the happening of the event he will pay the money, the personal undertaking of the solr. is sufficient to enable the ct. to exercise its summary jurisdiction to compel him to carry out the undertaking on the application of the person to whom it is given, although it is not a personal guarantee in the sense that the solr. guarantees the payment of the money out of his, the solr.'s, own pocket. Further, the ct. will exercise its disciplinary jurisdiction to prevent a breach of trust where there has been a declaration of trust by a solr. in favour of a person even though not his client, which induces that person to alter his position. The dishonourable conduct . . . in order to give the ct. jurisdiction must be dishonourable conduct to appet. in the course of legal proceedings (*A. T. LAWRENCE, J.*).—*Re A SOLICITOR, Ex p. HALES*, [1907] 2 K. B. 539; 76 L. J. K. B. 931; 97 L. T. 212; 23 T. L. R. 573; 51 Sol. Jo. 626, D. C.

Annotation—*N.F.* *United Mining & Finance Corpn. v. Becher*, [1910] 2 K. B. 296.

3737. —.—.]—An undertaking by solrs., defts., in these terms: "In consideration of you, pltf.'s solrs., on behalf of your clients, agreeing to the proceedings . . . being adjourned for one week . . . we on behalf of our clients undertake to apply at the opening of the ct." for certain cross-summonses "& to pay to you on behalf of your clients whatever balance may be adjudged by the magistrate to be due to your clients," is a personal undertaking by the solrs., for if it were not so the undertaking would mean nothing, the clients being liable by the order of the magistrate.—*Re C.* (1908), 53 Sol. Jo. 119, D. C.

(b) *Undertaking Must be Given in Professional Capacity.*

3738. Necessity for undertaking to be given professionally.—The undertaking of an attorney can only be enforced by attachment, where he has given it for his client.—*Ex p. WATTS* (1832), 1 Dowl. 512.

PART X. SECT. 3, SUB-SECT. 1.—
O (b).

3738 i. Necessity for undertaking to be given professionally.—*GORMAN v.*

NORTON (1887), 8 N. S. W. L. R. (L.) 479; 4 N. S. W. W. N. 129.—*AUS.*

3738 ii. —.—.]—The ct. will not summarily compel a solr. to perform an

agreement or undertaking, merely because he is a solr.; if it was not given by him in his professional connection with the suit or matter, the party to

Sect. 3.—Liability upon undertakings: Sub-sect. 1, C. (b); sub-sect. 2, A.]

3739. ———.]—*Re BATEMAN* (1833), 2 Dowl. 161.

3740. ———.]—The ct. will not summarily enforce an undertaking by an attorney, which is not given in his character of attorney.—*Re SAMUEL v. RHODES, Ex p. SAMUEL v. ISAACS* (1838), 2 Jur. 858.

3741. ———. In course of legal proceedings.]—An attorney who acted for one of the parties to an arbn., & who gave his undertaking to pay a certain sum for his client in order to save the expense of a formal award, may be called on summarily to perform his undertaking, although no cause was depending in the ct.—*Ex p. FRYER* (1836), 2 Har. & W. 294.

3742. ———.]—Where an attorney arranged terms for the settlement of an action, & in pursuance thereof drew up a promissory note for the amount of the debt & costs which deft. signed; & also gave his own undertaking to guarantee the payment of the note with interest:—*Held*: this was an undertaking given in his character of attorney; although he was not the attorney in the action, & it was sworn by him that he was not acting as attorney for deft., & he had not made any charge, or been paid anything for his services.—*Re FAIRTHORNE* (1846), 3 Dow. & L. 548; 1 New Pract. Cas. 391; 1 Saund. & C. 40; 15 L. J. Q. B. 131; 6 L. T. O. S. 377; 10 Jur. 287.

Annotation:—Apld. United Mining & Finance Corpn. v. Becher, [1910] 2 K. B. 296.

3743. ———.]—*Re A SOLICITOR, Ex p. HALES*, No. 3736, *ante*.

3744. ———. No misconduct suggested.]—UNITED MINING & FINANCE CORPN., LTD. *v.* BECHER, No. 3721, *ante*.

3745. Undertaking given as agent on behalf of client.]—An attorney for & on behalf of his client deft. promises to pay £500 to pltf.; this being done by the authority of the client, the attorney is not liable, but only the client. *Secus*, if the attorney had no authority from his client to make this engagement.—*JOHNSON v. OGILBY* (1734), 3 P. Wms. 277; 24 E. R. 1064, L. C.

Annotations:—Reid. Jenkins v. Hutchinson (1849), 18 L. J. Q. B. 274; *Re Williams* (1850), 12 Beav. 510. *Mentd. Drage v. Ibberson* (1798), 2 Esp. 643; *Keir v. Leeman* (1846), 9 Q. B. 371; *Thol v. Leask* (1855), 1 Jur. N. S. 117.

3746. ———.]—Upon an alleged misjoinder of husband & wife as petitioners, counsel, upon the instructions of the solr., undertook to amend by making it the petition of the wife by her next friend:—*Held*: the solr. was not personally responsible for the performance of the undertaking.—*Re WILLIAMS* (1850), 12 Beav. 510; 19 L. J. Ch. 422; 16 L. T. O. S. 189; 14 Jur. 561; 50 E. R. 1156.

3747. ———.]—An undertaking by deft.'s attorney to withdraw pleas is binding on deft., even without any formal consent by pltf. or his attorney, & ought to be enforced upon an application at chambers. But if such an undertaking be not carried out & pltf. in consequence loses the benefit of a subsequent judgment, deft.'s attorney is not necessarily liable for pltf.'s debt & costs.—

whom it is given will be left to his action.—*WILSON v. BEATTY, Re DONOVAN & MORPHY* (1885), 12 A. R. 252.—CAN.

3748 i. Undertaking given as individual.]—An attorney having an execution in the sheriff's hands, & the sheriff requiring security before seizure, the attorney's partner wrote to the sheriff agreeing to indemnify him. The sheriff seized, was sued, & judgment went against him. Upon a

summary application to enforce the undertaking:—*Held*: the undertaking was that of the writer personally.—*Re MCPHILLIPS* (1880), 6 Man. L. R. 108.—CAN.

3748 ii. ———.]—The attorney for an execution creditor, having given an indemnity to the sheriff's officer, signed by himself as attorney, is personally liable. Such a guarantee is legal, & supported by sufficient consideration.—*FARRELL v. HICKIE* (1857), 30

BURNETT v. PROOIS, Re AN ATTORNEY (1870), 22 L. T. 543.

3748. Undertaking given as individual.]—An attorney giving an undertaking for another in a cause in which he is not concerned as attorney will not be found summarily to fulfil it; but the party to whom it is given will be left to his action.—*WALKER v. ARLETT* (1831), 1 Dowl. 61.

3749. ———.]—An attorney who is party in a cause giving an undertaking to the sheriff in that cause is not liable to have that undertaking summarily enforced by the ct.—*NORTHFIELD v. ORTON* (1832), 1 Dowl. 415.

3750. ———.]—The ct. will not summarily compel an attorney to pay money, pursuant to his undertaking to indemnify against costs, in an action where at his instance a party has allowed his name to be used as pltf. without any interest in the matter.—*Ex p. CLIFTON* (1836), 5 Dowl. 218; 2 Har. & W. 296.

3751. ———.]—When an attorney being employed to sue deft. gave his undertaking for the debt sought to be recovered to his own client, the ct. refused to enforce the fulfillment of that undertaking by attachment.—*Ex p. EVANS* (1840), 9 Dowl. 106; Woll. 2; 4 Jur. 991.

3752. ———.]—Where a party, about to borrow money to carry on a law suit in an ecclesiastical or in an Irish ct., referred the lender to an attorney to inform him of the nature of the suit, & the latter gave a guarantee of the loan, but one on which an action would not lie:—*Held*: the ct. would not interfere summarily to enforce the guarantee.—*Re KEARNS* (1847), 11 Jur. 521.

3753. ———.]—Where an attorney of a railway co. contracted as such, but managed all the concerns of the co., there being no acting committee:—*Held*: the attorney was not personally liable under such contracts.

Deft. was known to be an attorney, & attorneys are rarely personally liable. He professed to act as such, & if he was really a principal, the burden lay on pltf. to prove the fact (*WILDE, C.J.*).—*RUSSEL v. REECE* (1847), 2 Car. & Kir. 669.

SUB-SECT. 2.—WHAT UNDERTAKINGS ENFORCEABLE.

A. In General.

3754. Acceptance of declaration.]—*KILBEY v. WEYBERG* (1698), 12 Mod. Rep. 251; 88 E. R. 1300.

3755. Procuring consent of client to reference.]—Where an attorney, in order to get possession of papers belonging to B., in the hands of B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that B. should enter into an unqualified reference, not revocable, etc.:—*Held*: B. having become subsequently bkpt. for the second time, & without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 Geo. 3, c. 121, s. 14, so as to dispense with the reference, & that the attorney was liable, pursuant to his undertaking, to procure

L. T. O. S. 56.—IR.

PART X. SECT. 3, SUB-SECT. 2.—A.

b. Undertaking by solicitor's clerk—*To obtain removal of caveat.]*—A clerk of debts. (a firm of solrs.) gave an undertaking to the pltf.'s solrs., on the completion of the purchase of certain land, in the following form: "In consideration of settlement of this matter to-day we . . . undertake to satisfy the requisitions of the Registrar-General with regard to the withdrawal

B.'s signature to an agreement of reference, & to find security for the performance of the award to the satisfaction of the master.—*Ex p. HUGHES* (1822), 5 B. & Ald. 482; 106 E. R. 1267.

3756. Payment of money.]—BIRCHINSHAW v. JACKSON (1825), 3 L. J. O. S. K. B. 253.

3757. — Refund after taxation.]—The ct. will not grant an attachment against an attorney for not performing his undertaking to refund money, upon his bill being taxed. The usual course is, to make the order for taxing it a rule of ct.—*MORLING v. TONGUE* (1823), 1 L. J. O. S. K. B. 108.

3758. — Into court—Bankruptcy of lunatic client—Proof by solicitor.]—Re AYTOUN, Ex p. OFFICIAL SOLICITOR OF SUPREME COURT (1904), 20 T. L. R. 252.

3759. Verbal undertaking — To pay costs & damages.]—The ct. cannot permit an attorney to have the benefit of executions issued against a client for damages & costs which the former has been compelled by a rule to pay in consequence of a personal undertaking. *Semble*: the ct. will enforce a verbal undertaking made by an attorney on behalf of a client to pay damages & costs, where the other party has been thereby induced to consent to take a verdict for a certain sum, instead of going to the jury.—*KITE v. MILLMAN* (1833), 2 Moo. & S. 616.

3760. Payment of expenses of barrister.]—Deft., who was the solr. to the London creditors of a bkpt., wrote to pltf., the solr. of the country creditors, a letter, wherein he stated, that he was willing "on behalf of the London creditors," to bear two-thirds of the expenses of the attendance of a barrister to resist a particular claim, & of investigating the accounts; concluding with the words—"I hereby undertake to bear & pay, on behalf of these creditors, two-thirds of the expenses incident thereto accordingly." A further attendance of a barrister becoming necessary, he again wrote—"I shall have no objection to bear, as before, the proportion of expense of the barrister attending the meeting stated in your letter":—*Held*: deft. was personally liable to pltf. for the two-thirds of the expenses he had so undertaken to pay.—*HALL v. ASHURST* (1833), 1 Cr. & M. 714; 3 Tyr. 420; 2 L. J. Ex. 295; 149 E. R. 586.

Annotations:—*Appld. Re C.* (1908), 53 Sol. Jo. 119. *Refd.* *Downman v. Jones* (1845), 5 L. T. O. S. 77; *Lewis v. Nicholson* (1852), 18 Q. B. 503.

3761. Absolute written undertaking—Parol agreement as to enforceability.]—The ct. will compel an attorney to perform an absolute written undertaking, notwithstanding a parol agreement that it should not be enforced except upon a contingency.—*HILLS v. WARNER* (1833), 1 Dowl. 680; *sub nom. WILLS v. WARNER*, 2 L. J. Ex. 174.

3762. Payment of fees—Commission of lunacy.]—Where an attorney, attending a commission of lunacy for petitioner, promised the undersheriff to pay the fees due to him, the comrs. & the jury, on the inquisition being returned, but failed to do so on the return & on request, this ct. granted a rule calling upon him to pay such fees, on the ground that, when his undertaking was accepted, credit was given to him in his professional character; & it was held no objection to such rule, that the proceedings of which in respect the obligation was incurred took place in another ct.

of caveat"—which had been lodged by the Registrar-General; this undertaking the clerk signed in the name of the firm:—*Held*: defts. were personally bound by the undertaking & under a duty to satisfy the Registrar-General's requisitions as to the caveat.—

HAWKINS v. GADEN, [1926] Argus, L. R. 109; 37 C. L. R. 183; 26 S. R. N. S. W. 382.—*AUS.*

e. —.—An attorney held bound by the undertaking of his clerk, though he, on the same day, in another place, refused to give the same under-

—*Ex p. BODENHAM* (1838), 8 Ad. & El. 959; 112 E. R. 1105.

Annotations:—*Distd. Re Webb* (1845), 2 Dow. & L. 932. *Refd. Re Kearns* (1847), 11 Jur. 521.

3763. Payment of debt.]—Attorneys, assignees of a mtge. of lands, brought an action in the name of the mtgee. against W., the mtgor., for principal & interest; & W. pleaded. The attorneys had obtained from E., their client, a loan to W. on further mtge. of the same lands, & had brought an action, for E., against W. for principal & interest due on that mtge.; & W. had pleaded. They also obtained a verdict against W., & certificate for execution, in an action of debt at their own suit. D., an attorney, but not employed as such by the mtgor., who was the brother of D.'s professional agent, wrote to pltf., promising that, if they would not issue execution for two months, the pleas should be withdrawn & judgment suffered by default in the first two actions; & further undertaking as follows. "I shall pay all the principal, interest & costs through a friend of mine in London, to whom a transfer of all the securities you have will have to be made." "The cash will be ready, if the securities will, on the 10th instant." Pltf. agreed, & forbore issuing execution; but the party referred to by D. did not advance the money:—*Held*: D. was personally liable in *assumpsit* on the above undertaking, for the amount claimed by pltf. in the first two actions.—*HARPER v. WILLIAMS* (1843), 4 Q. B. 219; 12 L. J. Q. B. 227; 114 E. R. 880.

Annotations:—*Refd. Lewis v. Nicholson* (1852), 18 Q. B. 503. *Mentd. Jenkins v. Hutchinson* (1849), 18 L. J. Q. B. 274; *Duncombe v. Brighton Club Co.* (1875), L. R. 10 Q. B. 371.

3764. Undertaking to abide by order of Court of Appeal as to costs.]—Two out of four bkpts. appealed from the adjudication, & the Ct. of Appeal gave them leave to try the question in an action, upon the undertaking of their solrs. to abide by such order as the Ct. of Appeal might make as to costs. The adjudication was sustained at law:—*Held*: the appeal must be dismissed, but without costs; the solrs. in pursuance of their undertaking, to pay the costs of the action.—*Re CASTELLI, Ex p. CASTELLI* (1854), 23 L. J. Bcy. 42, L. JJ.

3765. Undertaking not to interfere with witness.] Upon an application to enlarge the time for closing evidence in the above cause, deft.'s solr. signed an undertaking that, in the event of a certain witness being produced for examination, no attempt should be made to discover her place of residence, or in any way to molest her. On motion to commit the solr. to prison for a breach of the above undertaking:—*Held*: the serving such witness while before the examiner with a copy of a writ of subpoena to give evidence in another cause, amounted to an act of molestation; & the solr. was ordered personally to pay the costs of the motion.—*LAWFORD v. SPICER, Re A SOLICITOR OF THE COURT* (1856), 27 L. T. O. S. 75; 2 Jur. N. S. 564; 4 W. R. 497.

3766. Compromise of action—Undertaking to carrying out compromise.]—LEEDHAM v. BAXTER, No. 3735, *ante*.

3767. Undertaking to withdraw pleas.]—BURNETT v. PROOIS, Re AN ATTORNEY, No. 3747, *ante*.

3768. Restraint of issue of execution—If payment of debt accelerated.]—A solr. has authority to

taking to the agent of the person to whom his clerk gave the promise.—*YOUNG v. POWER* (1862), 14 Ir. Jur. 388.—*IR.*

*d. Verbal undertaking.]—*Sheriffs recommended to take precise written engagements from attorneys when they

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enter into an undertaking on behalf of his client, not to issue a writ of *fi. fa.* against client's debtor, in consideration of the acceleration of payment of the debt.

A breach of such an undertaking, by the issue of writs against debtor, was held to be contrary to good faith, & the solr. was ordered to pay the expenses of issuing such writs, & of an application to recover them.—*Re COMMONWEALTH LAND, BUILDING, ESTATE & AUCTION CO., LTD., Ex p. HOLLINGTON* (1873), 43 L. J. Ch. 99; 29 L. T. 502; 22 W. R. 106.

3769. Undertakings given in court.]—WALTER v. BROWN (1885), 29 Sol. Jo. 435.

3770. Undertaking to stamp document.]—On motions, which were acceded to by the ct., an undertaking was given at the bar by counsel for resps., a co., on the instructions of their solrs., that unstamped documents tendered in evidence on behalf of resps. should be duly stamped, which undertaking was not fulfilled.

The ct. directed the order made on the motions to be drawn up without entering the unstamped documents, & made a four-day order on the solrs. to produce the documents to the registrar duly stamped.—*Re COOLGARDIE GOLDFIELDS, LTD., Re CANNON, SON & MORTEN*, [1900] 1 Ch. 475; *sub nom. Re COOLGARDIE GOLD FIELDS, Ex p. FLEMING*, 69 L. J. Ch. 215; 82 L. T. 23; 48 W. R. 461; 16 T. L. R. 161; 44 Sol. Jo. 230; *previous proceedings*, [1899] W. N. 128.

3771. Payment of money into court—Bankruptcy of lunatic client—Proof by solicitor.]—Re AYTOUN, Ex p. OFFICIAL SOLICITOR OF SUPREME COURT (1904), 20 T. L. R. 252.

3772. Undertaking with reference to order of court—Not embodied in order.]—WILLIAMS v. WILLIAMS & PARTRIDGE, No. 3720, *ante*.

B. Undertakings to Enter Appearance.

3773. Liability for failure to perform undertaking.]—If an attorney undertake to appear, & afterwards will not do it, upon summons before a judge, he shall be compelled to do it; for that an attorney to undertake to appear & not to do it after is a contempt of the ct. (*per CUR.*).—*WIGG v. ROOK* (1703), 6 Mod. Rep. 86; *Cas. Pract.* K. B. 36; 87 E. R. 843.

3774. —.]—Where attorney undertakes to appear, the ct. will oblige him to do it in all events.—*LORYMER v. HOLLISTER* (1726), 2 Stra. 693; 93 E. R. 788.

3775. —.]—BURNFIELD v. JAMES (1732), 2 Barn. K. B. 232; 94 E. R. 469.

3776. —.]—DEWICK v. BAMBER (1649), *Sty.* 208; 82 E. R. 651.

3777. —.]—An attorney not entering an appearance pursuant to his undertaking by an indorsement on the writ, incurs contempt.—*WILLIAMS v. NASH* (1735), *Lee temp. Hard.* 131; 95 E. R. 82.

3778. —.]—An attorney is liable to an attachment for not entering an appearance for deft., in pursuance of his undertaking.—*MOULD v. ROBERTS* (1824), 4 Dow. & Ry. K. B. 719.

3779. —.]—When pltf. is improperly delayed in his action in consequence of deft.'s attorney not fulfilling his undertaking to enter an appearance

in due time, the ct. will not compel the latter to give security for the debt & costs conditional on pltf.'s obtaining a verdict.

If there is any remedy it is against the attorney on his undertaking (*WILLIAMS, J.*).—*MORRIS v. JAMES* (1838), 6 Dowl. 514; 1 Will. Woll. & H. 177.

3780. —.]—Where pltf. moved for an attachment against an attorney for not entering an appearance, pursuant to his undertaking; & it appeared that he had not, previous to moving the rule, requested the attorney to enter the appearance, the ct. discharged the rule.—*JACOB v. MAGNAY* (1842), 12 L. J. Q. B. 93; 7 Jur. 326.

3781. —.]—An attorney who undertakes to accept process & appear for deft. may be punished by attachment for not performing his undertaking.—*WILLIAMS v. ROBERTS* (1850), as reported in 14 Jur. 399.

3782. — Reasonable time.]—An undertaking to appear, given by an attorney, must be enforced within a reasonable time; & therefore a motion, made in Michaelmas term, to compel an attorney to enter an appearance, pursuant to an undertaking given by him on Mar. 8, is too late.—*BALLS v. STRUTT* (1837), 7 L. J. Ex. 7.

3783. — Withdrawal of authority by client.]—(1) Where, with the authority of deft. in an action, his solr. accepts service of the writ on his behalf & gives a written undertaking, under R. S. C., 1883, Ord. 9, r. 1, "to enter an appearance in due course," that undertaking is unconditional & must be performed forthwith, & at the instance of pltf., it can be enforced by attachment of the solicitor under R. S. C., Ord. 12, r. 18.

Solrs. to deft. in an action accepted, by his authority, service of the writ on his behalf, & at the same time gave pltf.'s solr. a written undertaking to enter an appearance in due course, but, on account of a proposal by deft. for settlement, the time for appearance was extended for two months. No appearance was ever entered, & no step was taken in the action for a further period of eighteen months, when pltf. desiring to proceed, required deft.'s solrs. to enter appearance pursuant to their undertaking, which they declined to do, on the ground that their clients, considering the action at an end, had directed them not to enter appearance.

Upon an application by pltf., under R. S. C., Ord. 12, r. 18, to attach the solrs. for breach of their undertaking, the Ct. of Appeal ordered the solrs. to enter appearance forthwith, with liberty to pltf. to renew his application in case of their default.

(2) An application by pltf. under R. S. C., Ord. 12, r. 18, to enforce by attachment a written undertaking by deft.'s solr. to enter an appearance to the writ, should be made & intitled, not in the action, but in the matter of the solr., by virtue of the jurisdiction of the ct. over his officers.

(3) A written undertaking by a solr. acting on the authority of a deft., to enter an appearance to the writ, constitutes a contract on the part of deft. by the solr. or his agent to enter appearance, & differs from an ordinary contract only in that it may be enforced against the solr. himself by attachment at any time within six years, provided the action continues effective (*FARWELL, J.*).—*Re KERLY, SON & VERDEN*, [1901] 1 Ch. 467; 70 L. J. Ch. 189; 83 L. T. 699; 49 W. R. 211; 17 T. L. R. 189; 45 Sol. Jo. 206, C. A.

mean to hold them liable in cases they have nothing to do with except professionally, though the ct., where the attorney has orally agreed to indemnify, if the agreement is admitted, will

enforce it.—*Re CORBETT v. O'REILLY* (1851), 8 U. C. R. 130.—*CAN.*

e. —.]—A parol undertaking by deft.'s attorney to give a plea of confession enforced; the undertaking,

although a parol one, having been repeatedly given, & his refusal to comply with it being a breach of faith.—*RYAN v. BALL* (1834), 2 Ir. L. Rec. N. S. 153.—*IR.*

3784. —.]—Defts.' solrs. signed, without qualification, a notice, under R. S. C., Ord. 29, r. 12, by which they undertook to enter an appearance & give bail in a sum not exceeding the value of ship, cargo, & freight; but pltfs.—notwithstanding the *caveat* which on the filing of the above notice in the registry had been thereupon entered—took out, under R. S. C., Ord. 29, r. 18, a warrant for the arrest of defts.' vessel in a salvage action:—*Held*: defts.' solrs., by signing the undertaking without qualification, rendered themselves personally responsible, & pltfs. might have taken a reasonable time to make inquiry whether the undertaking was satisfactory; but as, instead of doing so, they had insisted upon the security of the ship, pltfs. had failed to show "good & sufficient reason" within R. S. C., Ord. 29, r. 18, for arresting the vessel, & must, therefore, be condemned in damages & costs.—*THE CRIMDON*, [1900] P. 171; 69 L. J. P. 103; 82 L. T. 660; 48 W. R. 623; 16 T. L. R. 403.

3785. Without authority of client—Breach of warranty.—Where an authority given to an agent has without his knowledge, been determined by the death or lunacy of the principal, & subsequently, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business with another person, representing that, in so doing, he was acting on behalf of the principal, the agent is liable, as having impliedly warranted the existence of the authority which he assumed to exercise, to that other person, in respect of damage occasioned to him by reason of the non-existence of that authority.

Solrs. were instructed by a client to conduct his defence to an action which was then threatened & was afterwards commenced against him. Before the commencement of the action the client became, & was certified as being, of unsound mind. In ignorance of his unsoundness of mind, & of his having been so certified, the solrs. entered an appearance for him in the action, & delivered a defence, to which pltf. replied, & other interlocutory proceedings took place in the action. Subsequently, the action not then having come to trial, pltf.'s solr. was informed that the deft. had been certified as being of unsound mind; & an application was made on behalf of pltf. at chambers for an order that the appearance & all subsequent proceedings in the action should be struck out, & that the solrs. who had assumed to act for deft. should be ordered personally to pay pltf.'s costs of the action up to date, on the ground that they had so acted without authority. The master made an order that the appearance & subsequent proceedings in the action should be struck out, but refused to make an order for payment of pltf.'s costs by the solrs. personally, which refusal was on appeal affirmed by the judge at chambers. Pltf. having appealed to the Ct. of Appeal:—*Held*: (1) the appeal was on a matter of practice & procedure within Jud. Act, 1894 (c. 16), & therefore, the appeal lay direct to the Ct. of Appeal, & not to the Div. Ct.; (2) the solrs. who had taken on themselves to act for deft. in the action had thereby impliedly warranted that they had authority to do so, & therefore were liable personally to pay pltf.'s costs of the action.—*YONGE v. TOYNBEE*, [1910] 1 K. B. 215; 79 L. J. K. B. 208; 102 L. T. 57; 26 T. L. R. 211, C. A.

Annotations:—As to (1) *Reid*. *Haxby v. Wood Advertising Agency* (1913), 109 L. T. 946; *Re Wingfields*, [1923] 2 K. B. 112. As to (2) *Apld.* *Re Dunn, Simmons v. Liberal*

Opinion, [1911] 1 K. B. 966. *Reid*. *Fernce v. Gorlitz* [1915] 1 Ch. 177. *Generally, Mentd.* *Edwards v. Porter*, [1925] A. C. 1.

3786. —.]—*THE GERTRUD* (1927), 138 L. T. 239; 44 T. L. R. 1; 17 Asp. M. L. C. 343.

C. Undertakings to put in

3787. Personal liability of solicitor—Authority subsequently withdrawn.—Where in a collision action *in rem* solrs. for defts. accept service of the writ & indorse it with the words "We accept service on behalf of defts., the owners of the A., & undertake to put in bail in a sum not exceeding the value of the said barque A., " & in consequence of their authority being withdrawn by defts. they do not enter an appearance, they do not thereby commit a breach of their undertaking so as to render themselves liable to attachment, inasmuch as they have never expressly undertaken to appear.—*THE ANNA & BERTHA* (1891), 64 L. T. 332; 7 Asp. M. L. C. 31.

3788. —.]—*THE CRIMDON*, No. 3784, *ante*.

3789. —.]—**Attempted withdrawal of undertaking.**—On June 22, 1920, defts.' solrs. gave an undertaking to enter an appearance & put in bail in respect of a writ *in rem* claiming damages in respect of loss by collision. In consequence defts.' vessel was not arrested. On Feb. 17, 1921, defts.' solrs. wrote to pltfs.' solrs. that their clients were unable to make arrangements for bail, that accordingly the undertaking for bail was withdrawn, & that, as the vessel was within the jurisdiction of the Ct., pltfs. could arrest her. Pltfs.' solrs. arrested the vessel but wrote to defts.' solrs. that they reserved all their clients' rights under the undertaking for bail. On Mar. 16, 1921, the vessel was appraised as being at that time of a value of £600. Defts. provided bail in that sum & the vessel was released. On Apr. 12 pltfs. applied for an order that defts.' solrs. should forthwith provide good & sufficient bail, pursuant to their undertaking. It appeared that in June, 1920, the value of the vessel was much in excess of £600, & pltfs. estimated her value at £4,500:—*Held*: (1) the undertaking to give bail could not be withdrawn by substituting the vessel for the bail; (2) pltfs. had not waived their rights under the undertaking by arresting the vessel; & (3) defts.' solrs. must complete their undertaking by putting in bail to the value of the vessel as on June 22, 1920.—*THE BORRE*, [1921] P. 390; 91 L. J. P. 1; 125 L. T. 576; 37 T. L. R. 668; 65 Sol. Jo. 715; 15 Asp. M. L. C. 334.

3790. —.]—*THE GERTRUD* (1927), 138 L. T. 239; 44 T. L. R. 1; 17 Asp. M. L. C. 343.

D. Payment of Costs.

3791. Undertaking to pay costs.—*IVESON v. CONINGTON*, No. 3729, *ante*.

3792. —.]—*Re BENTLEY, Ex p. BENTLEY*, No. 3731, *ante*.

3793. —.]—*CLARKE v. SMITH* (1850), 15 L. T. O. S. 68.

3794. —.]—A., an attorney having been employed by a former client of B. in consideration of the latter handing him over the papers in the cause, wrote as follows: "Out of any moneys which I may receive on this or any other proceeding on pltf.'s account, I will hand you such balance as may remain due of your bill of costs, as settled at £9":—*Held*: A. was bound to pay B. out of the first moneys A. received on account of the client, & not out of the surplus after deducting

PART X. SECT. 3, SUB-SECT. 2.—D.

3791 i. Undertaking to pay costs.—*SARTORI v. MACLEOD* (1897), 22 V. L. R. 498.—AUS.

3791 ii. —.]—*Re FRACKELTON v. McQUEEN, Re A SOLICITOR*, [1910] S. R. Q. 1.—AUS.

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his own costs.—*THARRATT v. TREVOR* (1851), 7 Exch. 161; *sub nom. THARRETT v. TREVOR, Re UNDERWOOD*, 21 L. J. Ex. 59; 18 L. T. O. S. 173.

3795. —.]—A solr. for deft. in an action gave to plffs.' solrs. an undertaking in writing expressed to be given on behalf of his firm, whereby the firm agreed to pay to plffs.' solrs. an agreed sum for costs due from deft. to plffs.:—*Held*: the ct. before which plffs.' action was pending would, in exercise of its summary jurisdiction, compel the solr.'s firm to pay the amount in accordance with the undertaking, together with the costs of a motion to enforce the undertaking.—*Re WOODFIN & WRAY* (1882), 51 L. J. Ch. 427; 30 W. R. 422.

Annotation:—Refd. Swyny v. Harland, [1894] 1 Q. B. 707.

3796. —.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1902), 46 Sol. Jo. 340, D. C.

3797. Payment of costs upon undertaking to repay if appeal successful.—Where an order is made for a stay of execution pending appeal, appct. to pay the taxed costs of the successful party to his solr. on his personal undertaking to repay them should the appeal be successful, the undertaking given by the solr. may be enforced by the ct. in a summary manner.—*SWYNY v. HARLAND*, [1894] 1 Q. B. 707; 63 L. J. Q. B. 415; 70 L. T. 227; 42 W. R. 297; 10 T. L. R. 276; 38 Sol. Jo. 256; 9 R. 210, C. A.

3798. —.]—Three suits were brought to administer the estate of an intestate which amounted to £200,000. The chief clerk certified five persons to be the intestate's next of kin, & two shares were sold out. Another person then brought an action to establish her right as next of kin, & to restrain dealings with the remaining three shares. The cts. of first & second instance decided against the claim made in this action, the effect being to dissolve the injunction, but the Ct. of Appeal stayed the drawing up of the order on being informed that an appeal would be presented to the House of Lords. On an application to the Ct. of Appeal to continue the injunction pending the appeal to the House of Lords:—*Held*: the Ct. of Appeal had jurisdiction to make such an order.

On motion to restrain defts. & their solrs. from enforcing payment of costs, unless & until such solrs. should have given their personal undertaking to return to plff.'s solrs. the amount of any such costs which might be paid in case the appeal to the House of Lords proved successful. The Ct. of Appeal ordered the usual undertaking to be given.—*POLINI v. GRAY, STURLA v. FRECCIA* (1880), 28 W. R. 360, C. A.

3799. —.]—An order dismissing an action

3801 i. Payment of costs upon undertaking to repay if appeal successful—No liability unless undertaking given—Decision reversed on appeal.—*BURKE v. BEATTY & WHITE*, [1928] 1 R. 91.—IR.

PART X. SECT. 3, SUB-SECT. 2.—E.

1. General rule.—The ct. will not summarily compel a solr. to perform an agreement or undertaking, merely because he is a solr. If it was not given by him in his professional connection with the suit or matter, the party to whom it is given will be left to this action.—*WILSON v. BEATTY, Re DONOVAN & MORPHY* (1885), 12 A. R. 252.—CAN.

g. Whether undertaking enforced—Personal undertaking—Client man of

no means.—The following undertaking "on behalf of our client G. we undertake to have the agreement arranged between us executed by S., or some third person acceptable to you & to pay you forthwith the cash payment of \$300 as arranged. We may add that S. was in to sign the papers to-day, but our Mr. K. being engaged in ct. did not look over the agreement," was an undertaking by the solrs. personally & not a mere undertaking by the client G., a man of no means.—*Re SOLICITORS*, [1917] 1 W. W. R. 529; 23 B. C. R. 442.—CAN.

h. —.—In an action for foreclosure of mtge. deft. asked for sale & the order nisi for sale contained the following recital: "W. appearing

with costs directed the money paid into ct. by the plaintiff as security to be paid to deft.'s solrs. on account of their costs, they undertaking to refund if directed by the Ct. of Appeal. The schedule to the order directed payment to deft. personally. Deft. changed his solrs., & received the money out of ct. by virtue of the schedule. The appeal was afterwards allowed with costs, but no costs of trial on either side:—*Held*: the solrs. could be ordered upon motion to refund the money so received by their late client in pursuance of their undertaking.—*DOTESIO v. BISS* (1912), 56 Sol. Jo. 736, C. A.

3800. — Court cannot compel undertaking.—On appeal, a workman recovered judgment & costs. The employers applied for a stay, pending appeal to the House of Lords, but this was refused, & the ct. suggested that some terms might be made between the parties. It was then agreed to pay the workman certain weekly compensation in any event, pending the further appeal, but nothing was said as to costs. War was declared before costs were paid, & a stay was obtained under the Courts (Emergency Powers) Act, 1914 (c. 78), on the full amount of taxed costs being paid into ct. Before these costs were paid out the employers applied to the Ct. of Appeal for an order that the workman's solr. should be made personally liable for their return, in the event of the further appeal being successful:—*Held*: the ct. could not impose such terms upon the solr., but, under the circumstances, the costs were ordered to remain in ct., pending the result of the further appeal.—*CHILTON v. BLAIR & Co., LTD.* (1914), 8 B. W. C. C. 1.

3801. — No liability unless undertaking given—Decision reversed on appeal.—A solr. who has demanded & received payment of costs payable to his client under an order of ct., with knowledge that an appeal against the order was pending, cannot on its reversal be ordered personally to repay the costs so paid to him where there has been no misconduct & no undertaking to repay.—*HOOD BARRS v. CROSSMAN & PRICHARD*, [1897] A. C. 172; 66 L. J. Q. B. 357; 76 L. T. 297; 45 W. R. 465; 41 Sol. Jo. 347; *sub nom. HOOD BARRS v. CROSSMAN & PRICHARD, HOOD BARRS v. HERIOT*, 13 T. L. R. 291, H. L.

E. Undertakings Apart from Litigation.

3802. Whether undertaking enforced—Payment of rent due from client.—*BURRELL v. JONES*, No. 3728, *ante*.

3803. — To clear title of estate sold.—The ct. will not exercise its summary jurisdiction to compel a vendor's solr. to perform an undertaking, given by him at the sale, to do certain acts for clearing the title to the estate.—*PEART v. BUSHELL* (1827), 2 Sim. 58; 57 E. R. 705.

Annotation:—N.F. United Mining & Finance Corp'n. v. Becher, [1910] 2 K. B. 296.

for deft. . . & guaranteeing the costs of sale." W. was acting in his official capacity as a solr. in the cause for deft.:—*Held*: the guarantee of costs was a personal guarantee by deft.'s solrs.—*STANDARD TRUST Co. v. SZLACHETKA* (Sask.), [1919] 3 W. W. R. 614.—CAN.

k. —.—*DORES v. HORNE & ROSE* (1842), 4 Dunl. (Ct. of Sess.) 673; 14 Sc. Jur. 265.—SCOT.

l. —.—After a seizure under a *fi. fa.*, deft.'s attorney undertook, without any authority, to procure the security of a third person for the amount of the execution. Plff.'s attorney received the undertaking saying, that if his client would not consent, the instrument should be returned. While the goods were under

3804. — Payment of balance of purchase-money.]—An attorney, who on completing a purchase, gives an undertaking to pay over a balance of the purchase-money, cannot be called on summarily to perform his undertaking.—*Ex p. PHILLIPS* (1838), 1 Will. Woll. & H. 418.

3805. — Payment of costs of abstract—Mortgage.]—Where an undertaking is given in the character of attorney, the ct. will compel its officer to perform it. Where, therefore, the attorney of a mtgor. induced the attorney of a mtgee. to give up the title deeds, on his undertaking to pay the costs of abstract, etc., the ct. ordered him to pay the amount, in pursuance of his undertaking.—*Re GEE* (1845), 2 Dow. & L. 997; 10 Jur. 694.

*Annotations:—*Consd. *Re Fairthorne* (1816), 3 Dow. & L. 548. *Apld.* *United Mining & Finance Corpn. v. Becher*, [1910] 2 K. B. 296.

3806. — Payment of debt due from client.]—A solr. who guarantees payment of a debt due from his client may, on default of payment by the client, be ordered by the ct. in a summary way to pay the amount himself, without any necessity on the part of the creditor to bring an action against the solr.—*Re PASS* (1887), 35 W. R. 410.

*Annotation:—**Apld.* *United Mining & Finance Corpn. v. Becher*, [1910] 2 K. B. 296.

3807. — Payment of moneys arising under settlement.]—*Re F. C.*, [1888] W. N. 77.

3808. — Delivery up of title deeds—On conveyance.]—*Re A SOLICITOR* (1888), 33 Sol. Jo. 76.

*Annotation:—**N.F.* *United Mining & Finance Corpn. v. Becher*, [1910] 2 K. B. 296.

3809. — Applicant not client of solicitor.]—*UNITED MINING & FINANCE CORPN., LTD. v. BECHER*, No. 3721, *ante*.

SECT. 4.—LIABILITY FOR COSTS.

SUB-SECT. 1.—IN GENERAL.

See, now, R. S. C., Ord. 65, r. 11.

3810. Power of judge to make order—Without application from any party.]—The powers given by R. S. C., Ord. 65, r. 11, of disallowing costs improperly incurred or rendered fruitless by undue delay, are not confined to delay, & costs taking place & named after the Orders of 1883 came into operation, but extend to all costs incurred in an action pending when the Orders came into operation which costs had not already been adjudicated upon, & these powers may be exercised by the judge of his own motion without any request from any of the parties.

The rule extends to cases where in the ordinary course the costs are paid out of a fund, & is not confined to disallowing costs as between the solr. & his client who has to pay them.—*BROWN v.*

seizure, he was informed that the terms could not be complied with. No further proceeding having been had to a sale, the ct. refused to grant an attachment for nonperformance of the undertaking.—*WILSON v. O'NEILL* (1833), *Hayes & Jo.* 184.—*IR.*

m. —.]—*Semble*: deft.'s attorney having given a written undertaking, to pay to pltf., whatever the deficit might be, on a sale of the mtged. premises, under the decree in a foreclosure suit, will be compelled to perform it, notwithstanding the death of his client.—*BAILEY v. DANIELL* (1834), *Hayes & Jo.* 586.—*IR.*

n. — Registration of title.]—A solr. acting for the vendor gave an undertaking, signed by him, to a purchaser of land, already registered in

accordance with Local Registration of Title (Ireland) Act, 1891, that, in consideration of the purchaser paying the balance of the purchase-money to him, he would have all the incumbrances affecting the property effectually released & would hand over the original documents creating the charges & also the deeds of release duly registered. The solr. declined to register the releases, on the grounds that it was contrary to the Act, & was useless & unnecessary.—*Held*: the solr. was bound to comply with his undertaking as to registration.—*Re A SOLICITOR* (1918), 53 I. L. T. 51.—*IR.*

PART X. SECT. 4, SUB-SECT. 1.

o. General rule.]—An attorney will

BURDETT (1887), 37 Ch. D. 207; 58 L. T. 571; 36 W. R. 225; 4 T. L. R. 165, C. A.

*Annotation:—*Consd. *Re Scowby*, *Scowby v. Scowby*, [1897] 1 Ch. 741.

3811. Application of rule—Costs payable out of fund in ordinary course.]—*BROWN v. BURDETT*, No. 3810, *ante*.

SUB-SECT. 2.—PROCEDURE TO OBTAIN ORDER.

A. In General.

See R. S. C., Ord. 65, r. 11.

3812. When substantive application necessary—Misconduct not in character of solicitor.]—If a rule for a *quo warranto* is discharged on a defect in the affidavits in support of it, costs may be adjudged to be paid by a deposing party, who from the circumstance of his being an attorney, or from an affidavit in answer may be presumed to have been cognisant of such defect; it is otherwise, if the rule is discharged on the affidavits in answer.

When the conduct objected to in an attorney has not been done in his character of attorney, the costs should not be granted against him without a special application.—*R. v. GREENE* (1842), 4 Q. B. 646, 649; 2 Gal. & Dav. 789; 11 L. J. Q. B. 281; 6 J. P. 687; 6 Jur. 896; 111 E. R. 1043; *subsequent proceedings* (1813), 12 L. J. Q. B. 239.

3813. — Application by respondent against appellant's solicitor.]—An appeal by a married woman having been dismissed with costs, resp. asked that applt.'s solr. might be ordered to pay the costs personally.—*Held*: if the ct. had jurisdiction to make the order it must be on a substantive application.—*TATUM v. TATUM* (1886), 2 T. L. R. 423, C. A.

3814. What is good service of petition—Leaving copy at solicitor's office.]—The ct. refused to make an order, that service of a petition against an attorney, for an order to pay certain costs for which he had been declared liable, by leaving a copy at his chambers, should be deemed good service.—*Re SANDYS* (1833), 3 Deac. & Ch. 34.

3815. Necessity for notice to solicitor.]—An order upon an attorney of one of the parties to pay the costs incurred in proceedings in a cause, he not being a party applying to the ct., is bad, if the attorney had no notice in the summons that he would be called upon to pay such costs.—*ROUCH v. ALBERTY* (1863), 3 New Rep. 137; 33 L. J. Q. B. 127; 12 W. R. 136; *sub nom.* *ROUCH v. ALBERTY*, *Ex p. WOOD*, 9 L. T. 420.

3816. —.]—(1) The ct. will not order the costs of proceedings to be paid personally by the solr. conducting them, on account of any misconduct unconnected with those proceedings, or upon an application not giving him proper notice of the charges against him.

(2), solrs., having been requested by P., another solr., on behalf of a client for whom they had

not be ordered to pay costs due by his client to the opposite party, unless he has positively engaged to do so.—*ROSS v. CALDER* (1847), 3 U. C. R. 180.—*CAN.*

p. Defendant's attorney settling with plaintiff—After writ of fieri facias put in sheriff's hand for costs by plaintiff's attorney.]—Where deft., an attorney, settled with pltf. after a *fi. fa.* had been put in the sheriff's hands, which deft. must have known pltf.'s attorney had issued almost wholly for costs, the ct. ordered pltf.'s attorney's costs included in the execution to be referred for taxation, & deft. to pay the sum to pltf.'s attorney, with the costs of the application.—*GRIFFS v. MEYERS* (1850), 6 U. C. R. 532.—*CAN.*

Sect. 4.—Liability for costs: Sub-sect. 2, A., B. & C.; sub-sect. 3, A. (a) & (b).]

hitherto acted, to deliver up all deeds belonging to the client on the usual terms, sent the deeds to a relative of the client who held a power of attorney from him, with the bill of costs, the amount of which they retained out of moneys in their hands belonging to the client, & they then informed P. that they had no deeds in their possession, & no bill of costs against the client. An order of course was then taken out by P., on behalf of the client, for taxation & delivery up of deeds & papers, but it was not complied with, & a writ of attachment was issued against G. On a motion to set aside the attachment with costs to be paid by P. personally:—*Held*: in the circumstances of the case, G. were not justified in refusing to deliver up the papers, or to give in their bill for taxation; (2) it was no ground of objection to the attachment, that in consequence of the indorsement required by Consolidated Order 33, r. 10, being omitted in the order first served on G., it had been served a second time in proper form more than fourteen days afterwards.—*Re GREGG, Re PRANCE* (1869), L. R. 11 Eq. 137; 39 L. J. Ch. 107; 23 L. T. 234; 34 J. P. 276; 18 W. R. 589.

Annotation:—*Generally, Rejd.* Northumberland v. Todd (1878), 26 W. R. 350.

3817. Notice of motion—When service on agent allowed.]—The ct. will under special circumstances allow a rule calling on an attorney to pay costs to be served on his agent.—*BURRELL v. SEATON* (1837), 5 Dowl. 661; Will. Woll. & Dav. 395.

3818. When order made to indemnify client—Necessity for payment by client—Before application made.]—Pltf. who has been made liable to the costs of the day by the negligence of his attorney, cannot compel the attorney to pay him those costs unless he, pltf., has first paid them to deft.—*LAYTON v. WOOD* (1839), 3 Jur. 124.

B. Who May Apply.

3819. Either party.]—If an attorney commence an action in the name of a pltf. from whom he has no retainer nor authority, the proceedings may be stayed on application to the ct. by either party, & the attorney is liable to the costs of both.—*HUBBART v. PHILLIPS* (1845), 2 Dow. & L. 707; 13 M. & W. 702; 1 New Pract. Cas. 232; 14 L. J. Ex. 103; 153 E. R. 294, Ex. Ch.

Annotations:—*Rejd.* Bayley v. Buckland (1847), 1 Exch. 1; Reynolds v. Howell (1873), L. R. 8 Q. B. 398; Yonge v. Toynbee, [1910] 1 K. B. 215. *Mentd.* Duckett v. Gover (1877), 25 W. R. 554; *Re Mathews, Oates v. Mooney* (1905), 74 L. J. Ch. 656.

3820. Adverse party.]—Where an action is brought in the name of a person as pltf. without his authority & he subsequently repudiates the action, debts on application in the action may obtain an order for payment of their costs by the solrs. who issued the writ. So held in a case where an infant was joined as co-pltf. by solrs. on the assumption that he was of full age.—*GEILINGER v. GIBBS*, [1897] 1 Ch. 479; 66 L. J. Ch. 230; 76 L. T. 111; 45 W. R. 315; 41 Sol. Jo. 243.

Annotation:—*Rejd.* Adams v. London Motor Builders, [1921] 1 K. B. 195.

C. Time for Application.

3821. Effect of delay in application.]—The names of persons made pltf. in a bill without their

authority, ordered to be struck out with costs to be paid by the solr., their application, after they were apprised of the fact, having been made without delay. *Seemle*: where persons who have been made pltf. without their consent, have after the fact has come to their knowledge acquiesced for a considerable period, their names will not, on their application be struck out of the bill.—*WILSON v. WILSON* (1820), 1 Jac. & W. 457; 37 E. R. 442, L. C.

Annotations:—*Rejd.* Malins v. Greenway, *Re Kirk* (1847), 2 New Pract. Cas. 487; Norton v. Cooper, *Re Manby & Hawksford, Ex p. Bittleston* (1856), 3 Sm. & G. 375.

3822. — Adverse party agreeing to withdrawal of juror.]—Where deft. has consented to withdraw a juror he cannot afterwards apply to the ct. to make pltf.'s attorney pay his costs, on the ground that the action was brought without the consent or authority of pltf.—*HAMMOND v. THORPE* (1834), 1 Cr. M. & R. 64; 4 Tyr. 838; 3 L. J. Ex. 358; 149 E. R. 995.

SUB-SECT. 3.—GROUNDS FOR MAKING ORDER.

A. Acting without Authority.

(a) In General.

3823. General rule.]—Upon a revocation by a client of the authority under which his solr. acted, the solr. is not permitted to take any further step, even in an interlocutory proceeding already commenced; & he will be answerable for the costs of any such subsequent step, as well as for the costs of a motion on the part of the client to restrain the solr. from proceeding.—*FREEMAN v. FAIRLIE* (1838), 8 L. J. Ch. 44.

3824. —.]—*Re SAVAGE*, No. 3867, *post*.

3825. Onus of proof of authority—On solicitor.]—*MARIES v. MARIES*, No. 3837, *post*.

3826. Consenting to final reference.]—Solrs. assenting to interlocutories may bind but not to final reference.—*COLWEL v. CHILD* (1660), 1 Cas. in Ch. 86; 1 Rep. Ch. 195; 22 E. R. 707; *sub nom.* COLLWELL v. CHILD, Freem. Ch. 151.

Annotation:—*Mentd.* H'ide v. Petit (1670), Freem. Ch. 133.

3827. Consenting to supersedeas—In absence of client.]—If a solr., in the absence of his principal, undertake to consent to a *supersedeas*, the ct. will, in the event of the petition for a *supersedeas* being dismissed, make the solr. pay the costs.—*Re MUNK, Ex p. MUNK* (1836), 6 L. J. Bey. 9.

3828. Consenting to judgment.]—One partner has no implied authority to consent to an order for a judgment in an action against himself & his co-partner. Though the ct. will, in general, where deft. is prejudiced by the act of an attorney in acting for him without authority leave him to his remedy against the attorney, if solvent; that rule does not apply, where deft. is in custody by reason of the unauthorised act, or where pltf. or his attorney is party to the wrong.—*HAMBRIDGE v. DE LA CROUEE* (1816), 3 C. B. 742; 4 Dow. & L. 466; 1 New Pract. Cas. 512; 16 L. J. C. P. 85; 8 L. T. O. S. 163; 10 Jur. 1098; 136 E. R. 297.

3829. Consenting to settlement.]—Female pltf. consulted a counsel residing in the country upon the subject of her rights for seduction & breach of promise of marriage against deft. The counsel himself, then wrote to him, but as terms could not be effected the counsel recommended her to an attorney to bring the actions, & what was required

PART X. SECT. 4, SUB-SECT. 2.—B.

q. Sheriff.]—The sheriff can, by summary application to the ct. call on the attorney in the cause to pay fees & expenses of execution.—*Re MITCHELL, Ex p. THE SHERIFF* (1889), 10 N. S. W. L. R. (Law) 111. —*AUS.*

PART X. SECT. 4, SUB-SECT. 3.—A. (a).

r. Bond executed on verbal authority.]—The ct. refused an order to an attorney to pay the costs of a suit on a bond to the limits, where he had

signed the name of one of the obligors & executed the bond on his behalf on a mere parol authority.—*LEONARD v. GLENDENNAN* (1830), Dra. 244.—*CAN.*

t. Continuing proceedings — After revocation of authority.]—*TAYLOR v. WOOD* (1802), 14 P. R. 419. —*CAN.*

to be done by an attorney was done in his office by his clerks. Pltf. never spoke to the attorney himself. At the assizes where the causes were ready for trial female pltf. & her mother, in a conversation upon terms of settlement, told the managing clerk to settle on the best terms he could, the counsel who had sent her to the attorney was her junior counsel in the case. Terms of settlement were come to in ct., when he was present, & these terms indorsed on the briefs of the leading counsel for pltf. & deft. Afterwards she refused to be bound thereby; & repudiated the terms come to, saying she had not authorised them:—*Held*: there must be a new trial under the circumstances, her attorney to pay the costs, & of the rule for it. If she authorised the terms, then she would pay those costs. If she did not, they would properly fall upon her then attorney.—*BROOKS v. COX* (1858), 30 L. T. O. S. 288; 6 W. R. 287.

3830. Causing arrest.—An arrest having been made by a person named in the warrant, who did it at the request of the attorney, the ct. discharged the party out of custody, & ordered the attorney to pay the costs.—*BRADBURY v. HUNTER* (1824), 2 L. J. O. S. K. B. 79.

3831. Continuing proceedings—After revocation of authority—Appointment of receiver of lunatic.—B. having become of unsound mind, his family applied to S., his agent, to render accounts. S. consulted his solrs. M. & P., who in Aug. 1871, filed a bill in the name of B. by a next friend, who was a stranger to the family, against S. for an account. A receiver was appointed, & in Dec. 1871, without notice to the family, the cause was heard as a short cause, & a decree made directing accounts & inquiries. In Mar. 1872, B. was found lunatic, of which M. & P. had full notice. On June 8, 1872, the chief clerk made his certificate, & on June 29, 1872, the cause was heard on further consideration, & an order made directing the costs of both parties, as between solr. & client to be paid out of the moneys in the hands of the receiver. In the accounts of the receiver as passed were also included considerable sums for his poundage & for the employment of an accountant to investigate the books. Some time after the order on further consideration a committee was appointed in the lunacy. On petition by the lunatic & his committee:—*Held*: all the proceedings in the suit after the appointment of a receiver were unauthorised and improper, & all proceedings after the finding on the inquisition were irregular & void, & M. & P. must make good to the lunatic's estate the sums paid to the accountant, & the sums paid to themselves & deft.'s solrs. for costs, less the costs up to the appointment of the receiver, & must pay the costs of the petition, both before the Vice-Chancellor & the Ct. of Appeal, as between solr. & client.—*BEALL v. SMITH* (1873), 9 Ch. App. 85; 43 L. J. Ch. 245; 29 L. T. 625; 38 J. P. 72; 22 W. R. 121, L. J.

Annotations:—*Distd.* *Re Armstrong*, [1896] 1 Ch. 536. *Refd.* *Howell v. Lewis* (1891), 61 L. J. Ch. 89. *Mentd.* *Halfhide v. Robinson* (1874), 30 L. T. 216; *Jones v. Lloyd* (1874), L. R. 18 Eq. 265; *Porter v. Porter* (1888), 37 Ch. D. 420; *Farnham v. Milward*, [1895] 2 Ch. 730; *Didlake v. London & Westminster Bank*, [1900] 2 Ch. 15; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666.

PART X. SECT. 4, SUB-SECT. 3.— A. (b).

3834.1. Whether solicitor ordered to pay costs.—Where an attorney commenced an action of tort on behalf of a supposed husband & wife, upon instructions from the wife, without ascertaining whether the husband authorised such proceedings the ct. on summons by the male pltf. who had authorised or been

cognisant of such proceedings, struck out his name from the writ & all subsequent proceedings, & ordered pltf.'s attorney to pay the costs of such pltf., as between attorney & client; & also ordered pltf.'s attorney to pay deft.'s costs as between party & party.—*HILL v. POWER* (1880), 6 V. L. R. (L.) 109.—*AUS.*

3834.2. —.—]—Deft., after a verdict

3832. Applying for "usual order" for costs in divorce proceedings.—The ct. probably has jurisdiction to make an order as to costs even after decree absolute, but in the circumstances, no application having been made at the trial, as until nearly twelve months afterwards, for the "usual order," the decree having meanwhile been made absolute; & the co-resp. being out of the jurisdiction, declined to review the decree *nisi*.—*BEETON v. BEETON & ROBERTSON*, [1921] P. 417; 90 L. J. P. 351; 126 L. T. 114; 37 T. L. R. 902.

3833. Discontinuing proceedings.—*PATENT WOOD KEG SYNDICATE, LTD. v. PEARSE* (1906), 50 Sol. Jo. 650.

(b) Instituting Proceedings.

3834. Whether solicitor ordered to pay costs.—Order to dismiss a bill, with costs to be paid by pltf.'s solr., the bill having been filed without special authority from pltf. A solr. may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without a special authority for the purpose.—*WRIGHT v. CASTLE* (1817), 3 Mer. 12; 36 E. R. 5, L. C.

Annotation:—*Apld.* *Norton v. Cooper, Re Manby, Ex p. Bittleston* (1856), 3 Sm. & G. 375.

3835. —.—]—Where on a motion for judgment as in case of a nonsuit, it appeared that the action was commenced & carried on in pltf.'s name without his authority or knowledge; & that the attorney could not be found after diligent inquiry:—*Held*: this was no answer to the motion, & pltf.'s only remedy was against the attorney: but the ct., under the circumstances, enlarged the rule to give pltf. time to find the attorney, & granted a rule to show cause why the attorney should not pay deft.'s costs.—*MUDRY v. NEWMAN* (1834), 1 Cr. M. & R. 402; 4 Tyr. 1023; 3 L. J. Ex. 358; 149 E. R. 1136; *sub nom.* *MUDAY v. NEWMAN*, 2 Dowl. 695.

Annotations:—*Consd.* *Reynolds v. Howell* (1873), L. R. 8 Q. B. 398. *Refd.* *The Bellcairn* (1886), 54 L. T. 544.

3836. —.—]—A solr. taking a proceeding in a suit in the name of a person, without his authority, is personally liable to pay the costs, charges, & expenses occasioned to the other parties thereby, and such a proceeding having taken place in the master's office, the ct., on the petition of the parties injured, ordered the costs, etc., to be taxed & paid by the solr.—*MALINS v. GREENWAY* (1847), 10 Beav. 564; 17 L. J. Ch. 26; 10 L. T. O. S. 242; 12 Jur. 66; 50 E. R. 699; *sub nom.* *MALINS v. GREENWAY, Re KIRK*, 2 New Pract. Cas. 487; *affd.* (1848), 17 L. J. Ch. 331; 11 L. T. O. S. 449, L. C.

3837. —.—]—The *onus* of showing authority to institute proceedings or subsequent acquiescence lies upon the solr.; & if he fails to do so, a party who has been made a pltf. is entitled to have his name struck out, & to have the costs paid by the solr., even although the evidence may be conflicting.—*MARIES v. MARIES* (1853), 2 Eq. Rep. 361; 23 L. J. Ch. 154; 22 L. T. O. S. 184; 2 W. R. 635.

3838. —.—]—Where client absent.—The solr. to pay the costs where the party absents himself.—*DIGARDINE v. SWIFT* (1866), 1 Cas. in Ch. 71; 22 E. R. 700, L. C.

against him, placed in his attorney's hands £22, to be applied in part payment of the judgment: the attorney retained the money, & made an application to review the taxation of costs, which was refused with costs, because deft. had in the meantime paid the amount of debt, & costs to the sheriff. The ct. ordered the attorney to repay deft. the £22, but refused

solr. who filed it.—**WANDSWORTH & PUTNEY GAS LIGHT & COKE CO. v. WRIGHT** (1870), 22 L. T. 404 ; 18 W. R. 728.

Annotations :—**Reid**. *Duckett v. Gover* (1877), 25 W. R. 554. **Mentd.** *Harben v. Phillips* (1883), 23 Ch. D. 14.

3849. ———.]—Motion by defts. claiming to be duly elected directors of & in the name of pltf. co., asking that all proceedings in the action might be stayed on the ground that they had been instituted without the authority of the co., & that the solrs. by whom the writ was issued might be ordered to pay the costs of the action & of that application. The co. was formed in 1890, under Table A. of Companies Act, 1862 (c. 89). No appointment of directors was made, nor did the subscribers of the memorandum of association act as directors. Seven gentlemen, however, constituted themselves directors, & proceeded to act as such. Disputes subsequently arose which resulted in the present action. Pending the disputes the secretary of the co. convened a meeting of the subscribers to the memorandum of assocn. for the purpose of (*inter alia*) appointing directors. Ten out of the twelve subscribers attended, but two protested, & withdrew. The remaining eight appointed defts. as directors. The persons who had originally constituted themselves directors also made an effort to get themselves duly appointed by a document intended to be signed by all the subscribers to the memorandum. It was, however, in fact signed by seven only :—**Held** : the self-constituted directors had never been properly appointed. Article 62 of Table A. only applied to continue in office directors who had been properly appointed in the first instance, & would not apply either to *de facto* directors or to subscribers of the memorandum of assocn. The subscribers to the memorandum were entrusted with the power of appointing directors, & they exercised it by appointing defts. The motion must therefore succeed, & the solrs. must be ordered to pay the costs personally.—**JOHN MORLEY BUILDING CO. v. BARRAS**, [1891] 2 Ch. 386 ; 60 L. J. Ch. 496 ; 64 L. T. 856 ; 39 W. R. 619.

3850. ——— **Solicitor unaware that authority invalidated—Effect of notice from opposite party.**—The rule that proceedings taken by a solr. without proper authority will be annulled with costs, to be paid by the solr., does not apply unless the solr. was aware of the circumstances which invalidated his authority ; & notice from the other side is not sufficient to fix him with knowledge, if he had good reason to suppose that the facts stated in the notice were not true.—**THOMAS v. FINLAYSON** (1870), 19 W. R. 255.

3851. ——— **Commencing action against company—Without giving indemnity.**—An order was made on the application of R., in a winding-up, directing that he should receive his costs of the application out of the assets. H. & co. were his solrs. in this application, but had no other connection with the co. or its affairs. The costs were not paid, & R. became bkpt. Subsequently the Vice-Chancellor made an order, on the application of H. & co., that they should be at liberty, on giving such indemnity as the judge should direct, to institute such proceedings as they might be advised against the former directors & promoters, to recover certain sums from them, appcts. undertaking to pay into the bank to the credit of the liquidators whatever was recovered, & also to abide by any order the

ct. or judge might make as to the costs of such proceedings. H. & co. thereupon commenced this action in the name of the co., against the former directors & promoters, without having taken any steps to have the indemnity fixed by the judge. Defts. moved that all further proceedings might be stayed, or the suit & all proceedings under it set aside, on the ground that the action had been commenced without proper authority. This application was refused by the Vice-Chancellor, who expressed his opinion that the undertaking of H. & Co., contained in the order, was a sufficient indemnity :—**Held** : (1) as H. & co. were strangers to the co., being neither creditors nor contributories, & having no charge on the assets, there was no jurisdiction to give them leave to sue in the name of the co. ; (2) if there had been jurisdiction to make such an order, the action would still have been commenced without authority, the condition precedent of H. & co. giving indemnity not having been complied with, therefore, the action must be dismissed, as having been instituted without authority, & H. & co. must pay the costs of all parties, including the official liquidators ; the costs of the co. being taxed as between solr. & client, & the other costs as between party & party.—**CAPE BRETON CO. v. FENN** (1881), 17 Ch. D. 198 ; 50 L. J. Ch. 321 ; 44 L. T. 445 ; 29 W. R. 386, C. A.

Annotations.—As to (2) **Apld.** *Fricker v. Van Grutten*, [1896] 2 Ch. 619. **Reid**. *Geilinger v. Gibbs*, [1897] 1 Ch. 479 ; *Adams v. London Improved Motor Coach Builders*, [1921] 1 K. B. 495. (*Generally*, **Mentd.** *Re Dronfield Silkstone Coal Co. (No. 2)* (1883), 23 Ch. D. 511 ; *Re London Metallurgical Co.*, [1895] 1 Ch. 758.

(c) *Defending Proceedings.*

3852. Whether solicitor ordered to pay costs.—C. & D. were trustees of a will, under which the funds became divisible on the death of the tenant for life in June, 1890. The greater part of the trust funds were distributed during the autumn of 1890. D. died in Dec. 1890, & C. was left sole surviving trustee. The trust funds then consisted of £3,000 invested on mtge. & a small amount of railway shares. The firm of B. & G. of which G. was the sole surviving member, had always acted for the trustees. Notice had been given to pay off the mtge., & C. repeatedly wrote to G., who also acted for the mtgor., asking when the mtge. money would be paid. G. answered with plausible excuse that the mtgor. was selling other property to pay off the mtge., & delays had arisen in completion. On Oct. 23, 1891, some of the beneficiaries under the will, who had been constantly applying to G. as C.'s solr., for accounts, took out an originating summons against C. for an account. G. entered an appearance for C. without authority & without any communication with C. C. having discovered this, moved to set aside the appearance & all subsequent proceedings. G. had meanwhile absconded, & it was found that he had received & retained the mtge. money :—**Held** : the fact that G. had acted as solr. for C. in all matters connected with the trust did not authorise him to enter an appearance for him as deft., & the appearance must be set aside with costs to be paid by G.—**Re GRAY, GRAY v. COLES** (1891), 65 L. T. 743.

Annotation :—**Reid**. *Dillon v. Dillon & Chamberlaine* (1920), 36 T. L. R. 250.

3853. ——— **Where authority revoked—By lunacy of client.**—**YONGE v. TOYNBEE**, No. 3785, *ante*.

liability to pay deft.'s costs by the fact that he acted in good faith.—**MURPHY v. REEVES & WILLIAMS'** OFFICIAL ASSIGNEE, [1918] N. Z. L. R. 189.—N.Z.

PART X. SECT. 4, SUB-SECT. 3.— A. (c).

a. *Company incorporated but powers thereof unused.*—Application by pltf.'s

solr. for payment by deft.'s solrs. of his costs of the action on the ground that they warranted their authority to act for their client, an incorporated co. which had never been

Sect. 4.—Liability for costs: Sub-sect. 3, A. (c)
(d), B. & C. (a) & (b) i.]

3854. ——— *SIMMONS v. LIBERAL OPINION, LTD., Re DUNN, No. 3874, post.*

3855. ——— *Where bona fide belief in authority.]*—Circumstances in which a solr. having entered an appearance & taken other steps in a litigation on behalf of certain defts. for whom he had in fact no authority to act, although he *bona fide* believed that he had authority, was ordered to pay their costs of setting aside the appearance & all subsequent proceedings as between solr. & client, & pltf.'s costs of the application as between party & party.—*PORTER v. FRASER* (1912), 29 T. L. R. 91.

3856. ——— *Instructions given by underwriters.]*—*THE NEPTUNE*, [1919] P. 21, n.; 88 L. J. P. 96, n.

(d) *Joining Parties.*

3857. Joining co-plaintiff.] — *TITTERTON v. OSBORNE* (1762), 1 Dick. 350; 21 E. R. 304.

3858. ———.]—A bill being dismissed with costs, a person who was made a co-pltf. without his authority or knowledge is liable for the costs to deft. but is entitled to be indemnified by the solr.—*WADE v. STANLEY* (1820), 1 Jac. & W. 674; 37 E. R. 525.

Annotations:—Folld. Hood v. Phillips (1842), 6 Beav. 176. *Apld. Jerdein v. Bright* (1862), 6 L. T. 279. *Refd. Nurse v. Durnford* (1879), 13 Ch. D. 764.

3859. ———.]—A bill having been filed without the authority of one of the co-pltfs., the ct., after replication, ordered his name to be struck out as co-pltf., & the costs of suit & of the application to be paid by the solr. who filed the bill.—*TABERNOR v. TABERNOR* (1836), 2 Keen, 679; 6 L. J. Ch. 19; 48 E. R. 790.

Annotation:—Refd. Pinner v. Knights (1843), 6 Beav. 174.

3860. ———.]—A bill filed without the authority of pltf. was dismissed with costs & pltf. was taken under an attachment for non-payment of costs. The ct. on motion ordered the solr. to indemnify A., but refused to release A. as against the claim of defts.:—*Held*: A. was not on such an application to be deprived of his right against the solr. of damages for his imprisonment.—*HOOD v. PHILLIPS* (1842), 6 Beav. 176; 49 E. R. 793.

Annotation:—Refd. Nurse v. Durnford (1879), 13 Ch. D. 764.

3861. ———.]—A bill being filed without the written authority of one of several co-pltfs., & the evidence being unsatisfactory as to the retainer, his name was struck out as co-pltf. with costs to be paid by the solr.—*PINNER v. KNIGHTS* (1843), 6 Beav. 174; 12 L. J. Ch. 230; 49 E. R. 792.

3862. ——— *Where evidence of want of authority doubtful.]*—When a solr. makes a person a co-pltf. in a suit without a retainer or sufficient authority, he does so at his own peril; but if the evidence of want of authority be doubtful.

On motion on behalf of such co-pltf. to strike out his name as co-pltf., & to make the solr. pay the costs of the motion:—*Held*: he was entitled to have his name as co-pltf. struck out, but he must pay the costs of the motion himself.—*EVANS v. KINSEY* (1853), 21 L. T. O. S. 178.

3863. ———.]—*Semble*: where parties have been joined as pltfs. without their consent, but merely by mistake & *bona fide*, & without any misconduct on the part of the attorney, deft. has no remedy

for his costs against the attorney, even although their names are struck out, & the parties remaining on the record are insolvent, or dead, or are not to be found. His remedy is only against pltfs. on the record; & the remedy of such as have been joined without their consent is against the attorney.—*COLLINS v. JOHNSON* (1855), 16 C. B. 588; 3 C. L. R. 1285; 24 L. J. C. P. 231; 139 E. R. 889.

Annotation:—Mentd. Leggo v. Young (1856), 25 L. J. C. P. 176.

3864. ——— *Effect of delay by client.]*—M., a member of a firm of two solrs., M. & H., in 1847, without any authority given by B., instituted a suit in B.'s name, as one of several co-pltfs., & carried it on for nine years, when B., on being served with a *subpoena* for payment of costs of some unsuccessful exceptions, became for the first time aware of the unauthorised use of his name:—*Held*: upon petition by B. in the suit, M. was responsible for the costs of the suit from beginning to end; & H., though not personally cognisant of his partner's misconduct, was also liable, at all events, for costs incurred up to the time when, upon the dissolution, in 1849, of the partnership between himself & M. his name ceased to appear on the records of the ct. as one of the solrs. for the co-pltfs. in the suit. *Semble*: if B. had during the course of the litigation become aware of the use of his name, his subsequently omitting to interfere actively to prevent its continuance would not *per se* have been sufficient to relieve the solrs. from liability to him for the costs.—*NORTON v. COOPER, Re MANBY & HAWKSFORD, Ex p. BITTLESTON* (1856), 3 Sm. & G. 375; 26 L. J. Ch. 313; 29 L. T. O. S. 378; 3 Jur. N. S. 259; 65 E. R. 701.

3865. ———.]—Where a debtor is joined as a co-pltf. in a suit by a trustee of a creditor's deed under Schedule D. to Bkpcy. Act, 1861 (c. 134), he is entitled to have his name struck out, with costs against the solr., even though he may have given the solr. an authority to take all such steps as might be necessary to enforce the contract.—*FENTON v. QUEEN'S FERRY WIRE ROPE CO.* (1868), L. R. 7 Eq. 267; 38 L. J. Ch. 136; 20 L. T. 297; 17 W. R. 155.

3866. ——— *With authority of other co-plaintiff.]*—*NURSE v. DURNFORD, No. 4029, post.*

3867. ———.]—A petition for the appointment of new trustees & a vesting order was presented in the names of several co-petitioners, & an order made. Upwards of a year afterwards an application was made to the ct. by persons who had been joined as co-petitioners that the order might be rescinded on the ground that they had only recently heard of the petition, which was in no way authorised by them:—*Held*: the order made could not be rescinded by the ct., but should be amended by striking out the names of appcts. as co-petitioners, & treating them as not having been served with the petition.

Where a solr. acts without authority, he must, as a general rule, pay the costs thereby occasioned.—*Re SAVAGE* (1880), 15 Ch. D. 557; 29 W. R. 348.

3868. ——— *Effect of discontinuance of action.]*—A co. named as co-pltfs. in an action served notice of motion to strike out their name, & asked that the solrs. who had issued the writ might be ordered to pay the co.'s costs on the ground that their name had been used without their authority. Before the motion could be heard the solrs. served a notice

organised & which had no assets:—*Held*: deft. co. was a legal entity, with unused powers, & there was nothing to show that deft.'s solrs. had knowledge of any defects in its organisation

& therefore the motion must fall.—*CAMPBELL v. TAXICABS VERRALLS, LTD.* (1912), 23 O. W. R. 6; 4 O. W. N. 28; 27 O. L. R. 141; 7 D. L. R. 91.—*CAN.*

PART X. SECT. 4, SUB-SECT. 3.—
A. (d).

38671. Joining co-plaintiff.]—*BARRIE TOWN v. WEAYMOUTH* (1892), 15 P. R. 95.—*CAN.*

wholly discontinuing the action:—*Held*: notwithstanding the discontinuance the ct. had jurisdiction to make the order asked for.—**GOLD REEFS OF WESTERN AUSTRALIA, LTD. v. DAWSON**, [1897] 1 Ch. 115; 66 L. J. Ch. 147; 75 L. T. 575; 45 W. R. 285; 41 Sol. Jo. 145.

3869. — *Infant.*—**GEILINGER v. GIBBS**, No. 3820, *ante*.

B. Acting for Non-Existent Client.

3870. Solicitor ordered to pay costs.—**GYNN v. KIRBY** (1720), 1 Stra. 402; 93 E. R. 594; *sub nom.* **GLYNN v. KIRBY**, Cas. Pract. K. B. 37.

Annotation:—*Mentd.* **Johnson v. Birley** (1822), 5 B. & Ald. 540.

3871. — *]*—An attorney, although he need not be instructed by a pltf. personally, but may receive instructions from any one interested in the action, is liable to deft. for costs if it turns out that pltf. is a non-existing person.—**HOSKINS v. PHILLIPS** (1847), 16 L. J. Q. B. 339.

3872. — *]*—Where an attorney brought an action without direct authority, & on inquiry there were strong reasons for believing that pltf. was fictitious, the ct. made absolute a rule against him for payment of deft.'s costs.—*Re CHIDLEY, MEETEN v. NICHOLLS* (1849), 13 L. T. O. S. 72.

3873. — *Non-existent corporation.*—(1) If a bill is ordered to be taken off the file on the ground that pltf's. assume to sue in a corporate character to which they are not entitled, the costs will be ordered to be paid by the town agent of pltf's., & not by their solr. in the country.

(2) Where a country solr. acts by a town agent, such agent, & not the principal, is liable for the costs of taking a bill off the file for irregularity.—**RUTHIN CORPN. v. ADAMS** (1835), 7 Sim. 345; 4 L. J. Ch. 167; 58 E. R. 870.

3874. — *]*—A solr. assuming to act for one of the parties to an action warrants his authority, & is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing, or has revoked the authority.—**SIMMONS v. LIBERAL OPINION, LTD., Re DUNN**, [1911] 1 K. B. 966; 80 L. J. K. B. 617; 104 L. T. 261; 27 T. L. R. 278; 55 Sol. Jo. 315, C. A.

C. Misconduct.

(a) In General.

See R. S. C., Ord. 65, r. 11.

3875. General rule.—Upon a petition charging a solr. with improper conduct, costs will be given against him, as between solr. & client.—*Re* — (1824), 2 L. J. O. S. Ch. 177, L. C.

3876. Misconduct must be connected with proceedings.—**R. v. DODSON** (1839), 9 Ad. & El. 704; 5 J. P. 404; 112 E. R. 1379.

Annotations:—*Mentd.* **R. v. Collins** (1852), 16 J. P. 230; **R. v. Westmeath County JJ** (1866), 15 W. R. 59.

3877. — *]*—*Re GREGG, Re PRANCE*, No. 3816, *ante*.

3878. Misappropriation of money.—**SEFTON v. HILL** (1822), 13 C. B. 371, n.; 138 E. R. 1243.

3879. — *]*—*Re* —, No. 4069, *post*.

(b) In Contentious Matters.

i. In General.

See R. S. C., Ord. 65, r. 11.

3880. Misconduct must amount to contempt.—Commission of Bkpcy. superseded with costs; the

bond to be assigned; & the proceedings to be impounded. The solicitor not charged with the costs; unless guilty of such an abuse as amounts to a contempt; in which case he might even be struck off the roll; but, the charges being denied, the creditor must bring an action against him.—*Ex p.* **HEYWOOD** (1806), 13 Ves. 67; 33 E. R. 220.

3881. Acting on both sides.—An attorney having acted for both parties in a suit, the ct. ordered the proceedings to be set aside, & the attorney to pay the costs of the cause & of the motion.—**BERRY v. JENKINS** (1826), 3 Bing. 423; 11 Moore, C. P. 308; 4 L. J. O. S. C. P. 126; 130 E. R. 576.

3882. Refusing to allow costs to be set off.—Pltf. obtained judgment against deft. in two actions in this ct., & deft. obtained a judgment against pltf's. in the Ct. of K. B.:—*Held*: the attorney had no lien for his costs upon the judgments in this ct.; & he having refused to allow them to be set off against the judgment in the K. B., the ct. ordered him to pay the costs of the application.—**BRIDGES v. SMYTH** (1831), 8 Bing. 29; 1 Dowl. 242; 1 Moo. & S. 93; 1 L. J. C. P. 33; 131 E. R. 311.

Annotations:—*Mentd.* **Green v. Cobden** (1837), 4 Scott. 486; **Miles v. Bough** (1846), 11 L. T. O. S. 325.

3883. Procuring sheriff to make false return.—Pltf.'s attorneys having ceased to act for him, & become attorneys for deft., fraudulently procured the sheriff to return on a *fi. fa.* a sum larger than that actually levied & accounted for to pltf. The ct., at the expense of the attorneys, ordered the return to be amended according to the fact.—**GREEN v. GLASSBROOK** (1835), 2 Bing. N. C. 143; 1 Hodg. 193; 2 Scott, 261; 132 E. R. 57.

3884. Claiming excessive costs.—On writ of summons.—Where the indorsement upon a writ of summons claims more for costs than is really due, the proper course of deft. is to pay the whole & then procure a taxation. Therefore, where a deft. paid less than the sum indorsed, & in consequence pltf.'s attorney proceeded in the action, although it afterwards turned out that deft. had paid more than pltf.'s attorney was actually entitled to, the ct. refused to compel pltf.'s attorney to pay the costs of deft. subsequent to the date of the payment.—**HOPKINSON v. FINNEY** (1846), 7 L. T. O. S. 112.

3885. — *]*—**MARTIN v. BARTON, MARTIN v. HULLS** (1859), 32 L. T. O. S. 301.

3886. Proceeding on forged writ.—Seal forged by solicitor's clerk.—Where an attorney's clerk had fraudulently simulated the ct. seal upon a writ of summons, the ct. set aside the writ & all proceedings thereon, & ordered the attorney, though blameless, personally to pay the costs.—**DUNKLEY v. FARRIS** (1851), 11 C. B. 457; 138 E. R. 551.

3887. Giving bad advice.—*Re YARDE & LOADER* (1886), 21 L. J. N. C. 44.

3888. Defending with knowledge that no defence possible.—**WILKINS v. GREER** (1884), 28 Sol. Jo. 535.

3889. Failure to deliver bills of costs.—Agreement for payment made under pressure.—**MORGAN v. HIGGINS** (1859), 1 Giff. 270; 32 L. T. O. S. 290; 5 Jur. N. S. 236; 7 W. R. 273; 65 E. R. 915.

Annotations:—*Refd.* **Davies v. Parry** (1859), 33 L. T. O. S. 197; **Watson v. Rodwell** (1878), 7 Ch. D. 625.

PART X. SECT. 4, SUB-SECT. 3.—B.
3873 i. Solicitor ordered to pay costs
—*Non-existent corporation.*—**FLATT v. WADDELL, TOWNSEND v.**
(1889), 18 O. R. 539.—CAN.

PART X. SECT. 4, SUB-SECT. 3.—
C. (b) i.
b. Failure to file warrant to prosecute.—Where proceedings had been stayed until the attorney filed his

warrant to prosecute, & the warrant was not filed, the attorney was ordered to pay deft.'s costs of defence, & of staying proceedings.—**SMITH v. TURNBULL** (1852), 1 P. R. 88.—CAN.

Sect. 4.—Liability for costs: Sub-sect. 3, C. (b) i., ii. & iii.]

3890. Acting against former client—Wrongly defending action—To set aside deeds prepared by himself.]—A suit which had been instituted to set aside certain deeds & documents by which pltf. had conveyed away the whole of her property, & to recover back the property lost by means of them, was defended on behalf of the party who claimed under the deeds by the solr. who had prepared the documents sought to be impeached. The bill was then amended by making the solr. a party for discovery, & asking that he might be ordered to pay the costs of the suit. The amended bill also contained charges of improper motives against him, which were not sustained:—*Held*: his having defended the suit on behalf of principal deft., & endeavoured to support the transactions sought to be impeached, in addition to want of caution in the preparation of the documents themselves, were sufficient reasons for ordering him to pay the costs of the suit if the estate sought to be made liable were insufficient to pay them, notwithstanding that the charges against him were not sustained. It was an additional circumstance against him, that when he acted as solr. in the suit, he knew that the estate sought to be made liable would probably not be able to pay the costs of the suit.—*BAKER v. LOADER* (1872), L. R. 16 Eq. 49; 42 L. J. Ch. 113; 21 W. R. 167.

Annotations.—*Consd.* Clark v. Girdwood (1877), 7 Ch. D. 9. *Apld.* Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394. *Refd.* Welman v. Welman (1880), 15 Ch. D. 570.

3891. Misconduct in bankruptcy proceedings—Solicitor of trustee in bankruptcy.]—The right of the solr. to a trustee in bkpcy. to be paid his costs out of the bkpt.'s estate is only the right of his client, the trustee; he has no independent right. If either the trustee or the solr. has been guilty of misconduct, the ct. can refuse to allow the solr.'s costs to be paid out of the estate, & this notwithstanding that the costs have been taxed & an allocatur has been made by the taxing master.—*Re POOLEY, Ex p. HARPER* (1882), 20 Ch. D. 685; 51 L. J. Ch. 810; 47 L. T. 177; 30 W. R. 650, C. A.

Annotations.—*Consd.* Re Humphreys, *Ex p.* Lloyd-George & George, [1898] 1 Q. B. 520. *Mentd.* Re Baker, *Ex p.* Baker (1887), 53 L. T. 233.

3892. — Acting without authority of official receiver.]—*Re FITZGERALD (LORD)* (1914), 112 L. T. 86.

ii. Instituting Improper Proceedings.

3893. Fraudulent proceedings.]—Bill to set [settlement] aside was dismissed with costs, & defts. were held entitled to that judgment even against pltf. who was made so without authority: but his whole expense, & also the whole expense above the costs taxed of all defts. except the husband, were decreed to be paid by solr. for pltf's., the transaction being considered as a combination between husband, creditors who authorised the bill, & the solr., to defraud the children.—*DUNDAS v. DUTENS* (1790), 1 Ves. 196; 2 Cox, Eq. Cas. 235; 30 E. R. 298, L. C.

Annotations.—*Consd.* Nurse v. Durnford (1879), 13 Ch. D. 764. *Refd.* Bligh v. Tredgett (1851), 5 De G. & Sm. 74; Norton v. Cooper, *Re* Manby & Hawksford, *Ex p.* Bittleston (1856), 3 Sm. & G. 375; Williams v. Preston (1882), 51 L. J. Ch. 927. *Mentd.* Shaw v. Jakeman

(1803), 4 East, 201; Randall v. Morgan (1805), 12 Ves. 67; Rider v. Kidder (1805), 10 Ves. 360; Sims v. Thomas, Strachan v. Same (1840), 12 Ad. & El. 536; Lassence v. Tierney (1849), 1 Mac. & G. 551; Surcome v. Pinniger (1853), 17 Jur. 196; Warden v. Jones (1857), 23 Beav. 487; Goldieutt v. Townsend (1860), 28 Beav. 445; Trowell v. Shenton (1878), 8 Ch. D. 318; Colonial Bank v. Whinney (1885), 11 App. Cas. 426; British Mutoscope & Biograph Co. v. Homer, [1901] 1 Ch. 671; *Re* Holland, Gregg v. Holland, [1902] 2 Ch. 360.

3894. —.]—Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger under a title adverse to that of the landlord. On suspicion of collusion an inquiry into the circumstances was directed; & the report confirming the fraud the bill was dismissed with costs to the landlord, as between attorney & client, to be paid by pltf. & his solr.; the latter to show cause why he should not be struck off the roll.—*DUNGEY v. ANGOVE* (1794), 2 Ves. 304; 7 De G. M. & G. 278, n.; 30 E. R. 644, L. C.

Annotations.—*Apld.* Wheatley v. Bastow (1855), 7 De G. M. & G. 261. *Refd.* Goodwin v. Gosnell (1845), 2 Coll. 457; Andrews v. Barnes (1888), 39 Ch. D. 133. *Mentd.* Johnson v. Atkinson (1796), 2 Anst. 798; Clarke v. Byne (1807), 13 Ves. 383; Bowyer v. Pritchard (1822), 11 Price, 103; Stephens v. Callanan & Salwey (1823), 12 Price, 158; Gale v. Bowser (1855), 3 W. R. 430; Cook v. Rosslyn (1859), 1 Giff. 167.

3895. —.]—Commission of bkpcy. superseded with costs, for fraud & misconduct. The solr. charged with costs; not as having taken creditor's accounts of the amount of his debt, without sufficient inquiry, being pressed by an execution; but as having by a false description obtained the docket contrary to the Central Order of Lord Rosslyn.—*Ex p. CONWAY* (1806), 13 Ves. 62; 33 E. R. 218, L. C.

Annotation.—*Distd.* *Ex p.* Heywood (1806), 13 Ves. 67.

3896. —.]—Upon superseding a fraudulent commission of bkpcy. the solr. charged with costs as well as the other parties; except as to a criminal prosecution, not under a direction in bkpcy. & in which he was not deft. No objection, that a commission of bkpcy. was taken out for the express purpose of defeating an execution.—*Ex p. ARROWSMITH* (1807), 14 Ves. 209; 33 E. R. 501, L. C.

Annotations.—*Refd.* Clarkson v. Parker (1838), 7 Dowl. 87. *Mentd.* *Ex p.* Blumer (1816), 1 Madd. 250.

3897. —.]—Where an act of bkpcy. was concerted between the solr., petitioning creditor & bkpt. for the sole purpose of defeating an execution creditor & the solr. was the prime mover of the plot. The fiat was annulled with costs as against the solr., bkpt. & petitioning creditor.—*Re HARDY, Ex p. BARNETT* (1841), 2 Mont. D. & De G. 325; 5 Jur. 757, Ct. of R.

3898. Groundless application.]—If deft.'s attorney, without sufficient ground, directs an application under the statute 43 Geo. 3, c. 46, that pltf., having held deft. to bail & recovered at trial less than £10, shall pay deft.'s costs; the ct., in discharging the rule, will direct the costs of the motion to be paid by the attorney.—*ROLFE v. ROGERS, ROGERS v. BURGESS* (1811), 4 Taunt. 191; 128 E. R. 302.

3899. Unnecessary proceedings — Petition by bankrupt.]—Bkpt. presenting an unnecessary petition, his solr. ordered to pay 40s. costs.—*Re PARKER, Ex p. PARKER* (1819), Buck. 313.

3900. —.]—*Re COOKE* (1889), 5 T. L. R. 407; 33 Sol. Jo. 397, C. A.; *reversg.* S. C. *sub nom.* *Re A SOLICITOR*, 5 T. L. R. 335, D. C.

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d. Breach of trust committed against mortgagor-client.]—*MCCANN v. DEMPSEY* (1857), 6 Gr. 192.—CAN.

e. Veratious proceedings—Three cutions against defendant.]—*HENRY v. COMMERCIAL BANK* (1860), 17 U. C. R.

104.—CAN.

f. Nothing involved in appeal except question of costs.]—An order for costs against a solr. personally will not be made (in the absence of proof

3901. Vexatious proceedings.]—The attorney & complainant shall pay costs upon the discharging of a rule obtained against a justice of the peace upon grounds appearing to be frivolous.—*R. v. FIELDING* (1758), 2 Burr. 654; 97 E. R. 495.

Annotation:—*Mentd.* *Caddy v. Barlow* (1827), 1 Man. & Ry. K. B. 275.

3902. — Repeated notices of justifying bail.]—The ct. will compel an attorney to pay the costs occasioned by his vexatious conduct in giving repeated notices of justifying bail at chambers in vacation.

Where deft. had been removed by *habeas corpus* from Lincoln Castle to the K. B. prison, & pltf. has been put to the expense of inquiring after six sets of bail, as to one of whom a false description had been given, the ct. ordered deft.'s attorney to pay the costs incurred by pltf., although it was sworn that he had no personal knowledge of the misdescription & insufficiency of the bail.—*BLUNDELL v. BLUNDELL* (1822), 5 B. & Ald. 533; 1 Dow. & Ry. K. B. 142; 106 E. R. 1286.

3903. — Frivolous & vexatious action.]—*Semble*: if a bill be dismissed at the hearing with costs, & pltf. be then out of the jurisdiction, & pltf.'s suit be so frivolous & vexatious that the bill could not have been filed *bond fide* in expectation of a favourable decree, or if the solr. of pltf. guarantee his client against the costs of the suit, the ct., upon the petition of deft., will compel the solr. of pltf. to pay the taxed costs.—*COCKLE v. WHITING* (1829), 1 Russ. & M. 43; Taml. 55; 39 E. R. 17.

Annotations.—*Refd.* *Re Jones* (1870), 6 Ch. App. 497; *Scott v. Hitchcock* (1904), 20 T. L. R. 759.

3904. — Impecunious client.]—*WARD v. PROCTER* (1891), 7 T. L. R. 244, D. C.

3905. Improperly continuing proceedings—After offer to pay.]—Costs incurred subsequently to an offer to pltf.'s attorney, to pay the costs of an attachment for non-payment of costs irregularly issued & to waive the attachment, ordered to be paid by pltf.'s attorney.—*HALTON v. STOCKING* (1831), 2 Cr. & J. 60; 1 Dowl. 296; 2 Tyr. 165; 1 L. J. Ex. 38; 149 E. R. 25.

3906. Improper petition—In bankruptcy.]—Attorney, under the circumstances, ordered to pay the costs of an improper petition in bkpey.—*Ex p. CUTHBERT* (1815), 1 Madd. 78; 56 E. R. 30.

3907. —.]—Costs of an improper petition, ordered to be paid personally by the solr. to petitioner.—*Re LLEWELLYN, Ex p. WILLIAMSON* (1833), 2 L. J. Bcy. 48.

3908. Suing in wrong court—In disobedience to client's instructions.]—Deft. being indebted to pltf. in the sum of £4 pltf.'s wife called upon an attorney requesting him to write to deft. for the amount, & if he did not pay within a certain time to sue him in the county ct. Subsequently to this the attorney called upon pltf.'s wife to know if the amount had been paid, & finding that it had not, he desired that the amount should not be received unless the sum also of £2 was paid for costs, as he had brought an action in the Bail Ct. Upon surprise being expressed at this course being pursued, he offered to take £2 & say nothing more of it. Nothing more was heard of the matter until deft. obtained a rule for judgment as in case of a nonsuit, which was the first intimation which pltf. had of any action having been commenced in the Bail Ct.:—*Held*: the attorney

must discontinue the action, & pay all costs of the action brought in the Superior Ct.—*HOLT v. NEW* (1851), 18 L. T. O. S. 98, 111; 15 J. P. Jo. 755.

3909. — High Court instead of county court.]—*WARD v. PROCTER* (1891), 7 T. L. R. 244, D. C.

3910. Prohibition obtained against proceedings—On facts within knowledge of solicitor.]—*Semble*: the attorney of pltf. in the Mayor's Ct., against whom a prohibition has been obtained upon facts within the knowledge of such attorney was personally liable for the costs of such prohibition.—*ROBINSON v. EMANUEL* (1874), L. R. 9 C. P. 414; 43 L. J. C. P. 244; 30 L. T. 500.

Annotations:—*Refd.* *Evans v. Nicholson* (1875), 32 L. T. 664. *Mentd.* *Hawes v. Paveley* (1876), 46 L. J. Q. B. 18; *R. v. County of London JJ. & L.C.C.*, [1891] 1 Q. B. 453.

3911. —.]—*GOLD v. TURNER* (1874), L. R. 10 C. P. 149; 23 W. R. 732.

Annotations:—*Refd.* *Evans v. Nicholson* (1875), 32 L. T. 664. *Mentd.* *Ellis v. Fleming* (1876), 1 C. P. D. 237; *Hawes v. Paveley* (1876), 46 L. J. Q. B. 18; *R. v. London Corp.* (1892), 61 L. J. Q. B. 329.

3912. — Where no opportunity to solicitor to show cause.]—The order for the costs of prohibition will not be made against pltf.'s solr. personally, unless the rule has been moved for in that form & the solr. has had an opportunity of showing cause.—*ROGERS v. LONDON, CHATHAM & DOVER Ry. Co.* (1877), 26 W. R. 192.

3913. Unsuccessfully applying for judgment under R. S. C., Ord. 14.]—*WARD v. PROCTER* (1891), 7 T. L. R. 244, D. C.

3914. Where no chance of success.]—*TAYLOR v. LAWRENCE* (1892), 27 L. Jo. 422.

3915. Unreasonable haste.]—Pltf. being beneficially entitled under a will to a one-ninth share of a sum of £900 expectant on the death of a tenant for life, demanded from the trustees of the will particulars of the investments of testator's estate. The estate was amply sufficient for payment of the legacy. Pltf.'s solr. having shown unreasonable haste in commencing litigation, the application for particulars was granted without costs as between the parties, but an order was made against the solr. under R. S. C., Ord. 65, r. 11, he should be disallowed his costs against his client.—*Re DARTNALL, SAWYER v. GODDARD*, [1895] 1 Ch. 474; 64 L. J. Ch. 341; 72 L. T. 404; 43 W. R. 644; 12 R. 237, C. A.

3916. Proceedings not in client's interest.]—The solr. of applt. will be ordered to indemnify his client against the costs of the appeal if it was prosecuted not in the interests of the client, but for the purposes of the solr.—*HARBIN v. MASTERMAN*, [1896] 1 Ch. 351; 65 L. J. Ch. 195; 73 L. T. 591; 44 W. R. 421; 12 T. L. R. 105, C. A.

Annotations:—*Mentd.* *Re Travis, Frost v. Greatorox* (1900), 69 L. J. Ch. 663; *Re Evans & Bottell's Contract*, [1910] 2 Ch. 438; *Re Earle, Tucker v. Donne* (1923), 131 L. T. 383.

Speculative actions.]—See Part X., Sect. 6, *post*.

iii. Improper Pleadings.

3917. General rule.]—A declaration reduced from four counts to two, & attorney to pay costs.—*MACKDONNEL v. GUNTER* (1736), Cooke, Pr. Cas. 128; 125 E. R. 1001; *sub nom.* *MACDONALD v. GUNTER*, Barnes, 335.

3918. False plea.]—*FERGUSON v. MACRETH* (1784), 4 Term Rep. 371, n.; 100 E. R. 1070.

Annotations:—*Mentd.* *Kepp v. Wiggett* (1848), 6 C. B. 280; *Turquand v. Hennet* (1849), 7 C. B. 179.

of misconduct) on the ground that nothing was involved in the appeal except costs of the appeal.—*R. v. GEROW, Ex p. GROSS* (1915), 43 N. B. R. 352.—*CAN.*

PART X. SECT. 4, SUB-SECT. 3.—C. (b) iii.

3918 i. False plea.]—Where in ejectment deft., by his plea, purports to defend for a part of the land claimed

in pltf.'s writ, but in fact describes a different lot, pltf. will be entitled to judgment. If such a plea be put in with the design of misleading, the attorney may be made liable to pay

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3919. —.].—Where a sham plea was pleaded, calculated to raise issues requiring different modes of trial, the ct. suffered pltf. to sign judgment as for want of a plea, & made deft. or his attorney pay the costs occasioned by the plea, & the costs of the rule for correcting the proceedings.—*THOMAS v. VANDERMOOLEN* (1818), 2 B. & Ald. 197; 106 E. R. 339.

Annotation:—Refd. Young v. Gadderer (1823), 1 Bing. 380.

3920. —.].—Sham pleas tendering issues which required different modes of trial, & pleaded so as to entrap pltf., set aside with costs to be paid by the attorney, though he was expressly instructed by deft. to plead a dilatory plea.—*VINCENT v. GROOME* (1819), 1 Chit. 182.

3921. —.].—False plea put in for delay, ordered to be taken off the file with costs, to be paid by the solr.—*AUBREY v. ASPINALL* (1822), Jac. 441; 37 E. R. 917, L. C.

Annotation:—Refd. Re Commonwealth Land, Building, Estate & Auction Co., Ex p. Hollington (1873), 29 L. T. 502.

3922. —.].—If a mere sham plea is so ingeniously drawn as to render it necessary for pltf.'s attorney to consult counsel, & thereby cause delay & expense, the ct. will permit pltf. to sign judgment as for want of a plea, & make deft. or his attorney pay the costs.—*SHADBOLT v. BERTHOUD* (1822), 1 Dow. & Ry. K. B. 446.

Annotation:—Folld. Corbett v. Powell (1822), 1 Dow. & Ry. K. B. 448.

3923. —.].—Declaration by exor. on bond, delivered on Feb. 1, sham plea on Feb. 6, of an assignment of the bond before the death of testator & payment to the assignee; deft. ruled to abide by plea on Feb. 16, replication took issue on the payment pleaded, & pltf. entered a *similiter* for deft.; *similiter* struck out by deft., who filed demurrer to the replication:—*Held*: notwithstanding pltf.'s delay he might sign judgment as for want of a plea, & the ct. ordered pltf.'s attorney to pay the costs.—*CORBETT v. POWELL* (1822), 1 Dow. & Ry. K. B. 448.

Annotation:—Refd. Smith v. Hardy (1832), 1 Moo. & S. 676.

3924. False allegation in interpleader proceedings.]—A bill of interpleader, where the whole ground for relief rested on a false allegation of a threat & intention by one of defts. to bring an action, was dismissed; & pltf.'s solr. who filed the bill, being proved to be aware that the allegation was groundless, it was ordered on the petition of one of defts., for whom he also acted as solr., that all items in his bill of costs in respect of the interpleader suit be disallowed.—*Re HOOK, COOK v. ROSSLYN (EARL)* (1861), 3 Giff. 175; 5 L. T. 133; 66 E. R. 371; *sub nom. COOK v. ROSSLYN (EARL), ROSSLYN (EARL) v. WALROND, Re HOOK*, 7 Jur. N. S. 1070.

3925. Unreasonable plea of fraud & undue influence.]—Upon an application by pltf., who was propounding a will for which the ct. pronounced, that deft.'s solr. should be ordered to pay the costs upon the ground that charges of undue influence

& fraud had been unreasonably placed on the record:—*Held*: as the facts did not show that the solr. had made the case his own & was really the person fighting the case, he ought not to be ordered to pay the costs personally. In such a case there is no difference between the case of pltf. & that of deft.—*SCOTT v. HITCHCOCK* (1904), 20 T. L. R. 759.

iv. Improper Conduct During Proceedings.

2926. Affidavits taken before solicitor in cause.]

—Affidavits taken before a person who was a solr. in the cause cannot be read. The petition dismissed, & the costs directed to come out of the solr.'s pocket who took the affidavits.—*Re HOGAN* (1754), 3 Atk. 813; 26 E. R. 1264, L. C.

Annotations:—Refd. Foster v. Harvey (1863), 11 W. R. 899; *Re Gregg, Re Franco* (1869), L. R. 9 Eq. 137; *Re Commonwealth Land, Building, Estate & Auction Co., Ex p. Hollington* (1873), 29 L. T. 502; *Bourke v. Davis* (1889), 44 Ch. D. 110.

3927. Swearing falsely.]—Deft. in putting in bail, misinstructed the filazer as to the Christian name of one of two ptfs.; pltf.'s attorney thereupon swore that there were no bail in that action & moved that deft.'s attorney might pay debts & costs for superseding deft. The ct. discharged the rule with costs, to be paid by the attorney so swearing.—*CLARKE v. GORMAN* (1811), 3 Taunt. 492; 128 E. R. 195.

3928. —.].—*RIDSDALE v. LAUTOUR* (1851), 17 L. T. O. S. 77.

3929. Giving wrong evidence -- As to identity of witness.]—Pltf.'s attorney, in a cause tried at *Nisi Prius*, contradicted the testimony given by one of deft.'s witnesses, who had sworn that he never had had any conversation with the former on the subject in question—by stating positively that he had, & what the conversation was. Deft.'s witness was in consequence committed for perjury, but was afterwards discharged, on the attorney stating the next day that he might have been mistaken in the person of the witness for that of his brother, who greatly resembled him. An application being made for a new trial under these circumstances; & that pltf. or his attorney should be ordered to pay the costs of the former trial; the ct. granted a rule accordingly, which was afterwards made absolute, the ct. ordering pltf.'s attorney to pay the costs of the former trial.—*TRUBODY v. BRAIN* (1821), 9 Price, 76; 147 E. R. 26.

3930. Refusal to disclose name of client.]—Pltf. in an action on a statute passed for the preservation of game, being insolvent, & his attorney refusing to tell by whom he was employed, the ct. directed the action to be stayed, & ordered the attorney to pay the costs that had been incurred unless in ten days he gave security for the payment of the costs.—*SMITH v. MATSON* (1824), 2 L. J. O. S. K. B. 92.

3931. Improperly signing judgment.]—Where a plea was delivered after the time for pleading had expired, but before judgment actually signed, of which pltf.'s attorney was informed, but afterwards, on the ground that the time for pleading was out, signed judgment, the ct. set aside the

the costs out of his own pocket.—*McMARTERS v. GRAHAM* (1859), 2 Thom. 417.—CAN.

3918 II. —.].—*HADLY v. SHERMAN* (1859), 2 Thom. 416.—CAN.

*g. Facts suppressed in petition.]—**Re NESBITT* (1850), 2 Ir. Jur. 252.—IR.

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C. (b) iv.

*h. General rule.]—*Where a solr. adopts a course obviously unreasonable

& perverse, he will be ordered to pay the costs occasioned thereby.—*BRIGHAM v. SMITH* (1869), 2 Ch. Ch. 462.—CAN.

*k. Misleading solicitor for opposite party.]—*An attorney having received a declaration without denying that he was deft.'s attorney, & a plea having been requested from him several times, he not denying his character as attorney for deft., the ct. set aside interlocutory judgment,

signed for want of a plea, without costs, but stated that they would on application against the attorney order him to pay the costs.—*DOBIE v. MCFARLANE* (1834), 2 O. S. 285.—CAN.

*l. Tender of costs unreasonably refused.]—**RUTTAN v. ROBERTSON* (1845), 2 U. C. R. 37.—CAN.

*m. Notice of discontinuance served twelve months after final judgment entered.]—*Two defts., F. & W., not

judgment for irregularity, on payment of costs by pltf.'s attorney.—*AMPTHILL v. SEMPLE* (1832), 2 Cr. & J. 358; 1 Dowl. 316; 2 Tyr. 312; 1 L. J. Ex. 102; 149 E. R. 153.

3932 —.]—A writ issued in an action intended to be brought against one John G., by mistake described him as Henry G., & was served upon Henry G. The mistake in the service being discovered, notice was given to Henry G. not to appear. A copy of a *pluries* summons was some months afterwards left at the residence of John G., the real deft., still describing him as Henry G. Deft. gave this copy to Henry G., in whose name L., an attorney, entered an appearance, demanded a declaration, & afterwards, with full knowledge that the appearance was not appearance in the cause, signed judgment of *non pros.* for want of a declaration. The ct. set aside the judgment for irregularity, with costs to be paid by the attorney.—*BELCHER v. GOODERED* (1847), 4 C. B. 472; 16 L. J. C. P. 176; 9 L. T. O. S. 127; 136 E. R. 591.

3933 —.]—C. L. P. Act, 1852 (c. 76), s. 25, which enables pltf. to make on the writ of summons a special indorsement of his claim, with interest, is not confined to cases in which interest is payable by contract, express or implied.

But in all cases, except those of bills of exchange & promissory notes, if a pltf., by such indorsement claims interest where it is not due by contract, express or implied, & on default of appearance signs judgment for it, the ct. will set aside the judgment, & make the attorney pay the costs.—*RODWAY v. LUCAS* (1855), 10 Exch. 667; 3 C. L. R. 615; 24 L. J. Ex. 155; 24 L. T. O. S. 277; 1 Jur. N. S. 429; 3 W. R. 212.

Annotations :—*Reid*, *Ryley v. Master Sheba Gold Mining Co. v. Trubshawe*, [1892] 1 Q. B. 674. *Mentd.* *Wilks v. Wood*, [1892] 1 Q. B. 684.

3934. Improperly adding word to summons—Without leave of judge.—The word “peremptory” was put upon a summons to attend at chambers without the authority of the judge, & the ct. inflicted the payment of costs upon the attorney.—*FINNERTY v. SMITH* (1835), 1 Bing. N. C. 649; 1 Hodg. 158; 1 Scott, 743; 131 E. R. 1267.

3935. Refusal of counsel to admit documents—In breach of agreement to admit—Solicitor not present at trial.—Where pltf. was *non-suited* in consequence of a refusal by deft.'s counsel at the trial to admit certain documents which had been agreed to be admitted by deft.'s attorney's agent, the ct. granted a new trial, with costs to be paid by deft., but they refused to make deft.'s attorney pay the costs, because he was not present at the trial when the objection was taken, & had given no instructions to counsel to do so.—*DOE d. TINDAL v. ROE* (1836), 5 Dowl. 420.

3936. Making scandalous statements—In reply to interrogatories.—The attorney for defts. having been examined as their witness, & having made certain scandalous & impertinent statements in his depositions in reply to the last interrogatory, was compelled to pay the costs of expunging such scandalous & impertinent matter.—*GUDE v. MUMFORD* (1837), 2 Y. & C. Ex. 445; 1 Jur. 577; 160 E. R. 471.

Annotations :—*Mentd.* *Bally v. Boul* (1851), 14 Beav. 595; *Pridie v. Field* (1854), 19 Beav. 497; *Banks v. Braithwaite* (1862), 32 L. J. Ch. 35; *Re Grant*, *Nevinson v. United Kingdom Temperance & General Provident Institution* (1915), 59 Sol. Jo. 316.

defending an interlocutory judgment was entered against them. Notice of discontinuance as to remaining defts. was filed & final judgment entered against F. & W., the names of the other defts. having been omitted from the final judgment. The notice of discontinuance was not served on remain-

ing defts. for about a year after final judgment entered. Judgment was set aside & defts. F. & W. allowed in to defend. Pltf.'s solr. who entered final judgment, to pay costs.—*MACDONALD v. FAIRCHILD Co.* (Man.) (1909), 11 W. L. R. 236.—*CAN.*

n. *Refusal of attorney to claim for*

3937. Improperly applying for special jury—Application not proceeded with.—*BLACKBURN v. GILLET* (1850), 15 L. T. O. S. 256.

3938. Making wilful misrepresentation—Whereby amendment refused.—Where the judge refused an amendment at the trial by reason of the wilful misrepresentation of pltf.'s attorney, the ct., in making absolute a rule for a new trial on the ground that the amendment ought to have been made, ordered that the attorney should pay the costs of the rule.—*WILLIAMS v. JONES* (1855), 26 L. T. O. S. 93; 4 W. R. 99.

3939. Improperly opposing application—To set aside attachment for non-payment of purchase-money—Where failure to make good title.—Lands having been ordered by the ct. to be sold by private contract, an application was made by an illiterate person to the vendor's solr., who had the conduct of the sale, to become a purchaser of part of the premises; & a conditional contract was entered into, whereby the vendor agreed to sell & the purchaser to purchase the premises for £100. The purchaser also agreed at his own expense to obtain an order of the ct. confirming the sale, & in default that the vendor might obtain such an order at his, the purchaser's, expense. On the same day the purchaser gave a written retainer to the vendor's solr. to act as his attorney. The purchaser was a marksman, & both the above instruments were witnessed by the same solr. Afterwards an order was obtained confirming the purchase & ordering payment of the money. The purchaser, after the contract, finding that a good title could not be made to the premises, failed to pay the purchase-money, whereupon another order was obtained for payment, in default of which the purchaser was attached & committed to prison. On motion to set aside the attachment, the vendors & their solr. opposed the application. The ct. ordered the attachment to be set aside, & prisoner to be discharged, the agreement to be cancelled, & the costs of the prisoner throughout the proceedings, & of all parties on the motion, to be paid by the solr.—*BROMAGE v. DAVIES*, *BROMAGE v. SNEAD*, *Re GAMES* (1858), 31 L. T. O. S. 280; 4 Jur. N. S. 683.

Annotation :—*Reid*, *Re Commonwealth Land, Building, Estate & Auction Co.*, *Ex p. Hollington* (1873), 29 L. T. 502.

3940. Refusal to produce order to registrar—For payment of money out of court.—An order was made for the payment out of ct. of a sum of money to a married woman for her separate use. The solr. who had the charge & carriage of the order refused to produce it to the registrar, to enable him to countersign the cheque of the Accountant-General, except upon condition of his being paid thereout a sum of money, which, he alleged, he had advanced to the lady, or become security for, upon the faith of his being repaid out of the said money. Upon motion, he was directed to produce the order & to pay the costs of the motion.—*BENYON v. AMPHLETT*, *Re SIDNEY* (1862), 8 Jur. N. S. 759.

3941. Unreasonable insistence on rights—On taking accounts in chambers—Adjournment of particular items to judge.—Where accounts are being taken in chambers before the chief clerk, either party has a right to have an item which has

wages of crew unless funds provided by crew.—*Re ATTORNEY & PROCTOR* (1866), 1 Ind. Jur. N. S. 305.—*IND.*

o. *Making wilful misrepresentation.*—If pltf.'s attorney wilfully in the bill describe pltf. as resident within the jurisdiction when in fact he is resident out of the jurisdiction, he

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been found against him adjourned before the judge without taking out a summons for that purpose; & where a question of principle is involved in a particular item it may be necessary to do this. But the ordinary practice is to wait till the account is completed, & then take the adjournment once for all before the judge. If a solr. were to insist upon his right to take particular items before the Judge in an unreasonable manner, the ct. might make him pay the costs personally.—**UPTON v. BROWN** (1882), 20 Ch. D. 731; 47 L. T. 289; 30 W. R. 817, C. A.

Annotations:—Mentd. Walker v. Bunkell (1883), 52 L. J. Ch. 596; Hewlings v. Graham (1901), 70 L. J. Ch. 568.

3942. Failure to pay court fees.]—BAKEWELL v. CORNISH (1886), *Times*, Nov. 24.

3943. Suppressing facts—Pending bankruptcy proceedings.]—SCHMETTEN v. FAULKS (1893), 37 Sol. Jo. 389.

3944. — Pending lunacy petition.]—A solr. believing his client to be of sound mind, obtained an order for her on an *ex p.* application without disclosing the fact that a petition in Lunacy was pending against her. She was subsequently found to be of unsound mind. Upon an application to discharge the order:—*Held*: the solr. had not been guilty of such professional misconduct as to make him liable for the costs.—Re ARMSTRONG (GEORGE) & SONS**, [1896] 1 Ch. 536; 65 L. J. Ch. 258; 74 L. T. 134; 44 W. R. 281; 40 Sol. Jo. 228.**

Annotation:—Mentd. Didsheim v. London & Westminster Bank, [1900] 2 Ch. 15.

3945. Improperly issuing subpoena — Without authority of master.]—Re SANDERS (1919), 147 L. T. Jo. 212.

(c) In Non-Contentious Matters.

3946. Drawing fraudulent deed—Where acting under directions of client.]—An attorney's saying that he only followed directions in drawing deeds under fraudulent circumstances, will not excuse him from paying costs.—BENNET v. VADE** (1742), as reported in 2 Atk. 324.**

Annotations:—Refd. Bellamy v. Sabine (1835), 2 Ph. 425; Beadles v. Bunch (1839), 9 L. J. Ch. 57. **Mentd.** Middleton v. Sherburne (1841), 4 Y. & C. Ex. 358; Allen v. M'Pherson (1847), 1 H. L. Cas. 191; Jones v. Gregory (1863), 2 De G. J. & Sm. 83.

3947. — Solicitor taking benefit.] — Deed between husband & wife improperly obtained from the husband, through the wife's solr., who took a benefit under it, set aside, with costs to be paid by such solr.—PROCTOR v. ROBINSON** (1866), 35 Beav. 329; 14 L. T. 42; 14 W. R. 381; 55 E. R. 922; *affd.*, 15 W. R. 138, L. JJ.**

3948. Improperly advising client to sign document.]—BRIDGEMAN v. GREEN (1757), as reported in Wilm. 58; 97 E. R. 22.

Annotations:—Apld. Huguenin v. Baseley (1807), 14 Ves. 273; Baker v. Loader (1872), L. R. 16 Eq. 49. **Refd.** Harrison v. Wiltshire (1834), 4 L. J. Ch. 30; Cockell v. Taylor (1852), 15 Beav. 103; Smith v. Kay (1859), 7 H. L. Cas. 751. **Mentd.** Dent v. Bennett (1839), 4 My. & Cr. 269; Cooke v. Lamotte (1851), 15 Beav. 234; Reynell v. Sprye, Sprye v. Reynell (1852), 21 L. J. Ch. 633; Cox v. Bruton (1857), 5 W. R. 544; Lyon v. Home (1868),

L. R. 6 Eq. 655; Coultwas v. Swan (1871), 19 W. R. 485; Moxon v. Payne (1873), 8 Ch. App. 881; Vane v. Vane (1873), 8 Ch. App. 383; *Re Yates, Ex p. Brown* (1879), 27 W. R. 651; Allicard v. Skinner (1887), 36 Ch. D. 145; Berry v. Glazebrook (1891), 7 T. L. R. 574; *Re McCallum, McCallum v. McCallum*, [1901] 1 Ch. 143; Turnbull v. Duval, [1902] A. C. 429.

3949. Assisting client in execution of illegal conveyance.]—A solr. who assists his client in the execution of an illegal conveyance may properly be made a party to a suit to set aside the conveyance in question.

A bill was filed to set aside an illegal conveyance prepared by T., a solr. The bill charged fraudulent contrivance & undue influence against T., & prayed that T. might be ordered to pay the costs of the suit. These charges not being substantiated:—*Held*: the costs of T. so far as they had been occasioned by having to meet these charges, must be paid by pltf's.; but otherwise T., though not liable to pay costs, was not entitled to any costs as against pltf's.—**PHEEP v. AMCOTTS** (1869), 17 W. R. 703.

3950. Acting for both sides—In matter of voluntary settlement.]—A solr. acted for both parties in the matter of a voluntary settlement, which was set aside for undue influence. He was made a deft. to the suit, for that purpose. The ct., though exonerating him from culpability in the matter, made him bear his own costs, because he had not acted with proper prudence in the matter.—HARVEY v. MOUNT** (1845), 8 Beav. 439; 14 L. J. Ch. 233; 9 Jur. 741; 50 E. R. 172.**

Annotations:—Apld. Reynell v. Sprye, Sprye v. Reynell (1849), 8 Hare, 222. **Consd.** Barker v. Loader (1872), L. R. 16 Eq. 49. **Refd.** Barnes v. Addy (1873), 21 W. R. 324.

3951. — In matter of voluntary conveyance.]—REYNELL v. SPRYE, SPRYE v. REYNELL (1849), 8 Hare, 222; 16 L. T. O. S. 103; 68 E. R. 340; *affd.* (1852), 1 De G. M. & G. 660, L. JJ.

Annotations:—Refd. Hilton v. Woods (1867), L. R. 4 Eq. 432; Arkwright v. Newbold (1881), 17 Ch. D. 301; Rees v. De Bernardy, [1896] 2 Ch. 437; Parkinson v. College of Ambulance & Harrison, [1925] 2 K. B. 1. **Mentd.** *Re Tratt, Ex p. James* (1853), 3 De G. M. & G. 493; Parr v. Jewell (1855), 1 K. & J. 671; Parker v. Clarke (1861), 7 Jur. N. S. 1267; Traill v. Baring (1864), 4 De G. J. & Sm. 318; Hermann v. Charlesworth (1905), 74 L. J. K. B. 620.

3952. — In matter of sale to company.]—In Apr. 1871, D. was the solr. for B.; he was also the solr. for the intended co., & for A. Another person was solr. for C.:—*Held*: D. committed a great error in acting as solr. for both vendor & purchaser, & also for A., who had an interest adverse to the co., & must therefore pay the costs of the suit.—PHOSPHATE SEWAGE CO. v. HARTMONT** (1876), 45 L. J. Ch. 465; 34 L. T. 154; 24 W. R. 530; *affd.* (1877), 5 Ch. D. 394, C. A.**

Annotations:—Mentd. New Sombrero Phosphate Co. v. Erlanger (1876), 35 L. T. 309; Metzler v. Wood (1877), 47 L. J. Ch. 139; *Re Collie, Ex p. Adamson* (1878), 8 Ch. D. 807; Nant-y-Glo & Blaenau Ironworks Co. v. Grave (1878), 12 Ch. D. 738; Rees v. De Bernardy, [1896] 2 Ch. 437.

D. Negligence.

(a) In General.

See R. S. C., Ord. 65, r. 5.

3953. Gross neglect.]—Upon the attorney's or solr.'s appearing to be guilty of a gross neglect,

will be ordered to pay the costs of the motion to stay the proceedings until security for costs is given.—**KNOX v. O'BRIEN** (1840), 3 I. Eq. R. 62.—**IR.**

p. Refusal to indorse admission of service.]—If the solr. upon whom the subpoena to hear judgment is served, refuses to indorse on the original an admission of the service thereof, he will be ordered to pay the costs rendered necessary by such refusal.—ROSS v. WOOD** (1840), 2 Dr. & Wal.**

490.—**IR.**

PART IV. SECT. 4, SUB-SECT. 3.—C. (c).

q. Fraudulent misappropriation of money.]—MCLEAN v. GRANT (1873), 20 Gr. 76.—**CAN.**

r. Assisting in obtaining fraudulent release.]—A solr. assisting his client in obtaining a fraudulent release, properly made a party; & liable to costs if the principal be not solvent.—

BOWLES v. STEWART (1803), 1 Sch. & Lef. 227.—**IR.**

t. Wrongful description of property on sale.]—TAYLOR v. GORMAN (1842), 4 I. Eq. R. 550.—**IR.**

PART X. SECT. 4, SUB-SECT. 3.—D. (a).

3953 i. Gross neglect.]—An attorney was ordered to pay costs *de bonis propriis* on condition that his client did not pay the same within a fortnight

the ct. will order him to pay the costs.—*FAWKES v. PRATT* (1719), 1 P. Wms. 593; 24 E. R. 531.

3954. — Necessity for clear proof.]—The ct. will not, on a summary application, order an attorney to pay the costs of setting aside proceedings for irregularity, even where he has admitted that it was owing to his error, & has promised to pay, unless there is clear evidence of the nature of the negligence, & that it was gross.—*DICKINSON v. JACOBS, Re AN ATTORNEY* (1862), 5 L. T. 757; 10 W. R. 303.

3955. Delay.]—Delay having taken place, the solr. was ordered to pay personally the costs of a motion to take the carriage of proceedings, although the motion was refused, the solr. to have his remedy against his client.—*Re JACKSON* (1851), 16 L. T. O. S. 421.

3956. — In administration proceedings.]—Where very considerable delay had occurred in proceedings under a decree in an administration suit which, in the opinion of the ct., ought to be accounted for, the ct., in exercise of the powers afforded by R. S. C., Ord. 65, r. 11, ordered that, in the taxation of the costs, the matter be referred specially to the taxing master, & he be directed to inquire into the cause of the delay, to make such disallowance of costs in respect thereof as he might think fit, & to call upon the solrs. engaged in the conduct of the case to show cause why that disallowance should not be made.—*FURNESS v. DAVIS* (1885), 51 L. T. 854; 33 W. R. 320; 1 T. L. R. 211.

3957. — —.]—An administration action was commenced in May, 1875, & in Nov. 1887, was heard on second further consideration. It then appeared that the costs would probably amount to a sum almost equal to the value of the estate. The judge thereupon referred the matter to the taxing master under R. S. C., Ord. 65, r. 11, for inquiry & report as to the delay & the costs occasioned thereby, which order was affirmed on appeal. The taxing master reported that there had been great delay in the suit, which was caused by the conduct of the solr. for plff., & he disallowed considerable sums of the costs as between the various solrs. & their clients:—*Held*: the ct. will not permit the costs occasioned by improper litigation, or by the negligent conduct of administration proceedings, to be paid out of an estate under its care; the amount of costs allowed by a taxing master as between the client & his solr. is not conclusive of the amount which the ct. will allow out of the estate; & therefore the ct. had jurisdiction to refuse to allow plff., a trustee, to have the full amount of the costs allowed him in taxation paid out of the estate.—*BROWN v. BURDETT* (1888), 40 Ch. D. 244; 60 L. T. 520; 37 W. R. 533; 5 T. L. R. 88, C. A.

Annotations:—*Apld. Re Scowby, Scowby v. Scowby* (1897), 66 L. J. Ch. 327. *Distd. Re Burn & Berridge* (1908), 99 L. T. 606.

3958. Reckless conduct -- Interests of other solicitor disregarded.]—*GIBBS v. TREDWELL, Re ARMSTRONG* (1886), 30 Sol. Jo. 181, C. A.

3959. Failure to summon commissioners.]—The quorum comrs. residing in the country have a right to be summoned to attend all meetings held under flats directed to their lists; & the ct. will visit the solr., who neglects to summon them,

where the facts showed that his conduct was grossly negligent.—*KESSACK v. KESSACK'S TRUSTEE*, [1919] W. L. D. 96.—S. AF.

a. Duty to advise client of his responsibility.]—The solr. of a party beneficially interested, using the name of a mere trustee in litigating a question

of interest, is bound to put such mere trustee on his guard, as to his responsibility for damages or costs, & by neglecting to do so, may render himself responsible in default of his principal without giving any undertaking, or being guilty of any misconduct.—*Re BURTON, Ex p. SCALLAN; Ex p.*

with costs.—*Re BAKER, Ex p. WILLIAMS* (1836), 5 L. J. Bcy. 37.

3960. Taking insufficient security.]—A solr. took an insufficient security for his client, & the nature of the transaction was such, as in the opinion of the ct. to create a case of combined agency & trust. He was held, under the circumstances, personally responsible for the deficiency, & for the costs of suit.—*CRAIG v. WATSON* (1845), 5 Beav. 427; 50 E. R. 167.

Annotations:—*Distd. Chapman v. Chapman* (1870), L. R. 9 Eq. 276. *Consd. British Mutual Investment Co. v. Cobbold* (1875), L. R. 19 Eq. 627; *Dooby v. Watson* (1888), 39 Ch. D. 178. *Reid. Crawford v. Crawford* (1867), 16 W. R. 411; *Banbury v. Bank of Montreal*, [1918] A. C. 626.

3961. Failure to deliver papers.]—Where the usual papers had not been left with the ct., plff.'s solr. was ordered personally to pay to deft. the costs of the day.—*SOMERVILLE v. JAMIESON* (1853), 20 L. T. O. S. 205; 1 W. R. 123.

3962. Negligently preparing deed — Marriage settlement.]—The solr. who had prepared the marriage settlement, being also a trustee of it, & as such a party to the suit, had severed in his defence for his co-trustee. The ct. considering that the litigation had been caused by his negligence in preparing the settlement, refused to allow him his costs in the suit.—*BARROW v. BARROW* (1854), 5 De G. M. & G. 782; 3 W. R. 122; 43 E. R. 1073; *sub nom. BARROW v. WILLIAMS, BARROW v. BARROW*, 24 L. T. O. S. 198.

Annotations:—*Mentd. Re Ford* (1863), 3 New Rep. 349; *Spirett v. Willows* (1865), 3 De G. J. & Sm. 293; *Re Cooke's Trusts* (1887) 56 L. T. 737.

3963. — Voluntary conveyance.]—*BAKER v. LOADER*, No. 3890, *ante*.

3964. — Voluntary settlement—Omission of power of revocation.]—A decree being made for setting aside a voluntary settlement, on the ground of the omission of a power of revocation:—*Held*: the solr. who prepared the deed, & who was one of the trustees named in it, must pay his own costs as a penalty for not having called the settlor's attention to the absence of the power.—*HENSHALL v. FEREDAY* (1873), 27 L. T. 743; 21 W. R. 240; *affd.*, 29 L. T. 46, L. JJ.

3965. — Mistake.]—In the absence of fraud the ct. has no jurisdiction to order a solr. who has made a mistake in the preparation of a document to pay the costs of a suit for its rectification.—*CLARK v. GIRDWOOD* (1877), 7 Ch. D. 9; 47 L. J. Ch. 116; 37 L. T. 614; 26 W. R. 90, C. A.

Annotation:—*Reid. Lovesy v. Smith* (1880), 15 Ch. D. 655.

3966. Failure to make inquiries—As to provisions in settlement—Solicitor to grantee of annuity.]—A married woman having personal property under a will for life & absolutely, a settlement is made of it to her separate use without power of anticipation, with a power of appointment by deed. Without adverting to the clause against anticipation, & in alleged ignorance of its existence, she & her husband grant an annuity in consideration of £215, & an order is made for payment of the dividends of her separate property to the grantee to secure the annuity, & he receives the dividends & hands over the surplus from time to time. The clause against anticipation is then discovered, & the wife petitions for discharge of the order for payment of the dividends to the grantee of

JONES (1827), 1 Mol. 63.—IR.

b. Employment of perjurer to serve process.]—A man notoriously guilty of perjury, was employed by an attorney to make service of process. He made the usual affidavit of service which was verified by the attorney. The affidavit was taken off the file, &

Sect. 4.—Liability for costs: Sub-sect. 3, D. (a) & i., ii., iii., iv. & v., & (c) i.]

the annuity, for restitution of the money received, & for costs against the grantee & his solr.:—*Held*: the order must be discharged, & the restitution not being pressed for, no order made upon that part of the petition, but costs given against the grantee, his solr., & her husband.—*FORTY v. REAY* (1855), 3 W. R. 317.

(b) *Before Trial.*

i. *In General.*

See R. S. C., Ord. 65, r. 5.

3967. Failure to give security for costs.]—LADY-WELL MINING CO. v. HUGGONS, [1885] W. N. 55.

3968. Omission to make application in time—For cause to stand over.]—SHORTER v. TOD HEATLEY (1894), 38 Sol. Jo. 239.

3969. Failure to ascertain position of defendants—Dissolution of defendant company before leaving.]—Where pltf. had obtained judgment in an action against a co. & on proceeding to enforce his judgment discovered that, after the action had been set down for trial, but before the hearing, the co. had been dissolved under Companies Act, 1862 (c. 89), ss. 142, 143, the solrs. who appeared for the co., & who at the hearing did not know of the actual dissolution of the co., were ordered to pay to pltf. his costs as between solr. & client as from the date of the hearing only, on the ground that they had not at that date used due diligence to ascertain whether the co. was dissolved or not.—*SALTON v. NEW BEESTON CYCLE CO.*, [1900] 1 Ch. 43; 69 L. J. Ch. 20; 81 L. T. 437; 48 W. R. 92; 16 T. L. R. 25; 7 Mans. 74.

Annotation:—*Dbtd. Yonge v. Toynbee*, [1910] 1 K. B. 215.

3970. Commencing action in name of infant.]—Solr., having commenced action on behalf of an infant by her next friend who was also an infant:—*Held*: personally liable, as between solr. & client, for costs which defts. had incurred in defending action, including costs of application to set aside writ, but excluding costs of defts., who had put forward the next friend.—*FERNÉE v. GORLITZ*, [1915] 1 Ch. 177; 84 L. J. Ch. 404; 112 L. T. 283.

ii. *In respect of Writ.*

3971. Irregularity of writ—Cause of action wrongly stated.]—ANON. (1739), 7 Mod. Rep. 299; 87 E. R. 1253.

3972. — Name of defendant wrongly stated.]—ANON. (1739), 7 Mod. Rep. 299; 87 E. R. 1253.

3973. — Giving false residence of plaintiff.]—An attorney who gives a false residence of his client [ptf. in the action] without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him, but he is not liable to pay the costs of the action, if he is *bonâ fide* unable, after proper inquiry, to give his client's residence.—*NEAL v. HOLDEN* (1835), 3 Dowl. 493; *previous proceedings* (1834), 3 L. J. Ex. 149.

3974. — — —.]—In a writ of summons it is

the process-server prosecuted to conviction for perjury:—*Held*: the attorney was personally liable to the costs of the prosecution.—*MORGAN v. FLEMING* (1851), 3 Ir. Jur. 9.—*IR.*

PART IV. SECT. 4, SUB-SECT. 3.—D. (b) i.

a. Costs of rectification of mistake—Mistake in title of cause.]—Order being rendered nugatory by mistake

in the title of the cause, the solr. was ordered to pay the costs of motion to rectify the mistake.—*BLACK v. CREIGHTON* (1828), 2 Mol. 552.—*IR.*

d. — — —.]—Mistake arising from negligence of clerk or solr. allowed to be rectified, the order on the motion to amend, providing that the costs should not be charged against the client on fund.—*CALEDON (LORD) v. EVORY* (1828), 1 Mol. 224.—*IR.*

necessary to state truly the residence of pltf.; the business address of pltf. is not enough.

The solr. must take the consequences of his wrongful act; he must indemnify deft. against the costs of the action & he must pay the costs of this application of all parties except the Incorporated Law Society (HUDDLESTON, B.).—*Re A SOLICITOR, KARPELES v. FRIEDLANDER* (1889), 53 J. P. 264; 5 T. L. R. 339.

3975. Failure to return writ with affidavit of service—Country solicitor.]—HOWELL v. WATTS (1844), 2 L. T. O. S. 350.

iii. *In respect of Pleadings.*

3976. Delivery of incomplete particulars—In action for account.]—If an attorney delivers a particular containing only the debtor side of the account he may be made to pay the costs subsequently incurred in the action.—*ADLINGTON v. APPLETON* (1810), 2 Camp. 410; 170 E. R. 1200, N. P.

Annotation:—*Refd. Smith v. Eldridge* (1835), 4 Ad. & El. 64.

3977. Failure to annex particulars to record.]—COULTON v. HANSON (1860), 2 F. & F. 312, N. P.

3978. Failure to plead replication—Whereby judgment signed against clients.]—On motion, by one of two defts., in an action of replevin, in which their attorney allowed judgment to be signed against them for want of a replication, for costs to be paid by the attorney, the ct. refused to interfere, but left the party to his remedy by action.—*RUSSELL v. BLUCK* (1828), 6 L. J. O. S. C. P. 58.

3979. Omission in petition—Payment out of fund in court to wrong person.]—Re DANGAR'S TRUSTS, No. 4187, *post*.

iv. *In respect of Affidavits.*

3980. Irregular affidavit—Whole petition recited.]—If a whole petition is recited in an affidavit of service, the ct. will make the attorney who drew it, pay the costs out of his own pocket.—*Ex p. SMITH* (1742), 1 Atk. 139; 26 E. R. 90, L. C.

3981. — Mistake in jurat.]—Where time was applied for to send an affidavit of justification into the country, to amend a mistake in the jurat, the ct. made the attorney pay the costs of the application.—*SHILLITON'S CASE* (1826), 9 Dow. & Ry. K. B. 6.

3982. Failure to file affidavit.]—TAYLOR v. GATES (1895), 72 L. T. 436; 39 Sol. Jo. 318, C. A.

v. *Failure to Instruct Counsel.*

See R. S. C., Ord. 65, r. 5.

3983. Whether solicitor ordered to pay costs.]—If a cause which is meant to be defended is called on, & tried as an undefended cause in consequence of deft.'s attorney neglecting to deliver his briefs, the ct. will grant a new trial compelling deft.'s attorney to pay the costs as between attorney & client out of his own pocket.—*DE ROUFFIGNY v. PEALE* (1811), 3 Taunt. 484; 128 E. R. 192.

Annotation:—*Consd. Watson v. Reeve* (1838), 6 Scott, 783.

e. Conduct of attorneys with regard to insolvent's estate—Where acting for assignee.]—Re CONNELL (1859), 1 L. T. 47.—*IR.*

PART X. SECT. 4, SUB-SECT. 3.—D. (b) iii.

1. Copies of documents incorrectly made.]—It is the duty of the solrs. not to take office copies without being authenticated, & where the copy of

3984. —.]—On setting aside a nonsuit, occasioned by the neglect of an attorney to deliver briefs to counsel, & to procure the attendance of witnesses, the ct. will not require the attorney to pay costs as between attorney & client, if satisfied that he had reasonable ground to suppose that the cause would not be called on so early.—**PROUDSTONE v. TWEMLOW** (1832), 1 L. J. Ex. 175.

3985. —.]—The ct. granted a rule for a new trial in an action not properly defended, in consequence of deft.'s attorney's neglect in not delivering the briefs at a proper time, on condition of deft.'s attorney paying the costs of the day as between attorney & client, & of the application as between party & party; the amount of the verdict to be paid into ct. to abide the result of the new trial.—**COE v. HOWARD** (1840), 12 L. T. O. S. 401.

3986. —.]—**TOWNLEY v. JONES**, No. 4004, *post*.

3987. —.]—A bill having been dismissed with costs owing to pltf.'s solr. having neglected to instruct counsel or deliver papers, the cause was, on motion supported by affidavit, under the circumstances ordered to be restored upon payment of costs by pltf.'s solr.—**BIRCH v. WILLIAMS** (1876), 24 W. R. 700.

Annotation:—**Apld.** **Cockle v. Joyce** (1877), 37 L. T. 428.

3988. —.]—Where in a divorce suit which had been put in the list earlier than was anticipated by resp.'s country solr., who, in consequence, had not instructed counsel or arranged for the attendance of resp., co- resp. & witnesses, a decree *nisi* was granted in the absence of those parties & witnesses, the ct. made an order for the rehearing of the suit on the terms (a) that an affidavit should be filed by resp. & co- resp. swearing that they had not committed adultery; & (b) resp.'s country solr. should, as he had offered to do, pay petitioner's costs of the trial which had been thrown away, & also the costs of the application for the new trial.—**HOLDEN v. HOLDEN & PEARSON** (1910), 102 L. T. 398; 26 T. L. R. 307; 54 Sol. Jo. 328, D. C.

(c) *At Trial.*

i. *In General.*

See R. S. C., Ord. 65, r. 5.

3989. Failure to procure attendance of witnesses—Where reasonable excuse.]—**PROUDSTONE v. TWEMLOW**, No. 3984, *ante*.

3990. Failure to procure attendance of parties—At summons.]—The master having reported, under the provisions of Court of Chancery Act, 1852 (c. 80), that he was unable to proceed with an order of reference, by reason of the neglect of the parties to attend his summons, & the neglect having been occasioned by the solr. of pltf., the ct. directed the reference should be proceeded with in chambers; & the client undertaking not to bring an action against the solr. in respect of the conduct of the suit, it also ordered the solr. to pay the costs of the master's certificate, & of the subsequent proceedings.—**RIDLEY v. TIPLADY** (1855), 20 Beav. 44; 24 L. J. Ch. 207; 1 Jur. N. S. 249; 52 E. R. 518; *sub nom.* **RIPLEY v. TIPLADY**, 24 L. T. O. S. 298; 3 W. R. 276.

3991. Delay—Failure to examine witness.]—Where a pltf.'s case had been conducted with great delay, & ultimately, through the mistake of his attorney, publication has passed without his examining witness, the attorney was made to pay the costs of an application to enlarge publication.

—**WHITE v. HILLACRE** (1838), 3 Y. & C. Ex. 278; 8 L. J. Ex. Eq. 65; 160 E. R. 707.

3992. Giving insufficient ball—Misdescription.]—**BLUNDELL v. BLUNDELL**, No. 3902, *ante*.

3993. Making wrong representation to court—Appointment of receiver—Liability of country solicitor—Representation by London agent.]—A receiver was appointed by the ct., upon the representation of pltf.'s solr. that the receiver had entered into the usual recognisances, which he had not in fact done. A loss occurred, in consequence of the receiver's liability being only in the nature of a simple contract debt. The solr. was, at the instance of a deft., made personally liable for the loss occasioned by his neglect:—**Held**: the country solr. was liable, though the representations were made by his London agents.—**Re WARD** (1862), 31 Beav. 1; 54 E. R. 1037.

Annotations:—**Consd.** **Re Dangar's Trusts** (1889), 41 Ch. D. 178. **Distd.** **Marsh v. Joseph**, [1897] 1 Ch. 213. **Refd.** **Re Coolgardie Goldfields, Re Cannon & Morten**, [1900] 1 Ch. 475.

3994. Improper notice of motion.]—At a general meeting of shareholders, the number of directors, of whom deft. was one, were proposed to be reduced from ten to six. Deft., being chairman on the above occasion, refused to put the resolution. Whereupon another person put them, & they were carried; & Y. having been voted to take the chair, the common seal was affixed in a lease made to another co. An injunction, *ex parte*, having been obtained against deft. & the other directors, from entering into, or setting the seal of the co., to any agreement with any person or co.:—**Held**: the signature of the co.'s solr. to the notice of motion was sufficient, without that of any other person; for if it had been improperly given, the ct. might hold the solr. liable.—**EXETER & CREDITON RY. CO. v. BULLER** (1847), as reported in 9 L. T. O. S. 194.

Annotations:—**Mentd.** **Cooper v. Shropshire Union Ry. & Canal Co** (1848), 6 Ry. & Can. Cas. 136; **Yetts v. Norfolk Ry.** (1848), 5 Ry. & Can. Cas. 487; **Edwards v. Shrewsbury & Birmingham Ry.** (1849), 1 De G. & Sm. 537; **East Pant Du United Lead Mining Co. v. Merryweather** (1864), 4 New Rep. 541.

3995. —.]—Where a motion is made on behalf of a married woman, without a next friend being named, the ct. has jurisdiction to make the solr. who gave the instructions for the motion pay the costs of it.—**PEARSE v. COLE** (1852), 19 L. T. O. S. 21; 16 Jur. 214.

3996. Failure to ascertain truth of allegation by opposite party—Whereby wrong order made.]—Where persons, even without *malâ fides*, make or adopt a statement, the contrary of which they ought to have known by reasonable diligence to be the truth, & a wrongful order is made by the ct. grounded on such statement, all such persons are liable to indemnify the persons who suffer through such an order from all the consequences.

The primary liability in respect of costs falls upon the solr., through whose agency the order was obtained, & the primary liability as to the fund lost through the order falls upon those who wrongfully received it.—**Re SPENCER** (1870), 39 L. J. Ch. 841; 21 L. T. 808; 18 W. R. 240, L. C.

Annotations:—**Apld.** **Re Dangar's Trusts** (1889), 41 Ch. D. 178. **Distd.** **Marsh v. Joseph**, [1897] 1 Ch. 213.

3997. Mistake in drawing up decree.]—In drawing up a decree, the word "inquiry" was erroneously inserted for the word "sale." It became necessary for deft. to make an application to correct the error:—**Held**: the solr. of deft. must bear the costs.—**Re BOLTON** (1846), 9 Beav.

deposition proved to be very incorrect, but was taken & paid for before it was

compared or attested, the solr. was ordered to pay the costs of the day.—

MORGAN v. ROE (1848), 12 I. Eq. R. 21.—**IR.**

Sect. 4.—Liability for costs: Sub-sect. 3, D. (c) i. & ii., & (d), E. & F.; sub-sect. 4.]

272; 1 New Pract. Cas. 375; 6 L. T. O. S. 451; 10 Jur. 22; 50 E. R. 348.

Annotation:—Apld. Re Massey & Carey (1884), 26 Ch. D. 459.

3998. Failure to furnish copies of judge's notes—On appeal.]—LEWIS v. CORY, [1906] W. N. 95, C. A.

ii. Failure to Attend Court.

See R. S. C., Ord. 65, r. 5.

3999. Refusal to appear—Pursuant to undertaking.]—Solr. ordered to pay all the costs, occasioned by his refusing to appear for deft. at the hearing, pursuant to his undertaking, & the costs of the application. Motion to enlarge publication in the original cause until answer to the cross bill, the original cause being set down for hearing, & the cross bill filed after rules for passing publication, refused with costs.—COOK v. BROOMHEAD (1809), 16 Ves. 133; 33 E. R. 934, L. C.

4000. Failure to appear.]—ELLIS v. KING (1820), 5 Madd. 21; 56 E. R. 802.

4001. —.]—An attorney, imagining that the two causes above his own would take up some time, left the ct. at the assize. On his return, the tenant had been called to confess lease, entry, & ouster. It was not sworn that counsel had been instructed. The ct. granted a trial, on the attorney paying the costs out of his own pocket.—DOE v. ROE (1823), 1 L. J. O. S. K. B. 154.

4002. —.]—Where pltf. was nonsuited through the neglect of the attorney's clerk to attend in ct., the ct. refused to set aside the nonsuit, except upon the terms of pltf.'s attorney paying the costs occasioned by deft.'s attending to try.—WHITE v. SANDELL (1835), 3 Dowl. 798.

4003. —.]—A cause was set down for trial at the first sittings in Michaelmas Term, & no one appearing for deft. was taken at those sittings as an undefended cause, & verdict entered for pltf. Upon affidavit by deft.'s attorney that he was under an impression that the cause would be tried at the second sittings in that term, & had made a memorandum accordingly in his note book, the ct. granted a rule for a new trial on payment of costs by the attorney.—NEAVE v. MILNS (1854), 24 L. T. O. S. 215.

4004. —.]—Pltf.'s attorney having without reasonable excuse neglected to instruct counsel or to appear at the assizes when the cause was called on, in consequence of which pltf. was nonsuited, the ct. granted a new trial only upon the terms of the attorney paying the costs of the day out of his own pocket.—TOWNLEY v. JONES (1860), 8 C. B. N. S. 289; 29 L. J. C. P. 299; 6 Jur. N. S. 1159; 141 E. R. 1177.

Annotation:—Refd. Holden v. Holden & Pearson (1910), 26 T. L. R. 307.

4005. —.]—Pltf. brought an action against deft., who, being a solr., appeared personally. Pltf. did not deliver his statement of claim, & deft. took out a summons for the dismissal of the action for want of prosecution, but did not attend the summons personally, & was represented by his clerk. The solr. for pltf. objected that deft. must attend personally, & could not be represented by his clerk, & that there was no evidence to support the summons. The chief clerk overruled the

objection that the personal attendance of deft. was necessary, & adjourned the summons for an affidavit as to the non-delivery of the statement of claim, but pltf.'s solr. insisted on the objection as to the necessity for the personal attendance of deft., & at this request, the chief clerk adjourned the summons to the judge upon that point. Deft. attended in person before the judge, but pltf.'s solr. did not attend, & the judge dismissed the application, with costs, & ordered pltf.'s solr. to pay personally the costs of deft.'s attendance. On a motion by pltf.'s solr. to vary so much of the order as directed him to pay personally the costs of deft.'s attendance before the judge:—*Held*: R. S. C., Ord. 65, r. 5, empowered the judge to make the order, & the order was right.—BARNARD v. SCOLES (1889), 37 W. R. 668.

(d) After Trial.

4006. Issuing irregular process.]—Proceedings set aside for irregularity in process, & rule for attorney to show cause why he should not pay the costs.—WHITE v. WASHINGTON (1738), Cooke, Pr. Cas. 152; Barnes, 411; 125 E. R. 1017.

4007. Irregular service of warrant for taxation of costs.]—Where a warrant for taxation was irregularly served on pltf., & the master's certificate irregularly obtained, & pltf. was arrested for non-payment of the costs, all the proceedings were, on motion, set aside for irregularity, & deft.'s solr. ordered to pay the costs thereof.—BRICKNALL v. STANFORD (1838), 2 Jur. 1010.

4008. Serving wrong notice of appeal—On party against whom no relief asked.]—The solr. for applt., who was suing in *forma pauperis*, had served resp. with notice of the appeal, although the case against that resp. had been abandoned at the hearing below, & no relief was asked against him on the appeal. On these facts the ct. gave leave to move against the solr. before the Ct. of Appeal to show cause why he should not be personally liable to pay the costs of resp.'s appearing on the appeal.—MARTINSON v. CLOWES (1885), 52 L. T. 706; 33 W. R. 555, C. A.

Annotations:—Mentd. Farrar v. Farrars (1888), 40 Ch. D. 395; Colson v. Williams (1889), 58 L. J. Ch. 539; Nutt v. Easton (1899), 68 L. J. Ch. 367; Hodson v. Deans, [1903] 2 Ch. 647; Bath v. Standard Land Co., [1911] 1 Ch. 618.

E. Indemnity Given to Client.

4009. Whether solicitor ordered to pay costs.]—COCKLE v. WHITING, No. 3903, ante.

4010. —.]—Where a solr. engages to indemnify pltf. in a suit against the costs of the suit, & has the control of the suit, he will be ordered to pay to defts. their costs of the suit when dismissed.—Re JONES (1870), 6 Ch. App. 497; sub nom. FIELDEN v. NORTHERN RY. OF BUENOS AYRES CO., LTD., Re JONES, 40 L. J. Ch. 113; 23 L. T. 655; sub nom. FIELDEN v. NORTHERN RY. OF BUENOS AYRES CO., LTD., Ex. p. JONES, 19 W. R. 361, L. C.

Annotations:—Apld. Scott v. Hitchcock (1904), 20 T. L. R. 759. Refd. Ram Coomar Coondoo v. Chunder Canto Mookerjee (1875), 2 App. Cas. 186.

F. Other Cases.

4011. Claiming excessive costs—In action against client.]—An attorney brought his action for his bill of costs, & held deft. to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable

PART X. SECT. 4, SUB-SECT. 3.—D. (c) ii.

4000 i. Failure to appear.]—Pltf.'s solr. order to pay the costs of the day, in consequence of his non-attendance in ct. when the cause was called on.—

COURTNEY v. STOCK (1812), 2 Dr. & War. 251.—IR.

PART X. SECT. 4, SUB-SECT. 3.—F.

g. Undertaking to add another plaintiff—Failure to fulfil because of

refusal of party to be joined.]—REEVES v. REEVES (1908), 12 O. W. R. 124; 16 O. L. R. 588.—CAN.

h. Name of next friend of married woman omitted from notice.]—When a motion is made on behalf of a married

cause for so doing :—*Held* : this was a case within 43 Geo. 3, c. 46, s. 3 ; & if not within the Act, still the ct., in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances.—*ROBINSON v. ELSAM* (1822), 5 B. & Ald. 661 ; 106 E. R. 1332.

Annotations:—**Distd.** *Hinton v. Warren* (1826), 12 Moore, C. P. 31; *Watkins v. O'Gorman Mahon* (1836), 2 Gale, 129; *Robinson v. Powell* (1839), 9 L. J. Ex. 17. **Consd.** *Stevens v. Russell* (1857), 1 H. & N. 752. **Refd.** *Keene v. Deeble* (1824), 3 B. & C. 491; *Brvson v. Simcox* (1828), 6 L. J. O. S. C. P. 90; *Rowe v. Rhodes* (1834), 2 Cr. & M. 379.

4012. — — — Solicitor uncertificated for part of time.]—Pltf., an attorney, arrested deft. for £100, the amount of a bill of costs delivered & served him with a copy of the declaration. Deft. pleaded the general issue, on which issue was joined. At the trial, the amount of the bill was, by consent of the parties, referred to the prothonotary to be taxed, & he found that £60 only was due, as pltf. had neglected to take out his certificate, for a part of the time during which the business was done:—*Held*: deft. was not entitled to his costs under the statute.—HINTON v. WARREN (1826), 12 Moore, C. P. 31; 5 L. J. O. S. C. P. 1.

4013. — On taxation of costs.]—Where pltf.'s attorney, in an arrangement with deft., exacted from him the payment of costs as between attorney & client; & the bill was reduced on taxation from £27 to £9:—*Held*: it was not a case within 2 Geo. 2, c. 23, in which the attorney could be ordered to pay the costs of the taxation.

Nor would the ct. introduce a precedent by exercising their jurisdiction, independent of the Act, over the attorney, as one of their own officers. — *SUTCLIFFE v. CLEGG* (1830), 8 L. J. O. S. K. B. 280.

4014. — Taxation as between party & party.]—*Scmble*: if on a party & party taxation, where the party taking the taxation pays the costs, the solr. whose bill is under taxation delivers an extortionate bill with the view of increasing the costs of taxation, the taxing master has a discretion & can report the circumstances specially, & the ct. has authority in such a case not only to deprive the solr. of his costs, but also to make him pay the costs of taxation.—*Re GRUNDY, KERSHAW & Co.* (1881), 17 Ch. D. 108 ; 50 L. J. Ch. 467 ; 44 L. T. 511 ; 29 W. R. 581.

Annotation:—**Reid**, *Re Cowdell* (1883), 52 L. J. Ch. 246.

4015. — Work charged for not carried out.]—Where pltf.'s attorney had charged in his bill, & had been paid, for entering satisfaction on the roll, but had omitted to do so, the ct., at the instance of deft., ordered him to do so at his own cost.—*ORAM v. PARKER* (1838), 6 Scott, 245; 7 L. J. C. P. 233.

4016. — Application for refund.] — An attorney who charges in his bill of costs more than, according to the established practice of the courts, he is entitled to, will be visited with the costs of obtaining a rule to refund, though no objection has been made to the overcharge.—

woman, & no person is named in the notice as her next friend, her solr. will be held responsible for costs if awarded against her.—*Cox v. M'NAMARA* (1823), 1 Hog. 78.—**IR.**

k. Costs of application of married woman not party to cause.]—Costs of application by married woman not a party in the cause in her own name, given against the solr. serving the notice.—**BETAGH v. BURKE** (1827), 2 Mol. 384.—**IR.**

1. Arrest of person privileged from arrest.]—A person subpoenaed to attend as a witness on the trial of an action is privileged from arrest under a

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decree for debt, & will be discharged from custody on motion to the ct. in which the action is pending. & the attorney causing her to be arrested may be compelled to pay the costs of the motion.—HAYES v. BAGWELL (1870), 18 W. R. 470.—IR.

m. Appearance entered on behalf of infant—Solicitor having no knowledge of infancy—Solicitor not personally liable for costs.]—WADE v. KEEFE (1888), 22 L. R. Ir. 154.—IR.

n. Special jury fees — Plaintiff without means.—Pltf. in this action served notice for, and obtained a special jury. The jury found a verdict in

CRIPPS v. FIELD (1841), 8 M. & W. 659 10
L. J. Ex. 422; 5 Jur. 634; 151 E. R. 1203.

4017. — **Solicitor charged with false statement**
—Where not known to solicitor personally.]—Upon
a rule calling upon an attorney to answer matters,
the charge against him being that he had recovered
from debt. an excessive sum for costs, upon a
false statement that judgment had been signed &
execution issued, when in fact no judgment had
been signed, it appearing that the attorney himself
had no personal knowledge of the matter, the ct.
discharged the rule, but ordered him to refund
the overcharge, & pay the costs of the application.
—*Re EYRE, PALMER v. EVANS* (1856), 1 C. B. N. S.
151 ; 28 L. T. O. S. 125 ; 140 E. R. 64.

4018. Putting in insufficient examination—On taxation of costs.]—Upon a taxation, a solr. put in an an insufficient examination. He was ordered, on motion, to pay the costs occasioned thereby, & of the four day order, & of the application.—*Re BAINBRIGGE* (1848), 11 Beav. 620; 50 E. R. 956.

4019. Failure to pay money found due on taxation.]—A sum of money having on taxation been found due from a solr. to his client, the solr. was ordered to pay the costs of the application for the second order for payment. — *Re BAINBRIDGE* (1851), 14 Beav. 645; 51 E. R. 432; *previous proceedings* (1850), 13 Beav. 108.

Annotation — **Folld.** *Re Dufaur & Blakeney* (1852), 16 Beav.
113.

4020. —.]—Solr., from whom a sum was found due, ordered to pay all the costs of proceedings to compel payment.—*Re DUFAR & BLAKENEY* (1852), 16 Beav. 113; 51 E. R. 720.

4021. Failure to deliver up papers—In accordance with order on taxation.—By an order for taxation, the solr. was ordered, on payment, to deliver over the papers. Having made default, he was ordered to pay the costs of a motion to compel him, though he had delivered them up after the notice of motion but before it had been heard.—*Re MINTER* (1854), 19 Beav. 33; 52 E. R. 260.

4022. Breach of arrangement as to payment of costs—Special petition for taxation.]—Where a special petition for the taxation of a solr.'s bill of costs was occasioned by breach of arrangement on his part, he was ordered to pay the costs of the petition.—*Re* CATTLIN, *Ex p.* BAILEY (1856), 3 Jur. N. S. 33; *affd.* (1857), 30 L. T. O. S. 110, L. J.J.

SUB-SECT. 4.—FOR WHAT COSTS LIABLE.

4023. Limited to costs demanded in notice of motion.]—A person named as pltf. in a suit moved before a Vice-Chancellor to have the bill taken off the file, as having been filed by the solr. on the record without authority. The notice of motion asked that the solr. might be ordered to pay pltf.'s costs of the suit & of the motion, & that defts.' costs of the suit might be provided for. Defts.

favour of deft. It appeared in the course of the trial that pltf. was almost without means, & that she had given a mtge. to her solr., upon whatever property she had, to secure her solr.'s costs:—*Held*: the judge had jurisdiction in the circumstances, to order pltf.'s solr. personally to pay the jury fees.—**MONSERRATT v. SCOTT**, [1899] 2 I. R. 551.—**IR.**

PART X. SECT. 4, SUB-SECT. 4.

o. Whether solicitor ordered to pay costs — Entering appearance without authority.—Pltf. sued deft. for having caused an appearance to be entered

*Sect. 4.—Liability for costs: Sub-sects. 4, 5 & 6.
Sect. 5: Sub-sect. 1, A.]*

were not served with this notice. The Vice-Chancellor made an order that pltf. should be at liberty to take the bill off the file, & that the solr. should pay pltf.'s costs of the suit & of the motion, & his charges & expenses properly incurred, which were not asked for by the notice of the motion; but the order made no provision for the costs of defts. One of defts. subsequently moved before the Vice-Chancellor that pltf. might be ordered to pay his costs of the suit & of this second motion; & the Vice-Chancellor made an order that the solr. should pay those costs. On appeal by the solr. from both these orders:—*Held*: the first order ought to have been a peremptory one to take the bill off the file; the solr. ought not to have been ordered to pay charges & expenses of nominal pltf. which were not asked for by his notice of motion; as the second motion was rendered necessary by omission in the order on the first motion to provide for the costs of defts. the solr. ought not to have been ordered to pay the costs of the second motion; & defts.' costs of the suit must be ordered to be paid by pltf., if not paid by the solr.—*DAVIES v. DAVIES, DAVIES v. WILLIAMS* (1868), 18 L. T. 701, L. J. J.

Annotation:—*Consd.* *Palmer v. Walesby* (1868), 37 L. J. Ch. 612.

4024. Costs of appearance of defendant—Where unnecessary.]—If a solr. files a bill without the authority of his client, he will, upon motion to take the bill off the file, be ordered to pay the costs of suit both of pltf. & deft., pltf. paying the costs of deft. in the first instance, & having them over against the solr.

But upon such a motion it is not necessary to bring deft. before the ct., & the solr. will not be ordered to pay the costs of deft. on the motion.—*JERDEIN v. BRIGHT* (1862), 6 L. T. 279; 26 J. P. 356; 10 W. R. 380.

4025. Costs of second motion—Where occasioned by omission in order on first motion.]—*DAVIES v. DAVIES, DAVIES v. WILLIAMS*, No. 4023, *ante*.

4026. Costs of action & of motion to dismiss—As between solicitor & client.]—A suit instituted by a solr. without authority, dismissed on motion, with costs of the suit & of the motion, as between solr. & client.—*ALLEN v. BONE* (1841), 4 Beav. 493; 49 E. R. 429.

Annotations:—*Consd.* *Malins v. Greenway* (1847), 17 L. J. Ch. 26. *Apld.* *Crossley v. Crowther* (1851), 9 Hare, 384; *Atkinson v. Abbott* (1855), 3 Drew. 251. *Refd.* *Pinner v. Knights* (1843), 6 Beav. 174; *Norton v. Cooper, Re Manby, Ex p. Brittleston* (1856), 3 Sm. & G. 375.

4027. — — —.]—A suit instituted by a solr., without the authority of his client was dismissed on motion, with the costs of the suit & the costs of the motion, in each case as between solr. & client.—*CROSSLEY v. CROWTHER* (1851), 9 Hare, 384; 21 L. J. Ch. 565; 18 L. T. O. S. 181; 68 E. R. 556.

Annotation:—*Consd.* *Re Paine* (1912), 28 T. L. R. 201.

4028. — — —.]—A solr. obtained a retainer to proceed against exors. who had, after a long lapse of time, neglected to prove the will, & had rendered no account, to compel probate of the will, & to take such other proceedings for obtaining an account as might be necessary. He instituted a suit to compel probate, & obtained in it an account which was insufficient. He took then no other steps for three years, & then, without further consulting the client, filed a bill for an account;

he had no other authority than that retainer & the client denied any parol authority to file a bill:—*Held*: the retainer did not justify the solr., & the bill was dismissed with costs, to be paid by the solr.—*ATKINSON v. ABBOTT* (1855), 3 Drew. 251; 25 L. T. O. S. 314; 61 E. R. 899.

Annotation:—*Apld.* *Wray v. Kemp* (1884), 26 Ch. D. 169.

4029. Costs of client as between solicitor & client—Costs of adverse party as between party & party.]

—The proper form of order where an action is instituted by solrs. without authority is to direct the solrs. to pay all the costs occasioned by their commencing the action without such authority; those of pltf. as between solr. & client, & those of deft. as between party & party. In such a case defts. are not entitled to any order upon pltf. to pay their costs, or to any indemnity from them against the same; but on motion to dismiss, the solrs. will be ordered to pay deft.'s costs of the action. Where solrs. had joined A. as pltf. upon the instructions of B., another pltf., who had, in fact, no authority for that purpose, & who was since dead, & where the solrs. had been ordered to pay A.'s & deft.'s costs of the action:—*Held*: the solrs. would be entitled to prove against the estate of B. for all the costs so ordered to be paid by them.—*NURSE v. DURNFORD* (1879), 13 Ch. D. 764; 49 L. J. Ch. 229; 41 L. T. 611; 28 W. R. 145.

Annotations:—*Folld.* *Cape Breton Co. v. Fenn* (1881), 17 Ch. D. 198. *Apprvd.* *Fricker v. Van Grutten*, [1896] 2 Ch. 649. *Refd.* *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (1879), 49 L. J. Ch. 231; *Williams v. Preston* (1882), 30 W. R. 555; *Joyes v. Loe & Pocock* (1896), *Times*, Dec. 14; *Gellinger v. Gibbs*, [1897] 1 Ch. 479; *Didisheim v. London & Westminster Bank* (1900), 69 L. J. Ch. 443. *Mentd.* *Boswell v. Coaks* (1887), 57 L. J. Ch. 101.

4030. — — —.]—When a solr. has instituted proceedings in the name of his client without his authority, & an application is made by pltf. for an order to make him pay the costs, the practice formerly prevailing at common law will, for the future, be adopted in preference to the old Chancery practice. Notice of the application will be served on deft., & the solr. will be ordered to pay the costs, not only of pltf. but also of deft., the costs of pltf. as between solr. & client, & those of deft. as between party & party.—*NEWBIGGIN-BY-THE-SEA GAS CO. v. ARMSTRONG* (1879), 13 Ch. D. 310; 49 L. J. Ch. 231; 41 L. T. 637; 28 W. R. 217, C. A.

Annotations:—*Folld.* *Cape Breton Co. v. Fenn* (1881), 17 Ch. D. 198. *Consd.* *John Morley Building Co. v. Barras*, [1891] 2 Ch. 386. *Folld.* *Fricker v. Van Grutten*, [1896] 2 Ch. 649. *Refd.* *Smith v. Day* (1881), 50 L. J. Ch. 333; *Williams v. Preston* (1882), 30 W. R. 555; *London Scottish Permanent Benefit Soc. v. Chorley* (1881), 50 L. T. 265; *Joyes v. Loe & Pocock* (1896), *Times*, Dec. 14; *Gellinger v. Gibbs*, [1897] 1 Ch. 479; *Gold Reefs of Western Australia v. Dawson*, [1897] 1 Ch. 115; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Yonge v. Toynbee*, [1910] 1 K. B. 215; *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168. *Mentd.* *Boswell v. Coaks* (1887), 57 L. J. Ch. 101.

4031. — — —.]—*CAPE BRETON CO. v. FENN*, No. 3851, *ante*.

4032. — — —.]—Where a person is made a pltf. in an action without proper authority, & orders have been, without his knowledge, made against him, under which he is liable to pay costs to deft., the proper order to make is to stay all proceedings in the name of the person in question, & all proceedings against him in the action since he was added as a pltf., & to direct his name to be struck out for the purpose of future proceedings; the solr. who wrongly made him a party must pay all his costs, & all the costs which he has been

for defts. in an ejectment, brought by pltf. against them, for land assigned to pltf. under process issued in an action of dower against this deft., alleging that he had done so wilfully, wrongfully, &

without the consent, knowledge, or authority of defts., but not charging malice or want of reasonable or probable cause:—*Held*: the declaration was bad on this ground.—*FISHER v.*

HOLDEN (1867), 17 C. P. 395.—*CAN.*

v. AUBREY (1833), 1 Ir. L. Rec. N. S. 38.—*IR.*

ordered to pay, & also all deft.'s costs, the costs of the person wrongly made pltf. as between solr. & client, & the costs of the deft. as between party & party, & in such costs must be included the costs of the application to be relieved from the consequences of the misjoinder.—**FRICKER v. VAN GRUTTEN**, [1896] 2 Ch. 649; 65 L. J. Ch. 823; 75 L. T. 117; 45 W. R. 53; 40 Sol. Jo. 701, C. A. *Annotations*:—**Apld.** *Gellinger v. Gibbs*, [1897] 1 Ch. 479. **Refd.** *Yonge v. Toynbee*, [1910] 1 K. B. 215.

SUB-SECT. 5.—ENFORCEMENT OF ORDER.

4033. Whether attachment issued.]—**GYNN v. KIRBY** (1720), 1 Stra. 402; 93 E. R. 594; *sub nom.* **GLYNN v. KIRBY**, Cas Pract. K. B. 37. *Annotation*:—**Mentd.** *Johnson v. Birley* (1822), 5 B. & Ald. 540.

4034. —.]—An action was ordered to be stayed, & the costs of defts. to be paid by pltf.'s solr. The order was served by leaving a copy at the office of the solr., but was not obeyed. Upon the application of defts., the ct. made an order for an attachment to issue against the solr., & for payment by him of the costs of the application & the attachment, as between solr. & client.—**TILNEY v. STANSFELD** (1880), 28 W. R. 582.

4035. — Against solicitor litigant—Appeal from order for taxation.]—A common order was made against a solr. for delivery of his bill of costs & taxation. He moved to discharge this order, & his application was dismissed with costs. He then appealed, & his appeal was also dismissed with costs:—**Held**: the non-payment of the costs of the appeal was not a default in payment of a sum of money by a solr. as an officer of the ct. within Debtor's Act, 1869 (c. 62), s. 4; (1) & an attachment could not be issued against him.—**Re HOPE** (1872), 7 Ch. App. 523; 41 L. J. Ch. 797; 26 L. T. 814; 20 W. R. 694, L. J.J.; *subsequent proceedings*, 7 Ch. App. 766, L. J.J.

Annotations:—**Expld.** *Re A Solicitor*, [1895] 2 Ch. 66. **Distd.** *Re N* (1917), 61 Sol. Jo. 445.

4036. — Non-payment of costs after undertaking to pay.]—**FARLEY v. BUCKLER** (1893), *Times*, Oct. 30.

4037. — Where doubt whether order made to pay in character of solicitor—Failure to repay costs to trustee in bankruptcy.]—Where a solr. was ordered under Bkpcy. Rules, 1886, r. 112, to repay to the trustee by reason of the gross proceeds of the assets not exceeding £300 a certain sum paid to

him as costs on the higher scale together with the costs of the order, & the solr. repaid the amount so received by him in excess but failed to pay the costs, & application was made for his committal, the ct. in the absence of authority refused to make an order to commit, being doubtful whether resp. had been ordered to pay the money in respect of which a committal order was asked for in his character of solr.—**Re APELT, Ex p. BYRNE** (1889), 6 Morr. 102.

— **Bankruptcy of solicitor.]**—See **BANKRUPTCY**, Vol. V., p. 1030, Nos. 8420–8423.

SUB-SECT. 6.—APPEAL FROM ORDER.

4038. Whether leave of court necessary.]—An order that the costs of an application at chambers on behalf of a client shall be paid by his solr. personally cannot be costs left to the discretion of the ct. within Jud. Act, 1873 (c. 66), s. 49, unless the solr. has been guilty of misconduct or negligence, & therefore, an appeal lies from such order without leave as to whether there has been such misconduct or negligence.—**Re BRADFORD** (1883), 15 Q. B. D. 635; 50 L. T. 170; *sub nom.* **Re MILTON & BRADFORD**, 53 L. J. Q. B. 65; 32 W. R. 238, C. A.

Annotation:—**Refd.** *Stevens v. Met. Dist. Ry.* (1885), 29 Ch. D. 60.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49).

4039. To what court appeal lies—Refusal to make order.]—**YONGE v. TOYNBEE**, No. 3785, *ante*.

SECT. 5.—LIABILITY OF CLIENT.

SUB-SECT. 1.—TO PAY OVER MONEY.

A. In General.

4040. Summary jurisdiction of court.]—**DE WOOLFE v. —**, No. 4045, *post*.

4041. —.]—**Re BECKE**, No. 4099, *post*.

4042. —.]—A solr. received from his client a sum of money to pay off a mtge. He did not so apply it, but claimed a lien on it for his costs. He was summarily ordered to repay the amount to his client, but without interest.—**Re CULLEN** (1859), 27 Beav. 51; 54 E. R. 20.

Annotation:—**Mentd.** *Stunmore v. Campbell* (1891), 66 L. T. 218.

4043. —.]—An attorney to whom a writ has

PART X. SECT. 4, SUB-SECT. 6.

a. At whose instance order rescinded.]—Where a judge in chambers has made an order requiring a solr. in the cause personally to pay the costs of an application, the ct. will not, at the merely nominal instance of the client rescind the order; the solr. must make a substantive motion on his own behalf to discharge it.—**HUDDELETON v. MARSHALL** (1862), Mac. 38.—**N.Z.**

PART X. SECT. 5, SUB-SECT. 1.—A.

r. General rule.]—A solr. is liable to account for moneys or securities on summary application, although they may have come to his hands as an agent for the owner, & not strictly as solr. or attorney, or involve any duty as such in the holding or possession of them.—**Re CARROLL** (1841), 2 Ch. Ch. 323.—**CAN.**

t. —.]—**Re WALKER** (1868), 2 Ch. Ch. 324.—**CAN.**

a. Mode of procedure for recovery.]—The proper proceeding against an attorney for mere non-payment of money pursuant to a rule of ct., where there are no special circumstances

showing fraud or dishonesty, is by judgment & execution under C. S. U. C. c. 24, s. 15, & not by motion to strike him off the rolls, nor by attachment. Under Imperial Act, 32 & 33 Vict. c. 62, s. 4 (4), attorneys ordered to pay money in that character are excepted from the general rule & may be attached as before. There is no exception in our Act.—**Re CAMPBELL** (1872), 32 U. C. R. 441.—**CAN.**

b. Duty to lay money out at interest — & right to commission thereon.]—A party receiving money as attorney of another was bound to lay it out at interest within six months thereafter, & was liable in 5 per cent. for all money not so laid out; & he was entitled to a commission of 2½ per cent. on the money received by him.—**BROWN'S TRUSTEES v. BROWN** (1830), 4 Wils. & S. 28.—**SCOT.**

c. —.]—A sum of money belonging to a trust estate was lodged for some years in the hands of the factors & law agents for the trustees administering the estate, & was not invested; during these years certain questions regarding the trust estate were under discussion, & the trustees were cogni-

sant of the money remaining uninvested. — **Held**: in accounting for money, the factors were only bound to debit themselves with interest on it at the rate of 4 per cent.—**FORTUNE'S TRUSTEES v. GIBSON-CRAIGS, WARDLAW & DALZIEL** (1839), 2 Dunl. (Ct. of Sess.) 59.—**SCOT.**

d. Right of set-off for fees against money advanced by clients.]—When a client advances a sum of money to a firm of attorneys on account of costs in a pending action the contract between them is not one of *depositum*, but is a contract whereby the client indemnifies the attorneys against loss owing to the costs of the action to the extent of the advance with a right in them to use the money & no right in himself to reclaim it unless they should, on a successful issue of the suit, be reimbursed by the opposing party. In the event of the suit being successful, the attorneys would be entitled to set off against the advance any sum due by the client to them for professional work & to retain so much of the advance as would suffice to satisfy their claim.—**NGANGELIZWE KAMA v. YATES & MURRAY** (1902), 17 E. D. C. 60.—**S. AF.**

Sect. 5.—Liability of client: Sub-sect. 1, A., B. & C. (a), (b) & (c).]

been sent for service afterwards receiving the debt from deft., will be ordered by the ct. at once to pay the same.—*WALKER v. PEARCE, Re AN ATTORNEY* (1862), 7 L. T. 285.

B. Application for Summary Order.

4044. By whom made—Necessity for application by client.]—This ct. will not, in a summary way, compel an attorney of the ct. to pay over money to a party entitled to it, though the attorney has received it from a client to be paid to such party, if the application is not made on behalf of the client.—*Re FENTON* (1835), 3 Ad. & El. 404; 1 Har. & W. 310; 5 Nev. & M. K. B. 239; 4 L. J. K. B. 204; 111 E. R. 467.

Annotation:—Apld. Re Cross (1843), 2 L. T. O. S. 227.

4045. — Agent of client.]—A summary application may be supported against an attorney to compel him to pay moneys entered by him, though he was not employed in any suit; & an agent may make the application, though it has no authority to receive, & the ct. will compel the payment into ct. for benefit of parties interested.—*DE WOOLFE v. —* (1822), 2 Chit. 68.

Annotation:—Reid. Re Knight, Ex p. Hall (1822), 7 Moore, C. P. 437.

4046. To whom made—Court—In which action prosecuted.]—An application to compel an attorney to pay over to his client money recovered from deft. in an action need not be made in the ct. in which the action was prosecuted.—*Re GARBETT* (1843), 2 L. T. O. S. 169.

4047. — Judge in chambers.]—An application against an attorney to pay over to his client a sum of money received by him for such client, there being no imputation upon him which he is required to answer, should be made at chambers & not to the ct.—*STECHEER v. KRALICK* (1868), 17 L. T. 441.

C. When Summary Order Made.

(a) In General.

4048. Necessity for taxation.]—Attachment for not paying over surplus money when rule has been served for taxing an attorney's bill, ct. will not grant an attachment against attorney for not paying the balance due to his client till the costs have been taxed, though the balance is admitted & though it is agreed to dispense with taxation.—*v. BARTON* (1817), 2 Chit. 66.

4049. —.]—*ANON.* (1851), 17 L. T. O. S. 79.

Order against London agent—Of solicitor of client.]—See No. 4356, *post*.

(b) Necessity for Relationship of Solicitor and Client.

Liability to third parties.]—See Part XI., Sect. 2, sub-sect. 5, C., *post*.

4050. General rule.]—An attorney cannot be compelled to pay over money received by him in his character of attorney, to the use of a third party, unless he received it as the attorney, & by the authority, of such third party.—*Re CROSS* (1843), 2 L. T. O. S. 227.

4051. —.]—A. purchased an estate from B., & on the completion, one solr. acted for both parties, & the purchase-money was paid into his

hands. Afterwards, the purchaser was defeated by C., who had a paramount mtge. The purchaser presented a petition against the solr., asking payment by the solr. out of the purchase-money of the losses occasioned, or that he might indemnify petitioner. The petition was dismissed with costs, the ct. holding, first, that it had no jurisdiction to award compensation or damages in such a case, & secondly, that the money having come to the hands of the solr. as agent of the vendor, & not of petitioner, it could not interfere.

I agree that if a client pay a sum of money to his solr. in that character, this, like other matters arising between them in the relation of solr. & client, can be inquired into summarily in this ct. (*ROMILLY, M.R.*).—*Re HINTON, TYLEE v. WEBB* (1851), 14 Beav. 14; 18 L. T. O. S. 37; 15 Jur. 1023; 51 E. R. 192.

4052. —.]—The ct. will not, in the exercise of its summary jurisdiction over solrs., call upon a solr. to account for moneys received by him, where they were received by him not in the character of solr. to the person making the application, but of solr. to another person.

D. was solr. to pltf. in a cause, & also to the receiver, & the receiver was in the habit of remitting the rents to him:—*Held*: D. must be considered to have received the rents as solr. or agent of the receiver, & pltf. could not call upon him to account for them under the summary jurisdiction.—*DIXON v. WILKINSON* (1859), 4 De G. & J. 508; 4 Drew. 614; 33 L. T. O. S. 321; 5 Jur. N. S. 1063; 7 W. R. 624; 45 E. R. 198, L. JJ.

Annotations:—Consd. Re Dangar's Trusts (1889), 41 Ch. 1). 178. *Reid. British Mutual Investment Co. v. Cobbold* (1875), L. R. 19 Eq. 627.

4053. —.]—Where a solr. makes default in payment of a sum of money which he has been ordered to pay in the character of an officer of the ct., he is not the less liable to an order for an attachment because in the interval between the date of the order & the time fixed for payment he has been struck off the roll, & has ceased to be a solr. Of the three possible periods for ascertaining whether the person ordered to pay & making default held the character of a solr., & was as such within the exception of Debtors Act, 1869 (c. 62), s. 4 (4), viz.—(a) of the act done; (b) of the order made; or (c) of the default committed, that to be looked to is, if not the first, at the latest the second period.—*Re STRONG* (1886), 32 Ch. D. 342; 55 L. J. Ch. 553; 55 L. T. 3; 51 J. P. 6; 34 W. R. 614; 2 T. L. R. 549, C. A.

Annotation:—Mentd. Re Gent, Gent-Davis v. Harris (1888), 40 Ch. D. 190.

4054. Relationship repudiated by client—Disclaimer of liability for costs.]—A. employed B. to collect the amount due on a bill of exchange. B. instructed C., an attorney, to sue upon the bill. A. repudiated C. as acting on his account, & disclaimed any liability for costs in the action. C. sued, & the amount of the bill was recovered & paid over to him:—*Held*: A. was not entitled to the summary interference of this ct., calling on C. to pay over the amount so recovered.—*Re MARSHALL* (1857), 28 L. T. O. S. 231; 5 W. R. 200.

4055. Time when relationship exists—Relevant time.]—*Re STRONG*, No. 4053, *ante*.

PART X. SECT. 5, SUB-SECT. 1.—B.

e. By whom made—Assignee.]—The ct. will not compel an attorney, on a summary application, to pay over the proceeds of a judgment to a person claiming as assignee unless his right is clear.—*MURRAY v. JOHNSON* (1850),

1 All. 697.—CAN.

PART X. SECT. 5, SUB-SECT. 1.—C. (b).

f. Against two members of partnership.]—Upon a summary application by a client for an order for payment

over by three solrs. of money of hers alleged to be in their hands as a firm, & in default for an order striking them off the roll:—*Held*: no professional misconduct being suggested against two of them, one of whom had left the firm before, & the other of whom was

4056. Solicitor struck off the rolls—Between order for payment & date of payment.]—*Re STRONG*, No. 4053, *ante*.

4057. Presumption of relationship—From character of employment.]—*Re AITKIN*, No. 4192, *post*.

(c) *In respect of What Moneys.*

4058. Money lent to client by solicitor—For bills in excess of loan—Payment of balance.]—Where bills have been deposited with an attorney, & he has advanced money on them, & he refuses to account, the ct. will not compel him summarily to pay over the alleged balance.—*Ex p. SCHWALBANKER* (1832), 1 Dowl. 182.

*Annotation:—*Consd. *Re CARDROSS* (1839), 5 M. & W. 545.

4059. Money borrowed for client—When payment over ordered.]—The ct. will not summarily compel an attorney to pay over money borrowed for his client on security, unless the security is by deed, perused by the attorney on behalf of his client.—*Re —* (1847), 11 Jur. 396.

4060. Money borrowed from client—For purchase of land by solicitor—Returnable when purchase uncompleted.]—A client agreed in writing to lend his solr. a sum of money to enable him to make a purchase of land, but if the purchase was not completed, the money was to be at once repaid. The purchase was not made, & the money was not returned.

The client applied for an order for repayment, under the summary jurisdiction of the ct.:—*Held*: there being no relation of solr. & client between the parties in respect of the agreement, no order could be made under the summary jurisdiction of the ct.—*Re BRYANT* (1884), 50 L. T. 450.

4061. — Trust money lent by trustee.]—(1) In an administration action it appeared that the trustee had lent moneys of the trust estate without security to his solr., who had accepted the loan with notice that it was trust money. The solr. was not a party to the action:—*Held*: the ct., in the exercise of its summary jurisdiction over its officers, had power on motion in the action, to order the solr. to bring the money into ct.

(2) In such a case the notice of motion should be entitled in the action, & in the matter of the particular solr.—*Re CARROLL, BRICE v. CARROLL*, [1902] 2 Ch. 175; 71 L. J. Ch. 596; 86 L. T. 802; 50 W. R. 650.

4062. — Jurisdiction of master—R. S. C., Ord. 52, r. 25.]—B. had employed Y., a solr., to act for him professionally. B. paid Y. £200, & the following document was drawn up, recording the transaction, & signed by Y.: "Three months after demand I promise to pay Mr. B., or to invest for him, as he may wish, the sum of £200 for value received, & in the meantime to pay interest after the rate of £5 per centum . . . until payment or investment . . . or so much thereof as shall from time to time remain owing." B. applied by summons under R. S. C., Ord. 52, r. 25, for payment of the £200, & interest thereon:—*Held*: having regard to the terms of the document & to the other evidence, the transaction was a loan to the solr., & not a payment to him of money for investment, & therefore the master had no jurisdiction under R. S. C., Ord. 52, r. 25,

to make the order asked for.—*Re Y.* (1910), 54 Sol. Jo. 459, D. C.

4063. Money received during articles.]—The ct. will not interfere summarily to compel an attorney to pay over or account for money received by him during his clerkship.—*Ex p. DEANE* (1834), 2 Dowl. 533.

4064. Money received as steward of manor.]—The ct. will not on the application of the lord grant a rule calling upon an attorney of the ct. to produce an account of all fees & fines received by him in a ct. of which he is the steward, unless the affidavit in support of the application discloses improper conduct on his part as an attorney.—*ANON.* (1855), 25 L. T. O. S. 161; *sub nom. Re AN ATTORNEY*, 3 W. R. 515.

—*See, also*, COPYHOLDS, Vol. XIII., p. 46, No. 539.

4065. Money received as officer of company—Member of special committee.]—Resp., a solr., was appointed a member of a committee of a co., with power to compromise two suits. He, with the approbation of his co-committee, compromised them & received the money. A summary application that he might pay over the money or be struck off the Rolls was refused with costs.—*Re HARVEY* (1859), 27 Beav. 330; 54 E. R. 129.

4066. Money received by solicitor partner—Used by firm.]—Where money has been paid by a client to one of two attorneys, partners, & which has been applied to their own use in account with their bankers, the ct. will summarily compel them to refund.—*Re FORD & THOMAS* (1840), 8 Dowl. 684.

4067. — Without knowledge of other partners.]—*Re LAWRENCE, Ex p. BURDON*, No. 4247, *post*.

4068. Money paid to firm of solicitors—Misappropriated by member.]—*CHATER v. MCLEAN, Re LAWRENCE, CROWDY & BOWLBY*, No. 3566, *ante*.

4069. Money received by investment—Bankruptcy of solicitor.]—An attorney, having received bills from a firm in India, with instructions as to the investment & application of the proceeds, neglected those instructions, & when the money was required, was unable to furnish it. He had obtained a certificate under 7 & 8 Vict. c. 70, & entered into an arrangement with his creditors to pay all his debts by yearly instalments, without the knowledge of the remitters of the bills. The ct., considering him to have been guilty of fraud in obtaining the bills, & misapplication of the proceeds, made a rule absolute, calling on him to refund the money & to pay the costs of the application.—*Re —* (1855), 25 L. T. O. S. 98; 3 W. R. 422.

4070. Money invested in joint names of solicitor & client—Claim by solicitor for costs.]—Where an exor. & residuary legatee employed a solr. in the matter of the exorship, & transferred into the joint names of client & solr. a sum of stock to answer a legacy, & subsequently employed the same solr. in two suits in equity & in an action at law, in all of which matters costs were incurred, the ct. having, by an order made in both suits, ordered the payment of the legacy out of the fund, & the costs of the parties to the suits to be paid by themselves, refused a motion made on the part of the client, pending an action for the balance of bills of costs, asking that the solr. might be ordered to join in transferring the balance of the

ignorant of, the receipt of a large sum of money by the third, the summary order asked for could not be made against the two, although they might be liable in an action.—*Re ROSS, CAMERON & MALLON* (1895), 16 P. R. 482.—CAN.

PART X. SECT. 5, SUB-SECT. 1.— C. (c).

g. Money recovered under fraudulent judgment.]—In an action for money had & received against an attorney, he cannot set up as an answer to his client, that the judgment under which

the money was collected was fraudulently confessed by deft. in that cause to the client.—*WILLIAMS v. KING* (1831), Dra. 439.—CAN.

h. Rent of land of deceased client.]—W., suing in his individual capacity, obtained a judgment against M., &

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fund, after payment of the legacy, into the client's name, on the ground that the proceedings in respect of which the costs claimed were incurred were closely connected with the purposes for which the fund was invested, & that the claim was one to be settled by a ct. of law.—*Re ROBINSON* (1859), 5 Jur. N. S. 1021; 34 L. T. O. S. 51.

4071. Money received from mortgagee.]—*LEWES v. MORGAN* (1817), 5 Price, 42, 148; 146 E. R. 530, 565.

4072. —.]—Where an attorney has been employed to prepare mtge. deeds, & he receives the money raised by the mtge., he may be called upon summarily to account for it.—*Ex p. CRIPWELL* (1837), 5 Dowl. 689; Will. Woll. & Dav. 356; *sub nom. Re CRETWELL v. FOSBROOKE*, 1 Jur. 755.

4073. Money received from mortgagor—For redemption of mortgage.]—*Re CULLEN*, No. 4042, *ante*.

4074. Money received as proceeds of execution—Amount levied objected to.]—An attorney has no right as against his client to retain money in his hands which he has received as attorney for his client, even though it should be the proceeds of an execution against the goods of a deft. who objects to the amount levied & who has a rule then pending before the master, calling on pltf. or his attorney to refund part of the money.—*SIBLEY v. LEICESTER* (1833), 2 Dowl. 234; 3 L. J. Ex. 62.

4075. Money received on cheque payable to client.]—A married woman, to whom a sum of money was payable for her separate use, received a cheque from the Accountant-General & handed it over to her solr. who accompanied her. The solr. was on motion ordered to pay the balance to his client, & held, that the *onus* being on the solr. to show cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt out of it.—*MAWHOOD v. MILBANKE* (1851), 15 Beav. 36; 51 E. R. 449.

4076. Money received for probate of will.]—Where an attorney received money to pay over to a proctor for probate of a will, the ct. refused to interfere summarily to make him account for it.—*Ex p. COHEN* (1835), 1 Har. & W. 211.

4077. Money received by solicitor in bankruptcy.]—A solr. who gets money into his possession in character of a receiver, is not entitled to retain it as a set-off to a sum owed to him on a private account between him & the assignee.—*Re CANNINGS, Ex p. WALSH* (1832), 2 L. J. Bcy. 39.

4078. Money paid to solicitor's clerk.]—The managing clerk of pltf.'s attorney called at the office of deft.'s attorney, & there received a sum of money for debts & costs in settlement of the action; he embezzled the amount & other sums. *Qu.*: was that a payment to the attorney so as to make him liable to pltf. for the amount.—*Re GEOGHEGAN* (1859), 32 L. T. O. S. 301.

4079. —.]—*Re A SOLICITOR* (1878), 22 Sol. Jo. 496.

4080. Costs paid to agent of uncertificated solicitor.]—Where an attorney being off the roll, in consequence of not taking out his certificate,

employed his agent to sue out process, & costs were paid in the action to the agent, the ct. would not compel either the attorney or his agent to refund those costs.—*NASH v. GOODE & PARRY* (1841), 9 Dowl. 929; 5 Jur. 653.

4081. Money paid to person professing to act as solicitor—Solicitor struck off the rolls.]—*Re STRONG*, No. 4053, *ante*.

4082. — Unqualified person.]—Where an unqualified person had obtained possession of money & documents by pretending to be a solr.:—*Held*: the ct. in the exercise of its summary jurisdiction could order him to deliver up such money & documents & upon his disobedience could punish him by attachment.—*Re HULM & LEWIS*, [1892] 2 Q. B. 261; 61 L. J. Q. B. 502; 66 L. T. 683; 8 T. L. R. 533, D. C.

Annotation:—*Distd. Re Hurst & Middleton, Middleton v. The Co.*, [1912] 2 Ch. 520.

4083. Costs overpaid.]—An order, on petition, having been made for the taxation of a solr.'s bill of costs, & on the taxation less than one-sixth having been taxed off, there remained in the solr.'s hands, on the balance of accounts, after satisfying the solr.'s claims a sum of money which the ct. ordered to be paid over to petitioner within ten days; the order could not be personally served, & substituted service was allowed by the ct.; the solr. having failed to comply with the order, petitioner moved the ct. to grant him a four-day order, but produced an affidavit of non-payment made several days previous to the day on which the motion was made. The ct. granted the order, but required an affidavit of non-payment up to the time of application.—*Re NIAS* (1846), 8 L. T. O. S. 153.

4084. —.]—The order on a solr. for payment to his client of a sum found due on taxation, requires personal service; but it appearing that the solr. absented himself to avoid service, an order for substituted service was made.—*Re LLOYD* (1848), 10 Beav. 451; 50 E. R. 655.

4085. — Bill of exchange from client to solicitor—Payment to holder of title.]—An attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found he has been overpaid, & he was ordered to refund the overpayment to the client, & also by a subsequent order to pay the costs of taxation, more than a sixth having been taken off.

Upon the application of the attorney to be allowed to pay these sums to the holder of the bill of exchange, which had been dishonoured, instead of his client, he was ordered to do so within a week, or, in default, that an attachment should issue:—*Held*: (1) no demand of these two sums was necessary to ground an attachment, but it was his duty to seek the holder of the bill, & pay the money to him.

(2) A personal service of the rule of ct. must be made to ground an attachment for nonpayment of money pursuant to a judge's order, which is afterwards made a rule of ct., & service of the order & allocatur are not sufficient nor is service of the rule on the London agents of the attorney sufficient; & for this defect an attachment, issued at the end of Jan. & executed on Feb. 12 was set aside in Trinity term following.—*WOOLLISON v. HODGSON* (1834), 3 Dowl. 178.

deft. (his attorney) after W.'s death received the money. W. was the administrator of A., & this judgment was for rent of A.'s land. W.'s exors. having sued deft. for the money so received, persons interested in A.'s estate notified him not to pay:—*Held*. having received the money as W.'s

attorney, he could not resist payment to his exors.—*CHARTERIS v. MILLER* (1856), 14 U. C. R. 62.—*CAN.*

k. Money received in proceedings not in court.]—A judge in chambers may interfere summarily against the attorney, by ordering him to render an account of & pay over such moneys,

although there is no litigious or suit, in ct. by or in which the money was received.—*Re AN ATTORNEY* (1877), 7 P. R. 174.—*CAN.*

l. Whether client made to bring action.]—Although an attorney, who has collected money, may be made to account therefor in a civil action, the ct. will

4086. — Sum deposited as security for costs—Costs not exhausting fund.]—A solr., professionally concerned in a transaction for A., received on his account in the course of that transaction a sum of money. Afterwards it was arranged between A. & B. & the solr. that the sum should remain in the solr.'s hands as a security for the payment of the expenses of certain proceedings taken in Parliament by B. to obtain an Act for a divorce. The application to Parliament having failed, & the costs of it not having exhausted the fund:—*Held*: under the summary jurisdiction of the ct. over the solr. it could order the repayment to A. of the balance.—*Ex p. WORTHAM* (1851), 4 De G. & Sm. 415; 64 E. R. 893; *affd.*, 4 De G. & Sm. p. 420, L. C.

4087. Whether interest allowed.]—The ct. will not grant an application requiring an attorney to pay over the interest of a sum of money which has come improperly into his hands.—*FENN v. WILD* (1832), 1 Dowl. 498.

4088. —.—*Re CULLEN*, No. 4042, *ante*.

4089. —.—*Pltf. instructed deft., his solr., to recover a sum of money for him. He did so, but did not pay it to pltf. Subsequently pltf. demanded payment of this sum:—Held*: interest on this sum was payable by deft. as from the date of the demand only, & not from the date when the money was received by deft.—*BARCLAY v. HARRIS & CROSS* (1915), 85 L. J. K. B. 115; 112 L. T. 1134; 31 T. L. R. 213.

See Attorney & Solicitors Act, 1870 (c. 28), s. 17.

D. Loss of Right to Summary Order.

4090. Acceptance of promissory note by client.]—If a party in a cause take a promissory note from his attorney, for the debt, which his attorney has received from the opposite party, he deprives himself of the summary relief by application to the ct., to make the attorney pay over the money.—*ANON.* (1825), 3 L. J. O. S. K. B. 106.

4091. Bankruptcy of solicitor.]—The ct. will not compel an attorney to pay a sum of money he has received in his character of attorney; he having after the receipt of the money become bkpt. & obtained his certificate.—*Ex p. CULIFORD v. WARREN* (1828), 8 B. & C. 220 6 L. J. O. S. K. B. 329; 108 E. R. 1026.

Annotation. —Consd. Re — (1855), 25 L. T. O. S. 98.

4092. Money fraudulently received.]—Where an attorney has received money to the use of his client & not accounted for it, & has afterwards become bkpt. & obtained his certificate, the ct. will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate. But if the attorney committed fraud in the receiving & not accounting, the ct. in the exercise of its general jurisdiction over its officer will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct. The case of fraud, however, ought to be clear, & the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to show cause why he should not pay over the money.—*Re BONNER* (1833), 4 B. & Ad. 811; 1 Nev. & M. K. B. 555; 110 E. R. 661.

Annotation. —Apld. Re — (1855), 25 L. T. O. S. 98.

compel him to do summary justice without putting the client to the necessity of bringing an action.—*Ex p. KERR v. THORNE* (1879), 18 N. B. R. 625.—*CAN.*

m. Right to money dependent on dis-
*contract.]—*The ct. will not, on

a summary application, compel an attorney to pay over money the right to which is dependent on the existence of an agreement between the attorney & the client, which the latter disputes.—*Re ROBERTSON, Ex p. KIERSTEDT* (1908), 38 N. B. R. 463; 5 E. L. R.

4093. Action by client against solicitor.]—If a person commences an action against his attorney for money owing to him, he cannot make a summary application against him to the ct. to make him pay the amount, until he has discontinued the action.—*ANON.* (1841), 5 Jur. 678.

4094. —.—*Where an award arising out of an action against an attorney was made against him, but he kept out of the way & did not pay the sum awarded, being money entrusted to him for investment which he had appropriated, a summary remedy against him was refused.—Re AN ATTORNEY* (1856), 4 W. R. 617.

4095. —.—*The ct. will not grant a rule calling upon an attorney to show cause why he should not pay over to his client moneys received by him as attorney for such client, when the client has issued a writ & recovered judgment for such moneys against the attorney.—Re DAVIES* (1866), 15 L. T. 161; 15 W. R. 46.

Annotation. —N.F. Re Grey, [1892] 2 Q. B. 410.

4096. —.—*The summary jurisdiction of the ct. over solrs. will not, except under very special circumstances, be exercised to enforce a claim which has been barred in an action at law.—SITTINGBOURNE & SHEERNESS RY. CO. v. LAWSON* (1886), 2 T. L. R. 605, C. A.

4097. —.—*Where a solr. has committed a breach of professional duty in failing to pay over money received by him for his client, the fact that the client has brought an action against him & recovered judgment for the money does not take away the disciplinary jurisdiction of the ct. summarily to order payment of the money to the client.—Re GREY, [1892] 2 Q. B. 440; 61 L. J. Q. B. 795; 57 J. P. 246; 41 W. R. 3; 8 T. L. R. 694, C. A.*

Annotation. —Apld. Re A Solicitor, Ex p. Hales, [1907] 2 K. B. 539.

4098. Right dependent on special agreement—Agreement disputed by solicitor.]—The ct. will not interfere to compel an attorney to pay over money, the right to which is dependent on the existence of a special agreement between the client & the attorney which the latter disputes.—*HODSON v. TERRALL* (1833), 2 Dowl. 264.

4099. Money claimed by third party.]—(1) A solr. who has received & has in his hands the money of his client, will be summarily ordered to pay over the amount.

(2) A solr. received moneys for his client, an administratrix:—*Held*: he could not set up proceedings by the next of kin, of whose rights he had notice, as a defence for not paying the administratrix.—*Re BECKE* (1854), 18 Beav. 462; 52 E. R. 182.

Delay.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 326, 482, 540, Nos. 124, 1450, 1923.

E. Attachment for Disobedience to Order.

Contempt of court, attachment & committal generally.]—See CONTEMPT OF COURT, Vol. XVI., pp. 6 *et seq.*

4100. Balance found due on taxation—Application of Debtors Act, 1869 (c. 62).]—Default by a solr. in payment of a balance found due from him to his client upon taxation of his bill of costs under the common order to tax is "default by a solr. in payment of a sum of money,

389.—*CAN.*

PART X. SECT. 5, SUB-SECT. 1.—E.

*n. Who may be attached — Queen's Bench attorney practising in district court.]—*An attorney of the Queen's Bench practising in a district ct., may

Sect. 5.—Liability of client: Sub-sect. 1, E.; sub-sect. 2. Sect. 6.]

when ordered to pay the same in his character of an officer of the ct. making the order" within above Act, s. 4, & an attachment may be issued against him.—*Re WHITE* (1870), 23 L. T. 387; 19 W. R. 39.

Annotation:—Appld. Re Barfield & Rush (1871), 19 W. R. 466.

4101. ———.]—Default by a solr. in payment of a balance found due from him upon taxation of his bill of costs under the common order for that purpose, is default in payment of a sum of money ordered to be paid by the solr. in his character of an officer of the ct. within above Act, s. 4 (4), & an attachment may be issued against him.—*Re RUSH* (1870), L. R. 9 Eq. 147; 21 L. T. 692; 18 W. R. 331; *subsequent proceedings*, L. R. 10 Eq. 442.

Annotation:—Distd. Re Hope (1872), 7 Ch. App. 523.

4102. ———.]—*Re A SOLICITOR*, No. 3637, *ante*.

4103. ———.]—*Re BLAKE* (1846), 9 Beav. 209; 7 L. T. O. S. 108; 10 Jur. 168; 50 E. R. 323.

4104. ———.]—A solr. may be imprisoned for default in payment of a balance ordered to be paid on a common order to tax his bill of costs.—*Re A. B.* (1870), 39 L. J. Ch. 159.

4105. ———.]—An attorney having failed to obey a rule of ct. by which he was ordered to pay over a sum of money received by him in his character of attorney, the ct. refused to order an attachment upon the common affidavit. Where the client has elected to take his remedy by a civil proceeding, he must have recourse to an execution under Judgments Act, 1838 (c. 110), s. 18, or an application under Debtors Act, 1869 (c. 62).—*Re BALL* (1873), L. R. 8 C. P. 104; 42 L. J. C. P. 104.

Annotations:—Distd. Re Dudley (1883), 12 Q. B. D. 44. *Consd. Re Grey*, [1892] 2 Q. B. 440.

4106. ———.]—Under an order to tax made in 1873, a balance was found due from a solr. in respect of moneys received by him, & ought to have been paid within twenty-one days from Aug. 21, 1875:—*Held*: the case was governed by R. S. C. 1875, Ord. 44, r. 2, & an attachment for non-payment could not be issued without notice to the solr.—*Re A SOLICITOR* (1875), 1 Ch. D. 445; 24 W. R. 103; 3 Char. Pr. Cas. 369.

Annotation:—Refd. Dallas v. Glyn (1876), 3 Ch. D. 190.

4107. ———.]—A solr. received on behalf of a client a sum of £339, which he paid into his account with his own bankers & dealt with as his own money. He afterwards forwarded to his client a sum of £100, & refused to pay the balance, on the ground that he had a claim against an agent whom his client had employed to communicate with him. Application having been made to the Q. B. Div. to compel the solr. to pay the money, the matter was referred to a master, who reported that the balance was due from the solr. to his client. An order was made by the Q. B. Div., & also a subsequent order was made at chambers, that the solr. should pay the balance claimed to his client. These orders not having been complied with, an order for the attachment of the solr. was made by a judge at chambers:—*Held*: the orders for the payment of the balance claimed were not merely in the nature of civil process, but were orders made against the solr. as an officer of the ct., & the attachment was properly granted.—*Re DUDLEY* (1883), 12 Q. B. D. 44; 49 L. T. 737; *sub nom.*

be attached for not paying over money received for his client.—CARRUTHERS v. ——— (1825), Tay. 243.—**CAN.**

o. To repay money improperly with-

drawn from court.]—An attorney had been ordered to pay into ct. a sum improperly withdrawn by him from ct. After a hearing, the ct. directed

Re DUDLEY, Ex p. MONET, 53 L. J. Q. B. 16; 32 W. R. 264; 28 Sol. Jo. 71, C. A.

Annotations:—Consd. Re Wray (1887), 36 Ch. D. 138; *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190; *Re Grey*, [1892] 2 Q. B. 440; *Seldon v. Wilde*, [1911] 1 K. B. 701. *Refd. Re Strong* (1886), 32 Ch. D. 342; *Godfrey v. G.* (1895), 73 L. T. 599.

4108. Bankruptcy of solicitor—Effect of discharge.]—By the master's allocatur an attorney was ordered on May 12 to pay over to his client a sum of £15; on June 20 the attorney became bkpt., & afterwards obtained his certificate:—*Held*: it was then too late to move for an attachment for not paying the money pursuant to the master's allocatur.—*BARON v. MARTELL* (1827), 9 Dow. & Ry. K. B. 390.

Annotation:—Refd. Re Newbery (1835), 4 Ad. & Kl. 100.

4109. ———.]—An attorney, in custody under an attachment for non-payment of money pursuant to a rule of ct., is entitled to be discharged from custody on having become bkpt., & obtained his certificate, even though he received the money in the course of his employment as attorney.—*R. v. EDWARDS* (1829), 9 B. & C. 652; 7 L. J. O. S. K. B. 341; 109 E. R. 242.

Annotations:—Refd. Re ——— (1855), 25 L. T. O. S. 98. *Mentd. Re Helsby* (1832), 1 L. J. Bey. 5; *Lees v. Newton* (1866), L. R. 1 C. P. 658.

———.]—*Sec, further, BANKRUPTCY*, Vol. V., pp. 1029–1032, Nos. 8414–8434.

4110. Order for payment—Defect—Misnomer.]—An attachment ordered absolutely in the first instance against an attorney for non-payment of money, pursuant to an order, to another attorney of the party, for whom the former had been changed by order of the ct., & that although in the orders for changing the attorney, & for payment of the money, he had been called John, whereas his name was James, but he had attended several summonses taken out as against John, & had consented to some of them without objecting the misnomer, which the ct. thought, under the circumstances, cured the mistake.—*STEVENSON v. POWER* (1821), 9 Price, 384; 147 E. R. 126.

4111. ———.]—**Vagueness & uncertainty.**]—An order was made directing that applt. should be ordered "to deliver to appct. a cash account showing the moneys received by him for & on account of appct., & to pay the moneys due from him to appct., & such further order as to the taking of any account or production of any papers as might seem fit." The order was not complied with, & the judge in chambers made an order under which applt. was committed to prison:—*Held*: the order directing the payment of money "due from applt., to the appct." was too uncertain & vague, & therefore both the order for attachment & the writ must be set aside as being irregular & bad.—*Re WEATHERLEY* (1918), 88 L. J. K. B. 482; 120 L. T. 431; 63 Sol. Jo. 100, C. A.

4112. ———.]—**Service on solicitor—Necessity for.**]—*WOOLLISON v. HODGSON*, No. 4085, *ante*.

4113. Notice of motion to solicitor—Necessity for.]—*Re A SOLICITOR*, No. 4106, *ante*.

4114. Whether attachment absolute in first instance.]—A rule to show cause why an attorney should not pay his client a sum of money, having been referred to the master, who found a certain sum due, & made his allocatur accordingly, whereupon the rule was made absolute:—*Held*: a rule for an attachment for the non-payment was not absolute in the first instance.—*RYAN v. FARNELL* (1836), 1 Har. & W. 641.

attachment to issue for appct.'s wilful disobedience.—*Re MILLER* (N. S.) (1909), 7 E. L. R. 12.—**CAN.**
p. Refusal to pay to English attorney

4115. —.].—Where money has been wrongfully detained by an attorney from his client, & a rule requiring him to pay that money over has been made absolute against him, it being clearly shown that he was aware of what the rule required him to do, the ct. granted a rule for an attachment absolute in the first instance, he not having complied with the rule.—*Ex p.* BURGIN (1841), 1 Dowl. N. S. 292.

4116. —.].—A rule *nisi*, requiring an attorney to show cause why he should not pay a sum of money, was enlarged at his request, but no cause being shown, & the rule being made absolute, this ct. granted an attachment absolute in the first instance.—*Ex p.* BRIGHTMORE (1841), 6 Jur. 15.

4117. Whether right to attachment waived—Acceptance of part payment.]—An order made against A., a solr., under Debtors Act, 1869 (c. 12), for payment of money by a certain day, with notice that in default his property would be liable to sequestration & himself to be arrested & committed to prison, was followed by the issue of a *fi. fa.*, under which the sheriffs took possession. An arrangement was then made by which the sheriffs withdrew from possession, upon an engagement by A. to pay the amount, costs, charges, & interest, by monthly instalments, & in default that they should re-enter under the original order & proceed with the execution of the warrant as if they had not withdrawn from possession. Default having been made in payment of the instalments:—*Held*: after the arrangement for withdrawing from possession & payment by instalments, A. could not be attached for default.—*HARVEY v. HALL* (1873), L. R. 16 Eq. 324; 43 L. J. Ch. 95; 28 L. T. 734.

Annotation:—*Distd. Re Fereday*, [1895] 2 Ch. 437.

4118. —.].—After a writ of attachment had been issued at the instance of clients against a solr. for his non-payment of a sum of £78 which he had been ordered to pay, the clients, at the request of the solr., agreed to suspend proceedings upon the writ for fourteen days upon the solr. paying £25 on account. This was done, but the solr. did not make any further payment within the extended time, & he was arrested. Upon a motion by the solr. for his discharge from custody:—*Held*: by giving time & accepting part payment, the clients had not waived their right to enforce the writ of attachment.—*Re FEREDAY*, [1895] 2 Ch. 437; 73 L. T. 56; 13 R. 639; *sub nom.* *Re A SOLICITOR*, 64 L. J. Ch. 894; 39 Sol. Jo. 601.

4119. —.].—**Civil proceedings against solicitor.]**—*Re BALL*, No. 4105, *ante*.

SUB-SECT. 2.—TO DELIVER UP PAPERS.

See Sect. 2, sub-sect. 4, B., *ante*.

SECT. 6.—SPECULATIVE ACTIONS.

4120. Right to bring speculative action.]—Observations as to the circumstances in which a

received in acting as agent.]—An Irish attorney, employed by an English attorney to recover a debt due in Ireland to an English client,

received the amount but did not pay it over, & having been ordered by the ct. to pay it & the costs of the order, did not obey the order:—*Held*: he was

solr. may take up a speculative case on behalf of a poor client, & as to the terms on which he may do so.—*WIGGINS v. LAVY* (1928), 44 T. L. R. 721, C. A.

4121. —.].—*LADD v. LONDON ROAD CAR CO.* (1900), 110 L. T. Jo. 80.

Annotations:—*Apprvd.* *Rich v. Cook* (1900), 110 L. T. Jo. 94. *Refd.* *Wiggins v. Lavy* (1928), 44 T. L. R. 721.

4122. —.].—*RICH v. COOK* (1900), 110 L. T. Jo. 94, C. A.

Annotation:—*Refd.* *Wiggins v. Lavy* (1928), 44 T. L. R. 721.

4123. Liability to pay costs personally—Where bonâ fide cause of action.]—*RICH v. COOK* (1900), 110 L. T. Jo. 94, C. A.

4124. —.].—In a speculative action brought to recover damages for personal injury the evidence at the trial showed that the action was wholly unwarrantable. As pltf. was a man of straw, defts., judgment with costs having been entered for them, moved that the solr. for pltf. should be ordered personally to pay their taxed costs:—*Held*: although the solr.'s clerk who had taken instructions & prepared the brief had been guilty of reprehensible conduct, there was no absolute proof that the solr. had not acted *bonâ fide* in the matter. There was nothing wrong or illegal in taking up a speculative action so long as the solr. took reasonable care to assure himself that pltf. had a case fit to be brought into ct. In the present case the solr. deposed that he had given the matter his consideration, & had decided on the documents that pltf. had a fair chance of succeeding. He was therefore entitled to the benefit of the doubt, & it would not be fair to order him to personally pay defts.' costs. At the same time, defts. ought not to pay more than their own costs of the motion, which for the reason above stated was dismissed.—*WARREN v. LONDON ROAD CAR CO.* (1907), 52 Sol. Jo. 13.

4125. —.].—**Illegal agreement between solicitor & client.]**—A solr. acting for a client in reference to a claim against a bank wrote to the client as follows: "Inasmuch as you have agreed to pay me 25 per cent. of whatever you may succeed in recovering . . . I agree that such percentage shall cover all my costs & expenses in any action . . . taken in respect of your claim, & in the event of your failing to recover anything I undertake to make no claim against you for my costs or charges." A writ was issued against the bank, but from a very early period in the action the solr. knew that there was no substance in the claim. Eventually the client withdrew her claim & judgment was entered for the bank, with costs. The costs not being paid by the client, the bank sought to make the solr. personally liable:—*Held*: the agreement between the solr. & the client was champertous & illegal; the solr. had been guilty of misconduct as a solr.; & he must pay the bank's costs in the action inasmuch as these would not have been incurred but for his conduct.—*DANZEY v. METROPOLITAN BANK OF ENGLAND & WALES* (1912), 28 T. L. R. 327.

—.].—*See* Sect. 4, *ante*.

guilty of misconduct as an officer of the ct., within Debtors (Ireland) Act, 1872, s. 5 (4), & an attachment should issue.—*Re B*—(1876), 1 R. 10 C. L. 439.—*IR.*

Part XI.—Solicitors and Third Persons.

SECT. 1.—IN GENERAL.

4126. Necessity for proof of employment.]—Defender M. was trustee under a marriage contract, by which the wife's property was settled on herself for life, excluding the *jus mariti*; &, in case she survived her husband, to her in fee; but, should she predecease her husband, to him for life or until his second marriage; & lastly, in the event of her predeceasing her husband, to her children in fee, after her husband's decease or second marriage. Defender M. & the husband & wife, who were also trustees, lent this trust fund on the security of unfinished houses in course of erection under a building speculation. The only valuation the trustees had before them was one by an architect, which had been obtained by the borrower, but they consulted defender H., who was their law agent, & were informed by him that there was no object to the investment. The deed contained an immunity clause exonerating the trustees from "omissions or neglect of diligence, or the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." Pursuers, the children of the marriage, while both spouses were alive, brought an action for a declarator that defender M. & the law agent were jointly & severally liable to restore the fund, which had been lost by the failure of the speculation:—*Held*: the law agent was not liable, for there was no evidence to prove that he had been employed by pursuers or any person on their behalf.—*RAE v. MEEK* (1889), 14 App. Cas. 558, H. L.

Annotations—*Apld.* Brinsden v. Williams, [1894] 3 Ch. 185. *Refd.* Mara v. Browne, [1896] 1 Ch. 190. *Mentd.* Wyman v. Paterson, [1900] A. C. 271.

4127. Duty of solicitor—On making arrangement with opposite party.]—The prudent course for attorneys, when they enter into any arrangement with an opposite party, is to draw up a memorandum of the terms agreed upon & read it over to the party, & let him sign it.—*GREENWOOD v. ELDRIDGE* (1833), 6 C. & P. 128; 172 E. R. 1175.

4128. — Communication with opposite party—In absence of opposite party's solicitor.]—*RASPELSON v. PECK* (1849), 13 L. T. O. S. 163.

4129. — Solicitor acting for trustee client—Duty as against cestui que trust.]—It is improper conduct in a solr. acting for a trustee to attempt to protect his client against the just demands of a *cestui que trust* by throwing formal difficulties in the way of the latter, which the solr. would not otherwise have insisted on as necessary for the protection of his client.—*AYLMER v. WINTERBOTTOM* (1857), 4 Jur. N. S. 19.

4130. — On acquiring interest in land—Not in character of solicitor.]—Where a solr. acquires by contract a different interest beyond what his character of solr. confers, such as an equitable mtge., it is incumbent on him immediately to give clear & distinct notice of such interest to all persons in the visible ownership of the estate, & such a case is not within the principle of the cases in which a purchaser of land has been held bound to inquire of the tenant in possession the nature of his interest.—*BOZON v. WILLIAMS* (1829), 3 Y. & J. 150; 148 E. R. 1131.

Annotation:—*Refd.* Small v. Attwood (1834), 1 Y. & C. Ex. 37.

PART XI. SECT. 2, SUB-SECT. 1.

4133 i. Sheriff's fees.]—An attorney is liable to the sheriff for fees on executing writs, & for services rendered for him

in causes of his clients, without any special undertaking.—*JARVIS v. WASHBURN* (1830), Dra. 163.—*CAN.*

*q. Acting without authority.]—*MORAN

v. SCHERMERHORN (1858), 2 P. R. 261.—*CAN.*

*r. —.]—*MORRIS v. CONFEDERATION LIFE ASSOCN. (1895), 17 P. R. 24.—*CAN.*

SECT. 2.—LIABILITY TO THIRD PERSONS.

SUB-SECT. 1.—IN GENERAL.

4131. Non-disclosure of incumbrance—Sale of land.]—Attorney on sale of an estate not disclosing to the buyer an incumbrance, & leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor.—*ARNOT v. BISCOE* (1748), 1 Ves. Sen. 95; 27 E. R. 914, L. C.

Annotations:—*Distd.* Evans v. Bicknell (1801), 6 Ves. 174. *Refd.* Slim v. Croucher (1860), 8 W. R. 347. *Mentd.* Downing v. Townsend (1753), Amb. 592; Seddon v. Connell (1840), 10 Sim. 58.

4132. —.]—*Re HINTON, TYLEE v. WEBB*, No. 4051, *ante*.

4133. Sheriff's fees.]—A sheriff's officer can recover caption fees, by an action against the pltf.'s attorney, who caused the warrants from the sheriff's office to be directed to him, it being proved that the master will allow the caption fee in taxing costs, & that it is always paid by pltf.'s attorney, notwithstanding 23 Hen. 6, c. 9.—*TOWNSEND v. CARPENTER* (1825), 2 C. & P. 118; Ry. & M. 314; 172 E. R. 54, N. P.

Annotations:—*Fold.* Newton v. Chambers (1844), 1 Dow. & L. 869. *Apld.* Walbank v. Quarterman (1846), 3 C. B. 94.

4134. — Evidence of usage.]—A sheriff's officer may maintain an action against the attorney of pltf. in the original suit for caption fees & conduct money, on proof of an employment by the attorney, & that it is the usual course of business for the attorney to be charged with & to pay such fees.

Proof of the usage of business is admissible in evidence to establish the liability of the attorney.—*NEWTON v. CHAMBERS* (1844), 1 Dow. & L. 869; 13 L. J. Q. B. 141; 2 L. T. O. S. 351; 8 Jur. 244.

—.]—*See* EXECUTION, Vol. XXI., pp. 614, 615, Nos. 2025–2035.

4135. Costs—Refunding costs—Paid by defendant to solicitor—Solicitor acting without authority of client.]—If an attorney sue out a writ against A., at the suit of B., without any authority, express or implied, from B. for so doing, & A. pay the costs of such writ to the attorney, A. may recover back the amount of those costs, by bringing an action for money had & received against the attorney; but if the attorney had any authority, either express or implied, from B. to sue out the writ, such action for money had & received will not lie against the attorney, even though B. had no cause of action against A.—*DUPEN v. KEELING* (1829), 4 C. & P. 102; 172 E. R. 626, N. P.

4136. — — — Paid for client by third person—After taxation on third person's application.]—If a party taxes the bill of an attorney for costs due from a third person & pays the bill, he cannot afterwards recover the amount without showing the payment to have been made through ignorance or misrepresentation; & if an action be brought, the ct. will stay proceedings.—*KENDALL v. ALKEN* (1834), 10 Bing. 438; 2 Dowl. 783; 4 Moo. & S. 319; 131 E. R. 974.

— — — **Claim by trustee in bankruptcy.]—***See* BANKRUPTCY, Vol. V., pp. 641, 642, Nos. 5764–5773.

— — — **Liability to pay costs.]—***See* Part X., Sect. 4, *ante*.

4137. Expenses of witnesses—Where express promise to pay—Compensation for loss of time.]—A promise by an attorney after trial to pay a witness a compensation for his loss of time cannot, it seems, be enforced either by action or attachment.—*BATES v. STURGES* (1832), 2 Moo. & S. 172.

4138. ——— Money received from opposite party.]—A., an attorney, caused B. to be subpoenaed as a witness in a cause in which A. was attorney, & B., before he went to the Assizes, asked A. who was to pay him, & A. said he would do so. After the Assizes, at which B. attended, & was examined. A.'s clerk, by the direction of A., gave B. an I.O.U. for the amount of B.'s expenses & loss of time, which amount A. received from the opposite party after the costs in the cause had been taxed:—*Held*: B. might recover the amount from A. on a declaration containing counts for money had & received, & on an account stated.—*EVANS v. PHILLIPOTS* (1840), 9 C. & P. 270; 173 E. R. 831. ———.]—*See EVIDENCE*, Vol. XXII., p. 436, Nos. 4530, 4531.

4139. Money received in bankruptcy proceeding—Solicitor acting for creditor—Without authority.]—Assignees, on the representation of the solr. to the commission that he is authorised to receive it as agent, pay over a dividend to such solr. It turns out he had no such authority. Upon petition of creditor for payment to him of the dividend, charging that no authority was given to that solr., held, that being solr. to the commission he might be made resp. as well as the assignee, & that a joint order might be made against them all for its payment.—*Re JOHNSON, Ex p. STORY* (1834), 4 Deac. & Ch. 504; 2 Mont. & A. 54; 4 L. J. Bcy. 11, Ct. of R.

4140. Expenses of commissioner for examining witnesses.]—On a petition by the comr. appointed to examine witnesses in the cause, the solr. for defts. was ordered to pay the comr.'s expenses in attending the commission, & the costs of this petition, although he had given no personal guarantee for the payment of such expenses.—*PARSONS v. BENN* (1850), 19 L. J. Ch. 264.

4141. Application of trust money—Received under administration order.]—(1) Although the fact that solrs. have, in the administration of a deceased person, received trust moneys with knowledge of the trust, & paid them over to their client, the personal representative, by whom they have been wasted, will not render them personally liable to the *cestuis que trust*, yet when there was a decree directing the representative to pay into ct. what he should receive, & subsequently to that decree portions of the estate came into the hands of the solrs., from which they discharged themselves, partly by taking credit for their antecedent bills of costs, & partly by payments to their client shortly before his bkpct., in a suit by the *cestuis que trust*:—*Held*: the solrs. were bound to see that the decree of the ct. was obeyed; they were not entitled themselves to receive, or to appropriate any part of the estate in a manner at variance with the order, & they must be charged with the amounts in question, & interest from the time when they received the principal.

(2) As to moneys forming part of the estate which, at a period anterior to the decree, the solrs., acting for the personal representative, had lent upon certain bonds, & the bonds were, after the decree, paid off to the solrs.:—*Held*: inasmuch as these were never bonds of testator, & as in a prior administration suit, the investment upon them had been disallowed, these moneys must be regarded as having been throughout in the hands of the representatives, & the solrs.

were not liable to the *cestuis que trust* in respect of them.—*HARRIES v. REES* (1867), 37 L. J. Ch. 102; 17 L. T. 418; 16 W. R. 91, L. JJ.

Annotation:—*Generally, Refd. Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370.

4142. ——— Received from client — To defray client's costs.]—*Semble*: a solr. who receives from his client for the purpose of his or her defence a sum of money which A. alleges was trust money in the client's hands is under no duty to preserve the money as such trust money or to refuse to apply it in accordance with the client's directions.—*LA ROCHE v. ARMSTRONG*, [1922] 1 K. B. 485; 91 L. J. K. B. 342; 126 L. T. 699; 38 T. L. R. 347; 66 Sol. Jo. 351.

4143. Fees for entering appeal at sessions—Liability to clerk of peace.]—The solr., & not the client, is liable to the clerk of the peace for fees connected with the entering, etc., of an appeal at the sessions.—*LANGRIDGE v. LYNCH* (1876), 31 L. T. 695; 40 J. P. 631.

4144. False instructions to counsel.]—An agreement had been come to between A. & B. The agreement was by B., & as the claim alleged, the breach was accompanied by false instructions to counsel given by a solr., & by the solr.'s false statements upon oath:—*Held*: on an action for injunction consequent upon the breach by B., on the claim as alleged, there was no right of action against the solr. for costs.—*BLACKBURN UNION v. BROOKS* (1877), as reported in 26 W. R. 57.

4145. Withholding information.] —*DAVIS v. OHRLY* (1898), 14 T. L. R. 260.

Counsel's fees.]—*See BARRISTERS*, Vol. III., pp. 332, 333, Nos. 212–214, 221–229.

Liability to trustee in bankruptcy.]—*See BANKRUPTCY*, Vol. V., pp. 641, 642, 987, Nos. 5761–5773, 8080.

Money deposited with solicitor of vendor—Non-completion of sale—Liability to refund.]—*See AGENCY*, Vol. I., pp. 667, 668, Nos. 2808–2813; *AUCTION*, Vol. III., p. 24, No. 168.

Liability of partnership—For acts of partner.]—*See Part XII.*, Sect. 4, sub-sect. 4, *post*.

SUB-SECT. 2.—IN CONTRACT.

4146. No priority between client & third persons.]—A person instructs an attorney to bring an action; who employs his own stationer, generally employed by him. The client has nothing to do with the stationer, if the attorney becomes insolvent. The client pays the attorney. The stationer therefore has no remedy against the client (*LORD ERSKINE, C.*).—*Ex p. HARTOP* (1806), 12 Ves. 349; 33 E. R. 132, L. C.

4147. Express contract—Not entered into as solicitor.]—An attorney who signs an instrument agreeing to give up certain bills of exchange, on certain things being done, is personally liable, unless he enters into the agreement as the attorney or agent, & it is so specified on the instrument.—*KENDRAY v. HODGSON* (1805), 5 Esp. 228; 170 E. R. 794, N. P.

4148. ——— Purchase of freehold in own name—Specific performance.]—A solr. contracted, in his own name, to purchase a freehold; he resisted the performance of it on the ground, that he had acted as the mere agent of a client, & that, being a case of hardship, damages at law would be an adequate remedy to the vendor:—*Held*: he was bound to perform the contract.—*SAXON v. BLAKE* (1861), 29 Beav. 438; 54 E. R. 697.

4149. ——— Entered into as agent—Indorsing bill of exchange.]—Where a solr., acting in getting

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in debts due to the estate of an intestate, under the authority of & as local agent to the administrator, another person being the immediate & general agent of the administrator, under whose directions the solr. acts, has received money in the course of his agency, which it is his duty according to his instructions to remit to the general agent; if in order to effect the object of remittance more conveniently he procure a banker's bill for that purpose which is accidentally drawn in his favour, so that it becomes necessary that he should indorse it, & he does so, a ct. of equity will restrain an action commenced against him on such indorsement, whether brought by the indorsee, the principal agent, or by a banker with whom the bill has been deposited for the purposes of being presented for acceptance & payment by the drawee although the banker may have given credit for the amount, if the latter can be shown to have had any knowledge or information of the circumstances attending the transaction & of the relative situation of the parties.—*KIDSON v. DILWORTH & WELCH* (1818), 5 Price, 564; 146 E. R. 695.

Annotation:—Mentd. Castrique v. Buttlieg (1855), 10 Moo. P. C. C. 91.

4150. ——— Where no authority.]—Semble: if an attorney enters into an agreement professing to bind others, but which is inoperative by reason of the want of authority, he renders himself personally liable thereon.—*WESTMINSTER IMPROVEMENT COMRS. v. FULLER* (1849), 13 L. T. O. S. 264.

4151. ——— ———.]—A contract having been entered into by a firm of solrs. acting on behalf of their client, to pay pltf. certain sums of money, pltf. filed his bill against the client & solrs., alleging that the client was bound by the contract, but that the client denied that he was so bound on the ground that the solrs. had no authority to enter into such contract; & the bill prayed specific performance by the client; or otherwise if it should appear that the solrs. were not authorised, then that the solrs. themselves might be declared personally liable to perform the same. A demurrer to the bill by the solrs. was allowed on the ground that pltf. did not himself allege that the client was not bound, & also, that alternative relief could not be prayed against one deft. in case relief could not be obtained against another deft. —*CLARK v. RIVERS (LORD)* (1867), L. R. 5 Eq. 91; 37 L. J. Ch. 70; 17 L. T. 166; 32 J. P. 71; 16 W. R. 123.

4152. Implied contract—Expenses of messenger under commission of bankrupt.]—Petitioning creditor, & not the solr., is liable to the messenger under a commission of bkpt., for the costs & expenses attending it. The solr. is an agent merely, & is not to be regarded as a principal as respects the messenger; & although he make himself responsible to the messenger, petitioning creditor will not therefore be exonerated, without the express consent of the messenger to discharge him.—*HART v. WHITE* (1816), Holt, N. P. 376; 171 E. R. 277, N. P.

4153. ——— Refreshments supplied to witnesses.]—An attorney who takes witnesses to an inn, is *prima facie* liable to the innkeeper for the expenses incurred.—*CARISS v. RICHARDSON* (1822), 1 L. J. O. S. K. B. 11.

4154. ——— ———.]—The mere circumstance of a party being the attorney in the cause will not make him responsible for refreshments supplied by a coffee house keeper to the witnesses while

attending the trial. But the fact of his being found in communication with the witnesses at the coffee house, is some evidence to go to the jury, that the supplies were sanctioned by him.—*FENDALL v. NOKES* (1839), 7 Scott, 647; 3 Jur. 726.

Annotation:—Refd. Lee v. Everest (1857), 2 H. & N. 285.

4155. ——— Employment of surveyor—Solicitor acting for abortive railway company.]—The solr. of an abortive railway co. is not liable for the employment of a surveyor.—*REECE v. JACKSON* (1848), 10 L. T. O. S. 327.

4156. ——— ——— As expert witness.]—An attorney, being in the position of an agent for his client, is not liable for the charges or expenses of a skilled witness retained by him, in pursuance of his general instructions to make surveys, researches, calculations or experiments, with a view to examination as a witness in his client's cause.—*LEE v. EVEREST* (1857), 2 H. & N. 285; 26 L. J. Ex. 334; 29 L. T. O. S. 263; 22 J. P. 55; 5 W. R. 759.

Annotation:—Expld. Sollery v. Flewker (1857), 27 L. J. Ex. 11.

4157. ——— Repairs done to client's houses—Account received by solicitor without objection.]—The attorney for the owner of houses was held liable for repairs, having ordered the work to be done, & received, without objection, an account made out to himself, although the owner had given bills on which pltf. had recovered judgment against him.—*JONES v. WINT* (1858), 1 F. & F. 261, N. P.

4158. ——— Employment of shorthand writer—Liability for fees.]—Where a solr. employs a shorthand writer to take shorthand notes of a case in which the solr. is acting for a client, in the absence of a special arrangement the solr. is personally liable to the shorthand writer for the costs of the notes.—*COCKS v. BRUCE, SEARL & GOOD* (1904), 21 T. L. R. 62; *sub nom. COCKS v. B. S. & G.*, 49 Sol. Jo. 69.

Annotation:—Distd. Wakefield v. Duckworth (1914), 84 L. J. K. B. 335.

4159. ——— Employment of photographer—Liability for photographs supplied for use in court.]—A member of a firm of solrs. ordered certain photographs from pltf., a photographer, for the purpose of litigation in which the solrs. were acting for a client. Pltf., who knew that the solrs. were so acting & that the photographs were required for the purpose of litigation, debited the solrs. with the price of the photographs in his books. In an action brought by pltf. to recover the price of the photographs from the solrs.:—*Held:* the solrs. were not liable inasmuch as they were *prima facie* agents acting on behalf of a principal, & the transaction was not a cash transaction in the sense that the solrs. had no authority to pledge the credit of the client, nor had any custom been proved that a solr. who makes a contract of this nature is personally liable.—*WAKEFIELD v. DUCKWORTH & Co.*, [1915] 1 K. B. 218; 84 L. J. K. B. 335; 112 L. T. 130; 31 T. L. R. 40; 59 Sol. Jo. 91, C. A.

4160. ——— Business done by other solicitor.]—*SCRACE v. WHITTINGTON*, No. 4363, *post*.

SUB-SECT. 3.—IN TORT.

A. In General.

4161. Wrongful payment of money—After bankruptcy of client—Liability to assignees of bankrupt.]—A party being arrested gave a bail bond, but in consequence of his not perfecting special bail,

the sheriff was fixed. Pltf. having sued on the bail bond, a summons was taken out on behalf of the bail, & a judge ordered the proceedings to be stayed, on payment of debt & costs to the attorney for the original pltf., by the attorneys of the original deft., who had in the meantime become bkpt., but had, before his bkpcy., supplied them with a sum of money towards paying the debt & costs; the money having been paid over accordingly:—*Held*: this payment under the judge's order was payment under process of law, & A.'s assignees could not recover it from original pltf., to whom it was so paid.

Semble: their remedy was against bkpt.'s attorneys, who paid over the money after the bkpcy.—*BELCHER v. MILLS* (1835), 2 Cr. M. & R. 150; 1 Gale, 142; 5 Tyr. 715; 4 L. J. Ex. 160; 150 E. R. 64.

Annotation:—*Refd.* Reynolds v. Wodd (1838), 4 Bing. N. C. 694.

4162. — Proceeds of bill of exchange—Liability to indorsee.—A., the acceptor of a bill, had agreed with his creditors to pay a composition partly in money & partly in notes. The bill having become due the drawer was unable to take it up, but the indorsee entrusted it to the drawer to get the composition in money & notes for him. The drawer handed it to his attorney with other bills accepted by A., to get the composition for him, & at the same time obtained an advance of £200 from the attorney. The attorney obtained the composition in money & repaid himself the £200 & carried the balance to the account of the drawer. For the composition in notes he took one note for the aggregate amount of the composition on the several bills handed to him:—*Held*: the attorney was not liable to the indorsee either in trover for the bill, or for the money kept back by him to repay the advance to his client, the drawer.—*SYMONDS v. ATKINSON* (1856), 1 H. & N. 116; 25 L. J. Ex. 313; 27 L. T. O. S. 160; 156 E. R. 1153.

Annotation:—*Refd.* Jones v. Waring & Gillow, [1925] 2 K. B. 612.

4163. Retaining proceeds of bill of exchange—In repayment of advance—Liability to indorsee.—*SYMONDS v. ATKINSON*, No. 4162, *ante*.

4164. Improperly concealing settlement—Mortgage of settled property—Liability for repayment to mortgagee.—B., being in pecuniary difficulties, consulted her solr. as to the best means of raising money. He suggested that certain leasehold property which had been settled by her upon trust for herself for life with remainder to her children, might be treated as belonging to her absolutely & be mortgaged. The trustees of the settlement declined to join in raising money, but, knowing all the circumstances of the case, retired from the trust conditionally on other trustees being appointed. This was done & money raised by the new trustees, the existence of the settlement being concealed from the mtgees. On a bill filed by the mtgee. against B., her solr., & the old & new trustees, nine years after the discovery of the fraud, praying for a declaration that all & each were liable to make good the moneys advanced by the mtgee.:—*Held*: all defts. were liable as prayed.—*CLARK v. HOSKINS* (1867), 36 L. J. Ch. 689; 16 L. T. 730; 15 W. R. 1161; *varied on appeal* (1868), 37 L. J. Ch. 561; 19 L. T. 331; 16 W. R. 1159, L. JJ.

Annotation:—*Consd.* Head v. Gould, [1898] 2 Ch. 250.

4165. Improperly concealing agreement—Action to rescind purchase—Liability to company as purchasers—Where no fraudulent intent.—Pltfs.

were a joint stock co., which was formed for the purpose of purchasing & working a colliery & ironworks formerly the property of J. B., deceased. Before the co. was formed J. B.'s trustees entered into negotiations with R., a financial agent, to get up a co. for the purchase of the property for about £300,000. R. applied to C., & C. made an arrangement with G., upon the terms stated below. Two contemporaneous agreements were signed, by one of which the trustees agreed to sell the property to a trustee for the co. for £300,000; & by the other which was called in the pleadings the secret agreement, the trustees agreed with C., that he should bring out the co. or forfeit £20,000; & that they should pay £85,000 for commission & risk. On the same day C. agreed with G. that G. should take the whole risk of bringing out the co. & should receive £60,000 & C. £25,000 of this bonus. D. & co., the vendors' solrs., were to receive £1,500 from the tenant for life of the property if the purchase was completed. The co. was established, the first directors being found by R.; & D. & co. became the solrs. of the new co. The prospectus & articles referred to the agreement for the purchase of the property, but made no mention of the agreement between the vendors & C. or of any of the arrangements relating to it. The purchase-money was paid to the vendors, who paid out of it £85,000 to C., of which he gave £60,000 to G. & £10,000 to R. The directors were not informed by D. & co. or any other person, of the agreement between the vendors & C.; but some time afterwards they discovered it, & thereupon called a general meeting of the co. to consider the subject. The result was that a bill was filed by the co. against the vendors & against R., C., G., & D. & co. praying that the purchase might be rescinded or that defts. might be held liable to repay all profits which they had made by the transaction; pltf. offering to allow expenses properly incurred & a fair commission. Before the cause came to a hearing pltf. compromised the suit with the vendors, receiving from them £31,000 as the price of not insisting on the purchase being rescinded:—*Held*: although D. & co. had acted improperly in concealing from the co. the agreement between the vendors & C., they ought to have been dismissed from the suit when pltf. elected not to rescind the purchase; & inasmuch as D. & co. had acted in the matter with no fraudulent intent the ct. dismissed the suit against them without costs up to the time of the compromise & with costs as to all subsequent proceedings.—*BAGNALL v. CARLTON* (1877), 6 Ch. D. 371; 47 L. J. Ch. 30; 37 L. T. 481; 26 W. R. 243, C. A.

Annotations:—*Refd.* *Re* Liberator Permanent Benefit Bldg. Soc. (1894), 10 T. L. R. 537. *Mentd.* Evans v. Davis (1878), 10 Ch. D. 747; Nant-y-glo & Blauna Ironworks Co. v. Gravo (1878), 12 Ch. D. 738; Emma Silver Mining Co. v. Grant (1879), 11 Ch. D. 918; Emma Silver Mining Co. v. Lewis (1879), 4 C. P. D. 396; Lydney & Wigpool Iron Ore Co. v. Bird (1886), 33 Ch. D. 85; Capel v. Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713; *Re* Fauvre Electric Accumulator Co. (1888), 40 Ch. D. 141; Salford Corp'n. v. Lever, [1891] 1 Q. B. 168; Edwards v. Hood-Barrs, [1905] 1 Ch. 20; Jubilee Cotton Mills v. Lewis, [1924] A. C. 958.

4166. Malicious prosecution—Improperly procuring order for arrest.—In an action against a builder, his attorney, & his attorney's clerk, for maliciously & without reasonable or probable cause procuring an order for the arrest of the now pltf. in an action of debt, it appeared that pltf., a Roman Catholic priest, had entered into a contract with the builder for the erection of a

PART XI. SECT. 2, SUB-SECT. 3.—A.

t. False imprisonment—Necessity for malice.]—*JOHNSTON v. ROBERTSON* (1907), 42 N. S. R. 84.—CAN.

Sect. 2.—Liability to third persons: Sub-sect. 3, A., B. & C.; sub-sect. 4.]

church, the contract containing the usual condition for payment only on architect's certificates; & all the money originally due upon it having been paid, & a further claim made by the builder for extras, which the architect had refused to allow, thereupon the builder consulted his attorney, the co-deft., who sent his clerk, the other co-deft., to serve the now pltf., & see what he would say; & on the clerk's statement as to what he said, the attorney, viz. that pltf. had said he was going abroad at some time, the precise words being in dispute caused his clerk to make an affidavit thereof, & his client to make an affidavit of debt, & of belief that pltf. was going abroad; upon which a judge made the order; the affidavit not making mention of the contract, & its condition, or of the architect's refusal to certify, or of pltf.'s permanent office:—*Held*: there was no reasonable or probable cause for the proceeding, as there was no reason to suppose that pltf. was going abroad for any lengthened time, or to avoid the action; if the proceeding was for any improper purpose, as to coerce pltf. into more speedy payment, it would be malicious; in such case the attorney would be liable; but its merely being an improper proceeding, & without reasonable cause, was not *per se* evidence of malice, assuming *bona fides*.—*MELIA v. NEATE* (1863), 3 F. & F. 757, N. P.

4167. — Prosecuting bankruptcy petition without reasonable cause.]—S., an attorney, having been instructed by H. to make J. bkpt., obtained a debtor's summons under Bankruptcy Act, 1869 (c. 71), s. 7, & served it on J., who thereupon applied to the registrar of the county ct. to dismiss the summons. Having heard both parties, the registrar made an order on Apr. 12, that J. should within seven days enter into a bond, with two such sufficient sureties as the ct. should approve, to pay such sum as should be recovered by H. in any proceeding taken for the recovery of the debt due to him from J., together with costs; & that all proceedings on the summons should be stayed until the ct. in which such proceedings for the recovery of the debt should be taken had come to a decision thereon. S. drew up the order, which was the first of the kind made by the county ct. in pursuance of the statute. During the seven days a correspondence took place as to the proposed sureties, who were objected to by S. on behalf of H., & no bond having been executed in consequence, a petition in bkpcy. was, by the express order of H., presented by S. on Apr. 21, under sect. 8, & on the same day a receiver was appointed under sect. 13, the act of bkpcy. alleged being that the petitioning creditor had served on J. a debtor's summons, & that he being a trader had for seven days neglected to pay the debt alleged to be due, or to secure or compound for the same. J. objected to the petition; & after several hearings under sect. 8, the county ct. judge on May 8 adjudged J. to be bkpt.:—*Held*: upon these facts an action was maintainable by J. against S. for maliciously & without reasonable & probable cause presenting the petition & causing him to be adjudicated a bkpt.—*JOHNSON v. EMERSON & SPARROW* (1871), L. R. 6 Exch. 329; 40 L. J. Ex. 201; 25 L. T. 337.

Annotation:—*Consd.* Quartz Hill Consolidated Gold Mining Co. v. Eyle (1883), 11 Q. B. D. 674.

B. Misrepresentation.

4168. Consent of client—To postponement of execution.]—Deft.'s attorney requested pltf.'s

attorney to forbear charging deft. in execution until next term, & falsely represented to pltf.'s attorney that he had the authority of deft. to consent that he should not be charged in execution until the next term; & deft.'s attorney gave a consent in writing to that effect, which omitted to state that the proceedings were stayed at the request of deft., according to the rule Hil., 1786. Pltf.'s attorney forbore to charge deft. in execution until the next term, & deft. was discharged for want of having been so charged, on the ground that the consent did not state that the proceedings were stayed at the request of deft. In an action brought by pltf. against deft.'s attorney for the false representation, as having occasioned the damage:—*Held*: the action was not maintainable.—*HEWITT v. MELTON* (1834), 1 Cr. M. & R. 232; 4 Tyr. 1003; 3 L. J. Ex. 228; 149 E. R. 1066.

4169. Identity of person in custody—Liability to sheriff.]—A sheriff declared in case, for that, defts. being attorneys of P. who had sued out a *ca. sa.* against W., & the sheriff having in custody, under another *ca. sa.* another W., who was entitled to his discharge, defts., well knowing the premises, falsely represented to the sheriff that the last mentioned W. was the W. against whom P.'s writ had issued; by means whereof defts. caused the sheriff to detain the W., who was in his custody; for which the last mentioned W. sued the sheriff, & he paid money by way of compromise. The attorneys pleading not guilty, evidence was given, for the sheriff, that his officer delivered a note to defts.' managing clerk in P.'s action describing the W. who was in custody, & inquired if that was the W. whom they had sued on behalf of P.; & that the clerk took the letter into the office where defts. were, & afterwards returned & told the officer that that was the W.; neither defts. nor the clerk at that time knowing the contrary:—*Held*: a plea alleging that defts. had good & probable reason to believe, & did with good faith believe, the representation to be true, was an answer to the action.—*EVANS v. COLLINS* (1841), 5 Q. B. 801; Dav. & Mer. 609; 13 L. J. Q. B. 180; 2 L. T. O. S. 425; 8 Jur. 315; 114 E. R. 1453, Ex. Ch.

Annotations:—*Expld.* Childers v. Wooller (1859), 2 E. & E. 287. *Refd.* Freeman v. Cooke (1848), 18 L. J. Ex. 114; Thom v. Bigland (1853), 8 Exch. 725; Leather v. Simpson (1871), 40 L. J. Ch. 177; Richardson v. Silvester (1873), L. R. 9 Q. B. 34; Derry v. Peek (1889), 14 App. Cas. 337; Sheffield Corpn. v. Barclay, [1905] A. C. 392. *Mentd.* Barley v. Walford (1846), 9 Q. B. 197; Evans v. Edmonds (1853), 1 C. L. R. 653; Collen v. Wright (1858), 4 Jur. N. S. 357; Bamfield v. Goole & Sheffield Transport Co., [1910] 2 K. B. 94.

4170. Solvency of client.]—Distinction between misrepresentations giving a legal & those giving an equitable remedy. The ct., assuming that pltfs. had lent B. money, on the security, first, of a leasehold, secondly, of a policy, & thirdly, of the written representation of his solr. as to his solvency, held, that pltfs. could not make the solr. liable for misrepresentation, without showing that they had taken proper steps to make the other securities available.

Pltfs. lent B. money on mtge. on the application of his solr., who assured them, in writing, that in his opinion he would be able to pay the amount. Pltfs., alleging this to be a false & fraudulent misrepresentation, instituted a suit in equity to make the solr. personally liable:—*Held*: their remedy, if any, was at law.—*WHITMORE v. MACKESON* (1852), 16 Beav. 126; 51 E. R. 725.

Annotation:—*Refd.* Clelland v. Leech (1856), 27 L. T. O. S. 59.

4171. Authority to contract.]—*OXENHAM v. SMYTHE* (1860), 2 F. & F. 220, N. P.; *subsequent proceedings* (1861), 0 H. & N. 690.

4172. Representation to court—On appointment of receiver—Liability of country solicitor for representation of London agent.]—*Re* WARD, No. 3993, *ante*.

C. Wrongful Execution.

4173. General rule—Not liable unless duty exceeded.]—This action cannot be maintained against the attorneys, unless it can be proved that they had gone beyond the line of their duty, by which pltf. had suffered. It would be a case of infinite hardship, if an attorney, who was instructed to use the most effectual means to secure parties suspected, should be subject to actions of trespass, in the fair discharge of their duty (*LORD KENYON*).—*SEDLEY v. SUTHERLAND* (1800), 3 Esp. 202; 170 E. R. 588, N. P.

Annotations:—Distd. *Codrington v. Lloyd* (1838), 3 Nev. & P. K. B. 442. *Dbtd.* *Green v. Elgie* (1843), 5 Q. B. 99. *Expld.* *Rundle v. Little* (1844), 6 Q. B. 174. *Mentd.* *Howard v. Newton* (1843), 2 Mood. & R. 509.

4174. Illegal arrest.]—Where a writ of *capias ad respondendum* has been set aside for irregularity, the attorney who sued it out is liable in trespass. —*CODRINGTON v. LLOYD* (1838), 8 Ad. & El. 449; 3 Nev. & P. K. B. 442; 7 L. J. Q. B. 196; 2 Jur. 593; 112 E. R. 909; *sub nom.* *CODRINGTON v. LLOYD*, 1 Will. Woll. & H. 358.

Annotations:—Consd. *Rundle v. Little* (1844), 6 Q. B. 174; *Collett v. Foster* (1857), 26 L. J. Ex. 412. *Refd.* *Green v. Elgie* (1843), 5 Q. B. 99. *Mentd.* *Gregory v. Brunswick* (1846), 3 C. B. 481.

4175. —.]—In an action of trespass against petitioner's attorney for falsely & maliciously imprisoning pltf.; plea not guilty; pltf. proved that deft. had indorsed his name & address on the warrant sued out for petitioner, on which pltf. was committed:—*Held*: sufficient evidence to support a verdict for pltf. on such plea.

An attorney, who deliberately directs the execution of a warrant, is liable in trespass if it prove bad.—*GREEN v. ELGIE* (1843), 5 Q. B. 99; Dav. & Mer. 199; 14 L. J. Q. B. 162; 8 J. P. 133; 8 Jur. 187; 114 E. R. 1186.

Annotations:—Refd. *Rundle v. Little* (1844), 6 Q. B. 174. *Mentd.* *Re Martin, Ex p. Van Sandan* (1844), De G. 55; *Ex p. Fernandez* (1861), 7 Jur. N. S. 571.

4176. —.]—An action of trespass is not maintainable against pltf. in an action, or his attorney, for suing out an execution, & causing deft. to be arrested under it, deft. having at the time an order for protection from arrest under 5 & 6 Vict. c. 116, s. 4, of which pltf. had no notice. —*YEARSLEY v. HEANE* (1845), 14 M. & W. 322; 3 Dow. & L. 265, n.; 153 E. R. 499.

Annotations:—Refd. *Ewart v. Jones* (1845), 14 M. & W. 774; *Phillips v. Naylor* (1858), 3 H. & N. 14.

4177. —.]—If attorneys, conducting the business of a flat in bkpcy. take out a summons to attend before a comr. under 6 Geo. 4, c. 16, s. 33, which is disobeyed, & they afterwards obtain a warrant of the comr. to arrest & bring before him for examination the party so summoned, which warrant proves invalid, the attorneys are not liable in trespass, if they have taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who, when it was ready, gave the messenger notice to take it.

Although the attorneys, in applying for the warrant, used urgency, & being told by the comr. that they must take it at their peril, said they would do so.—*COOPER v. HARDING* (1845),

7 Q. B. 928; 5 L. T. O. S. 306; 9 Jur. 777; 115 E. R. 737.

Annotations:—Refd. *Re Thin & Flett's Trust Deed, Ex p. Alexander* (1863), 1 De G. J. & Sm. 311; *Williams v. Smith* (1863), 14 C. B. N. S. 596; *Johnson v. Emerson* (1871), L. R. 11 Exch. 329.

4178. —.]—The distinction between a warrant granted by a justice, & process directed to the sheriff, cannot be made available for his protection by attorney, who not only applies to a justice for a warrant, which turns out to be bad, but personally takes a part in instigating the proceedings resulting in the warrant, & in executing the warrant itself.—*EGGINGTON v. LICHFIELD CORPN.* (1855), 5 E. & B. 100; 24 L. J. Q. B. 360; 26 L. T. O. S. 27; 19 J. P. 819; 1 Jur. N. S. 908; 119 E. R. 418.

Annotation:—Mentd. *Flood v. Jackson*, [1895] 2 Q. B. 21.

4179. —.]—Deft., who is taken in execution under a writ of *ca. sa.* issued on a judgment for less than £20, without the order of the judge who tried the cause, may maintain an action of trespass against the pltf. & his attorney, although the writ has not been set aside.—*BROOKS v. HODGKINSON* (1859), 4 H. & N. 712; 29 L. J. Ex. 93; 33 L. T. O. S. 227; 7 W. R. 735; 157 E. R. 1021.

Annotations:—Refd. *Smith v. Sydney* (1870), 39 L. J. Q. B. 144; *Cronmire v. MacColla* (1893), 9 T. L. R. 549.

4180. Effect of ratification by client.]—A. placed money in the hands of his attorney to invest for him, giving the attorney an unlimited discretion to do what was best: the attorney advanced the money to B. on mtge. but discovering that the security was bad, the attorney sued out a bailable writ in A.'s name, against the borrower, for the amount, without A.'s knowledge:—*Held*: B. could maintain no action against the attorney for arresting him without the authority of A. if the attorney acted *bona fide*, & A. afterwards approved of what he had done.—*ANDERSON v. WATSON* (1827), 3 C. & P. 211; 172 E. R. 392, N. P.

Annotation:—Refd. *Davies v. Jenkins* (1843), 12 L. J. Ex. 386.

—.]— See EXECUTION, Vol. XXI., pp. 467, 468, Nos. 485, 487, 493.

Illegal execution on goods.]—See EXECUTION, Vol. XXI., pp. 458, 465, 551, 677, Nos. 394, 453, 1249–1254, 2553.

SUB-SECT. 4.—FUND IN COURT WRONGFULLY APPLIED.

4181. Payment out obtained by fraud—Liability of firm—Knowledge of one member.]—A tenant for life of settled estates obtained an Act of Parliament, for selling the estates & investing the proceeds, under the direction of the ct. in the purchase of other lands to be settled to the same uses. After the estates had been sold & the money paid into ct., the tenant for life fraudulently obtained an order, under which part of the money was paid out to him. B., G. & C., solrs. & co-partners, acted as the solrs. of the tenant for life, in obtaining the orders & in every other proceeding under the Act. B. was aware of the fraud; but G. & C. were wholly ignorant of it:—*Held*: nevertheless, in a suit instituted by the remainderman after the death of the tenant for life, G. & C., as well as B., & the estate of the tenant for life, & all the other parties to the trans-

PART XI. SECT. 2. SUB-SECT. 3.—C.

4174 i. Illegal arrest.]—*COOK v. WALLACE & WILSON* (1889), 16 R. (Ct. of Sess.) 565.—SCOT.

a. *Excessive distress.]—**REID v. BULL* (1859), 15 U. C. R. 568.—CAN.

b. *Pointing out wrong goods to sheriff.]—**POWER v. FLEMING & O'DONNELL* (1870), 1 R. 4 C. L. 404.—IR.

c. *Illegal distress.]—**FARRELL v. SMITH* (1896), 15 N. Z. L. R. 348.—N.Z.

d. *Wrongful use of diligence.]—**SMITH & Co. v. TAYLOR* (1882), 10 R. (Ct. of Sess.) 291; 20 Sc. L. R. 216.—SCOT.

Sect. 2.—Liability to third persons: Sub-sects. 4 &

action, were jointly & severally liable to make good the money.—*BRYDGES v. BRANFILL* (1842), 12 Sim. 369; 11 L. J. Ch. 249; 6 Jur. 310; 59 E. R. 1174.

Annotations:—Distd. Marsh v. Joseph, [1897] 1 Ch. 213. *Refd. Norris v. Wright* (1851), 14 Beav. 291; *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394. *Mentd. Brooke v. Mostyn* (1864), 33 Beav. 457; *Howard v. Shrewsbury* (1866), L. R. 3 Eq. 218; *Fadelle v. Bernard* (1871), 19 W. R. 555.

4182. ——— Unauthorised use of solicitor's name.]—MARSH v. JOSEPH, No. 4276, *post*.

4183. ———.]—Liability of a party acting as a solr. in a proceeding in which funds are wrongfully obtained out of ct.

If a solr. knowing that money in ct. belongs to one person, presents a petition & obtains payment to another, he is personally responsible. The principle applies if he has merely a knowledge of circumstances which, if duly considered, would lead to a knowledge of the fact.—*EZART v. LISTER*, *EZART v. GOODILL* (1842), 5 Beav. 585; 12 L. J. Ch. 10; 49 E. R. 705.

Annotation.—Consd. Re Dangar's Trusts (1889), 41 Ch. D. 178.

4184. ——— Fraud of managing clerk—Administration action—Forgery of affidavit.]—In an administration action a fund belonging to the children of R. who should attain twenty-one or marry was carried over to "the account of the issue or children of R., deceased." The fund in Jan. 1884, consisted of £4,387 10s. 3d. Consols & £195 19s. 4d. cash. B., managing clerk of the firm of solrs. conducting the action, knew that R. died leaving one daughter, who would attain twenty-one in Dec. 1886. He retained L. as solr. on behalf of the daughter to get the fund out, saying he had authority. A summons was taken out in chambers, & B. having produced an affidavit that the daughter was of age, an order was made by the chief clerk on Jan. 28, 1884, for transfer & payment to the daughter. B. got the usual form of power of attorney from the Paymaster General, & it was apparently executed by the daughter of R. in favour of L., but in reality it was forged. L. obtained payment, & after deducting one-half of one-sixth of the fund & other expenses, pursuant to an agreement between him & B., paid the remainder to B. on an authority apparently signed by the daughter of R. but really forged. L. never saw the daughter of R. & had no communication with her. The daughter of R. never saw B. & never gave any authority to B. B. absconded. In Dec. 1886, when the daughter of R. attained twenty-one, she presented a petition to the Lord Chancellor under Court of Chancery Funds Act, 1872 (c. 44), s. 5, for a certificate under that sect., in order that the fund might be replaced out of the Consolidated Fund. Upon the hearing of this petition on Dec. 14, 1887, counsel for the Treasury contended that the application should not go until petitioner had herself obtained a proper order from the ct. for payment out of the fund to her, & the Paymaster General had failed to comply with such order. This was a petition to discharge the order of Jan. 28, 1884, & for payment out of the sums above-mentioned, & the interest & dividends. The petition was served on the Comrs. of Her Majesty's Treasury, & the Paymaster General & upon L.:—*Held*: (1) the order of Jan. 28, 1884, must be discharged, & an order now be made that the sums of £4,387 10s. 3d. Consols & £195 19s. 4d. cash, & such further sums as would have been standing to the credit of the account, if the order

of Jan. 28, 1884, had not been made, should be respectively transferred & paid to petitioner, & L. should within two months from the date of the present order pay into ct. to the account of the Paymaster General the sum of £4,387 10s. 3d. Consols & £195 19s. 4d. cash, & such other sums as should be payable to petitioner under the present order; (2) such costs of petitioner as would necessarily have been incurred if petitioner had been applying for payment to her of the funds which would have been standing to the credit of the account if the order of Jan. 28, 1884, had not been made, must come out of the fund, or be paid by petitioner, & L. would be ordered to pay all the other costs of the proceedings, including the costs of the requisite application to the Lord Chancellor under Court of Chancery Funds Act, 1872 (c. 44), s. 5.—*SLATER v. SLATER* (1888), [1897] 1 Ch. 222, n.; 58 L. T. 149.

Annotations.—As to (1) Apld. Re Dangar's Trusts (1889), 41 Ch. D. 178. *Distd. Marsh v. Joseph*, [1897] 1 Ch. 213. *Refd. Re Williams' S. E.*, [1910] 2 Ch. 481.

4185. Wrong distribution through solicitor's negligence—Creditors' suit.]—Where a fund, paid into ct. in creditors' suit, has been distributed by mistake among specialty & simple contract creditors, to the exclusion of a mtgee., this ct. holds such creditors liable to repay, not *in solido* but *pro rata*; & no creditor will be fixed with liability in respect of the rateable part which the mtgee. may fail to recover from creditor, who, since sharing in the fund, has become insolvent, or cannot now be found. Pursuant to a decree in creditors' suit, real estate was sold, & the purchase-money paid into ct. In consideration of such payment, a mtgee., who was not a party to the suit, but whose mtge. was noticed in the conditions of sale, executed the conveyance, but the fund was distributed among the other creditors without any payment being made to the mtgee. Upon bill filed by his personal representative:—*Held* (1) the latter was entitled to recover (a) from debtors who had been paid simple contract debts, the several sums paid to them, the total amount of such sums being less than pltf.'s claim; (b) from the only specialty creditor, so much as might be necessary to satisfy what might remain due to pltf. for principal moneys & interest, after deducting the total amount of the moneys paid to the simple contract creditors, whether parties to this suit or not; (c) from the solr. of pltf. in creditors' suit, whatever might be necessary to make good any deficiency arising by reason of some of creditors becoming insolvent, or of others not being to be found, or the like; it being the duty of such solrs. to see that the purchase-money paid into ct. was properly applied; (d) although, under the circumstances, the mtgee.'s solr. was chargeable, as between his client & himself, with gross negligence in not placing a stop order on the fund in the original suit, his duties were *dehors* that suit, in which the primary duty lay with the solrs. of pltf., who had the distribution of the fund, & in this suit he could not be made responsible.—*TODD v. STUDHOLME* (1857), 3 K. & J. 324; 26 L. J. Ch. 271; 29 L. T. O. S. 24; 5 W. R. 277; 69 E. R. 1132.

Annotations:—As to (1) Consd. Re Dangar's Trusts (1889), 41 Ch. D. 178. *Distd. Marsh v. Joseph*, [1897] 1 Ch. 213.

4186. ———.]—Re SPENCER, No. 3996, *ante*.

4187. ———.]—Trustees paid into ct., under the Trustee Relief Act, a legacy of £500 bequeathed to D., an infant, to the credit of an account in the matter of the trusts of the will of testator. Two years afterwards they transferred into ct. to the same account a sum of Consols, representing a

legacy of £7,000 bequeathed to M., & after her death to her children, & on both occasions the trustees in the petitions stated that the office of N., their solr., was to be the place for the service of any notice in reference to the funds. A year after the transfer to the Consols a petition was presented by M., by her next friend, a solr., & by the trustees, for the purpose of dealing with the Consols, & the solrs. on the record for petitioners were the firm of whom N. was a member, & the office of N. was to be the place where any notice was to be served relating to the trust fund. The petition set forth what had been done in respect of the Consols & other matters. An order was made in reference to the Consols & dividends; but in drawing it up an error occurred by including in it the whole of the fund standing to the credit of the account, & the future dividends were, as ordered, paid to M. during her life. D. had suffered loss by payments wrongly made to M., now deceased, & she, on attaining majority, presented a petition asking that the estate of M. might be made primarily liable for the loss which she had suffered, & that N. might be made liable for any deficiency:—*Held*: N., as officer of the ct., had been guilty of negligence in not seeing that all the facts relating to the funds were brought before the ct. when the order was made, & he must, after D. had exhausted the estate of M., make good any deficiency, & pay the costs of the petition.—*Re DANGAR'S TRUSTS* (1889), 41 Ch. D. 178; 58 L. J. Ch. 315; 60 L. T. 491; 37 W. R. 651; 5 T. L. R. 266.

Annotations.—*Distd.* Marsh v. Joseph, [1897] 1 Ch. 213. *Consd.* *Re Williams' S. E.*, [1910] 2 Ch. 481.

4188. Money taken out & paid to client—Judgment for less sum—Liability to refund to opposite party.—In an action for wrongful dismissal, claiming a year's salary in lieu of notice, deft. pleaded that pltf. was only entitled to one month's notice; or, in the alternative, three months'; that before action deft. made tender of three month's salary, which pltf. refused; that deft. had paid the amount into ct., & that it was enough to satisfy pltf.'s claim. The request for lodgment in ct. contained a statement that the money was paid in with a defence setting up tender.—Pltf.'s solr., without obtaining an order, but on the written authority of pltf., took the money out of ct., & pltf. proceeded with the action. At the trial judgment was given for deft. on the ground that pltf. was only entitled to one month's salary. Dft. applied for an order against the solr. to refund so much of the money taken out of ct., as represented the difference between one month's & three months' salary. The solr. had acted *bonâ fide* in taking the money out of ct., & had paid it over to pltf. before the application to make him refund it was made:—*Held*: although pltf. ought not to have had the money out of ct., because a defence of tender of the sum paid in could not be pleaded to a claim for unliquidated damages, yet under the circumstances the solr. ought not to be ordered to refund it.—*DAVYS v. RICHARDSON* (1888), 21 Q. B. D. 202; 57 L. J. Q. B. 409; 59 L. T. 765; 36 W. R. 728; 4 T. L. R. 608, C. A.

Annotation:—*Mentd.* The Mona (1894), 6 R. 707.

SUB-SECT. 5.—UNDER SUMMARY JURISDICTION OF COURT.

A. In General.

4189. Whether summary order made—To account for rents of estate of lunatic—Solicitor of committee of estate.—A lunatic was found by the J.—VOL. XLII.

ct. to be seized in fee of certain real estate, & certain persons were found to be his heirs. On his death intestate:—*Held*: the ct. could not, under its general jurisdiction, order a solr. to account for rents so accrued & received by him as solr. for the committee of the estate.—*Re BUTLER* (1866), 1 Ch. App. 607, L.JJ.

Annotations.—*Consd.* Carrow v. Ferrior, Dunn v. Ferrior (1868), 3 Ch. App. 719. *Refd.* *Re Ferrior, Carrow v. Ferrior, Dunn v. Ferrior* (1867), 3 Ch. App. 175.

4190. — To make good loss of interest—Solicitors having conduct of sale—Failure to give instructions to invest purchase-money.—(1) An order was obtained by the solr. for pltf. that the purchaser of property, sold under an order of the ct. in an action, should pay his purchase-money into ct., & that the money when paid in should be invested in Consols. Pltf. had the conduct of the sale. The money was paid into ct. by the purchaser, but pltf.'s solr. omitted to leave with the Paymaster the necessary request for its investment & consequently the investment was not made. On the further consideration of the action it was ordered that the balance of the purchase-money after the payment of certain costs, should be paid to the receiver in the action, in part satisfaction of a balance due to him. The carriage of the order was given to the receiver, & he then discovered that the purchase-money had not been invested. He took out a summons, asking that pltf.'s solr. might be ordered to pay to him the amount of interest lost by the non-investment of the purchase-money:—*Held*: the solr., as the officer of the ct. having the conduct of the sale, was responsible not only to his client, but to the ct. for the due discharge of his duty, & he must make good to the person entitled the loss of interest, but he was entitled to a set-off in respect of a gain which had resulted from a fall in the price of Consols between the time when the investment ought to have been made, & the date of the order on further consideration; this liability could be enforced by summons in the action.

(2) On allowing the set-off, it appeared that the amount to be paid by the solr. would be only £5 8s. 6d.:—*Held*: the solr. must pay the costs of the summons.—*BATTEN v. WEDGWOOD COAL & IRON CO.* (1886), 31 Ch. D. 346; 55 L. J. Ch. 396; 54 L. T. 245; 34 W. R. 228; 2 T. L. R. 236.

Annotations:—*As to* (1) *Consd.* MacDougall v. Knight, [1887] W. N. 68, *Re Dangar's Trusts* (1889), 41 Ch. D. 178.

4191. — — — — —.]—MACDOUGALL v. KNIGHT, [1887] W. N. 68, C. A.

Annotation.—*Consd.* *Re Dangar's Trusts* (1889), 41 Ch. D. 178.

B. Delivery up of Documents.

See Part X., Sect. 2, sub-sect. 4 C., *ante*.

C. Payment of Money.

Summary jurisdiction generally.—*See* Part X., Sect. 2, *ante*.

Liability to client.—*See* Part X., Sect. 5, sub-sect. 1 C. (b), *ante*.

4192. Whether summary order to pay made—Payment to executors of client—Money collected as solicitor of deceased administrator.—Where the employment of an attorney is so connected with his professional character as to afford a presumption that his employment was in consequence of that character, the ct. will interfere in a summary way to compel him faithfully to execute the trust reposed in him; & therefore, where an attorney was employed by A. to collect & get in the effects due to him as administrator of another person, the ct. compelled the attorney to

Sect. 2.—Liability to third persons: Sub-sect. 5, C. & D. Part XII. Sects. 1 & 2.]

render an account to the exors. of A. of the moneys, etc., received by him, although he had never been employed by A. or his exors. to conduct any suit in law or equity on his or their behalf.—*Re AITKIN* (1820), 4 B. & Ald. 47; 106 E. R. 855.

Annotations:—*Consd. Re Murray* (1826), 1 Russ. 519. *Apld. Re* — (1826), 4 L. J. O. S. Ch. 207; *Re Barker* (1834), 11 Sim. 476; *Re Bunting* (1835), 3 Ad. & El. 467. *Distd. Re Marris* (1835), 2 Ad. & El. 582. *Consd. Ex p. Smart* (1835), 1 Har. & W. 526; *Ex p. Yeatman* (1835), 4 Dowl. 304; *Ex p. Clifton* (1836), 5 Dowl. 218; *Turquand v. Knight* (1836), 2 Gale, 192. *Apld. Ex p. Fryer* (1836), 2 Har. & W. 294; *Ex p. Cripwell* (1837), 5 Dowl. 689. *Consd. Re Knox, Ex p. Baker* (1837), 1 Jur. 895; *Clarkson v. Parkes* (1838), 7 Dowl. 87. *Apld. Re Jephson, Ex p. Bodenham* (1838), 8 Ad. & El. 959. *Consd. Re Cardross* (1839), 5 M. & W. 545; *Re Webb* (1845), 2 Dow. & L. 932; *Re An Attorney* (1855), 3 W. R. 515; *Re Strong* (1885), 53 L. T. 694. *Reid. Re Knight, Ex p. Hall* (1822), 7 Moore, O. P. 437; *Cooper v. Ewart* (1847), 11 Ph. 362; *Warde v. Warde* (1851), 3 Mac. & G. 365; *Re Blanchard* (1861), 3 De G. F. & J. 131. *Mentd. Cocks v. Nash* (1833), 9 Bing. 723.

4193. — — — — —.]—*Re BURBIDGE* (1837), 1 Jur. 238.

4194. — — — — — **Money held by solicitor of testator—Claim by executors—Objection by one executor & beneficiaries.]—***Re BUNTING*, No. 3703, *ante*.

4195. — — — — — **Client's life insured by solicitor—Policy money claimed by administrator.]—***Re CARDROSS* (LORD), No. 3707, *ante*.

4196. — — — — — **Money received for purposes of suit.]—**This ct. will not call upon an attorney to repay money or to account before the master on the grounds merely that the attorney obtained such money from his client as if for the purposes of a suit, but that his bill is said not to account satisfactorily for the obtaining & application of such money, that the amount obtained seems immoderate & that the client states a case of fraud.—*Re MARRIS* (1835), 2 Ad. & El. 582; 111 E. R. 224.

4197. — — — — — **Money paid to London agent—Not for purposes of any suit.]—**Where a town agent received moneys, not in any cause, belonging to B. the client of a country attorney under a power of attorney from B. & placed them to the credit of the country attorney, the ct. refused a sale on the application of B. to compel the agent to pay over the moneys to him as the receipt of them did not establish the relation of attorney & client between the agent & B.—*Ex p. BAKER* (1837), Will. Woll. & Dav. 591; *sub nom. Re KNOX, Ex p. BAKER*, 1 Jur. 894.

4198. — — — — — **Money paid under compromise of execution proceedings—In excess of amount chargeable.]—**In Jan. 1836, debt. was charged in execution for £61 14s. On Oct. 1, 1838, Judgments Act, 1837 (c. 110), came into operation. Pltf. having afterwards died, & his widow having taken out administration, A., who had acted as attorney for pltf., commenced proceedings in the insolvent ct. to obtain a vesting order upon debt.'s estate, under sect. 36. Debt. sent B., an attorney, to A. to endeavour to effect a compromise. A. claimed £85 5s. 2d. including a claim for interest at 4 per cent. upon the judgment, from the time it was entered up, under sect. 17. It was ultimately agreed between A. & B., that debt. should be discharged upon payment of £80, which agreement was carried into effect. The ct. refused to compel A. to refund the sum of £18 6s., the excess beyond the sum for which debt. was taken in execution, it having been paid under a compromise.—*HAIGH v. JONES* (1843), 5 Man. & G. 634; 1 Dow. & L. 81; 6 Scott, N. R. 696; 134 E. R. 713.

4199. — — — — — **Refund of money given for payment of legacies—Employment not necessarily in professional character.]—**Where an attorney was intrusted by exors. with a sum of money, for the purpose of paying legacy duty, & failed so to apply it, the ct. refused to interfere summarily to compel him to refund the money, as it did not appear that this employment was necessary in his professional character, or that he had on other occasions ever acted as attorney for the parties.—*Re WEBB* (1845), 2 Dow. & L. 932; 14 L. J. Q. B. 241; *sub nom. Ex p. WEBB*, 1 New Pract. Cas. 213; 5 L. T. O. S. 59; 9 Jur. 538.

4200. — — — — — **Money received from personal representatives.]—**A large balance was found due from the legal personal representatives, but it appeared that the amount had been received, under orders, in another suit, by their solr., who retained it to satisfy large claims he had against his clients. The cause coming on for further consideration, & on a petition of pltf., the solr. was ordered to pay the amount into ct.—*BIBBY v. THOMPSON* (No. 2) (1863), 32 Beav. 647; 55 E. R. 254.

4201. — — — — — **Admission of possession of money amounting to declaration of trust—Inducing third party to alter his position.]—***Re A SOLICITOR, Ex p. HALES*, No. 3736, *ante*.

D. Payment of Costs.

See Part X., Sect. 4, ante.

Part XII.—Partnership between Solicitors.

SECT. 1.—IN GENERAL.

Partnership generally, *see* PARTNERSHIP, Vol. XXXVI., pp. 310 *et seq.*

4202. **Agreement to pay share of profits—To person not solicitor—Whether legal.]—***Semble*: an agreement by an attorney to pay a share of the profits of his business to another person who is not an attorney is not illegal.

It is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity payable out of the future profits. I have thought that,

consistently with the policy of the law, agreements could not be made by which they contract to recommend those who succeed them (LORD ELDON, C.).—*CANDLER v. CANDLER* (1821), Jac. 225; 37 E. R. 834, L. C.

Annotations:—*Apld. Aubin v. Holt* (1855), 2 K. & J. 66. *Reid. Whittaker v. Howe* (1811), 3 Beav. 383; *Scott v. Miller* (1859), John. 220; *Eddison v. Rothery* (1864), 11 L. T. 134.

4203. — — — — — **Annuity to retiring partner—Retiring partner to recommend successor.]—***CANDLER v. CANDLER*, No. 4202, *ante*.

PART XI. SECT. 2, SUB-SECT. 5.—C.

c. Refund of amount overpaid.]—An attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation

has taken place, though such person be a third party who is liable to pay & has paid the bill to the attorney or party entitled thereto.—*Re GLASS & SPRINGER & MACDONALD* (1863), 13 C. P. 419.—**CAN.**

PART XII. SECT. 1.

1. Signature of one partner—Notice of proceedings.]—Where two attorneys in partnership appear in a suit, a subsequent notice of a proceeding in the suit signed in the name of one of

4204. — Annuity payable to widow of deceased partner—Husband dying insolvent—Widow entitled to annuity.]—Articles of partnership between two solrs. provided that the partnership should be for the term of ten years from May 1, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his exors. or administrators, or the exors. or administrators of the deceased partner, should be entitled to receive out of the net profits of the partnership business, during so much, if any, of the term of five years from May 1, 1880, as should remain after the determination of the partnership, the yearly sum of £350, & during so much, if any, of the term of five years from May 1, 1885, as either the retiring partner, or a widow of the retiring or deceased partner, should be living, the yearly sum of £250, any sum which might under this provision for the time being become payable to the exors. or administrators of a deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow & children, & in default of such direction to be paid to such widow, if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883, leaving a widow, but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee & sole extrix. He died insolvent, & an action was brought by a creditor to administer his estate:—*Held*: the annuity did not form part of testator's estate, but that by the articles a trust of it was created in favour of the widow, & she was entitled to it free from the claims of testator's creditors.—*Re FLAVELL, MURRAY v. FLAVELL* (1883), 25 Ch. D. 89; 53 L. J. Ch. 185; 19 L. T. 690; 32 W. R. 102, C. A.

Annotations:—*Mentd. Re Davies, Davies v. Davies*, [1892] 3 Ch. 63; *Ehrmann v. Ehrmann* (1891), 72 L. T. 17.

4205. Legal proceedings by partners—Right to sue jointly—For professional services of one.]—Where a party has employed two attorneys, partners, to manage a cause for him in the Palace Ct., an action in the common form lies against him at the suit of both, for the bill of costs, though one only was an attorney of the ct., & actually did the business there. Although the client gave a written retainer to the latter attorney only, & he only was mentioned in the rule for taxing costs, these facts were held not conclusive, there being evidence, *aliunde*, of a contract with both.—*ARDEN v. TUCKER* (1833), 4 B. & Ad. 815; 1 Nev. & M. K. B. 759; 2 L. J. K. B. 137; 110 E. R. 663.

4206. Employment of one solicitor by another to do particular business—On equal division of profits—Whether amounting to partnership.]—*BEVAN v. BAYNTON* (1850), 15 L. T. O. S. 363; 14 Jur. 846.

4207. Employment of partner—By partner acting as liquidator—Employment in winding-up—Partner employed must act without remuneration.]—The rule that a liquidator who is a solr. shall not employ his partner as his solr. in the winding-up, will only be departed from where the partner is

willing to act as such solr. without any remuneration.—*Re UNIVERSAL PRIVATE TELEGRAPH CO.* (1870), 23 L. T. 884; 19 W. R. 297.

4208. Rescission of partnership contract—Grounds for—Delay in furnishing further capital—According to articles.]—*BREWER v. YORKE, YORKE v. BREWER*, No. 4299, *post*.

4209. Profits of partnership—How ascertained—Balance of receipts over expenditure in each year—Time when work done immaterial.]—In ascertaining the "profits" of a partnership, in the absence of special agreement to the contrary, the net profits of each year must be ascertained upon the footing of the moneys actually received & paid in that year without reference to when the work is done in respect of which the moneys are received.—*BADHAM v. WILLIAMS* (1902), 86 L. T. 191.

SECT. 2.—VALIDITY OF PARTNERSHIP AGREEMENT.

4210. Whether partners must be qualified solicitors.]—*CROW v. COLUMBINE* (1843), 1 L. T. O. S. 107.

4211. — At time of making agreement.]—By memorandum, dated Nov. 1822, A., an attorney, agreed with B., for a valuable consideration, to take C., the son of B., into partnership, as attorneys & solrs. for ten years, & to allow him a moiety of the profits. The memorandum did not state when the partnership was to commence. C. was not admitted an attorney until Apr. 1823, but he conducted the business in the name of A. from Jan. 1823. In an action by A. against B. for part of the consideration money:—*Held*: (1) the agreement, though legal on the face of it, upon proof of C. not being admitted an attorney till after its execution, became illegal, within 22 Geo. 2, c. 46, s. 11, & void; (2) such proof was properly admitted on the part of deft; (3) proof on the part of pltf. that the agreement was to be kept as an escrow & not acted upon till after C.'s admission was inadmissible & properly rejected.—*WILLIAMS v. JONES* (1826), 5 B. & C. 108; 7 Dow. & Ry. K. B. 548; 108 E. R. 40.

Annotations:—*As to* (1) *Reid*, *Cusse v. Corfe* (1828), 6 L. J. O. S. K. B. 140; *Armstrong v. Lewis* (1834), 2 Cr. & M. 274. *As to* (2) *Apd.*, *Bissell v. Beard* (1873), 23 L. T. 740.

4212. — — —.]—An agreement of partnership was made between two solrs., one of whom could only practise in a superior, the other only in an inferior ct. Both undertook to divide the profits of their general business, & each stipulated to recommend the other to his clients, & to keep the partnership a secret from all the world:—*Held*: such an agreement was void, for a ct. cannot suffer statements to be made & papers presented to it by parties who are neither parties to the cause, nor their lawfully authorised agents, & who are consequently not properly responsible to the ct. for their conduct.

The parties could not enter legally into this contract, one of the parties not being qualified to practise in the ct. from whence the emoluments arose (*LORD BROUGHAM, C.*).—*GILFILLAN v. HENDERSON* (1833), 2 Cl. & Fin. 1; 6 E. R. 1057, H. L.

them is sufficient; the act of one partner in such a matter being the act of both.—*DOE v. TAYLOR* (1857), 3 All. 437.—**CAN.**

g. — Indorsement of notes.]—In an action against B. & S., a firm of solrs., on notes indorsed by B. in the name of the firm, it was proved that

on other occasions S. had so indorsed in the same manner:—*Held*: sufficient evidence to go to the jury of a mutual authority.—*WORKMAN v. MCKINSTRY, BURTON & SADLEIR* (1862), 21 U. C. R. 623.—**CAN.**

h. Occupation of common office & employment of joint clerks.]—*MORRISON*

v. SERVICE (1879), 6 R. (Ct. of Sess.) 1158; 16 Sc. L. R. 686.—**SCOT.**

PART XII. SECT. 2.

4210 i. Whether partners must be qualified solicitors.]—*JONES v. MILLIKEN* (1882), 22 N. B. R. 315.—CAN.****

Sect. 2.—Validity of partnership agreement. Sects. 3 & 4: Sub-sects. 1, 2 & 3, A.]

4213. Admissibility of evidence—That person not qualified.]—WILLIAMS *v.* JONES, No. 4211, *ante*.

4214. — As to commencement of agreement.]—WILLIAMS *v.* JONES, No. 4211, *ante*.

4215. One partner receiving fixed sum out of profits—Without liability for losses.]—A. & B. carried on business together as solrs. in partnership, & held themselves out as such, & deft. employed them in that capacity. By the agreement under which A. & B. entered into business together, B. was to receive annually out of the profits the sum of £300, but he was not to be in any manner liable to the losses of the business, & was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner :—*Held* : A. & B. were properly joined as pltf. in an action for work & labour, as the money, when recovered, would be the joint property of both until the accounts were ascertained & the division took place.—BOND & WATTS *v.* PITTARD (1838), 3 M. & W. 357 ; 1 Horn & H. 82 ; 7 L. J. Ex. 78 ; 2 Jur. 183 ; 150 E. R. 1182.

Annotations :—*Refd.* Rawlinson *v.* Clarke (1846), 15 L. J. Ex. 171 ; Cox *v.* Hickman (1860), 8 H. L. Cas. 268 ; Wheatecroft *v.* Hickman (1860), 9 C. B. N. S. 47 ; Jeffrey *v.* Bamford, [1921] 2 K. B. 351.

4216. Partnership in respect of business for particular company—To commence on admission of intending partner—Business done for different company—Intending partner not practising.]—Pltf., in 1844, then preparing to be a solr., entered into an agreement with defts., who were solrs., that defts. should be solely interested as solrs., for the provisional committee of the D. N. Ry. co. until pltf. was admitted a solr. ; & that for three years from that time the profit of all business that might be transacted by the parties for the railway should be divided between them in equal shares : in the event of the business being conducted by defts. with the aid of their establishment to a greater extent than by pltf. & his establishment, a percentage to be paid to defts. before any division of profits ; the foregoing arrangements to be applied to any collateral lines & undertakings that might emanate from the D. N. Ry. co.

The D. N. Ry. co. Bill was afterwards withdrawn, & the co. in 1846 amalgamated with another, the two forming together the G. N. Ry. co., of which defts. became part solrs.

Pltf. was admitted a solr. in June, 1847. The bill was filed in May, 1848, & prayed for specific performance of the agreement, & for an account.—*Held* : as this was a mere money demand on the footing of an account, where there was no mutuality between the parties, & a want of consideration moving from pltf., he was not entitled to a decree for specific performance of the agreement.

Moreover, inasmuch as looking at the agreement as a contract for partnership, it appeared that no partnership had ever taken place, & that the claim was in respect of business done, not for the D. N. Ry. co., but for another co., the bill was dismissed, but without costs ; defts. not asking for them.—ORD *v.* JOHNSTON (1855), 26 L. T. O. S. 68 ; 1 Jur. N. S. 1063 ; 4 W. R. 37.

Compare Sect. 3, post.

SECT. 3.—SOLICITOR UNDERTAKING BUSINESS JOINTLY.

4217. Presumption of partnership as to particular matter—Division of profits.]—Issues directed on

*receiving fixed sum out of profits—Without liability for losses.]—*RAGHUNANDAN NANU *v.* HORMASJEE 26), 1 L. R. 51 Bom. 342.—**IND.**

the questions whether the solrs. of a railway co. were partners in the business done by them for the co. ; & if partners, whether in equal shares.—MCGREGOR *v.* BAINBRIDGE (1848), 7 Hare, 164, n. ; 68 E. R. 67.

Annotation :—*Folld.* Robinson *v.* Anderson (1855), 20 Beav. 98.

4218. — — — — —.]—Where two separate solrs. are retained by the same clients in the same business, the presumption of law is, that as their liability is joint, the profits are to be equally divided, & this presumption is not removed by the delivery of separate bills of costs where the solrs. have conducted different parts of the business. Where, therefore, the evidence in favour of an agreement for a different division was not stronger than that against it, the ct. decided in favour of equality.

Where the contrary [that they were not partners in this matter] is alleged, the burden of proof is on him alleging it.—ROBINSON *v.* ANDERSON (1855), 20 Beav. 98 ; 7 Do G. M. & G. 239 ; 44 E. R. 94.

4219. — — — — — Effect of release by one solicitor.]—At a meeting held in 1852, between pltf. & deft., two solrs., it was agreed that the professional business connected with the formation of a new line of railway should be apportioned between them ; that they should co-operate as solrs., in getting up the co. & obtaining the Act of Parliament at their own risk ; that each should provide the cash for his own disbursements, such disbursements to be repaid in the first instance, & then that any profits should be equally divided between them. The co. was formed & the Act obtained ; & at a meeting of the co. in Mar. 1855, a proposal in writing was made by pltf. & deft., & confirmed by the co., that pltf. & deft. should be allowed £1,500, in paid up shares, in addition to their disbursements, such £1,500 to be received in full professional business up to the then present time, but to be subject to revision in case the line should be completed. In 1856 part of the line was commenced, but the works were stopped for the want of funds. These funds were afterwards supplied by deft., & others, pltf. not being able to contribute. In 1858 a small part of the line was completed, & pltf., early in 1859, pressed the co. for payment on account of his costs. In May, 1859, the co. paid pltf. £150 in cash & £740 in paid up shares, & took from him a general release of all claims. From that time pltf. ceased to act as solr. to co. Deft. said that some time in 1858 he told pltf. when he was pressing the co., that he, deft., should henceforth decline undertaking any fresh business of the co. in co-operation with him ; & alleged that since the date of the release he had had nothing whatever to do with pltf. He admitted pltf.'s right to have the profits attending the obtaining of the Act of Parliament ; but insisted that the memorandum of Mar. 1855, & the payments and release of May, 1859, settled all questions between the pltf. & himself. He denied that any partnership was ever constituted between pltf. & himself :—*Held* : the release did not put an end to the agreement between the parties, & pltf. was entitled to a decree for an account down to Apr., 1859.—HANSLEY *v.* KITTON (1862), 7 L. T. 291 ; 8 Jur. N. S. 1113, L. C.

4220. — — — — — Irrespective of work done.]—Two sets of parties having projected a railway on a similar line, agreed to consolidate the project, & appointed as solrs. of the proposed co. pltf. & deft., whom they had respectively consulted prior to the consolidation. The two solrs. accepted the

appointment without making any definite arrangement as to the division of the business, or of the emoluments of the office, & a much larger portion of the work was done by deft. than by pltf. In a conversation between them about six months after the appointment, & before the principal part of the business was transacted, pltf. stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses & personal trouble in such limited partnerships between solrs. was made by each party retaining, besides his expenses & disbursements, from ten to twenty-five per cent. on the amount of the net charges for the business done, & which principle he considered satisfactory; & deft., in reply, observed that there could be no misunderstanding about it between honourable men. Upon a bill by pltf. claiming an account & division of the profits of the business done by the co., upon the footing of an equal co-partnership, & offering to allow twenty-five per cent. upon the work done separately to the partner who did it, the ct. in the circumstances, made a decree accordingly.—WEBSTER v. BRAY (1849), 7 Hare, 159; 68 E. R. 65.

Annotation :—Folld. Robinson v. Anderson (1855), 20 Beav. 98.

4221. — Rebuttal of presumption—Onus of proof.—ROBINSON v. ANDERSON, No. 4218, *ante*.

4222. — Delivery of separate bills of costs.—ROBINSON v. ANDERSON, No. 4218, *ante*.

4223. Payment of sum to one solicitor—To meet liabilities of client—Right of other solicitor as against sum paid—Account.—Pltfs. were, jointly with deft., the solrs. of an abortive railway scheme under an arrangement to divide the profits between them in moieties; on the failure of the project certain of the directors subscribed £680, & deposited it with deft. to meet the liabilities of the co. Large sums being due to pltfs. in respect of costs, they requested deft. to apply the £680 for that purpose, but he refused, stating that the money was deposited with him conditionally. Pltfs. then resolved to bring actions against the directors who would not contribute; deft., who refused to take any part therein abandoning to pltfs. all claims on the costs to be recovered, & being indemnified against all risk. Actions were successfully brought, & a large sum recovered, but was reduced on taxation to a small sum, the directors declaring that the £680 were applicable to the payment of costs. Pltfs. filed their claims for an account of partnership transactions, & to recover the £680 from deft., which he had represented as not applicable to the costs. The claim was dismissed as to the £680, & the usual accounts were ordered.—OVERBURY v. TEALE (1852), 20 L. T. O. S. 107; 1 W. R. 27.

SECT. 4.—LIABILITY FOR ACTS OF PARTNER.

SUB-SECT. 1.—IN GENERAL.

Liability to summary jurisdiction of court.—See Nos. 3565–3567, *ante*.

SUB-SECT. 2.—LIABILITY INTER SE.

4224. Promissory note in name of firm—Security for money advanced to one partner.—SMITH v. COLEMAN, No. 4270, *post*.

PART XII. SECT. 3.

4221 i. Presumption of partnership as to particular matter—Rebuttal of presumption—Onus of proof.—MARTIN v. SHERRY, [1905] 2 I. R. 62.—IR.

4225. Implied authority to make loans.—EARLE v. ORFORD (1885), *Times*, Dec. 10. C. A.
See, generally, PARTNERSHIP, Vol. XXXVI., pp. 419 *et seq.*

SUB-SECT. 3.—LIABILITY TO CLIENT.

A. Transactions within Scope of Business.

4226. Liability for fraud.—Q. sells an estate under a power contained in a mtge. deed, & out of the proceeds of the sale prior incumbrances are paid off, & retaining the amount of his mtge. debt, hands the surplus of the moneys arising from the sale to S., one of the firm of R., S. & S. who acted for him as his solr., & who were also solrs. of H., the mtgor., with injunctions to apply it in payment of subsequent incumbrances, according to their priorities. At the time of the sale L. claimed as a creditor next in priority a lien on the estate by virtue of a judgment obtained against H. & duly registered. R., S. & S. were not only aware of L.'s judgment, but had taken proceedings on the part of H. to set it aside, in which they failed. They then obtained the opinions of two counsel on the question whether Q. could safely hand over the surplus to H. One of the counsel advised that he could, & the other that he could not, the latter opinion S. concealed from Q. & the money was paid to H. Q. shortly afterwards died, & after his death L. filed a bill against his representatives to make good to him the amount of his charge, & obtained a decree in his favour. S. died, & upon a bill by Q.'s representatives against R. & S., his surviving partners & his exors., to make good the amount so paid by them, on the ground of fraudulent concealment of the adverse opinion & improper conduct in the matter :—*Held* : R. & S. as surviving partners of S. were liable to make good the amount to Q.'s estate, together with costs, & fraud & misrepresentation of one partner entitled the client to relief in equity against the surviving partners, & that notwithstanding the case was one in which the client might have recovered in an action of law. —REW v. LANE (1856), 28 L. T. O. S. 184; 3 Jur. N. S. 125; 5 W. R. 110.

4227. — — ——Pltf. applied to R. a member of a firm of solrs., to obtain for him a loan on the mtge. of his freehold estate. R. obtained the loan from some clients of the firm, but informed pltf. that the mtgees. required collateral security as well; & that pltf. accordingly deposited with R. certain share warrants payable to bearer. A mtge. deed of the freehold estate was then prepared by R., & executed by pltf. in which, however, no mention was made of the deposit of the share warrants or of any collateral security. The mtgees. had not in fact required collateral security, & neither they nor R.'s partners had any knowledge of the deposit of the share warrants. R. afterwards sold the shares & appropriated the proceeds to his own use & absconded. On two previous occasions pltf. had deposited the same securities with R. to enable him to raise temporary loans, notice of which transactions appeared in the books of the firm; & it appeared that the firm were in the habit of holding securities payable to bearer, & also sums of money, for their clients. In an action by pltf. to redeem the mtge. & to make the mtgees. & the partners of R. liable for the loss of the shares :—*Held* : (1) it was within the scope of the apparent

PART XII. SECT. 4, SUB-SECT. 2.

k. Liability of partner entering firm after wrongful act.—When a solr., representing that money of a client has been invested, misappropriates it,

& afterwards takes a partner, payment of interest by the firm does not establish such negligence or misconduct on the part of the incoming partner as to make him responsible for the ante-

Sect. 4.—Liability for acts of partner: Sub-sect. 3, A., B. & C. (a) & (b).]

authority of R. to take the custody of the share warrants payable to bearer, & his partners were liable for his misappropriation of them; (2) as the mtgees. had given no instructions to R. to obtain collateral security, & were ignorant of the deposit of the share warrants he was not their agent in receiving them, & they were not responsible for their loss.—*RHODES v. MOULES*, [1895] 1 Ch. 236; 64 L. J. Ch. 122; 71 L. T. 599; 43 W. R. 99; 11 T. L. R. 33; 39 Sol. Jo. 44; 12 R. 6, C. A.

Annotations:—As to (1) Consd. Mara v. Browne, [1895] 2 Ch. 69. *Generally, Refd. Marsh v. Joseph*, [1897] 1 Ch. 213; *Powell v. Brodhurst* (1901), 84 L. T. 620.

4228. — Client electing to deal with defaulting partner.]—Where A. has a contract with B. & B. takes C. into partnership & gives A. notice, A. has an option whether he will abide by his contract with B. alone or accept the liability of the partnership. If he elect to abide by his contract with B., C. is not liable for a fraud committed by B. against A. in respect of the contract, though B. was acting within the scope of the partnership business. Pltfs. appointed B. their solr., & instructed him to act for them in a mtge. transaction. While the business was pending, B. took deft. into partnership, & gave pltfs. notice in writing. Pltfs. paid no attention to the notice, continued to correspond with B. in his own name, & finally sent him the money to advance on the mtge. by cheque made payable to his order, & accepted his receipt in his own name. B. paid the money into his own account & misappropriated it:—*Held*: pltfs. had elected to continue to employ B. alone, & deft. was not liable for B.'s fraud.—*BRITISH HOMES ASSURANCE CORPN., LTD. v. PATERSON*, [1902] 2 Ch. 404; 71 L. J. Ch. 872; 86 L. T. 826; 50 W. R. 612; 18 T. L. R. 676.

4229. Liability for misconduct—Solicitor on record.]—*NORTON v. COOPER, Re MANBY & HAWKSFORD, Ex p. BITTLESTON*, No. 3864, *ante*.

4230. Liability for negligence—Partner appearing insufficiently instructed.]—*CLARKE v. COUCHMAN* (1885), 20 L. Jo. 318.

4231. —.]—In 1869, P., a member of a firm of solrs., by his advice induced pltf. to invest moneys upon the security of an equitable mtge. of a lease which he represented as renewable, & which had previously been renewed by custom every fourteen years but the future renewal whereof was prohibited by statute passed in 1868. In 1875, P. fraudulently, & without the knowledge of his partners, gave a legal mtge. of the lease to a third party without notice of pltf.'s mtge. The security proved insufficient, & P. having absconded, pltf. sought to make P.'s firm liable for the loss sustained by him:—*Held*: since the transaction of 1869, was within the ordinary limits of the partnership business, the firm was liable for negligence in respect thereof, but the remedy against them was barred by Stat. Limitations; P.'s fraud of 1875 not being committed in the ordinary course of the business, the firm was not liable in respect thereof.—*HUGHES v. TWISDEN* (1886), 55 L. J. Ch. 481; 54 L. T. 570; 34 W. R. 498; 2 T. L. R. 432.

4232. —.]—In 1877 W., the senior partner of a firm of solrs., invested moneys belonging to his

client upon a mtge. security which he recommended, & of which his client approved. W. died in 1879. The security having afterwards proved insufficient, the client brought an action in 1886 against J., as the surviving partner of the firm, & also executor of W., claiming that he should make good the deficiency:—*Held*: no relation of trustee & *cestui que trust* existed between the solr. & his client; & Stat. Limitations was a bar to any action for negligence.—*DOOBY v. WATSON* (1888), 39 Ch. D. 178; 57 L. J. Ch. 865; 58 L. T. 943; 36 W. R. 764; 4 T. L. R. 584.

Annotation:—Refd. Hackney v. Knight (1891), 7 T. L. R. 254.

B. Transactions Not within Scope of Business.

See Partnership Act, 1890 (c. 39), s. 7.

4233. Partners not liable.]—*HUGHES v. TWISDEN*, No. 4231, *ante*.

4234. Necessity for express authority—Promissory note or bill of exchange.]—The implied authority of one partner to bind another by promissory note or bill of exchange is confined to partnerships for the purpose of trade. One of two attorneys in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt. As, for money handed to the firm by a client to be laid out on mtge. Declaration on a promissory note, with a count on an account stated; particular of demand, specifying that the action is brought to recover £555 due on the note set forth in the first count, with interest from, etc. to the day of payment; & that pltf., for recovery thereof, will avail herself of the whole or any part of the declaration:—*Held*: the note, being invalid, was not, by the particular, made admissible evidence of the account stated.—*HEDLEY v. BAINBRIDGE* (1842), 3 Q. B. 316; 2 Gal. & Dav. 483; 11 L. J. Q. B. 293; 6 Jur. 853; 114 E. R. 527.

Annotation:—Consd. Garland v. Jacob (1873), L. R. 8 Exch. 216.

4235. Safe custody of negotiable securities.]—*CLEATHER v. TWISDEN*, No. 4253, *post*.

4236. Acts done in private capacity—Fraud as trustee.]—Under a will £2,910 stock was vested in testator's three unmarried nieces, who were his extrices., in trust for themselves for life, then for children, with ulterior trusts. Their confidential solrs. were a firm of two persons, of whom the senior, under his own advice, was associated as their co-trustee, & a declaration of trust, prepared by the firm, was executed by the four persons in 1822. Subsequently, on the advice of the senior solr., the fund was sold out, & paid to him alone; but he, on the same day, paid the precise amount to the credit of the banking account of the firm. In 1824 the senior partner untruly represented that the money had been laid out on specified freehold security; but, in 1825, a sufficient freehold mtge. was taken by the senior partner to himself alone, & was treated by him as the security for the trust fund, less a very small balance, which was divided among the three ladies. The interest was duly paid to the ladies until 1828, when the senior partner realised that security without their privity, & again untruly alleged that he had laid out the amount

cedent fraud.—*ARDEN v. ROY* (1883), 1 N. Z. L. R. C. A. 365.—**N.Z.**

1 —.]—*TULLY v. INGRAM* (1891), 19 R. Ct. of Sess. 65; 29 Sc. L. R. 78.—**SCOT.**

PART XII. SECT. 4, SUB-SECT. 3.—A.

4231 1. Liability for negligence] —

UNION BANK OF AUSTRALIA v. FISHER (1893), 11 N. S. W. Eq. 241; 9 N. S. W. W. N. 31.—**AUS.**

m. Death of one partner — Effect on retainer.]—If a firm, consisting of two or more partners, are retained, & one die, it will be assumed that the retainer continues to the

partner or partners.—*ALCHIN v. FALO & LAKE HURON RY. CO.* (1866), 2 Ch. Ch. 45.—**CAN.**

PART XII. SECT. 4, SUB-SECT. 3.—B.

n. Necessity for express authority.]—*THOMPSON v. ROBINSON* (1889), 16 A. R. 175.—**CAN.**

on another specified security. The firm dissolved partnership in 1834, & each partner practised separately; the senior partner continued regularly to pay sums as the interest to the ladies until 1844, when he became bkpt., & afterwards died abroad uncertificated. In a suit by the three ladies against the junior partner, charging him as liable to make good the amount:—*Held*: a sufficient investment having been made in the name of the senior partner, & communicated to the parties, & adopted, the duty of the firm was discharged, & the subsequent loss was a breach of duty by the senior partner alone, & not by the partnership, & the suit was dismissed, with costs.—*COOMER v. BROMLEY* (1852), 5 De G. & Sm. 532; 20 L. T. O. S. 21; 16 Jur. 609; 64 E. R. 1230.

Annotations:—*Consd.* *St. Aubyn v. Smart* (1867), L. R. 5 Eq. 183. *Refd.* *Re Partridge & Edwards, Ex p. Bollamy* (1862), 6 L. T. 696.

4237. ———.]—G., a partner in the firm of J. & G., solrs., was secretary to a co. The co. purchased property, & for their own convenience had it conveyed to G. in his own name without any declaration of trust in the conveyance. The transaction was carried through & the conveyance settled by the firm of J. & G. as the co.'s solrs. The conveyance, the only title deed handed over, was retained by G. G. fraudulently raised money by deposit of the conveyance, & afterwards executed a legal mtge. to the equitable mtgee. J. had no notice that the conveyance had been made to G. alone, or of any part of the transaction, except such notice as was implied by his firm having acted for the co. The partnership deed made the secretaryship a part of the partnership business:—*Held*: G. having a legal right as trustee to the possession of the deed, it was no part of the duty of the firm to see that he did not obtain it without the direction of his *cestui que trust*, the co. Assuming that the firm would have been liable for any negligence of G. in his duty as secretary, it was no part of such duty to act as trustee of the co.'s property. J. was therefore not liable for his partner's fraud.—*TENDRING HUNDRED WATERWORKS CO. v. JONES*, [1903] 2 Ch. 615; 73 L. J. Ch. 41; 52 W. R. 61; 19 T. L. R. 720.

Annotation:—*Refd.* *Lloyd v. Grace, Smith*, [1911] 2 K. B. 489.

4238. ———.]—A solr. whose firm acted as solr. to the trustees of a marriage settlement, was appointed a trustee of the trust, & after his appointment a sum of money came into his hands to invest under the terms of the settlement. £600, part of this sum, it was agreed he should retain himself as a loan on the mtge. of his own house. The mtge. in fact was never executed, although he paid interest to the *cestui que trust* as if it had been. After some years the solr. got into difficulties. His house was sold, & the co-trustee brought an action against the solr.'s solvent partner, alleging that he was liable:—*Held*: deft. was not liable for the default of his partner which caused the loss, as the loss was due to wrongful acts *qua* trustee & not *qua* solr.—*PALMER v. S.* (1907), 51 Sol. Jo. 653.

4239. ——— *Fraud as administrator.*]—*CHILTON v. COOKE* (1879), *Times*, July 2, C. A.

C. Misappropriation.

(a) Moneys and Securities received in Ordinary Course of Business.

4240. All partners liable.]—A bill of exchange received by a partner in a solr.'s firm from a client is, *prima facie*, to be deemed to be received on behalf of the firm, & if the solrs. allege the contrary, they are bound to prove it by clear evidence.—*MOORE v. SMITH* (1851), 14 Beav. 393; 51 E. R. 338.

4241. ———.]—Where one of a firm of solrs. received from a client a sum of money for which a receipt was given in the name of the firm stating that part of the money was in payment of certain costs due to the firm, & that the residue was to make arrangements with the client's creditors, & the solr. misappropriated the money:—*Held*: the transaction with the client was within the scope of the partnership business; & the partners in the firm were jointly & severally liable to make good the amount.—*ATKINSON v. MACKRETH* (1866), L. R. 2 Eq. 570; 35 L. J. Ch. 624; 14 L. T. 722; 14 W. R. 883.

Annotations:—*Consd.* *Plumer v. Gregory* (1874), L. R. 18 Eq. 624. *Refd.* *St. Aubyn v. Smart* (1867), L. R. 5 Eq. 183.

4242. ———.]—Money received by one member of a firm of solrs. in the course of the management & settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business; & consequently, the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received.—*DUNDONALD (EARL) v. MASTERMAN* (1869), L. R. 7 Eq. 504; 38 L. J. Ch. 350; 20 L. T. 271; 33 J. P. 691; 17 W. R. 548.

Annotations:—*Consd.* *Plumer v. Gregory* (1874), L. R. 18 Eq. 621; *Cleather v. Twisden* (1884), 28 Ch. D. 340. *Refd.* *Biggs v. Bree* (1881), 51 L. J. Ch. 64. *Mentd.* *Re Collie, Ex p. Adamson* (1878), 8 Ch. D. 807.

4243. ———.]—In an administration action real estate was sold under an order of the ct., & the purchaser's deposit was paid by cheque drawn payable to the auctioneer or his order. Before the result of the sale had been certified, B., a member of the firm of solrs. who had the conduct of the sale, wrote in the name of his firm, & obtained from the auctioneer the cheque with an indorsement over to the firm in order that the money might be paid into ct. B., unknown to his partners, cashed the cheque & absconded:—*Held*: it was fairly within the scope of a solr.'s authority to apply to the auctioneer for the amount of the deposit for the purpose of paying it into ct., even before the result of the sale had been certified; & therefore, B.'s co-partners were liable to make good the defalcation.—*BIGGS v. BREE* (1882), 51 L. J. Ch. 263; 46 L. T. 8; 30 W. R. 278, C. A.

Annotations:—*Distd.* *Re Mitchell, Mitchell v. Mitchell* (1884), 54 L. J. Ch. 342. *Appld.* *Brown v. Farebrother* (1888), 58 L. J. Ch. 3.

4244. ———.]—*RENESON v. COE* (1885), 1 T. L. R. 419.

(b) Money and Securities received for Safe Custody or on Deposit till Investment.

4245. Innocent partner not responsible.]—In Mar. 1832, defts. B. & C., who were then in

PART XII. SECT. 4, SUB-SECT. 3.— C. (a).

4240 i. All partners liable.]—*REID v. SILBERBERG*, [1906] V. L. R. 126.—*AUS.*

o. Award against one partner — Although misappropriated by firm.] —

v. WALLACE (1870), 8 N. S. R. (2 G. & O.) 83.—*CAN.*

p. Innocent partner not responsible] —Where one member of a firm of attorneys receives money for investment, & misappropriates it without the knowledge or consent of the other, it ought to be clearly shown that the

latter was guilty of personal misconduct, or at least, of neglect of duty as a member of the firm, in consequence of the misconduct of his partner, before the ct. will interfere on a summary application to compel him to pay money.—*Ex p. FLOOD* (1883), 23 N. B. R. 86.—*CAN.*

Sect. 4.—Liability for acts of partner: Sub-sect. 3, C. (b) & (c).]

partnership as solrs., were employed by A. to lay out £500 on mtge. They lent the money to L. on the mtge. of certain premises, & retained possession of the mtge. deed. The premises were afterwards sold subject to the mtge., & the purchaser paid C. the £500 & interest, but without the knowledge of B., & the deed was given up to the purchaser by C., but no receipt was indorsed thereon, nor was any reconveyance or receipt executed or signed by A., who was not informed that the money had been paid. In Dec. 1832, C., without the knowledge of B., returned to the purchaser £300, & received back the mtge. deed, & no part of the £500 was paid to A. Interest, at first on the £500, & then upon the £300, was paid to C. by the purchaser; & entries were made in the books of defts., giving credit to A. for interest on the £500, & debiting him with interest paid to his agent. In July, 1838, defts. dissolved partnership. Up to the dissolution, interest on the £500 was regularly paid to the agent of A. by C., by cheques drawn by defts. on their bankers; & after the dissolution, it was paid by C., sometimes in cash & sometimes by cheques on his own banker. In some of the receipts the money was described as interest upon a mtge. A. died in May, 1840. In Dec. 1846, the purchaser paid C. the £300 & interest, & received from him the mtge. deed. B. was ignorant of the receipts & payments subsequent to the investment of the £500, until 1849. In 1848, pltf., the exors. of A., first discovered that the mtge. money had been repaid:—*Held*: no action would lie against B., inasmuch as the subsequent receipt of the mtge. money by C. was wholly unauthorised, & not within the scope of the partnership business.—*SIMS v. BRUTTON* (1850), 5 Exch. 802; 20 L. J. Ex. 41; 16 L. T. O. S. 173; 155 E. R. 351.

Annotations:—*Reid*. *Gordon v. James* (1885), 53 L. T. 641. *Mentd. Re Somerset, Somerset v. Poulett*, [1891] 1 Ch. 231.

4246. —.—.]—*HARMAN v. JOHNSON*, No. 4256, *post*.

4247. —.—.]—(1) Where a client had corresponded & dealt exclusively with one only out of a partnership of three solrs., & remitted a sum of money to that one alone, although desired by him to remit the money to the firm, a motion against all three partners, under the summary jurisdiction of the ct., to compel them to pay the money, refused as to the two partners who had thus been excluded from the fair means of the knowledge of the remittance.

The summary jurisdiction of the ct. over its officers extends to relief only in cases of personal misconduct & neglect of duty.

(2) A solr., who allows his name to be used by others conducting in his name the business of solrs., incurs the peril of personal responsibility.—*Re LAWRENCE, Ex p. BURDON* (1854), 2 Sm. & G. 367; 2 Eq. Rep. 931; 23 L. J. Ch. 791; 23 L. T. O. S. 267; 18 Jur. 742; 2 W. R. 680; 65 E. R. 439.

Annotation —.—.]—(1) *Distd. Norton v. Cooper* (1856), 3 Sm. & G. 375.

4248. —.—.]—It is well settled that it is not within the ordinary business of a solr. to receive purchase-money belonging to his client, or money due to him on mtge., nor to receive money from him for the purpose of investment generally, & one partner is not liable for the misapplication of money so received by another without his privity.

Secus: where the money is received for the purpose of being invested on a particular security.—*BOURDILLON v. ROCHE* (1858), 27 L. J. Ch. 681; 31 L. T. O. S. 264; 6 W. R. 618.

Annotations:—*Consd. Eager v. Barnes & Bridger* (1862), 7 L. T. 408. *Distd. St. Aubyn v. Smart* (1868), 3 Ch. App. 646. *Apld. Plumer v. Gregory* (1874), L. R. 18 Eq. 621. *Reid. Biggs v. Bree* (1881), 51 L. J. Ch. 64.

4249. —.—.]—Pltf. a married woman, & her husband were clients of J. & W., a father & son, who carried on business together in partnership as solrs. In 1859 pltf. became possessed to her separate use of a sum of £3,000, which, in consequence of her husband's pecuniary difficulties, she was advised by the solrs. to invest without his concurrence. On the suggestion of J. & W. she advanced to them £1,300, part of the £3,000, which they required for another client to complete a purchase of an advowson, on the security of a written undertaking signed by both to execute a legal mtge. of the advowson to her when the transaction was completed. Pltf. subsequently handed the remaining £1,700 to W., on the representation by him alone that it would be invested on mtge. of the real estate of another client. In Jan. 1865, J. died, having retired from the business in 1862 & in May, 1865, pltf. was fraudulently induced by W. to execute a deed constituting him the sole trustee of the £3,000 & empowering him to invest it as he thought proper, without being answerable for any loss. No legal mtge. of the £1,300 was ever effected, & in 1868 it was paid off to W. under the authority of the deed of 1865, & it & the £1,700, which had never been invested were spent by W. He continued to pay pltf. interest on these funds till Nov. 1871, & died insolvent in Mar. 1872. On bill against the exors. of J. & W.:—*Held*: (1) J.'s estate was liable to make good the loss of the £1,300; (2) in consequence of the regular payment of interest by W., laches was not attributable to pltf. for not enforcing her rights sooner; (3) the dealing with the £1,700 was not part of the regular business of J. & W. as solrs., & the receipt of it by one partner alone did not make the other partner liable, & J.'s estate was not liable to replace this fund.

(1) During part of these transactions C. was also a partner with J. & W., but he was not a party to the frauds, & no guilty knowledge was attributed to him:—*Held*: pltf. might proceed against any or all of the parties jointly & severally liable, & C. was not a necessary party to the suit.—*PLUMER v. GREGORY* (1874), L. R. 18 Eq. 621; 43 L. J. Ch. 803; 31 L. T. 80.

Annotations:—*As to* (3) *Reid. Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394; *Biggs v. Bree* (1881), 51 L. J. Ch. 64. *Generally, Reid. Cleather v. Twisden* (1883), 24 Ch. D. 731; *Hughes v. Twisden* (1886), 55 L. J. Ch. 481.

4250. —.—.]—*Unless authorising receipt.*—A. & B., having for many years been partners in business as solrs., dissolved their partnership in 1834, & the business continued to be carried on by A. alone, until 1841, when he became bkpt., & it was then discovered that a sum of money which had been paid by a client into the joint account of the firm at their banker's in 1829, for the purpose of investment, & which A. had shortly afterwards represented to have been invested accordingly, & on which he had regularly paid interest on the footing, had, instead of being invested, been appropriated by him to his own use. Upon a bill filed by the client against B. to make him liable for the money:—*Held*: even assuming debt. to

PART XII. SECT. 4, SUB-SECT. 3.—C. (b).

4245 1. *Innocent partner not responsible.*—*JOHNSTON v. BRANDON* (1919), 45 O. L. R. 369; 16 O. W. N. 134.—CAN.

have been, as he alleged he was, personally ignorant of the whole transaction, & to have derived no benefit from the fraud, still he was bound by the representation of his partner; such representation relating to a matter within the limits of the partnership business, & amounting therefore to a guarantee by the firm to the parties concerned, that they should be placed in the same situation as if the fact represented were true.—**BLAIR v. BROMLEY** (1847), 2 Ph. 354; 16 L. J. Ch. 495; 11 Jur. 617; 41 E. R. 979, L. C.

Annotations.—**Distd.** Coomer v. Bromley (1852), 5 De G. & Sm. 532. **Consd.** Eager v. Barnes & Bridger (1862), 7 L. T. 408. **Apld.** St. Aubyn v. Smart (1868), 3 Ch. App. 646. **Distd.** Hughes v. Twisden (1886), 55 L. J. Ch. 481. **Apld.** Moore v. Knight, [1891] 1 Ch. 547. **Refd.** Bourdillon v. Roche (1858), 27 L. J. Ch. 681; Essell v. Hayward (1860), 24 J. P. 819; Slim v. Croucher (1860), 8 W. R. 347; Alliance Bank v. Tucker (1867), 17 L. T. 13; Sawyer v. Goodwin (1867), 36 L. J. Ch. 578; Plumer v. Gregory (1874), L. R. 18 Eq. 621; Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394; Biggs v. Bree (1881), 51 L. J. Ch. 64; Thorne v. Heard, [1894] 1 Ch. 599; Betjemann v. Betjemann (1895), 73 L. T. 2; Mara v. Browne, [1895] 2 Ch. 69; *Re Fountaine*, Fountaine v. Amherst (1909), 78 L. J. Ch. 648. **Mentd.** Ingram v. Thorp (1848), 7 Hare, 67; Wilson v. Short (1848), 6 Hare, 366; Bishop v. Jersey (1854), 2 Drew. 143; Imperial Gas Light & Coke Co. v. London Gas Light Co. (1854), 10 Exch. 39; Hunter v. Gibbons (1856), 1 H. & N. 459; *Re Cameron's Coalbrook, etc. Co.*, *Ex p.* Hunt (1863), 2 New Rep. 50; Ramshie v. Bolton (1869), L. R. 8 Eq. 291; Ecclesiastical Comrs. for England v. N. E. Ry (1877), 4 Ch. D. 845; Gibbs v. Guld (1882), 9 Q. B. D. 59; *Re Mutual Aid Permanent Benefit Bldg. Soc.*, *Ex p.* James (1883), 49 L. T. 530; Whitwam v. Watkin (1898), 78 L. T. 188.

4251. ———.] Plt. being entitled to a fund in ct., gave the firm of solrs. who had acted for him in the matter a joint & several power of attorney to receive the money from the Accountant-General. Plt. sent the power to B., one of the partners, who received the money, & signed the receipt in his own name. B. paid the money into his own private banking account, & shortly afterwards absconded with it. The letters on the subject of the power of attorney, & the cost of stamping it, were charged for in the bill of costs of the firm. Upon a bill seeking to make S., the other partner, liable to repay the money, but not praying for an account:—*Held*: (1) the money must be treated as having come into the hands of the firm in the course of their business as solrs.; & S. was liable for its repayment with interest; (2) the ct. had jurisdiction to give relief, though the bill did not pray for an account, both under its general jurisdiction over solrs. & because B. had been guilty of fraud.—**ST. AUBYN v. SMART** (1868), 3 Ch. App. 646; 19 L. T. 192; 16 W. R. 1095, L. J.

Annotations.—*As to* (1) **Consd.** Dundonald v. Masterman (1869), L. R. 7 Eq. 504. **Distd.** Hughes v. Twisden (1886), 55 L. J. Ch. 481. **Consd.** Thorne v. Heard, [1894] 1 Ch. 599. **Refd.** Plumer v. Gregory (1874), L. R. 18 Eq. 621; Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394; Mara v. Browne, [1895] 2 Ch. 69. *Generally, Refd.* Biggs v. Bree (1881), 51 L. J. Ch. 64. **Mentd.** Ramshie v. Bolton (1869), L. R. 8 Eq. 291.

4252. ———.]—H., who had been a partner in a firm of solrs., & had during that time attended to the management of a certain trust, continued to act in relation to a change of investment of part of the trust funds after he had retired from the firm as if he were still a partner, & wrote to the trustees from the office of the firm saying that he had obtained a power of attorney authorising "our brokers" to sell the stock, & asked them to sign it, & send it to the office of the firm. The trustees did as requested, & the stock was sold, & the money received by H.'s late partners, who misapplied it, & it was lost to the trust. It appeared that the tenant for life was aware at this time that H. had retired from the firm, but the trustees were not:—*Held*: H. was liable to

make good to the trust the capital sum lost, & interest from the last day on which any was paid.—**SLACK v. PARKER** (1886), 54 L. T. 212.

4253. ———. **Or ratifying receipt.**]—Trustee under a will deposited certain bonds payable to bearer with P., a member of the firm of solrs. who were acting for the estate. His partners had no knowledge of this, but letters referring to the bonds were copied in the letter book of the firm & were charged for in the bill of costs of the firm, & the bonds were included in a statement of account which the firm made out for the trustees. P. paid some of the interest of the bonds by cheques of the firm, but on each occasion recouped the firm by a cheque for the same amount on his private account. P. misappropriated the bonds:—*Held*: the cheques, letters, & entries were too ambiguous to affect the other partners with acquiescence in P., having the custody of the bonds as part of the partnership business, & they could not be held liable for their misappropriation.

We must inquire, first, whether they gave him express authority to take charge of the bonds; secondly, if not, whether they ratified what he did; & thirdly, if they neither expressly authorised nor ratified his act, whether they consented that he should have general authority to act without their knowing what he did (**BOWEN, L.J.**).—**CLEATHER v. TWISDEN** (1884), 28 Ch. D. 340; 54 L. J. Ch. 408; 52 L. T. 330; 33 W. R. 435; 1 T. L. R. 175, C. A.

Annotation.—**Distd.** Rhodes v. Moules, [1895] 1 Ch. 236.

(c) Money received for Investment on Specific Security.

4254. Liability of innocent partner.]—If two are partners, as attorneys & conveyancers, & one receive money to be laid out on mtge., the other is liable for the amount, though his partner gave a separate receipt for it.—**WILLET v. CHAMBERS** (1778), 2 Cowp. 814; 98 E. R. 1377.

Annotation.—**Mentd.** Coleman v. Ritches (1855), 24 L. J. C. P. 125.

4255. ———.]—**BLAIR v. BROMLEY**, No. 4250, *ante*.

4256. ———.]—The receipt of money by one of a firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it, as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, & attorneys, as such, not necessarily being scriveners. But, if money be so deposited with one partner for the purpose of its being invested on a particular security, the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney.—**HARMAN v. JOHNSON** (1853), 2 E. & B. 61; 22 L. J. Q. B. 297; 21 L. T. O. S. 89; 17 Jur. 1096; 1 W. R. 326; 118 E. R. 691.

Annotations.—**Consd.** Bourdillon v. Roche (1858), 27 L. J. Ch. 681. **Apld.** St. Aubyn v. Smart (1868), 3 Ch. App. 646. **Consd.** Dundonald v. Masterman (1869), L. R. 7 Eq. 504; Plumer v. Gregory (1874), L. R. 18 Eq. 621; Cleather v. Twisden (1884), 28 Ch. D. 340. **Distd.** Rhodes v. Moules (1894), 61 L. J. Ch. 122. **Refd.** Edgelow v. MacElwee, [1918] 1 K. B. 205.

4257. ———.]—A. & B., solrs. in partnership together, jointly attended to the management of certain settlement trust funds, of which A. & E. were trustees, who had executed the settlement. E. was the client of A., who represented to E. that he had a good mtge. security on which to invest a portion of the trust moneys; & E., accordingly, assented to his making such investment. A. did not, however, invest the money

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on the mtge., but paid it into the bank of his firm, to their partnership account there; the proceeds being applied, with the knowledge of B., to the use of the firm. A. died in insolvent circumstances, leaving B. him surviving:—*Held*: B. was personally liable to E. for the money; & E. was *pro tanto* a specialty creditor of A.'s estate.—*EAGER v. BARNES* (1862), 31 Beav. 579; 7 L. T. 408; 54 E. R. 1263.

Annotation:—*Consd. Alliance Bank v. Tucker* (1867), 17 L. T. 13.

4258. —.] —*PLUMER v. GREGORY*, No. 4249, *ante*.

4259. —.] —The decision in *Blair v. Bromley*, No. 4250, *ante*, does not proceed on any principle or rule of equity specially applicable to trustees, but rests upon principles of the law relating to representation & partnership, & is unaffected by Trustee Act, 1888 (c. 59), s. 8.

Between the years 1867 & 1874, pltf. deposited divers sums of money with M., G. & B., a firm of solrs., for the purpose of investment. Representations were from time to time made to pltf., on behalf of the firm, that her money had been duly invested, & interest was paid to her by M., G. & B. down to the death of G., in 1877, & by the surviving members of the firm down to 1886. In 1886 it was discovered that pltf.'s moneys had never, except as to one small sum, been invested, but had, in fact, been embezzled by a clerk of the firm.

In an action brought by pltf., after the death of all the partners, for the recovery of her money, G.'s exors. pleaded Stat. Limitations & Trustee Act, 1888 (c. 59), s. 8; & contended that the Act of 1888 had rendered the decision in *Blair v. Bromley*, No. 4250, *ante*, no longer applicable:—*Held*: the decision in *Blair v. Bromley* No. 4250, *ante*, was unaffected by Trustee Act, 1888 (c. 59), & pltf. was entitled to be repaid the sums invested, with interest from 1886, out of the joint estate of the firm of M., G., & B.; & if such estate was not sufficient, then to recover the balance out of the separate estates of M., G., & B.—*MOORE v. KNIGHT*, [1891] 1 Ch. 547; 60 L. J. Ch. 271; 63 L. T. 831; 39 W. R. 312.

Annotations.—*Refd. Thorne v. Heard*, [1894] 1 Ch. 599; *Mara v. Browne*, [1895] 2 Ch. 69; *Palmer v. S.* (1905), 51 Sol. Jo. 653; *Re Fountaine*, *Fountaine v. Amherst* (1909), 78 L. J. Ch. 648. *Mentd. Whitwam v. Watkin* (1898), 78 L. T. 188.

D. Dealings with Trust Funds.

4260. General rule—One partner constructive trustee—Innocent partner not affected.]—It is not within the scope of the implied authority of a solr. carrying on business in partnership to constitute himself a constructive trustee, & thereby to subject his partner to liability in that character, the partner being ignorant of the dealings by which the constructive trust is established. It having been held by the judge that a solr. had constituted himself a constructive trustee, & that both he & his partner in business were liable to make good a loss which had resulted from improper investments of the trust funds:—*Held*: upon the evidence in the matters in question the solr. had acted only in the character of solr. to the trustees, & that consequently neither he nor his partner were liable as constructive trustees.—*MARA v. BROWNE*, [1896] 1 Ch. 199; 65 L. J. Ch. 225; 73 L. T. 638; 44 W. R. 330; 12 T. L. R. 111; 40 Sol. Jo. 131, C. A.

Annotations.—*Refd. Plaskitt v. Eddis* (1898), 79 L. T. 136. *Mentd. Re Taylor*, *Atkinson v. Lord* (1900), 81 L. T. 812; *Re Stanley's Settlement*, *Maddocks v. Andrews*, [1916] 2 Ch. 50.

4261. Investment of trust moneys on mortgage of insufficient security—Liability of all partners.]

Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solrs., F., S., & F., at their bankers. The funds were afterwards advanced on a mtge. of house property in a new neighbourhood, & of inadequate value. At that date there were no trustees of the settlement, & the mtge. was taken in the names of S. & two other persons who were then proposed, & shortly afterwards appointed new trustees, & never repudiated the transaction. S. was the member of his firm who acted for them in all the matters, & for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment for their bill of costs out of the funds. The mtge. proved to be an insufficient security, & in an action against the trustees it was held that they were jointly & severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make the firm of solrs. liable for the loss of the funds on the ground of negligence, though S.'s partners had not had any personal knowledge of the property at the time when the mtge. transaction was completed:—*Held*: (1) in all that S. had done in the matter of the mtge., he acted within the scope of his authority as a partner, his firm must be taken to have had knowledge that the security was, for trustees, improper, & consequently, they were implicated in & jointly & severally liable for the breach of trust; & further, the judgment which had been recovered against S., as one of the trustees, had not discharged his partners from liability; (2) though there had not been an express retainer, the relation of solr. & client might be inferred from the acts of the parties; it subsisted between the firm & the trustees, & the firm were liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients; (3) the liability extended to the estate of a member of the firm since deceased.—*BLYTH v. FLADGATE*, *MORGAN v. BLYTH*, *SMITH v. BLYTH*, [1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546; 39 W. R. 422; 7 T. L. R. 29.

Annotations.—*As to* (1) *Consd. Mara v. Browne*, [1895] 2 Ch. 69. *Refd. Re Turner*, *Barker v. Ivimey*, [1897] 1 Ch. 536.

SUB-SECT. 4.—LIABILITY TO THIRD PARTIES.

A. Transactions within Scope of Business.

4262. Fraud.]—*BRYDGES v. BRANFILL*, No. 4181, *ante*.

4263. —.]—A firm of country solrs. entrusted W., one of their partners, with the management of their business in London. In the course of this branch of the business certain persons for the purposes of investment advanced money to W. which were misapplied by him & lost. Subsequently all of the members of the firm with the exception of G. became insolvent. G. afterwards died, & on his estate being administered a claim for the first time was made against him in respect of the moneys misapplied by W.:—*Held*: the claim was good as against G.'s estate.—*SAWYER v. GOODWIN*, *MISSING'S CASE* (1867), 16 L. T. 514.

4264. —.]—On the occasion of a mtge. a firm of solrs. acted for the mtgor. One of the partners conducted the matter, & delivered an abstract of title, suppressing all reference to prior mtges. within his knowledge affecting part of the proposed security. The other partner having died, & the security appearing to be deficient. In a suit to

knowledge of the transactions relied upon to show such authority:—*Held*: plff. could not recover against both defts., but deft. who signed the note was liable.—*WILSON v. BROWN* (1881), 6 A. R. 411.—**CAN.**

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& it certainly is not according to the usual practice of attorneys generally (PATTESON, J.).—*HASLEHAM v. YOUNG* (1844), 5 Q. B. 833; Dav. & Mer. 700; 13 L. J. Q. B. 205; 3 L. T. O. S. 34; 8 Jur. 338; 114 E. R. 1463.

4275. —.—.]—*MAYFIELD v. SANKEY* (1890), 6 T. L. R. 185.

4276. **Permitting stranger to use firm name.**—Without the knowledge or authority of X., a solr., B., another solicitor, used X.'s name in proceedings wherein by acts of fraud & forgery B. obtained an order for the payment out of a fund in ct., & was thereby enabled to get the fund paid out by a cheque from the Paymaster General, with which he opened a fictitious account at a bank. Two days later, & after the account had been partially drawn upon, X. was told by B. that his name had been made use of for a formal party. X. reprimanded B. for this, but, without inquiring into the nature of the business, accompanied B. to the Paymaster General's Office, & received a cheque for £15 for costs; over £10 of this he paid to B. for out-of-pocket expenses, & the balance of £4 5s. 6d. he handed to his partner Y., who entered it to the credit of the firm in their books without knowing anything of the circumstances under which the money had been paid. A large portion of the fund formerly in ct. having been lost:—*Held*: (1) even if X. had previously authorised the use of his name for a formal party, he would not have been responsible for the acts of fraud & forgery committed by his supposed agent for that agent's own fraudulent purposes; (2) under the circumstances, X. had not condoned or ratified the use of his name by B., & was not liable for the whole of the loss sustained, but only for the amount of the £15 cheque which he took; (3) Y. was liable only for the £4 5s. 6d. received by him for the partnership.—*MARSH v. JOSEPH*, [1897] 1 Ch. 213; 66 L. J. Ch. 128; 75 L. T. 558; 45 W. R. 209; 13 T. L. R. 136; 41 Sol. Jo. 171, C. A.

Annotations—*Generally*, *Mentd.* *Hambro v. Burnard*, [1903] 2 K. B. 399; *Re Williams' S. E.*, [1910] 2 Ch. 481.

SECT. 5.—PROFITS OF OFFICES.

4277. **Profits of offices held by individual partners—Whether treated as profits of partnership.**—*Primâ facie*, the emoluments derived from offices of the character of a clerkship to the guardians of a union, do not fall within the ordinary description of profits of an attorney.

The profits of the offices of clerkship to poor law guardians, of superintendent registrar of births, etc., treasurer of turnpike trust, stewardship of a manor, treasurership of a charity & receivership of tithes, at a fixed salary, held to form part of a partnership between solrs.

In the absence of any evidence, the presumption is, that partners are equally entitled to the profits & equally liable to bear the losses of the business.—*COLLINS v. JACKSON, JACKSON v. COLLINS* (1862), 31 Beav. 645; 51 E. R. 1289.

4278. —.—.]—Metropolis Toll Bridge Act, 1877 (c. xcix), s. 20, provided that compensation should be paid to certain officers, including clerks, but not including solrs. of the private cos. or corpns. whose bridges were taken over by the Metropolitan Board of Works under the Act upon a scale to be calculated on the basis of the emoluments actually received by them in the two years previous to the passing of the Act. The Deptford Creek Bridge was taken over by the board, & thereby

pltf., who was a partner in a firm of solrs. & clerk to the bridge company, lost his office. He had received a salary as clerk, & also payments for legal business done by him as solr. for the company, & commission on the rents of the co.'s property which he received. The bridge co. had by their Act power to appoint a solr. & receiver as well as a clerk; they had never appointed such officers, & the legal business of the co. had always been done, & the rents received, by the clerk who had always been a solr.:—*Held*: by the practice of the co. these duties had been attached to the office of clerk, & pltf. was entitled to compensation in respect of the payments received for discharging them as part of the emoluments of his office; but, as to the payments for legal business done by him, only in respect of his proportion as partner in the firm of solrs. of the net profits after deducting all office expenses necessarily incurred in earning the money.—*DREW v. METROPOLITAN BOARD OF WORKS* (1883), 50 L. T. 138, C. A.

4279. —.— **Office purchased with partnership funds.**—Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for the other partners, after the term of the partnership has expired.—*CLARKE v. RICHARDS* (1835), 1 Y. & C. Ex. 351; 4 L. J. Ex. Eq. 49; 160 E. R. 143.

4280. —.— **Provision in partnership articles—Legality of.**—A., an attorney, holding the offices of clerk of the peace, clerk to the magistrates, clerk to the comrs. of land & assessed taxes, clerk to the comrs. of sewers, clerk to the deputy-lieutenants, steward of certain manors, coroner for a liberty, secretary to a Conservative Assocn., & secretary to a polling district assocn., entered into articles of partnership with B., by which, after reciting that A. carried on the business of an attorney at, etc., & held many offices, clerkships, & stewardships of manors & that it had been agreed that B. should enter into partnership with A. "in the said business, & in the emoluments of the offices, clerkships, & stewardships," upon the terms thereafter expressed, it was agreed that they should enter into partnership for twenty years & that "all the profits & emoluments arising from the offices, clerkships, & stewardships, held by A., as also all such offices, clerkships, & stewardships as should be held by either of them A. & B. during the partnership, should be considered as partnership property, & be distributable accordingly"; & the articles contained this further provision, "that if A. should die during the term, then, if & during such period or periods as, it should happen that no son of A. should be a partner in the business, B. should be interested in one moiety of the partnership business, & the exors. or administrators of A. should be entitled to the profits of the remaining moiety thereof, to be applied by them as part of his personal estate":—*Held*: the contract was not void, as being a contract for the sale of an office, either within Sale of Offices Acts, 1551 (c. 16), or 1809 (c. 126), & the latter clause was no violation of 22 Geo. 2, c. 46, s. 11.—*STERRY v. CLIFTON* (1850), 9 C. B. 110; 4 New Mag. Cas. 114; 19 L. J. C. P. 237; 14 L. T. O. S. 375, 488; 14 J. P. 274; 14 Jur. 312; 137 E. R. 834.

Annotation:—*Mentd.* *Pugh v. Carttar* (1851), 17 L. T. O. S. 107.

4281. —.— **Office to be procured for partnership.**—*SMITH v. MULES*, No. 4308, *post*.

4282. —.— **Valuation of office in taking partnership accounts.**—*SMITH v. MULES*, No. 4308, *post*.

4283. Office in nature personal.]

—Where one of two partners, holds an office personal in its nature, the emoluments of which are by the terms of the partnership to be equally divided between the partners, a debt incurred in respect of such office is not a partnership but a private debt.—*ALSTON v. SIMS* (1855), 3 Eq. Rep. 834; 24 L. J. Ch. 553; 25 L. T. O. S. 139; 1 Jur. N. S. 438; 3 W. R. 431.

Annotation:—*Refd.* *Collins v. Jackson, Jackson v. Collins* (1862), 31 Beav. 645.

4284. ——— Pay received by partner as army officer.]—A partnership deed made in 1909 between pltf. & deft., who were solrs., provided that “the salary or other benefit derived by either partner from any office which he may hold during the continuance of the partnership shall be treated as forming part of the profits,” & that after five years pltf. should not be obliged to attend to the business any further than he thought proper. In 1914 pltf. joined the Army with the rank of major, & in 1918 he was demobilised. The partnership was dissolved in 1921:—*Held*: the word “office” in the deed included the position of an officer in the Army, & on the taking of accounts the pay received by pltf. as an officer was to be treated as profits of the partnership.—*CARLYON-BRITTON v. LUMB* (1922), 38 T. L. R. 298.

SECT. 6.—GOODWILL.

4285. Whether goodwill in partnership business.]

—*SPICER v. JAMES* (1830), cited in 3 De G. & Sm. at p. 713; 64 E. R. 673.

4286. ——— Necessity for express contract.]

In 1877 the three partners in a firm of solrs. agreed that the partnership should be dissolved, that two of them should continue to carry on the partnership business, & should employ the third as a clerk at a salary, & that all the books, papers, & other property of the firm should vest in & be the property of the two continuing partners. The third partner died shortly afterwards, & in an action by his administratrix against the two continuing partners, an order was made directing the partnership accounts to be taken as from Jan. 1874. In taking the accounts, pltf. claimed that a sum should be allowed in respect of the interest of the deceased partner in the “goodwill” of the partnership business, which was put at £10,000, being five years’ purchase of the estimated annual profits of the business:—*Held*: under the circumstances no sums could be allowed in respect of the alleged “goodwill” of the business.

As a general rule, & in the absence of express contract, there is not, in a partnership between solrs., any partnership asset which is capable of being sold or valued as the “goodwill” of the partnership business.—*ARUNDELL v. BELL* (1883), 52 L. J. Ch. 537; 49 L. T. 345; 31 W. R. 477, C. A. *Annotation*:—*Refd.* *Re Barfield, Goodman v. Child* (1901), 84 L. T. 28.

4287. ——— Articles containing provision for goodwill on death or retirement—Subsequent articles containing no provision.]—F., II. & B. were in partnership as solrs. until 1839, when F. retired & A. was introduced into the business, & it was then agreed that F. should be at liberty at any future time to introduce T. into the firm. In 1846 the partners entered into new articles, by which it was agreed that the partnership should continue for seven years; that on the death or retirement of any partner his interest & goodwill in the business should be paid for; & it was also provided that these articles should be subject to

the agreement as to the introduction of T. into the business as already stated. In 1848 H. died, & in accordance with the above agreement a sum of money was paid to his widow for his interest & goodwill in the business. In 1849 T. was admitted into the firm, & in the articles of partnership it was agreed that he should receive one fifth of the profits until Sept. 1, 1853, after which date he was to share equally with the other partners. In case of the death or retirement of either of the two senior partners in the meantime, his two-fifths were to be divided into thirds, the remaining senior partner to take two-thirds & T. one-third. On Aug. 29, 1853, two days before the expiration of the partnership of 1846, A. gave notice of his retirement & claimed to be paid for his share of the goodwill of the business according to the clause in the articles of 1846:—*Held*: pltf.’s share must be confined within the limits of the partnership which terminated two days after he gave notice, & he was not entitled to any supposed value beyond it.

The “goodwill” of a business is the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. But the term “goodwill” is wholly inapplicable to the profession of a solr., which has no local existence, but is entirely personal.—*AUSTEN v. BOYS* (1858), 2 De G. & J. 626; 27 L. J. Ch. 714; 31 L. T. O. S. 276; 4 Jur. N. S. 719; 6 W. R. 729; 41 E. R. 1133, L. C.

Annotations:—*Refd.* *Clark v. Leach* (1863), 1 De G. J. & Sm. 109; *Reynolds v. Bullock* (1878), 47 L. J. Ch. 773; *Corbin v. Stewart* (1911), 28 T. L. R. 99.

4288. Use of firm name—Agreement by retiring partner to permit use—Validity of agreement.]

A contract entered into by a practising attorney to relinquish his business & recommend his clients to two other attorneys for a valuable consideration, & that he would not himself practise in such business within certain limits, & would permit them to make use of his name in their firm for a certain time, but without his interference, etc., was holden to be valid in law.—*BUNN v. GUY* (1803), 4 East, 190; 1 Smith, K. B. 1; 102 E. R. 803, L. C.

Annotations:—*Distd.* *Bozon v. Farlow* (1816), 1 Mer. 459, *Hughes v. Statham* (1825), 6 Dow. & Ry. K. B. 219. *Dbtd.* *Thornbury v. Bevil* (1842), 1 Y. & C. Ch. Cas. 554. *Refd.* *Candler v. Candler* (1821), Jac. 225; *Hornor v. Graves* (1831), 9 L. J. O. S. C. P. 192; *Hitchcock v. Coker* (1837), 6 Ad. & El. 438; *Whittaker v. Howe* (1841), 3 Beav. 383; *Mallen v. May* (1843), 11 M. & W. 653, *Aubin v. Holt* (1855), 2 K. & J. 66. *Mentd.* *Proctor v. Sargent* (1840), 2 Scott, N. R. 289; *Green v. Price* (1846), 9 Jur. 857; *Mumford v. Gething* (1859), 7 C. B. N. S. 305; *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535.

4289. ———.]—Notwithstanding the case of *Bunn v. Guy*, No. 4288, *ante*, from which I do not mean to express dissent, decided as it was by judges of high authority, I am not prepared to say that it is fit that a ct. of equity should enforce an agreement between two solrs., that one on retiring from the business shall permit the other to carry on the business in his name. Whether such agreement be or be not within the strict policy of the law it may be doubtful whether the ct. ought to assist it (KNIGHT BRUCE, V.-C.).—*THORNBURY v. BEVILL* (1842), 1 Y. & C. Ch. Cas. 554; 6 Jur. 407; 62 E. R. 1014.

Annotation:—*Distd.* *Aubin v. Holt* (1855), 2 K. & J. 66.

4290. ——— Agreement in consideration of annuity.]—An agreement between two solrs. in partnership together, that one of them should continue to carry on the business under their joint names, & should be entitled to all the profits thereof, & should grant to the other partner an annuity of £300, during the life of his mother, &

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in the event of his dying in the lifetime of his mother, should pay to his widow an annuity of £100 during the remainder of his mother's life, & should indemnify him against all liability in respect of his name being used, & that the partnership should cease on the death of the mother of the retiring partner:—*Held*: not to be void as against public policy, but to be a valid & binding agreement; the agreement must be considered to mean, that an annuity was to be granted by deed, & that the retiring partner was entitled to enforce specific performance of such agreement; as incidental to such relief, the ct. would decree an account & payment of the arrears of the annuity, & would not direct the deed to be ante-dated, so as to cover them, & leave pltf. to recover at law upon the deed.—*AUBIN v. HOLT* (1855), 2 K. & J. 66; 25 L. J. Ch. 36; 4 W. R. 112; 69 E. R. 696.

4291. ——— **Specific performance.**—*THORN-BURY v. BEVILL*, No. 4289, *ante*.

4292. ——— ————*].—AUBIN v. HOLT*, No. 4290, *ante*.

4293. ——— **Dissolution of partnership—Goodwill not disposed of—No risk of liability to other partners.**—A firm of solrs., consisting of three partners, carried on business under the style of "Chappell, Son, & Griffith." The senior partner having died, the business was continued by the son & the junior partner under the same style for upwards of three years. The partnership was then dissolved, an agreement being executed providing for the dissolution, but containing no reference to the goodwill of the business or the sale or disposal thereof.

After the dissolution the business of a solr. was carried on by Chappell, the son, on the premises held by the original firm, under the style of "Chappell & Son." Griffith, having taken offices a few doors off, also carried on the business of a solr., under the style of "Chappell & Griffith." To this Chappell objected, & having commenced an action to restrain Griffith from carrying on business under the style referred to, moved for an *interim* injunction.

It was proved that, immediately before the dissolution of the partnership, Griffith had written to Chappell stating that he intended to carry on business under the style of "Chappell & Griffith" & making suggestions as to the style which Chappell should adopt.

Circulars were also forwarded by Griffith to all the clients of the old firm, informing them that he proposed to carry on the business of a solr. by himself, & stating the style he intended to adopt:—*Held*: the *prima facie* right of dejt. was to use the name of the old firm, no arrangement having been made as to goodwill of the business; from the nature of the business, & from the fact that the style of the original firm had been used with a variation, there was practically no risk that pltf. would be exposed to injury by what dejt. was doing; & therefore no case had been made for the intermediate interference of the ct.—*CHAPPELL v. GRIFFITH* (1885), 53 L. T. 459; 50 J. P. 86; 2 T. L. R. 58.

Annotation:—*Appld.* *Burchell v. Wilde*, [1900] 1 Ch. 551.

—*].—Upon the dissolution of a partnership, without any sale or assignment of the goodwill of the business, & without any provision as to the use of the firm*

name, each of the partners is entitled to carry on business under that name, provided that he does not by so doing expose his former partners to any risk of liability.

Whether there will be any such risk is a matter to be determined, having regard to the circumstances of each case.

In 1882 a partnership of solrs. was constituted, the partners being William Burchell the elder, William Burchell the younger, dejt. W. G. Wilde, & pltf., J. W. Burchell & C. T. D. Burchell, & they carried on business under the style of "Burchell & co."

In June, 1893, William Burchell the elder having died & William Burchell the younger having retired, pltf. & dejt. W. G. Wilde agreed to continue in partnership under the style of "Burchell & co."

In the year 1899 the partnership was dissolved by consent, there being no sale of the goodwill or assets & no provision as to the use of the firm name.

Pltf. then proceeded to carry on business at the old office as "Burchells & co.," & dejt. W. G. Wilde & his son, whom he had taken into partnership, at new offices as "Burchell & co."

Pltf. claimed the exclusive right to use the name "Burchell" or "Burchells," & to restrain defts. from using either of those names in any way as part of the firm name. The judge held on motion for an injunction, that the right to the injunction depended upon pltf.' establishing that any use of the word "Burchell" as part of the name of defts.' firm would expose pltf. to risk of liability, & the ct. not being satisfied that either of pltf. would be under any tangible risk of liability if defts. were, as they said they were, willing to do to practise as "Burchell, Wilde & co.," especially if pltf. were to use a style carrying their initials, or were to take the name of "Burchells & Burchell," made no order on the motion:—*Held*: subject to the above limitation, defts. were entitled to use the name "Burchell & co.," though it would be more satisfactory if they would undertake to continue to use, as they had done since the hearing, the name "Burchell, Wilde & co."—*BURCHELL v. WILDE*, [1900] 1 Ch. 551; 69 L. J. Ch. 314; 82 L. T. 576; 48 W. R. 491; 16 T. L. R. 257, C. A.

Annotations:—*Reid.* *Townsend v. Jarman*, [1900] 2 Ch. 698; *Rosher v. Young* (1901), 17 T. L. R. 347. *Mentd.* *Walter v. Ashton*, [1902] 2 Ch. 282.

Agreement not to practise within certain limits.—*See* **TRADE & TRADE UNIONS.**

SECT. 7.—DISSOLUTION OF PARTNERSHIP.

Dissolution of partnership generally.—*See* **PARTNERSHIP**, Vol. XXXVI., pp. 497–520.

4295. Right to dissolve as against client.—Solrs. in partnership cannot dissolve their partnership, as against their client, without his consent, so as to enable the retiring partner, as discharged, to act against him.

Practice of solrs., partners, dividing their business, considering one only as agent to the other, disallowed; the client being entitled to their united exertions.—*CHOLMONDELEY (MARQUIS) v. CLINTON (LORD)* (1815), 19 Ves. 261; *Coop. G.* 80; 34 E. R. 515, L. C.

Annotations:—*Distd.* *Bricheno v. Thorp* (1821), *Jac.* 300. *Consd.* *Beer v. Ward*, *Ward v. Beer* (1821), *Jac.* 77;

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4293 l. Use of firm name—Dissolution of partnership—Goodwill not disposed of—No risk of liability to other partners.—*SMITH v. GREER* (1904), 24 C. L. T. 226; 7 O. L. R. 332; 3 O. W. R. 125.—**CAN.**

Johnson v. Marriott (1833), 2 Cr. & M. 183; Griffiths v. Griffiths (1843), 2 Hare, 587. *Distd.* Hutchinson v. Newark (1850), 3 De G. & Sm. 727; *Re* Holmes, *Re* Electric Power Co. (1877), 25 W. R. 603. *Consd.* Little v. Kingswood Collieries Co. (1882), 20 Ch. D. 733. *Expld.* Rakusen v. Ellis, Munday & Clarke, [1912] 1 Ch. 831. *Refd.* Dietrichsen v. Cabburn (1846), 1 Coop. temp. Cott. 72; Pearce v. Pearse (1846), 1 De G. & Sm. 12; Parratt v. Parratt (1848), 2 De G. & Sm. 258; Manser v. Dix (1855), 1 K. & J. 451; Horsley v. Cox (1869), L. R. 7 Eq. 464. *Mentd.* Baylis v. Grout (1835), 2 My. & K. 316; Turquand v. Knight (1836), 2 M. & W. 98; Campbell v. A.-G. (1867), 2 Ch. App. 571.

4296. Return of premium—Dissolution due to bankruptcy of partner paying premium—Petition by partner receiving premium.]—A., being an attorney, prevails upon B. to enter into partnership with him for the term of five years, for which he is to pay £1,050, but before fourteen months are expired A. sues out a commission of bkpt. against B. which puts an end to the partnership:—*Held*: a fraud on the part of A., & he was decreed to repay part of the premium which had already been advanced, & to deliver up a bond given by B. for securing the remainder.—*HAMIL v. STOKES* (1817), Dan. 20; 4 Price, 161; Wils. Ex. 39; 146 E. R. 426, Ex. Ch.

Annotation:—Consd. Freeland v. Stansfield (1854), 2 Sm. & G. 479.

4297. — Partnership for certain term—Return of part proportionate to unexpired portion.]—Pltf. & deft. entered into partnership as solrs. for a term of seven years, pltf. paying a premium of £800. Deft. before entering into the partnership, knew that pltf. was inexperienced & incompetent in his profession, & assigned that reason for requiring the amount of premium which was paid. After the expiration of two years deft. complained that pltf.'s incompetence was injurious to the business, & called on him to dissolve the partnership; & pltf. thereupon filed a bill praying for a dissolution, & for a return of a proportionate part of the premium:—*Held*: pltf. was entitled to the return of a part of the premium proportionate to the unexpired portion of the term.—*ATWOOD v. MAUDE* (1868), 3 Ch. App. 369; *sub nom.* *ATTWOOD v. MAUDE*, 16 W. R. 665, L. C. & L. J.

Annotations:—Apld. Rooke v. Nisbet (1881), 50 L. J. Ch. 588. *Refd.* Whincup v. Hughes (1871), L. R. 6 C. P. 78; Wilson v. Johnstone (1873), L. R. 16 Eq. 606; Belfield v. Bourne, [1894] 1 Ch. 521.

4298. — — — — —.]—Pltf & deft. entered into partnership as solrs. for a term of twelve years, "the partnership to be determinable at the option of any partner" by giving three months' notice; & pltf. to have the option of increasing his share in the profits of the business upon payment to deft. of £600. Pltf. paid the premium of £600. Afterwards deft. dissolved the partnership by giving a notice as provided by the articles:—*Held*: pltf. was entitled to the return of a proportionate part of the premium.—*ROOKE v. NISBET* (1881), 50 L. J. Ch. 588; *sub nom.* *DAW v. ROOKE*, *ROOKE v. NISBET*, 29 W. R. 842.

4299. — Grounds for refusing return—Incompetence of partner.]—(1) Mere delay by one partner in furnishing further capital according to articles of partnership is not a ground for rescinding the partnership contract, or, in case of dissolution, for depriving the partner of the right to a return of the premium paid by him on entering into partnership.

(2) Where one partner, who has paid a premium on entering into partnership, commenced an action for dissolution, & the other partner immediately afterwards commenced a cross-action for dissolution, & the first partner then filed affidavits in his action containing imputations of misconduct against the other partner, which he did not sustain, & one decree for dissolution was

made in both actions, which were practically one litigation:—*Held*: the making of the imputations was not such misconduct as to disentitle the party making them to a return of his premium.

(3) Mere incompetence in a partner, however great, is not a bar to the return of any part of the premium paid by him, unless such incompetence has caused damage or injury, when it may be taken into account in determining how much of the premium shall be returned.

(4) Where a man with a business has taken a person into partnership with him, & has taken a less premium from him in the belief that he will be of material service in the partnership, & the new partner turns out utterly incompetent, such incompetence may possibly be a good reason for not allowing the return of the whole premium.

(5) Where an inquiry was directed to be made in chambers as to the amount of premium to be returned to one partner on a dissolution of partnership, & a certain amount was certified by the chief clerk, whose certificate was afterwards confirmed by the judge & the Ct. of Appeal, interest on the amount was directed to be paid from the date of the certificate.—*BREWER v. YORKE*, *YORKE v. BREWER* (1882), 46 L. T. 289, C. A.

4300. — — — Misconduct — Unsustained charge of misconduct against other partner.]—BREWER v. YORKE, *YORKE v. BREWER*, No. 4299, *ante*.

4301. — — — Delay in furnishing further capital—In accordance with articles.]—BREWER v. YORKE, *YORKE v. BREWER*, No. 4299, *ante*.

4302. — — Inquiry as to amount returnable—Interest on amount certified—From date of certificate.]—BREWER v. YORKE, *YORKE v. BREWER*, No. 4299, *ante*.

— **On discharge of articles.]—See** Part II., Sect. 2, sub-sect. 9, B., *ante*.

4303. Winding up—Authority of partner to give credit in account—No direction to appropriate.]—P. & D., in the year 1814, commenced a partnership as solrs. W. was a client of the firm, & employed D. as his private agent to receive his rents. The partnership was dissolved in 1817, when W. was indebted to the firm for a bill of costs in a sum of £867; & D., upon a settlement of the partnership accounts between him & P., was found indebted to P. in a sum of £750, for which he gave security, & agreed to assign to P. the outstanding partnership debts. Of this settlement, debt, & agreement notice was given to W. in 1821. During the partnership & afterwards D. had received moneys on account of W. beyond the amount of the bill of costs: there was no evidence of any direction given by W. to D. to apply the moneys received by D. on his account to the payment of the bill of costs, nor of any settlement of accounts between W. & D., but it was in evidence, that upon one occasion W. said to D. that he had better keep some money of W. which he had in his hands, as he might want it.

A bill in equity filed by P., stating these facts, & that D. had possession of the partnership books, to which P. had no access; that D. had refused to concur with him in suing W. at law or to permit the use of his name for that purpose; & that by collusion between W. & D., the moneys of W. received by D. had, as they pretended, been applied to payment of the partnership debt, & praying an account & payment of the debt, was dismissed by the Master of the Rolls; but on appeal to the Lord Chancellor, this order was reversed, & a decree for account & payment made against the exors. of W., & this decree was affirmed on appeal.—*NOTTIDGE v. PRICHARD*

Sect. 7.—Dissolution of partnership. Part XIII.
Sect. 1.]

(1834), 8 Bli. N. S. 493; 2 Cl. & Fin. 379; 5 E. R. 1026, H. L.; *affg.* S. C. *sub nom.* PRITCHARD v. DRAPER (1831), 1 Russ. & M. 191, L. C.

Annotations.—*Refd.* Parker v. Morrell (1848), 2 Ph. 453, Piercy v. Fynney (1871), L. R. 12 Eq. 69.

4304. Order previously obtained by one partner—Petition for discharge by client & other partner—Misjoinder of parties.]—(1) Two solrs. in partnership: the one partner obtains an order in the name of a client; the partnership is then dissolved, & the client & the other partner come as co-petitioners to discharge the order, & for other relief:—*Held*: on the whole scope of the petition it was a misjoinder for such other partner to unite in it.

(2) Covenant on dissolution of partnership between solrs., that various debts & costs should only be received by them jointly. In a suit, in which costs the subject of such covenant are due, a stop order only may be obtained. Further relief against breach of the covenant as regards those costs must be sought by bill.—SANGAR v. GARDINER (1838), Coop. Pr. Cas. 119; 47 E. R. 428.

4305. Covenant providing for joint receipt of debts & costs—Stop order in respect of costs due—Further relief against breach of covenant by bill.]—SANGAR v. GARDINER, No. 4304, *ante*.

4306. Exclusion of partner—Restraint by injunction—Pending inquiry as to facts justifying exclusion.]—Where solrs. had entered into partnership upon the terms that either party might dissolve the partnership in the event of inattention to business or other misconduct on the part of the other partner, & one of them having availed himself of such provision, & excluded the other from the office:—*Held*: on a bill filed by the excluded partner, an issue was properly directed to try the fact of inattention to business, & in the meantime the continuing partner ought to be restrained by injunction from excluding his co-partner from the business.—MINGAYE v. WILKINS (1848), 11 L. T. O. S. 41, L. C.

4307. — Pending winding up.]—Where A. & B. have carried on business as solr. in partnership, the ct. will not allow A. to give notice of dissolution, & exclude B. from the office until the concern is finally wound up, even though it be a partnership at will, & the business is carried on in the offices belonging to A. with a right of user by the partnership only during the existence of the partnership.

There must be an injunction to restrain deft. from excluding pltf. from the law offices of the dissolved partnership, lately subsisting between pltf. & deft., & from preventing pltf. from having as free & unrestrained access thereto as deft. had, & from permitting deft.'s sole name to remain on the offices as carrying on business therein, or affixing thereon any name or inscription denoting that he was carrying on business in such offices on his sole account (WOOD, V.-C.).—ROBERTS v. EBERHARDT (1853), as reported in 2 Eq. Rep. 780; 23 L. J. Ch. 201; 22 L. T. O. S. 253; 2 W. R. 125; 69 E. R. 63.

Annotations.—*Refd.* Marsden v. Kaye (1857), 30 L. T. O. S. 197; Medwin v. Ditcham (1882), 47 L. T. 250.

4308. Notice of dissolution—Notice by one partner—Necessity for joining co-partner.]—By articles of partnership between three solrs., A., B., & C., it was provided that in case either of the partners should do or omit to do certain acts, or misconduct himself as there mentioned, or neglect diligently & faithfully to carry out the partnership practice, or if two of the partners, naming them, should unduly absent themselves, then the other

partners or partner might give notice declaring the partnership dissolved. By another clause it was provided that each of the three partners was to employ all his time in the partnership business, & was to communicate to the others or other of them, on request, all instructions in anywise relating to the partnership practice. By another clause it was provided that C. should be a sub-partner only, should perform & attend to all the duties of certain offices held by the firm as partnership property, & should, in lieu of all his share in the profits of the partnership, take the emoluments of those offices. Shortly after the formation of the partnership, A., being in difficulties, absconded. Disputes arose between B. & C., & B. gave notice to C., & served it at A.'s place of residence, for a dissolution, in terms of the articles. The bill was taken *pro confesso* as against A.:—*Held*: (1) it was not a sufficient cause of dissolution to show that C. had neglected other parts of the partnership practice; it must be shown that he had neglected the part peculiarly confided to his charge; (2) neglect to communicate instructions, etc., was a cause of dissolution only if such neglect continued after a request to have the instructions, etc., communicated; (3) B. had no right, under the articles, to dissolve by himself alone against A., without joining C. in the notice of dissolution given to or served on A., but the notice operated as a general dissolution of partnership, but without the consequences following a dissolution under the articles.

Under the circumstances of the present case, the offices in question were directed to be valued by the master, & deft. C., in whose name they were granted, was to be charged with the value in taking the partnership accounts.—SMITH v. MULES (1852), 9 Harc. 556; 21 L. J. Ch. 803; 19 L. T. O. S. 26; 16 Jur. 261; 68 E. R. 633; *varied*, 9 Harc. 573, L. JJ.

4309. Grounds for dissolution—Neglect of partnership duties—Duties confided to partner's charge.]—SMITH v. MULES, No. 4308, *ante*.

4310. — Failure to communicate instructions—After request to communicate.]—SMITH v. MULES, No. 4308, *ante*.

4311. — Impossibility of carrying on partnership without mutual loss—By change of circumstances—Or conduct of parties.]—(1) This ct. will dissolve a partnership before the expiration of the term, where the circumstances have so changed, & the conduct of the parties is such, as to render it impossible to carry it on without injury to all the partners.

The ct. dissolved a partnership entered into for a term of years, when, without any breach of the partnership articles, circumstances had so altered that it could not be carried on upon the footing originally contemplated, & the confidence mutually reposed having ceased, & given place to mistrust, so that it was apparent that the partnership could not go on without mutual injury.

(2) A. & B., who had been partners for some time, entered into a new partnership with C. At the same time B. took all the assets of the old firm, & covenanted to indemnify A. from the liabilities. The ct. held, that the partnership between the three might be determined by the ct., for due cause, without setting aside the deed of indemnity, which might be the subject of another suit.—HARRISON v. TENNANT (1856), 21 Beav. 482; 52 E. R. 945.

Annotation.—*Generally*, *Refd.* Leary v. Shout (1864), 33 Beav. 582.

4312. — Slight breach of articles—Provision against giving guarantees without consent—One

guarantee for small amount over long period.]—This ct. will not dissolve a partnership on the ground of a small infraction of the articles of co-partnership.

Articles of partnership provided, that if either of the partners should give guarantees without consent, the other might dissolve on giving notice. One of the partners, in the course of eight years, gave a guarantee for £52, & the other gave notice to dissolve:—*Held*: this alone was not, in equity, a sufficient ground for a dissolution.—*ANDERSON v. ANDERSON* (1857), 25 Beav. 190; 53 E. R. 609.

4313. — Partner misapplying trust funds.]—A partnership between two solrs. for their joint lives may be dissolved *instantly*, if one of the parties fraudulently sells out trust funds & applies the produce to his own use.—*ESSELL v. HAYWARD* (1860), 30 Beav. 158; 29 L. J. Ch. 806; 3 L. T. 500; 24 J. P. 819; 6 Jur. N. S. 690; 8 W. R. 593; 54 E. R. 849.

4314. Admission of third person to partnership—One partner taking over assets & indemnifying new partner—Dissolution of old partnership—Indemnity not set aside.]—*HARRISON v. TENNANT*, No. 4311, *ante*.

4315. Re-opening of settled accounts.]—Where an account is impeached, if a single important error is established, the ct. will not, except in the case of fraud, order the whole account to be opened, but will make a decree that pltf. may be at liberty to surcharge & falsify.

In a partnership action, where one error of £950 was established in an account long settled:—*Held*: on taking the accounts pltf. should be at liberty to surcharge & falsify, & such liberty

should not be limited to errors appearing from the books.—*GETTING v. KEIGHLEY* (1878), 9 Ch. D. 547; 48 L. J. Ch. 45; 27 W. R. 283.

Annotations:—*Consd.* *Ward v. Sharp* (1884), 53 L. J. Ch. 313. *Reid.* *Re Webb, Lambert v. Still*, [1894] 1 Ch. 73; *Yourell v. Hibernian Bank*, [1918] A. C. 372.

4316. Partner receiving assets on account of himself & partners—Not person acting in fiduciary capacity—Debtors Act, 1869 (c. 62), sect. 4 (3).]—One partner receiving assets of the partnership on account of himself & his co-partners, is not liable to imprisonment under above sub-sect. as a person acting in a fiduciary capacity.—*PIDDOCKE v. BURT*, [1894] 1 Ch. 343; 63 L. J. Ch. 246; 70 L. T. 553; 42 W. R. 248; 38 Sol. Jo. 141; 8 R. 104.

Annotations:—*Consd.* *Gordon v. Holland, Holland v. Gordon* (1913), 82 L. J. P. C. 81. *Reid.* *Rodriguez v. Speyer*, [1919] A. C. 59.

4317. Rights & duties of partners—No duty to assist in making out bills—Partnership books in hands of receiver.]—In an action for dissolution of partnership between solrs. a receiver was appointed to get in outstanding costs due from clients, & the books of the firm were placed in his hands. The entries of attendances made by R., one of the partners, were not sufficiently detailed to enable the receiver to make out proper bills. R. refused to settle the bills unless remunerated by 5 per cent. on the amount thereof. The other partner thereupon took out a summons for an order that R. should be directed to settle the bills within one week:—*Held*: the summons must be refused.—*RAY v. FLOWER ELLIS* (1912), 56 Sol. Jo. 724, C. A.

Use of firm name on sale of goodwill.]—*See* Nos. 4293, 4294, *ante*.

Part XIII.—London and Other Legal Agents.

SECT. 1.—IN GENERAL.

4318. Authority of country solicitor to countermand notice of trial—Though agent solicitor on record.]—Countermand of notice of trial, in a country cause, may be given by the country attorney, although the agent in town is the attorney on the record.—*CHESLYN v. PEARCE* (1836), 1 M. & W. 56; 4 Dowl. 693; 1 Gale, 423; Tyr. & Gr. 238; 5 L. J. Ex. 106; 150 E. R. 344.

Annotation:—*Mentd.* *R. v. Greene* (1843), 4 Q. B. 646.

4319. Creation of agency — Employment of country solicitor by solicitor of Government department.]—An attorney in the country employed by the solr. of one of the departments of the Govt. (*e.g.* the Post Office) in carrying on a Govt. prosecution, is an agent to such solr. & his bill of costs is not therefore taxable under Solicitors Act, 1843 (c. 73), s. 37.

If a prosecutor employs P. to conduct a prosecution, in the course of which work is done, & if P., residing in London, & doing himself such part of the work as could be performed in London, delegates to S., residing in the country, such part as could be performed there, because he does not choose to leave London to perform it himself. P. must be considered as the principal, & by consequence, becomes P.'s agent (*COLERIDGE, J.*).—*SIMONS v. PEACOCK, Re SIMONS* (1845), 3 Dow. & L. 156; 14 L. J. Q. B. 296; 5 L. T. O. S. 390; 9 Jur. 711.

Annotation:—*Consd.* *Smith v. Dimes* (1849), 4 Exch. 32.

4320. Agreement to charge costs on agency terms—Solicitor executor appointing another—Suit for administration of estate—Solicitor executor beneficially interested.]—S., solrs., promised, by letter, to conduct the professional business in which F. might be concerned "personally or otherwise," upon the terms of receiving agency charges. F. was a solr., but he had omitted to take out his certificate; at that time he was interested in a suit which he had procured to be instituted against himself, for the purpose of administering the estate of testatrix, whose exor. he was, & in whose estate he was beneficially interested. Upon the completion of this business, S. obtained the whole of the money belonging to F. out of ct.; they repudiated the letter, & insisted upon their right to costs as between solr. & client; they also refused all accounts, & never delivered any bills of costs. Upon a bill by F.:—*Held*: the letter was a valid agreement; S. were not entitled to higher charges because F. was uncertificated; his being uncertificated was immaterial, as such an agreement was legal if made with any client; the transaction was such that it could not be taxed under the common order; & it was necessary to file a bill & abandon the common order which had been obtained for taxation; & a reference was directed to the taxing master to tax the bill of costs as between principal & agent.—*FOLEY v. SMITH* (1851), 20 L. J. Ch. 621; 17 L. T. O. S. 273.

4321. — Solicitor trustee appointing another—

PART XIII. SECT. 1.

q. Delegation of authority.]—ACHESON v. MASSEY (1827), 1 Ir. L. Rec. 1st ser. 36, 185.—IR.

t. Employment to receive costs.]—STACKPOOLE v. STACKPOOLE (1830), 3 Ir. L. Rec. 1st ser. 304.—IR.

Sect. 1.—In general. Sects. 2 & 3: Sub-sect. 1.]

Advantage for benefit of trust estate—Taxation between principal & agent.]—A solr., one of three trustees, appointing another solr. to act for him on agency terms, does so for the benefit of the trust, although it be done with the consent of his co-trustees; & any advantage which may arise to him by the contract is for the benefit of the trust estate:—*Held*: a taxation of the solr.'s costs was properly made as between principal & agent, instead of solr. & client.—*Re TAYLOR* (1854), 18 Beav. 165; 23 L. J. Ch. 857; 23 L. T. O. S. 72; 18 Jur. 666; 2 W. R. 249; 52 E. R. 65.

Annotations:—Distd. Re Donaldson (1884), 27 Ch. D. 544. *Consd. Re Doody, Fisher v. Doody, Hibbert v. Lloyd*, [1893] 1 Ch. 129. *Refd. Stedman v. Collett* (1854), 17 Beav. 608.

4322. — Solicitor conducting defence of another.]—A solr. agreed to undertake the defence of another solr. upon agency charges. On special petition, a taxation of his bill was ordered, "having regard to the agreement."

A solr. agreed to conduct the defence of another solr. upon agency terms, in case of the defence being unsuccessful. On entering into the agreement, the latter suppressed from the former the existence of a material correspondence, which was the principal ground of a decree being made against him. But the solr., after the discovery, still continued the defence without objection:—*Held*: he was not released from the contract.—*Re GEDYE* (1857), 23 Beav. 347; 53 E. R. 136.

Annotations:—Distd. Ward v. Lawson (1872), 8 Ch. App. 65. *Refd. Re Philip* (1860), 2 Giff. 35.

4323. — Revocation of agreement—Death of solicitor employing agent.]—*HARRIS v. NUNN* (1886), 21 L. Jo. 440.

4324. Authority of solicitor to employ agent.]—A country solr. who is authorised to institute a suit, is justified in employing a London agent for that purpose, in whose name, as agent, the bill may be filed.—*SOLLEY v. WOOD* (1852), 16 Beav. 370; 51 E. R. 821.

4325. Agreement to share costs on agency terms.]—A. employed B., a writer to the signet, as his law agent in Scotland; & on the recommendation of B., he employed C. as his solr. in England. By a private agreement between B. & C., the latter arranged to allow the former half the profits of the business transacted by him for A. Upon a taxation of C.'s bill, A. presented a petition claiming the benefit of the agreement between B. & C.; but it was dismissed with costs.—*GORDON v. DALZELL* (1852), 15 Beav. 351; 21 L. J. Ch. 206; 18 L. T. O. S. 250; 16 Jur. 186; 51 E. R. 573.

4326. —.]—*MURRAY v. HONEY* (1900), 44 Sol. Jo. 469.

4327. Employment of agent for certain period—Order for change of agent obtained in suit—Agreement suppressed—Discharge of order.]—A country solr. agreed to employ a town agent for fifteen years. Before the expiration of the term, he obtained an order of course, in a suit, to change the agent, suppressing the existence of the special contract. The order was discharged for irregularity, with costs.—*RICHARDS v. SCARBOROUGH MARKET CO.* (1853), 17 Beav. 83; 22 L. J. Ch. 759; 21 L. T. O. S. 17; 17 Jur. 294; 1 W. R. 250; 51 E. R. 963.

4328. Employment of agent by solicitor as own solicitor.]—Where a country solr. is a deft., it is competent to him to act as solr. for his co-deft., & employ his town agent to be his own solr., & two distinct sets of costs may thus be charged against pltf.—*BAINBRIGGE v. MOSS* (1856), 3 Jur. N. S. 107.

4329. Employment of one agent by joint solicitors.]—*WALDON v. THOMPSON* (1868), L. R. 6 Eq. 7; 37 L. J. Ch. 751.

4330. Right to agency charges—Country solicitor having office in London—Agency charges on letters from one office to another.]—*Semble*, a solr. having an office in the country & another in London is not entitled to agency charges for letters written from one office to another on client's business.—*Re HARLE* (1868), 19 L. T. 305; 17 W. R. 21.

4331. — London agents for country solicitors—Partners common to both firms—Fees on taxation.]—It is a settled rule in the taxing master's office that where a London firm of solrs. & a country firm have a common partner, the London firm cannot be treated as agent for the country firm so as to be entitled to agency fees, but will be considered as transacting the business on its own account.

Where, therefore, in winding-up proceedings, a London firm acted for a country firm, each firm consisting of three partners, two of whom were the same in both firms:—*Held*: close copies & term fees could not be allowed on taxation.

As regards close copies, held, that the rule in Appendix N. as to close copies did not give the taxing master a discretion as to allowing them, for that the rule only applied in cases of agency.—*Re BOROUGH COMMERCIAL & BUILDING SOCIETY*, [1894] 1 Ch. 289; 63 L. J. Ch. 365; 70 L. T. 51; 42 W. R. 161; 10 T. L. R. 142; 7 R. 75, C. A.

4332. London solicitor obtaining order restraining sale—Under execution in country—Necessity for employment of country solicitor—To give notice of order.]—A London solr., who obtains an order from the Ct. of Bkpcy. in London restraining a sale under an execution in the country, ought, instead of telegraphing the order to the sheriff's officer, to telegraph it to a solr. at the place, as his agent, asking him to give notice of it to the persons affected.—*Re BISHOP, Ex p. LANGLEY, Ex p. SMITH* (1879), 13 Ch. D. 110; 49 L. J. Bcy. 1; 41 L. T. 388; 28 W. R. 174, C. A.

4333. Auctioneer employed by solicitor—Costs received by agent—Action by auctioneer against agent—Privity of contract.]—H. had been employed in a foreclosure action by D. & B., a country firm of solrs., as auctioneer, & when the costs came to be taxed by the London agent S. he received a voucher from H. for his fees. S. thereupon took the money out of ct. after taxation, which included this item of H.'s fees. Before he received this money it came to his knowledge that H. had not been paid. In an action by H. against S. to recover these fees as money had & received:—*Held*: there was no privity of contract between them, & the action therefore failed.—*HANNAFORD v. SYMS* (1898), 79 L. T. 30; 14 T. L. R. 530.

SECT. 2.—SCOPE OF COUNTRY CERTIFICATE.

4334. Attending taxation in London—Whether amounting to "acting or practising" in London.]—A solr., with a country certificate, & whose offices were at Birmingham, came up on a retainer & attended the taxation of a bill of costs within the ten miles radius:—*Held*: he did not, by this one transaction, act or practise in London within 33 & 34 Vict. (c. 97), s. 59.—*Re HORTON* (1881), 8 Q. B. D. 434; 51 L. J. Q. B. 309; 45 L. T. 541; 46 J. P. 293; 30 W. R. 102, D. C.

Annotation:—Appld. Woodward v. Lowe (1884), 19 L. Jo. 324.

4335. Notice of appeal from order of district registrar.]—A notice of appeal signed by the country solr. is a good notice (*FIELD, J.*).—

ROTHERHAM CORPN. v. PEACE, [1883] W. N. 216 ; Bitt. Rep. in Ch. 14.

4336. Delivery of statement of claim in London district.]—WOODWARD v. LOWE (1884), 19 L. Jo. 324 ; Bitt. Rep. in Ch. 15, n., D. C.

SECT. 3.—RELATIONS BETWEEN AGENT AND LAY CLIENT.

SUB-SECT. 1.—IN GENERAL.

4337. Taxation of costs—Whether bill taxable—On application of client.]—The bill of costs of an attorney, agent to the attorney employed by the party in respect of whose business the agency charges have been incurred, will not be ordered to be referred to a master to be taxed on the application of the client.—WILDBORE v. BRYAN (1820), 8 Price, 677 ; 146 E. R. 1333.

*Annotation :—*Reid. Cardale v. Bull (1843), 4 Q. B. 611.

4338. ——— On application of agent.]—In 1903 R., a solr., as clerk to the H. district council, instructed B. L. & co. to take certain proceedings in London in pursuance of a resolution of the council. The proceedings were accordingly taken, & conducted by B. L. & co., as the London agents of R. B. L. & co.'s bill of costs was taxed & paid on that footing. Upon a subsequent arbn. in the same matter B., as the successor of B. L. & co., acted as solrs. upon R.'s instructions without any fresh retainer. R. became financially embarrassed. B. sent in his bill direct to the council. They, by a letter dated Oct. 30, 1906, instructed B. to send in his bill to the clerk of the council to be taxed, but after nine months refused to pay the bill, on the ground that B.'s claim was against R., to whom the council were liable :—*Held* : the council were not estopped by their letter of Oct. 30, 1906, not did this letter amount to a contract, or ratification of any contract, to pay, & in the absence of any evidence of retainer by the council of B. as their solr., they were not liable to have his bill taxed as against themselves.—*Re* BAKER (1907), 52 Sol. Jo. 173.

— *In agency business generally.]—*See Part VI., Sect. 5, sub-sect. 1, C. (a), *ante*.

4339. Authority of agent—To bind client.]—Pltf. is bound by the acts of his attorney's agent in town.—GRIFFITHS v. WILLIAMS (1787), 1 Term Rep. 710 99 E. R. 1335.

*Annotation :—*Mentd. Stevenson v. Yorke (1790), 1 Term Rep. 10.

4340. ——— To institute proceedings—As solicitor for client.]—A town agent of a solr. in the country cannot, on an authority given to the solr. for a particular purpose, take proceedings on behalf of the client not specially authorised.—MALINS v. GREENWAY (1848), 17 L. J. Ch. 331 ; 11 L. T. O. S. 449 ; 12 Jur. 318, L. C.

4341. ———.]—SOLLEY v. WOOD, No. 4324, *ante*.

4342. ———.]—A retainer to a country solr. does not operate as a retainer to his London agents. Therefore, where a retainer had been given by a client to a country solr., & his London agents had issued a writ joining such client as pltf. & indorsed with their names as solrs. & not with the name of the country solr., pltf. was held to be entitled to have her name struck out as pltf.—WRAY v. KEMP (1884), 26 Ch. D. 169 ; 53 L. J. Ch. 1020 ; 50 L. T. 552 ; 32 W. R. 334.

*Annotations :—*Folld. *Re* Scholes (1886), 34 W. R. 515. *Appld. Re* Becket, Purnell v. Paine, [1918] 2 Ch. 72.

4343. ———.]—M., having been appointed trustee of a will jointly with C., the continuing trustee desired to change the solrs. S. & Son, who had acted for the trust, & to have the deeds in their hands delivered up. S. & Son refused to deliver up the deeds without payment of their costs, & presented a bill for work done before M. was appointed. M., with the consent as he alleged of C., instructed another firm of solrs., S. & T., to have S. & Son's bill taxed. S. & T. instructed their London agents to present the usual petition for taxation in the names of M. & C. On an objection of the registrar that the work had been done before M. was appointed, his name was struck out, & the petition presented in C.'s name alone. The London agents of S. & T. indorsed the petition with their own names as solrs. for C. instead of as agents for S. & T. his solrs. The usual order was made for taxation. C. moved to discharge it on the ground that he had never authorised the petition :—*Held* : C. had in fact authorised the presentation of the petition, but, on the authority of *Wray v. Kemp*, No. 4342, *ante*, the petition was bad because the London agents' name was put upon it as if they were the principal solrs., & the motion allowed, but without costs.—*Re* SCHOLES & SONS (1886), 32 Ch. D. 245 ; 55 L. J. Ch. 626 ; 54 L. T. 466 ; 34 W. R. 515 ; 2 T. L. R. 476.

4344. ——— Costs of motion to have name struck out from record.]—NURSE v. DURNFORD, No. 4029, *ante*.

4345. ——— Petition in lunacy.]—The London agent of a country solr. is not competent to sign a notice under rule 59 of the Lunacy Orders, 1883, unless he has authority to sign himself as petitioner's solr.—*Re* SUMMERVILLE (1885), 31 Ch. D. 160 ; 55 L. J. Ch. 367 ; 54 L. T. 143 ; 34 W. R. 185, C. A.

4346. ——— To accept payment of sum sued for.]—Where an agent who received money for a party pays it to another agent of that party, he is bound to pay it in cash, & not merely settle it in an account between that agent & himself ; unless he can show an authority from his principal & that there was an account between the principal & that agent with a balance in favour of the agent.

Payment made by a deft. to the London agent of pltf.'s attorney is a payment to pltf.

S., the London agent of W., attorney to pltf. in a suit between A. & B., received the sum sued for from deft., & at the request of W. set it off against advances in an account between them : the ct. compelled S. to pay pltf. *de novo*, he not showing that there was an account between pltf. & W., with a balance in favour of the latter.—HANLEY v. CASSAM (1847), 2 New Pract. Cas. 431 ; 10 L. T. O. S. 189 ; 11 Jur. 1088.

*Annotations :—*Distd. Robbins v. Fennell (1847), 11 Q. B. 248. *Consd.* Robbins v. Heath (1848), 2 New Pract. Cas. 433. *Folld. Ex p.* Edwards (1881), 8 Q. B. D. 262.

4347. ——— To sign judgment & tax costs—Agent solicitor on record—Death of solicitor.]—The London agent, the attorney on the record, after the death of the country attorney, wrote to the client for authority to sign judgment & tax costs, & not receiving any answer, proceeded & signed judgment & taxed costs. This ct. refused to set aside the judgment & taxation upon the client's application.—DAVIES v. BOWEN (1863), 1 New Rep. 312 ; 7 L. T. 739 ; 11 W. R. 282.

4348. ——— To compromise action.]—The solr.

PART XIII. SECT. 3, SUB-SECT. 1.
a. *Negligence.]—*The agent, an attorney, in the country of a Dublin

attorney is liable to be made answerable, on a summary application by pltf., for negligence or misconduct in the discharge of a duty undertaken

by him in his professional capacity, even though he act gratuitously.—*Re* DENNEHY v. HAMILTON (1856), 27 L. T. O. S. 47.—*IR.*

*Sect. 3.—Relations between agent and lay client:
Sub-sects. 1, 2 & 3.]*

on the record, whether in London as agent for a country solr. or in a district registry as agent for a London solr., has a general authority to compromise an action on behalf of his client, provided he acts *bond fide* & reasonably, & not in defiance of his direct & positive instructions; & in either case the lay client will be bound although there is no privity between him & the agent on the record.

Trustees issued an originating summons in the Liverpool District Registry for directions in certain matters relating to the trust estate. An appearance was entered in the district registry by Liverpool solrs. as agents for London solrs., who were the principal solrs. of defts., the beneficiaries under the trust. Defts. objected to the application as unnecessary, & on their behalf a summons was taken out to transfer the proceedings to London. Prior to the hearing of the two summonses the London solrs. wrote their Liverpool agents, "Failing an order dismissing pl'tfs.' application with costs, & giving costs on our application, you will please adjourn the matter to the judge." When the two summonses were heard by the registrar, the Liverpool agents, after some discussion, agreed that no order should be made except that the costs of all parties should be paid out of the estate. On motion by defts. to discharge this order:—*Held*: on the evidence, it was a consent order; the letter did not prohibit a compromise; & defts. were bound by the act of the Liverpool agents.—*Re NEWEN, CAR-RUTHERS v. NEWEN*, [1903] 1 Ch. 812; 72 L. J. Ch. 356; 88 L. T. 264; 51 W. R. 297; 19 T. L. R. 247; 47 Sol. Jo. 300.

Annotation.—*Reid. Welsh v. Roe* (1918), 87 L. J. K. B. 520.

4349. Delivery of bill of costs to client—Discharge of order.—An order directing a London agent to deliver a bill of costs to his country client will not be discharged on the ground that it is contrary to the practice of the Ch. Div. to grant a country client such an order on a petition of course.—*Re A SOLICITOR* (1909), 54 Sol. Jo. 67.

SUB-SECT. 2.—RELATION IN CONTRACT.

4350. Whether privity of contract between agent & lay client.—*ASQUITH v. ASQUITH*, [1885] W. N. 31.

4351. ———.]—Where a country solr. employs a London agent he ought to incorporate in his bill of costs the details of the charges of the London agent, & until the details of such charges are stated, either in the original or a supplemental bill, there is no complete bill capable of taxation so as to entitle the solr. to rely upon its delivery for twelve months as a ground for refusing taxation.

It is well settled that between the client & the London agent of the county solr. there is no priority. The relationship of solr. & client does not exist between the client & the London agent (*STIRLING, J.*).—*Re POMEROY & TANNER*, [1897] 1 Ch. 284; 66 L. J. Ch. 158; 75 L. T. 525; 45 W. R. 245; 41 Sol. Jo. 212.

4352. ———. **To support application under summary jurisdiction.**—If the agent of an attorney does wrong, the client cannot make a summary application against the agent.—*Ex p. JONES* (1833), 2 Dowl. 161.

4353. ———.]—A country attorney employed his London agent to receive some money under a power of attorney from his client:—*Held*: the latter could not compel the London agent, by means of a summary application, to pay him over the money.—*Ex p. BAKER* (1837), Will. Woll. & Dav. 591; *sub nom. Re KNOX, Ex p. BAKER*, 1 Jur. 894.

4354. ———. **For payment of money in hands of agent—Proceeds received without authority.**—Where a country attorney, who is employed in a cause, employs a London agent, there is not, in general, such privity between the client & the London agent as entitles the client to recover, for money had & received, against the agent, in respect of proceeds of the cause which the agent has received in the ordinary course of his business. But, if it appear that such proceeds have been received by the agent without authority, either from the client or the country attorney, the ct. will, if the agent be an attorney of the ct. compel him, upon application, to pay over the proceeds to the client. Though the country attorney be indebted to the London agent in a greater sum on other accounts.—*ROBBINS v. FENNEL*, (1847), 11 Q. B. 248; 2 New Pract. Cas. 426; 17 L. J. Q. B. 77; 12 Jur. 157; 116 E. R. 468; *sub nom. ROBINS v. FENNEL*, 10 L. T. O. S. 246.

Annotations.—*Consd. Robbins v. Heath* (1848), 2 New Pract. Cas. 433. *Distd. Collins v. Brook* (1860), 5 H. & N. 700. *Refd. Hobart v. Butler* (1859), 33 L. T. O. S. 62; *Ex p. Edwards* (1881), 7 Q. B. D. 155. *Mentd. New Zealand & Australian Land Co. v. Ruston* (1880), 5 Q. B. D. 474.

4355. ———. **Proceeds coming accidentally to agent's hand.**—F., the London agent of S., attorney to pl'tf. in an action received the sum recovered in that action from the undersheriff out of the ordinary course of business; & informing S. thereof, inquired what he was to do with it. Upon application by pl'tf., the ct. compelled F. to pay the money to pl'tf., F. not showing any authority from S. to retain the money, or apply it to the balance accounts between them. *Qu.*: whether an action for money had & received would not lie against F.—*ROBBINS v. HEATH* (1848), 11 Q. B. 257; 2 New Pract. Cas. 433; 10 L. T. O. S. 371; 12 Jur. 158; 116 E. R. 472.

Annotation.—*Folld. Ex p. Edwards* (1881), 45 L. T. 578.

4356. ———. **Agent wrongfully claiming lien.**—The town agent of the solr. of pl'tf., in an action in which judgment had been recovered for a debt, refused to pay over to pl'tf. the amount of the debt which had been received by him from the sheriff under a writ of *fi. fa.*, on the ground that he was entitled to retain such amount for a debt due to him from the country solr. of equal amount. The country solr. had no lien on such amount against his client, pl'tf.:—*Held*: the ct. in the exercise of its summary jurisdiction over its own officers would order the town agent to pay over the amount of the debt to pl'tf. In such a case the ct. will exercise its summary jurisdiction, although there be no fraud imputed to the town agent.—*Ex p. EDWARDS* (1881), 8 Q. B. D. 262; 45 L. T. 578; *sub. nom. Re JOHNSON, Ex p. EDWARDS*, 51 L. J. Q. B. 108, C. A.

4357. ———. **To support action for money had & received.**—*BOLTON v. NORTHWOOD* (1843), 1 L. T. O. S. 291.

4358. ———.]—A., being def't. in an action brought by B., paid the debt & costs to his own

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4350 i. *Whether privity of contract between agent & lay client.*—*ROSS v*

FITCH (1880), 6 A. R. 7.—**CAN.**

4350 ii. ———.]—*CLARK & MAC-DONALD v. SCHULZE* (1902), 4 F. (Ct. of Sess.) 448; 39 Sc. L. R. 318; 9

S. L. T. 388.—**SCOT.**

4350 iii. ———.]—*MARTIN v. ROBERTSON* (1907), 24 S. C. 149.—**S. AF.**

country attorney for transmission to B. The attorney sent a cheque, exceeding the amount, to his own town agent, directing him to pay the debt & costs out of it. The agent acknowledged the receipt by letter to the country attorney, & therein promised to apply the money as directed; but he retained it in reduction of a debt due to him from the attorney:—*Held*: there was no sufficient privity to support an action for money had & received by A. against the agent.—*COBB v. BECKE* (1845), 6 Q. B. 930; 14 L. J. Q. B. 108; 4 L. T. O. S. 394; 9 Jur. 439; 115 E. R. 350.

Annotations:—*Folld.* *Robbins v. Fennell* (1847), 11 Q. B. 248. *Refd.* *Hobart v. Butler* (1859), 33 L. T. O. S. 62; *Collins v. Brook* (1860), 5 H. & N. 700. *Mentd.* *Colonial Bank v. Exchange Bank of Yarmouth* (1885), 54 L. T. 256.

4359. ———.]—*ROBBINS v. FENNEL*, No. 4354, *ante*.

4360. ———.]—*ROBBINS v. HEATH*, No. 4355, *ante*.

4361. ———. **Agents becoming solicitors in cause.**]—Agents of country attorneys who finally become attorneys in a cause, & in such character receive the costs, cannot retain a certain portion above their demand upon the client, on the ground that the country attorneys were not satisfied as to their claims, & that they received the money as stakeholders for them, no demands being made by the country attorneys themselves.

The fact of the agents being attorneys in that stage of the cause when they receive the money, is sufficient to establish that privity which is necessary to enable the client to maintain an action for money had & received.—*QUARRINGTON v. WHITE* (1837), 6 L. J. C. P. 253.

4362. ———. **To enable agent to sue client for costs.**]—*ANON.* (1784), 2 Dick. 802; 21 E. R. 483.

4363. ———.]—Where one attorney in the country requests another attorney to do some business for the benefit of his client, the credit may be given to the attorney who is bound to pay the bill of costs, unless he expressly says, that his client alone shall be liable: & the mere circumstance of the client signing his name to some part of the proceeding, & thus becoming known to the attorney employed, is not sufficient to compel him to look to that client for a remuneration for his trouble.—*SCRACE v. WHITTINGTON* (1823), 2 B. & C. 11; 3 Dow. & Ry. K. B. 195; 1 L. J. O. S. K. B. 221; 107 E. R. 287.

Annotations:—*Expld.* *Hall v. Ashurst* (1833), 1 Cr. & M. 714. *Refd.* *Robins v. Bridge* (1837), 6 Dow. 140; *Harper v. Williams* (1843), 4 Q. B. 219.

4364. ———. **Irish agent of English solicitor.**]—*HYNDMAN v. WARD* (1899), 15 T. L. R. 182; 43 Sol. Jo. 246, D. C.

SUB-SECT. 3.—AGENT'S LIEN AS AGAINST LAY CLIENT.

4365. Whether lien attaches—Lien on client's papers—For costs in particular matter.]—A country client employs an attorney or solr. in the country in a cause in chancery, the solr. employs a clerk in chancery, the client in the country pays his solr., but the clerk in chancery is unpaid. The client not bound to pay the clerk in chancery; but if the latter has any papers in his hands, he may retain them.—*FAREWELL v. COKER* (1728), 2 P. Wms. 400; 24 E. R. 814.

Annotations:—*Consd.* *Bray v. Hine & Fox* (1818), 11 Price, 203; *Potter v. Hyatt* (1836), 2 Y. & C. Ex. 112; *Waller v. Holmes* (1860), 1 John. & H. 239.

4366.

——.]—Lien of the agent in town upon the papers in his hands for what was due to him, as agent in the cause, from the solr. in the country.—*WARD v. HEPPE* (1808), 15 Ves. 297; 33 E. R. 767, L. C.

Annotations:—*Consd.* *Bray v. Hine & Fox* (1818), 11 Price, 203. *Distd.* *Moody v. Spencer* (1822), 2 Dow. & Ry. K. B. 6. *Apld.* *Waller v. Holmes* (1860), 1 John. & H. 239. *Consd.* *Lawrence v. Fletcher* (1879), 12 Ch. D. 858; *Re Jones & Roberts*, [1905] 2 Ch. 219. *Refd.* *Peatfield v. Barlow* (1869), L. R. 8 Eq. 61.

4367. ———.]—Where the town agents of a country solr., since a bkpt., had received papers from him belonging to his client for the purposes of the client's business, they have a lien on them as against the client for the amount of money due from him to the solr. & from the solr. to them on account of business done in the cause; & where the client had, after the solr.'s bkpcy. paid the agent so much money to obtain such papers although an action had been previously brought against him by the assignees for the recovery of it, the ct. granted & continued an injunction against the action, on the ground of the agent's lien.—*BRAY v. HINE & FOX* (1818), 6 Price, 203; 146 E. R. 786.

Annotation:—*Apld.* *Lawrence v. Fletcher* (1879), 12 Ch. D. 858.

4368. ———.]—(1) The town agent of an attorney has a lien upon the money received in the particular cause, & upon the papers in the particular cause, for the amount due to him by the attorney for the agency bill in that particular cause only, & he has this lien against all the world; & if he has had no payment made to him specifically on account of this cause, he is entitled to this lien until his agency bill in the particular cause is satisfied.

An attorney has a lien upon all papers of his client which are in his hands for his bill for all business of that client. . . . The agent has only a lien upon the money recovered, & upon the papers in his hands, in the particular cause, for the amount due to him by the attorney in that particular cause only (*LITTLEDALE, J.*).

(2) If the agent has parted with the possession of the papers by his own act, though by mistake, his lien is at an end; but if the papers did not get lawfully out of his possession, his lien continues, & he may maintain trover for them.—*DICAS v. STOCKLEY* (1836), 7 C. & P. 587; 173 E. R. 258, N. P.

4369. ———. **Agent obtaining order for taxing solicitor's costs—Order for payment of costs.**]—When a clerk in ct. obtains an order for taxing the costs of the solr. who employed him, & afterwards obtains another order for payment of the costs incurred by such taxation, how far he shall not be allowed to detain the papers of the solr.'s client till the costs incurred by such taxation are paid him.—*COCKEREL v. —* (1740), Barn. Ch. 264; 27 E. R. 639, L. C.

4370. ———. **Agent parting with possession by own act—Extinguishment of lien.**]—*DICAS v. STOCKLEY*, No. 4368, *ante*.

4371. ———. **Where nothing due from client to solicitor.**]—Where a client has paid the bill of his country solr. before receiving notice of anything remaining due from the solr. to the London agent, the latter has no lien on documents which have come into his hands in the course of the suit.

It makes no difference whether the bill has been paid in cash or by set-off in account, if, at the

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4365.1. Whether lien attaches—Lien on client's papers—For costs in particular matter.]—*KEMP v. YOUNGS, AYTOUN & OTHERS* (1838), 16 Sh. (Ct. of Sess.) 500; 13 Fac. Coll. 344.—*SCOT.*

g. —.]—Where a solr. has not entered the name of his agent in a

attorney, dying intestate & insolvent, pending a suit, has a lien for his costs upon a *postea*, of which the former has obtained possession after the death of the intestate.

(2) Death of a principal attorney, pending a suit, does not revoke his agent's authority to obtain possession of a *postea*, after verdict found for the former.—*TAUNTON v. GOFORTH* (1825), 6 Dow. & Ry. K. B. 384; *sub nom. Ex p. TAUNTON'S ADMINISTRATORS v. JEYES, TAUNTON v. GOFORTH*, 3 L. J. O. S. K. B. 229.

4386. — Delivery of briefs to counsel by agent—Revocation of authority to pay fees.]—A country solr. instructed London solrs. to act as his agents in an appeal in which he was acting as solr. The agents briefed counsel in the usual way. After the delivery of briefs the country solr. revoked his authority to the London agents to pay the fees on the briefs, but, nevertheless, the agents paid them, recouping themselves out of moneys of the country solr. in their hands. In an action by the latter to recover the moneys so retained:—*Held*: the country solr. in these circumstances had no power to revoke his authority.—*RHODES v. FIELDER, JONES & HARRISON* (1919), 89 L. J. K. B. 15; 148 L. T. Jo. 158, D. C.

4387. Settlement of action against agent for negligence—Verdict in arbitration proceedings in favour of solicitor—Whether bar to second action.]—Pltf., an attorney in the country, sued his agent in town for negligence in conducting pltf.'s business, & alleged in his declaration that he had thereby, become liable to pay certain sums, & had lost the employment of divers clients. The cause was referred under an order of *Nisi Prius*, by which pltf. consented not to bring any action or suit concerning the premises referred. The order was afterwards made a rule of ct., & the arbitrator directed a verdict to be entered for pltf., who afterwards commenced a second action against deft., alleging in the declaration that pltf. had paid certain sums to persons who had threatened him with actions, & lost the employment of divers other clients, from the negligence of deft. The ct. refused to stay the proceedings in the second action on motion, but intimated an opinion that the recovery in the former action might be pleaded in bar to the latter.—*DICAS v. JAY* (1830), 6 Bing. 519; 4 Moo. & P. 285; 8 L. J. O. S. C. P. 210; 130 E. R. 1381.

4388. Bill for account—Account obtainable under order for taxation—Bill dismissed.]—A bill was filed by a country solr., against his town agents, for an account of cash transactions between them:—*Held*: as the account might have been obtained under the common order for taxation the bill must be dismissed.—*HARVEY v. MAYHEW* (1853), 2 W. R. 128.

4389. Order of court for payment of money—Default by agent—"Person acting in fiduciary capacity"—Debtors Act, 1869 (c. 62), s. 4 (3).]—*LITCHFIELD v. JONES*, No. 3636, *ante*.

county town, service of papers in an action where the proceedings are being carried on in such county town cannot be effected upon him by posting up copies in the office of the local registrar there, if he has the name of a Toronto agent duly entered.—*ESSERY v. GRAND TRUNK RY. Co.* (1889), 13 P. R. 221.—*CAN.*

h. Attorney employed at weekly salary—Employment as counsel included.]—*GORDON v. ADAMS* (1878), 43 U. C. R. 203.—*CAN.*

k. Entry of agent's name—In agent's book.]—Written authority should be filed in the office of the registrar

of the ct. authorising either the registrar or a solr. to enter the name of the agent in the agent's book, when the principal does not enter the name himself.—*WALLACE v. BURKNER* (1883), Cass. Dig. 2nd ed. 669.—*CAN.*

l. Liability for costs.]—Solrs. in British Columbia who on behalf of a client had obtained a judgment there for costs, & who instructed a solr. in Alberta to proceed to collect on the judgment were held personally liable to the latter for his costs of proceedings taken by him.—*Gow v. MACINNES & ARNOLD* (B. C.), [1923] 4 D. L. R. 1012; [1923] 3 W. W. R. 828.—*CAN.*

4390. Non-payment of money paid out of court—Attachment of agent.]—*Re FARMAN, Ex p. TRUMAN* (1897), 14 T. L. R. 20, D. C.

SUB-SECT. 2.—SOLICITOR'S LIABILITY FOR ACTS OF AGENT.

4391. Liability to client—Negligence of agent.]—*COLLINS v. GRIFFIN* (1734), Barnes, 37; 94 E. R. 794.

Annotation:—*Reid. Re Jones* (1819), 1 Chit. 651.

4392. — Agent receiving money improperly.]—If a London agent receives money improperly, the remedy of the client is not against him, but against his attorney.—*GRAY v. KIRBY* (1834), 2 Dowl. 601.

4393. — Appointment of receiver—False representation by agent that recognisances completed—Loss to estate.]—*Re WARD*, No. 3993, *ante*.

4394. — Misappropriation by agent.]—*ASQUITH v. ASQUITH*, [1885] W. N. 31.

4395. Agent consenting to order of court—Consent binding on solicitor.]—Under a *fi. fa.*, at the suit of P., lodged with the sheriff of Hants, the goods of execution debtor F. were seized on Mar. 22. Before the return of the writ P. issued a *ca. sa.*, under which debtor was arrested in Middlesex. The attorney of P. thereon, by letter, directed the sheriff of Hants to withdraw the *fi. fa.* Another *fi. fa.* against F., at the suit of W., the attorney of F., had been lodged with the same sheriff on Apr. 14; & under this *fi. fa.* F. had executed a bill of sale of the goods seized to W. No directions were in fact given to the bailiff in possession to withdraw, & he continued in possession, holding both warrants. On May 3, the London agents of W., acting as attorneys for F., took out a summons for F.'s discharge from custody, on the ground that the *ca. sa.* had been irregularly issued; & an order was thereon made by consent, on May 4, that on payment of the debt & costs no *ca. sa.* should be issued, but that P. should be at liberty to proceed on the *fi. fa.* already issued, & "under which the sheriff of Hants is in possession." W. did not at the time know of or consent to this order. But though he was soon afterwards acquainted with it, he did not make any objection to it for many months. On an interpleader issue to try whether W.'s title to the goods under the bill of sale was valid as against P.'s *fi. fa.*:—*Held*: W. was precluded from disputing the fact that the sheriff of Hants was in possession under the *fi. fa.* as the order of May 4, recited it; he, as attorney of F., was bound by the act of his London agents, in assenting to it; & if he, W., as a private individual, had felt aggrieved by that order, as prejudicial to his interest, he ought immediately to have applied to have it rescinded, & not have lain by in silence for so long a period.—*WITHERS v. PARKER* (1860), 5 H. & N. 725; 29 L. J. Ex. 320;

m. —.]—*MICHAU & DE VILLIERS v. ROUSSEAU & ROUSSEAU*, [1913] C. P. D. 146.—*S. AF.*

PART XIII. SECT. 4, SUB-SECT. 2.

4391 i. Liability to client—Negligence of agent.]—A solr. who employs reputable solrs. as his agents in another province in which he is not entitled to practice is not responsible to his client for such agents' negligence, & it is, therefore, not a defence to the solr.'s action to recover the amount of his bill.—*PERRY v. HORNBY* (B. C.), [1925] 1 D. L. R. 1133; [1925] 1 W. W. R. 761.—*CAN.*

Sect. 4.—Relations between agent and solicitor: Sub-sects. 2, 3, 4 & 5. Sect. 5.]

2 L. T. 602; 6 Jur. N. S. 1033; 8 W. R. 550, Ex. Ch.

Annotation:—Extd. Re Newen, Carruthers v. Newen, [1903] 1 Ch. 812.

SUB-SECT. 3.—AGENT'S LIEN AS AGAINST SOLICITOR.

4396. Lien on papers in hands—Against trustee in bankruptcy of solicitor.]—*Ex p. STEELE* (1809), 16 Ves. 161; 33 E. R. 945, L. C.

Annotation:—Apld. Bray, etc. v. Hine & Fox (1818), 6 Price, 909.

4397. ——— Lien for general charges.]—The trustee in bkpcy. of a country solr. delivered to a client a bill of costs which included agency charges & disbursements made by the London agents by whom the business of the client had been transacted. The client, acting through the London agents, obtained an order for taxation. Upon a motion by the trustee for an order upon the London agents to produce before the taxing Master all documents in the possession relating to the matters referred for taxation:—*Held*: the London agents were entitled to insist upon their lien, not only for their costs included in the particular bill, but for all costs due to them from the country solr. in respect of agency business & disbursements generally, & they had not waived their right to lien by acting for the lay client on the application for taxation.—*Re JONES & ROBERTS*, [1905] 2 Ch. 219; 74 L. J. Ch. 458; 92 L. T. 562; 53 W. R. 444; 21 T. L. R. 352; 49 Sol. Jo. 367; *on appeal*, 54 W. R. 22, C. A.

4398. ——— Death of solicitor before papers obtained—Lien as against solicitor's administrator.]—*TAUNTON v. GOFORTH*, No. 4385, *ante*.

4399. ——— Waiver of lien—Agent acting for lay client on application for taxation.]—*Re JONES & ROBERTS*, No. 4397, *ante*.

4400. Lien on money recovered in action—Lien for general costs—Solicitors Act, 1860 (c. 127), s. 28.]—Where a sum is due for costs in a suit to a London agent of a country solr., whose costs in the suit have been ordered to be paid out of a fund in ct., the ct. will under above sect. order the costs of the London agent to be paid out of the fund in ct. to the extent of the country solr.'s interest therein.—*TARDREW v. HOWELL* (1861), 3 Giff. 381; 66 E. R. 458; *sub nom. TARDREW v. HOWELL, PARRY v. HOWELL*, 31 L. J. Ch. 57; 5 L. T. 276; 7 Jur. N. S. 1120; 10 W. R. 32.

4401. ———.]—(1) A London solr. acting as agent for a country solr. has a general lien against the country solr. upon any money recovered in an action, for all costs for agency business & disbursements due from the country solr., whether in the particular action or in any other proceedings.

(2) As between the town agent & the client, the lien of the former extends only to the costs of the particular action in which he is engaged.—*LAWRENCE v. FLETCHER* (1879), 12 Ch. D. 858; 41 L. T. 207; 27 W. R. 937.

Annotations:—As to (1) Refd. Re Johnson & Weatherall (1888), 37 Ch. D. 433, *Re Jones & Roberts*, [1905] 2 Ch. 219.

PART XIII. SECT. 4, SUB-SECT. 3.

n. Lien on papers in hands.]—The agent of a solr. has a lien on the papers, or on a fund recovered, against his principal, & to the same extent against the principal's client, & such client is justified in paying the agent so as to discharge such lien & obtain his papers.—*Re CROSS* (1872), 4 Ch. 11.—CAN.

o. ———.]—*Re AN ATTORNEY* (1878), 7 P. R. 311.—CAN.

p. Lien on money recovered in action.]—*Re CROSS* (1872), 4 Ch. 11.—CAN.

q. ———.]—*Re RYAN* (1885), 11 P. R. 127.—CAN.

r. Agent for solicitor appearing in person.]—*Ross v. McLAY* (1877), 7

4402. Moneys subject to express agreement.]—H. by agreement with J. became solr. on the record in certain suits, & an arrangement was made that moneys received by him as such solr. should be applied to meet some fees to counsel due from J. The moneys were so received & applied after J.'s death. J.'s estate was insolvent, & a summons was taken out by J.'s exor. for payment of these sums:—*Held*: as H. had received these moneys as solr. on the record & by express agreement with J., he was entitled to retain them, subject only to an account.—*JEYES v. JEYES* (1876), 45 L. J. Ch. 245; 34 L. T. 167.

SUB-SECT. 4.—REMUNERATION OF AGENT.

4403. Usual terms—Repayment of disbursements.]—W. was the country solr. of the Sittingbourne & Sheerness Railway co. L. agreed to act as his London agent in the co.'s business on the usual agency terms, except that L. should not call on W. to pay any of his agency bills until W. had obtained payment of his bill of costs from the co. There was difficulty in obtaining payment from the co., but ultimately, by means of a litigation which lasted eleven years, W. obtained payment from the co. of the amount of his bill of costs, with a considerable sum for interest:—*Held*: the usual agency terms being that the agent should be repaid his disbursements, & receive, not half the profits, but half the profit charges whether they were paid by the client or not, he was entitled to nothing more, & could not claim to participate in the interest; for although his suspending his right to payment would have made a stipulation for interest reasonable, the ct. could not import such a stipulation from the mere fact of his agreeing not to claim payment till W. had received the amount of his bill.—*WARD v. LAWSON* (1890), 43 Ch. D. 353; 62 L. T. 158; 6 T. L. R. 156; *sub nom. WARD v. LAWSON, LAWSON v. WARD*, 59 L. J. Ch. 323; 38 W. R. 300, C. A.

4404. ——— Interest on disbursements not allowed.]—Notwithstanding the definition of the word "client" in Attorneys & Solicitors Act, 1870 (c. 28), s. 3, that Act does not apply to accounts between country solrs. & their town agents. The Act is not retrospective, & therefore interest cannot be allowed under sect. 17 on disbursements made prior to the passing of the Act. In May, 1872, a country solr. commenced a suit against his London agent, claiming an account & taxation of the bills of costs between them. Deft. filed his answer in Oct. 1872, & thereby alleged a large balance due to him & claimed interest thereon. He had also, in 1869, furnished pltf. with an account which contained items for interest. In 1875, a copy of the account was inclosed in a letter which referred to the account, but made no formal demand of payment, & which was signed by a firm of solrs. as his agents:—*Held*: neither the answer nor the letter enclosing the account was a sufficient demand in writing or notice within Civil Procedure Act, 1833 (c. 42), s. 28.

Attorneys & Solicitors Act, 1870 (c. 28), which

P. R. 97.—CAN.

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t. Recovery of costs.]—The personal liability of an English solr., at whose instance an Irish solr. undertakes professional work in Ireland for an English client, depends in each case upon whether there is a contract express or implied that the Irish solr.

says that interest may be allowed on disbursements . . . seems to me to deal entirely with cases arising between solrs. & their clients, & not those between country solrs. & their London agents (JAMES, L.J.).

I think the relation between these parties was not the common relation of a solr. to an ordinary client, but the relation of a London agent & a country solr. (JAMES, L.J.).—WARD v. EYRE (1880), 15 Ch. D. 130; 49 L. J. Ch. 657; 43 L. T. 525; 28 W. R. 712, C. A.

Annotations:—*Consd.* Ward v. Lawson (1890), 43 Ch. D. 353. *Expld.* Reid v. Burrows, [1892] 2 Ch. 413. *Distd.* Re Wilde, [1910] 1 Ch. 100. *Mentd.* Sheba Gold Mining Co. v. Trubshawe, Ryley v. Master (1892), 61 L. J. Q. B. 219; Tautz v. Archdale (1895), 11 T. L. R. 452.

4405. — Half profit charges—Whether paid by client or not.—WARD v. LAWSON, No. 4403, *ante*.

4406. — No right to share of interest received by solicitor—In absence of stipulation.—WARD v. LAWSON, No. 4403, *ante*.

4407. Recovery of costs—Agent need not deliver signed bill.—An agent to a country attorney is not obliged to deliver a bill signed.—BRIDGES v. FRANCIS (1790), Peake, 1; 170 E. R. 57, N. P.

4408. — — — — ——In an action by one attorney against another for agency business, a bill need not be delivered signed, under 2 Geo. 2, c. 23.—NELSON v. GARFORTH (1794), 1 Esp. 220; 170 E. R. 335, N. P.

SUB-SECT. 5.—TAXATION OF COSTS.

See Part VI., Sect. 5, sub-sect. 1, C. (d), *ante*.

D.—RELATIONS BETWEEN AGENT AND OPPOSITE PARTIES.

4409. Personal liability of agent—Filing of irregular document—Scandalous affidavit—Costs of taking off file.—Where an affidavit is reported to be scandalous, the agent in London who files the affidavit, is responsible for the costs as between attorney & client, notwithstanding the country attorney may himself have drawn the affidavit.

It would be very hard that the injured party should be made to pay the costs of taking the affidavit off the file, which is found to be irrelevant & scandalous (ERSKINE, J.).—*Re* BOOTH, *Ex p.* WAKE (1833), 3 Deac. & Ch. 246; Mont. & B. 259; 2 L. J. Rey. 38, C. of R.

4410. — — — — ——RUTHIN CORPN. v. ADAMS, No. 3873, *ante*.

4411. — Costs of taxation.—In an action for an attorney's bill of costs, the town agent of deft.'s attorney obtains an order for taxing the bill. Pltf. cannot call upon such agent to take up the master's allocatur & pay the fees. So, where part of the business is done in the House of Lords, & the certificate of the officer of the house is necessary for the purpose of enabling the taxing master to complete his allocatur, the ct will not compel deft.'s agent to take up such certificate.—BECKE

shall be entitled to recover his costs from the English solr.—PORTER v. KIRTLAN, [1917] 2 I. R. 138.—IR.

a. — — — — ——LIVESKY v. PURDOM & SONS (1894), 21 R. (Ct. of Sess.)

v. CATTELL (1841), 3 Man. & G. 480; 4 Scott, N. R. 246; 11 L. J. C. P. 49; 133 E. R. 1232.

4412. Service of notices & summonses.—Service of a rule on the London agent of a country firm is good service, so as to found a motion for a contempt against a partner who allows it, but it is not sufficient as regards the other partner.—*Re* HALLIDAY (1841), 5 Jur. 532.

4413. — Notice of motion for attachment.—*Re* BRADLEY (1845), 6 L. T. O. S. 132.

4414. — — — — — Affidavits in support—Agent proper person to be served.—The notice of motion for a writ of attachment was served on the London agents of deft.'s country solr. The office of the London agents was deft.'s address for service. The affidavits in support of the notice of motion were not served therewith, but were served on the same day on deft.'s country solr. Deft. did not appear at the hearing of the motion & an order for attachment was made in his absence:—*Held*: according to R. S. C., Ord. 52, r. 4, the affidavits ought to have been served together with & in the same way as the notice of motion, & ought not to have been served on the country solr.; the order made on the motion was consequently voidable under R. S. C., Ord. 70, r. 1; the ct. had power to deal with it; and that in the exercise of such discretion, it would order deft. to be discharged from custody.—PETTY v. DANIEL (1886), 34 Ch. D. 172; 56 L. J. Ch. 192; 55 L. T. 745; 35 W. R. 151.

Annotations:—*Refd.* *Re* Evans, Evans v. Noton, [1893] 1 Ch. 252; Taylor v. Roc (1893), 68 L. T. 213; *Re* Weatherley (1918), 88 L. J. K. B. 482. *Mentd.* *Re* Martin & Varlow (1894), 43 W. R. 247; Smythe v. Wiles, [1921] 2 K. B. 66.

4415. — Appeal from county court—Whether service on London agent sufficient—Respondent's solicitor practising in country.—*Semle*: in the case of an appeal from a county ct. where the solr. to resp. carries on business in the country, service of the notice of motion upon the London agent of the solr. is not sufficient service to satisfy R. S. C., Ord. 59, r. 12.—POWELL v. THOMAS, [1891] 1 Q. B. 97; 63 L. T. 812; 39 W. R. 224, D. C.

4416. — — — — ——In the case of an appeal from a county ct. where the solr. to resp. carries on business in the country, service of the notice of motion upon the London agent of the solr. is not sufficient service to satisfy R. S. C., Ord. 59, r. 12.—JACKSON v. MARGRETT (1893), 68 L. T. 91; 41 W. R. 267; 37 Sol. Jo. 195; 5 R. 181, D. C.

4417. — — — — — High Court action remitted to county court.—Notice of appeal from a county ct. in the case of an action remitted from the High Ct. should be served upon the local solr. whose name & address for service are given upon the particulars filed in the county ct.

Service upon the London agent whose name & address for service appeared upon the original writ in the High Ct. is not sufficient service to satisfy R. S. C., Ord. 59, r. 12.—MALLEY v. SHEPLEY (1892), 62 L. J. Q. B. 31; 68 L. T. 294; 41 W. R. 63, 302; 9 T. L. R. 41; 37 Sol. Jo. 29; 5 R. 78, D. C.

& carried on the suit himself:—*Held*: full fees & disbursements, except instructions, had been properly allowed to him, & his acting as agent for the solr. whose name appeared in the proceedings as his solr. did not affect his right.—KING v. MOYER (1883), 9 P. R. 514.—CAN.

PART XIII. SECT. 5.

b. Solicitor agent suing in person—(Costs.)—Pltf., a solr., obtained a verdict for damages & costs in an action for libel, in which, although another solr. appeared as acting for him in all the pleadings & proceedings in the suit, he actually did the work,

Part XIV.—Discipline and Removal from Roll.

SECT. 1.—ENFORCEMENT OF DISCIPLINE.

SUB-SECT. 1.—ATTACHMENT.

See Part X., Sect. 2, sub-sect. 5, *ante*.

SUB-SECT. 2.—STRIKING SOLICITOR OFF THE ROLL.

A. In General.

4418. Duty of court.]—Solr. struck off the rolls for fraudulently abusing the confidence of his client.

It is the duty of the ct. to protect solrs. in the fair discharge of their difficult & delicate duties, but when a solr. is found to have availed himself of his honourable & confidential position, for the purpose of taking advantage of & defrauding his clients, it is not less the duty of the ct. to withdraw from him those privileges, & that certificate of character, which are afforded by his being permitted to remain on the roll of solrs.—*Re MARTIN* (1843), 6 Beav. 337; 1 L. T. O. S. 227; 49 E. R. 856.

4419. Solicitor guilty of indictable offence—Effect on proceedings for striking off.]—The Ct. of K. B. will not grant a rule calling on an attorney to show cause why he should not be struck off the roll, if the affidavits in support of the rule state an offence for which he would be liable to indictment.—*Re* — (1834), 5 B. & Ad. 1088; 110 E. R. 1095.

Annotations.—**Consd.** *Stephens v. Hill* (1842), 10 M. & W. 28; *Ex p. Hine* (1864), 3 New Rep. 502.

4420. ———.]—(1) Where an attorney has been guilty of misconduct in the course of a cause, the ct. will grant a rule calling on him to show cause why his name should not be struck off the roll, even, although the matter complained of may amount to an indictable offence; but the ct. will not under such circumstances call upon him to answer the matters of an affidavit.

(2) The affidavits to ground an application to strike an attorney off the roll for misconduct in a cause may be entitled in the cause, though judgment has been obtained in it.

(3) It is a sufficient ground for striking an attorney off the roll that he procured a witness of the adverse party to keep out of the way at the trial.—*STEPHENS v. HILL* (1842), 10 M. & W. 28; 1 Dowl. N. S. 669; 11 L. J. Ex. 329; 6 Jur. 585; 152 E. R. 368.

Annotations.—**As to (1)** **Consd.** *Ex p. Hine* (1864), 3 New Rep. 502. **Refd.** *Re Blake* (1860), 3 E. & E. 34; *Re Strong* (1885), 53 L. T. 694.

4421. ———.]—An attorney cannot be called upon to answer matters of an affidavit where the charges against him are indictable, unless they arise immediately out of a cause then depending in the ct.—*Re HUMPAGE, PARNELL v. WILLIAMS* (1846), 8 L. T. O. S. 171.

4422. ———.]—*Re B.* (1851), 16 L. T. O. S. 368.

4423. ———.]—*ATTWELL v. ENGLISH* (1856), 28 L. T. O. S. 106.

4424. ———.]—On a motion upon affidavit impeaching the conduct of an attorney, & imputing

perjury & matter involving a criminal charge, the form of the rule is to call on him to show cause “why he should not be struck off the roll, or be suspended from practice for such time as the ct. shall think fit.”

Qu. : whether, if such rule be discharged, the party on whose application it was granted would be liable to pay the costs of it, where his application was made fairly, honestly, & without malice.—*Re AN ATTORNEY* (1863), 7 L. T. 716; 11 W. R. 268.

4425. ———.]—Upon a motion for a rule calling on an attorney to show cause why he should not answer the matters in certain affidavits, which affidavits in fact charge the attorney with the commission of an indictable offence, the ct. will not grant the rule prayed for, but will grant a rule calling on the attorney to show cause why he should not be struck off the rolls.—*Ex p. HINE* (1864), 3 New Rep. 502; *sub nom. Re AN ATTORNEY*, 12 W. R. 311.

4426. Solicitor in contempt—Necessity for attachment before striking off.]—Where an attorney is in contempt by disobeying a rule of ct., the proper course of proceeding against him is by moving for an attachment, & not by applying to strike him off the roll.—*Ex p. TOWNLEY* (1834), 3 Dowl. 39.

Annotation.—**Expld.** *Ex p. Grant* (1835), 3 Dowl. 320.

4427. ———.]—Where an attorney disobeys a rule of ct. requiring him to do a particular act, an application cannot in the first instance be made to strike him off the roll, but a rule *nisi* for an attachment may be obtained.—*Ex p. GRANT* (1835), 3 Dowl. 320.

4428. Whether taking out certificate condition precedent to striking off.]—In an application to strike an attorney off the rolls, it is no answer to say, that he has not taken out his certificate for the current year, & therefore, that it is unnecessary.—*Ex p. CHAMP* (1843), 2 L. T. O. S. 168.

Effect of order for striking off—On liability to be struck off roll of notaries.]—See NOTARIES, Vol. XXXVI., p. 148, Nos. 51, 52.

B. Jurisdiction.

(a) Jurisdiction of Court.

See, now, Solicitors Act, 1919 (c. 56).

4429. Summary jurisdiction.]—ANON. (1704), 6 Mod. Rep. 187; 87 E. R. 942.

4430. ———.]—*Re BLAKE* (1860), 3 E. & E. 34; 30 L. J. Q. B. 32; 2 L. T. 429; 6 Jur. N. S. 1242; 121 E. R. 357.

Annotations.—**Appld.** *Re Hill* (1868), L. R. 3 Q. B. 543. **Consd.** *Re Strong* (1885), 53 L. T. 694. **Refd.** *Re A Solicitor* (1890), 25 Q. B. D. 17. **Mentd.** *Blake v. Stevens* (1864), 4 F. & F. 232.

4431. ———.]—*Ex p. BRIGGS* (1872), L. R. 8 C. P. 63.

4432. ———.]—*Re MARTIN* (1875), 24 W. R. 111, D. C.

4433. ———.]—*Re WHITEHEAD* (1885), 28 Ch. D. 614; 54 L. J. Ch. 796; 52 L. T. 703; 33 W. R. 601, C. A.

4434. ———.]—*Re WEARE*, [1893] 2 Q. B. 439; 62 L. J. Q. B. 596; 58 J. P. 6; *sub nom. Re A*

PART XIV. SECT. 1, SUB-SECT. 2.—A.

c. *Striking off roll of barristers—Where already struck off roll of attorneys.]—**Re J. B.* (1889), 6 Man. L. R. 19.—CAN.

d. ———.]—*Re R. A.*, 11 C. L. T. Occ. N. 208.—CAN.

PART XIV. SECT. 1, SUB-SECT. 2.

B. (a).

44291 Summary jurisdiction.]—*Re MONCKTON* (1837), 1 Moo. P. C. C. 455; 12 E. R. 887.—CAN.

e. *Jurisdiction of High Court of Bengal.]—*There is no special authority

vested in the High Ct. to strike a solr. off the rolls when such a step would not be sanctioned by the practice of the ct. in England.—*Re STEWART* (1868), 16 W. R. 1000, P. C.—IND.

f. *Discretion of court.]—*SHANKAR GANESH DABIR v. SECRETARY OF STATE

SOLICITOR, *Ex p.* INCORPORATED LAW SOCIETY, 69 L. T. 522; 9 T. L. R. 595; 37 Sol. Jo. 671, C. A.

Annotations:—*Appl.* R. v. Incorporated Law Soc., [1895] 2 Q. B. 456. *Reid.* *Re A Solicitor, Ex p.* Law Soc. (No. 25) (1911), 27 T. L. R. 535.

4435. Effect of order of colonial court striking solicitor off.—On the hearing of an application to strike the name of a solicitor off the Roll of solrs. of the Supreme Ct., it was proved that an order had been made by the Supreme Court of a colony to strike the name of the solr. off the roll of solrs. of that ct. for misconduct, but no direct evidence of the facts constituting the alleged misconduct was produced before the Div. Ct.:—*Held*: in the absence of legal evidence of the alleged misconduct, the ct. could not act on the order of the colonial ct. alone, & the application must be refused.—*Re A SOLICITOR, Ex p.* INCORPORATED LAW SOCIETY, [1898] 1 Q. B. 331; 46 W. R. 303; 14 T. L. R. 159; 42 Sol. Jo. 200; *sub nom.* *Ex p.* INCORPORATED LAW SOCIETY, 67 L. J. Q. B. 245; *sub nom.* *Re M., Ex p.* INCORPORATED LAW SOCIETY, 77 L. T. 661, D. C.

4436. Duty to order investigation by law society.—*Re ATKINSON, Ex p.* ATKINSON (1892), 9 Morr. 193; *sub nom.* *Re A., Ex p.* A., 36 Sol. Jo. 542, C. A.

Annotations:—*Mentd.* *Re Otway, Ex p.* Otway, [1895] 1 Q. B. 812, *Re Bebio*, [1900] 2 Q. B. 316; *Re Hay* (1913), 110 L. T. 47; *Re Debtor*, [1928] Ch. 199.

4437. Misconduct disclosed in action—Whether application to strike off a further proceeding in action.—An application for the ct. to exercise its jurisdiction over a solr. on account of conduct disclosed in an action may be made in the action, & therefore is a further proceeding within R. S. C., Ord. 51, r. 1 (a).—*Re CAVE, CAVE v. CAVE* (1880), 49 L. J. Ch. 656; 28 W. R. 761; *sub nom.* *CAVE v. CAVE, Re A SOLICITOR*, 43 L. T. 157.

(b) *Jurisdiction of Law Society.*

See Solicitors Act, 1919 (c. 56), s. 5.

C. *Grounds for.*

(a) *In General.*

See Solicitors Act, 1843 (c. 73), s. 29.

4438. Defect in articles—What amounts to defect—Fraudulent admission to roll.—An attorney admitted fraudulently, struck off the roll; & an attachment against the master.—*Ex p.* HILL & HARGRAVE (1775), 2 Wm. Bl. 991; 96 E. R. 582.

4439. ——— Failure to pay proper fee.—Under 9 Geo. 4, c. 49, s. 1, & Stamp Act, 1811 (c. 184), Sched., Part I., Title Articles of Clerkship, an attorney who has paid £60 stamp duty on his articles in order to be admitted to the Ct. of Common Pleas at Lancaster must, in order to his admission to the Cts. at Westminster, pay an additional duty of £120. When an attorney, under such circumstances, had been admitted to this ct. on payment of an additional £60 only, the ct. on motion made within a year of such admission, but more than a year after his admission to the Ct. of Common Pleas at Lancaster, ordered him to be struck off the roll unless he paid an additional £60 in a month: though, before paying the second duty, he had been informed at the Stamp Office that £60 was sufficient.—*Re MYERS*

(1846), 8 Q. B. 515; 115 E. R. 969; *sub nom.* *Re MYERS*, 15 L. J. Q. B. 209; 6 L. T. O. S. 368; 10 Jur. 563.

4440. ——— Time for making application.—After an attorney has been admitted more than two years, it is too late to make an application to strike him off the rolls on the ground that he has not *bond fide* served under articles of clerkship.—*ANON.* (1831), 9 L. J. O. S. K. B. 321.

4441. ——— ————*R. v. WALSH* (1837), 1 Jur. 559.

4442. ——— ————An application to strike an attorney off the roll, made under Solicitors Act, 1843 (c. 73), s. 29, is not too late if made on the same day a twelvemonth after his admission.

The ct. has a discretion in granting a rule under the foregoing section.

An articulated clerk, whilst serving under his articles, was appointed to & voluntarily served the office of churchwarden, & on an application after his admission to strike him off the roll for the above cause, the ct. in its discretion, refused the rule.—*Re LEY* (1849), 13 L. T. O. S. 262.

4443. Verdict against solicitor in civil suit—Libel.—The ct. will not strike an attorney off the roll, on the ground that a verdict in a civil suit has been found against him for a libel.—*Ex p.* —, (1833), 2 Dowl. 110; *sub nom.* *Re DICAS*, 2 L. J. Ex. 267.

(b) *Acting as Agent for Unqualified Person.*

See Solicitors Act, 1843 (c. 73), s. 32.

4444. Liability of solicitor to be struck off—Whether power of court discretionary.—(1) Solicitors Act, 1843 (c. 73), s. 32, enacts that, if a solr. shall wilfully & knowingly act as agent in any action or suit for an unqualified person, or permit his name to be used in any action or suit for the profit of an unqualified person, then such solr. "shall & may be struck off the roll, & for ever after disabled from practising as an attorney or solr.":—*Held*: the ct., instead of striking off the rolls a solr. who has brought himself within this sect., has a discretion, under its general authority over solrs., to inflict a minor punishment, such as suspension from practice, notwithstanding the words in the sect., that such solr. "shall & may be struck off the roll."

(2) A solr. made a verbal agreement with a debt collector, who had started a trade protection society for the recovery of debts, to act for the debt collector as his solr. in all county ct. matters, upon the terms that when the solr. recovered a debt & costs he should bring the debt collector the whole amount, & the debt collector should return half the costs to the solr., retaining one-half of the costs for himself, but taking the solr.'s receipts for the whole, & when no costs were recovered no division of costs should take place. This bargain was acted upon in many cases, & wherever the full debt & costs were recovered the solr. divided the costs with the debt collector, but when no costs were recovered no division of costs took place, & the solr. received no costs:—*Held*: the solr. had brought himself within Solicitors Act, 1843 (c. 73), s. 32, as constituting himself, within that sect., the agent of the debt collector, an unqualified person, & in the circumstances of the case, he ought to be suspended from practice for one year.—*Re A SOLICITOR, Ex p.*

FOR INDIA (1922), 49 L. R. Ind. App. 319.—IND.

PART XIV. SECT. 1, SUB-SECT. 2.—C. (a).

4438 1. Defect in articles — What

amounts to defect—*Fraudulent admission to roll.*—An attorney was struck off the rolls, where it was shown on affidavit that during the entire period he was under articles he was a salaried clerk attending a public office.—*Re*

RIDPORT (1839), 3 Ont. Dig. 6524.—CAN. g. *Necessity for misconduct.*—To justify an order to strike a solr. off the rolls there must be personal misconduct.—*Re McCAUGHEY & WALSH* (1883), 3 O. R. 425.—CAN.

Sect. 1.—Enforcement of discipline: Sub-sect. 2, C. (b), (c), (d) & (e) i.]

INCORPORATED LAW SOCIETY (1890), 63 L. T. 350, D. C.

Annotation:—As to (1) Expld. Re Burton & Blinkhorn, [1903] 2 K. B. 300.

4445. What amounts to acting as agent.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY, No. 4444, ante.*

Agreements between qualified & unqualified persons.]—*See Part XV., Sect. 4, post.*

(c) Employment of Person Struck Off Roll. See Solicitors Act, 1928 (c. 22).

(d) Permitting Use of Name by Unqualified Person.

See Solicitors Act, 1843 (c. 73), s. 32.

4446. Liability of solicitor to be struck off.]—The ct. struck two attorneys off the roll for knowingly permitting an unqualified person to practise as an attorney in their names, for his own profit, contrary to 22 Geo. 2, c. 46, & sentenced the unqualified person to be imprisoned for three months in the prison of the ct. The latter being previously a prisoner for debt, was ordered by the ct. to be brought up without a day rule, on a suggestion that he was unable to pay the expense of the day rule.—*Re CLARK (1823), 3 Dow. & Ry. K. B. 260.*

Annotation:—Apld. Re Palmer (1835), 4 L. J. K. B. 110.

4447. —.]—*Re WHITMARSH (1883), 27 Sol. Jo. 683, D. C.*

4448. —.]—*Re A SOLICITOR, Re SIMMONS (1886), 21 L. Jo. 462, D. C.*

4449. —.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY (1896), 12 T. L. R. 311; 40 Sol. Jo. 440, D. C.*

4450. —.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY (1900), 44 Sol. Jo. 676, D. C.*

4451. —.]—*Re OSBORNE & JONES & SMITH (1905), 49 Sol. Jo. 597, D. C.*

4452. — Whether power of court discretionary.]—A superior ct. is bound, upon summary application under 22 Geo. 2, c. 46, s. 11, to order an attorney who is shown to have allowed an unqualified person to practise in his name in such ct. to be struck off the roll. But that ct. only from which the abused process issues, can, upon summary application under this enactment, order the attorney to be struck off the roll.

Where, upon such an application under this statute, the ct. referred it to the master to say whether in any instance the unqualified person had, with the permission of the attorney, practised in that ct., the rule can be made absolute only upon its appearing by the master's report that the case is within the statute, not upon the ground of a general jurisdiction of the ct. over its officers.—*Re PALMER (1835), 2 Ad. & El. 686; 4 Nev. & M. K. B. 529; 1 Har. & W. 55; 4 L. J. K. B. 110; 111 E. R. 263.*

Annotation:—Refd. Re Stewart (1868), L. R. 2 P. C. 88.

4453. —.]—*Re HICKS & ABBOTT (1883), 28 Sol. Jo. 90, D. C.*

Annotation:—Refd. Re Kelly (1894), 43 W. R. 191.

4454. —.]—*Re A SOLICITOR, Re WALL (1888), 4 T. L. R. 749; sub nom. Re GRAYSTON, Re WALL, 32 Sol. Jo. 680, D. C.; on appeal, 4 T. L. R. 772, C. A.*

Annotations:—Expld. Re Burton & Blinkhorn, [1903] 2 K. B. 300. Refd. Re Kelly (1894), 43 W. R. 191.

4455. —.]—Although, upon an application to strike a solr. off the rolls for an offence under Solicitors Act, 1843 (c. 73), s. 32, such as allowing an unqualified person to practise in his name, the ct. may have a discretionary power to inflict a punishment short of striking him off the rolls, yet, if the ct. does make an order striking him off, it has no power afterwards to re-instate him, the direction in the sect. being absolute that, as the consequence of such an order, he shall for ever thereafter be disabled from practising as a solr.—*Re LAMB (1889), 23 Q. B. D. 477; 58 L. J. Q. B. 450; 61 L. T. 374; 37 W. R. 665; 5 T. L. R. 619, C. A.*

Annotations:—Consd. Re Kelly, [1895] 1 Q. B. 180; Re Burton & Blinkhorn, [1903] 2 K. B. 300.

4456. —.]—Solicitors Act, 1843 (c. 73), s. 32, which enacts that a solr. "shall & may be" struck off the roll for certain specified offences, does not give the ct. a discretion to inflict upon the offending solr. any less punishment than that of striking him off the roll.—*Re KELLY, [1895] 1 Q. B. 180; 43 W. R. 191; sub nom. Re KELLY, Ex p. INCORPORATED LAW SOCIETY, 64 L. J. Q. B. 129; 71 L. T. 843; 39 Sol. Jo. 115; 15 R. 106; sub nom. Re A SOLICITOR, 11 T. L. R. 102, D. C.*

Annotations:—Folld. Re Burton & Blinkhorn, [1903] 2 K. B. 300; Re A Solicitor, Re Jones, Ex p. Same (1903), 47 Sol. Jo. 711.

4457. —.]—Solicitors Act, 1843 (c. 73), s. 32, which enacts that a solr. "shall & may be" struck off the roll for certain specified offences, does not give the ct. a discretion to inflict upon the offending solr. any less punishment than that of striking him off the roll.—*Re BURTON & BLINKHORN, [1903] 2 K. B. 300; 72 L. J. K. B. 752; 89 L. T. 549; sub nom. Re BURTON & BLINKHORN, Ex p. INCORPORATED LAW SOCIETY, 51 W. R. 668; 19 T. L. R. 581; sub nom. Re A SOLICITOR, Re BLINKHORN, Ex p. SAME, 47 Sol. Jo. 711, D. C.*

4458. —.]—*Re A SOLICITOR, Re JONES, Ex p. SAME (1903), 47 Sol. Jo. 711, D. C.*

4459. —.]—Where a solr. knowingly permits an unqualified person to use his name contrary to Solicitors Act, 1843 (c. 73), s. 32, the ct. has no discretion to inflict a less punishment on the solicitor than that of striking him off the roll. But where on appeal the solr. denies that he in fact knew what was being done by the unqualified person, the inference to be drawn from the solr.'s conduct to the contrary gives the ct. a discretion, as, the proceedings against the solr. being of a quasi-criminal character, such a charge cannot be held to be established on suspicion or supposition, & the ct. in that case has discretion to punish the offence by suspension.—*Re TWO SOLICITORS, Ex p. INCORPORATED LAW SOCIETY (1909), 53 Sol. Jo. 342, C. A.*

4460. What amounts to permission—Object of Solicitors Act, 1843 (c. 73).]—The mischief against which Solicitors Act, 1843 (c. 73), s. 32, was directed is the practice of acting as an attorney or solr. without being duly qualified. The offence prohibited by that section is not the mere permitting your name as an attorney or solr. to be made use of in an action or suit, "upon the account or for the profit of an unqualified person, but doing it in such a manner as "thereby to enable such unqualified person to appear, act or practise in any suit at law or in equity."—*SCOTT v. MILLER (1859), John. 220; 28 L. J. Ch. 584;*

PART XIV. SECT. 1, SUB-SECT. 2.—C. (b).

4445 i. What amounts to acting as agent.]—INCORPORATED LAW SOCIETY v. VERSFELD, [1909] T. S. 309.—S. AF.

PART XIV. SECT. 1, SUB-SECT. 2.—C. (d).

i. Liability of solicitor to be struck off.]—*Re RAWLINGS & LEVIEN, Ex p. CARD (1889), 10 N. S. W. L. R. 43; 5 N. S. W. N. 107.—AUS.*

33 L. T. O. S. 270; 5 Jur. N. S. 858; 7 W. R. 470; 70 E. R. 404.

4461. —.]—*Re JACKSON & WOOD*, No. 4762, *post*.

4462. —.]—The ct. refused to strike an attorney off the roll on an affidavit which stated that a person who had lately been his clerk & who lived at a town eight miles distant from the residence of the attorney, & carried on business at an office, over the door of which was written the attorney's name, but that he only attended on market days, & then transacted all his business at an inn, on the ground that it should have been shown that such person either participated in the profits or carried on business on his own account.—*Re GARBUTT* (1824), 2 Bing. 74; 9 Moore, C. P. 157; 130 E. R. 233.

Annotations:—*Folld. Re King* (1834), 1 Ad. & El. 560. *Refd. Re Palmer* (1835), 2 Ad. & El. 686.

4463. —.]—In affidavits filed to support an application to strike an attorney off the roll for suffering an unprofessional person to carry on business for him as his clerk, contrary to 22 Geo. 2, c. 46, s. 11, it is not sufficient to state facts from which the ct. may infer that the parties shared the profits; the prosecutors must state their belief that such was the case, unless the facts are such as cannot lead to any other conclusion. The mere fact of the attorney having employed an unprofessional person to carry on business for him as his clerk, at a place ninety miles distant from the attorney's own residence, is not sufficient ground for such an application.—*Re KING* (1834), 1 Ad. & El. 560; 3 Nev. & M. K. B. 716; 110 E. R. 1321.

4464. —.]—*Re PALMER*, No. 4452, *ante*.

4465. —.]—*Re A SOLICITOR, Re SIMMONS* (1886), 21 L. Jo. 462, D. C.

4466. —.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY, Re HATTERSLEY, Ex p. INCORPORATED LAW SOCIETY* (1890), *Times*, Aug. 7, D. C.

4467. —.]—A solr. purported to act for, & subsequently to employ, unqualified persons. He allowed them to carry on a business in his name, in the course of which they solicited money from the friends of prisoners, & obtained permission to see prisoners awaiting trial, with offers of legal assistance. The solr. exercised no supervision over them, but received various sums as his share of profits:—*Held*: the solr. was guilty of professional misconduct.—*Re D., Ex p. LAW SOCIETY* (1911), 56 Sol. Jo. 93, D. C.

4468. Who is an unqualified person—Solicitor failing to take out certificate.—*Re HODGSON & ROSS*, No. 4763, *post*.

Agreements between qualified & unqualified persons.—*See Part XV., Sect. 4, post*.

(e) *Conviction of Crime.*

i. *In General.*

4469. In respect of what proceedings—Offence not committed qua solicitor.—Upon an application by the Incorporated Law Society to strike the name of a solr. off the roll, it appeared that he had been summarily convicted of allowing houses, of which he was the landlord, to be used by the tenants as brothels:—*Held*: a solr. may be struck off the roll for an offence which has no relation to his character as a solr., the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence *prima facie* makes a solr. unfit to continue on the roll; but the ct. has a discretion, & will inquire into the nature of the crime, & will not as a matter

of course strike him off because he has been convicted: & the ct. considered that in the present case the nature of the offence was such that the solr. ought to be struck off the roll.—*Re WEARE*, [1893] 2 Q. B. 439; 62 L. J. Q. B. 596; 58 J. P. 6; *sub nom. Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY*, 69 L. T. 522; 9 T. L. R. 595; 37 Sol. Jo. 671, C. A.

Annotations:—*Consd. Re A Solicitor, Ex p. Law Soc.* (No. 25) (1911), 27 T. L. R. 535. *Refd. R. v. Incorporated Law Soc.*, [1895] 2 Q. B. 456.

4470. Offence not of pecuniary character.—Where a solr. has been convicted of a crime which is not in itself a pecuniary offence, the ct. will, if the crime is of such a character that it is expedient for the protection of the public & the profession that the solr. should be struck off the roll, order that he be struck off accordingly. Therefore, where a solr. had lent large sums of money belonging to clients to a third person for speculative purposes, & in consequence of the money having been lost became so depressed that he attempted to murder his wife & afterwards to commit suicide, & he had been sentenced to penal servitude, the ct. ordered him to be struck off the roll.—*Re COOPER* (1898), 67 L. J. Q. B. 276, D. C.

4471. Felony.—An attorney convicted of felony was struck off the roll, though he had been burnt in the hand & suffered imprisonment pursuant to his sentence, five years before, & no misconduct imputed to him since. He is an unfit person to practise as an attorney.—*Ex p. BROWN-SALL* (1778), 2 Cowp. 829; 98 E. R. 1385.

Annotations:—*Appld. Stephens v. Hill* (1842), 10 M. & W. 28; *Re Weare*, [1893] 2 Q. B. 439. *Refd. Re King* (1845), 8 Q. B. 129; *Re Dillet* (1887), 12 App. Cas. 459.

Particular offences.—*See Sub-sect. 2, C. (c), post*.

4472. When liability arises—On conviction—Although reversed on technical grounds.—An attorney of this ct. was convicted & received judgment on an indictment charging a conspiracy to defraud parties of goods, & that, in pursuance thereof, one conspirator obtained the goods on credit, & the attorney seized them by a collusive execution which he sued out against such conspirator. Judgment was reversed for insufficiency of the indictment:—*Held*: a sufficient ground for striking him off the roll, though no affidavit was made that he had committed the offence, but only that he had been convicted; & though he deposed that the money produced by the execution was justly due to him from such alleged conspirator, & denied that he had been "a party or privy to such criminal conduct," as was stated in the indictment, or that it contained any offence punishable by law; the affidavit not specifically denying the conspiracy, or that the act charged was done in pursuance of it.—*Re KING* (1845), 8 Q. B. 129; 1 New Pract. Cas. 331; 15 L. J. Q. B. 2; 6 L. T. O. S. 149; 10 Jur. 7; 115 E. R. 823.

Annotations:—*Refd. Re Hill* (1868), 9 B. & S. 481; *Re Dillet* (1887), 12 App. Cas. 459.

4473. Discretion of court—Solicitor previously suspended for same offence.—It is not an inflexible rule that a solr. who has been convicted of felony will as a matter of course be struck off the rolls. Therefore, where a solr., having been employed as clerk by a firm of solrs., & having embezzled money belonging to them, for which he was suspended by the ct. from practice for eighteen months, was subsequently convicted, on precisely the same facts, of embezzlement, & sentenced to imprisonment:—*Held*: as all the facts which were now before the ct. were before the ct. when the solr. was suspended, except

Sect. 1.—Enforcement of discipline: Sub-sect. 2, C. (e) i. & ii., (f) & (g), & D.; sub-sects. 3, 4 & 5. 2: Sub-sect. 1.]

the fact of his subsequent conviction for the felony, it would be unfair to punish him again for the same offence by striking him off the rolls.—

Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY (1889), 37 W. R. 598; 5 T. L. R. 486, C. A. Annotation:—Refd. Re Weare, [1893] 2 Q. B. 439.

4474. ——— **Liability dependent on nature of offence.]—***Re WEARE, No. 4469, ante.*

4475. ——— **Striking off expedient for protection of public & profession.]—***Re COOPER, No. 4470, ante.*

4476. ——— **As to postponement of striking off.]—**The ct. granted an application by a solr. undergoing imprisonment, consequent on a conviction for receiving stolen goods, that he should be struck off the rolls until he had been liberated & had an opportunity of contesting his conviction.—*Re A SOLICITOR (1891), 7 T. L. R. 420, D. C.*

4477. ——— **—.]—***Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY (1896), 40 Sol. Jo. 389.*

4478. ——— **—.]—***Re JELICOE, Ex p. INCORPORATED LAW SOCIETY (1898), 43 Sol. Jo. 192, D. C.*

4479. ——— **—.]—***Re WATTS, Ex p. INCORPORATED LAW SOCIETY (1899), 43 Sol. Jo. 192, D. C.*

ii. Particular Offences.

4480. Obtaining money by threats.]—*R. v. SOUTHERTON (1805), 6 East, 126; 102 E. R. 1235.*

Annotations:—Distd. Ex p. Warren (1835), 1 Har. & W. 113. Apld. Re Weare, [1893] 2 Q. B. 439. Refd. Re Blake (1860), 3 E. & E. 34; Re Strong (1885), 53 L. T. 694. Mentd. R. v. Crisp (1818), 1 B. & Ald. 282; R. v. Smith (1849), 2 Car. & Kir. 882.

4481. Conspiracy.]—A conviction of conspiracy is not of itself a sufficient ground for striking an attorney off the roll.—*Re — (1832), 1 Dowl. 174*

Annotation:—Distd. Re King (1845), 6 L. T. O. S. 149.

4482. ——— **—.]—***Re — (1843), 2 L. T. O. S. 126.*

4483. ——— **—.]—***Re KING, No. 4472, ante.*

4484. Perjury.]—The ct. will not strike an attorney off the rolls, on an affidavit alleging a distinct case of perjury, unless enough appear on his own admission to render the interposition of a jury unnecessary.—*Re — (1838), 1 Will. Woll. & H. 355; 3 Nev. & P. K. B. 389.*

4485. ——— **—.]—***Re GARBETT, No. 4688, post.*

4486. Obtaining money by false pretences.]—*— (1843), 2 L. T. O. S. 126.*

4487. ——— **—.]—***Re SILL (1852), 20 L. T. O. S. 72; 16 J. P. Jo. 774.*

4488. ——— **—.]—***Re PATTISON (1854), 22 L. T. O. S. 259.*

4489. ——— **—.]—***Re ELTON (1897), 13 T. L. R. 392, C. A.; affg. S. C. sub nom. Re ELTON, Ex p.*

PART XIV. SECT. 1, SUB-SECT. 2.—C. (e) i.

4474 i. When liability arises — Discretion of court—Liability dependent on nature of offence.]—*Re CHANDI CHARAN MILLER, GLADDER (1920), 24 C. W. N. 755.—IND.*

4474 ii. ——— **—.]—**The mere fact that an attorney has been convicted of a crime is not in itself conclusive that his name will be removed from the roll of practitioners. The ct. must consider whether taking the nature & circumstances of the crime into consideration the attorney concerned is a fit & proper person to be an officer of the ct.—*INCORPORATED [1918]*

h. ——— **—.]—**Two attorneys having been convicted of crimes, struck off the rolls at the instance of the Law Society.—*ANON. (1831), Glascock, 55.—IR.*

PART XIV. SECT. 1, SUB-SECT. 2.—C. (e) ii.

4492 i. Forgery.]—An attorney convicted of forgery will be struck off the roll, & the ct. will act upon the verdict, if satisfied of its correctness.—*ANON. (1834), Hayes & Jo. 583.—IR.*

4492 ii. ——— **—.]—***Re SMYTHIES (1871), Mac. 702.—N.Z.*

4493 i. Embezzlement.]—*SOCIETY OF SOLICITORS IN THE SUPREME COURTS OF SCOTLAND v. PENNELL, [1927] S. C. 280.—SCOT.*

INCORPORATED LAW SOCIETY (1896), 13 T. L. R. 135, D. C.

4490. ——— **—.]—***Re JELICOE, Ex p. INCORPORATED LAW SOCIETY (1898), 43 Sol. Jo. 192, D. C.*

4491. ——— **—.]—***Re WATTS, Ex p. INCORPORATED LAW SOCIETY (1899), 43 Sol. Jo. 192, D. C.*

4492. Forgery.]—*Re WALKER (1844), 3 L. T. O. S. 105.*

4493. Embezzlement.]—*Re RICHARDS (1857), 29 L. T. O. S. 162; previous proceedings, 29 L. T. O. S. 108.*

4494. ——— **—.]—**Where an attorney was convicted of embezzlement, & sentenced to seven years' penal servitude, in July, 1861, an application to strike him off the roll was held not to be too late in Michaelmas Term, 1862. The rule for that purpose may be served upon prisoner.—*Re THOMPSON (1862), 13 C. B. N. S. 288; 7 L. T. 327; 143 E. R. 115.*

4495. Permitting use of premises as brothel.]—*Re WEARE, No. 4469, ante.*

4496. Unnatural offences.]—The difficulty is that there are cases unconnected with fraud, but so disgraceful in their nature, e.g. if a solr. were convicted of an unnatural offence, that the ct. would undoubtedly interfere. That is true, but this is not such a case (*WILLS, J.*).—*Re A SOLICITOR (1893), as reported in 37 Sol. Jo. 405, D. C.; subsequent proceedings, sub nom. Re WEARE, [1893] 2 Q. B. 439, C. A.*

Annotations:—Mentd. R. v. Incorporated Law Soc., [1895] 2 Q. B. 456; Re A Solicitor, Ex p. Law Soc. (No. 25) (1911), 27 T. L. R. 535.

4497. Attempt to murder.]—*Re COOPER, No. 4470, ante.*

4498. Attempt to commit suicide.]—*Re COOPER, No. 4470, ante.*

(f) Professional Misconduct.

4499. General rule.]—Where a solr. is guilty of malpractices, he may be degraded by applying to strike him out of the Roll of solrs.—*ANON. (1741), 2 Atk. 173; 26 E. R. 508.*

What amounts to.]—*See Sect. 2, post.*

(g) Corrupt Practices at Elections.

See Corrupt & Illegal Practices Prevention Act, 1883 (c. 51), s. 38 (7); Municipal Elections, Corrupt & Illegal Practices Act, 1884 (c. 70), s. 23.

What are corrupt practices.]—*See ELECTIONS, Vol. XX., pp. 71–103.*

D. Procedure.

See Sect. 3, post.

SUB-SECT. 3.—PAYMENT OF COSTS IN LIEU OF STRIKING OFF.

See, now, Solicitors Act, 1919 (c. 56), s. 5.

4500. When ordered.]—An attorney who had taken out his certificate for the current year, but

PART XIV. SECT. 1, SUB-SECT. 3.

4500 i. When ordered.]—*Re LITCHFIELD (1916), 16 S. R. N. S. W. 1; 33 N. S. W. W. N. 6.—AUS.*

4500 ii. ——— **—.]—***Re AN ATTORNEY (1873), 34 U. C. R. 246.—CAN.*

4500 iii. ——— **—.]—***Re KNOWLES (1894) 16 P. R. 408.—CAN.*

4500 iv. ——— **—.]—***Re R. (1893), 12 N. Z. L. R. 26.—N.Z.*

4500 v. ——— **—.]—***INCORPORATED LAW SOCIETY v. VAN NIEKERK (1908), 25 S. C. 809.—S. AF.*

4500 vi. ——— **—.]—**Where an attorney had, in giving evidence, admitted receiving payment from deft. while acting for pltf., the ct., in view

had neglected to do so for two years preceding, sued by attachment of privilege without being re-admitted. Rule to strike him off the rolls was discharged, on payment of costs to deft.—*COOKE v. LEGGATT* (1825), 3 L. J. O. S. K. B. 134.

4501. —.]—On a reference to the prothonotary of a rule for striking an attorney off the roll, on a charge of having hired sham bail in error, the officer reported that the attorney did not actually hire the bail, but was aware that they were hired. The ct. discharged the rule on the terms of the attorney paying all the costs of & occasioned by the proceedings.—*DICAS v. WARNE* (1834), 4 Moo. & S. 470; *subsequent proceedings* (1835), 1 Scott, 537.

4502. —.]—*CLEMENTSON v. AMOS* (1848), 10 L. T. O. S. 429.

4503. —.]—*Re SOLICITOR* (1883), 27 Sol. Jo. 683, D. C.

Annotation :—*Reid. Sadd v. Griffin*, [1908] 2 K. B. 510.

4504. —.]—*Re A SOLICITOR* (1891), 8 T. L. R. 75; 36 Sol. Jo. 80, D. C.

4505. —.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1897), 41 Sol. Jo. 726.

4506. —.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1898), 42 Sol. Jo. 397.

4507. —.]—*Re A SOLICITOR* (1902), 46 Sol. Jo. 531.

4508. —.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1905), 50 Sol. Jo. 45.

4509. —.]—A client agreed with a solr. to conduct legal proceedings on his behalf for the lump sum of £70. On Nov. 12, 1907, counsel was instructed to appear in the matter, & his brief was marked three guineas & one guinea. The client paid the solr. £50 on Apr. 19, 1907, & the remaining £20 on Nov. 15, 1907. The barrister's clerk applied on a number of occasions for the payment of the fees marked on the brief, but on May 1, 1910, the fees had not been paid. The matter having been brought before the Law Society by the Bar Council, the solr. on May 25, 1910, paid the fees in full, stating in a letter by the solr. to the Bar Council that he had distinguished the case from one in which a payment had been received from a client on account of counsel's fees, or where the fees had been set out in a bill of costs, & the bill paid, & also pleading poverty. It appeared that the matter in respect of which the lump sum had been paid was an action in the High Ct., in which the client was a party :—*Held* : the solr. had committed professional misconduct within Solicitors' Act, 1888 (c. 65), & the order was made that the solr. should pay the costs of the inquiry before the Law Society, & of the application to the ct.—*Re A SOLICITOR, Ex p. LAW SOCIETY* (1910), 55 Sol. Jo. 49.

4510. —.]—The Law Society found that resp. by his interest in & connection with a debt collecting assocn. had been guilty of professional misconduct :—*Held* : this finding was right, but as resp., on becoming aware that his connection with the assocn. was unprofessional, at once severed his connection with it, it was sufficient to order him to pay the costs of the proceedings.—*Re A SOLICITOR, Ex p. LAW SOCIETY* (1913), 29 T. L. R. 354.

of mitigating circumstances, merely ordered the attorney to pay the costs of the application to have his name struck off the roll.—*INCORPORATED LAW SOCIETY v. COETZEE* (1919), O. P. D. 19.—S. AF.

PART XIV. SECT. 1, SUB-SECT. 4.

4511 i. *Discretionary power of court.*]

—*Re DREW* (1920), 20 S. R. N. S. W. 463; 37 N. S. W. W. N. 160.—AUS.

4511 ii. —.]—*SMYTHIES v. MACASSEY* (1883), 1 N. Z. L. R. C. A. 293.—N.Z.

4511 iii. —.]—*Re H. P.* (1884), 1 N. Z. L. R. C. A. 97.—N.Z.

k. Champerty.—*INCORPORATED LAW SOCIETY v. REID* (1908), 25 S. C.

SUB-SECT. 4.—SUSPENSION.

See, now, Solicitors Act, 1919 (c. 56), s. 5.

4511. *Discretionary power of court.*—*Re BLAKE*, No. 4519, *post*.

4512. —.]—*Re CARLYLE* (1891), 36 Sol. Jo. 14.

— *Solicitor acting as agent for unqualified person.*—*See Part XV., Sect. 6, post.*

— *Solicitor permitting use of name by unqualified person.*—*See Part XV., Sect. 5, post.*

4513. *Option as to date of suspension—Effect of exercise of option.*—*Re A SOLICITOR* (1898), 42 Sol. Jo. 718.

Grounds for.—*See Sect. 2, post.*

Procedure.—*See Sect. 3, post.*

SUB-SECT. 5.—OTHER METHODS OF ENFORCEMENT.

4514. *Restraint of renewal of certificate—Without leave.*—From the evidence given by a solr. in an action in the Ct. of the County Palatine of Lancaster he appeared to have been guilty of gross misconduct in his character of solr. as to one of the mtges. to which the action related. Pltfs. in the action having appealed, the conduct of the solr. came under the consideration of the Ct. of Appeal, who directed the official solr. to take proceedings. The official solr. accordingly moved in the Ct. of Appeal for an order calling on the solr. to explain his conduct or that he might be struck off the roll. The solr. had not taken out his certificate for several years & did not take any notice of the application. The ct., under the special circumstances of the case, did not think fit to strike him off the roll or suspend him, but made an order restraining him from applying to renew his certificate without the leave of the ct.—*Re WHITEHEAD* (1885), 28 Ch. D. 614; 54 L. J. Ch. 796; 52 L. T. 703; 33 W. R. 601, C. A.

SECT. 2.—WHAT AMOUNTS TO PROFESSIONAL MISCONDUCT.

SUB-SECT. 1.—IN GENERAL.

4515. *Standard of conduct required from solicitors—Standard of solicitors of good repute & competency.*—If it is shown that a solr., in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute & competency, the Law Society will be justified in finding that he has been guilty of misconduct within Solicitors Act, 1888 (c. 65), s. 13, & the standard of professional conduct adopted by the society will be that of the ct.

I do not think I need attempt to add anything to the definition which was given in *Allison v. General Council of Medical Education & Registration*, [1894] 1 Q. B. 750 (DARLING, J.).—*Re A SOLICITOR, Ex p. LAW SOCIETY*, [1912] 1 K. B. 302; 81 L. J. K. B. 245; 105 L. T. 874; 28 T. L. R. 50; *sub nom. Re G., Ex p. LAW SOCIETY*, 56 Sol. Jo. 92, D. C.

Annotation :—*Apprvd. Re A Solicitor* (No. 2) (1924), 93 L. J. K. B. 761.

612.—S. AF.

PART XIV. SECT. 2, SUB-SECT. 1.

4515 i. *Standard of conduct required from solicitors—Standard of solicitors of good repute & competency.*—*Re R.*, *Re A.*, [1927] S. A. S. R. 58.—AUS.

4515 ii. —.]—*Re BEARD*, [1918] N. Z. L. R. 202.—N.Z.

Sect. 2.—What amounts to professional misconduct: Sub-sects. 1 & 2, A. & B.]

4516. Whether misconduct must be in relation to professional business.]—A verdict having been obtained against an attorney in an action for publishing a libel of a very aggravated nature, but in which the jury only gave 1s. damages, the ct. refused to strike him off the roll on the mere ground of the publication of the libel. *Semble*: the ct. will not strike an attorney off the roll, unless for some misconduct in his business of attorney, or when criminal proceedings have been taken against him.—*Ex p.* — (1833), 2 Dowl. 110; *sub nom. Re DICAS*, 2 L. J. Ex. 267.

4517. —.]—The ct. will not entertain a motion to strike an attorney off the rolls, on the application of a party who has been his client, on the suggestion of gambling frauds committed since the termination of the business which the attorney conducted for him; there being also proceedings pending in equity in respect of the same frauds.—*Re* — (1843), 12 L. J. Q. B. 331; *sub nom. Re COOK, Ex p. STRATFORD*, 1 L. T. O. S. 311; 7 Jur. 512.

4518. —.]—An attorney cannot be called upon to answer an affidavit, the effect of which is to charge him with fraud or conspiracy in matters in which he has been engaged wholly unconnected with his business as an attorney. For such misconduct he should be indicted.—*Re* — (1855), 24 L. T. O. S. 237; 3 W. R. 181 (b).

4519. —.]—The summary jurisdiction of the ct. over its attorneys is not limited to cases in which they have been guilty of misconduct such as amounts to an indictable offence, or arises in the ordinary course of their professional practice; but extends to all cases of gross misconduct, on their part, in any matter in which they may, from its nature, fairly be presumed to have been employed in consequence of their professional character. B. lent money to an attorney, whom he had previously known & employed as such, on the security of the attorney's promissory note for the amount, & of the deposit by the attorney of a deed of assignment to him of a mtge. on an estate in Ireland, by which a greater amount than B.'s loan was secured to the attorney. The estate getting into the Irish Incumbered Estates Ct., the attorney borrowed the deed of B. for the purpose, as he alleged to B., of supporting his claim in that ct., but in reality in order to obtain from that ct. payment of the amount secured to him by the deed. Having, by production of the deed to the ct., established his right to that payment, he returned the deed to B., & afterwards received out of ct. the whole of the amount which he claimed. He never informed B. of this, but appropriated the whole amount to his own purposes, & continued for several years afterwards to pay B. interest on his loan. He then became insolvent, & B. in consequence lost the whole of the money advanced by him. Upon these facts the ct., holding that the attorney had been guilty of gross misconduct, suspended him from practising for two years.—*Re BLAKE* (1860), 3 E. & E. 34; 30 L. J. Q. B. 32; 2 L. T. 429; 6 Jur. N. S. 1242; 121 E. R. 357.

Annotations:—Apld. Re Hill (1868), L. R. 3 Q. B. 543;

4516 i. Whether misconduct must be in relation to professional business.]—*Re WALLACE* (1866), L. R. 1 P. C. 283.—CAN.

4516 ii. —.]—*Re BEATTY* (1919), 29 Man. L. R. 388.—CAN.

4516 iii. —.]—*Re PLEADER* (1900),

I. L. R. 24 Mad. 17.—IND.

4516 iv. —.]—*Re A SECOND-GRADE PLEADER* (1918), I. L. R. 42 Mad. 111.—IND.

4516 v. —.]—*Re BAILLIE* (1915), 34 N. Z. L. R. 705.—N.Z.

Re Strong (1885), 53 L. T. 694. *Consd. Re A Solicitor* (1890), 25 Q. B. D. 17.

4520. —.]—A solr. is amenable to the summary jurisdiction of this ct. although the misconduct of which he has been guilty did not arise in a matter strictly between solr. & client, but in a loan transaction, if the circumstances are such as to afford a fair presumption that, but for his character of solr., the matter complained of would not have been entered into.—*Re STRONG* (1885), 53 L. T. 694; 50 J. P. 148; *subsequent proceedings*, 31 Ch. D. 273, C. A.

4521. —.]—**Misconduct sufficient to constitute bar to admission.]**—Misconduct which would form an absolute or temporary bar to the admission of appct. to practise as an attorney, is a sufficient ground for the exercise, after admission, by the ct. of its summary jurisdiction in striking him off the rolls or suspending him for a time.

H., an admitted attorney, being engaged in the employ of a firm of attorneys as managing clerk, embezzled two sums of money, one amounting to £85, & the other to about £8, having received the former from a client of the firm for the settlement of a purchase, & the latter for costs in a county ct. action. The embezzlement was not discovered until upwards of three years after it had been committed. On the fraud being discovered, H. confessed the facts & repaid the money. On motion to strike H. off the roll of attorneys:—*Held*: it was not necessary, in order to render him answerable to the summary jurisdiction of the ct., that the misconduct of which he had been guilty should be misconduct in his character of attorney.—*Re HILL* (1868), L. R. 3 Q. B. 543; 9 B. & S. 481; 37 L. J. Q. B. 295; 18 L. T. 564; 16 W. R. 1061.

Annotations:—Consd. Re A Solicitor, Ex p. Incorporated Law Soc. (1889), 61 L. T. 842; *Re A Solicitor* (1890), 25 Q. B. D. 17. *Apld. Re Weare*, [1893] 2 Q. B. 439. *Refd. Re Incorporated Law Soc. & Four Solicitors* (1891), 7 T. L. R. 672; *Re A Solicitor, Ex p. Law Soc.* (No. 25) (1911), 27 T. L. R. 535.

4522. Misconduct must be since admission.]—The ct. refused to strike an attorney off the rolls on the ground that he had not served a regular clerkship, & had misconducted himself previously to admission.—*Re PAGE* (1823), 1 Bing. 160; 7 Moore, C. P. 572; 1 L. J. O. S. C. P. 45; 130 E. R. 65.

4523. —.]—A motion to strike an attorney off the roll on the ground of misconduct, & the want of regular service, in his clerkship, comes too late when the party has been three years & a half admitted.—*Re* — (1831), 2 B. & Ad. 766; 109 E. R. 1329.

Annotations:—Distd. Re Swan (1846), 15 L. J. Q. B. 402; *Re Thompson* (1862), 13 C. B. N. S. 288.

4524. —.]—**Solicitor no longer in practice.]**—The ct. struck the name of a solr. off the rolls upon the ground that he had carried on the business of a bookmaker since 1902, & that he distributed circulars in connection therewith, which, in the opinion of the ct., might get into the hands of minors & married women, the solr. having ceased to practise as a solr. since 1898, & not having since that time taken out a certificate.—*Re A SOLICITOR, Ex p. LAW SOCIETY* (1905), 93 L. T. 838; 22 T. L. R. 127; 50 Sol. Jo. 113.

4516 vi. —.]—*DE VILLIERS v. MCINTYRE*, [1921] App. D. 425.—S. AF.

i. — Negligence.]—Re SOLICITOR, Re FITZPATRICK, [1924] 1 D. L. R. 981; 54 O. L. R. 3.—CAN.

m. —.]—Re A VAKIL (1925), 1 L. R. 49 Mad. 523.—IND.

4525. Criminal misconduct—Effect of acquittal.]—*Re BROWN* (1882), 17 L. Jo. 165, D. C.

SUB-SECT. 2.—IN RELATION TO CLIENT.

A. In General.

4526. Extent of duty to client.]—*Re COOKE* (1889), 5 T. L. R. 407; 33 Sol. Jo. 397, C. A.; *revisg.* S. C. *sub nom.* *Re A SOLICITOR*, 5 T. L. R. 335, D. C.

4527. Attempt to communicate client's secrets.]—*CHOLMONDELEY (MARQUIS) v. CLINTON (LORD)* (1815), 19 Ves. 261; *Coop. G.* 80; 34 E. R. 515, L. C.

Annotations:—*Consd.* *Beer v Ward*, *Ward v. Beer* (1821), Jac. 77. *Expld.* *Bricheno v. Thorp* (1821), Jac. 300. *Johnson v. Marmott* (1833), 3 Cr. & M. 183. *Distd.* *Parratt v. Parratt* (1848), 2 De G. & Sm. 258; *Hutchinson v. Newark* (1850), 3 De G. & Sm. 727; *Re Holmes, Re Electric Power Co.* (1877), 25 W. R. 603. *Consd.* *Little v. Kingswood Collieries Co.* (1882), 20 Ch. D. 733. *Expld.* *Rakusen v. Ellis, Munday & Clarke*, [1912] 1 Ch. 831. *Refd.* *Turquand v. Knight* (1836), 2 M. & W. 98; *Griffiths v. Griffiths* (1813), 2 Hare, 587; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; *Manser v. Dix* (1855), 1 K. & J. 451; *Horsley v. Cox* (1869), L. R. 7 Eq. 464. *Mentd.* *Baylis v. Grout* (1835), 2 My. & K. 316; *Dietrichsen v. Cabburn* (1846), 1 *Coop. temp. Cott.* 72; *Campbell v. A.-G.* (1867), 2 Ch. App. 571.

4528. Cheating client at gaming.]—*Re* —, No. 4517, *ante*.

4529. Acting without authority—Obtaining payment out of court.]—A solr. having, without authority from his client, given a brief to counsel to consent to the payment of the client's money out of ct., after cause shown, was ordered to be struck off the roll.—*Re COLLINS, WHEATLEY v. BASTOW* (1855), 7 De G. M. & G. 558; 24 L. J. Ch. 732; 26 L. T. O. S. 25; 44 E. R. 218; *sub nom.* *WHEATLEY v. BASTOW, COLLINS'S CASE*, 3 Eq. Rep. 865; 1 Jur. N. S. 1125, L.JJ.

4530. Failure to make proper inquiries.]—*Re A SOLICITOR* (1891), 8 T. L. R. 75; 36 Sol. Jo. 80, D. C.

4531. Acting for both parties in purchase.]—The ct. held on the facts that no charge of professional misconduct such as to warrant the ct. in exercising its punitive jurisdiction had been made

out.—*Re INCORPORATED LAW SOCIETY & FOUR SOLICITORS* (1891), 7 T. L. R. 672, D. C.

Annotation:—*Refd.* *Re A Solicitor, Ex p. Law Soc.* (No. 25) (1911), 27 T. L. R. 535.

4532. Recommending improper investments.]—*Re CROWDY, Ex p. INCORPORATED LAW SOCIETY* (1895), 11 T. L. R. 406; *sub nom.* *Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY*, 39 Sol. Jo. 486, D. C.

Annotation:—*Refd.* *Re Davies* (1898), 14 T. L. R. 161.

4533. Failure to advise client.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1895), 39 Sol. Jo. 219, D. C.

B. Pecuniary Transactions.

4534. Taking client's money.]—*FAWNE'S CASE* (*circa* 1632), 11et. 29; 124 E. R. 317.

4535. — Fraud — Effect of repayment.]—Where an attorney has fraudulently obtained & withheld his client's money, the repayment of the money is not a purgation of the offence.—*Re H.* (1875), 31 L. T. 730; *sub nom.* *Re HOLMES*, 19 Sol. Jo. 218.

4536. Refusal to refund money—Pursuant to allocatur.]—*ANON.* (1821), cited in 10 Jur. at p. 198.

4537. Misappropriation.]—*Re MARTIN*, No. 4418, *ante*.

4538. —.]—*SEFTON v. HILL* (1822), 13 C. B. 371, n.; 138 E. R. 1243.

4539. —.]—*Re ROBINS* (1859), 33 L. T. O. S. 90.

4540. —.]—*Re BLAKE*, No. 4519, *ante*.

4541. —.]—*ANON.* (1890), 88 L. T. D. C.

4542. —.]—*Re HOPPER* (1890), 34 568, C. A.

4543. —.]—*Re CHAMBERLAINE* (1891), 36 Sol. Jo. 45, D. C.

4544. — By solicitor's clerk—Negligence of solicitor.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (No. 1) (1893), 38 Sol. Jo. 28, D. C.

4545. —.]—*Re BUTLER, Ex p. INCORPORATED LAW SOCIETY* (1898), 42 Sol. Jo. 416, D. C.

— **Failure to pay counsel's fees.]**—*See* Nos. 4610 4616, *post*.

— **Breach of trust.]**—*See* Sub-sect. 3, *post*.

4546. Retaining client's money.]—The mere non-

4525 i. Criminal misconduct—Effect of acquittal.]—*STATE ATTORNEY v. L.* (1895), 2 O. R. 214.—S. AF.

n —.]—*Re* —, [1918] S. A. L. R. 160.—AUS.

o. *Action settled — Attorney defending motion to set aside.]*—*MORAN v. GALLGHER* (1818), 1 All. 24.—CAN.

p. *Dealing with opposite party—In absence of solicitor.]*—*BANK OF MONTREAL v. WILSON* (1867), 2 Ch. Ch. 117.—CAN.

q. *Using name of clerk—As nominal plaintiff.]*—*DICKSON v. MCMAHON* (1869), 11 C. P. 521.—CAN.

r. *County court judge — Acting as attorney for profit.]*—*ALLEN v. JARVIS* (1871), 32 U. C. R. 56.—CAN.

t. *Persuading client to leave other solicitor.]*—As an absolute proposition, it cannot be questioned that a solr. ought not to detach a client from another solr. during the period of his retainer.—*Re AN ATTORNEY* (1925), 1 L. R. 52 Cal. 795.—IND.

PART XIV. SECT. 2, SUB-SECT. 2.—A.

4526 i. Extent of duty to client.]—*Re MOSELEY* (1925), 25 S. R. N. S. W. 174; 42 N. S. W. N. 44.—AUS.

4526 ii. —.]—The important consideration is the solr.'s fitness. The duties of a solr. are such that he must necessarily be entrusted with his client's property & secrets. The ct.'s concern, therefore, must be to see that he is a

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person of such character that the confidence which must be reposed in him will not likely be betrayed.—*Re KNOX* (1914), 29 W. L. R. 1; 20 D. L. R. 516; 7 Alta. L. R. 409.—CAN.

4527 i. Attempt to communicate client's secrets.]—*DAMODAR VENKATESH v. BHAVANISHANKAR MANGESH* (1902), 1 L. R. 26 Bom. 423.—IND.

4527 ii. —.]—*ROBINSON v. VAN HULSFYNN, FELTHAM & FORD*, [1925] App. D. 12.—S. AF.

a. *Acting without authority.]*—*SAMPLE v. McLAUGHLIN* (1897), 17 P. R. 490.—CAN.

PART XIV. SECT. 2, SUB-SECT. 2.—B.

4546 i. Retaining client's money.]—*Re FLETCHER* (1881), 28 Gr. 113.—CAN.

4546 ii. —.]—An attorney will not be struck off the rolls for non-payment of money merely.—*Re J. B.* (1889), 6 Man. L. R. 19.—CAN.

4546 iii. —.]—*Re FORBES* (No. 3) (1897), 2 Terr. L. R. 447.—CAN.

4546 iv. —.]—*Re BLAKE* (1898), 6 B. C. R. 276.—CAN.

4546 v. —.]—*TOBIN v. GANNON* (1901), 31 N. S. R. 9.—CAN.

4546 vi. —.]—*Re HARRIS* (1910), 7 Alta. L. R. 287; 13 W. L. R. 131.—CAN.

4546 vii. —.]—A solr. who is suspended for a certain period of time for not accounting for & paying over money

held for a client cannot merely by settlement with said client gain complete absolution from the term of suspension.—*Re A SOLICITOR* (1914), 29 W. L. R. 392; 7 W. W. R. 87.—CAN.

4546 viii. —.]—The disciplinary sects. of Legal Profession Act, Sask., were not merely passed for the purpose enforcing payment over by solrs. of money collected by them for their clients, but that in every case the conduct of the solr. in the premises is a proper subject for the consideration of the ct.—*Re A SOLICITOR* (Sask.) (1915), 32 W. L. R. 60; 23 D. L. R. 887.—CAN.

4546 ix. —.]—A solr. is not guilty of unprofessional conduct, or misconduct as a barrister, solr. or attorney of the ct. in retaining moneys placed in his hands by a person to whom, through mental & physical incapacity a curator was subsequently appointed, the solr. having guaranteed to a doctor & landlady the payment of sums of money for care of the mentally afflicted persons.—*Re LAW SOCIETY ACT & HUGGARD* (Man.), [1917] 2 W. W. R. 91; 36 D. L. R. 239.—CAN.

4546 x. —.]—*Re PURNA CHANDRA DUTT* (1904), 1 L. R. 31 Cal. 44.—IND.

4546 xi. —.]—*Re M.* (1878), 1 L. R. Ir. 188.—IR.

4546 xii. —.]—*INCORPORATED LAW SOCIETY v. SIME*, [1913] T. P. D. 165.—S. AF.

Sect. 2.—What amounts to professional misconduct:
Sub-sect. 2, B.; sub-sects. 3, 4 & 5.]

payment of money by an attorney, pursuant to an order & rule of ct., is no ground for striking him off the roll.—*GUILFORD v. SIMS* (1853), 13 C. B. 370; 138 E. R. 1242.

4547. — Subsequent bankruptcy of solicitor.]—The ct. will not strike an attorney off the rolls, where he has become bkpt. having moneys of a client in his hands which ought to have been paid over, unless a clear case of fraudulent misappropriation be made out against him.—*Re SPARKS* (1864), 17 C. B. N. S. 727; 144 E. R. 291.

4548. — — —.]—Re HUTCHINGS (1887), 22 Notes of Cases, 174.

—.]—*Re A SOLICITOR* (1884), 19 L. Jo. 500, D. C.

4550. — —.]—Re BARNES (1887), 4 T. L. R. 26, D. C.

4551. — —.]—Re HOPPER (1890), 34 Sol. Jo. 508, C. A.

4552. — —.]—Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY (1892), 37 Sol. Jo. 30, D. C.

4553. — —.]—Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY (No. 2) (1893), 38 Sol. Jo. 28, D. C.

4554. — —.]—Re A SOLICITOR (1895), 11 T. L. R. 169; 39 Sol. Jo. 202, D. C.

Annotation:—Refd. Re Solicitor, Ex p. Incorporated Law Soc. (1905), 49 Sol. Jo. 516.

4555. Borrowing money from client.]—Re HILL, Ex p. INCORPORATED LAW SOCIETY (1893), 10 T. L. R. 33, D. C.

4556. — —.]—Where a report of the statutory committee of the Incorporated Law Society found that a solr. had been guilty of professional misconduct in accepting large sums of money by way of loan from a client who has just attained the age of twenty-one, & in keeping no proper account or record of the transactions:—Held: inasmuch as the client had suffered a loss from the fact of the solr. having combined the two characters of professional adviser & borrower, the case was one calling for punishment, & the solr. be suspended from practice for a period of two years.—Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY, [1894] 1 Q. B. 254; 63 L. J. Q. B. 313; 70 L. T. 27; 42 W. R. 237; 10 T. L. R. 121; 38 Sol. Jo. 100; 10 R. 34.

4557. Obtaining loan for client—Sharing commission with moneylender.]—Re HILL, Ex p. INCORPORATED LAW SOCIETY (1893), 10 T. L. R. 33, D. C.

4558. Obtaining money from illiterate client—By misrepresentation.]—In a country which is only partially civilised it is necessary to induce the inhabitants to resort to the cts. for the settlement of their disputes rather than to personal violence; with that object it is essential that they should be brought to feel the greatest respect not only for the impartiality & independence of the tribunals, but also for the honesty & fairness of those who practise before them.

Applt., an enrolled barrister & solr. of the Supreme Ct. of Sierra Leone, obtained by way of professional remuneration from a native chief, who was entirely illiterate & unfamiliar with legal proceedings, the sum of £135 by professionally irregular conduct & £50, part of a larger demand, by misrepresentation. The Chief Justice, who by Ordinance had power, for reasonable cause, temporarily to suspend any barrister or solr., or to order his name to be struck off the roll of the

ct., ordered applt.'s name to be struck off:—**Held: the order should be affirmed, a mitigation of the penalty to a suspension from practice being refused, upon the ground that the authority of the Chief Justice in the matter should not be interfered with, having regard to the considerations above stated.—MACAULEY v. SIERRA LEONE SUPREME COURT JUDGES, [1928] A. C. 344; 97 L. J. P. C. 60; 139 L. T. 314, P. C.**

4559. Mixing client's money with own.]—Re SOLICITOR, Ex p. INCORPORATED LAW SOCIETY (1893), 38 Sol. Jo. 82.

4560. — —.]—Re SOLICITOR, Ex p. INCORPORATED LAW SOCIETY (1905), 49 Sol. Jo. 516, D. C.

4561. — —.]—Re SOLICITOR, Ex p. LAW SOCIETY (1911), 28 T. L. R. 59, D. C.

Misconduct in relation to costs.]—See Sub-sect. 7, post.

SUB-SECT. 3.—BREACH OF TRUST.

See, generally, TRUSTS & TRUSTEES.

4562. Advising breach of trust—Improper sale of trust fund—Fund replaced pursuant to order of court.]—On a bill filed by parties interested under a will against the sole acting trustee & exor., & against his solr. under whose advice the trust property had been improperly sold out by the trustee & applied principally to the solr.'s use, praying that the stock might be replaced, the ct. at the hearing, after directing certain inquiries, ordered that the solr. should show cause why, having regard to his answer & the evidence in the cause, his name should not be struck off the roll of solrs. of the Ct. of Ch.

A solr. having advised his client, a person in an humble station of life, to commit a breach of trust by selling out stock of which the client was a trustee & having himself profited by the breach of trust, was ordered to be struck off the roll, unless he showed good cause to the contrary; but having in obedience to the decree in the cause replaced the stock & paid the costs of the suit the ct., taking into consideration his youth & other circumstances, abstained from further proceedings in the matter, upon his undertaking to pay to the other parties to the suit their costs, charges & expenses.—*GOODWIN v. GOSNELL* (1846), 2 Coll. 457; 7 L. T. O. S. 26, 156; 10 Jur. 259; 63 E. R. 813; *sub nom.* *GOODWIN v. GOSNELL, Ex p. HILL*, 10 Jur. 422.

4563. — — —.]—A., a solr., who was the only person who acted professionally in the trust, induced his co-trustee, who was his client, improperly to sell out the trust fund, which was received by A. & applied to his own use. On the application of one of the *cestuis que trust*, the solr. was struck off the Rolls.—Re CHANDLER (1856), 22 Beav. 253; 25 L. J. Ch. 396; 27 L. T. O. S. 61; 2 Jur. N. S. 366; 52 E. R. 1105.

4564. Committing breach of trust—Failure to invest trust fund.]—A reversionary fund was assigned to trustees upon the trusts of a settlement for a wife, husband, & children. One of the trustees died, & a solr. was appointed in his place. The fund fell into possession, & was paid to the trustees, who both joined in a receipt. The solr. trustee did not invest the money according to the trusts of the settlement, but lent it upon security, which was insufficient, & the fund was lost. The solr. trustee was discharged, under the Act for the Relief of Insolvent Debtors, & in his schedule

PART XIV. SECT. 2, SUB-SECT. 3.

4564 i. Committing breach of trust—Failure to invest trust fund.]—Re BRUGES (1907), 26 N. Z. L. R. 541.—N.Z.

the amount of the trust fund was inserted. The *cestui que trust* for life from time to time received small interest for the lost money from the solr. trustee both before & after the insolvency. She filed a bill against both the trustees, & the Master of the Rolls made a decree against the solvent trustee to replace the fund:—*Held*: the decree was correct, for the discharge under the insolvency was a complete discharge from the debt, though the co-trustee had liberty to go in under the insolvency & prove against the estate of the solr. trustee. The ct. *ex mero motu* ordered the solr. trustee to show cause why he should not be struck off the roll.—*THOMPSON v. FINCH* (1856), 8 De G. M. & G. 560; 22 Beav. 316; 25 L. J. Ch. 681; 27 L. T. O. S. 330; 44 E. R. 506, L. J. J.; *subsequent proceedings* (1857), 28 L. T. O. S. 279, L. J. J.

Annotations:—*Consd.* *Bahin v. Hughes* (1886), 31 Ch. D. 390. *Refd.* *Re Partington, Partington v. Allen* (1887), 57 L. T. 654; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536. *Mentd.* *Chillingworth v. Chambers*, [1896] 1 Ch. 685.

4565. ———.]—A solr. who, being one of the trustees of a settlement, had been guilty of fraudulent misapplication of, & misrepresentation as to, a part of the trust fund, was ordered to be struck off the rolls upon the petition of his co-trustees. In such a case, the fact that the delinquent was not, at the time of committing the fraud in question, acting as the solr. of the defrauded *cestuis que trust* is immaterial.—*Re HALL, DOLLOND v. JOHNSON* (1856), 27 L. T. O. S. 230; 2 Jur. N. S. 633; 4 W. R. 686.

Annotation:—*Refd.* *Re A Solicitor* (1890), 25 Q. B. D. 17.

4566. ——— *Misrepresentation as to trust fund.*]—*Re HALL, DOLLOND v. JOHNSON*, No. 4565, *ante*.

4567. ——— *Misappropriation of trust fund.*]—*THORNDIKE v. HUNT, BROWNE v. BUTTER* (1859), as reported in 28 L. J. Ch. 417; 32 L. T. O. S. 346; 5 Jur. N. S. 879; *sub nom.* *Re HUNT, THORNDIKE v. HUNT, BROWN v. BUTTER*, 33 L. T. O. S. 99, L. J. J.

Annotations:—*Refd.* *Case v. James* (1861), 30 L. J. Ch. 749; *Harpam v. Shacklock* (1881), 30 W. R. 49; *Taylor v. Blakelock* (1886), 32 Ch. D. 560; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 1 Ch. 231. *Mentd.* *Thompson v. Tomkins* (1862), 2 Drew. & Sm. 8; *Cloutte v. Storey*, [1911] 1 Ch. 18.

SUB-SECT. 4.—WRONGFULLY INSTITUTING PROCEEDINGS.

4568. Civil proceedings—Collusive action.]—*DUNGEY v. ANGOVE*, No. 3894, *ante*.

4569. ——— *Commenced without authority.*]—A solr., who had filed a bill for specific performance in the name of the assignee of a bkpt. without having obtained his consent or retainer, & who had also allowed his client to make an affidavit containing a statement which he knew to be false, was sentenced to be suspended for the space of ten years from practising as an attorney or solr.—*Re GRAY, Ex p. INCORPORATED LAW SOCIETY* (1869), 20 L. T. 730.

4570. ——— *Qui tam actions—For purpose of revenge.*]—It is no cause for striking an attorney off the rolls that he has commenced several *qui tam* actions for the purpose of revenge.—*Ex p. WARREN* (1835), 1 Har. & W. 113.

4571. ——— *Offer to compromise.*]—Where an attorney brings several *qui tam* actions, & after

their commencement makes an offer to deft. to compromise them, it is no ground for striking him off the roll.—*SMITH v. GILLET* (1835), 3 Dowl. 364.

Annotation:—*Appld.* *Varley v. Ellis, Re An Attorney* (1870), 23 L. T. 18.

4572. ——— *Action in name of third party—For purpose of avoiding liability for costs.*]—Upon a rule calling upon an attorney to answer matters alleged in affidavits, it appeared that he had brought four actions against a newspaper for penalties under 25 Geo. 2, c. 36, in the names of his clerk, & a relation of his clerk as plffs., persons without any means of paying costs; & it was stated that the actions were for his benefit, & that he made these people plffs. in order that he might avoid liability for deft.'s costs in case the actions should be unsuccessful. In answer the attorney & the two plffs. made a joint affidavit asserting that the actions were not for the attorney's benefit, & that he was acting *bona fide* as attorney for plffs.:—*Held*: although the case stated against the attorney if established would have justified the interference of the ct., yet the rule ought not to be made absolute upon the statements sworn to on the attorney's behalf.—*VARLEY v. ELLIS, Re AN ATTORNEY* (1870), 23 L. T. 18.

4573. Criminal proceedings—Commenced without authority.]—*Re DAVIES* (1853), Bail Ct. Cas. 207; 22 L. T. O. S. 92; 17 J. P. 793; *sub nom.* *Re —*, 2 W. R. 58.

4574. ——— *For purpose of extorting money.*]—*Re A SOLICITOR & Re SOLICITORS ACT* (1892), 27 L. Jo. 121.

SUB-SECT. 5.—DEFEATING COURSE OF JUSTICE.

4575. Wilfully misleading court—Plea of pending action—Action discontinued.]—If an attorney discontinue an action after having pleaded it as depending, or assign infancy for error when the party is adult, he shall be struck off the roll.—*ASTON'S CASE* (1670), 1 Mod. Rep. 41; 86 E. R. 716.

4576. ——— *Plea of infancy—Party adult.*]—*ASTON'S CASE*, No. 4575, *ante*.

4577. ——— *False representation that injunction granted.*]—Solr., falsely representing, that an injunction was granted, liable to damages, an indictment, & to be struck off the roll.—*KIMPTON v. EVE* (1813), 2 Ves. & B. 349; 35 E. R. 352, L. C.

4578. ——— *False affidavit as to existence of next of kin.*]—*RIDSDALE v. LAUTOUR* (1851), 17 L. T. O. S. 77.

4579. ——— *Permitting client to make false affidavit.*]—*Re GRAY, Ex p. INCORPORATED LAW SOCIETY*, No. 4569, *ante*.

4580. ———.]—*Re DAVIES* (1898), 14 T. L. R. 332, C. A.

4581. ——— *Failure to inform court of true date of deed.*]—Where the ct. having rightly acquitted a barrister & solr. of fraudulent intent in having antedated a mtge. deed which he had drawn for the mtgor., & in having inserted in it the sum of £250 for £150, nevertheless removed his name from the roll for having put the mtge. in evidence on behalf of the mtgee. in an interpleader suit without informing the ct. that the date was false:—*Held*: the second charge fell with the

PART XIV. SECT. 2, SUB-SECT. 4.

b. Civil proceedings—Duty to make inquiries as to genuineness of action.]—*SOCIETY OF SOLICITORS BEFORE SUPREME COURTS v. OFFICER, FACULTY*

OF PROCURATORS OF GLASGOW v. (1893), 20 R. (Ct. of Sess.) 1106; 30 Sc. L. R. 926; 1 S. L. T. 152.—*SCOT.* ———.]—*SOCIETY OF WRITERS TO H.M. SIGNET v. MACKERAY*, [1924] S. C. 776.—*SCOT.*

PART XIV. SECT. 2, SUB-SECT. 5.

4579 i. Wilfully misleading court—Permitting client to make false affidavit.]—*Re THORN* (1918), 18 S. R. N. S. W. 70.—*AUS.*

Sect. 2.—What amounts to professional misconduct:
Sub-sects. 5, 6, 7, 8 & 9.]

first, there being no evidence that applt. had any reason to believe that the mtgee. had not, as he stated in evidence, advanced the consideration mentioned in the deed at or before the date it bore; & it also appearing that it was immaterial to the question at issue on the interpleader whether the deed was antedated or not.—*Ex p. RENNER*, [1897] A. C. 218; 66 L. J. P. C. 49, P. C.

*Annotation:—*Reid. *Re Iles* (1922), 66 Sol. Jo. 297.

4582. —.—*Re COOKE* (1889), 5 T. L. R. 407; 33 Sol. Jo. 397, C. A.; *reversg.* S. C. *sub nom.* *Re A SOLICITOR*, 5 T. L. R. 335, D. C.

4583. Obtaining release of prisoner by bribe.]—An attorney fined £500 & imprisoned for taking £200 of one charged with forgery to let him out of the custody of a tipstaff.—*R. v. VAUGHAN* (1743), 1 Wils. 22; 95 E. R. 470.

4584. Keeping witness out of the way.]—*STEPHENS v. HILL*, No. 4420, *ante*.

4585. Attempted subornation of perjury.]—An attorney ordered to be struck off the rolls for conduct in the nature of subornation of perjury in tampering with a witness.—*Re MACEY, WOOD v. PORTARLINGTON (LORD)* (1847), 9 L. T. O. S. 245.

*Annotation:—*Reid. *Re Wood, Ex p. Randall* (1848), 11 L. T. O. S. 247.

4586. —.—*Re MACEY* (1847), 10 L. T. O. S. 202.

*Annotation:—*Reid. *Ex p. Gray* (1847), 10 L. T. O. S. 191.

4587. Assisting criminal to escape from country.]
VALLANCE (1889), 24 L. Jo. 638, D. C.

SUB-SECT. 6.—AS TO DOCUMENTS.

4588. Falsification — Writ.] —If an attorney falsify or forge a writ he shall be struck off the roll & fined.—*OSBASTON'S CASE* (1588), cited in Cro. Car. at p. 71; 79 E. R. 665.

4589. — Deed.]—*Re PARRY* (1895), *Times*, Feb. 15, C. A.

4590. — — — Evasion of stamp duty.]—A solr. in Trinidad altered, some fifteen years ago, the date of a deed, after its execution with the alleged intention of evading the payment of 15s. stamp duty. He was struck off the Rolls by the Supreme Ct. of Trinidad:—*Held*: applt. had not received harder measure than he deserved.—*Re ILES* (1922), 66 Sol. Jo. 297, P. C.

4591. Forgery—Writ.]—*OSBASTON'S CASE*, No. 4588, *ante*.

4592. — — — Demurrer.] —*SMITH v. MATHAM* (1824), 4 Dow. & Ry. K. B. 738.

4593. Suppression—Assisting client to suppress.]
—Re DAVIES (1898), 14 T. L. R. 332, C. A.

4594. Improper indorsement of summons.]—It is highly irregular & improper for attorneys to indorse a summons as if it has been attended before the judge, when in fact it has not, & there has been only a consent to an order. An attorney, who had served what purported to be a copy of an order, which he had not had drawn up, though he had obtained consent for a similar order on somewhat different terms, was suspended from practice in this ct. for three years, & fined £100.—*Re DE*

4582 i. —.—*Re A VAKIL* (1920), 1 L. R. 42 All. 450.—**IND.**

4582 ii. —.—*Re A VAKIL* (1925), 1 L. R. 47 All. 377.—**IND.**

d. Attempted subornation of jury.] —*Re TITUS* (1884), 5 O. R. 87.—**CAN.**

e. Assisting fraudulent discharge in

insolvency.]—*R. v. POLAND & MAGEE* (1828), Rowe, 585.—**IR.**

f. Conducting case after perjury of client.]—A practitioner who continues the conduct of a case after he is aware that his client has committed perjury is not thereby guilty of professional misconduct, provided he is no party

MEDINA (1862), 10 W. R. 627; *subsequent proceedings*, 6 L. T. 536.

*Annotation:—*Reid. *Re An Attorney* (1863), 7 L. T. 716.

4595. Misstatement of consideration in deed.]—

By an Order of the High Ct. of Judicature in Bengal an attorney & proctor of that ct. was struck off the rolls for inserting in a deed of conveyance a false recital as to the consideration money, knowing the same to be false, & for attesting the execution of the deed, & signing his name as a witness to the receipt of the consideration money, knowing that no such consideration had passed, or was intended to pass. Such order, on appeal, discharged, the Judicial Committee being of opinion, that although the preparation of such a deed, & the knowledge of such facts, would be circumstances of great weight against an attorney cognisant of them in the event of such a deed, upon or soon after its execution, being used as an instrument of fraud, yet, as the circumstances of its preparation were capable of being explained, & no fraudulent use of the instrument had been made or attempted, no fraudulent motive alleged, & no injury directly or indirectly occasioned by it, the misstatement upon the face of such a deed could not be considered sufficient in itself to warrant the striking an attorney off the Rolls of the Ct.—*Re STEWART* (1868), L. R. 2 P. C. 88; 5 Moo. P. C. C. N. S. 187; 37 L. J. P. C. 25; 16 W. R. 1000; 16 E. R. 486, P. C.

4596. Misdescription in writ.]—*Re A SOLICITOR, KARPELES v. FRIEDLANDER* (1889), 53 J. P. 264; 5 T. L. R. 339, D. C.

SUB-SECT. 7.—AS TO COSTS.

4597. False affidavit of increase.]—The ct. will cause an attorney to be struck off the rolls for using an affidavit on taxation of costs, false to his own knowledge, that certain payments had been made to witnesses which had not been made in fact, for the purpose of obtaining an excessive allowance of costs.—*HARCOURT v. DICKSON* (1849), 14 L. T. O. S. 310; 15 J. P. 611.

4598. —.—*Re FLEWKER, POWELL v. SHAW* (1851), 17 Q. B. 572, n.; 117 E. R. 1400.

*Annotation:—*Reid. *Doe d. Menno v. Hadley* (1851), 17 Q. B. 571.

4599. — —.]—*Re VAUGHAN* (1855), 24 L. T. O. S. 256.

4600. —.—*Re AN ATTORNEY* (1857), 21 J. P. Jo. 69.

4601. —.]—A fine of £100 & suspension from practice for three years imposed upon an attorney of this ct. for having made a false affidavit of increase in the taxation of a bill of costs.—*Re MANT* (1861), 5 L. T. 254.

*Annotation:—*Reid. *Re An Attorney* (1863), 7 L. T. 716.

4602. Excessive charges.]—A bill of costs of an attorney was reduced, on taxation, from £1,100 to £370, & £374, part of the bill, sworn to have been paid to witnesses, was reduced to £47. The ct. refused a rule to strike him off the rolls, on the ground that the charge could be established by witnesses only, & was therefore proper for the consideration of a jury.—*Re —* (1838), 1 Will. Woll. & H. 355; 3 Nev. & P. K. B. 389.

to deceiving the ct. & makes no use of the evidence which he knows to be false.
— INCORPORATED LAW SOCIETY v. BEVAN, [1908] T. S. 724.—**S. AF.**

PART XIV. SECT. 2, SUB-SECT. 6.

g. Fabrication of deed.]—*Re PALLAS* (1844), 4 L. T. O. S. 181.—**IR.**

4603. —.]—*Re RAWSON* (1887), 3 T. L. R. 663, D. C.

4604. —.]—*Re HILL & HILL* (1887), 4 T. L. R. 64, D. C.

4605. Wrongfully running up costs—Wrong steps.—*Re COOKE* (1889), 5 T. L. R. 407; 33 Sol. Jo. 397, C. A.; *revg. S. C. sub nom. Re A SOLICITOR*, 5 T. L. R. 335, D. C.

4606. —. **Unnecessary steps.**—*Re COOKE* (1889), 5 T. L. R. 407; 33 Sol. Jo. 397, C. A.; *revg. S. C. sub nom. Re A SOLICITOR*, 5 T. L. R. 335, D. C.

4607. Fraudulent charges by solicitor's trustee.—*Re COAKS, Ex p. INCORPORATED LAW SOCIETY* (1896), 40 Sol. Jo. 717, D. C.

4608. Agreement to share profit costs—Between solicitors representing conflicting interests.—It is an improper practice for solrs., acting for parties in an administration action, to share the profit costs of other solrs. introduced by them to act for other parties in the action whose interests conflict with those of the introducers' clients, & all the solrs. who engage in such a transaction are guilty of misconduct punishable by the ct.—*Re FOUR SOLICITORS, Ex p. INCORPORATED LAW SOCIETY*, [1901] 1 K. B. 187; 83 L. T. 484; 49 W. R. 219; 45 Sol. Jo. 62; *sub nom. Re LYDALL, Ex p. INCORPORATED LAW SOCIETY*, 70 L. J. Q. B. 5; 17 T. L. R. 73, D. C.

4609. Accepting payment of bill—Alleged disbursements not in fact made.—It is equally clear that a solr. cannot properly accept payment of the bill unless he has paid the alleged disbursements; & if he did so, he would run considerable risk of being struck off the rolls (FARWELL, L.J.).—*SADD v. GRIFFIN*, [1908] 2 K. B. 510; 77 L. J. K. B. 775; 99 L. T. 502; 24 T. L. R. 715; 52 Sol. Jo. 567, C. A.

Annotation.—*Re Massey* (1909), 101 L. T. 517; *Re Hildesheim*, [1914] 3 K. B. 841; *Re Eden, Watkins v. Eden*, [1920] 2 K. B. 333; *Smith v. Howes*, [1922] 1 K. B. 590.

SUB-SECT. 8.—FAILURE TO PAY COUNSEL'S FEES.

4610. Funds provided for payment.—*Re FARMAN* (1883), 18 L. Jo. 352, D. C.

4611. —.]—*Re SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1893), 37 Sol. Jo. 562, D. C.

4612. —.]—A solr. who has obtained payment of the disbursements in his bill of costs, including fees to counsel, & improperly neglects to pay those fees to counsel, is guilty of professional misconduct, although he may not have received the full amount of his bill of costs.—*Re SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1894), 63 L. J. Q. B. 397; 10 R. 576, D. C.

4613. —.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1901), *Times*, Nov. 5, D. C.

4614. —.]—*Re A SOLICITOR, Ex p. LAW SOCIETY* (1909), *Times*, Jan. 27, 28, D. C.

4615. —.]—*Re A SOLICITOR, Ex p. LAW SOCIETY*, No. 4509, *ante*.

4616. —.]—*Re A SOLICITOR, Ex p. LAW SOCIETY*, [1914] W. N. 148, D. C.

PART XIV. SECT. 2, SUB-SECT. 7.

4608 i. Agreement to share profit costs—Between solicitors representing conflicting interests.—It is misconduct punishable by the ct. for a solr. acting for parties in an administration action to share the profit costs of other solrs. introduced by him to act for other parties in the action, whose interests conflict with those of the introducer's clients.—*Re HEYDON* (1901), 1 S. R.

N. S. W. (L) 81.—AUS.

h. Excessive charges.—1 (1890), 8 N. Z. L. R. 617.—N.Z.

k. —.]—*Re LONDON*, [1918] N. Z. L. R. 193.—N.Z.

l. —.]—*INCORPORATED LAW SOCIETY v. FICHAT*, [1910] C. P. D. 209.—S. AF.

m. Becoming security for costs.—It is irregular for a solr. to become security

SUB-SECT. 9.—OTHER ACTS AND OMISSIONS.

4617. Keeping out of the way—To avoid service of allocatur.—Personal service of an attachment for not paying money pursuant to the master's allocatur cannot be dispensed with; but *qu.*: whether an attorney, who keeps out of the way to avoid service of the allocatur, is eligible to remain any longer on the roll.—*Re —* (1822), 1 Dow. & Ry. K. B. 529.

4618. Disobeying order of court—Order to refund money.—Where an attorney, who has been directed by the master of the ct. to refund a sum of money, disobeys the direction, & keeps out of the way, the ct. will order him to be struck off the roll.—*Re —* (1846), 10 Jur. 198.

4619. Failure to answer interrogatories.—Upon a report by the master that the matters contained in interrogatories were not answered by an attorney of this ct., the ct. may order that he be struck off the roll.—*Re HOLMES* (1848), 12 Jur. 657.

4620. Embezzlement by managing clerk.—*Re HILL*, No. 4521, *ante*.

4621. —.]—*Re DEAKIN* (1888), 5 T. L. R. 163, D. C.

4622. Failure to explain bill of sale by attesting solicitor.—*Re HAYNES, Ex p. NATIONAL MERCANTILE BANK*, No. 3559, *ante*.

4623. Use of judicial process for improper purposes.—*Re PULBROOK* (1892), 36 Sol. Jo. 867, D. C.

4624. Solicitor carrying on business of book-maker.—*Re A SOLICITOR, Ex p. LAW SOCIETY*, No. 4695, *post*.

4625. Assisting in simoniacal transaction.—*Re SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1905), 49 Sol. Jo. 686, D. C.

4626. Aiding & abetting moneylender.—*Re A SOLICITOR* (1906), 40 Sol. Jo. 481, D. C.

4627. Soliciting debt collecting business.—Upon the report of the committee of the Law Society it was found that a solr. had been cognisant of & party to the formation of a debt-collecting co., that he financed the co. & controlled its affairs with a view to its being made an adjunct or instrument for the collection of business for him as a solr., & that through the agency of the co. he systematically solicited debt-collecting business; & that in all cases where legal proceedings would have to be taken he was to receive as a commission a fixed percentage on the amount recovered, the percentage varying with the amount recovered, & in addition to such commission he also tried to obtain costs from debts in the actions so brought. The committee having found these facts to be proved, & that the solr. was guilty of professional misconduct:—*Held*: there was sufficient evidence to support the findings of the committee, & upon the facts so found the solr. was guilty of professional misconduct, & further, that as the solr. was to receive, did receive, a commission upon the amount of the debts recovered by him, he was guilty of champerty.—*Re A SOLICITOR, Ex p. LAW SOCIETY*, [1912] 1 K. B. 302; 81 L. J. K. B. 215; 105 L. T. 874; 28 T. L. R. 50; *sub nom. Re G., Ex p. LAW SOCIETY*, 56 Sol. Jo. 92, D. C.

Annotation.—*Re A Solicitor* (No. 2) (1924), 93 L. J. K. B. 761.

for costs for his client.—*BECKITT v. WRAGG* (1856), 1 Ch. Ch. 5.—CAN.

n. Undertaking to repay costs in certain event—Whether court acts summarily.—*Re HARRIS* (No. 2) (1898), 3 Terr. L. R. 105.—CAN.

PART XIV. SECT. 2, SUB-SECT. 9.

4627 i. Soliciting debt collecting business.—*INCORPORATED LAW SOCIETY v. REUTER*, [1913] T. P. D. 801.—S. AF.

Sect. 2.—What amounts to professional misconduct : Sub-sect. 9. Sect. 3: Sub-sect. 1, A., B., C. & D.; sub-sects. 2, 3 & 4, A.]

4628. —.].—*Re A SOLICITOR, Ex p. LAW SOCIETY, No. 4510, ante.*

4629. Bribery.].—A solr. who endeavours to obtain information as to unclaimed stocks & dividends of a co., by an offer to remunerate a subordinate servant of that co., in return for the information desired, is guilty of professional misconduct.—*Re C., Ex p. LAW SOCIETY (1911), 56 Sol. Jo. 93, D. C.*

4630. Deception of public—Concoction of false letter purporting to be written by condemned prisoner.].—The Statutory Committee of the Law Society found that resp. had, on Nov. 21, 1910, in the capacity of legal adviser to C., been permitted to visit him when a convict detained in his Majesty's prison, Pentonville, under sentence of death, & in abuse of the privilege thus extended to him, aided & abetted B., the editor of *John Bull*, to disseminate in that publication false information in the form of a letter purporting to have been written by C. from prison, although, as resp. well knew, no such letter in fact existed, & had further published, or permitted to be published, through the medium of *John Bull* & the *Daily Chronicle*, other false statements relating to the same matter, well knowing them to be false, whereby the public might be deceived:—*Held*: on these findings, with which the ct. agreed, resp. had been guilty of professional misconduct within Solicitors Act, 1888 (c. 65).—*Re SOLICITOR, Ex p. LAW SOCIETY (No. 25) (1911), 27 T. L. R. 535; 55 Sol. Jo. 670, D. C.*

4631. Obtaining retainer by fraud.].—A solr. was reported by a committee of the Law Society for professional misconduct, consisting in inducing a man, who called upon him for the purpose of being sworn to documents for obtaining letters of administration, to give him a retainer without informing him what it was, in keeping all the papers, & using them, with altered particulars & substituted sureties, to obtain a grant of administration. The charges having been proved, the Div. Ct. struck him off the rolls.

The Ct. of Appeal held the punishment was excessive, & reduced it to suspension for a period of five years.—*Re JENNENS (1918), 62 Sol. Jo. 351, C. A.*

4632. Obtaining administration by fraud.].—*Re JENNENS, No. 4631, ante.*

4631 i. Obtaining retainer by fraud.].—*Re SHORLAND (1893), 12 N. Z. L. R. 137.—N.Z.*

o. Threatening criminal proceedings.].—*Re GENT ONE, Re A BARRISTER (1920), 21 S. R. N. S. W. 12; 37 N. S. W. L. R. 271.—AUS.*

p. —.].—*INCORPORATED LAW SOCIETY v. MICHAU (1902), 19 S. C. 355.—S. AF.*

q. Insulting the court.].—*Re HERVEY (1811), 3 Ont. Dig. 6615.—CAN.*

r. —.].—*Re WALLACE (1866), C. R. 5 A. C. 109.—CAN.*

t. Attempting to secure preference as creditor.].—*Re AN ATTORNEY (1876), 39 U. C. R. 171.—CAN.*

a. Ignoring communication from Law Society.].—*Re HARRIS (1906), 3 W. L. R. 167.—CAN.*

b. —.].—It is reprehensible conduct for a solr. to ignore letters written to him by the Law Society with respect to complaints of clients & to treat with contempt proceedings by the Law Society begun as a result of such complaints.—*Re X. (1920), 16 Alta. L. R. 542.—CAN.*

c. Failure to abide by guarantee.].—*Re*

A SOLICITOR (1900), 45 Sol. Jo. 104.—IR.

d. Use of testimonials to obtain business.].—*Re A SOLICITOR, [1915] 11. R. 152.—IR.*

e. Sharing fees with unqualified person.].—*Ex p. VAN WONDENBERG, [1910] T. P. D. 616.—S. AF.*

f. Money-lending.].—It is not unprofessional conduct for an attorney to carry on a business of money lending in conjunction with that of his profession.—*INCORPORATED LAW SOCIETY v. ROSSOUW, [1921] T. P. D. 25.—S. AF.*

PART XIV. SECT. 3, SUB-SECT. 1. —A.

g. Necessity for affidavit.].—An appln. to strike an attorney off the roll for misconduct must be founded on an affidavit adduced on the motion.—*Ex p. PALMER (1849), 2 All. 533.—CAN.*

h. Procedure on application.].—A certificate of the clerk of the ct., on which an application under the rule of ct. is made to have the attorney struck off the rolls in another ct., should show the ground on which he was struck off. The application should also be for a rule to show cause, & should not be made on the last day of

SECT. 3.—PROCEDURE TO ENFORCE DISCIPLINE.

SUB-SECT. 1.—THE APPLICATION.

A. In General.

See Solicitors Acts, 1888 (c. 65), s. 12; 1919 (c. 56); Statutory Rules & Orders, 1924, No. 1582.

4633. Partner charged with misconduct—Application by other partner to be struck off—In order to go to the bar—Postponement of application.].—Where there is a motion pending for the taxation of a bill of two attorneys, partners, & one of them is charged with having appropriated some money to his own use improperly, the ct. postponed an application on behalf of the other partner to be struck off the rolls for the purpose of going to the bar.—*Re MARSHALL (1845), 6 L. T. O. S. 170.*

4634. Application by solicitor—Whether withdrawal allowed.].—Where a rule had been granted to strike an attorney off the roll at his own request, but it was not acted upon, & nothing was done beyond obtaining it, it was allowed to be rescinded.—*Ex p. — (1857), 5 W. R. 687.*

4635. —.].—*Ex p. HOOPER (1857), 29 L. T. O. S. 201.*

4636. Whether exhibits must be delivered with affidavits.].—*Re HUTCHINGS, Re SANDERS, VEALE v. WILLCOCKS, [1887] W. N. 254.*

Annotation:—Consd. Carter v. Roberts, [1903] 2 Ch. 312.

Absolute privilege of statements in affidavit.].—*See LIBEL & SLANDER, Vol. XXXII., p. 109, No. 1106.*

B. Who May Apply.

4637. Any person alleging misconduct—Not confined to client or person injured.].—(1) Under Solicitors Act, 1888 (c. 65), s. 13, & rules, the right to apply to the Committee of the Council of the Incorporated Law Society in respect of the misconduct of a solr. is not confined to clients or persons injured by such misconduct, but may be exercised by any person who alleges that it has taken place.

(2) On an application under Solicitors Act, 1888 (c. 65), s. 13, against a solr. who has been adjudicated bkpt., the notes of his public examination in bkpcy. signed by him may, by virtue of Bkpcy. Act, 1883 (c. 52), s. 17 (8), be used in evidence against him.—*Re A SOLICITOR (1890), 25 Q. B. D. 17; sub nom. Re SANKEY, 59 L. J. Q. B. 238; 6 T. L. R. 338; sub nom. Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY, 62*

term.—Re TREMAYNE (1864), 14 C. P. 257.—CAN.

k. Delay.].—A delay of six months is not a bar to a motion to strike off the rolls, where an unsuccessful motion for an order to compel the attorney to answer had meanwhile been made.—*Re R. A. (1890), 6 Man. L. R. 601.—CAN.*

l. To whom made.].—Where a client applies to strike the name of a solr. off the roll for misconduct in neglecting to pay over the client's money in his hands as solr., the first application should be made to a judge in ct.—*Re BRIDGMAN (1894), 16 P. R. 232.—CAN.*

m. Time for appeal.].—*EMERSON v. NEWFOUNDLAND JUDGES (1854), 3 Moo. P. C. C. 157, 14 E. R. 60.—NFLD.*

PART XIV. SECT. 3, SUB-SECT. 1.—B.

4637 i. Any person alleging misconduct—Not confined to client or person injured.].—*Re A SOLICITOR (1910), 13 W. L. R. 727.—CAN.*

4637 ii. —.].—*Re AN ATTORNEY (1913), 1. L. R. 41 Calc. 113.—IND.*

n. Client.].—*Re HARRIS & BURNE (1897), 3 Terr. L. R. 70.—CAN.*

L. T. 567; *sub nom. Re A SOLICITOR, Ex p. OFFICIAL RECEIVER*, 38 W. R. 533, C. A.

Annotation:—*Mentd. Re Atherton*, [1912] 2 K. B. 251.

C. What Affidavit must State.

See Statutory Rules & Orders, 1924, No. 1582.

4638. Direct assertion of misconduct—Not facts from which misconduct inferred.]—*Re KING*, No. 4463, *ante*.

D. No Case for Solicitor to Answer.

See, now, Statutory Rules & Orders, 1924, No. 1582.

4639. Discretion of Law Society to refuse to hear application.]—(1) Where an application is made to the committee of the council of Incorporated Law Society under Solicitors Act, 1888 (c. 65), s. 13, to require a solr. to answer allegations contained in an affidavit, & the committee are of opinion that no *prima facie* case of misconduct is made out upon the affidavit, the committee has a discretion, notwithstanding the provision of the sect. that the application "shall be heard by the committee," to refuse to take any further proceedings in the matter.

(2) As Solicitors Act, 1888 (c. 65), s. 13, preserves the right to apply to the ct. where the committee are of opinion that no *prima facie* case of misconduct is made out, & sect. 19 preserves to the ct. the right to exercise the same jurisdiction as before the Act, a writ of *mandamus* will not be granted directing the committee to hear such an application unless it can be shown that the remedy by application to the ct. is not equally convenient.

R. v. INCORPORATED LAW SOCIETY, [1895] 2 Q. B. 456; 64 L. J. Q. B. 797; 73 L. T. 187; 43 W. R. 687; 11 T. L. R. 557; 39 Sol. Jo. 692; *sub nom. R. v. INCORPORATED LAW SOCIETY, Ex p. CHAPMAN*, 15 R. 597, D. C.; *subsequent proceedings*, [1896] 1 Q. B. 327, C. A.

4640. Mandamus to compel hearing of application—Discretion of court.]—*R. v. INCORPORATED LAW SOCIETY*, No. 4639, *ante*.

Costs.]—See Nos. 4671, 4675, post.

SUB-SECT. 2.—NOTICE OF PROCEEDINGS.

See, now, Statutory Rules & Orders, 1924, No. 1582.

4641. Service of notice—When solicitor not resident in this country—At last place of residence.]—Where it was sworn that an attorney had no place of residence in this country, an order *nisi* for his being struck off the roll was permitted to be served at his last place of residence.—*Re MARK* (1834), 4 Deac. & Ch. 28.

4642. — Personal service.]—A rule *nisi* to strike an attorney off the roll after he has been struck off the rolls of the other cts. must be served personally.—*Re —* (1853), 23 L. J. Ex. 24.

SUB-SECT. 3.—THE HEARING.

See Solicitors Act, 1888 (c. 65), s. 12; & *now, Solicitors Act*, 1919 (c. 56); *Statutory Rules & Orders*, 1924, No. 1582.

PART XIV. SECT. 3, SUB-SECT. 2.

46421. Service of notice—Personal service.]—A complaint of unprofessional conduct was made against a practitioner under Legal Practitioners Act, 1893, & notice of such complaint was duly served on the practitioner, but he did not appear on the hearing of the inquiry by the Barristers' Board. An order was made for substituted service of the notice of motion to strike off the practitioner's name from the roll under sect. 25 of the Act:—*Held*: personal service of the notice of motion

was unnecessary.—*Re C.* (1918), 20 W. A. L. R. 107.—**AUS.**

o. Necessity for.]—Re ABDUL RASHID (1923), 1 L. R. 4 Lah. 271.—**IND.**

*p. Four clear days.]—*Before a motion can be made to compel a solr., or other officer, to answer a petition complaining of his conduct, he must be four days served with it.—*PITCAIRN v. WOODROFFE* (1824), 2 Mol. 353.—**IR.**

PART XIV. SECT. 3, SUB-SECT. 3.

q. Postponement of hearing.]—EMER-

4643. Composition of committee—Quorum required.]—*Re A SOLICITOR* (1902), 46 Sol. Jo. 466, C. A.

4644. Procedure of committee—Previous procedure adopted.]—*PRACTICE NOTE* (1921), 66 Sol. Jo. 158.

4645. — Findings & orders pronounced in open court.]—*PRACTICE NOTE* (1921), 66 Sol. Jo. 158.

4646. — Solicitor's name mentioned—When order made for striking off or suspension.]—*PRACTICE NOTE* (1921), 66 Sol. Jo. 158.

4647. Private compromise of charges of misconduct—Whether permissible.]—Where serious charges of misconduct against an attorney are brought before the ct. of which he is a member, the ct. will not permit any private arrangement of it to be made between the parties, but will require that such misconduct be fully explained to the satisfaction of the ct.—*Re —* (1863), 9 L. T. 299.

4648. Postponement of hearing—For solicitor to answer.]—*Ex p. INCORPORATED LAW SOCIETY* (1888), *Times*, Oct. 27, D. C.

4649. — Pending appearance before justices.]—A solr. was charged before justices & remanded, & he applied to the Div. Ct. that the report of the Statutory Committee on a charge of professional misconduct might stand out of their lordship's list, on the ground that a decision might prejudice his fair trial:—*Held*: the application should be granted, on the solr. giving an undertaking in writing not to practise until the report had been dealt with by the ct.—*Re SOLICITOR, Ex p. LAW SOCIETY* (1907), 51 Sol. Jo. 212, D. C.

4650. Evidence—Bankrupt solicitor—Admissions made on public examination.]—*Re A SOLICITOR*, No. 4637, *ante*.

4651. — Right of committee to documents impounded by court.]—*Re A SOLICITOR* (1891), 8 T. L. R. 1, D. C.

SUB-SECT. 4.—APPEALS.

A. To Divisional Court.

See, now, Solicitors Act, 1919 (c. 56), s. 8; *Statutory Rules & Orders*, 1923, No. 329.

4652. Attitude of court towards findings of committee—Whether court bound.]—*Re CROWDY, Ex p. INCORPORATED LAW SOCIETY* (1895), 11 T. L. R. 406, D. C.

Annotation:—*Refd. Re Davies* (1898), 14 T. L. R. 161.

4653. — — —.]—*Re DAVIES* (1898), 14 T. L. R. 332, C. A.

4654. — Great weight attached to findings.]—*Re DAVIES* (1898), 14 T. L. R. 332, C. A.

4655. — — —.]—(1) A claim was made before the committee of the Law Society against applt., who was a solr., that he had made payments to a clerk in the employment of resp., the Public trustee, as an inducement & reward for the introduction of clients to applt., & that in making such payments applt. was acting detrimentally to the public service. The committee suspended applt. from practice for two years & applt. ap-

v. NEWFOUNDLAND JUDGES (1854), 8 Moo. P. C. C. 157; 14 E. R. 60.—**NFLD.**

*r. Misconduct consisting of conviction of offence—Conviction cannot be questioned.]—*In disciplinary proceedings taken against a member of the legal profession on account of his being convicted of some offence it is not open to the person against whom such proceedings are taken to question the propriety of his conviction.—*Re TASADDUQ AHMAD KHAN SHERWANI* (1922), 1 L. R. 44 All. 352.—**IND.**

Sect. 3.—Procedure to enforce discipline: Sub-sect. 4, A. & B.; sub-sect. 5. Sect. 4.]

pealed to a Div. Ct. under Solicitors Act, 1919 (c. 56), s. 8:—*Held*: although the sect. gave an appeal which under the rules was in the nature of a rehearing, there was nothing to entitle the ct. to interfere with the decision of the committee.

(2) It is right that this ct. should pay the greatest attention not only to the findings of the committee under this Act, but also & not least, to the mode in which that experienced body has exercised its discretion (LORD HEWART, C.J.).—*Re A SOLICITOR* (No. 2) (1924), 93 L. J. K. B. 761; 131 L. T. 155; 40 T. L. R. 685; 68 Sol. Jo. 756, D. C.

4656. — Exercise of discretion by committee.]—*Re A SOLICITOR* (No. 2), No. 4655, *ante*.

4657. Whether appeal lies—No *prima facie* case made out before committee.]—If the affidavit discloses no *prima facie* case there is no need that the committee should take any other step. This does not preclude an appeal to the ct.; for appct. is at liberty to apply to the ct., although the committee are of opinion that there is no *prima facie* case of misconduct made out, on which point they are the sole judges (LORD ESHER, M.R.).—*R. v. INCORPORATED LAW SOCIETY*, [1896] 1 Q. B. 327; 65 L. J. Q. B. 326; 74 L. T. 67; 44 W. R. 307; 12 T. L. R. 191; 40 Sol. Jo. 261, C. A.

4658. Nature of the appeal—Under Solicitors Act, 1919 (c. 56)—Re-hearing.]—*Re A SOLICITOR* (No. 2), No. 4655, *ante*.

4659. Stay of publication of effect of order in London Gazette—Pending appeal—Jurisdiction of court.]—The ct. has jurisdiction to direct a stay, pending appeal, of the publication in the *London Gazette*, required by Solicitors Act, 1919 (c. 56), s. 7 (2) of the effect of an order made by the committee of the Law Society suspending a solr. from practice.

Wherever practicable, an application for such a stay should in the first instance, be made to the committee.—*Re A SOLICITOR*, [1924] 1 K. B. 699; 93 L. J. K. B. 478; 131 L. T. 136; 40 T. L. R. 420.

4660. — Application to be made to committee in first instance—Where practicable.]—*Re A SOLICITOR*, No. 4659, *ante*.

B. To Court of Appeal.

Sec. now, Solicitors Act, 1919 (c. 56), s. 8; Statutory Rules & Orders, 1923, No. 329.

4661. Not an appeal in “criminal cause or matter.”]—When the High Ct. makes an order ordering a solr. to be struck off the rolls for misconduct, it does so in exercise of a disciplinary jurisdiction over its own officers & not of a jurisdiction in any criminal cause or matter within Jud. Act, 1873 (c. 66), s. 47, & therefore an appeal lies from such order to the Ct. of Appeal.—*Re HARDWICK* (1883), 12 Q. B. D. 148; 53 L. J. Q. B. 64; 49 L. T. 584; 32 W. R. 191, C. A.

Annotations.—*Apld. Re Bradford* (1883), 15 Q. B. D. 635. *Distd. Re Grayston, Re Wall* (1888), 4 T. L. R. 772. *Apld. Godfrey v. George*, [1896] 1 Q. B. 48, *Seldon v. Wilde*, [1911] 1 K. B. 701.

4662. —.]—By Attorneys & Solicitors Act, 1843 (c. 73), s. 32 a solr., who (*inter alia*) permits

his name to be used in any action upon the account or for the profit of an unqualified person may upon complaint made be struck off the roll, & the unqualified person may be committed to prison for any term not exceeding one year. An order having been made by a Div. Ct. under the above sect. striking a solr. off the roll:—*Held*: the order was not made in a “criminal cause or matter” within Jud. Act, 1873 (c. 66), s. 47, & the Ct. of Appeal had therefore jurisdiction to entertain an appeal by the solr. from the order.—*Re EEDE* (1890), 25 Q. B. D. 228; 59 L. J. Q. B. 376; 6 T. L. R. 349; *sub nom. Re EEDE, Ex p. DAVY*, 38 W. R. 683, C. A.

4663. When security for costs to be given—Appeal against order striking solicitor off rolls.]—A solr. who appealed from an order striking him off the roll, & directing an account & payment of moneys due from him to clients of his who obtained the order, was directed to give security for costs, it being shown that he was in insolvent circumstances.

Qu.: whether security for costs would have been required if the solr. had appealed only against an order striking him off the roll.—*Re STRONG* (1885), 31 Ch. D. 273; 55 L. J. Ch. 506; 54 L. T. 219; 31 W. R. 420, C. A.

Annotation:—*Reid. Hood Barrs v. Herlot*, [1896] 2 Q. B. 375.

4664. — & against order directing account & refund of money.]—*Re STRONG*, No. 4663, *ante*.

4665. When appeal lies—Fresh evidence appearing—Not before committee.]—*Re A SOLICITOR, Ex p. INCORPORATED LAW SOCIETY* (1901), 45 Sol. Jo. 640, C. A.

SUB-SECT. 5.—COSTS.

Sec. now, Statutory Rules & Orders, 1924, No. 1582.

4666. Costs of proceedings—Where solicitor exonerated—Application made *bona fide*.]—Although a rule calling on an attorney to answer the matters of an affidavit is discharged; yet, if there were reasonable & probable grounds for moving for it, the ct. will not give costs to the attorney.—*DOE d. THWAITES v. ROE* (1823), 3 Dow. & Ry. K. B. 226; 1 L. J. O. S. K. B. 245.

4667. —.]—*Re AN ATTORNEY*, No. 4424, *ante*.

4668. —.]—*Re NEALE, Ex p. NEALE, SAME v. SAME* (1893), 10 T. L. R. 18; *sub nom. Re N., Ex p. N.*, 38 Sol. Jo. 28, D. C.

4669. —.]—*Re MOORE, Ex p. INCORPORATED LAW SOCIETY OF LIVERPOOL* (1884), 29 Sol. Jo. 50, D. C.

4670. —.]—R. made charges of professional misconduct against L., a solr., to the Incorporated Law Society. The statutory committee, created by Solicitors Act, 1888 (c. 65), s. 12, investigated the matter, & found that the charges had not been made out. The report embodying the finding was duly filed, & the society took no further step. L. applied to the ct. for an order against R. for the costs of his defence:—*Held*: there was jurisdiction to make

PART XIV. SECT. 3, SUB-SECT. 4.—B.

1. Reluctance to interfere with lower court's decision.]—*Re QUARRY* (1879), 1 L. R. 2 All. 511; L. R. 7 Ind. App. 6.—IND.

a. Whether appeal allowed.]—Disciplinary proceeding under clause 10 of Letter Patent are not appealable under clause 39 & High Ct. had no power to give leave to appeal to Privy

Council from an order passed in exercise of such jurisdiction.—*K. R. RAMCHANDRA AYYAR v. VAKILS' ASSOCN. (PRESIDENT) HIGH COURT, MADRAS* (1915), 1 L. R. 39 Mad. 128.—IND.

PART XIV. SECT. 3, SUB-SECT. 5.

b. Costs in favour of solicitor — Where solicitor exonerated.]—If com-

plaints of unprofessional conduct are made against an attorney it is the duty of the Law Society carefully to investigate such complaints before bringing them into ct.

Where a Law Society without sufficient investigation brought charges against attorneys which it failed to prove the ct. ordered the Society to pay the costs of the action.—LAW

the order.—*Re L., Ex p. R.* (1892), 40 W. R. 321 ; 36 Sol. Jo. 296, C. A.

4671. ———.]—By Solicitors Act, 1888 (c. 65), s. 13, an application to strike the name of a solr. off the roll or to require him to answer allegations in an affidavit is to be heard by a committee of the Incorporated Law Society, who are to embody their finding in a report to the High Ct., & the report is to have the same effect & to be treated by the ct. in the same manner as a report of a master of the ct., & the ct. may make such order thereon as to the ct. may seem fit.

Upon an application against a solr. under s. 13, founded on charges of misconduct, the committee of the Incorporated Law Society, after hearing the case, made a report to the Ct. exonerating the solr. from the charges affecting him:—*Held*: the ct. had jurisdiction to order appct. to pay the solr. his costs of the inquiry before the committee.—*Re LILLEY*, [1892] 1 Q. B. 759 ; 61 L. J. Q. B. 311 ; *sub nom. Re LILLEY, Ex p. RONEY*, 66 L. T. 270 ; 8 T. L. R. 377, C. A.

Annotation:—*Re A Solicitor, Ex p. Incorporated Law Soc.* (1903), 19 T. L. R. 368.

4672. ———.]—*Re NEALE, Ex p. NEALE, SAME v. SAME* (1893), 10 T. L. R. 18 ; *sub nom. Re N., Ex p. N.*, 38 Sol. Jo. 28, D. C.

4673. ———.]—*Re A SOLICITOR* (1898), 42 Sol. Jo. 689.

4674. ———.]—*No primâ facie case made out.*—*Re W., Ex p. W.* (1892), 37 Sol. Jo. 68, D. C.

4675. ———.]—*Re L., Ex p. R.*, No. 4670, *ante*.

4676. ———.]—*How application for costs made—To Divisional Court.*—Where a solr. has been exonerated from charges brought against him on an inquiry before the Committee of the Incorporated Law Society, under Solicitors Act, 1888 (c. 65), s. 13, an application by him for the costs of the inquiry must be made to the Div. Ct., & not to a judge at chambers.—*Re DAVIDSON, Ex p. DAVIDSON*, [1899] 2 Q. B. 103 ; 68 L. J. Q. B. 836 ; 81 L. T. 182, D. C.

4677. ———.]—*Whether to judge in chambers.*—*Re DAVIDSON, Ex p. DAVIDSON*, No. 4676, *ante*.

4678. ———.]—*Where solicitor struck off rolls.*—*Re S., Ex p. INCORPORATED LAW SOCIETY* (1896), 40 Sol. Jo. 390, D. C.

4679. ———.]—*Where solicitor suspended—Although appeal against suspension allowed.*—*Re HALL-WRIGHT* (1911), 55 Sol. Jo. 238, C. A.

4680. ———.]—*Action on order to pay costs—Notwithstanding unsuccessful application to attach solicitor for disobeying order—Application by person to whom costs awarded.*—An action will lie upon an order of the ct. by which a solr. is ordered to pay the costs of an application to strike him off the rolls, notwithstanding the fact that an unsuccessful application to attach him for disobedience to the order has been made by the

person to whom he was ordered to pay the costs.—*GODFREY v. GEORGE*, [1896] 1 Q. B. 48 ; 65 L. J. Q. B. 249 ; 73 L. T. 599 ; 44 W. R. 245 ; 40 Sol. Jo. 117, C. A.

Annotations:—*Consd. Seldon v. Wilde*, [1911] 1 K. B. 701. *Refd. Pritchett v. English & Colonial Syndicate*, [1899] 2 Q. B. 428 ; *Furber v. Taylor*, [1900] 2 Q. B. 719 ; *Ivimey v. Ivimey*, [1908] 2 K. B. 260 ; *Savill v. Dalton*, [1915] 3 K. B. 174.

SECT. 4.—RE-ADMISSION.

4681. Dependent on grounds for striking off—Grounds must be disclosed to court.—*Ex p. BARROW* (1882), 17 L. Jo. 49, D. C.

4682. ———.]—*Conviction for indictable offence.*—A conviction for a conspiracy to extort money by means of libel is a sufficient ground for not permitting an attorney to be readmitted.—*Re HAWDENE* (1811), 9 Dowl. 970 ; 5 Jur. 508.

4683. ———.]—*Re A SOLICITOR* (1881), 70 L. T. Jo. 370, D. C.

4684. ———.]—*Re A SOLICITOR* (1882), 73 L. T. Jo. 216.

4685. ———.]—*Re ABINGER* (1914), 49 L. Jo. 472.

4686. ———.]—*Subsequent pardon—Inexperienced solicitor.*—Attorney who had been struck off the rolls on conviction for seditious practices, & was afterwards pardoned, not allowed to be restored to the roll on ground of want of experience.—*Ex p. FROST* (1815), 1 Chit. 558, n. *Annotations*:—*Appl. Ex p. Billings* (1836), 5 Dowl. 395, *Ex p. Rudge* (1843), 7 Jur. 531.

4687. ———.]—*BARBER'S CASE* (1855), cited in 60 L. J. Q. B. at p. 502 ; 64 L. T. at p. 740. *Annotation*:—*Fold. Re Brandreth* (1891), 60 L. J. Q. B. 501.

4688. ———.]—*Subsequent good conduct.*—In the year 1847, A. was found guilty of forgery, but judgment was respited on the ground that the judge had received evidence which was inadmissible, viz. admissions which prisoner had been compelled to make when under examination as a witness in an action in the Ct. of Q. B. ; & he in consequence received a free pardon. In 1849, A. was struck off the roll for perjury in an affidavit of increase. The ct. refused in 1856 to re-admit him to the roll, although he produced very strong affidavits & testimonials as to his conduct since 1849.—*Re GARBETT* (1856), 18 C. B. 403 ; 139 E. R. 1425.

4689. ———.]—The ct. has power, even when it is proved that a conviction for an offence against the criminal law has taken place, but where the atonement of a long period of good conduct has been offered, to restore a solr. to the roll.—*Re BRANDRETH* (1891), 60 L. J. Q. B. 501 ; 64 L. T. 739 ; 39 W. R. 687, D. C.

4690. ———.]—*Misconduct—Effect of lapse of time.*—*Re HALLEY* (1844), 3 L. T. O. S. 102.

4691. ———.]—*Subsequent good conduct.*—*Re* ——— (1845), 6 L. T. O. S. 170.

SOCIETY OF CAPE OF GOOD HOPE v. FRANK & WARSHAW, [1921] C. P. D. 169.—S. AF.

c. Costs against solicitor.—*Re HOLLAND* (1842), 6 O. S. 441.—CAN.

PART XIV. SECT. 4.

4682 i. *Dependent on grounds for striking off—Conviction for indictable offence.*—*Re W. S. K.*, [1927] 2 D. L. R. 380 ; 59 N. S. R. 250.—CAN.

4691 i. ———.]—*Misconduct—Effect of lapse of time—Subsequent good conduct.*—*Ex p. MEAGHER* (1920), 20 S. R. N. S. W. 245 ; 37 N. S. W. N. 74.—AUS.

4691 ii ———.]—*Re MACNAMARA* (1883), 9 P. R. 497.—CAN.

4691 iii. ———.]—*Re LAW SOCIETY ACT & B.*, [1923] 3 W. W. R. 558 ; [1923] 4 D. L. R. 1202 ; 33 Man. L. R. 298.—CAN.

4691 iv. ———.]—*VARLEY*, [1924] 3 W. W. R. 552 ; [1924] 4 D. L. R. 852 ; 20 Alta. L. R. 585.—CAN.

4691 v ———.]—*Re E.* (Alta.), [1924] 3 W. W. R. 562 ; [1924] 4 D. L. R. 873.—CAN.

4691 vi. ———.]—*Re LONDON*, [1926] N. Z. L. R. 656.—N.Z.

4691 vii. ———.]—Where an attorney has been convicted of misappropriating trust funds & been struck off the roll a considerable period

must elapse before the ct. will reinstate him. After a lapse of three & a half years an attorney whose name had been removed from the roll for the above reason applied for reinstatement. The Law Society opposed, & laid before the ct. facts which tended to show that the attorney had been guilty of further improper dealings with trust funds at or about the date of his conviction:—*Held*: the application must be refused.—*LAMBERT v. INCORPORATED LAW SOCIETY*, [1910] T. P. D. 77.—S. AF.

4691 viii. ———.]—*BADENHORST v. LAW SOCIETY OF CAPE OF GOOD HOPE*, [1918] C. P. D. 224.—S. AF.

Sect. 4.—Re-admission. Sect. 5: Sub-sects. 1, 2 & 3. Part XV. Sects. 1 & 2: Sub-sect. 1.]

4692. ———. ———.]—A solr. who had been struck off the roll for misconduct, restored, after a lapse of ten years, during which, amidst great privation & suffering, he had maintained an irreproachable character, the application being supported by a memorial signed by a very large number of solrs. & not opposed by the Law Institution, though opposed by one individual solr. only.—ANON. (1853), 17 Beav. 475; 51 E. R. 1118.

4693. ———. ———.]—An attorney having been struck off the roll in Easter Term, 1859, for misappropriating to his own use money received from a client for a particular purpose, the ct., in Hilary Term, 1865, allowed his name to be restored to the roll, on affidavits of numerous attorneys to his good character & conduct in the interval.—*Re* ROBINS (1865), 34 L. J. Q. B. 121; 11 Jur. N. S. 504.

4694. ———. ———. **Efforts to make restitution.]**—Where an attorney has been struck off the roll for a fraudulent misappropriation of moneys of a client intrusted to him for investment, it is a condition precedent to his being restored that he should have made full restitution, or, at least, all the restitution in his power.—*Re* POOLE (1869), L. R. 4 C. P. 350; 17 W. R. 735; *sub nom. Ex p. POOLE*, 38 L. J. C. P. 216.

4695. ———. ———. **Abandonment of unprofessional occupation.]**—Resp., a solr., who had ceased to practice in 1898 & had not since taken out a certificate, carried on the business of a book-maker, & in the course of his business had sent circulars to a minor, a married woman, & a bank manager:—*Held*: resp. had been guilty of conduct unworthy of a member of the profession, & must be struck off the rolls, but it would be open to him if he *bonâ fide* abandoned the business to apply to the master of the Rolls for reinstatement.—*Re* A SOLICITOR, *Ex p. LAW SOCIETY* (1905), 93 L. T. 838; 22 T. L. R. 127; 50 Sol Jo. 113.

4696. ———. **Offence under Solicitors Act, 1843 (c. 73), s. 32.]**—*Re* LAMB, No. 4455, *ante*.

4697. ———. **Contempt of court—Insulting judge—Necessity for apology in court.]**—PARKER'S CASE (1678), 1 Vent. 331; 86 E. R. 214.

Annotation:—*Refd. R. v. York Corpn.* (1812), 3 Q. B. 550.

———. **Striking off at own request.]**—*See* Part II., Sect. 5, *ante*.

SECT. 5.—STRIKING OFF ROLL AT OWN REQUEST.

SUB-SECT. 1.—IN GENERAL.

4698. Attorney may be struck off.]—An attorney may, at his own request, be struck off the roll.—KIDWELL'S CASE (1736), Lee *temp.* Hard. 232; 95 E. R. 149.

4699. ———.]—*Re* TOMLINS (1852), 20 L. T. O. S. 69.

4700. ———.]—*Re* CLEMENT DALE (1856), 27 L. T. O. S. 187.

4701. ———.]—*Re* JAMES (1856), 27 L. T. O. S. 173.

4702. ———.]—*Ex p. HIGGINS* (1858), 31 L. T. O. S. 180.

4694 i The name of appct., which was in June, 1911, struck off the rolls of barristers & solrs., for misconduct, was restored less than three years later, upon evidence of his good conduct & of his having made restitution of moneys improperly used by

him.—*Re* HARRIS (1914), 28 W. L. R. 671; 7 Alta. L. R. 272; 17 D. L. R. 103; 6 W. W. R. 628.—CAN.

4694 ii ———.]—*Re* STAFFE (1883), 1 N. Z. L. R. C. A. 362.—N.Z.

4694 iii.

4703. Grounds for striking off—Intention of call to the bar.]—*Re* TOULMAN, *Re* SIMPSON (1844), 2 L. T. O. S. 309.

4704. ———.]—*Ex p. SMITH* (1844), 4 L. T. O. S. 100.

4705. ———.]—*Re* ——— (1849), 12 L. T. O. S. 403.

4706. ———.]—*Re* ——— (1849), 13 L. T. O. S. 97.

4707. ———. **Appointment as Chancery master.]**—*Ex p. PHILPOTS* (1845), 4 L. T. O. S. 319.

4708. ———.]—*Re* HUME (1852), 20 L. T. O. S. 70.

4709. Postponement of application—Pending proceedings against partner for misappropriation.]—*Re* MARSHALL, No. 4633, *ante*.

SUB-SECT. 2.—WHAT APPLICANT MUST SHOW.

See Statutory Rules & Orders, 1924, No. 1582.

4710. No other reason for application.]—The ct. will not strike a solr. off the roll at his own request without an affidavit, that there is no other reason for the application.—*Ex p. OWEN* (1801), 6 Ves. 11; 31 E. R. 913, L. C. *Annotation*:—*Refd. Re Strong* (1886), 55 L. T. 3.

4711. ———.]—A solr. not to be struck off the roll at his own request without an affidavit, that there is no other reason for the application.—*Ex p. FOLEY* (1802), 8 Ves. 33; 32 E. R. 262, L. C.

4712. No proceedings pending against him.]—Attorney cannot be struck off the roll on his own motion, though he has never practised, without an affidavit that no proceedings are pending against him for misconduct.—ANON. (1815), 1 Chit. 557, n.

4713. ———.]—If an attorney wish to take his name off the rolls of the ct., he must swear not only that no proceedings are depending against him for misconduct, but also that he does not expect that any are about to be instituted.—*Ex p. JONES* (1824), 2 L. J. O. S. K. B. 151.

4714. ———.]—Where an attorney applies to be struck off the roll at his own request, he must not only swear that no proceedings are pending against him but also that he expects none.—*Ex p. GRAY* (1841), 9 Dowl. 336.

Annotation:—*Refd. Re Strong* (1886), 55 L. T. 3.

4715. No proceedings expected against him.]—*Ex p. JONES*, No. 4713, *ante*.

4716. ———.]—*Ex p. GRAY*, No. 4714, *ante*.

4717. ———.]—It is necessary that the affidavit made on a motion to strike off an attorney at his own request, should state that he does not expect any proceedings to be taken against him.—ANON. (1841), 5 Jur. 25.

4718. ———.]—Upon an application by an attorney to be struck off the roll, the affidavit must state his belief that no application is likely to be made against him.—*Ex p. SHOOBRIDGE* (1856), 27 L. T. O. S. 83; 4 W. R. 526.

4719. Whether reason must be stated.]—When an attorney applies to be struck off the roll, he should state his reason for so doing.—*Ex p. MISSING* (1837), Will. Woll. & Dav. 73.

4720. ———.]—ANON. (1837), 1 Jur. 104.

4721. ———.]—The object an attorney has for being struck off the roll need not be stated on the affidavit in support of his application for that

WILCOCKS, [1920] T. P. D. 243.—S. AF.

PART XIV. SECT. 5, SUB-SECT. 1.

d. Necessity for grounds.]—Some reason should be given for striking an attorney off the roll, even on his own application.—*Ex p. McCULLEY* (1842), 1 Kerr. 521.—CAN.

purpose.—*Ex p.* CHARNOCK (1839), 1 Will. Woll. & H. 548 3 Jur. 23.

4722. —.] — On an application by an attorney to have himself struck off the rolls, the affidavit need not state the ground on which he applies.—*Ex p.* BURRELL (1847), 11 Jur. 1062.

4723. That certificate has been taken out—Affidavit stating that solicitor has been duly admitted—& that no proceedings pending or expected against him.]—Where an attorney, desirous of

being struck off the roll at his own request, states in his affidavit that he has been duly admitted, & that proceedings had neither been commenced nor were pending against him, it is not necessary to state that he has also taken out his certificate.—*Ex p.* PARTRIDGE (1840), 4 Jur. 681.

SUB-SECT. 3.—RE-ADMISSION.

See Part II., Sect. 5, *ante*.

Part XV.—Unqualified Persons.

SECT. 1.—IN GENERAL.

See Solicitors Act, 1843 (c. 73), s. 2.

4724. Who is unqualified person—Person regularly admitted who neglects to take out certificate.]—*Re* HODGSON & ROSS, No. 4763, *post*.

4725. —.]—An attorney who practices in the county ct. after having omitted for a year to take out his certificate is not liable to penalties under 12 Geo. 2, c. 13, s. 7, as a person practising in the county ct. without having been legally admitted according to 2 Geo. 2, c. 23.—*HODKINSON v. MAYER* (1837), 6 Ad. & El. 194; 1 Nev. & P. K. B. 397; 112 E. R. 73; *sub nom.* *HODKINSON v. MAYER*, Will. Woll. & Dav. 15; 6 L. J. K. B. 113; 1 J. P. 135.

4726. Qualified person carrying on business in name of unqualified person—Right to recover costs.]—*WILLIAMS v. VERE* (1894), 10 T. L. R. 477.

4727. Prosecution of unqualified person by Law Society—Disqualification of registrar—Magistrate a member of Law Society.]—On the hearing of a summons for falsely pretending to be a solr. contrary to Attorneys & Solicitors Act, 1871 (c. 68), s. 12, a magistrate who was a practising solr. & an ordinary member of the Incorporated Law Society sat & adjudicated. The proceedings were taken by the council of the Incorporated Law Society who alone had power to direct prosecutions, ordinary members having no control over the proceedings of the society. On the argument of an order *nisi* for a certiorari to quash the conviction:—*Held*: the circumstances did not show any probability of bias on the part of the magistrate, he was not disqualified by his membership of the Incorporated Law Society either as having a pecuniary interest in the proceedings or as being a prosecutor & therefore he was justified in adjudicating.—*R. v. BURTON*, *Ex p.* YOUNG, [1897] 2 Q. B. 468; 66 L. J. Q. B. 831; 77 L. T. 364; 61 J. P. 727; 46 W. R. 127; 13 T. L. R. 587; 41 Sol. Jo. 748; 18 Cox, C. C. 647, D. C.

PART XV. SECT. 1.

a. Right to lien on documents.]—An agent, not being an attorney, conducting an appeal to the Comrs. of Land Tax, has not a lien upon documents of his principal coming into his hands, for his charges in respect of such appeal.—*WATSON v. CLINCH*, *SAME v. SAME* (1879), 5 V. L. R. (L.) 278.—AUS.

f. Right to practise in Supreme Court—Land agent.]—A land agent, not being a barrister or solr., has no right to practise in the Supreme Ct., whether under Land Registry Act, or otherwise.—*Re JOHNSTONE* (1888), 1 B. C. R. pt. 2, 334.—CAN.

g. Summary jurisdiction of court.]—The summary jurisdiction of the ct.

over solrs. is not confined to those who are *de jure* such, but extends also to those who assume to act as solrs. without having the necessary qualifications.—*Re HAGEL* (1912), 21 W. L. R. 450; 22 Man. L. R. 746; 3 D. L. R. 706.—CAN.

PART XV. SECT. 2, SUB-SECT. 1.

h. Attorneys Act, s. 13—Effect of.]—The above sect. is intended to prevent persons from setting themselves up as attorneys, not from drawing agreements incidentally in the course of their ordinary business.—*Re HASLINGDEN*, *Ex p.* MANBY (1877), Knox, 416.—AUS.

k. —.]—What amounts to breach of.]—It is no breach of above enact-

Solicitor struck off roll—Failure to disclose disqualification to solicitor employer.]—See Solicitors Act, 1928, (c. 22), s. 2 (1).

SECT. 2.—WHAT ACTS PROHIBITED.

SUB-SECT. 1.—IN GENERAL.

4728. General rule—Actual acting as solicitor.]—*Re COOK* (1846), 6 L. T. O. S. 353.

4729. —.]—S., who carried on the business of an accountant, was instructed to collect a debt. Failing to recover the money he issued a writ which purported to be issued by Smale, a solr., but it was not signed by or on behalf of a solr. as required by R. S. C., Ord. 5, r. 7, & the address for service given upon the writ was the address of S.

After the writ was served, & after the summons had been taken out to stay proceedings on the ground that Ord. 5, r. 7, had not been complied with, S. telegraphed to Smale, who was in London, asking for a reply that the writ was issued with his authority & privity. Smale replied that it was issued with his authority & privity, being under the impression that S. was acting as clerk to a solr., in whose service S. had formerly been, & with whom he had previously had transactions as his agent.

The Incorporated Law Society obtained a rule calling upon S. to show cause why a writ of attachment should not issue against him for contempt of ct. for having acted as a solr. contrary to Solicitors Act, 1843 (c. 73), s. 2, & Solicitors Act, 1860 (c. 127), s. 26:—*Held*: there was not sufficient evidence to show that S. had put himself forward as actually acting as a solr., & on that ground alone the rule would be discharged upon S. paying all the costs.—*DOCKINGS v. VICKERY*, *Re SYMONS* (1882), 46 L. T. 139, D. C.

4730. Acting in own name as qualified solicitor.]—*Re SIMMONS*, No. 4741, *post*.

4731. Threatening proceedings under Solicitors

ment to charge a fee for drawing up an agreement for the sale of the furniture & goodwill of a hotel, by which also the person, a hotel keeper & an attorney, drawing it purported, as agent for the owner of the premises, to let the premises to the purchaser.—*Re WAYTH* (1879), 5 V. L. R. (L.) 389.—AUS.

l. —.]—It is an offence under above Act for an unauthorised person in expectation of a fee, to draw a bkpcy. petition & statement of affairs.—*Re RATCLIFFE* (1892), 13 N. S. W. L. R. 194.—AUS.

m. Unqualified person drawing deed for another unqualified person.]—An unqualified person, who draws a legal instrument for or in expectation of

Sect. 2.—What acts prohibited: Sub-sects. 1, 2, 3 & 4. Sect. 3: Sub-sects. 1 & 2, A.]

Acts.]—S., a partner in a firm of coal merchants, wrote to A., who owed the firm for coals, a notice, signed by himself, headed, "Final notice before proceeding in county ct. Unless you pay the sum of 22s. 6d. to the firm of, etc., I shall proceed against you under the above Act":—*Held*: the justices were wrong in convicting S. of pretending to be a solr. contrary to Solicitors Act, 1875 (c. 68), s. 12.—*SYMONDS v. INCORPORATED LAW SOCIETY* (1884), 49 J. P. 212, D. C.

4732. —.—*B.*, an agent, who used to issue county ct. summonses for people, was authorised by V. to write to a debtor of V. for payment. B. sent a notice, signed by himself, in these words: "County cts. Unless the sum of £1 15s. 6d. due to V. is paid, I shall proceed against you under the above Acts." The real debt due to V. was only £1 6s. B. being summoned under Solicitors Act, 1875 (c. 68), s. 12:—*Held*: the magistrate was right in dismissing the summons, as there was no evidence that B. pretended, etc., to act as a solr.—*INCORPORATED LAW SOCIETY v. BEDFORD* (1885), 49 J. P. 215; 1 T. L. R. 358, D. C.

4733. Issuing writ.]—Re INCORPORATED LAW SOCIETY'S APPLICATION (1885), 1 T. L. R. 354, D. C.

4734. Entering appearance in action.]—Re HALL, Ex p. INCORPORATED LAW SOCIETY, No. 4769, post.

4735. Giving notice of appearance to writ.]—An unqualified person who gives, as agent for deft in an action, the notice of appearance to the writ required by R. S. C., Ord. 12, r. 9, to be given by deft. to pltf. or his solr. is thereby acting in contravention of Solicitors Act, 1843 (c. 73), s. 2, which prohibits any unqualified person from "acting as a solr." or "carrying on any proceeding" in the superior cts.—*Re AINSWORTH, Ex p. LAW SOCIETY*, [1905] 2 K. B. 103; 92 L. T. 652; *sub nom. Re AINSWORTH, Ex p. INCORPORATED LAW SOCIETY*, 74 L. J. K. B. 462; 53 W. R. 533; 49 Sol. Jo. 403, D. C.

Annotation:—Reid. Kinnell v. Harding, Wace, [1918] 1 K. B. 405.

4736. Applying for decree absolute.]—DAVIES v. DAVIES, Re WATTS, No. 4772, post.

4737. Agent employed by company to institute proceedings in county court.]—A co., incorporated under Companies (Consolidation) Act, 1908 (c. 69), may lawfully employ an agent, who is not a solr., to institute proceedings in the county ct. & file the necessary praecipe on its behalf &, with the leave of the judge, to represent it in ct.

The ancient rule that a corp'n. can only act by attorney, which involved an appointment under the seal of the corp'n. does not extend to prevent joint stock cos. from issuing process in the county ct. as ordinary individuals can do, seeing that they are liable to comply with all the provisions of the county ct. rules, & without appointing any attorney under their common seal to do these acts for them.—*KINNELL (CHARLES P.) & Co. v. HARDING, WACE & Co.*, [1918] 1 K. B. 405; 87

a fee or reward to be paid to another unqualified person, is not punishable under Legal Practitioners Act, 1898, s. 40.—*Re CROWLEY* (1899), 20 N. S. W. L. R. 150; 15 N. S. W. W. N. 263.—**AUS.**

*n. Supreme Court Act, 1890, s. 261—Construction of.]—*The above sect. prohibiting unqualified persons from drawing or preparing for any fee, gain, or reward "any conveyance or other deed or instrument in writing relating to any real estate," is confined

in its operation to something akin in its nature to what is commonly known as conveyancing.—*Re SIMPSON & FRICKE, Ex p. ROBINSON*, [1910] V. L. R. 177.—**AUS.**

PART XV. SECT. 2, SUB-SECT. 2.

*o. Attorney without practising certificate signing consent in name of another attorney.]—*Where H., an attorney who had ceased practising, signed to a consent for judgment the

L. J. K. B. 342; 118 L. T. 429; 34 T. L. R. 217; 62 Sol. Jo. 267, C. A.

SUB-SECT. 2.—ACTING IN NAME OF QUALIFIED PERSON.

4738. Prohibition against acting in name of qualified solicitor.]—Re JAQUES, No. 4774, post.

4739. —.—*Re JACKSON & WOOD, No. 4762, post.*

4740. —.—*Re WHITMARSH* (1883), 27 Sol. Jo. 683, D. C.

4741. —.—*Every person who acts as a solr. contrary to Solicitors Act, 1843 (c. 73), s. 2, is liable to attachment for contempt of ct. under Solicitors Act, 1860 (c. 127), s. 26, whether he so acts in the name of any other person or in his own name, unless such person be duly qualified. Although the ct. will generally adopt the findings of the master as to such conduct, his report is not conclusive.—Re SIMMONS* (1885), 15 Q. B. D. 348; 53 L. T. 147; 49 J. P. 740; 33 W. R. 706, D. C.

Annotation:—Reid. Re Incorporated Law Soc. & Four Solicitors (1891), 7 T. L. R. 672.

4742. —.—*Re A SOLICITOR, Re WALL* (1888), 4 T. L. R. 749; *sub nom. Re GRAYSTON, Re WALL*, 32 Sol. Jo. 680, D. C.; *on appeal*, 1 T. L. R. 772, C. A.

Annotations:—Reid. Re Kelly (1894), 43 W. R. 191, *Re Burton & Binkhorn*, [1903] 2 K. B. 300.

4743. —.—*IRVIN v. SANGER, No. 4756, post.*

4744. —.—*Re BRAID, Ex p. INCORPORATED LAW SOCIETY* (1899), 43 Sol. Jo. 192, D. C.

4745. — With his consent.]—ABERCROMBIE v. JORDAN, Re HUNT, No. 4767, post.

4746. — Solicitor dead—Alleged ignorance of death.]—Re WEBBER (1892), *Times*, Dec. 20, D. C.

SUB-SECT. 3.—ACTING IN EMPLOYMENT OF SOLICITOR.

Sec. now, Solicitors Act, 1928 (c. 22).

4747. Solicitor charged for work done.]—Law stationers, not qualified as solrs. or proctors, were accustomed upon the instruction & in the names of London or country solrs. to take to the Registry of the Probate Div. original wills & the engrossments thereof, with the proper affidavits, & if these were in order, to fetch away the probate; if any question arose as to the sufficiency of the documents the stationers communicated it to the solrs. All the charges between solr. & client were made by the solrs. & the stationers charged the solrs. for their clerk's time only:—*Held*: the stationers had not acted as solrs. or proctors, & were not liable to the penalties imposed by Solicitors Act, 1860 (c. 127), s. 26.

A qualified solicitor may act *per alium* & is not bound necessarily to act *per se* (LORD SELBORNE, C.).—*LAW SOCIETY v. WATERLOW, SAME v. SKINNER* (1883), 8 App. Cas. 407; 52 L. J. Q. B. 674; 49 L. T. 141; 31 W. R. 754, H. L.; *affg*

name of another attorney, without any authority to do so, & the debt for which the action was brought was lost; the ct. on a petition presented by pltf. in that action, against H., ordered him to pay the amount of such debt, costs & interest, & also the costs of the petition as between attorney & client, with liberty, however, to proceed against the original debtor for the amount of the debt so paid by resp.—*PATON v. HARTE* (1859), 33 L. T. O. S. 292.—**IR.**

S. C. sub nom. LAW SOCIETY v. SHAW, SAME v. WATERLOW (1882), 9 Q. B. D. 1, C. A.

Annotation :—*Appl. Re Panton*, [1901] P. 239.

4748. —.].—A person employed by a solr. as a process server, who settles the affidavits of persons in his employment relating to service of process, does not by so doing act as a solr. within Solicitors Act, 1843 (c. 73), s. 2, so as to be liable to attachment for contempt of ct. under Solicitors Act, 1860 (c. 127), s. 26.—*Re LOUIS, Ex p. INCORPORATED LAW SOCIETY*, [1891] 1 Q. B. 649; 60 L. J. Q. B. 500; 64 L. T. 565; 39 W. R. 511; 7 T. L. R. 420, D. C.

4749. Stationers taking wills for probate.].—*LAW SOCIETY v. WATERLOW, SAME v. SKINNER*, No. 4747, *ante*.

4750. Process server settling affidavits—Affidavit relating to service of process.].—*Re LOUIS, Ex p. INCORPORATED LAW SOCIETY*, No. 4748, *ante*.

4751. Lodging caveat.].—Any person may enter a caveat on behalf of a country solr., & in doing so it is not necessary for him to give a London address. Entering a caveat is a ministerial act only, & a lay person who does so on behalf of another is not liable to attachment as an unqualified person under Solicitors Act, 1860 (c. 127), s. 26.—*Re PANTON*, [1901] P. 239; 70 L. J. P. 95; 84 L. T. 725; 45 Sol. Jo. 523.

SUB-SECT. 4.—ACCOUNTANTS DISCHARGING DUTIES OF SOLICITOR.

4752. Accountant acting as solicitor prohibited.].

—*ANON.* (1888), 23 L. Jo. 265.

4753. — — **Application for liquor license.**].—*Re REVELL, INCORPORATED LAW SOCIETY'S APPLICATION* (1888), 4 T. L. R. 538, D. C.

SECT. 3.—EFFECT OF DOING PROHIBITED ACTS.

SUB-SECT. 1.—IN GENERAL.

See Solicitors Acts, 1843 (c. 73), s. 26; 1860 (c. 127), s. 26; Attorneys & Solicitors Act, 1874 (c. 68), s. 12; Stamp Act, 1891 (c. 39), s. 43 (1).

4754. Liability for negligence.].—*BROWN v. TOLLEY*, No. 4778, *post*.

4755. Whether costs & disbursements recoverable.].—A person not a solr. sued for the amount of ct. fees paid by him on commencing a county ct. action on behalf of deft., & as a preliminary to the hearing of it, & for remuneration for services rendered in it out of ct. :—*Held* : the claim was, by Solicitors Act, 1874 (c. 68), s. 12, not maintainable.—*VERLANDER v. EDDOLLS* (1881), 51 L. J. Q. B. 55; 45 L. T. 543; 46 J. P. 229; 30 W. R. 104, D. C.

PART XV. SECT. 3, SUB-SECT. 1.

4755 i. *Whether costs & disbursements recoverable.*].—No solr.'s fees should be allowed on the taxation as against plff. of the costs of the successful defence of an action against one member of a legal firm for whom the firm acts as solrs. when another member is not a solr.—*WRIGHT v. ELLIOTT* (1911), 21 Man. L. R. 337.—*CAN.*

4755 ii. —.].—*STEPHENSON v. HIGGINSON* (1847), 9 L. R. 458; *affd.* (1851), 3 H. L. Cas. 638.—*IR.*

4755 iii. —.].—An unlicensed agent acting as agent in his own cause, & who has got a decree for expenses, cannot recover more than his outlays.—*STEWART v. A. B.* (1827), 5 Sh. (Ct. of Sess.) 658; 2 Fac. Coll. 476.—*SCOT.*

4755 iv. —.].—A law agent being trustee under a trust deed, in which he had a personal interest, having, as agent, conducted processes on behalf of the trust estate :—*Held* : not entitled to credit for his charges & disbursements as agent, while he had no attorney's certificate.—*JOHNSON v. M'QUEEN* (1834), 12 Sh. (Ct. of Sess.) 770.—*SCOT.*

PART XV. SECT. 3, SUB-SECT. 2.—A.

p. Fine—At instance of Law Society.].—*Re KING, Ex p. INCORPORATED LAW INSTITUTE OF N. S. W.* (1887), 8 N. S. W. L. R. (L.) 395.—*AUS.*

q. —.].—*WAKELY v. SULLIVAN* (1896), 30 L. L. T. Jo. 185.—*IR.*

r. Duty to convict attorney allowing his name to be used—Before subjecting unauthorised person to penalty.].—To subject a person to the penalty

4756. —.].—The successful party in an action cannot, where the person employed by him as solr. is a person unqualified to act as a solr., recover his costs & disbursements from the opposite party, since Attorney & Solicitors Act, 1874 (c. 68), s. 12, enacts that "no costs . . . in relation to any act or proceeding done or taken by any person who acts as attorney or solr. without being duly qualified . . . shall be recoverable . . . by any person or persons whomsoever."

The statute applies, although the solr. on the record is duly qualified, if the proceedings are in fact taken by a person who is not a solr.—*IRVIN v. SANGER* (1888), 58 L. J. Q. B. 64; 59 L. T. 894; 5 T. L. R. 113, D. C.; *affd.* (1889), 5 T. L. R. 171, C. A.

4757. —.].—*WILLIAMS v. VERE* (1894), 10 T. L. R. 477.

— **Practising without certificate.**].—See Part II., Sect. 6, sub-sect. 4, B., *ante*.

4758. Order to deliver up money into court—Disobedience to order attachment for contempt.].—*Re HULM & LEWIS*, No. 4082, *ante*.

4759. — — **Person intervening in business of solicitor—No representation as solicitor.**].—*Re HURST & MIDDLETON, LTD., MIDDLETON v. THE CO.*, No. 3570, *ante*.

Effect of practising without certificate.].—See Part II., Sect. 6, sub-sect. 4, *ante*.

SUB-SECT. 2.—PENALTIES.

A. In General.

See Solicitors Act, 1860 (c. 127), s. 26; Attorneys & Solicitors Act, 1874 (c. 68), s. 12.

4760. Indictment for misdemeanour.].—Solicitors Act, 1843 (c. 73), s. 2, prohibits, generally, persons from acting as attorneys in any ct. of civil or criminal jurisdiction, unless previously admitted, enrolled & otherwise duly qualified. Sects. 35, 36, enact that, in case any person shall so act, he shall be incapable of recovering his fees, & such offence shall be deemed a contempt of ct., & be punished accordingly :—*Held* : an unqualified person so acting as an attorney may be indicted under the substantive prohibitory clause, sect. 2, for a misdemeanour, & sects. 35, 36, do not limit the punishment for the offence to the particular incapacity & punishment there specified.—*R. v. BUCHANAN* (1846), 8 Q. B. 883; 15 L. J. Q. B. 227; 7 L. T. O. S. 83; 10 J. P. 615; 10 Jur. 736; 2 Cox, C. C. 36; 115 E. R. 1107.

Annotations :—*Reid. Osborne v. Milman* (1886), 17 Q. B. D. 511. *Mentd. R. v. Hall*, [1891] 1 Q. B. 747; *Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 894.

4761. — — —.].—*ANON.* (1890), 88 L. T. Jo. 315.

of 22 Geo. 2, c. 46, for suing out process, etc., the attorney allowing his name to be used must first be convicted.—*R. v. BIDWELL* (1827), Tay. 487.—*CAN.*

t. Land agent liable to penalty for acting as solicitor in Irish Land Commission Court.].—*INCORPORATED LAW SOCIETY v. LORTIE* (1905), 39 L. L. T. Jo. 192.—*IR.*

a. Whether indictment lies.].—Upon demurrer to an indictment charging deft. with having practised as a barrister & solr. contrary to Law Practitioners Act (Amendment) Act, 1866, s. 3 :—*Held* : as the clause creating the offence annexed a penalty to it, & as there was no other statutory provision expressly providing a remedy by indictment in such case, deft. was entitled to judgment.—*R. v. SMYTHIES* (1872), Mac. 939.—*N.Z.*

Sect. 3.—Effect of doing prohibited acts: Sub-sect. 2, B. & C.; sub-sect. 3. Sect. 4.]

B. Imprisonment.

See Solicitors Act, 1843 (c. 73), s. 32.

4762. Liability to imprisonment.]—An attorney engaged a certificated conveyancer to conduct his business, & agreed to allow him a moiety of the profit instead of a salary. The names of both were painted on the office door, & bills for business were made out & delivered in their joint names:—*Held*: this was a case within 22 Geo. 2, c. 46, s. 11, inasmuch as the attorney had allowed his name to be used for & on account of an unqualified person: & the ct. ordered the attorney to be struck off the roll, & the clerk to be committed to prison for a month.—*Re JACKSON & WOOD* (1823), 1 B. & C. 270; 3 Dow. & Ry. K. B. 263, n.; 1 L. J. O. S. K. B. 115; 107 E. R. 101.

Annotations:—Apld. Re Palmer (1835), 1 Har. & W. 55. *Consd. Sterry v. Clifton* (1850), 19 L. J. C. P. 237.

4763. ———.]—Where the London agents of an attorney residing in the country omitted for more than a year to take out a certificate for him, but afterwards a certificate was taken out but he was not re-admitted, & he continued to practise, & employed another person ignorant of the omission regarding the certificate, as his London agent, but upon notice of the facts, & of his legal liability, ceased to act as an attorney, & in the next succeeding term applied to be re-admitted, & was re-admitted accordingly:—*Held*: (1) the new agent was not liable under the 22 Geo. 2, c. 46, to be struck off the rolls for permitting an unqualified person to practise in his name; for though under 37 Geo. 3, c. 21, s. 31, the omission by an attorney for a year to take out his certificate makes his admission null & void, it does not render him an unqualified person within the meaning of the 22 Geo. 2, c. 46; (2) the country attorney was not, under the circumstances, liable to be imprisoned under that Statute.—*Re HODGSON & ROSS* (1835), 3 Ad. & El. 224; 1 Har. & W. 265; 111 E. R. 398; *sub nom. Re ROSS & HODGSON*, 4 Nev. & M. K. B. 763; 4 L. J. K. B. 264.

Annotation:—As to (1) *Apld. Hodgkinson v. Mayer* (1837), 6 Ad. & El. 194.

4764. ———.]—*Re WHITMARSH* (1883), 27 Sol. Jo. 683 D. C.

4765. ———.]—*Re A SOLICITOR, Re WALL* (1888), 4 T. L. R. 749; *sub nom. Re GRAYSTON, Re WALL*, 32 Sol. Jo. 680, D. C.; *on appeal*, 4 T. L. R. 772, C. A.

Annotations. —Consd. Re Burton & Blinkhorn, [1903] 2 K. B. 300. *Refd. Re Kelly* (1894), 43 W. R. 191.

4766. Whether prisoner treated as first class misdemeanant.]—A person committed to prison under Solicitors Act, 1843 (c. 73), s. 32, for acting as a solr. though not duly qualified is a "criminal prisoner" within Prison Act, 1865 (c. 126), s. 4. Such a person is not entitled to be treated as a first class misdemeanant by Prison Act, 1877 (c. 21), s. 41.—*OSBORNE v. MILMAN* (1887), 18 Q. B. D.

PART XV. SECT. 3, SUB-SECT. 2.—C.

4767 i. Whether writ issued.]—If a person does a thing usually done by a solr., & does it in such a way as to lead to the reasonable inference that he is a solr. If he combines professing to be a solr. with action usually taken by a solr. the person so conducting himself acts as a solr. within Imperial Acts Application Act, 1922, s. 87, & is liable to punishment as for a contempt of ct.—*Re SANDERSON, Ex p. LAW INSTITUTE OF VICTORIA*, [1927] V. L. R. 394, 49 A. L. T. 3; [1927] Argus, L. R. 229.—**AUS.**

4767 ii. ———.]—*Re C—* (1897), 5 B. C. R. 530.—**CAN.**

471; 56 L. J. Q. B. 263; 56 L. T. 808; 51 J. P. 437; 35 W. R. 397; 3 T. L. R. 452, C. A.

Annotations:—Apld. Re Grayston, Re Wall (1888), 4 T. L. R. 772. *Mentd. R. v. Nat Bell Liquors*, [1922] 2 A. C. 128.

C. Attachment and Committal.

See Solicitors Act, 1860 (c. 127), s. 26.

4767. Whether writ issued.]—An unqualified person who acts as a solr. commits an offence against Solicitors Act, 1843 (c. 73), s. 2, though he acts in the name & with the consent of a duly qualified solr. H., who had carried on the business of an accountant, arranged with C., who had been admitted as a solr., that he should use H.'s offices, & any business H. had he was to allow C. to attend to, H. to share in the profits, but in what proportion was not settled, or, according to H.'s version of the arrangement, H. was to be paid, as a commission, one half-share of profits after deducting all expenses, including rent of offices, & was to find money & clerk to carry on the business. Pursuant to this arrangement, H., sometimes with C., & sometimes alone, transacted various matters which it was alone competent to a solr. to transact, generally using the name of C. & co., but sometimes not, & not always with the knowledge or express sanction of C.:—*Held*: H. had been guilty of a contempt of ct., & an attachment must issue against him.—*ABERCROMBIE v. JORDAN, Re HUNT* (1881), 8 Q. B. D. 187; 30 W. R. 810, C. A.

4768. ———.]—*Re WEBBER* (1892), *Times*, Dec. 20, D. C.

4769. ———.]—Every unqualified person acting as a solr., contrary to Solicitors Act, 1843 (c. 73), s. 2, is liable to attachment for contempt of court under Solicitors Act, 1860 (c. 127), s. 26. An unqualified person, who described himself as an architect & surveyor, was employed as agent to negotiate about the lease of a house. He sent in a bill of costs to the person who employed him, in which the following item appeared: "At your request attending Law Cts. & paying the necessary ct. fees incidental to putting in a personal appearance to the action. Bringing forms to you & obtaining your signature, & depositing same in accordance with standing orders. Obtaining & paying for copies in duplicate & forwarding same to Messrs. C. & Sons requesting statement of claim":—*Held*: although the Act had been transgressed by the unqualified person, no order would be made against him except he be ordered to pay the costs of the application.—*Re HALL, Ex p. INCORPORATED LAW SOCIETY* (1893), 69 L. T. 385; 9 T. L. R. 462; 5 R. 525, D. C.

4770. ———.]—*Re BERRIMAN* (1896), 40 Sol. Jo. 377, D. C.

4771. ———.]—*Re BRAID, Ex p. INCORPORATED LAW SOCIETY* (1899), 43 Sol. Jo. 192, D. C.

4772. ———.]—Where an unqualified person acted in obtaining a decree *nisi* for divorce made absolute, & asked for & obtained from petitioner a larger

4767 iii. ———.]—An attorney who had been struck off the roll of attorneys, notaries & conveyancers, issued a circular to the effect that he was "prepared to undertake all matters in connection with the putting through of transfers & bonds & the conduct of civil cases in the lower cts.":—*Held*: the circular amounted to a representation that resp. was a qualified conveyancer & a qualified practitioner in the Magistrate's Ct., & an order for committal for contempt of ct. should be made against resp.—*INCORPORATED LAW SOCIETY v. BUKES*, [1910] T. P. D. 150.—**S. AF.**

b. Conditional order for attachment

*made.]—*An attorney residing the greater portion of his time in the country, & seldom coming to Dublin, employed a nonprofessional agent to transact his business, with instructions that whenever a plain & simple case came into his hands he might commence proceedings, & sue out writs of summons without communicating with his principal, & also that he should procure for him all the business he could. It did not appear that the agent had received instructions to inform his employer what was done in the conduct of such suits as might be commenced without the knowledge of the latter. A conditional order for

sum than was really payable as the necessary fee, the ct., holding that he had been guilty of contempt of ct., made an order that he should be committed to prison for six weeks, & pay the costs of the proceedings against him for attachment.—*DAVIES v. DAVIES, Re WATTS* (1913), 29 T. L. R. 513; 57 Sol. Jo. 534.

4773. — Plea of ignorance.]—ANON. (1888), 23 L. Jo. 265.

4774. Examination of witnesses in support of charge—Examination vivâ voce.]—By 22 Geo. 2, c. 46, s. 11, it is enacted, “that if any sworn attorney or solr. shall suffer his name to be used by an unqualified person, to enable him to practice as an attorney, or solr., & complaint shall be made thereof in a summary way, & proof made thereof on oath to the satisfaction of the ct., such attorney or solr. shall be struck off the roll”; & by the same sect. it is enacted, “that in that case, & upon such complaint, & proof made as aforesaid, it shall be lawful for the ct. to commit such unqualified person so acting or practising, as aforesaid to the prison of the said ct. for any time not exceeding one year”:—*Held*: a person brought within the latter branch of the sect. upon affidavit of his offence, was not entitled to have the witnesses in support of the charge examined *vivâ voce*.

After the matter had been referred in such case by consent of counsel, to the master of the Crown Office, who reported the party in contempt, the ct. allowed the latter to bring the whole of the case under their own consideration, when brought up to be committed.—*Re JACQUES* (1822), 2 Dow. & Ry. K. B. 64; *sub nom. Ex p. JACQUES*, 1 L. J. O. S. K. B. 5.

Annotation.—*Refd.* *Williams v. Jones* (1825), 7 Dow. & Ry. K. B. 548.

4775. Whether appeal lies to Court of Appeal.]—No appeal lies from an order of the High Ct. of Justice for the imprisonment of an unqualified person for acting as a solr.—*Re GRAYSTON, Re WALL* (1888), 4 T. L. R. 772, C. A.; *on appeal from S. C. sub nom. Re A SOLICITOR, Re WALL*, 1 T. L. R. 749, D. C.

Annotations.—*Refd.* *Re Kelly* (1894), 43 W. R. 191; *Re Burton & Blinkhorn*, [1903] 2 K. B. 300.

SUB-SECT. 3.—EFFECT ON PROCEEDINGS.

4776. Whether proceedings void.]—Where a declaration was delivered by pltf., in the name of F. as his attorney, & it appeared that F.'s name was not on the roll, or entered in the books of this ct., & that he had not taken out any certificate:—*Held*: it could not be treated as a nullity.—*BAYLEY v. THOMPSON* (1834), 2 Cr. & M. 673; 3 L. J. Ex. 216; 149 E. R. 931; *sub nom. BAZLEY v. THOMPSON*, 4 Tyr. 955.

an attachment against the attorney & agent was made absolute, upon the grounds that such a practice was a violation of 13 & 14 Geo. 3, c. 23.—*WISDOM v. KELLY* (1854), 7 Ir. Jur. 1.—*IR.*

PART XV. SECT. 3, SUB-SECT. 3.

4776 i. Whether proceedings void.]—A writ issued by an uncertificated attorney, & all proceedings taken hereunder, will be set aside.—*DESBRISSAY v. MACKAY* (1869), 1 Han. 138.—*CAN.*

4776 ii. —.]—Where a writ was made out & tested on June 11, & remained in the attorney's office until 15th, when he served it on deft.:—*Held*: it was not issued until 25th, & he attorney having taken out his certificate before that day, though after the writ was made out, the writ

was valid.—*SEELYE v. BLISS* (1877), 1 P. & B. 53.—*CAN.*

4776 iii. —.]—Proceedings by an attorney who has not paid the fee required by C. S. N. B. c. 34, s. 4, are void, & the right to set aside the proceedings is not waived by the opposite party contesting the suit to judgment.—*R. v. SISK, SISK v. FOLEY* (1901), 35 N. B. R. 560.—*CAN.*

c. Notice of action given by unauthorised person—Whether acts may be ratified.]—A notice of action given by an unauthorised solr. is not ratified by an authority to the solr. to sue, nor by commencing the action.—*SHAW, SAVILL, & ALBION CO., LTD. v. TIMARU HARBOUR BOARD* (1888), 6 N. Z. L. R. 456.—*N.Z.*

d. Validity of execution of trust-disposition & settlement.]—A trust disposition & settlement was signed on

4777. —.]—A motion to set aside an interlocutory judgment for irregularity, which was signed because a plea was pleaded in the name of a person who was not an attorney:—*Held*: in time, on May 23, the day of executing the writ of inquiry, though the notice of executing the inquiry was served on May 15. Pltf. cannot treat such a plea as nullity.—*HILL v. MILLS* (1834), 2 Dowl. 696.

4778. —.]—Proceedings taken by an uncertificated attorney, are not, as affects his client, deemed void or irregular.

If an unprofessional man undertake to conduct legal proceedings for another, he is liable to that other for negligence, although he may have employed an attorney to do part of the work.

B., being in difficulties, employed deft. to take him through the county ct. in bkpey. for reward. A petition for liquidation, signed by an uncertificated attorney, was filed, & pltf. was appointed trustee; deft. partly employing an attorney in the matter.

The necessary notices for the meeting of creditors not having been inserted in the *Gazette*, the registrar refused to register the proceedings, which became inoperative, so that B. was forced to pay debts which would otherwise have been barred:—*Held*: deft. was liable to pltf.—*BROWN v. TOLLEY* (1874), 31 L. T. 485; 39 J. P. 214.

Effect of practising without certificate.]—See Part II., Sect. 6, sub-sect. 4, E., *ante*.

SECT. 4.—VALIDITY OF AGREEMENTS BETWEEN SOLICITORS AND UNQUALIFIED PERSONS.

See, now, Solicitors Act, 1928 (c. 22).

4779. Bond given by solicitor—To secure part profits of suits for benefit of unqualified person.]—A bond given by an attorney, conditioned for securing a part of the profits from suits, for the benefit of an unqualified person, is illegal. But where the condition is composed, partly of such illegal provision, & partly of another, for securing to the same unqualified person a share of profits in the business, besides those to be derived from suits, the condition may stand good for the latter; & the bond may be enforced.—*CUSSE v. CORFEE* (1828), 6 L. J. O. S. K. B. 140.

4780. Solicitor permitting unqualified person to use his name.]—*SCOTT v. MILLER*, No. 4460, *ante*.

4781. —.]—There is nothing illegal in the employment by a solr. of an unqualified person upon the terms that he shall receive a share of the profits of business introduced by him to the solr.

By the first clause of an agreement entered into

behalf of grantor, who was unable to write, by a law agent, who had passed the necessary examination, paid the duty of £55, & been duly enrolled as a law agent, but who had not taken out the annual certificate authorising him to practise. In an action for reduction of the deed on the ground of invalidity of execution:—*Held*: the deed had been validly executed, in respect that the person signing for the grantor possessed the qualification & status of a law agent within Conveyancing (Scotland) Act, 1924, s. 18 (1).—*STEPHEN v. SCOTT*, [1927] S. C. 85.—*SCOT.*

PART XV. SECT. 4.

e. Sharing of fees.]—An attorney agreed with a clerk to take him into partnership at the expiration of his articles, & that his share in the profits should commence from the date of

Sect. 4.—Validity of agreements between solicitors and unqualified persons. Sects. 5, 6 & 7. Parts XVI., XVII. & XVIII.]

between a solr. & an unqualified person the solr. agreed to engage the unqualified person as his managing clerk, & to pay him a salary of £3 10s. per week, & in addition a bonus of 25 per cent. on all gross costs & other profits, exclusive of all disbursements, received by the solr. on all business introduced by the unqualified person either directly or indirectly.

Clause 3 provided that in the event of the determination of the engagement the bonus of 25 per cent. was to be continued to be paid, notwithstanding such determination, less £3 10s. per week:—*Held*: although the agreement would have been valid if it had contained the first clause only, it was rendered invalid by reason of the third clause inasmuch as that clause showed that the business which was the subject of the agreement was the business of the clerk which was to be carried on in the name of the solr. for the clerk's profit, & the agreement was therefore illegal under the words in Solicitors Act, 1843 (c. 73), s. 32, which prohibit a solr. from permitting his name to be used in any matter for the profit of an unqualified person.—*HARPER v. EYJOLFSSON*, [1914] 2 K. B. 411; 83 L. J. K. B. 774; 110 L. T. 540; 30 T. L. R. 246, C. A.

Annotation:—*Reid*, *Lake v. Bartlett & Gluckstein* (1921) 37 T. L. R. 316.

4782. Agreement between client & solicitor—Solicitor to be paid salary—Surplus of receipts to be paid to employer—Solicitor not to transact professional business for any other client.]—An agreement between a client & a solr. that the solr. shall be paid a fixed yearly salary, to be clear of all

expenses of his office, & to include all emoluments, he paying to the client any surplus which may arise of receipts over payments, is not opposed to the provisions of the Attorneys & Solicitors Acts, nor to the policy of the law, where it is also a term of the agreement that the solr. is not to transact professional business for any other client.—*GALLOWAY v. LONDON CORPN.* (1867), L. R. 4 Eq. 90; 36 L. J. Ch. 978; 16 L. T. 407; 15 W. R. 1032.

4783. Agreement to remunerate unqualified person for work introduced.]—There is nothing illegal in a bargain between a solr. & an unqualified person that the solr. will pay remuneration to the unqualified person in respect of business done by the solr. for clients introduced by the unqualified person.—*LAKE v. BARTLETT & GLUCKSTEIN* (1921), 37 T. L. R. 316.

4784. —.]—*HARPER v. EYJOLFSSON*, No. 4781, *ante*.

SECT. 5.—SOLICITOR PERMITTING USE OF NAME BY UNQUALIFIED PERSON.

See Part XIV., Sect. 1, sub-sect. 2, C. (d), *ante*.

SECT. 6.—SOLICITOR ACTING AS AGENT FOR UNQUALIFIED PERSON.

See Part XIV., Sect. 1, sub-sect. 2, C. (b), *ante*.

SECT. 7.—SOLICITOR EMPLOYING PERSON STRUCK OFF ROLL.

See Solicitors Act, 1928 (c. 22).

Part XVI.—The Official Solicitor.

See Official Solicitor Act, 1919 (c. 30); R. S. C. Ord. 33, r. 9; Ord. 65, r. 13.

4785. Official solicitor as solicitor to person suing in formâ pauperis.]—It is no part of the duties of the official solr. as such to act as solr. to pltf. suing in *formâ pauperis* who does not suggest the name of any other solr. to be assigned to him.

In the absence of special circumstances the official solr. will not be assigned as solr. to pltf. suing in *formâ pauperis*.—*MOUTRIE v. MITCHELL*, [1901] 1 K. B. 596; 70 L. J. K. B. 401; 84 L. T. 187; 49 W. R. 274; 17 T. L. R. 258; *sub nom.* *MONTRIE v. MITCHELL*, 45 Sol. Jo. 275, C. A.

Official solicitor as guardian ad litem—Infants.]

his articles. The evidence did not show that the clerk had been admitted. A separation took place, & an action was brought for compensation for services:—*Held*: the case came within

22 Geo. 2, c. 46, which is in force here, although repealed in England, & the action was not maintainable.—*DUNNE v. O'REILLY* (1862), 11 C. P. 404. **CAN.**

See INFANTS, Vol. XXVIII., pp. 303, 319, 328, Nos. 1619, 1840–1843, 1964, 1965.

—**Lunatics.]**—*See* LUNATICS, Vol. XXXIII., p. 232, Nos. 1457–1461.

4786. Instructions to official solicitor—To be reduced to writing.]—Where the ct. refers a matter to the official solr., the instructions, if not inserted in the order, ought to be embodied in some document, or at least be reduced into writing.—*Re CATON, VINCENT v. VATCHER* (1911), 55 Sol. Jo. 313.

4787. Undue delay in proceedings—Summons taken out by official solicitor.]—*Re* CORNISH TIN LANDS, LTD., *BASTARD v. THE CO.*, (1918), 63 Sol. Jo. 166.

f. - | It is not lawful for an attorney & notary to share his fees with a law agent or other unqualified person.—*MOORE v. HAUPT*, [1913] C. P. D. 1036.—**S. AF.**

Part XVII.—Commissioners for Oaths.

SECT. 1.—APPOINTMENT AND REMOVAL OF COMMISSIONERS.

See Commissioners for Oaths Act, 1889 (c. 10), ss. 1, 2, 6, 11; Solicitors Act, 1860 (c. 127), s. 30; Supreme Court of Judicature Act, 1925 (c. 59), ss. 110, 114.

4788. Duration of commission—Until revoked by Lord Chancellor.]—In 1875, prior to the coming into operation of Jud. Acts, a solr., whilst in practice as such, was appointed a comr. to administer oaths by the Ct. of Exch. under 22 Vict. c. 16. In 1883 he was struck off the rolls, but continued to act as a comr. Upon an application to remove an affidavit sworn before him in 1891, upon the ground that it was not sworn before a comr. or a person duly appointed to administer oaths:—*Held*: the period of duration of the commission was the pleasure of the Ct. of Exch.; in order to put an end to the commission, it must be revoked by the Lord Chancellor, in whom the power of revocation formerly possessed by that ct. is now vested by Commissioners for Oaths Act, 1889 (c. 10), s. 1; & as that had not been done, the application must be refused.—*WARD v. GAMGEE* (1891), 65 L. T. 610; 40 W. R. 39; 7 T. L. R. 752.

4789. ———.]—*SHRAPNEL v. GAMGEE* (1891), 8 T. L. R. 9, D. C.

4790. ——— Whether after solicitor struck off rolls.]—*WARD v. GAMGEE*, No. 4788, *ante*.

4791. ———.]—*SHRAPNEL v. GAMGEE* (1891), 8 T. L. R. 9, D. C.

SECT. 2.—WHO MAY TAKE AFFIDAVITS.

See Commissioners for Oaths Act, 1889 (c. 10), ss. 1, 2, 11; 1891 (c. 50), s. 1; R. S. C., Ord. 38, r. 16.

Solicitor in cause.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 556–558, Nos. 6004–6042.

4792. Solicitor who has not taken out practising certificate.]—*ANON.* (1909), 73 J. P. Jo. 136.

Officials & commissioners.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 555, 556, Nos. 5997–6003.

Persons out of the jurisdiction.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 558–562, Nos. 6043–6112.

SECT. 3.—DUTIES OF COMMISSIONERS.

4793. To certify exhibit referred to in affidavit.]—A comr. before whom an affidavit is sworn, ought to certify that any exhibit annexed is the document referred to in the affidavit.—*Re ALLISON* (1854), as reported in 10 Exch. 561; 18 J. P. 746; 3 W. R. 62; 156 E. R. 561.

4794. To see that witness understands what he is swearing.]—The comr.'s duty before he administers the oath is to satisfy himself that the witness does thoroughly understand what he is going to swear to; & he should not be satisfied on this point by any one but the witness himself (*KAY, J.*).—*BOURKE v. DAVIS* (1889), 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167; 6 T. L. R. 87.

Annotations —*Mentd.* *Edwards v. Jenkins*, [1896] 1 Ch. 308; *A.-G. & London Property Investment Trust v. Richmond Corpn. & Gosling* (1903), 89 L. T. 700; *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425; *Moser v. Ambleside U. D. C.* (1925), 89 J. P. 118.

Part XVIII.—Scriveners.

4795. What constitutes scrivining.] — *ANON.* (undated), Mont. 82, n.

4796. ———.]—A scrivener is a person entrusted with the money of his employer, & who finds a borrower.—*Re BURMAN, Ex p. BATH* (1830), Mont. 82.

Annotation:—*Apld.* *Lott v. Melville* (1841), 3 Man. & G. 40.

4797. ———.]—A transaction in which an attorney calls in & receives the money of a client, & retains the money in his possession, paying interest to that client upon the amount, is not trading as a money scrivener.—*LOTT v. MELVILLE* (1841), 3

Man. & G. 40; 9 Dowl. 882; 3 Scott. N. R. 346; 10 L. J. C. P. 279; 5 Jur. 436; 133 E. R. 1049.

Annotations:—*Refd.* *Re Gibbs* (1815), 5 L. T. O. S. 475; *Re Fisher* (1850), 15 L. T. O. S. 504.

4798. ———.]—(1) A partner in a firm of two solrs. received moneys belonging to the sister of the other for the purpose of investment, & in a few instances without any specific security having been arranged. The usual charges of an attorney or solr. were alone made upon the transactions:—*Held*: this did not amount to trading as a scrivener.

PART XVII. SECT. 1.

g. Who is "Commissioner appointed by the court."]—A comr. for taking affidavits, etc., who is in practice, & lawfully recognised by the ct. as an officer legally exercising a function so important, is within 1869 Act, c. 16, s. 123, "a comr. appointed by the ct."—*LANG v. FOREMAN* (1872), 8 N. S. R. (2 G. & O.) 546.—*CAN.*

h. When English solicitor appointed.]—The Lord Chancellor of Ireland will not appoint an English solr. a Master Extraordinary for taking affidavits for this ct. unless it appears that such appointment is required by the want of such an officer in the district, or that those already appointed neglect to attend to their duties.—*Re*

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CHANDLER (1850), 16 L. T. O. S. 132.—*IR.*

k. Enrolment of commission.]—When a comr. was appointed for taking affidavits in the Common Law Cts. in 1851, & enrolled his commission in the Ct. of Q. B. only, & afterwards took affidavits for the other cts.; upon objections by the officers of the other cts. that his commission was not enrolled in their respective cts., the Ct. of Exchequer allowed the comr. to enrol his commission *nunc pro tunc*.—*ANON.* (1859), 11 Ir. Jur. 245.—*IR.*

l. ———.]—When a comr. for taking affidavits neglected to enrol his commission in the Ct. of Common Pleas, though it had been duly enrolled in the Cts. of Q. B. & Exch., the ct. allowed it to be enrolled *nunc*

pro tunc.—*Re BOYD* (1861), 13 Ir. Jur. 284.—*IR.*

PART XVII. SECT. 2.

m. Whether magistrates.]—There is a strong dictum in one of the late editions of "Burn's Justice" that a magistrate taking an affidavit without authority is guilty of misdemeanour.—*JACKSON v. KASSEL* (1867), 26 U. C. R. 341.—*CAN.*

PART XVIII.

n. Scrivener's business part of solicitor's ordinary business.]—*Semble*: in this Province the business which is called "scrivener's business" is part of the ordinary business of a solr.—*THOMPSON v. ROBINSON* (1888), 15 O. R. 682.—*CAN.*

(2) Uncontradicted general evidence of a course of dealing amounting to scrivenering is sufficient to warrant an adjudication without proof of specific acts.—*Re DUFUR, Ex p. DUFUR* (1852), 2 De G. M. & G. 246; 21 L. J. Bcy. 38; 20 L. T. O. S. 186; 42 E. R. 867, L. JJ.

Annotations :—*As to* (1) *Refd.* *Bourdillon v. Roche* (1858), 27 L. J. Ch. 681. *As to* (2) *Refd.* *Re X. Y., Ex p. Haas*, [1902] 1 K. B. 98.

4799. ———.]—*CHUBB v. BUTTON* (1894), 10 T. L. R. 580.

4800. Evidence of scrivenering—Course of dealing.]—*Re DUFUR, Ex p. DUFUR*, No. 4798, *ante*.

4801. ———.]—*CHUBB v. BUTTON* (1894), 10 T. L. R. 580.

4802. Agreement by scrivener on behalf of client—To compound client's debt—Whether scrivener bound.]—Where an agreement made by a scrivener on behalf of his client, to compound his client's debt, shall bind the scrivener, though not the

client.—*PARROT v. WELLS* (1690), 2 Vern. 127; 23 E. R. 691.

4803. ——— **Whether client bound.]**—*PARROT v. WELLS*, No. 4802, *ante*.

4804. Duty to lend money received.]—Scrivener, etc., bound to place out money received, for which he gives a note, & is not discharged from interest, unless the security & interest are accepted by the employer.—*BARWELL v. PARKER* (1751), 2 Ves. Sen. 363; 28 E. R. 233.

Annotations :—*Refd.* *Blair v. Bromley* (1847), 2 Ph. 354; *Moore v. Knight* (1890), 63 L. T. 831. *Mentd.* *Pearce v. Slocombe* (1838), 3 Y. & C. Ex. 84; *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19.

4805. Liability to pay interest.]—*BARWELL v. PARKER*, No. 4804, *ante*.

4806. Solicitor acting as solicitor & scrivener—Propriety—Acting in both capacities in same matter.]—*GRADWELL v. AITCHISON* (1893), 10 T. L. R. 20, D. C.

Annotation :—*Distd.* *Chubb v. Button* (1894), 10 T. L. R. 580.

SOVEREIGN.

See CONSTITUTIONAL LAW.

SOVEREIGNS AND STATES.

See ACTION; CONFLICT OF LAWS; CONSTITUTIONAL LAW.

SPARKS.

See HIGHWAYS, STREETS, AND BRIDGES; RAILWAYS AND CANALS.

SPEAKER IN THE HOUSES OF PARLIAMENT.

See PARLIAMENT.

SPECIAL CONSTABLE.

See POLICE.

SPECIAL DAMAGE.

See DAMAGES.

SPECIAL GRANTS OF ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

SPECIAL JURY.

See JURIES.

SPECIAL LICENCE TO MARRY.

See HUSBAND AND WIFE.

SPECIAL OCCUPANT.

See DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

SPECIAL RESOLUTION.

See COMPANIES.

SPECIAL VERDICT.

See CRIMINAL LAW AND PROCEDURE ; JURIES.

SPECIALTY DEBTS.

See BONDS ; CONTRACT ; EXECUTORS AND ADMINISTRATORS ; LIMITATION OF ACTIONS.

SPECIFIC DELIVERY OF CHATTELS.

See SPECIFIC PERFORMANCE ; TROVER AND DETINUE.

SPECIFIC DEVISE.

See EXECUTORS AND ADMINISTRATORS ; WILLS.

SPECIFIC GOODS.

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SPECIFIC LEGACY.

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Contract, Principles of . See CONTRACT.

Damages DAMAGES.

*Fraudulent and Innocent
Misrepresentation* . See MISREPRESENTATION
*Injunction, Conditions of
Relief by* INJUNCTION.

Part I.—Discretion of the Court.

1. **General rule.**—PARKER v. PLUMMER (1662), Freem. Ch. 167; 22 E. R. 1134, L. C.

2. —.—]—ELY (DEAN & CHAPTER) v. STEWARD (1740), as reported in Barn. Ch. 170; 27 E. R. 600, L. C.

Annotation:—**Refd.** Robinson v. Dulcep Singh (1879), 11 Ch. D. 798.

3. —.—]—I think it must always upon a bill for specific performance be in the discretion of the ct. to decree it or leave it at law (EYRE, LORD COMMISSIONER).—COOPER v. DENNE, DENNE v. COOPER (1792), 1 Ves. 565; 4 Bro. C. C. 80; 30 E. R. 491.

Annotations:—**Consd.** Pyrke v. Waddingham (1852), 10 Hare, 1. **Refd.** Robinson v. Milner (1842), 1 Hare, 578, n.

4. —.—]—ALLEY v. DESCHAMPS, No. 752, *post*.

5. —.—]—Specific performance of an agreement the subject of discretion; refused therefore, in the case of mistake; though no fraud.—MASON v. ARMITAGE (1806), 13 Ves. 25; 33 E. R. 204, L. C.

Annotations:—**Appld.** Day v. Wells (1861), 30 Beav. 220. **Mentd.** Hughes v. Chester & Holyhead Ry. (1861), 1 Drew. & Sm. 524.

6. —.—]—WEDGWOOD v. ADAMS, No. 364, *post*.

7. —.—]—(1) A party contending for specific performance must show that his conduct has been fair. If he has made material misrepresentations to deft. it is no answer to say that deft. might have found out that there were misrepresentations.

(2) Specific performance is not of course because there is a contract, but a relief in the nature of indulgence peculiar to the jurisdiction of equity.—COX v. MIDDLETON (1854), 2 Drew 209; 2 Eq. Rep. 631; 23 L. J. Ch. 618; 23 L. T. O. S. 6; 2 W. R. 284; 61 E. R. 699.

Annotation:—**Generally**, **Mentd.** Dolling v. Evans (1867), 31 J. P. 375.

8. —.—]—Where pltf. proved by unquestionable evidence that there was a mistake in

essential parts of a written agreement:—**Held**: he was entitled to have it set aside.

To sanction the right to set aside an agreement on the grounds of fraud, mistake or surprise, parol evidence is in most cases essential; but where specific performance is asked the ct. has a discretion which is not permitted when it is called to set aside an instrument on any of those grounds.—PRICE v. LEY (1863), 4 Giff. 235; 32 L. J. Ch. 530; 7 L. T. 845; 9 Jur. N. S. 295; 11 W. R. 399; 66 E. R. 692; *affd.*, 32 L. J. Ch. p. 534; 11 W. R. 475, L. JJ.

9. —.—]—(1) A decree for specific performance of a contract cannot be accompanied by directing an inquiry whether a matter which was a consideration for entering into the contract has been, or can be, properly performed. Where a suit is instituted for specific performance of a contract, & the defence set up is, that the contract was made in consideration of certain promises which pltf. had not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the non-fulfilment of the alleged promises. Where the subject of the contract was an agreement to take the lease of a house, & the proposed tenant went into possession at once, & occupied for two years but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, & paid rent, but always paid it under protest:—**Held**: these circumstances did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but that the payments were to be treated as merely made in respect of the actual use & occupation, & in no other character.

(2) The exercise of the jurisdiction of equity as to enforcing specific performance of agreements,

PART I.

1 i. **General rule.**—The origin both of the action for specific performance & of the action for relief against re-entry for non-payment of rent is in the equitable jurisdiction of the ct.; the compelling performance in the one & the granting relief in the other is in the judicial discretion of the ct.; & in each the ct. has regard to the conduct of the party seeking to compel such performance or to obtain such relief.—COVENTRY v. McLEAN

1 ii. —.—]—The exercise of the jurisdiction of Equity as to enforcing specific performance of agreements is not a matter of right in the party

seeking relief, but of discretion in the ct. to be exercised in accordance with fixed rules & principles.—CALHOUN v. BREWSTER (1898), 1 N. B. Eq. Rep. 529.—CAN.

1 iii. —.—]—FRITH v. ALLIANCE INVESTMENT CO. (1913), 23 W. L. R. 830; 10 D. L. R. 765; 4 W. W. R. 88.—CAN.

1 iv. —.—]—Relief by way of specific performance is in the discretion of the ct.—GOODE v. BURO (1913), 24 W. L. R. 569; 4 W. W. R. 1009; 12 D. L. R. 263; 6 Sask. L. R. 92.—CAN.

1 v. —.—]—The jurisdiction to decree specific performance of a contract is discretionary, & the ct. is not bound to grant such relief.—KAR-KALIDAS GHIA v. CHHOTALAL

MOTICHAND (1923), 1 L. R. 48 Bom. 259.—IND.

1 vi. —.—]—The discretion of the ct. in granting or refusing a specific execution, is regulated by established principles.—REVELL v. HUSSEY (1813), 2 Ball & B. 280, 287.—IR.

1 vii. —.—]—A ct. of equity in the exercise of an enlarged discretion may decree, or refuse to decree specific performance of a contract, but it possesses no power to make one, or to add to the terms & conditions of that made.—BRIDGMAN v. ELLIS (1859), 4 Nfld. L. R. 325.—NFLD.

a. *When exercised*—**Agreement by member to deliver produce to company.**—By the arts. of assocn. of a co. whose business was, among other things, to

is not a matter of right in the party seeking relief, but of discretion in the ct. (LORD CHELMSFORD).—*LAMARE v. DIXON* (1878), L. R. 6 H. L. 414; 43 L. J. Ch. 203; 22 W. R. 49, H. L.; *restg. S. C. sub nom. DIXON v. LAMARE* (1871), 19 W. R. 942.

Annotations:—As to (1) *Consd. Jones v. Joseph* (1918), 87 L. J. K. B. 510. *Reid. Hombrow v. Talbot* (1892), 36 Sol. Jo. 712; *Abram S.S. Co. v. Westville Shipping Co.*, [1923] A. C. 773.

10. — Foundation of doctrine.—A purchaser bought property under a strict condition of sale that he should not make any objection as to the intermediate title between a certain lease & the assignment of it, but should assume that the assignment vested a good title in the assignees. It was afterwards discovered by the purchaser that there was a vital defect in the intermediate title, & that the assignees had no title to the property:—*Held*: (1) as the vendor could not give a holding title to the purchaser, the ct. would, in the exercise of its discretion, refuse to decree specific performance of the contract, & would leave the parties to their remedies at law.

(2) The extraordinary remedy by specific performance is always more or less open to discretion (LINDLEY, L.J.).

From the very first, when specific performance was introduced it has been treated as a question of discretion whether it is better to interfere & give a remedy which the common law knows nothing at all about, or to leave the parties to their rights in a ct. of law. The foundation of the doctrine of specific performance was this, that land has quite a character of its own, that the real meaning between the parties to a contract for sale of land was not that there should be a contract with legal remedies only, & that the purchaser should get the land, & should not be put off in an ordinary case by offering him damages (RIGBY, L.J.).—*Re SCOTT & ALVAREZ'S CONTRACT, SCOTT v. ALVAREZ*, [1895] 2 Ch. 603; 64 L. J. Ch. 821; 73 L. T. 43; 43 W. R. 694; 11 T. L. R. 471; 39 Sol. Jo. 621; 12 R. 474, C. A.

Annotations:—As to (1) *Reid. Re Calcott & Elvin's Contract* (1898), 67 L. J. Ch. 327; *Re Wallis & Barnard's Contract*, [1899] 2 Ch. 515; *Re Hughes & Ashley's Contract*, [1900] 2 Ch. 595; *Re Wells, Boyer v. McLean* (1903), 72 L. J. Ch. 513; *Beyfus v. Lodge*, [1925] 1 Ch. 350. *Generally, Mentd. Toon v. Stanbury-Eardley* (1906), 22 T. L. R. 536; *Simpson v. Gilley* (1922), 92 L. J. Ch. 194.

11. How exercised—Not arbitrarily.—Though discretionary in the ct. whether they will decree a specific execution, yet it is so on certain grounds, & not arbitrary, but governed by rules of equity.—*GORING v. NASH* (1744), 3 Atk. 186; 26 E. R. 909, L. C.

Annotations:—*Reid. Estcourt v. Estcourt* (1760), 1 Cox, Eq. Cas. 20. *Mentd. Stephens v. Trueman* (1747), 1 Ves. Sen. 73; *Ramsden v. Hylton* (1751), 2 Ves. Sen. 304; *Davenport v. Bishopp* (1846), 1 Ph. 698; *Kokewich v. Manning* (1851), 1 De G. M. & G. 176; *Barham v. Clarendon* (1852), 10 Hare, 126; *Cramer v. Moore* (1855), 25 L. T. O. S. 31.

12. — — — — ——(1) Specific performance matter of discretion, not arbitrary, but judicial.

(2) I am inclined to say that a sale by auction, no fraud, surprise, etc., cannot be set aside for mere inadequacy of price (LORD ELDON, C.).—*WHITE v. DAMON* (1802), 7 Ves. 30, 34; 32 E. R. 13, L. C.

Annotations:—As to (1) *Reid. Haywood v. Cope* (1858), 25 Beav. 140; *Rogers v. Challis* (1859), 27 Beav. 175; *Durham v. Legard* (1865), 34 Beav. 611; *Price v. Salusbury*

market the fruit grown by its members, it was provided that each member should deliver to the co. at one of its packing sheds 95 per cent. of his fruit immediately after each variety thereof should be ready, suitable & fit for ——— or picking, but not later a certain date in each year:— : assuming that an obligation in

those terms was imposed on each member of the co., it was not one in respect of which the ct. should, in the exercise of its discretion, at the instance of the co. grant specific performance or an injunction.—*PAKENHAM UPPER FRUIT CO., LTD. v. CROSBY* (1924), 35 C. L. R. 386; [1925] V. L. R. 27; 31 Argus L. R. 13.—AUS.

(1866), 14 L. T. 110; *Hopkinson v. Exeter* (1867), L. R. 5 Eq. 63; *La Blanche v. Rangel* (1867), L. R. 2 P. C. 38. As to (2) *Reid. Mortlock v. Buller* (1804), 10 Ves. 292; *White v. Cuddon* (1842), 8 Cl. & Fin. 766; *Borell v. Dann* (1843), 2 Hare, 440; *Falcke v. Gray* (1859), 4 Drew. 651.

13. — — — — ——It is true that equity does not in every case, lend its aid to carry a contract for a purchase into execution; but it does not arbitrarily execute any contract, & refuse to execute another. Some ground must be laid to prevent the party from obtaining in his case, the assistance which the ct. usually gives to cases of the same general description (GRANT, M.R.).—*BUCKLE v. MITCHELL* (1812), 18 Ves. 100; 34 E. R. 255.

Annotations:—*Reid. Butterfield v. Heath* (1852), 15 Beav. 408. *Mentd. Doe d. Baverstock v. Rolfe* (1838), 8 Ad. & El. 650; *Lister v. Turner* (1846), 5 Hare, 281; *Rosher v. Williams* (1875), L. R. 20 Eq. 210.

14. — — — — ——*BENNETT v. SMITH*, No. 996, *post*.

15. — — — — ——(1) A person contracting for the lease of a mine cannot resist its performance, on the ground of his ignorance of mining matters, & of the mine turning out worthless.

Pltf. had worked the coal under his estate, but abandoned it as unprofitable.

Twenty years afterwards deft. cleared the pit & examined the coal in the shaft with other persons, & subsequently contracted for a lease. The colliery turned out to be worthless:—*Held*: deft. could not resist a specific performance, on the ground of pltf. not having communicated the fact of his having worked the mine & found it unprofitable.

(2) Specific performance is a matter of discretion, to be exercised, however, according to fixed & settled rules, & the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance.

The ct. cannot exercise its discretion as to granting or refusing specific performance of an agreement, by the consideration whether it has turned out favourably or unfavourably to the party against whom specific performance is sought. *HAYWOOD v. COPE* (1858), 25 Beav. 140; 27 L. J. Ch. 468; 31 L. T. O. S. 48; 4 Jur. N. S. 227; 6 W. R. 304; 53 E. R. 589.

16. — To accomplish justice.—*POWELL v. LLOYD*, No. 734, *post*.

17. — Not according to principles applicable to construction of contracts.—Certain hereditaments were put up for sale in lots by auction subject to certain conditions of sale. The following conditions of sale were material:—

“(a) Each lot is believed & shall be taken to be correctly described as to quantity and otherwise . . . and the respective purchasers . . . shall be deemed to buy with full knowledge of the state and condition of the property as to repairs & otherwise, & no error, misstatement or misdescription shall annul the sale, nor shall any compensation be allowed in respect thereof.

“(b) Each purchaser shall send his objections & requisitions, if any, to or in respect of the title, & of all matters appearing upon the abstract or the particulars or conditions of sale, to . . . the vendor's solrs.” within a limited time.

“(c) If any purchaser shall insist upon any objection or requisition which the respective vendors shall be unable, or on the ground of

b. — Agreement not clear & unambiguous.—*STEWART v. LEES*, Cass. Dig. 2nd ed. 93.—CAN.

c. — — — — —.—*GERTZBEIN v. BELL* (1913), 23 O. W. R. 958; 4 O. W. N. 715; 9 D. L. R. 833.—CAN.

d. — Vendor selling land to third party after agreement to sell.—The fact

expense or otherwise unwilling to answer, comply with, or remove, the respective vendors may . . . at any time, & notwithstanding any intermediate or pending negotiations, proceedings, or litigation, annul the sale."

Lot 3 consisted of buildings & land, & was stated in the particulars of sale to contain 4 acres 3 roods 37 poles, & to be let at annual rents amounting to £27. At the auction lot 3 was sold, & a deposit was paid. The abstract of title having been delivered, the purchaser by his requisitions objected that lot 3 was much smaller in extent than was stated in the particulars, the deficiency amounting to an acre & a half, & the true acreage being 3 acres 1 rood 37 poles. The misstatement in the particulars of sale as to the acreage was inserted innocently, & the rentals of the property comprised in lot 3 were correctly stated. The purchaser claimed that the contract should be carried out with compensation; the vendor refused any compensation, but offered to annul the sale. The purchaser having refused to withdraw his requisition or to consent to the annulment of the sale, the vendor gave notice that in pursuance of condition (c) she annulled the sale. The purchaser having taken out a summons under Vendor & Purchaser Act, 1874 (c. 78), for specific performance with compensation:—*Held*: (1) the vendor might lawfully annul the sale by virtue of condition (c) for the requisition as the deficiency in the quantity was a requisition as to a matter appearing upon the particulars or conditions of sale within the meaning of condition (b); (2) even without conditions (b) & (c) the purchaser would have been prevented by condition (a) from obtaining specific performance with compensation.

(3) Now in all actions for specific performance, & in all applications to the ct. involving the exercise of that discretion which the ct. invariably does exercise in ordering or refusing specific performance, it is necessary not to confound the principles or rules by which contracts are interpreted with the principles or rules which guide the ct. in enforcing or declining to enforce specific performance. . . .

"It was contended that such conditions as condition (a) in this case only applied to comparatively trivial & unimportant errors, misstatements & misdescriptions, & several cases were referred to in support of that proposition. But when those cases are carefully looked at they will not be found to warrant so general a statement. The proposition is only true in certain classes of cases. It certainly would be surprising if any authorities were found which required the ct. to construe conditions of sale differently from other contracts, or to hold that they do not mean what their words, taken in their ordinary sense, would convey to the mind of an intelligent person. Conditions of sale like all other contracts, must be construed with reference to the subject-matter to which they relate, & upon the assumption that the parties to them are dealing fairly with each other (LINDLEY, L.J.).—*Re TERRY & WHITE'S*

CONTRACT (1886), 32 Ch. D. 14; 54 L. T. 353; 34 W. R. 379; 2 T. L. R. 327; *sub nom.* TERRY TO WHITE, 55 L. J. Ch. 345, C. A.

Annotations:—*As to* (1) *Reid*. *Re Aspinall & Powell's Contract* (1889), 5 T. L. R. 446; *Vowles v. Bristol, etc., Bldg. Soc.* (1900), 44 Sol. Jo. 592. *As to* (2) *Reid*. *Re Fawcett & Holmes' Contract* (1889), 42 Ch. D. 150. *As to* (3) *Consd.* *Jacobs v. Revell*, [1900] 2 Ch. 858. *Generally*, *Mentd.* *Hollwell v. Seacombe*, [1906] 1 Ch. 426.

18. When specific performance granted as of course.]—*HALL v. WARREN*, No. 267, *post*.

19. —.]—(1) The ct. is not bound to decree a specific performance in every case, where it will not set aside the contract; nor to set aside every contract, that it will not specifically perform. Under circumstances, that would have amounted to a breach of trust, inadequacy of consideration, arising from gross negligence of the agent, & a want of due authority, the bill was dismissed; though *pltf.* was unimpeached; without prejudice to his remedy at law.

(2) If the vendee chooses to take as much as he can have, he has a right to that, & to an abatement; & the ct. will not hear the objection by the vendor, that the purchaser cannot have the whole. But that always turns upon this; that it is, & is intended to be, the contract of the vendor (*LORD ELDON, C.*).—*MORTLOCK v. BULLER* (1804), 10 Ves. 292; 32 E. R. 857, L. C.

Annotations:—*As to* (1) *Apprvd.* *Merediths v. Saunders* (1814), 2 Dow, 514. *Apld.* *White v. Cuddon* (1842), 8 Cl. & Fin. 766; *Wedgwood v. Adams* (1844), 8 Beav. p. 105. *Distd.* *Salamon v. Sopwith* (1876), 35 L. T. 463. *Reid.* *Hill v. Buckley* (1811), 17 Ves. 394; *Baylies v. Baylies* (1844), 1 Coll. 537; *Bellringer v. Blagrave* (1847), 1 De G. & Sm. 63; *Marshall v. Sladden* (1849), 7 Hare, 428; *Millican v. Vanderplank* (1853), 11 Hare, 136; *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *Sneesby v. Thorne* (1855), 7 De G. M. & G. 399; *Wilson v. Williams* (1857), 3 Jur. N. S. 810; *Re Rolling Stock Co. of Ireland, Clack's Case* (1866), 14 W. R. 986; *Noble v. Edwards*, *Edwards v. Noble* (1877), 5 Ch. D. 378; *Thomas v. Williams* (1883), 24 Ch. D. 558; *Sun Bldg. Soc. v. Western Suburban Bldg. Soc.*, [1921] 2 Ch. 83. *As to* (2) *Apld.* *Burrow v. Scammell* (1881), 19 Ch. D. 175. *Distd.* *Hopcraft v. Hopcraft* (1897), 76 L. T. 341. *Consd.* *Rudd v. Lascelles*, [1900] 1 Ch. 815. *Reid.* *Williams v. Edwards* (1827), 2 Sim. 78; *Thomas v. Dering* (1837), 1 Keen, 729; *Ecol. Comrs. v. Pinney*, [1899] 2 Ch. 729. *Generally*, *Reid.* *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.*, *L. & N. W. Ry. v. Shrewsbury & Birmingham Ry.* (1853), 4 De G. M. & G. 115; *Wollaston v. Osborn* (1853), 20 L. T. O. S. 274. *Mentd.* *Wheate v. Hall* (1809), 17 Ves. 80; *Re Gundry, Ex p. Grylls, Ex p. Batten* (1832), 2 Deac. & Ch. 290; *Robinson v. Briggs* (1853), 1 Sm. & G. 188; *Wolley v. Jenkins* (1857), 28 L. T. O. S. 362.

20. —In all cases where a ct. of equity has jurisdiction to enforce the specific performance of contracts, & persons voluntarily, without any fraud, accident, or mistake, enter into contracts, the jurisdiction should be exercised (*JESSEL, M.R.*).—*LEECH v. SCHWEDER* (1874), 9 Ch. App. 465, n.; 43 L. J. Ch. 488, n.; *reversd.* on other grounds, 9 Ch. App. 463, L. JJ.

Annotations:—*Mentd.* *Leader v. Moody* (1875), L. R. 20 Eq. 145; *Manners v. Johnson* (1875), 1 Ch. D. 673; *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Bayley v. G. W. Ry.* (1884), 26 Ch. D. 434; *Warren v. Brown*, [1900] 2 Q. B. 722; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416; *Brigg v. Thornton* (1903) 73 L. J. Ch. 301; *Davis v. Town Properties Investment Corp.*, [1903] 1 Ch. 797; *Collis v. Home & Colonial Stores*, [1904] A. C. 179.

that, subsequently to, & in breach of, his contract to sell, the vendor has sold the same land to third parties having notice of the contract, & that, if relief is refused to *pltf.*, the land may remain in possession of such third

parties, does not affect the question as to the propriety of the exercise by the ct. of its discretionary power to enforce the contract.—*GURUSAMI SASTRIAL v. GANAPATHIA PILLAI* (1882), I. L. R. 5 Mad. 337.—*IND.*

e. —.]—Specific performance of a contract of purchase & sale will not be granted where the subject-matter has been disposed of to a *bona fide* purchaser.—*SHAKINOVSKY v. LAWSON*, [1904] T. S. 326.—*S. AF.*

Part II.—Limits of Jurisdiction.

SECT. 1.—EXECUTORY CONTRACTS.

21. General rule—Contract must be executory.]

—A ct. of equity will not entertain a bill for the specific performance of an agreement to pay in a certain event, which has happened, an annual sum by quarterly instalments.

The remedy of pltf. is by an action at law (LEACH, M.R.).—*BROUGH v. ODDY* (1829), 1 Russ. & M. 55; Tambl. 215; 8 L. J. O. S. Ch. 23; 39 E. R. 22.

Annotations:—*Reid*. *Rogers v. Challis* (1859), 27 Beav. 175. *Mentd.* *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561.

22. ———.]—(1) The common expression "specific performance," as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed (LORD SELBORNE, C.).

(2) There is a considerable class of contracts, such as ordinary agreements for work & labour to be performed, hiring, & service . . . which are not in the proper sense of the words cases for "specific performance" (LORD SELBORNE, C.).—*WOLVERHAMPTON & WALSAIL RY. CO. v. LONDON & NORTH WESTERN RY. CO.* (1873), L. R. 16 Eq. 433; 43 L. J. Ch. 131, L. C.

Annotations.—As to (1) *Apld.* *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143. *Reid*. *Donnell v. Bennett* (1883), 22 Ch. D. 835; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523. As to (2) *Reid*. *Ryan v. Mutual Tontine Westminster Chambers Assocn.*, [1892] 1 Ch. 427; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372. *Generally*, *Reid*. *Piperno v. Harmon* (1886), 3 T. L. R. 219; *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108. *Mentd.* *Halesowen Ry. v. G. W. Ry. & Mid. Ry.* (1883), 4 Rty. & Can. Tr. Cas. 224; L. C. & D. Ry. v. S. E. Ry. (1888), 40 Ch. D. 100; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; *Silver v. Gatti* (1893), 37 Sol. Jo. 776; *Davis v. Foreman* (1894), 8 R. 725; *R. v. England & Wales Charity Comrs.* (1897), 76 L. T. 199; *London Electric Supply Corp. v. Westminster Electric Supply Corp.* (1913), 11 L. G. R. 1046; *Mortimer v. Beckett*, [1920] 1 Ch. 571.

23. ———.]—Confusion . . . would be caused by transferring considerations applicable to suits for specific performance . . . to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the ct. is merely asked to protect rights completely defined as between the parties to the contract (LORD MACNAGHTEN).—*TAILBY v. OFFICIAL RECEIVER* (1888), 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513; 4 T. L. R. 726, H. L.; *revsq.* S. C. *sub nom.* *OFFICIAL RECEIVER v. TAILBY* (1886), 18 Q. B. D. 25, C. A.

Annotations:—*Consd.* *Re Turcan* (1888), 40 Ch. D. 5. *Reid*. *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *Re Wait*, [1927] 1 Ch. 606. *Mentd.* *Re Pyle Works* (1890), 44 Ch. D. 534; *Re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch.

530; *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; *Nelson v. Faber*, [1903] 2 K. B. 367; *Re Yorkshire Woolcombers Assocn., Houldsworth v. Yorkshire Woolcombers Assocn.*, [1903] 2 Ch. 284; *Re Dallas*, [1904] 2 Ch. 385; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *Ward, Lock v. Long*, [1906] 1 Ch. 550; *Glegg v. Bromley*, [1912] 1 K. B. 474; *Imperial Paper Mills of Canada v. Quebec Bank* (1913), 83 L. J. P. C. 67; *Re Cope, Marshall v. Cope* (1914), 110 L. T. 905; *British Union & National Insce. v. Rawson*, [1916] 2 Ch. 476; *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132; *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305; *London County & Westminster Bank v. Tompkins* (1918), 87 L. J. K. B. 662; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1; *Kursell v. Timber Operators & Contractors*, [1927] 1 K. B. 298; *Re Smith, Franklin v. Smith*, [1928] Ch. 10.

Application of rule—Contract to elect as directors nominees of outside body.]—*See* COMPANIES, Vol. IX., p. 438, Nos. 2845, 2846.

SECT. 2.—CONTRACTS CAPABLE OF PARTIAL ENFORCEMENT ONLY.

24. General rule—Partial relief not given.]—

Cts. of equity cannot decree the performance of one part of an agreement, leaving the other parts unperformed.—*WOOD v. ROWE* (1820), 2 Bli. 595; 4 E. R. 459, H. L.

Annotation:—*Reid*. *Askew v. Millington* (1851), 9 Hare, 65.

25. ———.]—A demises a house to B. for a term of years at a certain rent; & the lease contains a proviso that B. shall, at any time during the term, be enabled, upon giving a certain notice, to purchase the house at a price to be fixed by two surveyors to be named, the one by A., & the other by B., his exors., administrators, or assigns; A. sells his reversion to C., who buys it with notice of the proviso, & the lessee gives notice to C., that he is ready to purchase according to the proviso, & names a surveyor; C., however, refuses to sell, or to name a surveyor on his part:—*Held*: B. cannot maintain a bill against C. for the specific performance of the agreement in the proviso.

The ct. will not interfere in cases of specific performance, unless it can give complete, & not merely a partial relief.—*AGAR v. MACKLEW* (1825), 2 Sim. & St. 418; 4 L. J. O. S. Ch. 16; 57 E. R. 405.

Annotation:—*Reid*. *Richardson v. Smith* (1870), 5 Ch. App. 649, n.

26. ———.]—The ct. will not give any assistance to a party seeking to enforce a bad bargain.

The ct. will no doubt perform a negative contract; but as it cannot enforce the performance of the whole, it will not a part (SHADWELL, V.-C.).—*KIMBERLEY v. YEO, KIMBERLEY v. JENNINGS* (1836), Donnelly, 11; 6 Sim. 340; 5 L. J. Ch. 115; 47 E. R. 186.

Annotations:—*Apprvd.* *Dietrichsen v. Cabburn* (1846), 2 Ph. 52. *Consd.* *Lumley v. Wagner* (1852), 1 De G. M. & G. 604. *Reid*. *Pickering v. Ely* (1843), 12 L. J. Ch. 271; *Daggett v. Ryman* (1868), 16 W. R. 302; *Cornwall v. Hawkins* (1872), 41 L. J. Ch. 435.

27. ———.]—If the contract is to proceed, it is obviously of a nature over which this ct.

executed portions will not be disturbed.—*PECK & COLEMAN v. POWELL, COLEMAN & BRETT* (Ont.) (1885), 11 S. C. R. 494.—CAN.

1. *Contract must be capable of performance.*]—Where a purchaser, in consequence of the resale, filed a bill for specific performance before his contract was ripe for execution, the ct. on that ground dismissed the bill without costs, prefacing the order of

such dismissal with a declaration of the rights of the parties.—*TOWERS v. CHRISTIE* (1857), 6 Gr. 159.—CAN.

PART II. SECT. 2.

g. *Contract interdependent — Specific performance not granted.*]—*TREADGOLD v. ROST* (Y. T.) (1912), 22 W. L. R. 300; 7 D. L. R. 741.—CAN.

h. *Exceptions to rule—Conduct of defendant preventing the execution of*

PART II. SECT. 1.

21 i. *General rule—Contract must be executory.*]—According to the principles upon which a ct. of equity acts in enforcing such contracts & agreements as are properly the subject of its jurisdiction, it will always execute the whole or such parts of the agreement as remain executory; but, if the parties have before action carried out any of the terms of the contract, such

Sect. 2.—Contracts capable of partial enforcement only. Sect. 3.]

cannot have jurisdiction, by way of directing a specific performance; & not having that jurisdiction over the entire contract, the ct. will not assume it over a particular part of the contract (LORD COTTENHAM, C.).—*RANGER v. GREAT WESTERN Ry. Co.* (1838), 1 Ry. & Can. Cas. 1, L. C.

*Annotations:—*Refd. *Kirk v. Bromley Union Grdns.* (1846), 11 Jur. 49; *Waring v. M., S., & L. Ry.* (1849), 7 Hare, 482; *South Wales Ry. v. Wythes* (1854), 1 K. & J. 186; *Foster & Dicksee v. Hastings Corpn.* (1903), 87 L. T. 736.

28. —.]—Pltf., one of the shareholders of the Southampton & Dorchester Ry. co., filed his bill on behalf of himself & all other shareholders, etc., against the L. & S. W. Ry. co. & the Southampton & Dorchester Ry. co., on the ground that, in violation of the agreement, the L. & S. W. Ry. co. had purchased additional shares in the Southampton & Dorchester Ry. co., to assign them to nominees for the purpose of giving the former co. an undue influence in the election of the directors of the Southampton & Dorchester Ry. co., whereby the independence of the Southampton & Dorchester Ry. co. would be ruined; & prayed, among other things, for an injunction to restrain the L. & S. W. Ry. co., their officers & trustees, from applying for the registration of the transfer or assignment of any shares purchased by the L. & S. W. Ry. co., & from voting in the election of any director, etc.:—*Held*: (1) as the bill ought to have gone to the relief upon the agreement which bound all the three cos., the G. W. Ry. co. ought to have been made parties; (2) the London shareholders who had agreed to sell to the L. & S. W. Ry. co. were also necessary parties.

As to the question whether part, only, of an agreement can be enforced without seeking relief in respect of the whole.

The bill was filed, not for the direct & avowed purpose of having the agreement which comprehended the three cos. specifically performed; but to have the auxiliary agreement as between the Southampton & Dorchester Ry. co., & the L. & S. W. Ry. co. carried into effect. As this was to be considered a part only, of the principal agreement, which bound all the three cos., it could not be carried into effect; for unless the bill sought to have relief in respect of the whole agreement, it could not have the aid of the ct. as to part only (*per* CUR.).—*GREATHED v. SOUTH WESTERN & SOUTHAMPTON & DORCHESTER RY. COS.* (1846), 4 Ry. & Can. Cas. 213; 8 L. T. O. S. 65; 10 Jur. 343.

29. —.]—A. mortgaged his own estate for £5,000 for the benefit of B., & B., pursuant to an agreement to that effect with A., conveyed his estate, not only as an indemnity to A., but also to uses for the benefit of his own, B.'s, children & their issue:—*Held*: this ct. would have specifically enforced the whole agreement at the suit of A.

It is fully settled that a contract cannot be specifically performed in part. It must be wholly performed, or not at all.—*FORD v. STUART* (1852), 15 Beav. 493; 21 L. J. Ch. 514; 51 E. R. 629.

*Annotations:—*Mentd. *Kelson v. Kelson* (1853), 10 Hare, 385; *Clarke v. Wright* (1861), 7 Jur. N. S. 1032.

30. —.]—Ordinarily this ct. will not enforce specific performance of part of an agreement, nor consequently of part of an award.—*NICKELS v. HANCOCK* (1855), 7 De G. M. & G. 300;

3 Eq. Rep. 689; 1 Jur. N. S. 1149; 44 E. R. 117. L. JJ.

*Annotation:—*Refd. *Blackett v. Bates* (1865), 2 Hem. & M. 610.

31. —.]—The ct. will not decree the specific performance of a contract unless it can enforce the whole; but the difficulty seems to be removed where the part which it is impossible to enforce had already been performed.—*HOPE v. HOPE* (1856), 22 Beav. 351; 27 L. T. O. S. 227; 4 W. R. 583; 52 E. R. 1143; *on appeal*, 22 Beav. 366, L. JJ.; *subsequent proceedings* (1857), 8 De G. M. & G. 731, L. JJ.

*Annotations:—*Refd. *Walrond v. Walrond* (1858), John. 18; *Hart v. Hart* (1881), 50 L. J. Ch. 697.

32. —.]—An agreement was entered into between F. & O. that F. should grant to O. a lease of a coal wharf at a certain rent, & should be employed throughout the tenancy at a salary of £200 a year, & a commission on the coal sold at the wharf. Disputes having arisen, O. filed a bill against F., for specific performance of the agreement to grant the lease:—*Held*: specific performance could not be decreed, inasmuch as that part of the agreement of which the ct. could decree specific performance was inseparably connected with stipulations which the ct. could not enforce.—*OGDEN v. FOSSICK* (1862), 4 De G. F. & J. 426; 1 New Rep. 143; 32 L. J. Ch. 73; 7 L. T. 515; 9 Jur. N. S. 288; 11 W. R. 128; 45 E. R. 1249, L. JJ.

*Annotations:—*Consd. *Peto v. Brighton, Uckfield & Tunbridge Wells Ry.* (1863), 1 Hem. & M. 468. Distd. *Blackett v. Bates* (1865), 2 Hem. & M. 270. Consd. *Frith v. Frith*, [1906] A. C. 254. Refd. *Firth v. Ridley* (1864), 33 Beav. 516; *Wilkinson v. Clements* (1872), 8 Ch. App. 102, n.; *Measures v. Measures* (1910), 79 L. J. Ch. 707.

33. —.]—In an action of ejectment the jury found that applt. was in possession under a power of attorney for which he had given consideration other than & additional to that mentioned therein, viz., a personal guarantee to a mtgee. of the estate in suit that he would pay the mtge. debt on the day of redemption:—*Held*: assuming it to be irrevocable, he had not a good equitable defence to ejectment, since the contract with him was entire, & an inseparable part of it related to personal service. Applt. could not obtain specific performance thereof.—*FRITH v. FRITH*, [1906] A. C. 254; 75 L. J. P. C. 50; 94 L. T. 383; 54 W. R. 618; 22 T. L. R. 388, P. C.

*Annotation:—*Refd. *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

34. Exceptions to rule—Unenforceable part already performed.]—*HOPE v. HOPE*, No. 31, *ante*.

35. — Unenforceable part not affecting substance of agreement.]—Where certain provisions of an agreement not affecting its substance are such as the ct. cannot decree to be specifically performed, the ct. will decree specific performance of the agreement, & direct an inquiry as to damages in respect of the non-performance of such provisions, in case they should not be performed by deft.—*MIDDLETON v. GREENWOOD* (1864), 2 De G. J. & Sm. 142; 3 New Rep. 694; 10 L. T. 149; 10 Jur. N. S. 350; 46 E. R. 329, L. JJ.

*Annotation:—*Refd. *Elmore v. Pirrie* (1887), 57 L. T. 333.

36. — Plecemeal performance of agreement contemplated.]—An action was brought by a co. for the specific performance by deft. of an agreement which he had entered into to take 2,000 £10 shares in the co., & pay for them in such numbers & at such times as should be required for the pur-

part.]—The principle that the ct. will not perform part of a contract if it cannot perform it all does not apply to cases where the impossibility of carrying a part into execution is due

to the default of deft., who sets up this defence.—*KINHUA CHANDRA DEY v. GRAHAM* (1923), 1 L. R. 50 Calc. 700. —IND.

k. — Partial enforcement allowed

if justice results.]—The ct. will not specifically enforce part of a contract except where that part can be separately enforced without any possible injustice to deft.—*KINHUA CHANDRA*

poses of the co. His name had been placed on the register of shareholders, & a call had been made upon him which he refused to pay. Contemporaneously with the agreement to take the shares, the board of directors had agreed with deft. to pay him £4,000 in consideration of services rendered by him to the co. This sum was to have been paid twelve months after the shares should have been paid for in full. The directors afterwards called on deft. to pay up the full amount of 1,000 of his shares, which he refused to do. Deft. alleged that the two agreements formed really only one contract for the issue of the shares at a discount; that he had not rendered any services to the co., & that the contract was divided into two parts for the express purpose of evading a provision of the co.'s arts. of assocn., which prohibited the directors from issuing shares at a price below par without the consent of a general meeting. No such consent had been given to the contract with deft.:—*Held*: as the parties had contemplated a piecemeal performance of the one agreement, the ct. could compel the performance of a part.—*ODESSA TRAMWAYS CO. v. MENDEL* (1878), 8 Ch. D. 235; 47 L. J. Ch. 505; 38 L. T. 731; 26 W. R. 887, C. A.

Principal contract unenforceable.—See Part II., Sect. 7, *post*.

Contract for settlement.—See SETTLEMENTS, Vol. XL., p. 491, Nos. 390, 391.

SECT. 3.—VOLUNTARY CONTRACTS.

37. General rule—Not specifically enforceable.—*ALEXANDER v. CRESHELD* (1631), Toth. 21; 21 E. R. 111.

38. ———.—A ct. of equity will not interpose in voluntary agreements, where they have been entered into without fraud.—*MORRIS v. BURROUGHS* (1737), 1 Atk. 399; *West temp. Hard.* 242; 2 Eq. Cas. Abr. 272; 26 E. R. 253, L. C.; *subsequent proceedings* (1743), 2 Atk. 627, L. C.

39. ———.—The ct. never decrees specifically without a consideration; but this is not without consideration; for though nothing valuable is given on the face of the articles as a consideration, the settling boundaries, & peace & quiet, as a mutual consideration on each side; & in all cases make a consideration to support a suit in this ct. for performance of the agreement for settling the boundaries (*LORD HARDWICKE, C.*)—*PENN v. BALTIMORE (LORD)* (1750), 1 Ves. Sen. 444; 27 E. R. 1132, L. C.

Annotations.—*Refd.* Bayley v. Edwards (1792), 3 Swan. 703; Portarlington v. Souby (1834), 3 My. & K. 104; *Re Courtney, Ex p. Pollard* (1840), 4 Deac. 27; *Re Holmes* (1861), 2 John. & H. 527; *Cookney v. Anderson* (1962), 31 Beav. 452; *Sichel v. Raphael* (1864), 3 New Rep. 662; *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; *I. R. Comrs. v. Angus, Same v. Lewis* (1889), 23 Q. B. D. 579; *Companhia de Mocambique v. British South Africa Co., De Sousa v. Saine*, [1892] 2 Q. B. 358; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *A.-G. v. Johnson*, [1907] 2 K. B. 885. *Mentd.* Piko v.

DEY v. GRAHAM (1923), 1. L. R. 50 Cal. 700.—IND.

1. ———. *Sale of hotel, stock-in-trade, etc.—Specific performance of sale of goodwill & lease granted.*—*WHITTLE v. CARROLL* (1901), 19 N. Z. L. R. 716.—N.Z.

PART II. SECT. 3.

m. Not specifically enforceable — Voluntary bond.—The locattee of lands from the Crown executed a bond in favour of one of his sons, for the conveyance of fifty acres, to procure his marriage with a particular person,

which, however, never took place, & the son afterwards married another woman, having, in the meantime, been allowed to retain the bond. The father subsequently conveyed for value, to another son, who had notice of the bond; & he having obtained the Crown patent for the land, a bill was filed to compel specific performance of the bond:—*Held*: as against deft., a purchaser for value, the bond was voluntary & could not be enforced.—*OSBORNE v. OSBORNE* (1856), 5 Gr. 619.—CAN.

n. Voluntary oral promise.—

Hoare (1763), Amb. 428; *Bedreechund v. Elphinstone* (1831), 2 State Tr. N. S. 379; *Houlditch v. Donegal* (1834), 8 Bl. N. S. 301; *Norris v. Chambres* (1861), 29 Beav. 246; *Douglas v. Douglas, Douglas v. Webster* (1871), L. R. 12 Eq. 617; *Mercantile Investment & General Trust Co. v. River Plate Trust Loan & Agency Co.* (1892), 61 L. J. Ch. 473; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *British Controlled Oilfields v. Stagg* (1921), 127 L. T. 209; *Re Boundary between Canada & Newfoundland in Labrador Peninsula* (1927), 137 L. T. 187.

40. ———.—It is certain that, in general, cts. will not compel the performance of voluntary agreements. . . . But I think the present was not a mere voluntary agreement, & the ct. will, & I am warranted by the precedents to say, that it has done so, attend to slight considerations for confirming family settlement & modifications of property (*LORD NORTHINGTON, C.*)—*WYCHERLEY v. WYCHERLEY* (1763), 2 Eden, 175; 28 E. R. 864, L. C.

Annotations.—*Refd.* *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Bentley v. Mackay* (1862), 31 Beav. 143; *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200. *Mentd.* *Baker v. Bradley* (1854), 2 Sm. & G. 531.

41. ———.—A ct. of equity will not carry into execution a voluntary deed, without either a valuable or meritorious consideration.—*COLMAN v. SAREL, SAREL v. COLMAN* (1789), 3 Bro. C. C. 12; 1 Ves. 56; 29 E. R. 379, L. C.

Annotations.—*Consd.* *Ellison v. Ellison* (1802), 6 Ves. 656; *Meek v. Kettlewell* (1842), 1 Hare, 464; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Price v. Price* (1851), 14 Beav. 598. *Refd.* *Pulvertoft v. Pulvertoft* (1811), 18 Ves. 84; *Garrard v. Lauderdale* (1831), 2 Russ. & M. 451; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Simpson v. Howden* (1837), 3 My. & Cr. 97; *Hughes v. Stubbs* (1842), 1 Hare, 476; *McFadden v. Jenkins* (1842), 1 Hare, 458. *Mentd.* *Alexander v. Wellington* (1831), 1 Russ. & M. 35.

42. ———.—The ct. will not, generally speaking, enforce an agreement wholly voluntary, & without consideration.—*GROVES v. GROVES* (1829), 3 Y. & J. 163; 148 E. R. 1136.

Annotations.—*Refd.* *Wilkins v. Stevens* (1842), 1 Y. & C. Ch. Cas. 431; *Barnard v. Sutton* (1843), 7 Jur. 685; *Cave v. Mackenzie* (1877), 37 L. T. 218.

43. ———.—With respect to the copyholds, I have no doubt that the ct. will not execute a voluntary contract; & my impression is that the principle of the ct. to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement (*LORD COTTENHAM, C.*)—*JEFFERYS v. JEFFERYS* (1841), Cr. & Ph. 138; 41 E. R. 443, L. C.

Annotations.—*Consd.* *Price v. Price* (1851), 14 Beav. 598. *Refd.* *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Crouch v. Waller* (1859), 4 De G. & J. 302; *Gale v. Gale* (1877), 6 Ch. D. 144; *Gandy v. Gandy* (1885), 30 Ch. D. 57; *Re Holland, Gregg v. Holland*, [1901] 2 Ch. 145.

44. ———.—Where a bill was filed for the specific performance of an agreement & the whole scope & object of the bill were for a purely money demand, the amount of which if ascertained pltf. would be entitled to recover by an action at law, & compensation in money being sought on the footing of an account, the ct. held that relief under the jurisdiction of specific performance could not be granted.

A person about to purchase land stipulated orally with another, who had been accustomed to use a road over it, that in the event of the purchase he would be allowed to continue the use thereof, but afterwards refused to carry out such agreement:—*Held*: this promise was merely voluntary, & as such, insufficient to found a bill for specific performance.—*BARR v. HATCH* (1862), 8 Gr. 312.—CAN.

o. ———. *Instrument informally executed.*—The ct. will not, in favour of a volunteer, order the due execution of an instrument informally executed,

Sect. 3.—Voluntary contracts. Sect. 4: Sub-sects. 1 & 2.]

The ct. never interferes in support of a purely voluntary agreement or where no consideration emanates from the individual seeking the performance of the agreement.—*ORD v. JOHNSTON* (1855), 26 L. T. O. S. 68; 1 Jur. N. S. 1063; 4 W. R. 37.

45 ———.]—The ct. will not decree specific performance of an agreement to execute a voluntary deed of trust in respect of property voluntarily assigned.—*LISTER v. HODGSON* (1867), L. R. 4 Eq. 30; 15 W. R. 547.

Annotation:—Refd. Weir v. Van-Tromp (1900), 16 T. L. R. 531.

Incomplete gifts inter vivos.]—See GIFTS, Vol. XXV., pp. 533–536, Nos. 231–250.

Voluntary settlements.]—See SETTLEMENTS, Vol. XL., pp. 537, 538, Nos. 801–803, 810.

——— *Copyholds.]—See COPYHOLDS, Vol. XIII., p. 124, Nos. 1544–1546.*

What amounts to consideration.]—See Nos. 39, 40, ante; CONTRACT, Vol. XII., pp. 176 et seq.; SETTLEMENTS, Vol. XL., pp. 524 et seq.

SECT. 4.—CONTRACTS REQUIRING SUPERVISION.

SUB-SECT. 1.—IN GENERAL.

46. *Whether agreement specifically enforceable.]—An agreement between a railway co. & railway contractors, who were also landowners, for the construction of a branch railway, provided that the co. should find the land within a reasonable time & build the stations; that the contractors should give a bond to the amount of £50,000 to secure the performance of the contract, & undertake to execute the works for a double line of railway, & the ballasting & permanent way for a single line, according to the terms of a specification, to be prepared by the engineer for the time being of the co.; that the co. should work the branch in a reasonable & proper manner as compared to the remainder of the main railway; & that in case of difference as to working, the same should be settled by arbn.; & that any of the details of the arrangement, in case of difference, should be determined by a referee to be appointed by the S.-G. for the time being:—Held: this agreement was too vague, obscure & uncertain to be enforced in a specific performance suit, & the stipulation as to the execution of a bond could not be enforced apart from the rest, being merely an incidental & subsidiary part of the agreement, & not within the principle of *Lumley v. Wagner*, No. 567, *post*, where the negative stipulation was a distinct & substantive part of the contract.*

Though the ct. may execute an agreement framed in general terms where the law will supply the details, yet if those details are to be supplied, in modes which cannot be adopted by the ct., there is no concluded agreement which can be enforced in equity.—*SOUTH WALES RY. CO. v. WYTHES* (1854), 5 De G. M. & G. 880; 3 Eq. Rep. 153; 24 L. J. Ch. 87; 24 L. T. O. S. 165; 3 W. R. 133; 43 E. R. 1112, L. JJ.

Annotations:—Apld. Kernot v. Potter (1862), 3 De G. F. & J. 447; *Greenhill v. Isle of Wight* (Newport Junction) Ry.

although the relief would be granted to a purchaser for value.—*ROSS v. FOX* (1867), 13 Gr. 683.—**CAN.**

p. ——— *Declaration of trust lacking consideration.]—CORBETT v. MCNEIL* (1906), 41 N. S. R. 110; 2 E. L. R. 257.—**CAN.**

PART II. SECT. 4, SUB-SECT. 1.

46 i. *Whether agreement specifically enforceable.]—The ct. will not decree*

the specific performance of work which the ct. is unable to superintend.—*JOHNSON v. MONTREAL & OTTAWA JUNCTION RY. CO.* (1875), 22 Gr. 290.—**CAN.**

46 ii. ———.]—This ct. will not interfere to compel the specific performance of an agreement, unless it can itself execute the whole contract in the terms specifically agreed upon.—*GERVAIS v. EDWARDS* (1848), 1 Dr. &

(1871), 23 L. T. 885. *Distd. Greene v. West Cheshire Ry.* (1871), L. R. 13 Eq. 44. *Refd. Onions v. Cohen* (1865), 5 New Rep. 400; *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112.

47. ———.]—The ct. cannot enforce specific performance of the works; it cannot look after the acts & conduct of pltf., nor say how far he does or does not depart from what is right in executing the works or professing to execute them. If he is or shall be wronged by his exclusion from the works, & by the act of the co. in executing the works themselves, that will be a case for damages to be assessed & given either in this ct. or in a ct. of law; but it is not a case for specific performance, or relief analogous to specific performance, which, to proceed to grant an injunction on this part of the prayer of the bill, would necessarily amount to (*KNIGHT BRUCE, L.J.*)—*MUNRO v. WIVENHOE & BRIGHTLINGSEA RY. CO.* (1865), 4 De G. J. & Sm. 723; 12 L. T. 655; 11 Jur. N. S. 612; 13 W. R. 880; 46 E. R. 1100, L. JJ.

Annotations:—Mentd. Garrett v. Salisbury & Dorset Junction Ry. (1866), L. R. 2 Eq. 358; *Foster & Dicksee v. Hastings Corpn.* (1903), 87 L. T. 736.

48. ———.]—Specific performance will not be decreed of a contract to employ a person to construct works which the ct. is unable to superintend.

Where the directors of a railway co. entered into a written agreement to give pltf. "a contract for the construction of the line for the sum of £55,000, subject to a specification of the works on the line included in the said sum to be agreed upon between pltf. & the engineer of the co., in case of dispute the matter to be referred" to an arbitrator, & a bill was filed for specific performance:—*Held*: the terms of this agreement were too indefinite to be enforced in a specific performance suit; but even had the terms been sufficiently definite, the agreement was of such a nature that specific performance could not have been decreed.—*GREENHILL v. ISLE OF WIGHT (NEWPORT JUNCTION) RY. CO.* (1871), 23 L. T. 885; 19 W. R. 345.

49. ———.]—*COOKE v. CHILCOTT*, No. 61, *post*.

50. ——— *Damages inadequate compensation to plaintiff—& plaintiff having material interest in performance.]—This ct. has jurisdiction to enforce the specific performance of a contract by a deft. to do defined work upon his property, in the performance of which pltf. has a material interest, & which is not capable of adequate compensation in damages.*

If the thing be reasonably possible it must be done. The difficulty & expense of performing the contract do not necessarily form an objection (*KNIGHT BRUCE, V.-C.*)—*STORER v. GREAT WESTERN RY. CO.* (1842), 2 Y. & C. Ch. Cas. 48; 3 Ry. & Can. Cas. 106; 12 L. J. Ch. 65; 6 Jur. 1009, 1051; 63 E. R. 21.

Annotations:—Expld. South Wales Ry. v. Wythes (1854), 1 K. & J. 186; *A.-G. v. Thames Conservators* (1862), 1 Hem. & M. 1. *Consd. Wells v. Maxwell* (No. 1) (1863), 32 Beav. 408; *Blackett v. Bates* (1865), 2 Hem. & M. 270. *Apld. Wilson v. Furness Ry.* (1869), L. R. 9 Eq. 28; *Greene v. West Cheshire Ry.* (1871), L. R. 13 Eq. 44. *Consd. Greenhill v. Isle of Wight (Newport Junction) Ry.* (1871), 23 L. T. 885. *Apld. Cooke v. Chilcott* (1876), 3 Ch. D. 694. *Refd. Blackett v. Bates* (1865), 2 Hem. & M. 610; *McManus v. Cooke* (1887), 35 Ch. D. 681.

War. 80; 4 I. Eq. R. 555; 1 Con. & Law. 242.—**IR.**

46 iii. ———.]—There is no ct. which can decree specific performance of a private contract, or administer the equities arising out of part performance, or acquiescence by a vendor in the expenditure of money by a purchaser on the faith of the contract.—*GODFRAY v. SARK CONSTABLES* (1902), 87 L. T. 3, P. C.—**CHANNEL ISLANDS.**

51. — Where defendant has obtained benefit under contract.]—WILSON v. FURNESS RY. CO., No. 59, *post*.

Particular Instances.]—See Sub-sect. 2, *post*.

SUB-SECT. 2.—PARTICULAR INSTANCES.

52. Common covenants in husbandry.] —

Demurrer to a bill by a landlord for a specific performance of covenants, contained in a lease which had expired, to repair hedges & mansion house, & also for an account of loppings & dung, cut or removed, by the tenant; allowed; common covenants in husbandry not being the subject of equitable jurisdiction.—RAYNER v. STONE (1762), 2 Eden, 128; 28 E. R. 845, L. C.

Annotation:—Apld. Phipps v. Jackson (1887), 56 L. J. Ch. 550.

53. —.]—It appears to me that what in reality is being asked for is judgment for specific performance of a stipulation in a farming lease; & it has been well settled ever since the case of *Rayner v. Stone*, No. 52, *ante*, reported more than a hundred years ago that such an action cannot be maintained (STIRLING, J.).—PHIPPS v. JACKSON (1887), 56 L. J. Ch. 550; 35 W. R. 378; 3 T. L. R. 387.

54. Preservation of secret of invention—Expired patent.]—The ct. will not interfere by injunction to prevent the violation of an agreement, of which, from the nature of the subject, there could be no decree for a specific performance; as, for instance, to restrain deft. from imparting the secret of an invention which had been the subject of a patent long since expired.

The difficulty in such a case is, how to decree the specific performance of the agreement. Either it is a secret, or it is none. If a secret, what means does the ct. possess of interfering so as to enforce its own orders? (LORD ELDON, C.).—NEWBURY v. JAMES (1817), 2 Mer. 416; 1 Carp. Pat. Cas. 367; 35 E. R. 1011, L. C.

Annotations:—Distd. *Amber, Size & Chemical Co. v. Menzel*, [1913] 2 Ch. 239. Rejd. *Green v. Church* (1823), 1 L. J. O. S. Ch. 203; *Morison v. Moat* (1851), 20 L. J. Ch. 513; *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & Sm. 137; *James v. James* (1872), 20 W. R. 434.

55. Construction of railway works.]—Although a ct. of equity has jurisdiction in a proper case, to prevent an application to Parliament for a private Act, or an Act respecting property, it will not interfere on the ground that such an application, if successful would interfere with pre-existing rights, whether such rights exist by tenure of property, or by virtue of contract.

A railway co. applied to Parliament for an Act to form their line, & their application was opposed by a landowner through whose land the line would pass. He afterwards withdrew his opposition on the faith of an agreement which provided for the formation of a branch line to his iron works. The co. obtained an Act for this purpose, but afterwards determined to abandon their intention of making the branch railway, & were about to apply to Parliament for an Act to enable them to do so; when pltf. filed his bill for an injunction. The Vice-Chancellor of England granted the injunction, but the Lord-Chancellor, on appeal, reversed his decision, & dissolved the injunction:—*Held*: a contract to make a railway is not one of which a

ct. of equity will compel the specific performance, but will leave the parties to their legal remedies.—HEATHCOTE v. NORTH STAFFORDSHIRE RY. CO. (1850), 2 Mac. & G. 100; 6 Ry. & Can. Cas. 358; 2 H. & Tw. 332; 20 L. J. Ch. 82; 14 Jur. 859; 42 E. R. 39.

Annotations:—Consd. *Lancaster & Carlisle Ry. v. N. W. Ry.* (1856), 2 K. & J. 293; *Steele v. North Metropolitan Ry.* (1867), 1 Ch. App. 237; *Er p. Hartridge & Allender* (1869), 5 Ch. App. 672, n. Rejd. *R. v. L. & Y. Ry.* (1852), 1 E. & B. 228; *De Mattos v. Gibson* (1859), 4 De G. & J. 276; *Fothergill v. Rowland* (1873), L. R. 17 Eq. 132; *Keith Prowse v. National Telephone Co.*, [1894] 2 Ch. 147; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37.

56. —.]—SOUTH WALES RY. CO. v. WYTHES, No. 46, *ante*.

57. —.]—This ct. has not jurisdiction to decree the specific performance of a contract, for which the consideration on the part of pltf. is the execution of certain works which the ct. is unable to superintend.

Therefore, where the bill stated an agreement to employ pltf. as contractors for making a railway, & to pay for the works in debentures & shares of the co., a motion for an injunction to restrain the co. from dealing with the debentures, & transferring the shares in question to others, in derogation of pltf.'s rights, was refused.—PETO v. BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RY. CO. (1863), 1 Hem. & M. 468; 2 New Rep. 415; 32 L. J. Ch. 677; 9 L. T. 227; 11 W. R. 874; 71 E. R. 205.

Annotations:—Consd. *Greenhill v. Isle of Wight (Newport Junction) Ry.* (1871), 23 L. T. 885. Rejd. *Brett v. East India & London Shipping Co.* (1861), 10 L. T. 187; *Nuncaton L. B. v. General Sewage Co.* (1875), L. R. 20 Eq. 127; *Grimstone v. Cunningham*, [1894] 1 Q. B. 125; *Measures v. Measures*, [1910] 2 Ch. 248.

58. —.]—GREENHILL v. ISLE OF WIGHT (NEWPORT JUNCTION) RY. CO., No. 48, *ante*.

59. — Benefit accruing to defaulting party.]—A railway co. entered into an agreement with pltf., who were owners of land near to the railway, whereby the co., in case they obtained a release from certain obligations imposed upon them by their Act of Incorporation, to construct a drawbridge & viaduct, as mentioned in their Act, & in case certain land was conveyed to them, agreed with pltf. to construct a road between certain specified points, & to pay a certain annual sum towards the maintenance of it, & also to construct & maintain a wharf, as therein specified. About six years after the date of the agreement pltf. filed their bill for the specific performance of this agreement, alleging that the co. had been released from their obligations, & the land mentioned in the agreement had been conveyed to them, but they had only commenced, & never finished, the road, & had not commenced the wharf:—*Held*: the ct. would enforce the performance of this agreement, & since the co. had obtained the benefit of it, they would not be suffered to evade it by any difficulties there might be in the way of the ct. superintending the work. If necessary, the ct. might permit pltf. themselves to do the work at the co.'s expense.—WILSON v. FURNESS RY. CO. (1869), L. R. 9 Eq. 28; 39 L. J. Ch. 19; 21 L. T. 416; 18 W. R. 89.

Annotations:—Consd. *Greene v. West Cheshire Ry.* (1871), L. R. 13 Eq. 44; *Greenhill v. Isle of Wight (Newport Junction) Ry.* (1871), 23 L. T. 885. Rejd. *Ryan v. Mutual Tontine Westminster Chambers Assocn.*, [1893] 1 Ch. 116.

—.]—See, also, RAILWAYS, Vol. XXXVIII., pp. 282, 283, 294, Nos. 195–202, 249, 250.

PART II. SECT. 4, SUB-SECT. 2.
r. Contract to run cars at specified times with specified officers.]—The ct. will not order specific performance of an agreement by an electric railway co.

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to run its cars on certain streets at certain hours & with certain officers, as the ct. cannot oversee the carrying out of the judgment if granted. Nor will the ct. grant an injunction restrain-

ing the co. from carrying out such an agreement to the extent to which they are willing to carry it out unless & until they carry it out *in toto*, as this would also involve the same minute

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Sect. 4.—Contracts requiring supervision: Sub-sect. 2. Sect. 5: Sub-sect. 1.]

Contract for running powers—Involving supervision of railway line.]—*See RAILWAYS, Vol. XXXVIII., pp. 343, 344, No. 526.*

60. Covenant to work coal in specified mode.]—Pltfs. granted a lease of a coal mine to defts., reserving a minimum rent of £720, to be increased to £1,000 in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; & the lessees covenanted to work the mine uninterruptedly, efficiently, & regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits on pltfs.' property. Pltfs. being desirous of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill for specific performance of the covenant in the lease:—*Held*: there was no obligation upon defts. to sink pits although that might be the most efficient mode of working; & so long as the minimum rent was paid, defts. could not be compelled to work the mine at all; the lessees had committed no breach of contract; but if they had done so, the remedy was at law & not in equity; & this ct. could not, by a reference to chambers, give effect to the covenant by directions as to the management of a coal mine.

For this ct. to undertake the working of a colliery, for this ct. to superintend workings of this description, is entirely out of the question (MALINS, V.-C.).—*WHEATLEY v. WESTMINSTER BRYMBO COAL CO.* (1869), L. R. 9 Eq. 538; 39 L. J. Ch. 175; 22 L. T. 7; 18 W. R. 162.

Annotations:—Consd. Kinsman v. Jackson (1880), 42 L. T. 80. *Refd. Willesford v. Watson* (1871), L. R. 11 Eq. 572; *Simpson v. Ingleby* (1872), 26 L. T. 543

61. Supply of water by purchaser of land—Covenant with vendor.]—A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump & reservoir, & to supply water from the well to all houses built on the vendor's land:—*Held*: though the covenant was not one of which the ct. would decree specific performance directly as being for the construction of works which the ct. could not superintend, it could be enforced indirectly by an injunction restraining deft. from allowing the work to remain unperformed.—*COOKE v. CHILCOTT* (1876), 3 Ch. D. 694; 34 L. T. 207.

Annotations:—Refd. Haywood v. Brunswick Bldg. Soc. (1881), 8 Q. B. D. 403; *Andrew v. Aitken* (1882), 22 Ch. D. 218; *L. & S. W. Ry. v. Gomm* (1882), 20 Ch. D. 562; *Austerberry v. Oldham Corp.* (1885), 29 Ch. D. 750; *Hall v. Ewin* (1887), 37 Ch. D. 74.

62. Agreement to provide service—Porter in residential flats.]—*RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCN.*, No. 138, *post*.

63. — Housekeeper for offices.]—Offices in a large building were let by defts. & their predecessors in title at a yearly rent & an additional smaller rent for "cleaning the rooms by the housekeeper appointed for the time being by the landlord." There were other agreements with other tenants in this large building in similar form. With another set of offices the co. agreed "to appoint & pay a housekeeper to be in attendance"

for certain hours, "who shall act as the servant of the lessees in cleaning the rooms." The agreement added, "the lessors are to remove such housekeeper & substitute another if called upon to do so by at least two-thirds of the tenants." After all these terms had been subsisting for some time the resident housekeeper without any notice to the tenants left the building, which was placed in charge of a housekeeper who resided on the top floor of another building about 60 yards away & had charge of that other building & a third building. He attended at irregular times in the morning & in the evening, & only for short periods, & if needed at other times had to be sought in the other buildings:—*Held*: there was a correlative obligation to supply the services of a housekeeper, which corresponded with the obligation to pay the additional rent for those services; the landlord's obligation as to the housekeeper was one "with reference to the subject matter of the lease" under Conveyancing & Law of Property Act, 1881 (c. 41), s. 11; there was no obligation to provide a resident housekeeper, but there was an obligation to provide the housekeeper's attendance between certain hours under that agreement, which so provided, & that obligation had been broken; the remedy was in damages & not by way of specific performance.—*BARNES v. CITY OF LONDON REAL PROPERTY CO., ETC.*, [1918] 2 Ch. 18; 87 L. J. Ch. 601; 119 L. T. 203; 34 T. L. R. 361.

Annotation:—Mentd. O'Cedar v. Slough Trading Co., [1927] 2 K. B. 123.

64. Erection & maintenance of telephone apparatus—Involving supervision of maintenance.]—Under an agreement in 1889 defts., a telephone co., supplied to pltfs the use of a telephone wire & apparatus for three years at a rent payable quarterly. Upon the expiration of the term the parties continued the agreement by mutual consent. On Dec. 30, 1893, being the last day of a quarter, defts. gave pltfs. a notice determining the agreement forthwith, & stating their intention to disconnect the wire & remove the apparatus, & at the same time they demanded rent "up to Dec. 31" being one day beyond the quarter. This rent was duly paid to & accepted by defts. Upon a motion by pltfs. for an injunction to restrain defts. from interfering with the wire & apparatus:—*Held*: the agreement created the relation of landlord & tenant, & therefore that the acceptance by defts. of rent for a day beyond that on which the notice determining the contract was given operated as a waiver of the notice. Accordingly, an injunction was granted restraining defts. from acting their notice.

The co. agreed in the first paragraph of the agreement, to erect & maintain in working order, subject to provisions, a certain wire & the telephone apparatus relating thereto. It would be impossible for the ct. to supervise a complete performance of that clause of the agreement, & to see to the maintenance of the wire & telephonic apparatus during the period of the agreement (*KEKEWICH, J.*).—*KEITH, PROWSE & CO. v. NATIONAL TELEPHONE CO.*, [1894] 2 Ch. 147; 63 L. J. Ch. 373; 70 L. T. 276; 58 J. P. 573; 42 W. R. 380; 10 T. L. R. 263; 8 R. 776.

Annotations:—Distd. Cochrane v. Exchange Telegraph Co. (1896), 65 L. J. Ch. 334. *Refd. Civil Service Co-op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347.

supervision.—*CITY OF KINGSTON v. KINGSTON, PORTSMOUTH & CATARAQUI ELECTRIC RY. CO.* (1898), 25 A. R. 462.—*CAN.*

t. Covenant by lessee to keep on premises sufficient stock to satisfy

*distress.]—*Where a lessee covenanted that he would keep on the leased premises sufficient stock-in-trade to satisfy a distress for rent for a specified period:—*Held*: an injunction could not be granted to restrain the breach of the covenant on the ground that the

ct. would not grant an injunction which really amounted to a decree for specific performance requiring the continual superintendence of the ct. to carry it out.—*HILL v. FRASER* (1914), 29 W. L. R. 458; 7 W. W. R. 131; 18 D. L. R. 1; 7 Alta. L. R. 464.—*CAN.*

Agreement for lease.]—See LANDLORD & TENANT, Vol. XXX., pp. 416, 417, Nos. 782–786.

Building contracts.]—See BUILDING CONTRACTS, Vol. VII., pp. 400, 401, Nos. 265, 266, 271–273.

Covenant by tenant to repair.]—See LANDLORD & TENANT, Vol. XXXI., p. 337, Nos. 4803–4807.

Charterparty.]—See SHIPPING, Vol. XLI., pp. 321, 322, Nos. 1804–1806.

SECT. 5.—CONTRACTS OF PERSONAL WORK OR SERVICE.

SUB-SECT. 1.—IN GENERAL.

Personal contracts generally, see CONTRACT, Vol. XII., pp. 588–594, Nos. 4906–4948.

65. Specific performance not decreed—General rule.]—FIRTH v. RIDLEY, No. 250, *post*.

66. ———.]—WHITE v. BOBY, No. 1309, *post*.

67. ———.]—The *cts.*, as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring & service, being the common relation of master & servant, or whether they are agreements for the purpose of pleasure, as for the purpose of scientific pursuits, or for the purpose of charity as philanthropy (JESSEL, M.R.).—RIGBY v. CONNOL (1880), 14 Ch. D. 482; 49 L. J. Ch. 328; 42 L. T. 139; 28 W. R. 650.

Annotations:—*Apld.* Millican v. Sullivan (1888), 4 T. L. R. 203. *Consd.* Baird v. Wells (1890), 44 Ch. D. 661. *Distd.* Ryan v. Mutual Tontine Westminster Chambers Assn. (1892), 62 L. J. Ch. 252. *Consd.* Mullett v. United French Polishers London Soc. (1904), 91 L. T. 133; Yorkshire Miners' Assn. v. Howden, [1905] A. C. 256; Osborne v. Amalgamated Soc. of Railway Servants, [1911] 1 Ch. 540; Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley, [1922] 2 A. C. 440; Wing v. Burn (1928), 44 T. L. R. 258. *Refd.* Duke v. Littleboy (1880), 49 L. J. Ch. 802; Wolfe v. Matthews (1882), 21 Ch. D. 194; Swaine v. Wilson (1889), 24 Q. B. D. 252; Old v. Robson (1890), 59 L. J. M. C. 41; Chamberlain's Wharf v. Smith, [1900] 2 Ch. 605; Cullen v. Elwin (1904), 90 L. T. 840; Steele v. South Wales Miners Federation, [1907] 1 K. B. 361; Cope v. Crossingham, [1908] 2 Ch. 624; Cassel v. Inglis, [1916] 2 Ch. 211. *Mentd.* Winder v. Kingston-upon-Hull Incorporation for the Poor (1888), 58 L. T. 583; Taff Vale Ry. v. Amalgamated Soc. of Railway Servants, [1901] A. C. 426; Amalgamated Soc. of Railway Servants v. Osborne, [1910] A. C. 87; A.-G. v. Swan, [1922] 1 K. B. 682.

68. ———.]—(1) By an apprenticeship deed between an infant, her parent, & *pltf.* the infant was bound apprentice to *pltf.* for seven years, to be taught stage dancing, upon certain terms, by one of which the infant contracted that she would not accept any professional engagement or contract matrimony during the term without the consent of her master. The deed also contained mutual covenants by the master & the parent that the master would properly instruct the infant, & make certain payments to her for all dancing engagements in this country & in foreign or colonial countries; in return for which the infant's services were to be entirely at the disposal of the master. But there was no stipulation that the master should provide engagements for the infant or maintain her while unemployed. There was also a provision that the master might put

an end to the apprenticeship, if the infant should be found after fair trial unfit for the work of stage dancing, or should break any of the engagements of the deed, or in any way misconduct herself. The infant having made a professional engagement with *deft. B.*, *pltf.* brought an action against *B.*, the infant, & her parent, to enforce the provisions of the deed & for damages for breach of it:—*Held*: the provisions of the deed were unreasonable, & could not be enforced against the infant or her parent.

(2) I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression & a strong feeling, that it is not in the interest of mankind that the rule of specific performance should be extended to such cases (FRY, L.J.).—DE FRANCESCO v. BARNUM (1890), 45 Ch. D. 430; 60 L. J. Ch. 63; 63 L. T. 438; 39 W. R. 5; 6 T. L. R. 463.

Annotations:—*As to* (1) *Consd.* Corn v. Matthews, [1893] 1 Q. B. 310; Roberts v. Gray, [1913] 1 K. B. 520; Wilkins v. Weaver, [1915] 2 Ch. 322; Mackinlay v. Bathurst (1919), 36 T. L. R. 31. *Refd.* Clements v. L. & N. W. Ry., [1894] 2 Q. B. 482. *As to* (2) *Consd.* Whitwood Chemical Co. v. Hardman (1891), 39 W. R. 433. *Generally, Refd.* Long v. Smithson (1918), 88 L. J. K. B. 223.

69. Agency.]—Auctioneers advanced a sum of money to *J.*, who agreed to put a miscellaneous collection of property in their hands for sale, from the proceeds of which they were to retain the money advanced; a part only of the property was delivered & sold, but it realised less than the sum advanced; *J.* refused to part with the remainder of his collection; & upon a demurrer to a bill filed for a specific performance of the agreement:—*Held*: the Court would not compel the performance of the contract for an agency.—CHINNOCK v. SAINSBURY (1860), 30 L. J. Ch. 409; 3 L. T. 258; 6 Jur. N. S. 1318; 9 W. R. 7.

70. ———.]—The agreement . . . is one of agency, & consequently not one of which specific performance would be decreed by a *ct.* of equity (STIRLING, J.).—MORRIS v. DELOBBEL-FILPO, [1892] 2 Ch. 352; 61 L. J. Ch. 518; 66 L. T. 320; 40 W. R. 492; 36 Sol. Jo. 347.

Annotations:—*Refd.* Lord's Trustee v. G. E. Ry., [1908] 2 K. B. 54. *Mentd.* Wrightson v. McArthur & Hutchisons, [1921] 1 K. B. 807.

—*See, further*, AGENCY, Vol. I., pp. 544, 545, Nos. 1971–1976.

71. Agreements for purposes of pleasure.]—RIGBY v. CONNOL, No. 67, *ante*.

72. Agreements for scientific or charitable purposes.]—RIGBY v. CONNOL, No. 67, *ante*.

73. Contract for personal services included in larger enforceable contract—Whether enforceable.]—Where a railway co. has, on the purchase of land for the purposes of their Act, & as part of the consideration, entered into covenants with the landowner to make & maintain certain accommodation works, & also to perform certain acts in the nature of personal service, & then, by a subsequent Act of Parliament, the co. is dissolved

PART II. SECT. 5, SUB-SECT. 1.

65 i. Specific performance not decreed—General rule.]—A suit cannot be sustained which seeks to enforce an agreement for the continuance of *pltf.*'s duties or personal services to *deft.*, inasmuch as those services might be rendered in a manner productive of injury rather than benefit to the latter; & the *ct.* does not possess the means of compelling a person to fulfil his duty to his employer under such a contract.—FITZPATRICK v. NOLAN (1851), 1 L. Ch. R. 671.—IR.

u. Specific performance not decreed.]—*Pltf.* sought specific performance of a contract by which he was to receive one-fourth share in the profits on a patent for a sheep-shearing machine or any improvements thereon in consideration of his expending time & money on furthering the sale of the machine. *Deft.* obtained a patent for a sheep-shearing machine different from that mentioned in the agreement:—*Held*: assuming it to be merely an improvement the contract was not one of which the *ct.* would grant

specific performance because under it *pltf.* was bound to render personal services & that this was not affected by the fact that a co. had been formed to which the patent had been sold: so that the services were no longer necessary in as much as the time at which the materiality must be determined was the time at which the contract was made.—WOODS v. WOISELEY (1891), 12 N. S. W. Eq. 245.—AUS.

a. ———.]—The *ct.* will not decree specific performance of an agreement

Sect. 5.—Contracts of personal work or service : Sub-sects. 1 & 2. Sect. 6.]

& its undertaking transferred to another railway co. "subject to the obligations & liabilities" of the old co., the landowner can maintain an action against the new co. for specific performance of the whole covenants, including that for personal service.—*FORTESCUE v. LOSTWITHIEL & FOWEY RY. Co.*, [1894] 3 Ch. 621; 64 L. J. Ch. 37; 71 L. T. 423; 43 W. R. 138; 8 R. 664.

Annotation :—*Refd.* *Kennard v. Cory*, [1922] 1 Ch. 1.

Whether injunction granted—Where contract not specifically enforced.—*See* INJUNCTION, Vol. XXVIII., pp. 445–447, Nos. 655–663.

SUB-SECT. 2.—CONTRACTS OF EMPLOYMENT AND CONTRACTS FOR CONTINUOUS SERVICES.

74. Whether enforceable.—*JOHNSON v. SHREWSBURY & BIRMINGHAM RY. Co.*, No. 97, *post*.

75. —.—*WOLVERHAMPTON & WALSALL RY. Co. v. LONDON & NORTH-WESTERN RY. Co.*, No. 22, *ante*.

76. —.—*RIGBY v. CONNOL*, No. 67, *ante*.

77. Employment as manager.—The partners in certain brass works enter into articles with A., that he shall serve them as their manager & overseer, during his life; &, besides a stipulated yearly salary, he was to have 3s. 6d. for every hundredweight of brass wire made by him, or any other person during his life. A. was afterwards discharged by the partners from their service; & on a bill brought for a specific performance of these articles, it was decreed that pltf. was entitled to all the advantages thereby stipulated for him, except the 3s. 6d. payable to him for every hundredweight of brass wire made at the mills; which the Lord Chancellor conceived was intended as a reward, attending the produce of the works, during such time only as pltf. supervised same. But this part of the decree was reversed, & he was held to be entitled to this allowance, during his life.—*BALL v. COGGS* (1710), 1 Bro. Parl. Cas. 140; 1 E. R. 471.

Annotations :—*Apld.* *Adderley v. Dixon* (1824), 1 Sim. & St. 607. *Distd.* *Stocker v. Brockbank* (1851), 15 Jur. 591.

78. —.—By a contract between the vendors of a brewery & a trustee for a limited co. which was to be formed for the purchase & carrying on of the brewery, it was agreed, among other things, that B., one of the vendors, should be a managing director for a specified time, & that on his retirement or death his son, pltf., should be managing director for a term therein mentioned, & that B. should provide a qualification for his son as managing director. By the arts. of assocn., which adopted the contract it was provided that a director should vacate his office if he did not acquire a qualification within a month of his appointment or election, & that the qualification of a managing director should be the holding in his own right shares of the nominal value of £25,000. B. provided for pltf. shares to the amount of £5,000, & died in Aug. 1888. Pltf., who was one of his exors., & his co-exors. in Oct. 1888, transferred shares to the amount of £20,000 into pltf.'s name to complete his qualification as a managing director but the estate had not been administered, & there was

no evidence under what circumstances the shares were transferred to him or whether he was beneficially entitled to them. The board of directors refused to recognise pltf. as a director on the ground that he had not sufficient qualification, & he brought an action to restrain them from excluding him, & moved for an *interim* injunction :—

It would be contrary to the principles on which this ct. acts to grant specific performance of this contract by compelling this co. to take this gentleman as managing director, although he is qualified to act, when they do not desire him to act as such (*COTTON, L.J.*).—*BAINBRIDGE v. SMITH* (1889), 41 Ch. D. 462; 60 L. T. 879; 37 W. R. 594; 5 T. L. R. 375, C. A.

Annotations :—*Apld.* *Cuff v. London & County Land & Bldg. Co.*, [1912] 1 Ch. 440. *Consd.* *British Murac Syndicate v. Alpertou Rubber Co.*, [1915] 2 Ch. 186. *Refd.* *Re Bainbridge, Reeves v. Bainbridge*, [1889] W. N. 228. *Mentd.* *Cooper v. Griffin*, [1892] 1 Q. B. 740; *Howard v. Sadler*, [1893] 1 Q. B. 1; *Sutton v. English & Colonial Produce Co.*, [1902] 1 Ch. 502; *Boschock Proprietary Co. v. Fuke*, [1906] 1 Ch. 148; *Salmon v. Quin & Axtens*, [1909] 1 Ch. 311; *Cory v. S.S. Reludeer* (1915), 31 T. L. R. 530.

79. Employment as packer.—*EAST INDIA CO. v. VINCENT* (1740), 2 Atk. 83; 26 E. R. 451, L. C.

Annotations :—*Consd.* *McManus v. Cooke* (1887), 35 Ch. D. 681. *Refd.* *Moynell v. Surtees* (1855), 25 L. J. Ch. 257. *Mentd.* *Blakemore v. Glamorganshire Canal Navigation* (1832), 1 My. & K. 154; *Barnard v. Wallis* (1840), 1 Ry. & Can. Cas. 162; *Harryman v. Collins* (1851), 18 Beav. 11; *Scott v. Scott* (1854), 23 L. T. O. S. 27; *Horvey v. Smith* (1855), 1 K. & J. 389; *Crampton v. Varna Ry.* (1872), 7 Ch. App. 562.

80. Law reporter.—The ct. cannot specifically perform an agreement, whereby A. agrees to compose & write reports of cases determined in a ct. of justice, to be printed & published by a particular individual for a stipulated remuneration.—*CLARKE v. PRICE* (1819), 2 Wils. Ch. 157; 37 E. R. 270.

Annotations :—*Apld.* *Baldwin v. Soc. for Diffusion of Useful Knowledge* (1838), 9 Sim. 393; *Pickering v. Ely* (Bp.) (1843), 2 Y. & C. Ch. Cas. 249. *Consd.* *Lunley v. Wagner* (1852), 1 De G. M. & G. 604; *Hope v. Hope* (1856), 22 Beav. 351. *Refd.* *Komble v. Kean* (1829), 6 Sim. 333; *Taylor v. Davis* (1834), 4 L. J. Ch. 18; *Brace v. Welmer* (1858), 25 Beav. 348; *De Mattos v. Gibson* (1859), 4 De G. & J. 276; *Merchants Trading Co. v. Banner* (1871), L. R. 12 Eq. 18; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; *Mortimer v. Beckett*, [1920] 1 Ch. 571; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372. *Mentd.* *Dietrichsen v. Cabburn* (1846), 1 Coop. temp. Cott 72; *Fechter v. Montgomery* (1863), 33 Beav. 22.

81. Map draughtsman.—By an agreement between pltf. & defts., the former, in consideration of certain payments to be made by them to the latter, were to have the exclusive right of engraving & publishing a series of maps from drawings to be furnished to them, from time to time, by the latter. The ct. refused to restrain defts. from acting in violation of the agreement, as it could not compel defts. to furnish the drawings; & could not decree a specific performance of the agreement.—*BALDWIN v. SOCIETY FOR DIFFUSION OF USEFUL KNOWLEDGE* (1838), 9 Sim. 393; 2 Jur. 961; 59 E. R. 409.

Annotation :—*Refd.* *Pickering v. Ely* (Bp.) (1843), 12 L. J. Ch. 271.

82. Receiver to bishop.—By a grant or patent dated in 1801 the then Bishop of Ely having, as the grant stated, "confidence in the probity, fidelity, care & industry of P," granted to P., who was a solr., "the office of receiver of all issues profits, sum & sums of money arising & issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies, to be

for a lease at a peppercorn rent where the agreement provides that the lease shall be "subject to the same conditions as are in this agreement contained," & the conditions are covenants for personal services.—*GILMOUR v. BRUCE* (1873), 2 N. Z. Jur. 119.—N.Z.

PART II. SECT. 5, SUB-SECT. 2.

74 i. Whether enforceable.—The ct. will in no case decree specific performance of contracts which involve the performance of continuous acts.—*FELL v. NEW SOUTH WALES OIL & SHALE Co.* (1889), 10 N. S. W. Eq. 255;

6 N. S. W. W. N. 51.—AUS.

b. — Agreement to look after property.—*HEWITT v. BROWN* (1869), 16 Gr. 670.—CAN.

c. — Appointment as bath attendant.—*GILLIS v. M'GHEE* (1861), 13 I. Ch. R. 48.—IR.

approved of by the bishop & his successors, for his life. The office of receiver was an ancient office & had been exercised before the restraining statute of 1 Eliz. c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents but negotiated the renewals of leases, & prepared the leases of the see & likewise attended all searches for records in the bishop's muniment room, of which he kept a key; for the performance of which acts he received fees & emoluments. It appeared also that his predecessor in office who had held the office since 1785 had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop praying a declaration of the rights in question in his favour, that he might be quieted in the possession of the office, & that the bishop might be restrained by injunction from obstructing pltf. in the exercise of such rights & from doing acts in contravention of them:—*Held*: the relief sought being analogous to the specific performance of an agreement, the bill must fail, on the ground of want of mutuality; the nature of the duties & services asserted by pltf. being such as to preclude the possibility of a decree in this ct. against him, compelling their specific performance.—*PICKERING v. FLY* (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; 12 L. J. Ch. 271; 7 Jur. 479; 63 E. R. 109.

Annotations:—*Consd.* Johnson v. Shrewsbury & Birmingham Ry. (1853), 3 De G. M. & G. 914. *Apld.* Brett v. East India & London Shipping Co. (1864), 2 Hem. & M. 404. *Refd.* Millican v. Sullivan (1888), 4 T. L. R. 203.

83. Confidential servant.—*JOHNSON v. SHREWSBURY & BIRMINGHAM RY. CO.*, No. 97, *post*.

84. Revision of book for re-publication.—An author agreed with a bookseller for the publication of his work upon certain terms, under which the latter was to pay the expenses of publication, & to divide the net profits, if any, equally with the author. If all the copies should be sold, & a second edition should be required, the author was to make the necessary alterations, & the bookseller was to publish the second & every subsequent edition upon the same conditions. If all the copies of any edition should not be sold within five years of its publication, the bookseller might dispose of the remaining copies as he thought fit, so that the account might be closed. Two editions were accordingly published. The bookseller became bkpt., & pltf. purchased from his assignees all his copyrights, including nominally the work in question, & the unsold copies of the second edition. Two hundred copies being still in pltf.'s hands unsold, deft. published, with the author's concurrence, a third edition. In a suit to restrain the publication of the third edition:—*Seemle*: the agreement was not such as would, even as between the original parties to it, be specifically performed in equity.—*STEVENS v. BENNING* (1855), 6 De G. M. & G. 223; 1 K. & J. 168; 3 Eq. Rep. 457; 24 L. J. Ch. 153; 24 L. T. O. S. 205; 1 Jur. N. S. 74; 3 W. R. 149; 43 E. R. 1218, L. J.J.

Annotations:—*Refd.* Shepherd v. Conquest (1856), 17 C. B. 427; Reade v. Bentley (1858), 4 K. & J. 656; Holo v. Bradbury (1879), 12 Ch. D. 886; Rosa v. Scovell (1889), 5 T. L. R. 207; Macdonald v. Eyles, [1921] 1 Ch. 631; Messenger v. British Broadcasting Co. (1928), 97 L. J. K. B. 251. *Mentd.* London Printing & Publishing Alliance v. Cox, [1891] 3 Ch. 291; Griffith v. Tower Publishing Co. & Moncrieff, [1897] 1 Ch. 21; Re Jude's Musical Compositions, [1906] 2 Ch. 595..

85. Services as company promoter.—*STOCKER v. WEDDERBURN*, No. 99, *post*.

86. Broker.—The ct. will not compel specific performance of an agreement by a co. to employ pltf. as their broker.—*BRETT v. EAST INDIA & LONDON SHIPPING CO., LTD.* (1864), 2 Hem. & M. 404; 3 New Rep. 688; 10 L. T. 187; 12 W. R. 596; 71 E. R. 520.

87. Sale of medical practice.—*Qu.*: whether the ct. can enforce specific performance of a contract to sell a medical practice.—*MAY v. THOMSON* (1882), 20 Ch. D. 705; 51 L. J. Ch. 917; 47 L. T. 295, C. A.

Annotations:—*Consd.* Gray v. Smith (1889), 43 Ch. D. 208. *Refd.* Hawkesworth v. Chaffey (1886), 55 L. J. Ch. 335; Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs (1890), 44 Ch. D. 616; Bellamy v. Debenham (1891), 39 W. R. 257.

88. Doctor's assistant—Provision for occupation of house rent free.—Pltf. entered into a contract with deft., a doctor, to become his assistant, the contract being one which was to last for more than a year. According to pltf., the contract was made partly in writing by a letter written to him by deft. & partly at an interview held on the following day. The letter set out the terms of the arrangement with regard to the salary pltf. was to receive, & also the services which he was to render. It further set out that pltf. was to be allowed the use of a house rent free whilst acting as deft.'s assistant, but it did not mention the date from which the services were to commence. Pltf. having been dismissed by deft. brought an action to recover damages for the breach by deft. of the agreement. Deft. pleaded that the agreement was one which was not to be performed within the space of one year from the making thereof, & that there was no sufficient memorandum of the agreement to satisfy Stat. Frauds. It was contended on his behalf that in order to constitute a sufficient memorandum it was essential that the date of the commencement of the services should appear in the document. For pltf. it was contended that the term in the agreement that he was to occupy the house rent free made the contract one relating to the acquisition of an interest in land, & there having been a part performance by him of the services which he had to render, he was entitled to give evidence of the terms of the agreement under which he was in occupation of the premises:—*Held*: the term of the contract that pltf. was to occupy a house rent free did not constitute it an agreement of which a ct. of equity would entertain a suit for specific performance.—*ELLIOTT v. ROBERTS* (1912), 107 L. T. 18; 28 T. L. R. 436.

89. Articles of apprenticeship.—A bill for specific performance of articles of apprenticeship cannot be maintained.—*WEBB v. ENGLAND* (1860), 29 Beav. 44; 30 L. J. Ch. 222; 3 L. T. 574; 25 J. P. 292; 7 Jur. N. S. 153; 9 W. R. 183; 54 E. R. 541.

Annotations:—*Mentd.* Bush v. Trowbridge Waterworks Co. (1875), 33 L. T. 137; Ferns v. Carr (1885), 54 L. J. Ch. 478.

90. —.—*DE FRANCESCO v. BARNUM*, No. 68, *ante*.

Agreement to appoint nominees of company as directors of another company.—*See COMPANIES*, Vol. IX., p. 438, Nos. 2845, 2846.

SECT. 6.—CONTRACTS LACKING MUTUALITY.

SUB-SECT. 1.—IN GENERAL.

91. General rule.—Bill for a specific performance of articles for the purchase of lands dismissed,

PART II. SECT. 6, SUB-SECT. 1.
91 i. General rule.—A contract to be specifically performed must be

equal, fair & certain in its terms, & founded on good consideration.—*EARLEY v. MCGILL* (1864), 11 Gr. 75.—

CAN.

91 ii. —.—Where nothing has been done under an agreement, the ct.

Sect. 6.—Contracts lacking mutuality: Sub-sects. 1 & 2.]

because the lien or remedy was not mutual or reciprocal.

If a man comes for a specific performance as to the land itself, a ct. of equity ought to carry it into execution because there is no remedy at law; but if it is to have a performance in payment of the money, they may have remedy for that at law.—*ARMIGER v. CLARKE* (1722), Bunb. 111; 145 E. R. 614.

92. —.].—Specific performance of an agreement refused on the ground of the want of specific mutuality, of laches, misapprehensions in the party or parties of its nature & effect, inequality, improvidence, & other circumstances appearing in the case.

Here arose another objection, length of time, which was generally a very good reason for refusing to interfere in the case of a transaction of which, if the matter had been prosecuted at an earlier period, a different view might be given. The Statutes of Limitations were not a bar in equity, but cts. of equity looked to them as guides (LORD REDESDALE).—*HAMILTON v. GRANT* (1815), 3 Dow. 33; 3 E. R. 980, H. L.

Annotation:—Refd. Pickering v. Ely (Bp.) (1843), 12 L. J. Ch. 271.

93. —.].—It is not disputed that it is a general principle of cts. of equity to interpose only when the remedy is mutual (LEACH, M.R.).—*FLIGHT v. BOLLAND* (1828), 4 Russ. 298; 38 E. R. 817.

Annotations:—Refd. Pickering v. Ely (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; *Norris v. Jackson* (1860), 1 John. & H. 319; *King v. Bellord* (1863), 11 W. R. 900.

94. —.].—*PICKERING v. ELY* (Bp.), No. 82, ante.

95. —.].—Where the ct. of equity cannot carry the whole of an agreement into execution, & the effect of a partial specific performance, which was sought to be enforced would be to bind one party only to a performance, or where an agreement cannot be performed once for all, the ct. will not make a decree for a performance of the agreement *in specie*.—*HILLS v. CROLL* (1845), 2 Ph. 60; 1 De G. M. & G. 627, n.; 1 Coop. temp. Cott. 83; 14 L. J. Ch. 444; 5 L. T. O. S. 493; 9 Jur. 645; 41 E. R. 864, L. C.

Annotations:—Consd. Hope v. Hope (1856), 22 Beav. 351. *Apld. Blackett v. Bates* (1865), 1 Ch. App. 117. *Refd. Dietrichsen v. Cabburn* (1846), 7 L. T. O. S. 445; *Lumley v. Wagner* (1852), 1 De G. M. & G. 604; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Bowen v. Hall* (1881), 6 Q. B. D. 333; *Donnell v. Bennett* (1883), 22 Ch. D. 835.

96. —.].—The remedy by way of specific performance failed for want of mutuality & by reason of an action at law affording complete justice.—*STUART (LORD JAMES) v. LONDON & NORTH WESTERN RY. CO.* (1852), 1 De G. M. & G. 721; 7 Ry. & Can. Cas. 25; 21 L. J. Ch. 450; 19 L. T. O. S. 99; 16 Jur. 531; 42 E. R. 733, L. JJ.

Annotations:—Expld. Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331. *Refd. Gage v. Newmarket Ry.* (1852), 18 Q. B. 457; *Gooday v. Colchester, etc. Ry.* (1852), 17 Beav. 132; *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 De G. M. & G. 115. *Mentd. Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397.

97. —.].—A railway co. agreed with contractors that the latter should work the line, keep the engines & rolling plant in repair, & do certain other acts for seven years, at stipulated amounts of remuneration; if the contractors did not repair, within forty-eight hours after notice, the co. might by another notice determine the contract, & resume possession of the plant, sheds, buildings, etc.; & it was agreed that the contractors should

make good all damages done by collisions, etc., but they were not to be answerable for loss in respect of death of, or injury to passengers, etc., by accident, unless arising from their neglect, & then only for £100, in respect of all deaths, injuries, etc., caused by each accident. The co. gave a notice to repair, & the repairs could not be completed within the forty-eight hours. The contractors filed a bill, praying a declaration that the true construction of the agreement was that only such repairs were to be done within forty-eight hours as could reasonably be completed in that time, & for an injunction against giving the second notice to determine the contract. One of the Vice-Chancellors refused a motion for the injunction, & the contractors appealed:—*Held*: although not in form, the suit was in effect for specific performance, & must be so treated; & assuming pltf.'s case to be true, as it did not fall within any of the classes in which the interference of the ct. had been accustomed to be exercised, there being no mutuality, for if the contractors failed to perform their duty, the ct. could not compel them, & as for any breach of the contract by the co. the contractors had a right to sue at law, if the agreement were legal, the motion must be refused.

Before the ct. can act in the exercise of its peculiar jurisdiction to enforce specific performance of an agreement, it must first of all be satisfied that there is not a reasonable ground for contending that the agreement is illegal or against the policy of the law. . . . I apprehend that there may be objections to the ct. interfering by way of specific performance. . . . We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best & most competent persons that ever lived, still if the two do not agree, & good people do not always agree, enormous mischief may be done (KNIGHT BRUCE, L.J.).—*JOHNSON v. SHREWSBURY & BIRMINGHAM RY. CO.* (1853), 3 De G. M. & G. 914; 22 L. J. Ch. 921; 17 Jur. 1015; 43 E. R. 358, L. JJ.

Annotations:—Apld. Chaplin v. N. W. Ry. (1861), 5 L. T. 601; *Horne v. L. & N. W. Ry.* (1861), 10 W. R. 170; *Munro v. Wivenhoe & Brightlingsea Ry.* (1865), 4 De G. J. & Sm. 723; *Greenhill v. Isle of Wight (Newport Junction) Ry.* (1871), 23 L. T. 885. *Distd. Wolverhampton & Walsall Ry. v. L. & N. W. Ry.* (1873), L. R. 16 Eq. 433. *Consd. Millican v. Sullivan* (1888), 4 T. L. R. 203; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416. *Refd. Brett v. East India & London Shipping Co.* (1864), 10 L. T. 187; *Mair v. Himalaya Tea Co.* (1865), L. R. 1 Eq. 411. *Mentd. Barton v. Muir* (1874), L. R. 6 P. C. 134.

98. —.].—The ct. only grants relief by decreeing specific performance where compensation by way of damages would be inadequate, where the stipulations of a contract are such as can be specifically performed, or, at least, where its main subject is such as to call for the exercise of the jurisdiction of the ct., & where there is reasonable mutuality in the stipulations. Therefore, where a bill prayed specific performance of an agreement to let a certain spot at a certain rent, but the main relief sought was not in respect of the main subject of the agreement, but in respect of certain vague stipulations contained in it, & there had been a departure from the original terms of the agreement, & non-performance by defts. had been dealt with by pltf's. as matter of compensation:—*Held*: the ct. could not decree specific performance, & motion for an injunction by pltf's. to restrain certain acts alleged to be in violation of the agreement, refused.

ought not to decree a specific performance except when the right to compel

it is mutual.—*LAWRENSEN v. BUTLER* (1802), 1 Sch. & Lef. 13.—*IR.*

91 iii. —.].—*MORGAN v. RAINSFORD* (1845), 8 I. Eq. R. 299.—*IR.*

Where the original agreement has been subsequently varied, unless there be certainty as to those variations as affecting the original agreement, so that both together should form one consistent agreement, the ct. will not grant an injunction prayed for in a bill for specific performance.—*PARIS CHOCOLATE CO. v. CRYSTAL PALACE CO.* (1855), 3 Sm. & G. 119; 25 L. T. O. S. 7; 1 Jur. N. S. 720; 3 W. R. 267; 65 E. R. 588.

99. —.]—The ct. will not entertain a bill for specific performance of an agreement, which contains terms that cannot be enforced against pltf., where the effect of a decree would be that, on pltf. refusing to perform his part of the contract, defts. could not be restored to their former position.

Defts. entered into an agreement with pltf. to form a joint-stock co. for the purpose of working pltf.'s patent, & by the same agreement pltf. agreed to devote his whole time to the interests of the co., & the improvement of the patent. Upon demurrer to a bill for specific performance:—*Held*: the bill could not be sustained, the remedy being incomplete & the mischief of a decree for specific performance irremediable.—*STOCKER v. WEDDERBURN* (1857), 3 K. & J. 393; 26 L. J. Ch. 713; 30 L. T. O. S. 71; 5 W. R. 671; 69 E. R. 1162.

Annotations:—*Distd.* London Corpn. v. Southgate (1868), 38 L. J. Ch. 141. *Apprvd.* Douglas v. Baynes, [1908] A. C. 477. *Refd.* Ogden v. Fosslok (1861), 32 L. J. Ch. 75, n.

100. —.]—*FIRTH v. RIDLEY*, No. 250, *post*.

101. —.]—Pltfs. were asking for specific performance by deft. of an agreement which they were themselves unable to perform & no such relief could be granted.—*JATINDRA NATH BASU v. PEYER DEYE DEBI* (1916), I. L. R. 43 Calc. 990, P. C.

102. *Effect of plaintiff acting on agreement.*—Where pltf. has acted upon an agreement, want of mutuality is not a sufficient ground for refusing specific performance.—*HEYS v. ASTLEY* (1863), 4 De G. J. & Sm. 34; 3 New Rep. 19; 9 L. T. 356; 12 W. R. 64; 46 E. R. 827, L. J.J.

Annotation:—*Mentd.* Lucas v. Dixon (1889), 58 L. J. Q. B. 161.

SUB-SECT. 2.—TIME WHEN MUTUALITY MATERIAL.

103. *At date of contract—Non-mutuality arising after contract—By improper acts of party.*—The argument of non-mutuality, against specific performance, cannot be urged with success where the want of mutuality has arisen by improper acts of the party subsequent to the contract.—*HAWKES v. EASTERN COUNTIES RY. CO.* (1852), 1 De G. M. & G. 737; 7 Ry. & Can. Cas. 188; 22 L. J. Ch. 77; 20 L. T. O. S. 117; 16 Jur. 1051; 1 W. R. 25; 42 E. R. 739, L. J.J.; *affd. sub nom.* *EASTERN COUNTIES RY. CO. v. HAWKES* (1855), 5 H. L. Cas. 331, H.L.

Annotations:—*Refd.* Stuart v. L. & N. W. Ry. (1852), 15 Beav. 513; Ffooks v. South Western Ry. (1853), 1 Sm. & G. 142; Shrewsbury & Birmingham Ry. v. L. & N. W. Ry. (1853), 16 Beav. 441; Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241; Haynes v. Haynes (1861), 1 Drow. & Sm. 426; Bedford & Cambridge Ry. v. Stanley (1862), 2 John. & H. 746; Taylor v. Chichester & Midhurst Ry. (1870), L. R. 4 H. L. 628. *Mentd.* Lindsey v. G. N. Ry. (1853), 10 Hare, 664; South Yorkshire Ry. & River Dun Co. v. G. N. Ry. (1853), 9 Exch. 55; Norwich Corpn. v. Norfolk Ry. (1855), 4 E. & B. 397; Preston v. Liverpool Manchester, etc. Ry. (1856), 5 H. L. Cas. 605; Bateman v. Ashton-under-Lyne Corpn. (1858), 3 H. & N. 323; Maunsell v. Mid. G. W. Ry. & Great Northern & Western Ry. (1867), 2 Ch. App. 238, n.; Ashbury Railway Carriage & Iron Co. v. Riche (1875), L. R. 7 H. L. 653; A.-G. v. G. E. Ry. (1879), 11 Ch. D. 449; Sun Bldg. Soc. v. Western Suburban & Harrow Rd. Bldg. Soc., [1920] 2 Ch. 144; Sun Bldg. Soc. v. Western Suburban & Harrow Road Bldg. Soc., [1921] 2 Ch. 438.

104. — *Vendor without title—Defect subsequently cured—Enforcement by vendor.*—Where a person sells property which he is neither able to convey or to enforce a conveyance from other proper parties, the purchaser may repudiate the contract, and is not bound to wait to see if the vendor can induce some third person to join in making a good title. Pltf. agreed to grant to deft. a lease for twenty-one years, with a right to re-let; but he had only a term of twenty years, & could not underlet without the consent of his landlord. Deft. repudiated the contract. Pltf. afterwards filed his bill for specific performance &, pending the suit, the landlord agreed to concur:—*Held*: the contract could not be enforced & the bill was dismissed with costs.—*FORRER v. NASH* (1865), 35 Beav. 167; 6 New Rep. 361; 11 Jur. N. S. 789; 14 W. R. 8; 55 E. R. 858.

Annotations:—*Distd.* Wylson v. Dunn (1887), 34 Ch. D. 569. *Consd.* Lee v. Soames (1888), 59 L. T. 366; Bolton Partners v. Lambert (1889), 41 Ch. D. 295. *Apprvd.* Bellamy v. Debenham, [1891] 1 Ch. 412. *Consd.* Warren v. Moore (1897), 14 T. L. R. 138; Brickles v. Snell, [1916] 2 A. C. 599. *Refd.* Brewer v. Broadwood (1882), 22 Ch. D. 105; Re Cooke & Holland's Contract (1898), 78 L. T. 106; Smith v. Butler (1900), 48 W. R. 583; Re Hailes & Hutchinson's Contract, [1920] 1 Ch. 233.

105. —.]—By a letter dated Apr. 17, 1889, deft. offered £800 for the freehold of a house "with possession at Midsummer, assuming that the title is satisfactory," which offer was accepted by pltf. by a letter of Apr. 18. Pltf.'s solr. then sent deft.'s solr. a formal contract for his approval & signature containing special conditions which deft.'s solr. struck out. Pltf.'s solr. then wrote saying he would not consent to the alterations, & deft.'s solr. sent back the draft saying he would not go on with the negotiations. On May 18, pltf.'s solr. sent back the contract with some alterations & an abstract of the title, by which it appeared that the property was enfranchised copyhold, & that the minerals were reserved to the lord of the manor. Deft.'s solr. on May 20 wrote to pltf.'s solr. saying that this was a fatal objection, & that he could not advise his client to go on with the matter. Pltf. then entered into negotiations with the lord of the manor to obtain the minerals, but did not obtain a conveyance of them until the following Sept.:—*Held*: assuming the existence of a concluded contract, pltf. did not possess what he had contracted to sell, & deft., upon discovering it, on May 20, had rescinded the contract, & had power to do so although the time for completion had not expired; & therefore no order for specific performance of the contract ought to be made.—*BELLAMY v. DEBENHAM*, [1891] 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 478; 39 W. R. 257; 7 T. L. R. 199, C. A.

Annotations:—*Consd.* Mason v. Von Buch (1899), 15 T. L. R. 430; Perry v. Suffields, [1916] 2 Ch. 187. *Distd.* Brickles v. Snell, [1916] 2 A. C. 599. *Refd.* Re Cooke & Holland's Contract (1898), 78 L. T. 106; Halkett v. Dudley, [1907] 1 Ch. 590.

—.]—*See, also*, Nos. 120-123, *post*.

106. — *Performance of contract depending on act of third party—To knowledge of both parties to contract—Act performed within reasonable time.*—Where a contract is made which both parties to it knew at the time cannot be carried out without the act or consent of a third party, & that act or consent is done or given by the third party within a reasonable time, & he does nothing inconsistent with such act or consent, want of mutuality at the time of contract is no bar to its performance.—*BLACKBURN UNION v. BROOKS* (1877), 20 W. R. 57.

107. — *Contract by unauthorised agent—Subsequent ratification.*—An offer of purchase was

Sect. 6.—Contracts lacking mutuality: Sub-sects. 2, 3 & 4, A., B. & C.]

made by deft. to S., who was the agent of pltfs., but was not authorised to make any contract for sale. The offer was accepted by S. on behalf of pltfs. Deft. withdrew his offer, & after the withdrawal pltfs. ratified the acceptance of the offer by S. In an action by pltfs. for specific performance of the contract:—*Held*: the ratification by pltfs. related back to the acceptance by S., & therefore the withdrawal by deft. was inoperative, & pltfs. were entitled to specific performance.—*BOLTON PARTNERS v. LAMBERT* (1889), 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; 37 W. R. 434; 5 T. L. R. 357, C. A.

Annotations:—*Consd.* *Cook v. Williams* (1897), 13 T. L. R. 481. *Refd.* *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616; *Metropolitan Asylums Board v. Kingham* (1890), 6 T. L. R. 217; *Dibbins v. Dibbins*, [1896] 1 Ch. 348; *Fleming v. Bank of New Zealand*, [1900] A. C. 577; *Re Gloucester Municipal Petn.* 1900, *Ford v. Newth*, [1901] 1 K. B. 683; *Reynolds v. Atherton* (1921), 125 L. T. 690. *Mentd.* *Re Portuguese Consolidated Copper Mines, Ex p. Badman, Ex p. Bosanquet* (1890), 45 Ch. D. 16; *Re Hemp, Yarn & Cordage Co., Hindley's Case* (1896), 74 L. T. 627; *Re Tiedemann & Ledermann*, [1899] 1 Q. B. 66.

SUB-SECT. 3.—APPLICATION OF RULE.

108. Guarantee—Surety not effectually bound.]—A. being a surety only, & having no consideration for entering into the recognisance, the ct. would not make it good, nor allow it to be so much as a debt.—*SHEFFIELD v. CASTLETON* (LORD) (1700), 2 Vern. 393; 23 E. R. 853.

109. Action by tenant in tail—To enforce contract by life tenant—Sale of land.]—*ARMIGER v. CLARKE* (1722), Bunb. 111; 145 E. R. 614.

110. Action by remainderman or reversioner—To enforce contract by life tenant—Lease.]—Tenant for life of estate on which were mines opened, with power to let leases in possession for twenty-one years, reserving best rent, leases the mines, opened & unopened, for twenty-six years, without reference to the power, & before the expiration of a former lease, reserving ore as rent to him, his heirs, and assigns:—*Held*: the lease shall bind the remainderman for twenty-one years.

I do not know that the remainderman could on his part enforce the contract of such a tenant for life (LORD DE GREY, C.).—*CAMPBELL v. LEACH, LEACH & THOMAS v. CAMPBELL* (1775), Amb. 740; 27 E. R. 478, L. C.

Annotations:—*Refd.* *Morgan v. Milman* (1852), 10 Hare, 279. *Mentd.* *Medwin v. Sandham* (1789), 3 Swan. 685; *Re Smyth, Ex p. Smyth* (1818), 1 Swan. 337; *Daly v. Beckett* (1857), 21 Beav. 114.

111. ———.]—Lessees of way leaves under a lease granted by a copyhold tenant in fee of the land entered into a negotiation for a new lease with the tenant for life under the lessor's will, which gave the tenant for life power of leasing. A correspondence ensued, in the course of which the tenant for life offered to grant a new lease at a certain rent, which offer was accepted by the lessees. The original lease contained a clause usual, if not universal, in the leases in the neighbourhood, giving the lessees the option of determining the lease on notice. The correspondence respecting the new lease was silent as to the insertion of such a clause, but one of the earliest letters alluded to the proposed lease as a renewal of the former:—*Held*: (1) the lessees might have understood that such a clause was intended to be inserted in the new lease without putting a perverse or absurd construction on the correspondence, & whether such understanding

was correct or incorrect, or was confined or not confined to the lessees they ought not to be ordered to accept the lease without such a clause; (2) the tenant for life had not, under the will or otherwise, power to grant such a lease, & the reversioner, though able to fulfil the agreement, was not entitled to demand a specific performance of it.—*RICKETTS v. BELL* (1847), 1 De G. & Sm. 335; 10 L. T. O. S. 105; 11 Jur. 918; 63 E. R. 1093.

112. Damages sufficient remedy for vendor—Insufficient to purchaser—Action by vendor to enforce contract.]—(1) Where damages in an action at law for breach of a contract to sell a chattel would be an insufficient remedy for the purchaser, although a sufficient remedy for the vendor, a demurrer to a bill by the vendor for a specific performance was overruled, because the remedy in this ct. must be mutual for purchaser & vendor.

(2) Deft. who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for sale to him, because a Court of Law could not give him the subject of his contract (*LEACH, V.-C.*).—*WITHEY v. COTTLE* (1822), 1 Sim. & St. 174; 1 L. J. O. S. Ch. 5; 57 E. R. 70.

Annotations:—*As to* (1) *Refd.* *Walker v. Eastern Counties Ry.* (1848), 6 Hare, 594; *Adams v. Blackwall Ry.* (1819), 13 Jur. 620.

113. Agreement to enter into partnership—Capital to be lent even if agreement not performed.]—*SICHEL v. MOSENTHAL*, No. 947, *post*.

114. Agreement by father for custody of children—Mother-in-law to have custody for part of year.]—*KENNEDY v. MAY*, No. 203, *post*.

115. Agreement by married woman—Purporting to convey as trustee for sale.]—A *feme covert*, one of several devises in trust for sale, cannot bind herself to convey the estate, & a bill by the purchaser, to enforce specific performance of a contract by such trustees, dismissed.—*EVERY v. GRIFFIN* (1868), L. R. 6 Eq. 606; 18 L. T. 849.

Annotation:—*Apld.* *Cahill v. Cahill* (1883), 8 App. Cas. 420.

116. ——— Release of jointure—Incomplete agreement.]—A married woman was entitled by an ante-nuptial settlement to a jointure rentcharge after her husband's death secured upon his real estates in Ireland. The wife having left him the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up & signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification & no further steps were taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise & was executed by the husband, but the wife refused to execute it or to return to her husband, & the husband afterwards died:—*Held*: the wife was not, when she signed the document, in all respects in the same position as a *feme sole*, & even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4, c. 92, ss. 68, 71; & specific performance of the agreement to release her jointure could not be decreed against her.—*CAHILL v. CAHILL* (1883), 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861, H. L.

Annotations:—*Refd.* *Butler v. Butler* (1885), 16 Q. B. D. 374; *Clark v. Clark* (1885), 10 P. D. 188; *Harle v. Jarman*, [1895] 2 Ch. 419. *Mentd.* *Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Vardon's Trusts* (1885), 11 Ch. D. 275.

Contracts by infants.]—See *INFANTS*, Vol. XXVIII., pp. 162, 163, Nos. 199–201.

Contracts of personal service.]—See *Sect. 5, ante*.

SUB-SECT. 4.—EXCEPTIONS TO RULE.

A. *In General.*

117. Conditional contract.]—A proposal had been made that two pltfs. should buy a triangular field of about 3 acres, & that deft. should buy half an acre of it from them. One of pltfs. & deft. met on the field; deft. wished to have a place in one of the angles, & pltf. stepped so as to mark out where a base line would cut off half an acre. Some days afterwards same pltf. wrote to deft. asking her to let them have a letter agreeing to purchase the half acre she had selected for £350. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre of the land as agreed upon for £350. Pltfs. did not obtain a contract with the owner of the land for the purchase until Nov. 4, which was three months afterwards. On Nov. 13, deft. threatened to withdraw, & on Nov. 20 her solrs. wrote that she did withdraw from the contract:—*Held*: the doctrine of non-mutuality being a bar to specific performance, does not apply to a contract which to the knowledge of both parties cannot be enforced by either until the occurrence of a contingent event, & therefore, though deft. might have withdrawn at any time before Nov. 4, when pltfs. first became able to perform their part, she could not withdraw afterwards.—*WYLLSON v. DUNN* (1887), 34 Ch. D. 569; 56 L. J. Ch. 855; 56 L. T. 192; 51 J. P. 452; 35 W. R. 405.

Annotation:—*Refd.* Bolton Partners v. Lambert (1889), 41 Ch. D. 295.

118. Written undertaking by one party—Assent by other party without writing.]—The written undertaking of one party will be enforced, although the other party is not mutually bound by writing.—*PALMER v. SCOTT* (1830), 1 Russ. & M. 391; Taml. 488; 8 L. J. O. S. Ch. 127; 39 E. R. 151.

B. *Waiver of Objection by Conduct of Party.*

119. General rule.]—By a will, certain hereditaments were devised to trustees, on trust, if necessary, to sell for payment of debts, & subject thereto, in trust for A for life, with remainders over; & A. was appointed extrix. A. entered into a contract with B. for the sale of this property, as if she had been solely entitled thereto in her own right. Abstracts of title were, however, delivered immediately after to B.'s solrs., in which the state of the title appeared; & during the space of a year after the agreement, various communications passed between the solrs. of A. & B., & various requisitions as to the title were given & complied with, but, previously to the filing of the bill, no objection was ever made to the agreement on the ground of want of mutuality, & no doubt ever suggested that the proper parties would not join in the conveyance:—*Held*: in this state of things the purchaser could not resist specific performance, on the ground of want of mutuality.

The conduct of a purchaser may amount to a waiver of the objection of want of mutuality.—*SALISBURY v. HATCHER* (1842), 2 Y. & C. Ch. Cas. 54; 12 L. J. Ch. 68; 6 Jur. 1051; 63 E. R. 24.

Annotations:—*Consd.* Halkett v. Dudley, [1907] 1 Ch. 590. *Refd.* Lee v. Soames (1888), 36 W. R. 884.

120. Vendor without legal title—No rescission by purchase—Enforcement by vendor—Defect sub-

sequently cured.]—Houses & lands were devised to trustees in fee, upon trust for sale. The surviving trustee appointed pltfs. his exors., but did not make any devise which comprehended trust estates. On the death of the surviving trustee, his exors. sold the property in lots. Deft. became the purchaser of four of them, just as his purchase was about to be completed, it was discovered that the legal estate was in an infant, the heir-at-law of the surviving trustee. Pltfs. thereupon presented a petition to the ct., that the infant might be directed to convey. Pltfs. apprised deft. of this proceeding, to which he made no objection. Twelve months elapsed before the master's report could be obtained, & a short time previously deft. commenced his action for the deposit, & subsequently recovered it; in the meantime the dilapidations of the houses purchased had increased:—*Held*: although deft. might have retired from the contract on the discovery of the defect in the vendor's title yet as he did not do so & acquiesced in the proceedings which were necessary to clothe pltfs. with the legal title, & there being no evidence that reasonable diligence was not used in the master's office, pltfs. were entitled to a decree for specific performance.—*HOGGART v. SCOTT* (1830), Taml. 500; 1 Russ. & M. 293; 9 L. J. O. S. Ch. 54; 48 E. R. 199.

Annotations:—*Refd.* Bellamy v. Debenham, [1891] 1 Ch. 412; Halkett v. Dudley, [1907] 1 Ch. 590.

121. ————*Salisbury v. HATCHER* No. 119, *ante*.

122. ————*Wyllson v. DUNN*, No. 117, *ante*.

—.]—(1) A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality & may be a defence to an action for specific performance; but in order to avail himself of that defence he must repudiate the contract as soon as he finds that the vendor cannot make a good title.

(2) After a decree for specific performance has been made the purchaser cannot repudiate the contract without the leave of the ct.

(3) The usual rule is clear that in an ordinary case the vendor pays the costs up to the date when title was shown (*PARKER, J.*).—*HALKETT v. DUDLEY (EARL)*, [1907] 1 Ch. 590; 76 L. J. Ch. 330; 96 L. T. 539; 51 Sol. Jo. 290.

Annotations:—*As to* (1) *Consd.* Procter v. Pugh, [1921] 2 Ch. 256. *Appl.* Borneers v. Fleming, [1925] Ch. 264. *As to* (3) *Distd.* Bantfield v. Picard (1911), 55 Sol. Jo. 649.

C. *Memorandum to Satisfy Statute of Frauds signed by One Party Only.*

See Law of Property Act, 1925 (c. 20), s. 40.

124. Not signed by party seeking performance.]—

(1) Inadequacy of consideration no ground for resisting the execution of a contract to sell; the vendor not being under any incapacity, deficiency of judgment, or led by accident or design into a misapprehension of the value

(2) Defect of title to a considerable part of the estate, though a good objection by the purchaser to a specific performance, not by the vendor.

(3) . . . I should hardly be at liberty . . . to refuse a specific performance upon the ground, that there was not agreement signed by the party, seeking a performance (*GRANT, M.R.*).

PART II. SECT. 6, SUB-SECT. 4. B.

d. Vendor without legal title.]—Where pltf., at the time he entered into a contract with deft. for the exchange of lands, had no title to the lands he proposed to exchange, which were, to the knowledge of deft. at the time of the contract, vested in pltf.'s wife. In an

action for specific performance:—*Held*: deft. could not withdraw on the ground that pltf. had no title, at any rate before the time fixed for the completion of the exchange; & pltf., having tendered a conveyance from his wife before action, was entitled to succeed; for deft., having entered into the

contract knowing that it did not bind the estate, but only the person, of pltf., must be taken to have relied from the beginning upon the promise of pltf. to procure the concurrence of the owner, & could not set up that pltf. was not the owner.—*ST. DENIS v. HIGGINS* (1893), 24 O. R. 230.—*CAN.*

Sect. 6.—Contracts lacking mutuality: Sub-sect. 4, C. Sects. 7 & 8: Sub-sects. 1 & 2, A.]

(4) The proposition is quite untenable, that, if there is a considerable part, to which no title can be made, the vendor is therefore exempted from the necessity of conveying any part (GRANT, M.R.).—WESTERN v. RUSSELL (1814), 3 Ves. & B. 187; 35 E. R. 450.

Annotations:—Generally, Mentd. Warner v. Willington (1856), 25 L. J. Ch. 662; Ridgway v. Wharton (1857), 11 H. L. Cas. 238.

Signature by party to be charged.]—See CONTRACT, Vol. XII., pp. 152, 153, Nos. 1053-1065.

SECT. 7.—AGREEMENTS ANCILLARY TO UNENFORCEABLE PRINCIPAL CONTRACT.

125. Agreement ancillary to agreement for partnership—Dissolution of partnership—Effect on ancillary agreement.]—CROFT v. HAWK (1836), Donnelly, 82; 5 L. J. Ch. 305; 47 E. R. 241.

126. Contract to give bond to secure performance of work—Subsidiary to unenforceable building contract.]—SOUTH WALES RY. CO. v. WYTHES, No. 46, ante.

Contracts containing both positive & negative covenants—Grant of injunction.]—See INJUNCTION, Vol. XXVIII., pp. 451-454, Nos. 697-716.

SECT. 8.—EXISTENCE OF ADEQUATE REMEDY AT LAW.

SUB-SECT. 1.—IN GENERAL.

127. Whether specific performance granted—Damages recoverable.]—Specific performance of a covenant to make good a gravel-pit refused.

In the present case complete justice can be done at law. The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which by the covenant it ought to be. Pltf. will be entitled to recover damages in an action for breach of the contract (GRANT, M.R.).—FLINT v. BRANDON (1803), 8 Ves. 159; 32 E. R. 314.

Annotations:—Appld. Storer v. G. W. Ry. (1812), 2 Y. & C. Ch. Cas. 48; South Wales Ry. v. Wythes (1854), 1 K. & J. 186. Refd. Rogers v. Challis (1859), 27 Beav. 175.

128. ———.]—ADDERLEY v. DIXON, No. 162, post.

129. ———.]—STORER v. GREAT WESTERN RY. CO., No. 50, ante.

130. ———.]—The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay £200 to the payee, in trust for E., or £6 10s. per quarter, so long as the £200 should be unpaid, so that the notes should be suspended & rendered inoperative so long as the brother continued to pay the £6 10s. a quarter

to the payee; & on payment of the £200 all claim on the notes to cease, & the same to be given up. The brother not having paid the £6 10s. to the payee, for two quarters, but having paid these sums to E., the *cestui que trust*, as the latter admitted, the payee brought his action upon the notes against the maker:—*Held*: the brother was entitled to the specific performance of the agreement in equity, not on the ground of the circuitry of cross actions which the rule of law occasioned, but on the ground that this ct., by modifying its decree, could give to all parties the benefit of the agreement, whilst a ct. of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement without depriving another party altogether of such benefit.

I apprehend that where an agreement is made the direct substance of which can be had in this ct., it is not necessarily an answer to a bill for the performance of such an agreement to say that the parties may have compensation in damages equivalent in value to what this ct. can give by its decree. A ct. of law in this case cannot give the parties the direct benefit of the agreement. . . . But if this ct. can preserve to all the parties the benefit of the agreement the case may be proper for its interposition (WIGRAM, V.-C.).—BEECH v. FORD (1848), 7 Hare, 208; 68 E. R. 85.

131. ———.]—STUART (LORD JAMES) v. LONDON & NORTH WESTERN RY. CO., No. 96, ante.

132. ———.]—DOLLEFUS v. PICKFORD (1854), 2 W. R. 220, C. A.

133. ———.]—PARIS CHOCOLATE CO. v. CRYSTAL PALACE CO., No. 98, ante.

134. ———.]—ORD v. JOHNSTON, No. 44, ante.

135. ———.]—SKELTON v. COLE, No. 211, post.

136. ———.]—The ct. will not refuse to decree specific performance of an agreement, although pltf. may have a concurrent remedy in damages, or may have entered into a negotiation for a money compensation which has failed.—GREENE v. WEST CHESHIRE RY. CO. (1871), L. R. 13 Eq. 44; 41 L. J. Ch. 17; 25 L. T. 409; 20 W. R. 54.

Annotations:—Refd. Fortescue v. Lostwithiel & Fowey Ry., [1894] 3 Ch. 621; Kennard v. Cory, [1922] 2 Ch. 1.

137. ———.]—This ct. will not decree specific performance of an agreement if it be of such a nature that better justice will be done by leaving the parties to their remedy in damages.

A contract entered into by a railway co. with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, or the degree of convenience & accommodation to be afforded by it, is too vague & indefinite to be enforced by decree for specific performance.—WILSON v. NORTHAMPTON & BANBURY JUNCTION RY. CO. (1874), 9 Ch. Ap. 279;

PART II. SECT. 8, SUB-SECT. 1.

127 i. Whether specific performance granted—Damages recoverable.]—The purchaser of land paid a certain sum, gave a mtge. on other property of his for another portion, & for the balance four notes were to be given, made by the purchaser & "such other person as would render them saleable without indorsement by the vendor." One only of the notes was delivered.—*Held*: specific performance could not be obtained, the agreement for delivery of the notes being such as the ct. of ch. could not execute, & the remedy being at law for breach of the contract.—DEGEAR v. SMITH (1865), 11 Gr. 570.

127 ii. ———.]—MENNONITE LAND SALES CO., LTD. v. FRIESEN (Sask.), [1921] 3 W. W. R. 311; 62 D. L. R. 314.—CAN.

127 iii. ———.]—TODD & CO. v. MIDLAND GREAT WESTERN RY. OF IRELAND CO. (1881), 9 L. R. Ir. 85.—IR.

e. ———.]—Where a party seeks a remedy at law which is absolutely inconsistent with specific performance & does not seek or intimate any intention of seeking the equitable relief until he has failed at law he will be deemed to have waived his right to specific performance.—WILLIAMSON v. BORS (1900), 21 N. S. W. L. R. (Eq.) 302.—AUS.

f. ———.]—Where a bill prayed specific performance of an agreement, & for an injunction against waste, & an account of waste committed, & the ct. was of opinion that pltf.'s remedy, except as to the injunction, was at law, the decree was made without costs; the objection to the jurisdiction appearing by the bill, & not being raised until the hearing of the cause.—RAVEN v. LOVELASS (1865), 11 Gr. 435.—CAN.

g. ———.]—CAMPBELL v. SIMMONS (1868), 15 Gr. 506.—CAN.

h. ———.]—ASHTON v. PRYNE (1872), 19 Gr. 56.—CAN.

k. ———.]—The owner of land granted to a railway co. the privilege of

43 L. J. Ch. 503 ; 30 L. T. 147 ; 38 J. P. 500 ; 22 W. R. 380, L. C. & L. JJ.

Annotations :—*Reid*. *Abrahams v. Reisch*, [1922] 1 K. B. 477. *Mentd.* *Bullock v. Corrie* (1878), 38 L. T. 102 ; *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675.

138. ———.]—By indenture of lease defts. let to pltf. for the term of twenty-one years a residential flat in a block of buildings at Westminster. The lease contained a clause, by which it was agreed & declared that the premises were taken by the lessee subject to the regulations made by the lessors with respect to the duties of the resident porter, the regulations being set forth in the schedule thereunder written & to be considered as forming part of the indenture. By the regulations the rooms in the building were to be, with the entrance & staircase, in charge of a resident porter appointed by the lessors who was to act as servant to the tenants of the rooms in the block. The tenants were to have the right to the general services of the porter as thereafter defined & to special services under certain conditions. The general services of the porter were to be in constant attendance in the building either by himself or in his temporary absence by some trustworthy assistant, to cleanse the stairs & passages every morning, & to receive for, & deliver to, the tenants all letters, parcels, & messages. The lessors appointed a porter who was away for four hours every day acting as cook in a neighbouring building, & during his absence his duties were attended to by a charwoman or some boys :—*Held* : a decree for specific performance could not be granted & for two reasons ; (a) that part of the agreement which provided for the appointment by the lessors of a porter, was not divisible from so much of it as provided for the various duties of the porter, & as such a contract would require the constant supervision of the ct. during the existence of the lease, it was not one for which a decree of specific performance could be granted ; (b) damages were a sufficient compensation for the breach. — *RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCN.*, [1893] 1 Ch. 116 ; 62 L. J. Ch. 252 ; 67 L. T. 820 ; 41 W. R. 146 ; 9 T. L. R. 72 ; 37 Sol. Jo. 45 ; 2 R. 156, C. A.

Annotations :—*Consd.* *Wolverhampton Corpn. v. Emmons*, [1901] 1 K. B. 515. *Apld.* *L. C. & D. Ry. & S. E. & C. Ry. v. Spiers & Pond* (1916), 32 T. L. R. 493 ; *Barnes v. City of London Real Property Co.*, [1918] 2 Ch. 18. *Consd.* *Kennard v. Cory*, [1922] 2 Ch. 1. *Reid*. *Davis v. Foreman*, [1894] 3 Ch. 654 ; *Alexander v. Mansions Proprietary* (1900), 16 T. L. R. 431 ; *Krehner v. Gruban*, [1909] 1 Ch. 413 ; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

139. ———. *Covenant in settlement.*—A. on his marriage settles lands to the use of himself for life, then to the wife for life, remainder to the heirs of his body begotten on the wife, remainder to his own right heirs, & covenants in the settlement not to bar the entail, nor suffer a recovery ; & having one daughter, to whom on her marriage he had given a good portion, he suffers a recovery, & by will devises the estate to his daughter for life, & to her first, etc., sons in tail, with remainders over. On a bill for a specific performance of the covenant, the ct. would not decree it, but leave the party to recover damages at law, for breach of the covenant. — *COLLINS v. PLUMMER* (1708), 2 Vern. 635 ; 1 P. Wms. 104 ; 23 E. R. 1015.

Annotations :—*Consd.* *Worthing Corpn. v. Heather*, [1906]

crossing his property, in consideration of which the co. agreed, amongst other things, to pay him \$400 a year, to carry flour for him on certain favourable terms, & "to bottom out his present mill race from its present unfinished point" :—*Held* : the ct. should not decree a specific performance of, or damages for breach of, such a contract, but leave pltf. to sue on it at

law.—*DICKSON v. COVERT* (1870), 17 Gr. 321.—*CAN.*

1. ———.]—Specific execution of agreed decree where damages would not answer the intention in making the contract.—*DAVIS v. HONE* (1805), 2 Sch. & Lef. 341.—*IR.*

m. ———.]—The origin of decrees for specific execution is, that damages

2 Ch. 532. *Reid*. *Hamilton v. Grant* (1815), 3 Dow. 33. *Mentd.* *Cordwell v. Mackrill* (1766), Amb. 515 ; *Legard v. Hodges* (1792), 1 Ves. 477.

140. ———. *Voluntary deed.*—Whether a ct. of equity will carry a voluntary deed into execution, before the party has tried to get remedy at law.—*THURKETTLE v. HOWORTH* (1727), Bunb. 241 ; 145 E. R. 660.

141. ———. *Abortive negotiations for money compensation.*—*GREENE v. WEST CHESHIRE RY. CO.*, No. 136, *ante*.

142. ———. *Claim at law not enforceable—Agreement not under seal.*—The ct. will not entertain a bill for specific performance of a contract to pay a sum of money, either on the ground of part performance, or on the ground that for want of formality the contract is not enforceable at law, nor in such a case can the ct. give damages in lieu of specific performance under Chancery Amendment Act, 1858 (c. 27).

The agent of a railway co. made a verbal agreement with the contractor for the line, that if he would build on land of the co. certain cottages more substantially than would be required for his own purposes, & would leave them for the use of the co., then the co. would pay him £5,000. The cottages were accordingly built, & when the railway was completed the contractor left them on the land, & the agent of the co. made an agreement with the contractor that he should be paid £500 a year for the cottages by way of rent, with an option to the co. to purchase them for £5,000. This agreement was confirmed by a resolution of the board of directors. The co. paid the £500 a year for some years, & then refused to pay :—*Held* : the claim of the contractor being simply for payment of money, could not be enforced in the ct. of chancery ; & though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money.—*CRAMPTON v. VARNA RY. CO.* (1872), 7 Ch. App. 562 ; 41 L. J. Ch. 817 ; 20 W. R. 713, L. C.

Annotation :—*Reid*. *Hunt v. Wimbledon L. B.* (1878), 3 C. P. D. 208.

———. *Building contract.*—*See BUILDING CONTRACTS*, Vol. VII., p. 401, No. 273.

———. *Railway accommodation work.*—*See RAILWAYS & CANALS*, Vol. XXXVIII., pp. 282, 298, 299, Nos. 196, 271.

Grant of injunction where specific performance not given.—*See INJUNCTION*, Vol. XXVIII., p. 445, No. 651–654.

SUB-SECT. 2.—CONTRACTS IN RESPECT OF CHATTELS AND CHOSSES IN ACTION.

A. Chattels.

143. *General rule—Contract not enforceable.*—(1) In general this ct. will not entertain a bill for a specific performance of contracts for chattels, or which relate to merchandise, but leave it to law, where the remedy is much more expeditious ; but, in the present case, the agreement not being final, but to be made complete by subsequent acts, a bill to carry it into execution will be allowed.

at law would not put pltf. in a situation as beneficial to him as if the agreement were specially performed.—*HARNETT v. YIELDING* (1805), 2 Sch. & Lef. 549.

PART II. SECT. 8, SUB-SECT. 2.—A.

n. *Saw logs.*—Saw logs cannot be said *prima facie* to be of "peculiar

Sect. 8.—Existence of adequate remedy at law: Subsect. 2, A. & B.; sub-sect. 3.]

(2) Every agreement of this sort ought to be certain, fair & just, in all its parts, or this ct. will not decree a specific performance.—**BUXTON v. LISTER** (1746), 3 Atk. 383; 26 E. R. 1020, L. C.

Annotations:—As to (1) Consd. Pollard v. Clayton (1855), 1 K. & J. 463. *Refd.* Pooley v. Budd (1851), 14 Beav. 34; New Brunswick & Canada Ry. & Land Co. v. Mugeridge (1859), 7 W. R. 369. *As to (2) Refd.* Woollam v. Hoarn (1802), 7 Ves. 211; Wall v. Stubbs (1815), 1 Madd. 79; Martin v. Mitchell, Martin v. Pelle (1820), 2 Jac. & W. 413; Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331; Turner v. Green, [1895] 2 Ch. 205. *Generally, Refd.* Adderley v. Dixon (1824), 1 Sim. & St. 607; Jones v. Tankerville, [1909] 2 Ch. 440.

144. ———.]—No specific performance of an agreement for a transfer of stock.—**NUTBROWN v. THORNTON** (1804), 10 Ves. 159; 32 E. R. 805.

145. ———.]—**WRIGHT v. BELL**, No. 161, *post*.

146. ———.]—**ADDERLEY v. DIXON**, No. 162, *post*.

147. ———.]—When parties are solvent, equity does not interfere to decree specific performance of a contract to assign a chattel, as bank stock, etc., because damages will be complete compensation; but that is not the case when bkpcy. intervenes, & where one of the parties is not solvent, so that no damages would be paid (**ERSKINE, C.J.**).—*Re LITT, Ex p. MASTERMAN* (1835), 2 Mont. & A. 209; 4 Deac. & Ch. 751.

Annotations:—Mentd. Re Pearse, Ex p. Littledale (1855), 6 De G. M. & G. 714; Deering & McQuestion v. Hibernian Joint Stock Banking Co. (1868), 16 W. R. 578.

148. ———.]—Cts. of equity will not lend their assistance to enforce the specific performance of ordinary contracts for the sale & purchase of chattels, unless there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject-matter is a personal chattel will not prevent this ct. from enforcing the due execution of that trust.

Trusts may be constituted not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it.

A., who sold 500 tons of iron stacked on his wharf to B., in consideration of a bill accepted by a third party, gave an acknowledgment engaging to deliver it to the bearer, he, A., "having been paid for the same." B. mortgaged the iron, & the bill having been dishonoured. A. refused to deliver the iron. The mtgee. proceeded in equity to make A. responsible for the iron:—*Held*: A. had no ownership or property in the iron so stacked, & was a trustee, & therefore a demurrer for want of equity was overruled.—**POOLEY v. BUDD** (1851), 14 Beav. 34; 51 E. R. 200.

Annotation:—Mentd. Gunn v. Bolekow, Vaughan (1875), 10 Ch. App. 491.

149. ———.]—Litigation of a complicated character was being carried on both in this country & in Peru, in South America, between pltf. & deft., & also two sons of pltf., who had acted as his agents. On Nov. 8, 1856, an agreement was signed in England between pltf. & deft., whereby it was agreed that a patent standing in the name of pltf., but the right to which was claimed by

deft., "should be held for their mutual benefit, deft. to pay £100 towards the expenses of taking out the patent. Pltf. agreed to "rase" all proceedings here & in Peru by pltf. & his said two sons, each party paying his own costs, it being hereby agreed that all claims between deft. & pltf. & his said two sons are settled up to this date; the eight pianofortes in litigation in Peru to be delivered up by deft. to pltf. or his representatives." The difference still continuing, deft. was suing pltf. at law. Pltf. filed the present bill for specific performance of the above agreement. By a letter of pltf.'s solr., set forth in the bill it appeared that pltf. intended that a release should be executed by deft. & himself, & also by his two sons. Deft. demurred:—*Held*: the agreement was such an one as the ct. would decree the performance of; & it was not bad on any of the grounds urged, viz. neither for uncertainty, nor for want of mutuality, nor for that the ct. could not enforce some of the stipulations, nor for that adequate remedy & compensation could be had at law.

No doubt a bill for the specific performance of an agreement simply for the delivery up of specific chattels will not in general be entertained; but it does not follow that specific performance of an agreement, one of the clauses of which stipulates for the delivery up of specific chattels, will be refused (**PAGE-WOOD, V.-C.**).—**MARSH v. MILLIGAN** (1857), 3 Jur. N. S. 979.

150. Covenant relating to chattels in mining lease.]—Lease of alum mines, & bargain & sale of stock of alum, with the exception of certain quantities, which, if the same should come into lessee's possession, were immediately to be delivered to lessor. In suit by lessor for specific performance of covenant in the lease, that the lessee should, at the end of the lease, deliver to the lessor a particular quantity of alum, the defence set up by the lessee in his answer, being merely that, according to the meaning of the covenant, such particular quantity was not a quantity, which was to be delivered at the end of the lease, the ct. said that no regard ought to be had to documentary evidence brought forward by the lessee, that the quantity in question was part of the excepted alum, & had been delivered to the lessor by the lessee immediately after it came into his possession.—**BUCKINGHAMSHIRE (DUKE) v. WARD** (1724), 1 Coop. temp. Cott. 533; 47 E. R. 986; *affd. sub nom.* **WARD v. BUCKINGHAM (DUKE)** (1725), 3 Bro. Parl. Cas. 581, H. L.

Annotations:—Consd. Buxton v. Lister (1743), 3 Atk. 383; Nutbrown v. Thornton (1804), 10 Ves. 159. *Refd.* Anon. (1741), 2 Atk. 237; Davis v. Symonds (1787), 1 Cox, Eq. Cas. 402.

151. Damages insufficient for purchaser—Sufficient for vendor.]—**WITHEY v. COTTLE**, No. 112, *ante*.

152. Agreement on dissolution of partnership—Possession of partnership book.]—A ct. of equity will enforce an agreement made upon a dissolution of partnership, that a particular book used in the trade should become the exclusive property of one of the partners, & that a copy of it should be delivered to the other.—**JINGEN v. SIMPSON** (1824), 1 Sim. & St. 600; 57 E. R. 236.

153. Special nature of contract.]—**POOLEY v. BUDD**, No. 148, *ante*.

154. Special stipulation for delivery.]—**MARSH v. MILLIGAN**, No. 149, *ante*.

155. Chattel of special value.]—**FALCKE v. GRAY**, No. 413, *post*.

value"; but they are more likely to be so than other chattels; & specific relief may be given with respect to them in more instances than almost

any other sort of chattel property. The relief, however, must be applied for promptly.—**FLINT v. CORBY** (1853), 4 Gr. 45.—**CAN.**

*o. Chattel of special value.]—*The ct. will decree specific performance of a contract for the manufacture & sale of saw logs, where they are capable

156. — Picture.]—The ct. has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where, by the terms of an agreement & the frame of the pleadings, pltf., an artist, seeking restitution of a picture, had, in effect, put a fixed price upon it :—*Held* : damages would be an adequate remedy, & there was no jurisdiction in a ct. of equity to interfere.—*DOWLING v. BETJEMANN* (1862), 2 John. & H. 544 ; 6 L. T. 512 ; 26 J. P. 531 ; 8 Jur. N. S. 538 ; 10 W. R. 574 ; 70 E. R. 1175.

Annotations :—*Refd.* *Whiteley v. Hilt*, [1918] 2 K. B. 808 ; *Cohen v. Roche*, [1927] 1 K. B. 169.

157. — Effect of putting fixed price on chattel.]—*DOWLING v. BETJEMANN*, No. 156, *ante*.

158. Purchaser taking advantage of ignorance of vendor.]—*FALCKE v. GRAY*, No. 413, *ante*.

159. Sale of goods.]—*ADDERLEY v. DIXON*, No. 162, *post*.

160. — Unascertained goods.]—A coal co. contracted to supply a steel co. from designated mines with "all the coal that the steel co. may require for use in its own works as hereinafter described . . . all coal furnished shall be . . . reasonably free from stone & shale & shall be supplied from such seams then being worked by the coal co. as the steel co. may designate.

The steel co. agreed, so long as the coal co. should be willing & ready to supply it with coal, to purchase all the coal it required, to the amount agreed, from the coal co. The steel co. having rejected some of the coal which, though coming from the designated seams, was not suitable for the steel co.'s purposes :—*Held* : the steel co. was justified in such rejection, & the coal co. was not justified on the ground of such rejection in repudiating the contract, but the steel co. was not entitled both to specific performance of the contract to damages for the loss of it, the contract not being one of which a ct. of equity would decree the specific performance. The steel co., however, was entitled, in consequence of the coal co.'s repudiation of the contract, to treat the contract as at an end & to recover damages for the loss of it, in addition to damages in respect of the breaches thereof.—*DOMINION COAL CO., LTD. v. DOMINION IRON & STEEL CO., LTD. & NATIONAL TRUST CO., LTD.*, [1909] A. C. 293 ; 78 L. J. P. C. 115 ; 100 L. T. 245 ; 25 T. L. R. 309, P. C.

—*See, further*, *SALE OF GOODS*, Vol. XXXIX., pp. 677–679, Nos. 2633–2654.

Sale of ships.]—*See SHIPPING*, Vol. XLI., p. 171, Nos. 115a–116.

Specific delivery of chattels.]—*See SALE OF GOODS*, Vol. XXXIX., pp. 677–679 ; *TROVER*.

B. Choses in Action.

161. Sale of debt.]—The ct. will entertain a suit for the specific performance of a contract, for the purchase of a debt. It is within the exception to the rule, that cts. of equity will not compel specific performance of contracts, for the sale of personal chattels.—*WRIGHT v. BELL* (1818), 5 Price, 325 ; *Dan.* 95 ; 146 E. R. 622.

Annotation :—*Consd.* *Adderley v. Dixon* (1821), 2 L. J. O. S. Ch. 103.

162. —.]—Specific performance decreed, at

of being identified & possess a peculiar value for the purchaser.—*FULLER v. RICHMOND* (1854), 4 Gr. 657.—*CAN.*

PART II. SECT. 8, SUB-SECT. 2.—B. p. Insurance policy.]—*MEAGHER v. QUEEN'S INSURANCE CO.* (1878), R. E. D. 327.—*CAN.*

q. —.] — Where one of three joint purchasers of a policy of life insurance was a married woman, on whose behalf as an undisclosed principal her husband contracted, specific performance, at their instance, was refused, though the whole purchase-money had been paid, the married woman's share

the suit of the vendor, of a contract for the sale of debts proved under a commission of bkpt.

Cts. of equity decree the specific performance of contracts, not upon any distinction between realty & personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a ct. of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar & special value. So a ct. of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for ; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods (*LEACH, V.-C.*).—*ADDERLEY v. DIXON* (1824), 1 Sim. & St. 607 ; 2 L. J. O. S. Ch. 103 ; 57 E. R. 239.

Annotations :—*Refd.* *North Union Ry. v. Bolton & Preston Ry.* (1843), 3 Ry. & Can. Cas. 345 ; *Walker v. Eastern Counties Ry.* (1848), 6 Hare, 594 ; *Adams v. London & Blackwall Ry.* (1850), 6 Ry. & Can. Cas. 271 ; *Pollard v. Clayton* (1855), 1 K. & J. 462.

163. Sale of patent.]—A contract for the sale of a patent specifically enforced at the suit of the vendor, although all he required was the payment of the purchase-money.—*COGENT v. GIBSON* (1864), 33 Beav. 557 ; 55 E. R. 485.

SUB-SECT. 3.—STOCKS AND SHARES.

164. Whether enforced—General rule.]—*ADDERLEY v. DIXON*, No. 162, *ante*.

165. — East India stock.]—One is bound by bond to transfer £300 East India stock before Sept. 30, then next. Though the stock was much risen, debt. decreed to transfer the £300 stock *in specie*, & to account for all dividends from the time that it ought to have been transferred.—*GARDENER v. PULLEN* (1700), 2 Vern. 394 ; 23 E. R. 853.

166. — South Sea stock.]—Bill in equity will not lie for a specific performance of an agreement to transfer South Sea stock.

A ct. of equity ought not to execute any of these contracts but to leave them to law where the party is to recover damages . . . for there can be no difference between one man's stock & another's (*PARKER, L.C.*).—*CUD v. RUTTER* (1720), 1 P. Wms. 570 ; 2 Eq. Cas. Abr. 18 ; 24 E. R. 521 ; *sub nom.* *CUDDEE v. RUTTER*, 5 Vin. Abr. 538 ; *sub nom.* *SCOULD v. BUTTER*, Prec. Ch. 534, L. C.

Annotations :—*Distd.* *Stanton v. Percival* (1855), 5 H. L. Cas. 257. *Refd.* *Buxton v. Lister* (1743), 3 Atk. 383 ; *Mason v. Armitage* (1806), 13 Ves. 25.

167. —.]—If contract for South Sea stock be executed the ct. will not break into it, if executory, pltf. must seek his remedy at law.—*CAPPUR v. HARRIS* (1723), Bunb. 135 ; 145 E. R. 623.

168. York Buildings stock.]—Bill for a specific performance of a contract for £1,000 York Buildings stock, at £105 per cent. dismissed,

of it being paid out of her separate estate.—*BANK OF BRITISH NORTH AMERICA v. STURDEE* (1894), 32 N. B. R. 398.—*CAN.*

PART II. SECT. 8, SUB-SECT. 3.

r. *Whether enforced—Shares in boat.]*—Where one has subscribed for

Sect. 8.—Existence of adequate remedy at law: Subsects. 3, 4, 5, 6 & 7. Sects. 9 & 10.]

for this ct. will not carry these sorts of contracts into execution, but leave the parties to their remedy at law for the difference.—*DORISON v. WESTBROOK* (1722), 2 Eq. Cas. Abr. 161; 5 Vin. Abr. 540; 22 E. R. 137.

169. ——— *Effect of special circumstances.]*

—Bill to compel a performance of an agreement for transferring £5,000 York Buildings stock at 7½ per cent. Deft. demurred, but demurrer overruled, for the case may be attended with such circumstances as may make it just to decree a specific performance of the parties' own agreement, or at least to pay the difference.—*COLT v. NETTERVILL* (1725), 2 P. Wms. 304; 24 E. R. 741, L. C.

Annotations:—Reid. Anon. (1773), Lofft, 330. *Mentd.* *Watson v. Spratley* (1854), 10 Exch. 222.

170. ——— *Government stock.]—A bill will lie for the specific performance of a contract for the purchase of Govt. stock where it prays for the delivery of certificates which give the legal title to the stock.—DOLORET v. ROTHSCHILD* (1824), 1 Sim. & St. 590; 2 L. J. O. S. Ch. 125; 57 E. R. 233.

Annotations:—Reid. Re Litt & Harrison, Ex p. Masterman (1835), 4 Deac. & Ch. 751. *Mentd.* *Rothschild v. Hennings* (1829), 9 B. & C. 470; *Stead v. Dawber* (1839), 2 Per. & Dav. 447; *Stubbs v. Lister* (1841), 1 Y. & C. Ch. Cas. 81.

171. ——— *COLLETT v. HOVER* (1844), 1 Coll. 227; 63 E. R. 395, L. C.

172. ——— *Bank stock.]—Re LITT, Ex p. MASTERMAN*, No. 147, *ante*.

173. ——— *Life interest in public funds.]—On a sale by auction of a life interest in certain funds, the life was described in the particulars of sale to be that of a very healthy gentleman, aged forty-eight. In a subsequent part of the particulars, the life was described as that of a healthy gentleman, aged forty-eight, whose life was insurable. At the sale, an insurance was guaranteed at five guineas per cent. On a bill by the vendors for a specific performance of the contract, it was proved, that, shortly before the sale, the vendors had insured the life at a premium of £4 17s. 10d. per cent., though, according to the evidence of the actuary of the office where the life was so insured, the highest rate per cent. charged in London for a healthy life of that age was £4 6s.:—Held: with the knowledge of this fact, the vendors were not justified in describing the life as a healthy life, & the guarantee did not do away with the effect of this description, though the purchaser admitted he knew five guineas to be more than the premium usually charged.*

I think, upon the whole of the circumstances, I should not be justified in decreeing a specific performance; & I feel the less reluctance in refusing it, because plffs. can, if they think fit, go to a ct. of law, where they will obtain damages if they succeed in making out their case. In fact, the bill, in this suit, merely seeks a pecuniary payment in the shape of a specific performance (*LORD LYNDHURST, C.B.*).—*BREALEY v. COLLINS* (1831), You. 317; 159 E. R. 1014.

——— *Shares in company—Contract to take shares.]—See COMPANIES, Vol. IX., pp. 244, 247, Nos. 1533, 1548–1550.*

——— *Contract to transfer shares.]—See*

shares in a steamer which another person intends to build, if the subscriber refuse to accept & pay for the shares, an action can be maintained only on the special agreement, not for the price of the shares in the boat not yet built, as if they were a vendible commodity.—CAMERON v. THORNHILL (1843), 1 U. C. R. 132.—*CAN.*

t. ——— *Agreement to transfer stock.]—Specific performance will not be ordered where the other party has failed to deliver stock.—MILLER v. AVERILL* (1904), 10 B. C. R. 205.—*CAN.*

a. ——— *REARDON v. FRANKLIN* (1917), 51 N. S. R. 161; 35 D. L. R. 380.—*CAN.*

COMPANIES, Vol. IX., pp. 358–358, Nos. 2255–2267; Vol. X., p. 1140, No. 8051.

——— *Contracts relating to money & shares, generally.]—See Part IV., Sect. 13, post.*

SUB-SECT. 4.—SALE OF LAND.

174. *Damages inadequate remedy—Specific performance granted.]—ARMIGER v. CLARKE*, No. 91, *ante*.

175. ——— *Re SCOTT & ALVAREZ'S CONTRACT, SCOTT v. ALVAREZ*, No. 10, *ante*.

176. ——— *Land of peculiar value to purchaser.]—ADDERLEY v. DIXON*, No. 162, *ante*.

Compulsory purchase.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 227–230, Nos. 1129–1176.

SUB-SECT. 5.—AGREEMENT FOR LEASE.

See, generally, LANDLORD & TENANT, Vol. XXX., pp. 398–420, Nos. 610–822.

177. *Agreement for lease tithes.]—ROCH v. SUMMERS* (1769), 3 Wood, 218.

Mining Lease.]—See MINES, Vol. XXXIV., p. 641, No. 387.

SUB-SECT. 6.—GRANT OR SALE OF ANNUITIES OR RENTCHARGES.

178. *Whether enforced—Grant of annuity.]—BAIL v. COGOS*, No. 77, *ante*.

179. ——— *Sale of annuity.]—WITHY v. COTTLE*, No. 112, *ante*.

See, also, RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 131, 210, Nos. 244, 245, 998.

SUB-SECT. 7.—EXPRESS PROVISION FOR PAYMENT OF PENALTY OR DAMAGES.

180. *General rule.]—A proviso in articles for the purchase of an estate, that if either should break the agreement, he should pay £100 to the other; deft., on being offered two years' purchase more, accepted it, notwithstanding his agreement.*

The offering to pay the stipulated sum will not vacate the agreement, for it is no more than the common case of a penalty.

A penalty has never been held to release parties from their agreement, for though incurred, they must perform it notwithstanding.

If there had been evidence which had proved a misrepresentation of the farm by pltf. [purchaser] to a gentleman who had a desire of purchasing it, that would have been a reason for setting aside the agreement, & would have rebutted the equity pltf. has of a specific performance of the agreement (*LORD HARDWICKE, C.*).—*HOWARD v. HOPKINS* (1742), 2 Atk. 371; 26 E. R. 624, L. C.

Annotations:—Reid. Wall v. Stubbs (1815), 1 Madd. 80; *Roper v. Bartholomew* (1823), 12 Price, 797.

181. ——— *WEBB v. CLARK* (1782), 1 Fonblanque Treatise of Equity, 5th ed. p. 154.

PART II. SECT. 8, SUB-SECT. 7.

180 i. *General rule.]—If a contract for sale contains a proviso that either party is to pay a sum of money if he does not complete the contract, specific performance may, nevertheless, be enforced.—FRENCH v. MACALE* (1842), 4 I. Eq. R. 574; 2 Dr. & War. 269; 1 Con. & Law. 459.—*IR.*

182. Provision for penalty — Whether relief limited to penalty.]—Obligees in a bond :—*Held* : entitled to be paid out of the assets of a deceased obligor, a sum exceeding the penalty of the bond.

The doctrine of this ct. is that, wherever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum indefinite in amount . . . there, notwithstanding the agreement appears in the form of a bond with a penalty, the ct. will consider that the recital in the condition of the bond, is evidence of the agreement, & will not limit, the relief it gives, to the amount of the penalty (*SHADWELL, V.-C.*)—*JEUDWINE v. AGATE* (1829), 3 Sim. 129 ; 57 E. R. 948.

183. Alternative remedies available—Necessity for election.]—A. having filed a bill for specific performance of an agreement to assign him the lease of a house, obtained an interlocutory order for delivery up to him of possession & of the assignment. The assignment which was thus obtained was dated as of the time when possession was first claimed by pltf. A. had subsequently to this order brought an action of trespass against deft., alleging in other counts of the declaration special damage arising from breach of the agreement :—*Held* : A. who had obtained the benefit of the assignment by the interlocutory order, could not avail himself of it to bring an action of trespass at the same time that he was suing deft. in equity, & he must elect : pltf. not being allowed to sue in equity for specific performance of an agreement for the breach of which he was brought an action at law.—*GEDGE v. MONTROSE (DUKE)* (1857), 20 L. T. O. S. 122 ; *sub nom.* *GEDYE v. MONTROSE (DUKE)*, 5 W. R. 537.

Specific performance or injunction on bond.]—*See* BONDS, Vol. VII., pp. 207, 208, 252, 253, Nos. 490, 494, 947–955.

Liquidated damages or penalty generally.]—*See* DAMAGES, Vol. XVII., pp. 136–153, Nos. 422–546.

Covenants with a penalty.]—*See, generally,* DEEDS, Vol. XVII., pp. 402–405, Nos. 2112–2136.

— Agricultural tenancy.]—*See* AGRICULTURE, Vol. II., pp. 19, 24, 25, 99, Nos. 107–113, 141–145, 794.

— Renewal of tenancy.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 69, Nos. 2164, 2165.

SECT. 9.—WHERE PERFORMANCE OF CONTRACT VALUELESS.

184. Performance useless to defendant.]—Specific performance of an agreement become useless to deft., refused.—*— v. WHITE (circa 1709)*, 3 Swan. 108, n. ; 36 E. R. 792.

185. Agreement to grant deputation of office—Deputation revocable by principal.]—Bill for specific performance of an agreement to grant a deputation of the office of register of a consistory ct.

This was in its own nature a case improper for the ct. to decree a specific performance, because the law has allowed every principal a power to revoke his deputation at any time (*LORD TALBOT, C.*)—*WHEELER v. TROTTER* (1737), 3 Swan. 174 ; 1 Hov. Supp. 281 ; 36 E. R. 819, L. C.

186. Agreement for lease—Covenant against subletting—Covenant already broken.]—It is admitted that this ct. will never decree the specific performance of an agreement, if it is clear, that covenants must of necessity be introduced into the instrument, to be executed, that the party resisting the performance, may immediately take advantage of, to deprive the other of all benefit from that instrument. . . . Admitting it to be clear in this case, that there must be a covenant against underletting, & that deft. must recover for a breach of that covenant, it would be nugatory to decree the execution of a lease (*GRANT, M.R.*)—*JONES v. JONES* (1803), 12 Ves. 186 ; 33 E. R. 71.

*Annotations :—**Refd.* *Vere v. Loveden* (1806), 12 Ves. 179 ; *Browne v. Raban* (1808), 15 Ves. 528 ; *Church v. Brown* (1808), 15 Ves. 258 ; *Bowser v. Colby* (1811), 1 Hare, 109 ; *Walker v. Jeffreys* (1842), 1 Hare, 341 ; *Lowndes v. Bettle* (1864), 12 W. R. 399.

187. ——— Covenant likely to deprive one party of all benefit.]—*JONES v. JONES*, No. 186, *ante*.

188. ——— Colliery—Failure to procure necessary land.]—*ACHAMAN v. PRICE, DAVIES v. PRICE*, No. 1307, *post*.

189. Sale of goodwill of business—Not capable of conveyance.]—The ct. will not execute a contract for the sale of a goodwill but will leave the parties to law.

Suppose, for instance, there is a contract for the goodwill of a shop ; it cannot be conveyed, & the ct. would say, go & make what you can of it at law (*LORD ELDON, C.*)—*BAXTER v. CONOLLY* (1820), 1 Jac. & W. 576 ; 37 E. R. 487, L. C.

*Annotations :—**Consd.* *Coslake v. Till* (1826), 1 Russ. 376. *Refd.* *Thornbury v. Beville* (1842), 1 Y. & C. Ch. Cas. 554.

190. Agreement to take shares—By directors of company—When shares transferable.]—Decree to compel directors in a joint stock co. to take shares subscribed for by them, & which were transferable, refused.

It would be only compelling persons to take shares which they might at once get rid of (*ROMILLY M.R.*)—*BLUCK v. MALLALUE* (1859), 27 Beav. 398 ; 33 L. T. O. S. 267 ; 5 Jur. N. S. 1018 ; 54 E. R. 156 ; *sub nom.* *BLACK v. MALLALUE*, 7 W. R. 303.

*Annotation :—**Mentd.* *Stears v. South Essex Gas-light & Coke Co.* (1860), 7 Jur. N. S. 447.

Agreement for partnership.]—*See* Part IV., Sect. 16, *post*.

SECT. 10.—DEFENDANT NOT PERSONALLY SUBJECT TO JURISDICTION.

Equitable jurisdiction in personam, generally.]—*See* EQUITY, Vol. XX., pp. 235, 236, Nos. 29–35 ; *CONFLICT OF LAWS*, Vol. XI., pp. 347–354, Nos. 338–380.

Contracts relating to foreign immovables.]—*See* *CONFLICT OF LAWS*, Vol. XI., pp. 351, 352.

Action against members of partnership—After dissolution—One partner out of the jurisdiction.]—*See* *PARTNERSHIP*, Vol. XXXVI., p. 410, No. 795.

Contract made abroad with foreigner for sale of foreign ship — Ship within jurisdiction.]—*See* *CONFLICT OF LAWS*, Vol. XI., p. 476, No. 1305.

Commissioners of Woods & Forests.]—*See* *CONSTITUTIONAL LAW*, Vol. XI., p. 585, No. 864.

Legal proceedings against Crown, generally.]—*See* *CONSTITUTIONAL LAW*, Vol. XI., pp. 523–535, Nos. 284–378.

PART II. SECT. 9.

b. Performance of little value to plaintiff.]—Specific performance of a

contract will be refused if the result would be of little or no benefit to pltf. & would impose great hardship on defts., the other parties to the contract.

REAL ESTATE CO. v. ALLAN (Man), [1923] 3 W. W. R. 337.—*CAN.*

Part III.—Defences to Claim for Specific Performance.

SECT. 1.—CONTRACT NOT CONCLUDED.

SUB-SECT. 1.—IN GENERAL.

See, generally, CONTRACT, Vol. XII., pp. 51–118, Nos. 277–767.

191. General rule—Specific performance refused.]

—NORMANBY (MARQUIS) *v.* DEVONSHIRE (DUKE) (1697), Freem. Ch. 216; 22 E. R. 1169, L. C.

Annotation :—*Refd.* Popham *v.* Eyre (1774), Loft, 786.

192. ———.]—BROMLEY *v.* FETTIPLACE

(1700), Freem. Ch. 245; 22 E. R. 1187; *sub nom.* BROMLEY *v.* JEFFEREYS, Prec. Ch. 138; 2 Vern. 415.

Annotation :—*Distd.* Cave *v.* Cave (1762), 2 Eden, 139.

193. ———.]—The ct. is not to decree per-

formance, unless it can collect upon a fair interpretation of the letters, that they import a concluded agreement; that, if it rests reasonably doubtful, whether what passed was only treaty, let the progress towards the confines of agreement be more or less, the ct. ought rather to leave the parties to law than specifically to perform what is doubtful, as a contract (LORD ELDON, C.).—HUDDLESTON *v.* BRISCOE (1805), 11 Ves. 583; 32 E. R. 1215, L. C.

Annotations :—*Apld.* Stratford *v.* Bosworth (1813), 2 Ves. & B. 341. *Consd.* Tynte *v.* Buller (1854), 23 L. J. Ch. 501. *Mentd.* Ogilvie *v.* Foljambe (1817), 3 Mer. 53.

194. ———.]—Contract for land by letters

sufficient within Stat. Frauds not specifically executed unless upon a fair interpretation importing a concluded agreement, & not doubtful whether only treaty.—STRATFORD *v.* BOSWORTH (1813), 2 Ves. & B. 341; 35 E. R. 349.

Annotations :—*Distd.* Ogilvie *v.* Foljambe (1817), 3 Mer. 53.

Refd. Ridgway *v.* Wharton (1857), 6 H. L. Cas. 238.

195. ———.]—If, upon the treaty for sale

of an estate, the owner write a letter to the intended purchaser, stating the precise terms upon which he will part with the estate; but the intended purchaser, instead of accepting such terms, makes a different offer, which the owner rejects: & afterwards the intended purchaser offers to accept the owner's terms specific performance will not be decreed against the owner, although he may not have actually withdrawn his offer.—HYDE *v.* WRENCH (1840), 3 Beav. 334; 4 Jur. 1106; 49 E. R. 132.

Annotation :—*Consd.* Stevenson *v.* McLean (1880), 5 Q. B. D. 346.

196. ———.]—The ct. will not grant specific

performance against deft. who has made an agreement only in the form of a proposal, unless pltf. shows a clear, diligent, & unconditional acceptance on his part of such proposal in its exact terms.—THORNBURY *v.* BEVILL (1842), 1 Y. & C. Ch. Cas. 554; 6 Jur. 407; 62 E. R. 1014.

Annotation :—*Refd.* Aubin *v.* Holt (1855), 2 K. & J. 66.

197. ———.]—How can this be a case for

specific performance upon the terms insisted on by the purchaser? I think that it is not; & that in truth there never has been, in any part of the correspondence, a clear accession on both sides to one & the same set of terms (KNIGHT BRUCE, V.-C.).—THOMAS *v.* BLACKMAN (1844), 1 Coll. 301; 63 E. R. 429.

198. ———.]—A. was entitled to a bond

into which B. had entered to secure the payment of a sum of money. The two persons were on the most intimate terms. B. was about to marry, & A. being informed of that fact, told him & others, "I will not distress you about the bond, I have given it up, I shall never enforce it"; but on being requested to give up the bond in fact, she said, "No, I will be trusted, but he may rely on my word." B. married. A. afterwards married & her husband & herself put the bond in suit. B. filed a bill for an injunction to restrain them from proceeding, alleging that he had married on the faith of the promises made by B.:—*Held*: he was not entitled to an injunction, for what passed between the parties was neither a legal contract nor a misrepresentation of facts, but only an expression of intention, the performance of which could not be enforced.—JORDEN *v.* MONEY (1854), 5 H. L. Cas. 185; 23 L. J. Ch. 865; 24 L. T. O. S. 160; 10 E. R. 868, H. L.; *reversg.* S. C. *sub nom.* MONEY *v.* JORDAN (1852), 2 De G. M. & G. 318, L. JJ.

Annotations :—*Refd.* Whitmore *v.* Mackeson (1852), 16 Beav. 126; Pulsford *v.* Richards (1853), 17 Beav. 87; Stone *v.* Godfrey (1854), 5 De G. M. & G. 76; Warden *v.* Jones (1857), 23 Beav. 487; Piggott *v.* Stratton (1859), 1 De G. F. & J. 33; Goldieutt *v.* Townsend (1860), 28 Beav. 445; Loffus *v.* Maw (1862), 3 Giff. 592; Stephens *v.* Venables (No. 2) (1862), 31 Beav. 124; Williams *v.* Williams (1868), 37 L. J. Ch. 854; Maddison *v.* Alderson (1883), 8 App. Cas. 467; *Re* Fickus, Farina *v.* Fickus, [1900] 1 Ch. 331. *Mentd.* Bushby *v.* Ellis (1853), 17 Beav. 279; Hutton *v.* Rossiter (1855), 7 De G. M. & G. 9; Monypenny *v.* Monypenny (1858), 4 K. & J. 174; Smith *v.* Kay (1859), 7 H. L. Cas. 751; Steiry *v.* Combs (1871), 25 L. T. 10; Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L. R. 6 H. L. 352; Mills *v.* Fox (1887), 37 Ch. D. 153; Gillman & Spencer *v.* Carbutt (1889), 37 W. R. 437; Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396; Cave *v.* Crew (1893), 68 L. T. 254; Chadwick *v.* Manning, [1896] A. C. 231; Licenses Insee. Corpn. & Guarantee Fund *v.* Lawson (1896), 12 T. L. R. 501; Whitechurch *v.* Cavanagh, [1902] A. C. 117; Cresswell *v.* Joffreys (1912), 28 T. L. R. 413; *Re* A Bankruptcy Notice, [1921] 2 Ch. 76.

199. ———.]—A. & B. were partners for four years in the K. mill, & A. & C. were sub-partners at will. A. put an end to his sub-partnership with C. They afterwards met & A. drew up this document: "C. to receive three-sixteenths of the K. mill during the present partnership of A. & B.; if C. enters into any other business before, to renounce his interest above mentioned, & to receive £500 as a quit claim." It was taken to a solr. to draw a formal agreement, who said it was too vague to act upon, & both parties differed as to its construction:—*Held*: it was not a final concluded agreement which could be enforced.—FROST *v.* MOULTON (1856), 21 Beav. 596; 52 E. R. 990.

200. ———.]—SHREWSBURY & BIRMINGHAM RY. CO. *v.* NORTH WESTERN RY. CO., ETC., No. 337, *post*.

201. ———.]—A. signed a memorandum of agreement, by which he agreed to sell to B. & C. all his interest in a partnership business on a certain valuation, "this purchase being contingent upon B. & C. being able to agree on the purchase with the rest of the retiring partners." The memorandum was not then signed by B. & C., who proceeded to negotiate with the other partners for

PART III. SECT. 1, SUB-SECT. 1.

191 i. General rule—Specific performance refused.]—OMNIUM SECURITIES CO. *v.* RICHARDSON (1884), 7 O. R. 182.—CAN.

191 ii. ———.]—Only a concluded contract can be specifically

enforced.—SANDFORD *v.* CAMERON (N. S.) (1913), 13 E. L. R. 208.—CAN.

191 iii. ———.]—KERR *v.* CUNARD (1914), 42 N. B. R. 451; 14 E. L. R. 231, 16 D. L. R. 662.—CAN.

c. What amounts to completed con-

tract—Letters with simple acceptance.]—Letters will not constitute an agreement which the ct. will specifically perform, unless the answer is a simple acceptance, without the introduction of a new term.—WRIGHT *v.* ST. GEORGE (1861), 12 L. Ch. R. 226.—IR.

he purchase of their interests. A fortnight after signing the memorandum A. wrote to B. & C., withdrawing from his offer, on the ground that they had not complied with the condition alleged to have been verbally made by him that they should accept within a week. Letters passed, in which B. & C. did not state that they had accepted the offer, or that they considered A. as irrevocably bound, but that they had not as yet been able to complete the negotiations. They subsequently signed their acceptance upon the memorandum of agreement:—*Held*: there had been no such acceptance by B. & C. before A. had withdrawn from his offer, so as to constitute a binding agreement against him for the sale of his partnership interest of which specific performance could be enforced.—*HORSFALL v. GARNETT* (1858), 6 W. R. 387.

202. ———.]—*ORIENTAL INLAND STEAM CO. v. BRIGGS*, No. 890, *post*.

203. ———.]—(1) An agreement by which a father stipulated that the mother of his deceased wife should have the custody of the infant children during three months of every year is bad for want of mutuality, & cannot be enforced against deceased wife's mother, as she could not compel the father to deliver up the children to her for the stipulated period, nor restrain him from removing them out of the jurisdiction.

(2) Circumstances under which, independently of the objection for want of mutuality the *ct.* held, upon demurrer, that no concluded agreement had been come to between the parties.—*KENNEDY v. MAY* (1863), 1 New Rep. 427; 7 L. T. 819; 27 J. P. 308; 11 W. R. 358.

204. ———.]—A principal employed an agent to manage her estates in India. She charged the agent with misappropriating moneys received by him on her account, & with other fraudulent acts. Some negotiations took place between them, which resulted, as the principal said, in a concluded agreement, according to which a sum of money was to be paid by the agent to the principal, & the charges of fraud were to be withdrawn, & no further proceedings were to be taken. The agent having declined to carry out the alleged agreement, a bill was filed against him by the principal to compel specific performance of it. In this bill the charges of fraud were repeated & substantively alleged by plaintiff. Deft. denied that any agreement had been finally concluded, & he adduced evidence to rebut the charges of fraud. The Vice-Chancellor made a decree for specific performance of the agreement:—*Held*: (1) the evidence did not prove any concluded agreement between the parties, & the bill must be dismissed; (2) the charges of fraud being matters which the *ct.* could not try in this suit, their introduction into the bill was improper, but the charges having been made, deft. was entitled to adduce evidence to disprove them, & *pltf.* must pay all the costs incurred by reason of the making of those charges as between *solr.* & *client*.—*FORESTER v. READ* (1870), 6 Ch. App. 40; 24 L. T. 79; 19 W. R. 114, L. JJ.

Annotation:—As to (2) *Refd.* *Turner v. Collins* (1871), L. R. 12 Eq. 438.

205. ———.]—Upon complaint that a railway co. did not afford at their station at R. all reasonable facilities for receiving & forwarding & delivering coal & coke traffic upon & from their railway, it was proved that the railway co. refused to carry or convey on their railway coal or coke to or from their station at R. except coal or coke which had been raised from collieries or manufactured at coke ovens situated on the "Petre Estate." The

ground of such refusal was the fact that a former owner of the "Petre Estate" would not sell the land to the railway co. on which the R. station was subsequently erected, except under & subject to the condition & stipulation that the railway co. should not allow any coal or coke to be received or deposited at or sent from the intended station, either by railway or otherwise, which had not been raised from or manufactured at the collieries or coke ovens upon the "Petre Estate."

If the matter had rested upon an uncompleted agreement required to be carried out by virtue of a suit for specific performance, I cannot myself believe that specific performance would have been decreed in the face of that clause (*WILLS, J.*).—*RISHTON LOCAL BOARD v. LANCASHIRE & YORKSHIRE RY. CO.* (1893), 8 Ry. & Can. Tr. Cas. 74.

Annotation:—*Mentd.* *Holwell Iron Co. v. Mid. Ry.*, [1900] 1 K. B. 486.

206. ———.]—*Pltf.* must show . . . that there is a contract concluded between the parties (*LORD CAIRNS, C.*).—*HUSSEY v. HORNE-PAYNE* (1879), 4 App. Cas. 311; 48 L. J. Ch. 846; 41 L. T. 1; 43 J. P. 814; 27 W. R. 585, H. L.

Annotations:—*Consd.* *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616; *Lever v. Koffler*, [1901] 1 Ch. 543. *Refd.* *Wilcox v. Redhead* (1880), 49 L. J. Ch. 539; *Kadio v. Addison* (1882), 52 L. J. Ch. 80; *May v. Thomson* (1882), 20 Ch. D. 705; *Williams v. Brisco* (1882), 22 Ch. D. 441; *Wood v. Aylward* (1887), 57 L. T. 54; *Wylson v. Dunn* (1887), 34 Ch. D. 569; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; *Bellamy v. Debenham* (1890), 45 Ch. D. 481; *Page v. Norfolk* (1894), 70 L. T. 781; *Chipperfield v. Carter* (1895), 72 L. T. 487; *Mason v. Von Buch* (1899), 15 T. L. R. 430; *Brooks v. Knowles* (1911), 5 B. W. C. C. 15; *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284; *Morrell v. Studd & Millington*, [1913] 2 Ch. 648; *Perry v. Suffolds*, [1916] 2 Ch. 187; *Love & Stewart v. Instone* (1917), 33 T. L. R. 475. *Mentd.* *Tennent v. Welch* (1888), 58 L. T. 368; *Bank of New Zealand v. Simpson* (1900), 69 L. J. P. C. 22; *Haegerstrand v. Anne Thomas S.S. Co.* (1905), 10 Cont. Cas. 67; *Bristol Tramways, etc., Carriage Co. v. Fiat Motors*, [1910] 2 K. B. 831.

207. ———.]—Specific performance of an agreement "subject to a contract to be settled," or "subject to a proper contract," will not be enforced.—*HARVEY v. BARNARD'S INN (PRINCIPAL & ANCIENTS)* (1881), 50 L. J. Ch. 750; 45 L. T. 280; 29 W. R. 922.

208. ———.]—Action for specific performance dismissed on the ground that the correspondence disclosed no concluded contract.—*COOK v. WILLIAMS* (1897), 13 T. L. R. 481; *affd.*, 14 T. L. R. 31, C. A.

209. ———.]—*Vendor offering to waive terms.*—A contract by a rector for the sale of the rectory house & glebe land belonging thereto for £4,500 was pleaded as concluded in three specified letters. Before this the negotiations for the sale between the rector & his agent & the purchaser had been conducted at interviews & by letters on the footing that three acres of the glebe land should be reserved for the erection of a new rectory, & that certain fixtures should be taken by the purchaser. In defence to an action by the vendor for specific performance, the purchaser pleaded that there was no concluded agreement, & if there were there was no memorandum of it in writing to satisfy Stat. Frauds. *Pltf.*'s counsel waived the reservations in the vendor's favour, & was willing to convey the rectory house & all the glebe on payment of £4,500:—*Held*: no question of waiver by the vendor of terms in his favour could arise where he had failed to establish any concluded agreement.—*ALLSOPP v. ORCHARD*, [1923] 1 Ch. 323; 92 L. J. Ch. 257; 128 L. T. 823; 67 Sol. Jo. 312.

210. *Conclusiveness of contract doubtful.*—*HUDDLESTON v. BRISCOE*, No. 193, *ante*.

Sect. 1.—Contract not concluded: Sub-sects. 1 & 2.]

211. ——This case stands so close to the boundary which separates negotiation from agreement, & it seems so reasonably doubtful, to say the least, whether deft. ever intended to bind himself or meant to represent himself as intending to be bound, that it would be dangerous to exercise the jurisdiction of the ct. in directing specific performance, especially as, if there was a contract, an action for damages may be brought (KNIGHT BRUCE, L.J.).

The ground on which, I think, that the bill must be dismissed, is, that there is no memorandum or note of a contract in writing within the provisions of Stat. Frauds (TURNER, L.J.).—SKELTON v. COLE (1857), 1 De G. & J. 587; 44 E. R. 850, L. JJ.

SUB-SECT. 2.—PARTICULAR INSTANCES.

212. Contract by agent in excess of authority.]—Specific performance of a contract concerning land not decreed on the signature of an agent without authority.—HOWARD v. BRAITHWAITE (1812), 1 Ves. & B. 202; 35 E. R. 79, L. C.; *subsequent proceedings* (1813), 1 Ves. & B. 374, L. C.

213. ——It is not every excess of authority by an agent that will vitiate a contract, & where such excess is not unreasonable it will not operate to prevent specific performance of the contract.—BROMET v. NEVILLE (1909), 53 Sol. Jo. 321.

*Annotation:—*Reid. Rossdale v. Denny, [1921] 1 Ch. 57.

214. ——HAMMOND v. CHUBB (1915), 138 L. T. Jo. 360.

215. Contract for purchase of tolls—Conditions of sale not fulfilled.]—By Turnpike Roads Act, 1822 (c. 126), the trustees are empowered to let the tolls by auction; but amongst other provisions to prevent undue preference, a minute glass is to be turned thrice after each bidding; & it declares, that if no other person bids, the last bidder is to be the farmer or renter. Trustees under this Act put up tolls subject to other conditions, one of which was, that unless there should be three biddings there should be no letting, unless the trustees thought proper to take less than three biddings, & that the trustees should have a reserved bidding. There was one bidding only, which was made by pltf.; whereupon the trustees declared, that if there was no advance, they should be obliged to make a reserved bidding. The minute glass was turned thrice, & there was no further bidding. Pltf. insisted that, under the express terms of the Act, he was the purchaser, & he filed his bill for a specific performance:—*Held*: he was not entitled to relief, & the bill was dismissed, but without costs.—LEVY v. PENDERGRASS (1810), 2 Beav. 415; 48 E. R. 1242.

216. Parol agreement—Not reconcilable with correspondence.]—A parol agreement, which is not liable to the objection of Stat. of Frauds, or to which that objection has not been taken, if distinctly proved by unimpeached testimony, will be specifically performed, notwithstanding some correspondence had taken place between the parties which it might be difficult to reconcile with the existence of such an agreement.—CLIFFORD v.

TURRELL (1845), 14 L. J. Ch. 390; 5 L. T. O. S. 281; 9 Jur. 633, L. C.

*Annotations:—*Consd. Keenan v. Handley (1861), 10 L. T. 683; Frith v. Frith, [1906] A. C. 254. *Reid.* Kelson v. Kelson (1853), 1 W. R. 143; *Re* British & Foreign Cork Co., Lelfchild's Case (1865), L. R. 1 Eq. 231; Jervis v. Berridge (1873), 8 Ch. App. 351; *Re* Barnstaple Second Annuitant Soc. (1881), 50 L. T. 424.

217. Agreement to guarantee composition to creditors—Conditional on signing release within specified time—Failure to sign due to mistake of law.]—An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtor of their respective claims, is an agreement entered unto with such creditors only as actually signed before that day, & cannot be enforced in favour of a creditor who, in consequence of a misapprehension by both parties of their respective rights, failed to sign the release before the day specified.

Where such an agreement contained no stipulation for giving up securities, a creditor declined to sign the release till the result of an action, brought by him against the acceptor of certain bills which he had discounted for the debtor, should be known; the guarantee insisting on the delivery of the bills, the settlement was postponed, & the release was not signed within the time specified by the agreement:—*Held*: upon a bill filed by the creditor for specific performance of the agreement, although both parties were under a misapprehension, the creditor being entitled to retain the bills, & although his failure to sign the release arose from such misapprehension, the creditor was not entitled to relief.—EMMET v. DEWHURST (1851), 3 Mac. & G. 587; 21 L. J. Ch. 497; 15 Jur. 1115; 42 E. R. 386.

*Annotation:—*Reid. Williams v. Mostyn (1863), 33 L. J. Ch. 51.

218. Agreement entered into in pursuance of directions in statute—When not completed.]—Bill by a canal co. for specific performance by a railway co. of an agreement to purchase the canal for £12,000 entered into by the projectors of the railway, with a view of obviating *bonâ fide* opposition on the part of pltf's. to defts.' Act.

By the Act authorising the sale & purchase of the canal defts. were "authorised & required" with consent of three-fifths of the proprietors present at a special meeting "to purchase the canal upon such terms & conditions as shall be or may have been agreed upon between the said cos." The proprietors present at a special meeting, duly held, & called in every respect as required by the Act, passed a unanimous resolution, afterwards communicated to pltf's., authorising the directors to purchase the canal for £12,000 upon such terms & conditions as to them should seem meet:—*Held*: the Act, not referring to the previous imperfect agreement, did not give validity thereto. Besides, where there is not already an agreement under the co.'s seal, or signed by two of the directors, or where there is any question left open as to the terms or conditions of the agreement, the proper mode of enforcing such a direction in an Act of Parliament is by *mandamus*, & not by suit for specific performance.—LEOMINSTER CANAL NAVIGATION CO. v. SHREWSBURY & HEREFORD RY. CO. (1857), 3 K. & J. 654; 26

PART III. SECT. 1, SUB-SECT. 2.

212 i. Contract by agent in excess of authority.]—TRACEY v. FOWLES (1886), 13 A. R. 115.—CAN.

212 ii. ——GIBB v. MCMAHON (Ont.) (1906), 37 S. C. R. 362.—

CAN.

212 iii. ——WHITE v. EDGAR (1908), 7 W. L. R. 800.—CAN.

212 iv. ——MILLAR v. ROACH (1879), 6 Nfld. L. R. 173.—NFLD.

d. Parol agreement—Agreement to

*share profits on resale of land.]—*MCLEOD v. ORTON (1870), 17 Gr. 84.—CAN.

e. ——*Not reconcilable with acts of defendant.]—*HARRIS v. HARRIS (1920), 47 O. L. R. 321; 53 D. L. R. 389 18 O. W. N. 81.—CAN.

L. J. Ch. 764 ; 29 L. T. O. S. 342 ; 3 Jur. N. S. 930 ; 5 W. R. 868 ; 69 E. R. 1272.

Annotation :—**Consd.** *Bateman v. Mid-Wales Ry., National Discount Co. v. Mid-Wales Ry. Overend, Gurney v. Mid-Wales Ry.* (1866), 14 W. R. 672.

219. Representation.]—Pltf. prayed specific performance of an agreement for sale by five defts., brothers & sisters, who were owners of an estate in fee simple as tenants in common. A preliminary meeting was held in Feb. 1857, & shortly after a written agreement of sale, dated Feb. 12, was signed. The purchase-money, as pltf. alleged, was paid by him at another meeting in Oct. 1857. Deft.'s solr. sent the abstract of title to pltf.'s solrs. & the latter were preparing the conveyance, but before they could do so they were told it was useless, as two of defts., E. & M., did not concur & would not execute the deed.

At the preliminary meeting neither of the two was present. Pltf. alleged, but defts. E. & M. denied, that it was then & there stated that those who were present acted on behalf of all the rest. The agreement was not signed by either E. or M. At the meeting of Oct., M. was present but not E. Both E. & M. by their answers denied that pltf. ever paid to deft. any sum of money with the privity of them or either of them :—*Held* : upon the evidence there was nothing to show that E. was bound, & he must be decreed to redeem pltf. or be foreclosed, M. having been present at the meeting of Oct., was bound by the contract for sale.

Any person who is present upon the occasion of a transaction where money is paid in his presence, on the faith of a representation made with his privity, is bound to fulfil the purpose for which that representation was made.—**DAVIES v. DAVIES** (1860), 3 L. T. 233 ; 6 Jur. N. S. 1320.

220. —.]—**DAVEY v. BAINES** (1892), 9 T. L. R. 29, C. A.

—.]—*See, generally*, **ESTOPPEL**, Vol. XXI., pp. 287–402, Nos. 1019–1618 ; **MISREPRESENTATION, & FRAUD**, Vol. XXV., pp. 55, 56, Nos. 494–510.

221. Mutual contract between joint tenants—Where prior conditional contract by one to sell whole property.]—It is no objection to a mutual contract between A. & B., for the one to buy or sell from or to the other of them his interest in certain property, that at the time of that contract there existed a conditional agreement by one of them with a third party to sell the whole property to him.

Where, therefore, A. & B., who were interested in equal moieties in certain land, mutually contracted to buy from or sell to the other of them his interest, & at the time of that contract A. had conditionally agreed to sell the whole of the property to F. for a larger sum than the originally estimated value of half the property :—*Held* : A. & B. were not partners in the increased amount to be paid for the whole property, & A. was entitled, on a bill duly filed, to a decree for the specific performance of his mutual contract with B.—**CARTWRIGHT v. INSOLE** (1867), 16 L. T. 445.

222. Agreement for compromise of suit—Some parties not consenting.]—By his will made in Oct.

1861, F. gave the bulk of his property to the six children of his two sisters of the whole blood. By a subsequent will, made in Jan. 1862, he gave the bulk of his property to his half sister E.

The will of Jan. 1862, was propounded by the husband of E. & the proof of it was opposed by two of the children of F.'s sisters of the whole blood. Two suits were then instituted in the Ct. of Probate by the husband of E. to establish the will of 1862. These suits were consolidated & a trial took place, in the course of which a compromise was come to, the effect of which was that there should be a verdict for pltf. in that suit, he agreeing to charge the property passing under the will with six several sums of £500 in favour of the six children of F.'s two sisters of the whole blood. The terms of the compromise were indorsed on the brief of counsel for one of the two children, & were signed by him & by pltf.'s counsel, & verbally assented to by all the six children, two of whom alone were parties to the suit.

Certain of the six children who were not parties to the suit, afterwards entered *caveats* against the probate, & suits were instituted against them by E. & her husband to establish the will, which in the result they succeeded in doing.

On a bill by one of the six children, who was a party to the compromised suit, for specific performance of the compromise :—*Held* : the agreement for a compromise was to be binding only in the event of the six children consenting to be bound by it ; but as certain of the children had repudiated it, & E. & her husband had been put to the expense of establishing the will, to avoid which expense they had agreed to the compromise, the agreement was null & void.—**PLUMLEY v. HORRELL** (1869), 20 L. T. 473.

223. Negotiations for compulsory purchase of land—Notice to apply for appointment of surveyor.]

—A notice by defts., a railway co., to treat for a part of pltf.'s manufactory, was met by a counter-notice by pltf's., requiring them to take the whole. Defts. then gave pltf's. notice of their intention to apply to the Board of Trade for the appointment of a surveyor to determine the value of the premises comprised in the notice to treat, & of the further lands & hereditaments which pltf's. could lawfully require & had required defts. to purchase & take. Pltf's. then filed their bill, praying for a declaration that defts. could not take a part of the manufactory without taking the whole ; whereupon defts. gave notice of their intention to withdraw from their notice to treat, offering to pay pltf.'s costs of suit up to that date ; but pltf's. declined the offer & insisted on an answer which was filed. The bill was then amended, & as amended, prayed for a declaration that defts. were bound to take the whole manufactory :—*Held* : defts.' notice of their intention to apply for the appointment of a surveyor did not amount to a binding contract by them to take the property ; hence they were at liberty to withdraw their notice to treat ; & specific performance as prayed by the amended bill refused.—**GRIERSON v.**

219 i. Representation.]—**HAYDEN v. SMITH & ANGUS** (1887), 1 B. C. R., pt. 2, 312.—**CAN.**

219 ii. —.]—**A.-G. FOR ONTARIO v. GREAT LAKES PAPER CO., LTD.** (1921), 64 D. L. R. 159 ; 50 D. L. R. 78.—**CAN.**

f. Conditional acceptance.]—**O'BRIEN v. PEARSON** (1912), 20 W. L. R. 510 ; 1 W. W. R. 1126 ; 22 Man. L. R. 175 ; 4 D. L. R. 413.—**CAN.**

g. —.]—**WILEY v. TRUSTEES & CO.** (1912), 22 O. W. R.

625 ; 3 O. W. N. 997, 1494 ; 5 D. L. R. 409.—**CAN.**

h. Sale to partnership—Condition for mutual payments by partners not fulfilled.]—It was a term in an agreement for the sale of G.'s business, to B. & D. that B. should pay \$10,000 in cash & that D. should pay \$10,000 in the manner therein set forth. B. did not pay his \$10,000. The document was left with a solr. acting for both parties :—*Held* : specific performance could not be obtained by G.

against D., inasmuch as the payments by D. & B. were mutually conditional & the agreement was never concluded.—**DOW v. BODY & GRAHAM** (1914), 30 W. L. R. 248.—**CAN.**

k. Deed of sale not complete or final—But genuine & duly attested.]—**LALLA CHOONEELAL NAGINDAS v. SAWAECHUND NAMEDAS** (1835), 5 W. R. P. C. 111.—**IND.**

l. Time for payment & delivery of possession reserved.]—Specific performance will not be decreed of an

Sect. 1.—Contract not concluded : Sub-sect. 2. Sect. 2 : Sub-sects. 1 & 2, A.]

CHESHIRE LINES COMMITTEE (1874), L. R. 19 Eq. 83 ; 44 L. J. Ch. 35 ; 31 L. T. 428 ; 39 J. P. 229 ; 23 W. R. 68.

Annotation :—Refd. Ashton Vale Iron Co. v. Bristol Corpn. (1901), 83 L. T. 694.

— *Notice to treat.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 174, 175, 226, Nos. 522–527, 1120–1128.*

224. Contract for purchase of bankrupt's property—Scheme not accepted by creditors—Though approved by court.]—The trustee in a bkpcy. entered into a written agreement with defts. whereby it was agreed that defts. should purchase the assets of the bkpt. for such a sum as would pay the expenses of the bkpcy. & the preferential debts in full within fourteen days after the approval of the scheme by the ct. & a certain composition to the unsecured creditors, & that on the approval of the scheme by the ct. the bkpcy. should be annulled. The creditors by a requisite majority passed a resolution agreeing to the scheme of arrangement as proposed, but adding a clause that a bond should be given by defts. for payment of the money. The ct. afterwards approved the agreement signed by defts., & annulled the bkpcy. : —*Held* : in an action by the trustees against defts. for specific performance of their agreement, the creditors not having accepted the scheme proposed in the form in which defts. had agreed to it, there had been no approval of the scheme by the ct. & the agreement could not be enforced against defts.—*LUCAS v. MARTIN* (1888), 37 Ch. D. 597 ; 57 L. J. Ch. 261 ; 58 L. T. 862 ; 36 W. R. 627, C. A.

Agreements for lease.]—See LANDLORD & TENANT, Vol. XXX., pp. 371–375, 404, 405, Nos. 343–384, 676–683.

Contracts by corporations.]—See CORPORATIONS, Vol. XIII., pp. 377–398, Nos. 1076, 1077, 1085–1215.

Contracts for insurance.]—See INSURANCE, Vol. XXIX., pp. 73–75, Nos. 326–342.

Contracts for sale of land.]—See SALE OF LAND, Vol. XL., pp. 12–18, 53, 54, Nos. 1–54, 318, 349.

— *Agreement contemplating execution of more formal document.]—See CONTRACT, Vol. XII., pp. 83–89, Nos. 490–546 ; LANDLORD & TENANT, Vol. XXX., pp. 372, 373, Nos. 362–371.*

Contracts for sale of shares in company.]—See COMPANIES, Vol. X., pp. 1139, 1140, Nos. 8049–8052.

Contracts for settlements.]—See SETTLEMENTS, Vol. XL., pp. 472–477, Nos. 212, 214, 222–253.

SECT. 2.—CONTRACT NOT SUFFICIENTLY CERTAIN.

SUB-SECT. 1.—IN GENERAL.

225. General rule.]—*BUXTON v. LISTER*, No. 143, *ante*.

226. —.]—(1) Specific performance of agreement refused under circumstances of inadequate consideration.

(2) Undoubtedly every agreement, of which there should be a specific performance, ought to be in writing, certain, & fair in all its parts

agreement for the sale & purchase of land where the contract reserves the fixing of the time for delivery of possession for future arrangement & the parties do not thereafter make such arrangement. The time for delivery &

payment is a material part of such contract.—*DENNY v. KERR* (1903), 23 N. Z. L. R. 719.—*N.Z.*

PART III. SECT. 2, SUB-SECT. 1.

225 i. General rule.]—An agreement

HARDWICKE, C.).—UNDERWOOD v. HITCHCOX (1749), 1 Ves. Sen. 279 ; 27 E. R. 1031.

Annotations :—As to (1) Refd. Day v. Newman (1788), 2 Cox, Eq. Cas. 77 ; *Bower v. Cooper* (1843), 11 Hare, 408 ; *Falcke v. Gray* (1859), 5 Jur. N. S. 645. *As to (2) Refd. Mason v. Armitage* (1806), 13 Ves. 25.

227. —.]—Specific performance of marriage articles refused, on the ground of their being inconsistent, uncertain, & unintelligible.—*FRANKS v. MARTIN* (1759), 1 Eden, 309 ; 28 E. R. 704.

228. —.]—I lay it down as a general proposition, to which I know no limitation, that all agreements in order to be executed in this ct. must be certain & defined ; secondly, they must be equal & fair ; for this ct., unless they are fair, will not execute them ; & thirdly, they must be proved in such a manner as the law requires (*LORD LOUGHBOROUGH, C.).—WALPOLE (LORD) v. ORFORD (LORD)* (1797), 3 Ves. 402 ; 30 E. R. 1076.

Annotations :—Consd. Re Oldham, Hadwen v. Myles, [1925] 1 Ch. 75. *Refd. Denyssen v. Mostert* (1872), 8 Moo. P. C. C. N. S. 502 ; *Stone v. Hoskins*, [1905] P. 194 ; *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192 ; *Gray v. Perpetual Trustee Co.*, [1928] A. C. 391 ; *Mentd. Crosbie v. MacDonald* (1799), 4 Ves. 610 ; *Burton v. Newbery* (1875), 1 Ch. D. 231.

229. —.]—*PARIS CHOCOLATE CO. v. CRYSTAL PALACE CO.*, No. 98, *ante*.

230. —.]—A corpn. passed a resolution for granting to pltf. a long lease of waste lands by the sea, "opposite" his property, to be stumped out by him & a committee of the corpn., for the erection of a terrace. He fell out with the committee about the boundaries, & in 1860 took what land he thought proper & erected the terrace, & he paid the nominal rent, 10s., to 1865. After many disputes, an action of ejectment was commenced in 1869. On bill filed, the ct. restrained the action, & at the hearing the Vice-Chancellor decreed specific performance, with liberty to the parties to apply in chambers as to the agreement : —*Held* : the ct. could not decree specific performance without ascertaining the agreement.—*CROOK v. SEAFORD CORPN.* (1871), 6 Ch. App. 551 ; 25 L. T. 1 ; 35 J. P. 804 ; 19 W. R. 938, L. C.

Annotations :—Distd. Hoare v. Kingsbury U. C., [1912] 2 Ch. 452. *Refd. Hunt v. Wimbledon L. B.* (1878), 3 C. P. D. 208 ; *Melbourne Banking Corpn. v. Brougham* (1879), 48 L. J. P. C. 12 ; *Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281.

231. —.]—The ct. cannot either by specific performance or the award of damages enforce a contract which it is unable to interpret (*MCCARDIE, J.).—COUNTY HOTEL & WINE CO., LTD. v. LONDON & NORTH WESTERN RY. CO.*, [1918] 2 K. B. 251 ; 87 L. J. K. B. 849 ; 119 L. T. 38 ; 34 T. L. R. 393 ; 17 L. Q. R. 274 ; *on appeal*, [1921] 1 A. C. 85, H. L.

—.]—*See, also, BUILDING CONTRACTS, Vol. VII., pp. 400, 401, Nos. 265, 266, 267, 272.*

232. Circumstances affecting defence of uncertainty—Conduct of parties—Between agreement & action.]—In a suit for specific performance of an agreement, vague in its language, a ct. of equity, having regard to the terms of such agreement, will consider the surrounding circumstances & conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement & the commencement of the suit for its enforcement.

P. & co. entered into an agreement in writing with O. & co. for the transfer to them of the unexpired term of a lease held by P. & co. of land

leading to difficulty in its working out, but intelligible, is not too uncertain for specific performance.—*FORBES v. CLARTON* (1878), 4 V. L. R. (Eq.) 22.—*AUS.*

& houses at Shanghai, & to build or finish certain houses thereon; to proceed with the building at once; to consult O. & co.'s wishes in building the houses then in progress, & in building other houses not then commenced. O. & co., on their part, agreed to take the term so to be transferred, & to pay a certain rent divided into three portions, the liability for each portion to begin from the time when the house to which that portion related was finished by P. & co., & possession delivered over by them to O. & co. Both parties further agreed that a proper contract should be drawn for their mutual execution by a solr. named by them. No such contract, however, was executed. Possession was given, & the buildings altered by P. & co. at O. & co.'s instance:—*Held*: decreeing specific performance of such agreement, (1) the terms of the agreement expressed with sufficient clearness the intentions of the parties to bind them, from the time it was made, to do the several acts stipulated for each to perform; (2) the stipulation that a proper contract should be made by a legal adviser was so isolated from the other stipulations in point of sequence that it might be performed either directly after the signing of the memorandum of agreement or when possession was given of the first house specified, or at any subsequent time, either before or after the completion of all or any of the houses to be erected; (3) that part of the agreement which provided that the wishes of O. & co. should be consulted in erecting the buildings was not so vague or indefinite as to render the contract impossible to be enforced, having regard (a) to the surrounding circumstances, & (b) to the fact of a part performance by O. & co. in respect of the buildings & alterations of the houses.—*OXFORD v. PROVAND* (1868), L. R. 2 P. C. 135; 5 Moo. P. C. C. N. S. 150; 16 E. R. 472, P. C.

Annotations.—As to (3) *Refd.* *Waring & Gillow v. Thompson* (1912), 29 T. L. R. 151. *Generally, Refd.* *Coatsworth v. Johnson* (1885), Cab. & El. 543; *Hembrow v. Talbot* (1892), 36 Sol. Jo. 712; *Parkin v. South Helton Coal Co.* (1907), 97 L. T. 98.

233. Plaintiff insisting on particular construction of obscure contract—Specific performance of different construction refused.—Pltf. offered to take a lease of furnaces from deft., conditionally upon his being able to make arrangements with other persons as to ore. A loosely drawn memorandum was shortly afterwards signed by the parties, substituting certain other rents for the rents mentioned in the letter, which in other respects was to form the basis of the agreement. Deft., understanding that the lease was to begin immediately, offered possession to pltf. at once, but pltf. refused to take it, as he had not yet made arrangements for ores, & continued to treat the agreement as conditional on his making those arrangements. Ultimately the parties differed as to the covenants to be inserted in the lease, & pltf. commenced his action for specific performance:—*Held*: although where an agreement is clear the ct. must act upon its own view of the construction without regard to the view entertained by the parties, yet where a party has throughout

insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction.—*MARSHALL v. BERRIDGE* (1881), 19 Ch. D. 233; 51 L. J. Ch. 329; 45 L. T. 599; 46 J. P. 279; 30 W. R. 93, C. A.

Annotations.—*Refd.* *Rock Portland Cement Co. v. Wilson* (1882), 52 L. J. Ch. 214; *Wood v. Aylward* (1887), 57 L. T. 54; *Re Lander & Bagley's Contract*, [1892] 3 Ch. 41; *Oxford Corp'n. v. Crow* (1893), 69 L. T. 228; *Edwards v. Jones* (1921), 124 L. T. 740; *Berners v. Fleming*, [1925] 1 Ch. 264. *Mentd.* *Furness v. Bond* (1888), 4 T. L. R. 457; *Humphery v. Conybeare* (1899), 80 L. T. 40; *Curtis v. B. U. R. T. Co.* (1912), 28 T. L. R. 353.

234. Application of rule to contracts for settlements.—*Re CLARKE, COOMBE v. CARTER*, No. 935, *post*.

Instruments void for uncertainty.—*See DEEDS*, Vol. XVII., pp. 359-362, Nos. 1705-1736.

SUB-SECT. 2.—UNCERTAINTY AS TO TERMS.

A. In General.

235. General rule—Terms must be certain.—*PLAYFORD v. PLAYFORD*, No. 794, *post*.

236. — — —.]—One of two tenants in common in fee of lands containing mines of coal & iron entered into a negotiation for a lease of minerals, & wrote a letter stating his willingness to grant a lease on the terms of a paper referred to in the letter. There were two papers, each of which in some respects answered the description in the letter. One of these purported to be terms for letting & taking "coals, etc." under the lands in question, but contained no more definite description of the minerals which were the subject of it. In a suit by the proposed lessee for specific performance as to the moiety belonging to the tenant in common who had written the letter:—*Held*: even if, as pltf. contended, it was shown to be the above paper, its terms were too indefinite to be capable of being enforced specifically.—*PRICE v. GRIFFITH* (1851), 1 De G. M. & G. 80; 21 L. J. Ch. 78; 18 L. T. O. S. 190; 15 Jur. 1093; 42 E. R. 482, L. J.J.

Annotations.—*Expld.* *Naylor v. Goodall* (1877), 47 L. J. Ch. 53. *Mentd.* *Dawson v. Newsome* (1860), 6 Jur. N. S. 625; *Burrow v. Scammell* (1881), 19 Ch. D. 175; *Lundley v. Ravenscroft*, [1895] 1 Q. B. 683; *Heater v. Pearce*, [1900] 1 Ch. 311.

237. — — —.]—Bill for the specific performance of an agreement made between patentees for the use of their respective patents, embodied in an order at *nisi prius*, defts. admitting that they were bound by the agreement, & that it ought to be specifically performed, but disputing its meaning, dismissed without costs, on the ground that the agreement was framed in terms which were incapable of any certain construction.—*TATHAM v. PLATT* (1852), 9 Hare, 660; 68 E. R. 678.

238. — — —.]—C. S., a corn merchant, residing at B., & carrying on business in the towns & throughout the district traversed by a railway of defts., in 1846 entered into an agreement with them that he would, in consideration of defts. granting to him, yearly & every year, during so

PART III. SECT. 2, SUB-SECT. 2.—A.

235 i. General rule—Terms must be certain.—The ct. will not enforce specific performance of a contract where the terms of the contract are ambiguous & in part defective.—*O'BRIEN v. GOODSALL* (1878), 1 N. S. W. S. C. R. N. S. (Eq.) 6.—*AUS.*

235 ii. — — —.]—Specific performance will not be decreed where the terms of the contract signed are

uncertain, nor where it is plain that there was a misunderstanding.—*MCLAUGHLIN v. WHITESIDE* (1859), 7 Gr. 573.—*CAN.*

235 iii. — — —.]—A contract to be specifically performed must be equal, fair & certain in its terms, & founded on good consideration.—*EARLEY v. MCGILL* (1864), 11 Gr. 75.—*CAN.*

235 iv. — — —.]—*STRATHCLAIR v. CANADIAN NORTHERN RY. Co.* (1911), 21 Man. L. R. 555.—*CAN.*

235 v. — — —.]—Equity will not decree a specific execution upon a contract, the terms of which are uncertain as to its extent.—*HARNETT v. YIELDING* (1805), 1 Sch. & Lef. 549.—*IR.*

235 vi. — — —.]—*TOTTENHAM v. TOWNSEND* (1856), 5 I Ch. R. 225.—*IR.*

235 vii. — — —.]—*JAGADIS CHANDRA DEO DHABAL v. SATRUGHIAN DEO DHABAL* (1906), 1 I. L. R. 33 Calc. 1065.—*IR.*

Sect. 2.—Contract not sufficiently certain: Sub-sect. 2, A. & B.; sub-sect. 3, A.]

long a time as he should carry on business at B., a free pass over their line between the towns of B. & C., have, for so long a time as the scale of charges of debts. & of a certain canal co. should bear the same proportion to each other as they then bore, all his goods carried by debts. in preference to the said canal co. That arrangement continued down to 1849, when pltf., at the request of debts., to prevent the annoyance to them of constant applications for free passes, consented to pay £5 as a nominal consideration for such free passes. This arrangement continued down to 1857, when, after a long correspondence on the subject, arising out of pltf.'s application for a renewal of the pass, the debts. refused to renew it. The alleged agreement of 1845 was not executed by or on behalf of debts. A bill was filed by pltf. for the specific performance of the agreement, & on demurrer for want of equity, the ct. held that the agreement, being unilateral in its nature, & uncertain in its terms, could not be specifically enforced, & therefore the demurrer must be allowed.—*STURGE v. MIDLAND RY. CO.* (1858), 4 Jur. N. S. 273; 6 W. R. 233.

239. ———.]—In order to sustain the case made by the bill [for specific performance] it is necessary that the agreements relied upon should be both precise & accurate in their terms (*STUART, V.-C.*).—*EUROPEAN & AMERICAN SUBMARINE TELEGRAPH CO., LTD. v. ELLIOT* (1865), 12 L. T. 416.

240. ———.]—Where an agreement is in its terms so uncertain as to raise a doubt as to its true effect, whether to be considered as a purchase of premises or a lease, a demurrer will lie to a bill for a specific performance of it.—*DOLLING v. EVANS* (1867), 36 L. J. Ch. 174; 15 L. T. 604; 15 W. R. 394; 31 J. P. Jo. 375.

241. ———.]—Where the terms of an agreement are doubtful & obscure, & the ct. cannot see what the parties intended to pass under it, an order for specific performance will not be made.—*DAGGETT v. HILLIER* (1885), 1 T. L. R. 449.

242. General terms certain—Uncertainty as to subsidiary terms.]—*SOUTH WALES RY. CO. v. WYTHES*, No. 46, *ante*.

243. ———.]—If an agreement about a subject matter which is certain, is in intelligible language, & the stipulations contained in the agreement are perfectly certain, this ct. will give effect to the agreement, although certain rights consequent upon those stipulations may have to be determined, which the ct. either cannot or is not asked to decide.—*BEWLEY v. HANCOCK* (1856), 6 De G. M. & G. 391; 26 L. T. O. S. 264; 2 Jur. N. S. 289; 43 E. R. 1285, L. C.

244. Contradictory evidence of terms.]—Bill for specific performance of an agreement dismissed: the agreement appearing from letters produced to have been different from that set up by the bill & proved by one witness.—*LEGH v. HAVERFIELD* (1800), 5 Ves. 452; 31 E. R. 678.

245. ———.]—Specific performance of a parol agreement for the sale of an estate, proved by one witness, confirmed by part performance, by taking possession, & acts of ownership, refused; there being some inconsistencies in the testimony of the witness, which, with other circumstances, placed

the terms of the contract in doubt.—*REYNOLDS v. WARING* (1831), You. 346; 159 E. R. 1026.

246. ———.]—If the writing which purports to be the agreement of the parties is so expressed as to give the purchaser more than the actual agreement between the parties would entitle him to, it is perfectly clear that the vendor may show what the real agreement was, by way of defence to a bill by the purchaser seeking the specific performance of the subject of the inaccurately expressed writing. It must be admitted that debt. who sets up such a defence undertakes a task of difficulty, but that difficulty is diminished where the meaning of the writing is itself in any respect doubtful, & it is still further diminished where, as in this case, a conveyance has been executed, for the purpose of completing the agreement, & that conveyance not only accords with the construction of the agreement for which the vendor contends but has been accepted by the purchaser (*WIGRAM, V.-C.*).—*HUMPHRIES v. HORNE* (1844), 3 Hare, 276; 67 E. R. 386.

B. Particular Terms.

247. Agreement for grant of "child's part"—Contract in consideration of marriage.]—*SILVESTER'S CASE* (1619), Poph. 148; 79 E. R. 1248.

248. Uncertainty as to time from which rent payable.]—(1) Inadequacy of value is not an objection to decreeing specific performance, unless the inadequacy is so great as to prove fraud, or that the parties could not have intended to execute the contract.

(2) Objection was raised to the specific performance of this alleged contract, which was founded upon the uncertainty introduced by the memorandum of Nov. 15, which provided for the payment of the rent "henceforward," although the proposal of Nov. 11 accepted without qualification on Nov. 15 provided that no rent should be paid during the life of pltf. (*LORD COTTENHAM, C.*).—*CALLAGHAN v. CALLAGHAN* (1841), 8 Cl. & Fin. 374; 8 E. R. 145.

249. Stipulation respecting disposal of purchase-money—"Large portion" to be left in business sold.]—(1) The terms "goodwill, etc.," in a contract for the sale of a foundry, are not so uncertain as alone to prevent a decree for specific performance of it; for the words *et cetera* point to things necessarily connected with & belonging to the goodwill, & to be defined in the conveyance.

(2) Specific performance of an agreement to purchase one-third of a foundry refused, on the ground of uncertainty; the contract not specifying what portion of the purchase-money was to be left in the business, but only a "large portion," & not stating when it was to be paid, or how to be secured, & what interest was to be allowed in the meanwhile.—*COOPER v. HOOD* (1858), 26 Beav. 293; 28 L. J. Ch. 212; 32 L. T. O. S. 171; 4 Jur. N. S. 1266; 7 W. R. 83; 53 E. R. 911.

250. Agreement regulating rights to future patents—Uncertainty as to duration.]—Specific performance of an agreement between four persons, regulating the right to all their future patented inventions, refused, on the following grounds: (1) it was too vague & uncertain as to its duration; (2) it involved a contract for personal services of

PART III. SECT. 2, SUB-SECT. 2.—B.
m. *Covenant to build house under certain value within specified time.]*—*ROBERTSON v. PATTERSON* (1885), 10 O. R. 267.—**CAN.**

n. *Agreement conditional on reorganization of company.]*—*BRUNDAGE v.*

HOWARD, SWINYARD & NIAGARA RIVER HYDRAULIC CO. (1885), 13 A. R. 337.—**CAN.**

o. *Agreement to give unspecified collateral security for loan.]*—*FOSTER v. RUSSELL* (1886), 12 O. R. 136.—**CAN.**

p. *Uncertainty as to terms of payment.]*

—*CLEMENT v. MCFARLAND* (1912), 23 O. W. R. 613; 4 O. W. N. 448 8 D. L. R. 226.—**CAN.**

q. *Promise by land broker to resell for purchaser at profit or repurchase.]*—*FLETCHER v. HOLDEN* (1914), 27 W. L. R. 896; 11 W. W. R.

an uncertain duration; (3) the want of mutuality in regard to one of the stipulations.—*FIRTH v. RIDLEY* (1864), 33 Beav. 516; 55 E. R. 468; *affd.*, 4 New Rep. 415.

251. Agreement for purchase of lease—Length of term not mentioned.—An agreement for the purchase of a lease, which does not mention the length of the term granted by the lease, is void for uncertainty, & cannot be enforced.—*SOUTHERN v. HARRIMAN* (1866), 14 W. R. 487, L. C.

252. Covenant in tenancy agreement—"With the option of renewal."—Premises were let by agreement in writing not under seal, for a term of three years commencing from a certain date at a clear yearly rental of £80 & £8 yearly for the use of water, payable on the usual quarter days, "with the option of renewal":—*Held*: the words "with the option of renewal" were sufficiently definite to enable the ct., at the instance of the tenant, to carry them out by a decree for specific performance for a renewed agreement for the same period, on the same terms, except as to renewal, as those contained in the agreement.—*LEWIS v. STEPHENSON* (1898), 67 L. J. Q. B. 296; 78 L. T. 165.

Uncertainty in terms of building contract—Specification to be agreed.—*See BUILDING CONTRACTS*, Vol. VII., p. 400, Nos. 267, 269.

Terms of agreement for lease.—*See LANDLORD & TENANT*, Vol. XXX., pp. 410, 417-419, Nos. 725, 787-813.

Terms of agreement for separation.—*See HUSBAND & WIFE*, Vol. XXVII., p. 242, No. 2132.

Terms of family arrangements.—*See FAMILY ARRANGEMENTS*, Vol. XXIV., p. 954, Nos. 83, 84.

Terms of contract for sale of land.—*See MINES*, Vol. XXXIV., p. 662, Nos. 605, 606; *SALE OF LAND*, Vol. XL., pp. 16, 310, Nos. 38, 2648-2651.

SUB-SECT. 3.—UNCERTAINTY AS TO SUBJECT-MATTER.

A. In General.

253. Subject-matter must be certain.—A bill will not lie to compel the performance of an agreement to build an house; but it will to compel a conveyance of land, because there is a thing certain to be conveyed.—*FERRINGTON v. AYNLEY* (1788), 2 Dick. 692; 2 Bro. C. C. 341; 21 E. R. 440.

Annotation:—*Consd.* *Flint v. Brandon* (1803), 8 Ves. 159.

254. — Proved as described.—*Qu.*: to obtain a specific performance of a contract the subject must be proved as described.

In order to decree a specific performance of the first agreement, the subject must be proved, as it is described (LORD ELDON, C.).—*DANIELS v. DAVISON* (1809), 16 Ves. 249; 33 E. R. 978, L. C.; *subsequent proceedings* (1811), 17 Ves. 433, L. C.

Annotations:—*Refd.* *Holmes v. Powell* (1856), 8 De G. M. & G. 572; *James v. Lichfield* (1869), L. R. 9 Eq. 51; *Carroll v. Keays*, *Keays v. Carroll* (1873), 22 W. R. 243; *Caballero v. Henty* (1871), 9 Ch. App. 447; *Ellis v. Wright* (1897), 76 L. T. 522; *Lewis v. Stephenson* (1898), 67 L. J. Q. B. 296. *Mentd.* *Bozon v. Williams* (1828), 3 Y. & J. 150; *Miles v. Langley* (1831), 2 Russ. & M. 626; *Brunton v. Neale* (1844), 9 Jur. 338; *Penny v. Watts* (1850), 2 De G. & Sm. 501; *Bailey v. Richardson* (1852), 9 Hare, 734; *Barnhart v. Greeshields* (1853), 9 Moo. P. C. C. 18; *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Welchman v. Coventry Union Bank* (1860), 8 W. R. 729; *Boever v. Luck*, *Beavor v. Lawson* (1867), L. R. 4 Eq. 537; *Hughes v. Seanor* (1870), 18 W. R. 1122; *Cavander v. Bulteel* (1873), 11 Ch. App. 79; *Phillips v. Miller* (1875), L. R. 10 C. P. 420; *Hunt v. Luck*, [1901] 1 Ch. 45; *Green v. Rheinberg* (1911), 104 L. T. 149; *Reeves v. Pope*, [1914] 2 K. B. 284; *Ashburton v. Nooton*, [1915] 1 Ch. 274.

693; 17 D. L. R. 461; 19 B. C. R. 567.—CAN.

r. Agreement to return agreement.—agreement that a party there-

to "agrees to give back an agreement on the farm for the said amount of \$700," is so uncertain that the ct. in the total absence of anything to

255. — Reasonable description necessary.—In order to form a contract by letter, of which the ct. will decree a specific performance, nothing more is necessary than that the amount & nature of the consideration to be paid on one side, & received on the other, should be ascertained, together with a reasonable description of the subject matter of the contract. It is the clearly established doctrine that the ct. will carry into execution an agreement so constituted. It is not necessary to be satisfied that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising *de facto* out of the terms of the correspondence.—*KENNEDY v. LEE* (1817), 3 Mer. 441; 36 E. R. 170, L. C.

Annotations:—*Consd.* *Thomas v. Blackman* (1811), 1 Coll. 301; *Cayley v. Walpole* (1870), 39 L. J. Ch. 609; *Preston v. Luck* (1884), 27 Ch. D. 497. *Refd.* *Thornbury v. Bevil* (1842), 1 Y. & C. Ch. Cas. 554; *Chinnock v. Ely* (1865), 4 De G. J. & Sm. 638; *Baumann v. James* (1867), 16 L. T. 165; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Hawkesworth v. Chaffey* (1886), 54 L. T. 72; *Chillingworth v. Escho* (1923), 129 L. T. 808. *Mentd.* *Churton v. Douglas* (1859), John. 174; *Lewis v. Brass* (1877), 37 L. T. 738; *Reynolds v. Bullock* (1878), 47 L. J. Ch. 773; *Gines v. Cooper* (1880), 11 Ch. D. 596; *Pearson v. Pearson* (1884), 27 Ch. D. 145.

256. — Small inaccuracies immaterial.—LORD THURLOW used to say that the jurisdiction of a ct. of equity to compel a specific performance must have been founded upon the notion of its being against conscience to take advantage of small circumstances of variation in the description of the thing contracted for (LORD ELDON, C.).—*STEWART v. ALLISTON* (1815), 1 Mer. 26; 35 E. R. 587, L. C.

Annotations:—*Consd.* *Denny v. Hancock* (1870), 18 W. R. 566. *Refd.* *Trower v. Newcome* (1811), 3 Mer. 704; *Scott v. Hanson* (1826), 1 Sim. 13; *Taylor v. Martindale* (1842), 1 Y. & C. Ch. Cas. 658; *Brooke v. Rounthwaite* (1846), 5 Hare, 298; *Price v. Macaulay* (1852), 2 De G. M. & G. 339; *Leyland v. Illingworth* (1860), 2 De G. J. & S. 218. *Mentd.* *Flight v. Booth* (1834), 1 Bing. N. C. 370; *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 512; *Re Davis & Cavey* (1888), 40 Ch. D. 601.

257. ——A bill of sale assigned (*inter alia*) all the book debts due & owing or which might during the continuance of the security become due & owing to the mtgor.:—*Held*: the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined & passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mtgor. at the time of the assignment or in any other business.

No doubt an assignment may be so indefinite & uncertain in its terms that the cts. will not give effect to it because of the impossibility of ascertaining to what it is applicable. But that is certainly not the case with such an assignment as that which we are now considering (LORD HERSCHHELL).—*TAILBY v. OFFICIAL RECEIVER* (1888), 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513; 4 T. L. R. 726, H. L.; *reversg.* *S. C. sub nom. OFFICIAL RECEIVER v. TAILBY* (1886), 18 Q. B. D. 25, C. A.

Annotations:—*Consd.* *Re Wait*, [1927] 1 Ch. 606. *Refd.* *Re Clarke*, *Coombe v. Carter* (1887), 36 Ch. D. 348; *Re Turcan* (1888), 40 Ch. D. 5; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271; *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769; *Imperial Paper Mills of Canada v. Quebec Bank* (1913), 83 L. J. P. C. 67; *British Union & National Insce. v. Rawson*, [1916] 2 Ch. 476; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1; *Kursell v. Timber Operators & Contractors*, [1927] 1 K. B. 298. *Mentd.* *Re Pyle Works* (1890), 44 Ch. D. 534; *Re Kelcey*, *Tyson v. Kelcey*, [1899] 2 Ch. 530; *Nelson v. Faber*, [1903] 2 K. B. 367; *Re Yorkshire Woolcombers Assn.*, *Houldsworth v. Yorkshire Woolcombers Assn.*, [1903] 2 Ch. 284; *Re Dallas*, [1904] 2 Ch. 385; *Re Fitz-*

explain it, cannot order specific performance.—*CAMPBELL v. BARO*, [1917] 1 W. W. R. 283; 27 Man. L. R. 191,—CAN.

Sect. 2.—Contract not sufficiently certain: Sub-sect. 3, A. & B.; sub-sects. 4, 5, 6 & 7.]

Gerald, Surman v. Fitzgerald, [1904] 1 Ch. 573; *Ward v. Lock v. Long*, [1906] 2 Ch. 550; *Glegg v. Bromley*, [1912] 3 K. B. 474; *Re Cope, Marshall v. Cope* (1914), 110 L. T. 905; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132; *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305; *London County & Westminster Bank v. Tompkins* (1918), 87 L. J. K. B. 662; *Re Smith, Franklin v. Smith*, [1928] Ch. 10.

Identification of subject-matter.]—See DEEDS, Vol. XVII., pp. 287, 324, 325, Nos. 985, 1342, 1346, 1357.

B. Particular Instances.

258. Agreement "to build house on glebe land"—Covenant for benefit of church.]—ALLEN v. HARDING (1708), 2 Eq. Cas. Abr. 17; 22 E. R. 14, L. C.

Annotation:—Consd. Mosely v. Virgin (1796), 3 Ves. 184.

259. Agreement for sale of land—Partly freehold & partly leasehold—Boundary not distinctly defined.] (1) A party having agreed to purchase premises stated to be partly freehold & partly leasehold cannot, in the absence of fraud, concealment or misrepresentation on the part of the vendor, resist a specific performance of his contract merely on the ground that the exact position of the boundary line between the freehold & leasehold portions cannot be ascertained, & this would be so, even assuming for the purpose of argument that a vendor who contracts to sell property partly freehold & partly leasehold is, in the absence of specific stipulations, to be considered as bound to show what part is freehold & what leasehold.

(2) Abandonment of a contract may be waived by the subsequent conduct of the parties.—*MONRO v. TAYLOR* (1852), 3 Mac. & G. 713; 21 L. J. Ch. 525; 19 L. T. O. S. 97; 42 E. R. 434, L. C.

Annotation:—Generally, Refd. Abbott v. Calton (1853), 22 L. J. Ch. 936.

260. — "All his estate & interest."]—An agreement by a vendor to sell "all his estate & interest" in certain premises is *prima facie* good; & does not necessarily mean an agreement to sell an estate in fee simple, but may mean an equity of redemption only.—*PRIDDLE v. WOOD* (1864), 4 New Rep. 320.

261. — "So much as may be necessary."]—An agreement to give so much of a thing as may be necessary for a specified purpose confers a right of a nature known to the law, & is not open to the objection of uncertainty.—*RUMBLE v. HEYGATE* (1870), 18 W. R. 749.

Annotation:—Mentd. Bolton v. Bolton (1879), 11 Ch. D. 968.

PART III. SECT. 2, SUB-SECT. 3.—B.

1. Agreement for sale of land—Next to railway station as soon as laid out.]—It having been ascertained that a railway co. intended to have a station on deft.'s land, he contracted to sell to pltf. a quarter of an acre next to the railway station as soon as laid out. The co. having afterwards located the station ground, but not the position thereon of the intended station house:—*Held*: pltf.'s parcel could not be ascertained until the locality of the station house was determined, & until then a bill to enforce specific performance was premature.—*CARROLL v. CASEMORE* (1873), 20 Gr. 16.—**CAN.**

a. —.]—STRETTON v. STRETTON (1876), 24 Gr. 20.—**CAN.**

b. —.]—ROGERS v. HEWER (1912), 19 W. L. R. 868; 1 W. W. R. 481.—**CAN.**

■ Covenant in bill of sale to assign after-acquired goods.]—MCAL-

LISTER v. FORSYTH (N. S.) (1884), 12 S. C. R. 1.—**CAN.**

d. Agreement for sale of shares.]—BELL v. NORTHWOOD (1886), 3 Man. L. R. 514.—**CAN.**

e. Grant of right of way in lease—Term not specified.]—HANNAH v. AITKEN (1912), 31 N. Z. L. R. 90.—**N.Z.**

PART III. SECT. 2, SUB-SECT. 4.

1. Sum agreed indefinite—Discount on unspecified sum.]—Deft. wrote pltf. that he would take \$1,000 for lot A., half cash, balance in 6 months, with 5 per cent. interest; or, "will allow 10 per cent. discount for cash." Pltf. telegraphed in answer "Will take lot as per your letter, \$900 cash." Pltf. now sued for specific performance. Action & appeal dismissed. The letter was void from uncertainty as it cannot be determined on what sum the discount was to be allowed.—*WATSON v. JAMIESON* (1910), 12

262. — Doubt as to vendor's title.]—BRISTOW v. WOOD, No. 1585, *post*.

—*See SALE OF LAND*, Vol. XL., p. 109, No. 868.

263. Agreement for lease of glebe—"Except thirty-seven acres thereof."]—An incumbent agreed to grant, at a future period, a lease of his glebe, containing about four hundred & thirty-seven acres, "except thirty-seven acres thereof," which were not specified:—*Held*: the contract was not void for uncertainty.—*JENKINS v. GREEN* (No. 1) (1858), 27 Beav. 437; 28 L. J. Ch. 817; 5 Jur. N. S. 304; 54 E. R. 172; *affd. sub nom. GREEN v. JENKINS* (1860), 1 De G. F. & J. 454, L. C. & L. JJ.

Annotation:—Mentd. Savill v. Bethell, [1902] 2 Ch. 523.

Agreement for sale of colliery plant & stock—"The property."]—*See CONTRACT*, Vol. XII., p. 150, No. 1033.

Covenant to settle interest under will—Undefined spes successionis.]—See SETTLEMENTS, Vol. XL., pp. 474, 475, 516, Nos. 225, 230, 613.

Description in agreement for lease.]—See LANDLORD & TENANT, Vol. XXX., pp. 371, 377, Nos. 343, 411, 412.

SUB-SECT. 4.—UNCERTAINTY AS TO PRICE.

264. Sum agreed indefinite—Increase on specific sum to be realised at auction.]—A. agreed to sell an estate to B. for £3,000, " & the further sum of 20 per cent. on any sum the property might realise above that sum at the sale by auction advertised to take place" the next day. B. withdrew the estate from the sale:—*Held*: the contract was sufficiently certain, & might be enforced.—*LANGSTAFF v. NICHOLSON* (1858), 25 Beav. 160; 53 E. R. 597.

265. — Payment in shares—Value of shares unascertainable.]—Held: specific performance could not be decreed of a contract between pltf. & deft. by which the latter agreed to transfer to the former a farm in the Transvaal on which deposits of tin ore had been found in consideration of 3,700 shares of £5 each in a syndicate to be formed for the "purpose of developing" the same as a mining property, the 3,700 shares to represent applt.'s holding in a syndicate of 12,000 shares.

The price to be paid by pltf. was wholly uncertain. It was to consist of shares in a syndicate whose purpose of development there was no evidence to define, either as to the nature & extent of the operations contemplated or as to what the parties meant by it, the value of the shares depending upon the adequacy of working capital

W. L. R. 667.—**CAN.**

On the basis of fifty cents a thousand stumpage net.]—A contract for the sale of standing timber which states that the price is to be "on the basis of fifty cents a thousand stumpage net," but makes no provision for the method by which or the persons by whom such measurement is to be made, is not enforceable by specific performance.—*McMILLAN v. CAMERON* (B. C.), [1917] 2 W. W. R. 946.—CAN.****

h. Instalments inconsistent with amount of consideration.]—WILLIAMS v. NEWTON, [1923] 1 D. L. R. 423.—**CAN.**

k. Method of ascertaining price provided—Arbitration.]—A specific performance of an agreement to sell at a price to be settled by arbitrators named by the parties cannot be decreed unless an award has been made. If the parties agree to pay the cost of a valuation, but have not

which was neither ascertained nor ascertainable.—*DOUGLAS v. BAYNES*, [1908] A. C. 477; 78 L. J. P. C. 13; 99 L. T. 599; 24 T. L. R. 896, P. C.

266. — Price which the public will be asked to pay.]—By an agreement made between applt. & resps., applt. was to have the right of purchasing certain lots of land to be selected by him, with the concurrence of resps., at prices to “be decided by our officials as soon as the surveys are completed . . . our prices . . . will be at least no higher than the price which the public will be asked to pay.” The lots were selected, & were offered to applt. at the prices which similar lots had fetched at a sale by auction. Applt. refused to accept the lots at these prices, contending that “the price which the public was asked to pay” within the meaning of the agreement was the reserve price at which the lots were actually sold, & brought an action for specific performance or in the alternative for damages:—*Held*: he was not entitled either to specific performance of the contract or to damages for a breach of it.—*FREWEN v. HAYS* (1912), 106 L. T. 516, P. C.

267. Method of ascertaining price provided—Settlement by third party.]—(1) Specific performance of a contract by a competent party, & its nature & circumstances unobjectionable, as much, of course, as damages at law.

(2) Under a bill for specific performance of a contract, overreached by a commission of lunacy, pltf. not having traversed, the inquisition, an issue was directed, whether deft. was a lunatic at the execution: if so, whether he had lucid intervals; & whether the contract was executed during a lucid interval; the difficulties in executing the contract, which was for the sale of an estate vested in the lunatic, viz. that the price was to be fixed by persons to be nominated, not appearing strong enough to preclude the previous inquiry, with a view to performance: pltf. being willing to take the title.

Upon the face of it nothing appears to prevent execution. There is nothing unreasonable, as between the parties, upon the face of it. It fixes no value upon the estate; but it provides a mode, in which the value is to be ascertained, that is perfectly fair & equal between them. It must be supposed that, if competent, they had taken the proper means of getting at the real value, by employing persons of skill to value the advowsons & the farms (*GRANT, M.R.*).—*HALL v. WARREN* (1804), 9 Ves. 605; 32 E. R. 738.

Annotations:—*As to* (1) *Refd.* *Milnes v. Gery* (1807), 14 Ves. 400; *Agar v. Macklew* (1825), 1 L. J. O. S. Ch. 16. *Generally, Mentd.* *Re Walker* (1904), 71 L. J. Ch. 86.

268. — — —.]—Two surveyors, who it had been agreed, should fix the price of an estate, stated in their valuation, the sum to be paid & the quantity of land, & that if it proved to be less, either £84 or £42 should be deducted, according to the parts of the estate in which the deficiency occurred, but did not state the quantity contained in each part:—*Held*: the valuation was uncertain, & specific performance could not be enforced.

Referees may take the opinion of a third person as evidence, but cannot previously agree to be bound by it.—*HOPCRAFT v. HICKMAN* (1824), 2 Sim. & St. 130; 3 L. J. O. S. Ch. 43; 57 E. R. 295.

appointed valuers, the ct. will interfere so as to ascertain the value, & will decree specific performance.—*DALY v. DUGGAN* (1839), 1 I. Eq. R. 311.—*IR.*

1. — — —.]—The ct. cannot decree specific performance of a covenant to sell land at a price to be fixed

by valuers where there has been no valuation, notwithstanding that the absence of a valuation is due to the fault of the party resisting specific performance. The fact that a minimum value is put upon the land by the covenant does not enable the ct. to decree specific performance.—*REES*

— *Arbitrator.*]—*See* *ARBITRATION*, Vol. II., pp. 320, 385, 386, Nos. 59, 458–470; *COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 229, Nos. 1161–1164.

— *Under Lands Clauses Consolidation Acts.*]—*See* *COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 174, 226, Nos. 522, 1127, 1128.

269. Sale of “goodwill” of solicitor’s business—Without price named.]—An agreement to sell the “goodwill” of the business of a solr., without any stipulation as to the amount to be paid for it, or otherwise, cannot be enforced by specific performance.—*AUSTEN v. BOYS* (1858), 2 De G. & J. 626; 27 L. J. Ch. 714; 31 L. T. O. S. 276; 4 Jur. N. S. 719; 6 W. R. 729; 44 E. R. 1133, L. C.

Annotations:—*Refd.* *Clark v. Leach* (1863), 1 De G. J. & Sm. 409. *Mentd.* *Reynolds v. Bullock* (1878), 47 L. J. Ch. 773; *Corbin v. Stewart* (1911), 28 T. L. R. 99.

SUB-SECT. 5.—UNCERTAINTY AS TO PARTIES.

Sufficiency of description—To satisfy Statute of Frauds, s. 4.]—*See* *CONTRACT*, Vol. XII., pp. 143–148, 156, Nos. 968–1014, 1100.

SUB-SECT. 6.—USE OF “ETC.”

270. In agreement for lease—“Mines, minerals, etc.”]—*PARKER v. TASWELL*, No. 283, *post*.

271. — — — “Gates, buildings, etc.”]—*PARKER v. TASWELL*, No. 283, *post*.

272. In agreement for sale of foundry—“Goodwill, etc.”]—*COOPER v. HOOD*, No. 249, *ante*.

SUB-SECT. 7.—MATERIAL TERMS OMITTED.

273. Terms contained in suppressed letters—Referred to in letters forming contract.]—*Qu.*: whether letters referring to other letters which have been suppressed, but not containing in themselves certain terms of agreement, can be made the foundation of a specific performance.—*COLLET v. BUTLER* (*circa* 1700), 3 Swan. 482; 36 E. R. 924.

274. Agreement for mortgage—Omission of penalty, condition & interest.]—A. on an account stated, owes B. £400. A. agrees to give bond for £100 & to secure the remaining £300 by mtge. A. delivers a deed of conveyance to C., an attorney, who takes instructions to draw mtge.; but before the bond or mtge. executed A. dies. Though this agreement by parol be proved, yet on a bill brought against the heir of A. the ct. refused to carry them into execution.

Upon what penalty, upon what condition, upon what interest, or at what time payable does not at all appear; & therefore it is impossible for the ct. to carry so uncertain an agreement into execution (*LORD HARDWICKE, C.*).—*BRIZICK v. MANNERS* (1742), 9 Mod. Rep. 284; 88 E. R. 454, L. C.

Annotation:—*Refd.* *Norris v. Wilkinson* (1806), 12 Ves. 192.

275. Articles of partnership—Amount of capital omitted.]—Specific performance of a partnership contract for an absolute term of years, leaving undefined the amount of the capital, & the manner in which it is to be provided, the mode of carrying on the business being discretionary, cannot be enforced in a ct. of equity; & the ct., being unable

& *WI PERE v. JOHNSON* (1884), 3 N. Z. L. R. 1 (S. C.).—*N.Z.*

PART III. SECT. 2, SUB-SECT. 7.

m. General rule.]—Where a material ingredient in the terms of a contract has been omitted, equity con-

Sect. 2.—Contract not sufficiently certain: Sub-sects. 7, 8 & 9.]

to enforce the entire contract, will not enforce it in part, as against the representatives of a deceased partner, by refusing them a decree for the dissolution of the partnership & the sale of the property, which had, under the contract, been specifically devoted to the partnership business.—*DOWNS v. COLLINS* (1848), 6 Hare, 418; 12 L. T. O. S. 102; 67 E. R. 1228.

Annotations:—Consd. Lancaster v. Allsup (1887), 57 L. T. 53. *Refd. Johnston v. Moore* (1858), 6 W. R. 490.

276. Term omitted from written agreement—Necessity for clear proof.]—In a suit for the specific performance of a written agreement, deft. will not be allowed to set up as a bar to the suit that the written agreement does not contain all the terms of the real agreement, unless the proof of the omission by mistake of some term in the written agreement be very clear.—*CLAY v. RUFFORD* (1850), 19 L. J. Ch. 295; 14 Jur. 803; *subsequent proceedings* (1852), 5 De G. & Sm. 768.

277. — Terms contained in parol agreement.]—It is not a valid ground of non-performance of a written agreement, that the other party has not performed a secret agreement of parol, alleged to be part of the written agreement, but which is not referred to in it.

An agreement was made for the sale of the goodwill of a milliner's business, & lease of the house & furniture, including the services of pltf., the vendor, as his agent, buyer & artiste, "as agreed upon," for which the purchaser was to pay £1,500, & £200 *per annum* to pltf. for eight years. Pltf. was milliner to the Queen, & it was one of the terms of the agreement entered into verbally between the parties, that pltf. should endeavour to procure the transfer of the appointment to deft., & it was alleged by deft. that this was part of the services to be rendered by pltf., & for which he was to be paid the £200 *per annum*. Pltf. was unable to procure the appointment for deft. & deft. refused to pay the £200:—*Held*: this secret agreement, if proved, was not referred to in the written agreement, was not incorporated with it, & therefore, the payment of the £200 *per annum* could not be resisted on the ground that the appointment had not been obtained for deft., especially as, the rest of the agreement having been performed on both sides, the ct. could not restore the parties to their original position.—*VOUILLON v. STATES* (1856), 25 L. J. Ch. 875; 27 L. T. O. S. 268; 2 Jur. N. S. 845.

Annotation:—Refd. North v. Loomes, [1919] 1 Ch. 378.

278. — — —.]—Pltf., who was a builder, agreed with deft., who was an owner of some freehold land, to erect thirty-one houses on the said land on the terms of such agreement, & also of a parol understanding communicated to pltf. on behalf of deft. prior to the signing of the principal agreement. The chief stipulation of the parol understanding was the advance of moneys in certain definite instalments by or through deft. to pltf. for the purposes of the buildings. Pltf. afterwards took leases of the unfinished houses & executed two successive mtges. thereof to enable deft. to raise money on them as a security for the same purposes. Deft. failed to supply pltf. with the required funds as stipulated under the parol agreement, which, however, had been successively

departed from:—*Held*: in a bill praying specific performance of the parol understanding together with damages, or at all events damages that pltf. was entitled to neither but, deft. submitting to it, pltf. might have the ordinary redemption decree.—*THORPE v. HOSFORD* (1872), 20 W. R. 922.

279. Omission of consequential circumstances.]—(1) Long delay may prevent a party to an agreement from calling for specific performance of it.

(2) It is no objection to the specific performance of an agreement that collateral circumstances necessarily flowing out of the agreement are not mentioned in it (*LORD ST. LEONARDS.*).—*RIDGWAY v. WHARTON* (1857), 6 H. L. Cas. 238; 27 L. J. Ch. 46; 29 L. T. O. S. 390; 4 Jur. N. S. 173; 5 W. R. 804; 10 E. R. 1287, H. L.; *affg.* (1854), 3 De G. M. & G. 677, L. C.

Annotations:—Generally, Mentd. James v. Rice (1854), 5 De G. M. & G. 461; *Bligg v. Strong* (1857), 3 Sm. & G. 592; *Barker v. Allan* (1859), 5 H. & N. 61; *Lee v. Griffin* (1861), 30 L. J. Q. B. 252; *Heys v. Astley* (1863), 4 De G. J. & Sm. 34; *Chinnock v. Ely* (1864), 13 W. R. 176; *Houfray v. Fothergill* (1866), L. R. 1 Eq. 567; *Baumann v. James* (1868), 3 Ch. App. 508; *Brook v. Hook* (1871), L. R. 6 Exch. 89; *Vale of Neath Colliery Co. v. Furness* (1876), 45 L. J. Ch. 276; *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Long v. Millar* (1879), 4 C. P. D. 450; *Cave v. Hastings* (1881), 7 Q. B. D. 125; *Shardlow v. Cotterell* (1881), 20 Ch. D. 90; *Oliver v. Hunting* (1890), 11 Ch. D. 205; *Durant v. Roberts & Kelghley, Maxsted*, [1900] 1 Q. B. 629; *Thirkell v. Cambi*, [1919] 2 K. B. 590; *Wado v. L. & N. W. Ry.* (1920), 90 L. J. K. B. 593; *Franco-British Ship Store Co. v. Compagnie des Chargeurs Francaise* (1926), 42 T. L. R. 735.

280. Material term left for future agreement—Effect of user.]—Pltf., in 1855, submitted to the directors of a railway co. a project for a private branch line, to be constructed at pltf.'s cost, & for his accommodation; to which the directors expressed their assent & agreement generally, but the terms & details were left for future arrangement. In the year 1856 pltf., at considerable cost, constructed the branch, & the co. prohibited the user until a definite understanding should be come to: *semble*, at this time the co. were bound to assent to reasonable terms, & the ct., if possible, would have decreed specific performance.

After some discussion, terms as to tolls & other matters were proposed by pltf., & the traffic was continued on the basis of pltf.'s memorandum of terms, & payments made by pltf. for the carriage of goods during two & a half years, but no agreement was ever signed by two directors. The directors ultimately insisted on terms originally suggested by them before the user commenced, & then objected to by pltf.; & on pltf. declining to make an agreement at variance with the terms on which the user had been enjoyed, the co. proceeded to obstruct the traffic:—*Held*: on demurrer to bill for specific performance & injunction, there was an indefinite agreement in 1855 for a user on reasonable terms, the actual user had removed all difficulty about what terms were reasonable, & pltf. was entitled to specific performance on the basis of the unsigned memorandum, on the terms of which the user had been permitted.—*LAIRD v. BIRKENHEAD RY. CO.* (1859), John. 500; 29 L. J. Ch. 218; 1 L. T. 159; 6 Jur. N. S. 140; 8 W. R. 58; 70 E. R. 519.

Annotations:—Refd. Bourke v. Alexandra Hotel Co. (1877), 25 W. R. 393; *Civil Service Musical Instrument Assoon. v. Whiteman* (1899), 68 L. J. Ch. 484; *Marriott v. Reid* (1900), 82 L. T. 369; *Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281; *Michaud v. Montreal City* (1923), 92 L. J. P. C. 161.

sidering it as only resting in treaty, will not decree a specific execution.—*ORMOND (LORD) v. ANDERSON* (1813), 1 Ball & B. 363.—*IR.*

n. Other terms contemplated — Inference from improvidence of contract.]

—Specific performance of an agreement which is clearly worded cannot be resisted on the ground that other terms must have been in contemplation of the parties from the improvidence of the express contract. Such

performance decreed notwithstanding the act upon which the right depended, appeared under the circumstances to have been done with different intent.—*SULLIVAN v. JACOB* (1828), 1 Mol. 472.—*IR.*

281. — Decision of third party—No decision given.]—The ct. refused to decree specific performance of an agreement, where an essential particular was left, in case the parties differed, to the absolute decision of two persons named in the agreement, or their nominee, & where no such decision had been given.—*TILLET v. CHARING (CROSS BRIDGE CO. (1859), 26 Beav. 419; 28 L. J. Ch. 863; 34 L. T. O. S. 42; 5 Jur. N. S. 994; 7 W. R. 391; 53 E. R. 959.*

Annotations:—Expld. Hart v. Hart (1881), 18 Ch. D. 670. Refd. Baker v. Met. Ry. (1862), 31 Beav. 504; Re Whistler (1887), 35 Ch. D. 561.

282. — Agreement subject to "approval of terms of contract."]—Deft. offered in a letter to sell an estate for a certain sum. The letter stated that the offer was "subject of course to approval of the title & the terms of the contract." Pltf. accepted the offer, & the solrs. for the two parties agreed upon a draft contract. The vendor subsequently refused to proceed & an action was brought for specific performance:—*Held: the letters might have made a good contract but for the statement that the offer was subject to approval of the terms of the contract, which left a material term uncertain, & the contract, therefore, was one which could not be enforced.—(HATTERLEY v. NICHOLLS (1884), 1 T. L. R. 14, C. A.*

Omission of term from agreement for lease.]—*See LANDLORD & TENANT, Vol. XXX., pp. 419, 420, Nos. 814-816.*

Admission of evidence to add terms to contract.]—*See DEEDS, Vol. XVII., pp. 312-314, Nos. 1237-1253.*

SUB-SECT. 8.—EFFECT OF PART PERFORMANCE.

283. General rule.]—Where terms for letting farms provided that all materials required for buildings proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain the tenant leading tiles; that "gates, buildings, etc.," should be left in repair by the tenant, the landlord finding new gates when required; that the landlord reserved to himself all customary rights & reservations, such as liberty to cut & plant timber, search for & work "mines or minerals, etc.," allowing the tenant for any reasonable damage:—*Held: these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically.*

The second objection which is made to a decree for specific performance is uncertainty in the terms of the agreement, & it is urged, that having regard to the principles on which a ct. of equity acts, it is impossible to decree specific performance of such an agreement. . . . It must be borne in mind that this agreement has been partly executed by possession having been taken under it; & there are many authorities to show that in such a case the ct. will strain its power to enforce a complete performance. . . . It is further alleged on the part of deft. that there has been such a breach of the agreement by pltf. as disentitles him to claim specific performance. . . . the ct. will not refuse its aid unless the breaches of the agreement

are gross & wilful (LORD CHELMSFORD, C.).—*PARKER v. TASWELL (1858), 2 De G. & J. 559; 27 L. J. Ch. 812; 31 L. T. O. S. 226; 22 J. P. 432; 4 Jur. N. S. 1006; 6 W. R. 608; 44 E. R. 1106, L. C.*

Annotations:—Consd. Steevens Hospital v. Dyas (1864), 10 L. T. 882; Martin v. Smith (1874), L. R. 9 Exch. 50. Apld. Zimble v. Abrahams, [1903] 1 K. B. 577. Refd. Tidey v. Mollett (1864), 16 C. B. N. S. 298; Ball v. Bridges (1874), 30 L. T. 430; Willmott v. Barber (1880), 15 Ch. D. 96; Re Fireproofs Doors, Umney v. The Co., [1916] 2 Ch. 142.

284. —.]—It is no answer to a suit for specific performance, for deft. to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect.

Although there may be considerable vagueness in the terms, & although it may be such an agreement as the ct. would hesitate to decree specific performance of, if there had not been part performance, yet when, there has been part performance the ct. is bound to struggle against the difficulty arising from the vagueness (KAY, J.).—*HART v. HART (1881), 18 Ch. D. 670; 50 L. J. Ch. 697; 45 L. T. 13; 30 W. R. 8.*

Annotations:—Mentd. Bradley v. Bradley (1882), 51 L. J. P. 87; Harrison v. Harrison (1887), 12 P. D. 130; Wood v. Wood (1891), 64 L. T. 586.

285. Part performance as evidence of terms.]—A contract which is void for uncertainty is not rendered certain by part performance, but where a contract is complete in itself, in that a defined act is to be done upon reasonable terms, evidence is admissible as to what terms are reasonable, & the conduct of the parties may be the best evidence upon this point.—*WARING & GILLOW, LTD. v. THOMPSON (1912), 29 T. L. R. 154, C. A.*

Annotation:—Refd. County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

Non-compliance with Statute of Frauds—Effect of part performance.]—*See Sect. 3, sub-sect. 5,*

SUB-SECT. 9.—EFFECT OF FRAUD.

286. Fraud of defendant—Whether objection of uncertainty upheld.]—Deft. purchased an estate, having agreed with pltf. that, if he made the purchase, he would cede part thereof to pltf. There was some uncertainty in the memorandum of agreement between pltf. & deft. as to the exact portion which was to be ceded to pltf. In an action by pltf. for specific performance of the agreement, the ct. directed a reference to chambers to ascertain what portion pltf. was entitled to, & decreed that deft. should convey such portion to pltf.

In a case like this where deft. has acquired the estate or part of it by fraud on pltf. I think that the ct. would be bound, if possible, to overcome all technical difficulties in order to defeat the unfair course of dealing of deft. & I should not, in my opinion, be going too far, if I compelled deft. to give the whole estate to pltf. at the price given for it, rather than that he should succeed in retaining it on account of any uncertainty as to the part which pltf. is entitled to have (MALINS, V.-C.).—*CHATTOCK v. MULLER (1878), 8 Ch. D. 177.*

Annotation:—Refd. Rawlings v. General Trading Co., [1920] 3 K. B. 30.

Non-compliance with Statute of Frauds—Effect of fraud.]—*See Part III., Sect. 3, sub-sect. 3, post.*

PART III. SECT. 2, SUB-SECT. 8.

285 1. Part performance as evidence of terms.]—Though some terms of a contract appear uncertain, if there has been part performance by the party relying on the contract, & the ct. is satisfied there was a contract intended, it will strive to overcome the difficulty arising from the vagueness. As

to the uncertain terms the ct. may give the party seeking specific performance the option of accepting them as understood by the other party.—*KELLY v. WATSON (Alta.), [1920] 1 W. W. R. 939.—CAN.*

o. Contracts not under corporate seal.]—Contracts not under the corporate seal, made with trading cos.,

relating to purposes for which they are incorporated, if partly performed, & of such a nature as would induce the ct. to decree specific performance if made between ordinary individuals will be enforced against them.—*ONTARIO & WESTERN LUMBER CO. v. CITIZENS' TELEPHONE & ELECTRIC CO., 16 C. L. T. Occ. N. 118.—CAN.*

agreement to grant a lease enforced against the intended landlord on the ground of part performance, & on evidence consisting of a memorandum by the landlord, the parol testimony of a witness present, & the draft of a lease prepared by the landlord's steward, though the draft of the lease provided that the tenant should do an act for the landlord's benefit, which was not mentioned in the landlord's memorandum or the witness's testimony.

Cts. of equity exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been part performance, for the purpose of preventing the great injustice that would arise from permitting a party to escape from the engagements he has entered into, upon the ground of Stat. Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement (LORD COTTENHAM, C.).

(2) Deft. has endeavoured to set up, as a defence, acts of the tenant which would have been breaches of the covenant, if a lease had been executed. In this I think he has wholly failed; for instance, he charges the tenant with having grubbed up a hedge, & it is proved to have been done with the approbation of his own steward. This ground of defence assumes the existence of the agreement; & if, upon that supposition, the landlord never complained of the conduct of his tenant, but permitted him to act upon the faith of the contract, it would require a strong case to enable the landlord to raise such objection, for the first time, when the tenant claimed the benefit of it (LORD COTTENHAM, C.).—MUNDY v. JOLLIFFE (1839), 5 My. & Cr. 167; 9 L. J. Ch. 95; 3 Jur. 1045; 41 E. R. 331, L. C.

Annotations.—As to (1) *Consd.* Sutherland v. Briggs (1811), 1 Hare, 26; Phillips v. Alderton (1875), 24 W. R. 8. *Refd.* Dale v. Hamilton (1846), 5 Hare, 369. As to (2) *Refd.* Gregory v. Wilson (1852), 9 Hare, 683.

298. ———.]—The principle of part performance was based upon the idea that a statute designed to prevent fraud would be misapplied in cases where the existence of a contract was so plainly to be inferred that to allow a deft. to ride off upon the statute would be to enable him to commit a fraud under cover of the very act which was designed to prevent it (NEVILLE, J.).—HOARE v. KINGSBURY URBAN COUNCIL, [1912] 2 Ch. 452; 81 L. J. Ch. 666; 107 L. T. 492; 76 J. P. 401; 58 Sol. Jo. 704; 10 L. G. R. 829.

Annotation.—*Mentd.* Douglass v. Rhyll U. C., [1913] 2 Ch. 107.

299. ———.]—**Enforcement against remainderman.**—One question which is of great nicety & importance is this, whether in the case of a parol contract evidenced or at least supported by subsequent acts, but the only execution of which is to be deduced from the conduct of the parties,

part performance is the comprehensive power vested in them to prevent fraud. If the part performance be such that the parties can easily be replaced in the same position as if the agreement were never made, the ct. will not interfere with the express provision of Stat. Frauds. In any case, a final & concluded agreement must be conclusively proved.—MORLEY v. BOLAN (1852), 3 Nfld. L. R. 277.—**NFLD.**

300 i. *Enables specific performance—Of parol agreement.*—MAHON v. McCULLY (1868), 7 N. S. R. (1 G. & O.), 323.—**CAN.**

300 ii. ———.]—BOGART v. PATTERSON (1868), 14 Gr. 624.—**CAN.**

300 iii. ———.]—WHITMAN

COLP (1880), R. E. D. 471.—**CAN.**

300 iv. ———.]—GARSON v. GARSON (1883), 3 O. R. 439.—**CAN.**

300 v. ———.]—SNYDER v. KAULBACH (1891), 27 N. S. R. (15 R. & G.), 251.—**CAN.**

300 vi. ———.]—When a contract, resting on parol, or partly on parol, has been partly performed by the purchaser, the vendor will be precluded from setting up Stat. Frauds, & specific performance will be decreed if the contract is proved.—MOSES v. FRENCH (1914), 43 N. B. R. 1.—**CAN.**

300 vii. ———.]—An oral agreement for an easement may be enforced where there has been part-performance,

though the ct. would interfere in favour of a purchaser against an owner in fee, it would also interfere against a party entitled in remainder. . . . I think there is a great deal of force in the doubt, to put it no stronger, which has on several occasions been expressed upon the point, because when the principle upon which the ct. interferes in such cases is considered, namely, that it would be a fraud on the part of the person who might insist upon Stat. Frauds to insist upon it, I think it is extremely doubtful whether that principle is applicable to the case of enforcing such a parol contract against remaindermen (LORD CRANWORTH, C.).—MORGAN v. MILMAN (1853), 3 De G. M. & G. 24; 22 L. J. Ch. 897; 20 L. T. O. S. 285; 17 Jur. 193; 1 W. R. 134; 43 E. R. 10, L. C. & L. JJ.

Annotations.—*Refd.* Haynes v. Haynes (1861), 1 Drew. & Sm. 426. *Mentd.* Re Dykes' Estate (1869), 17 W. R. 658; Johnson v. Bragge, [1901] 1 Ch. 28.

300. *Enables specific performance—Of parol agreement.*—HOLLIS v. EDWARDS, DEANE v. IZARD (1683), 1 Vern. 159; 23 E. R. 385.

Annotations.—*Refd.* Maddison v. Alderson (1883), 8 App. Cas. 467; McManus v. Cooke (1887), 35 Ch. D. 681.

301. ———.]—Wherever a parol agreement is begun to be put in execution, & intended to be continued, there, though there be no writing, yet this ct. shall enforce the execution thereof, notwithstanding Stat. Frauds (LORD HARCOURT, C.).—GUERNSEY (LORD) v. RODBRIDGES (1708), Gilb. Ch. 3; 25 E. R. 3, L. C.

302. ———.]—AYLESFORD'S (EARL) CASE (1727), 2 Stra. 783; 93 E. R. 845.

Annotation.—*Consd.* Whitechurch v. Bevis (1789), 2 Bro. C. C. 559.

303. ———.]—**Absence of signature.**—Where the want of signature to an agreement for the sale of lands clearly appears on the bill, the objection may be taken advantage of by general demurrer; but the statements of this bill not being inconsistent with a signature by the party to be charged, & containing allegations of part performance, a general demurrer thereto was overruled.—FIELD v. HUTCHINSON (1839), 1 Beav. 599; 3 Jur. 792; 48 E. R. 1073.

304. ———.]—Leave given to file a claim to enforce the specific performance of a verbal agreement to purchase land, containing a statement of facts showing part performance.—BURNLEY v. EASTERN COUNTIES RY. CO. (1852), 5 De G. & Sm. 314; 64 E. R. 1132.

B. To What Contracts Applicable.

See, generally, CONTRACT, Vol. XII., p. 171, Nos. 1250–1255.

305. *Contract by company.*—A co. is as much bound by acts of part performance as an individual. Specific performance will not be refused because it would rest in covenant merely.—WILSON v. WEST HARTLEPOOL HARBOUR & RY. CO. (1865), 2

whether it is, or is not, within Stat. Frauds.—SMITH v. CURRY (Man.), [1918] 2 W. W. R. 848; 42 D. L. R. 225.—**CAN.**

300 viii. ———.]—ULBRICK v. McDONALD (1921), 55 N. S. R. 33.—**CAN.**

300 ix. ———.]—SHANNON v. BRADSTREET (1803), 1 Sch. & Lef. 52.—**IR.**

PART III. SECT. 3, SUB-SECT. 5.—B.

q. General rule.—*Seem:* the rule is that the doctrine of part performance applies to all cases in which a ct. of equity would entertain a suit if the contract had been in writing & is not confined to cases in which a ct. of equity would have entertained a

Sect. 3.—Non-compliance with Statute of Frauds:
Sub-sect. 5, B., C., D. & E. (a), (b), (c) & (d);
sub-sect. 6. Sect. 4: Sub-sects. 1 & 2.]

De G. J. & Sm. 475; 5 New Rep. 289; 34 L. J. Ch. 241; 11 L. T. 692; 11 Jur. N. S. 124; 13 W. R. 361; 46 E. R. 459, L. JJ.

Annotations:—*Consd.* Prince v. Prince (1866), 14 L. T. 43. *Distd.* Re National Savings Bank Assocn., Brady's Case (1867), 15 W. R. 753. *Consd.* Hart v. Hart (1881), 18 Ch. D. 670; *Re* Northumberland Avenue Hotel Co., Sully's Case (1885), 54 L. T. 76; *Re* Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156. *Refd.* Hunt v. Wimbledon L. B. (1878), 4 C. P. D. 48; A.-G. v. Biphosphated Guano Co. (1879), 11 Ch. D. 327; Melbourne Banking Corpn. v. Brougham (1879), 48 L. J. P. C. 12; Teebay v. Manchester & Sheffield Ry. (1883), 52 L. J. Ch. 613; Davis v. Leicester Corpn., [1894] 2 Ch. 208; Hoare v. Kingsbury U. C., [1912] 2 Ch. 452. *Mentd.* Bateman v. Mid-Wales Ry. (1866), L. R. 1 C. P. 499.

306. ——The rule of equity that part performance will take a case out of Stat. Frauds applies to an incorporated co., & an incorporated co. which comes within that doctrine of part performance is just as much bound by it as if it were an individual (KAY, J.).—HOWARD v. PATENT IVORY MANUFACTURING CO., *Re* PATENT IVORY MANUFACTURING CO. (1888), 38 Ch. D. 156; 57 L. J. Ch. 878; 58 L. T. 395; 36 W. R. 801.

Annotations:—*Refd.* Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 116. *Mentd.* *Re* Pyle Works (1890), 44 Ch. D. 534; Page v. International Agency & Industrial Trust (1893), 62 L. J. Ch. 610; Newton v. Anglo-Australian Investment Co., [1895] A. C. 244; Seligman v. Prince, [1895] 2 Ch. 617; *Re* Russian Spratts Patent, Johnson v. Russian Spratts Patent, [1898] 2 Ch. 149; Barker v. Stickney, [1918] 2 K. B. 356.

Necessity for existing & complete agreement.]—See CONTRACT, Vol. XII., p. 170, Nos. 1243-1245.

Family arrangement.]—See FAMILY ARRANGEMENTS, Vol. XXIV., p. 949, Nos. 32-35.

Contract of guarantee.]—See GUARANTEE, Vol. XXVI., p. 30, No. 185.

Agreement for lease.]—See LANDLORD & TENANT, Vol. XXX., p. 381, Nos. 450-452.

Contract made in consideration of marriage.]—See SETTLEMENTS, Vol. XL., pp. 471, 472, Nos. 199-211.

Acts of corporations.]—See CORPORATIONS, Vol. XIII., pp. 392, 396, 398, Nos. 1171-1176, 1205-1207, 1213.

Sale of land.]—See SALE OF LAND, Vol. XL., p. 36, Nos. 199-202.

Contracts of service.]—See CONTRACT, Vol. XII., p. 171, Nos. 1254, 1255.

C. Acts of What Party.

See, generally, CONTRACT, Vol. XII., p. 170, Nos. 1246, 1247.

307. Act of party to contract.]—"The doctrine of part performance is founded on a change of possession, which is assented to by that party to the contract who is sought to be charged. It cannot be alleged by him that he is a trespasser. You refer his possession, if you can, to a legal origin, & you can do that by implying a contract. But you cannot make a contract by the act of a third party, who is no party to the contract itself. For instance, if A. & B. contract that A. shall sell an estate to B. & B. takes possession of it, that is evidence against B. of a contract by him to buy the estate, for otherwise he would be a wrongdoer. But if A. & B. agree that an estate shall be settled on C. for life, with remainder to B., & B. gives

possession to C., that is not evidence against A. That is really what took place here. The bargain was that the property should be conveyed to C. But how can the fact of C. being put into possession by B. be evidence that A. gave up his debt? It is plain that A. is not a party to the taking possession; & he is not a trespasser, & consequently, as against him, the giving of possession to the persons who are to be trustees is no evidence whatever of a contract on his part, & is not part performance by him. That puts an end to the notion that there is anything to take this case out of Stat. Frauds" (JESSEL, M.R.).—*Re* FOSTER, *Ex p.* FOSTER (1883), 22 Ch. D. 797; 52 L. J. Ch. 577; 48 L. T. 497; 31 W. R. 774, C. A.

308. Act of third party—Arbitrators.]—Bill for specific performance of an agreement, originating in communications by the comrs., who took the depositions in a cause, & by the witnesses, to deft. as to the nature & effect of the evidence. Though pltf. was not implicated in the transaction, the bill was dismissed on grounds of public policy.

Upon a parol agreement for a compromise & a division of the estate by arbn. acts, done by the arbitrators towards the execution of their duty, as surveying, etc., cannot be considered acts of part performance to sustain the agreement.—COOTH v. JACKSON (1801), 6 Ves. 12; 31 E. R. 913, L. C.

Annotations:—*Consd.* Blundell v. Brettargh (1810), 17 Ves. 232; Ridgway v. Wharton (1854), 3 De G. M. & G. 677. *Refd.* Miles v. Gory (1807), 14 Ves. 400; Maddison v. Alderson (1883), 8 App. Cas. 467. *Mentd.* Johnson v. Johnson (1802), 3 Bos. & P. 162; *Re* Foster v. G. W. Ry., *Ex p.* G. W. Ry. (1882), 51 L. J. Q. B. 233.

309. ——*Re* FOSTER, *Ex p.* FOSTER, No. 307, *ante*.

D. Acts Must be Unequivocal and Referable to Contract.

See, generally, CONTRACT, Vol., XXI., pp. 169, 170, Nos. 1234-1249.

Agreements for leases.]—See LANDLORD & TENANT, Vol. XXX., pp. 381, 382, Nos. 453-460.

Sale of land.]—See SALE OF LAND, Vol. XL., p. 35, Nos. 192-196.

E. What Acts amount to Part Performance.

(a) Possession.

Agreements for lease.]—See LANDLORD & TENANT, Vol. XXX., pp. 382-385, 386, Nos. 450, 461-489, 494-502.

Sale of land.]—See SALE OF LAND, Vol. XL., pp. 37-40, Nos. 218-232.

Contracts in consideration of marriage.]—See SETTLEMENTS, Vol. XL., pp. 471, 472, Nos. 205-207.

(b) Payment of Purchase-Money or Rent.

Payment of rent.]—See LANDLORD & TENANT, Vol. XXX., pp. 385, 387, Nos. 490-493, 511-513.

Sale of land.]—See SALE OF LAND, Vol. XL., pp. 36, 37, Nos. 203-217.

(c) Expenditure of Money.

Agreements for lease.]—See LANDLORD & TENANT, Vol. XXX., pp. 382-385, 386, 387, Nos. 456, 457, 472-489, 503-510.

Sale of land.]—See SALE OF LAND, Vol. XL., p. 40, Nos. 233-237.

Settlements.]—See SETTLEMENTS, Vol. XL., p. 472, No. 208.

for specific performance.—SINCLAIR v. SCHILDT (1914), 16 W. A. L. R. 100.—AUS.

r. Licence for mining.]—A licence not under seal for mining on private property is revocable in law; but in

equity, where for valuable consideration & partly executed, the licensee is entitled to specific performance by a grant of a licence under seal.—ALL WYE v. LOCK (1872), 3 V. R. (Eq.) 112.—AUS.

t. Agreement for partnership.]—CROWLEY v. O'SULLIVAN, [1900] 2 I. R. 478.—IR.

a. Agreement to leave property by will.]—LOWRY v. REID, [1927] N. I. 142.—IR.

(d) Other Cases.

310. Giving deed to solicitor—To prepare conveyance.]—Putting a deed into the hands of a solr., to prepare a conveyance of the estate to a son-in-law, after marriage, not a part performance of a parol agreement, so as to take it out of Stat. Frauds: a demurrer allowed on that ground to a bill for specific performance.—**REDDING v. WILKES** (1791), 3 Bro. C. C. 400; 29 E. R. 609, L. C.

311. Deposit of title deeds—Agreement to charge real estate.]—*Qu.*: whether a deposit of title-deeds is a sufficient part performance to take a verbal agreement to charge real estate out of Stat. Frauds, s. 4.—**WHITMORE v. FARLEY** (1881), 45 L. T. 99; 20 W. R. 825; 14 Cox, C. C. 617, C. A.

Annotations:—**Mentd.** **Penley v. Anstruther** (1883), 48 L. T. 664; **Windhill L. B. of Health v. Vint** (1890), 45 Ch. D. 351.

Family arrangements.]—See FAMILY ARRANGEMENTS, Vol. XXIV., p. 949, Nos. 32-35.

Agreement in consideration of marriage.]—See SETTLEMENTS, Vol. XI., pp. 471, 472, Nos. 202-201, 208-211.

Agreements for leases.]—See LANDLORD & TENANT, Vol. XXX., p. 382, Nos. 456, 457.

Sale of land.]—See SALE OF LAND, Vol. XI., pp. 40, 41, Nos. 238-247.

SUB-SECT. 6.—EFFECT OF ADMITTING AGREEMENT.

See CONTRACT, Vol. XII., p. 163, Nos. 1184-1194.

SECT. 4.—ILLEGALITY OF CONTRACT.

SUB-SECT. 1.—IN GENERAL.

Void & illegal contracts generally.]—See CONTRACT, Vol. XII., pp. 234-303.

312. Presumption of legality—Absence of reasonable grounds for supposing illegality.]—**JOHNSON v. SHREWSBURY & BIRMINGHAM RY. CO.**, No. 97, *ante*.

313. — Agreement only savouring of illegality.]—An agreement between two solrs. in partnership together, that one of them should continue to carry on the business under their joint names & should be entitled to all the profits thereof, & should grant to the other partner an annuity of £300 during the life of his mother, & in the event of his dying in, he lifetime of his mother should pay to his widow an annuity of £100 during the remainder of his mother's life, & should indemnify him against

all liability in respect of his name being used, & that the partnership should cease on the death of the mother of the retiring partner:—**Held**: (1) not to be void as against public policy, but to be a valid & binding agreement; (2) the agreement must be considered to mean that an annuity was to be granted by deed, & the retiring partner was entitled to enforce specific performance of such agreement.

It is not within the discretion of the ct. to refuse specific performance, because an agreement savours of illegality. It must be shown to be illegal (**WOOD, V.-C.**).—**AUBIN v. HOIT** (1855), 2 K. & J. 66; 25 L. J. Ch. 36; 4 W. R. 112; 69 E. R. 696.

— See, further, CONTRACT, Vol. XII., pp. 235-237, Nos. 1939-1948.

Particular instances.]—See Sub-sect. 2, *post*.

SUB-SECT. 2.—PARTICULAR INSTANCES.

Void & illegal contracts generally.]—See CONTRACT, Vol. XII., pp. 234-303.

Agreement for sale of ecclesiastical office.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 242, No. 249.

Agreements contrary to public policy.]—See CONTRACT, Vol. XII., pp. 240-256.

Agreements relating to infants—Religion.]—See INFANTS, Vol. XXVIII., pp. 274, 275, Nos. 1256-1260.

— **Custody.]**—See INFANTS, Vol. XXVIII., p. 258, No. 1131.

Collateral agreement ultra vires of local authority—Transfer of electric lighting undertaking.]—See ELECTRIC LIGHTING, Vol. XX., p. 218, No. 111.

Agreement by unregistered money-lender.]—See MONEY & MONEY-LENDING, Vol. XXXV., p. 204, No. 301.

Immoral agreements & agreements with ulterior, illegal or immoral purposes.]—See CONTRACTS, Vol. XII., pp. 263-268, 275-277, Nos. 2155-2192, 2246-2271; BONDS, Vol. VII., pp. 168, 169, No. 50-71.

Agreement relating to leases or tenancies.]—See, generally, LANDLORD & TENANT, Vol. XXX., p. 412, Nos. 745-749.

— **Illegal covenant—In lease by charity trustees.]**—See CHARITIES, Vol. VIII., p. 363, No. 1643.

— **Assignment in contravention of covenant not to assign.]**—See LANDLORD & TENANT, Vol. XXXI., p. 371, No. 5181.

PART III. SECT. 3, SUB-SECT. 5.—
E. (d).

b. Devise to donee—Whether part performance of contract to give land for services—Invalid will.]—**BLACK v. BLACK** (1864), 2 E. & A. 419.—CAN.

c. Execution of deeds.]—A parol agreement in reference to land, partly performed by execution of deeds, was enforced.—**SHEENAN v. PARSHILL** (1871), 18 Gr. 8.—CAN.

d. Emigration to join grantor.]—**TURNER & TURNER v. PREVOST** (B. C.) (1890), 17 S. C. R. 283.—CAN.

e. Occupation by third party for whom premises purchased—To knowledge of purchaser.]—**HADDOCK v. NORGAN**, [1924] 2 D. L. R. 644; [1924] 2 W. W. R. 943; 34 B. C. R. 74.—CAN.

PART III. SECT. 4, SUB-SECT. 1.

312 i. Presumption of legality—Absence of reasonable grounds for supposing illegality.]—**CARLETON BRANCH RAILROAD CO. v. GRAND SOUTHERN**

RY. CO. (1882), 21 N. B. R. (5 P. & B.) 339.—CAN.

f. Immoral consideration.]—**MOON v. CLARKE** (1879), 30 C. P. 417.—CAN.

g. Illegality in part.]—Where a party succeeds in establishing the illegality of an instrument, he will not be allowed to enforce any stipulation that may be contained therein for his benefit.—**A.-G. v. NIAGARA FALLS INTERNATIONAL BRIDGE CO.** (1873), 20 Gr. 190.—CAN.

h. —.]—*Seemle*: a contract, partly legal & partly illegal may, if the illegal part be not *malum in se*, & rests in understanding only, be specifically performed by decree, so far as it is legally capable of execution.—**CAROLAN v. BRABAZON** (1846), 11 E. R. 224.—IR.

k. Agreement contrary to public policy.]—An agreement by a corpn. to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy & cannot be enforced by the cts.—**MONTREAL**

PARK & ISLAND RY. CO. v. CHATEAUGUAY & NORTHERN RY. CO. (Que.) (1904), 35 S. C. R. 18.—CAN.

l. Whether illegality must be pleaded]—Where a contract is *ex facie* illegal as being contrary to public policy it will not be enforced whether illegality is pleaded or not; but, where the question of illegality depends upon surrounding circumstances & has not been raised in the pleadings so as to warn pltf. to produce evidence, to rebut the allegation of illegality, the ct. as a general rule will not entertain the question; but will enforce the contract.—**BIALUSKI v. BORESKY** (Man.), [1922] 3 W. W. R. 408; 69 D. L. R. 185.—CAN.

m. —.]—Although illegality has not been pleaded, the ct. will not enforce an agreement involving or founded on unlawful purposes or objects, which are necessarily presented to it in the course of a suit.—**NATIONAL MORTGAGE & AGENCY CO., LTD. v. SCOTT** (1892), 11 N. Z. L. R.

Sect. 4.—Illegality of contract: Sub-sect. 2. Sects. 5 & 6: Sub-sect. 1, A.]

— **Contract to pay premium—Contrary to Rent & Mortgage Interest (Restrictions) Acts.]—See LANDLORD & TENANT, Vol. XXXI., p. 572, No. 7199.**

— **Underlease with option to purchase—Granted by personal representation.]—See EXECUTORS, Vol. XXIV., p. 568, No. 6062.**

— **Illegal or immoral purpose.]—See CONTRACT, Vol. XII., pp. 276, 277, Nos. 2259–2269.**

— **Options to purchase lease—Offending perpetuity rule.]—See LANDLORD & TENANT, Vol. XXX., p. 473, Nos. 1357–1359.**

— **Contract by building society—Sale of mortgages—Where performance would be ultra vires.]—See BUILDING SOCIETIES, Vol. VII., p. 492, No. 230.**

— **Agreements tending to pervert course of justice.]—See CONTRACT, Vol. XII., pp. 256–263, Nos. 2090–2154.**

— **Agreement for compromise of divorce proceedings.]—See HUSBAND & WIFE, Vol. XXVII., p. 447, Nos. 4615, 4616.**

— **Agreement contrary to Pluralities Act, 1838 (c. 106).]—See ECCLESIASTICAL LAW, Vol. XIX., p. 365, Nos. 1825, 1826.**

— **Agreements in restraint of trade.]—See TRADE & TRADE UNIONS.**

— **Agreements illegal by foreign law.]—See CONFLICT OF LAWS, Vol. XI., pp. 403–405, 436, Nos. 739–747, 976, 979.**

— **Agreement for cancellation of shares in company.]—See COMPANIES, Vol. IX., p. 422, No. 2728.**

— **Agreements between company & directors.]—See COMPANIES, Vol. IX., p. 470, Nos. 3077–3081.**

— **Contract by company ultra vires.]—See COMPANIES, Vol. IX., p. 632, No. 4184.**

— **Champerious agreements.]—See ACTION, Vol. I., pp. 76, 89, Nos. 614, 729, 730.**

— **Illegal agreements for partnership.]—See PARTNERSHIP, Vol. XXXVI., p. 343, Nos. 211–213.**

— **Illegal contracts by trustees—Right of cestui que trust to enforce trust.]—See TRUSTS & TRUSTEES.**

SECT. 5.—CONTRACT INVOLVING BREACH OF TRUST.

See, generally, TRUSTS & TRUSTEES.

314. **Whether ground for refusing specific performance.]—MORTLOCK v. BULLER, No. 19, ante.**

315. —.]—If the act of sale by the trustees takes place under circumstances which amount to a breach of trust, this ct. will not specifically perform the contract.—ORD v. NOEL (1820), 5 Madd. 438; 56 E. R. 962.

Annotations —**Distd.** Dance v. Goldingham (1873), 8 Ch. App. 906, n. **Refd.** Baylies v. Baylies (1844), 1 Coll. 537; Bellringer v. Blagrove (1847), 1 De G. & Sm. 63; Sneyby v. Thorne (1855), 3 Eq. Rep. 662; Harper v. Hayes (1860), 2 De G. F. & J. 542; Dunn v. Flood (1885), 28 Ch. D. 586.

316. —.]—An agreement by trustees of a will, to grant an underlease of their testator's leasehold property, is, *prima facie*, inconsistent with a trust for sale of it. There may be, however, circumstances to justify the agreement; but the ct. cannot enter into the consideration of those circumstances in a suit for specific performance between the trustees & the underlessee, the *cestuis que trust* not being parties to it.—EVANS v. JACKSON (1836), 8 Sim. 217; Donnelly, 147; 6 L. J. Ch. 8; 59 E. R. 87.

Annotations —**Refd.** Re Walker & Oakshott's Contract, [1901] 2 Ch. 383; Re Judd & Poland & Skelcher's Contract, [1906] 1 Ch. 684; Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 821; Re Kemnal & Still's Contract, [1923] 1 Ch. 293.

317. —.]—The ct. will not enforce a contract involving a breach of trust.—WOOD v. RICHARDSON (1840), 4 Beav. 174; 5 Jur. 623; 49 E. R. 305.

318. —.]—Trustees for sale of a manor described it in advertisements, & particulars & conditions of sale, as a manor in which the fines were arbitrary; adding that the clear profits, on an average of the last eight years, had been £150 a year; & it was one of the conditions of sale, that if there should be any error of mis-statement in the particulars, the vendors or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way. After the sale it was found that by the custom of the manor arbitrary fines were payable only on alienation, & that on the death of a tenant, his customary heir paid, upon admittance, a small fixed sum, & the widow was admitted to her free bench without any payment. It was also found that the clear profits exceeded £200 a year:—*Held*: there was no such misdescription of the property as would entitle the purchaser to compensation, inasmuch as the annual profits, which constituted the substantial value, far exceeded the amount stated.

Seemle: if there was a substantial misdescription, a ct. of equity would not enforce against trustees specific performance with compensation, as being prejudicial to the *cestui que trust*, & incapable of being ascertained.

In the present case the contract which we are called upon to enforce is one which the vendors, as trustees, had no right whatever to make, & which, if performed, would cast upon their *cestui que trust*, the consequences of their own negligence. This a ct. of equity never can do (LORD BROUGHAM).—WHITE v. CUDDON (1842), 8 Cl. & Fin. 766; 6 Jur. 471; 8 E. R. 300, H. L.; *reversg.* S. C. *sub nom.* CUDDON v. CARTWRIGHT (1840), 4 Y. & C. Ex. 25. *Annotations*:—**Refd.** Wilson v. Williams (1857), 3 Jur. N. S. 810; Cuddon v. Tite (1858), 1 Giff. 395.

319. —.]—A trustee entered into a contract for the sale of trust property, & it was agreed that the purchaser should, out of the purchase-money, retain a private debt due to him from the trustee. On a bill by the trustee:—*Held*: that this ct. would not decree the specific performance of such a contract.—THOMPSON v. BLACKSTONE (1843), 6 Beav. 470; 49 E. R. 908.

320. —.]—(1) With regard to the condition of sale, if it were calculated to mislead a purchaser, the ct. would not enforce it (KINDERSLEY, V.-C.).

(2) Neither, if the enforcement of the sale involved a breach of trust, would the ct. lend its assistance (KINDERSLEY, V.-C.).—GROOM v. BOOTH (1853), 1 Drew. 548; 1 Eq. Rep. 182; 22 L. J. Ch. 961; 21 L. T. O. S. 253; 17 Jur. 927; 1 W. R. 423; 61 E. R. 561.

Annotation:—**Mentd.** Re Hichens, Francis v. Francis, *Ex p.* Francis, *Ex p.* Hichens (1854), 5 De G. M. & G. 108.

321. —.]—MAW v. TOPHAM, No. 1461, *post*.

322. —.]—Where the contract was originally injurious to the *cestuis que trust*, or would expose the person contracting to a suit on reasonable grounds by his *cestuis que trust* for breach of duty, the ct. will not, in the exercise of its discretionary jurisdiction, enforce a contract entered into by a person in a fiduciary position.—SNEESBY v. THORNE (1855), 3 Eq. Rep. 662; 25 L. T. O. S. 125; 1 Jur. N. S. 536; 3 W. R. 438; *affd.* on other grounds, 7 De G. M. & G. 399, L. J.

Annotations:—**Mentd.** Naylor v. Goodall (1877), 47 L. J. Ch. 53; Re Ingham, Jones v. Ingham, [1893] 1 Ch. 352.

323. —.]—The ct. refuses to enforce specific performance of a contract which is a breach of trust, equally at the suit of the vendors as of the

purchasers.—*DUNN v. FLOOD* (1885), 28 Ch. D. 586; 54 L. J. Ch. 370; 52 L. T. 699 33 W. R. 315; 1 T. L. R. 206, C. A.

Annotation:—*Mentd.* *Re Hollis' Hospital Trustees & Hague Contract*, [1899] 2 Ch. 540.

324. —.]—Though a purchaser may, as a general rule, require a conveyance to a nominee, he cannot require a conveyance to one of the vendors under circumstances which may expose them to the risk of being parties to a breach of trust.—*DELVES v. GRAY*, [1902] 2 Ch. 606; 71 L. J. Ch. 808; 87 L. T. 425; 51 W. R. 56.

325. — **Breach of trust by company directors—Agreement for forfeiture of shares.**—Directors had power, on non-payment of calls, to sue for them or forfeit & sell the shares. They proposed to a shareholder to relieve him from further liability, on his consenting to an absolute forfeiture. He assented, but the directors, having afterwards discovered that he was in good circumstances refused to complete. The ct. declined to compel the directors specifically to perform the contract.—*HARRIS v. NORTH DEVON RY. CO.* (1855), 20 Beav. 384; 52 E. R. 651.

326. — **Legality of contract doubtful.**—Trustees for the sale of certain lands joined with the trustees for the sale of other lands, & with the absolute owner of other lands, in selling all the lands together. After entering into a contract for sale, they agreed as to the proportions in which they were to be entitled to the purchase-money. The conditions for sale stated, that as to a part of the lands the title was to commence in 1845 only. It appeared on investigation that this only related to a very small part:—*Held*: so joining in the sale, & so apportioning the purchase-money, was a breach of trust, & the condition was depreciatory; & specific performance at the suit of the vendors refused.

The doctrines & principles applicable to this case are opposed granting specific performance in the present instance; & if it is not clear that the contract . . . was a breach of trust, it must be held at least to be exceedingly doubtful whether it is not so (*KNIGHT BRUCE, L.J.*).—*REDE v. OAKES* (1864), 4 De G. J. & Sm. 505; 5 New Rep. 209; 34 L. J. Ch. 145; 11 L. T. 549; 10 Jur. N. S. 1246; 13 W. R. 303; 46 E. R. 1015, L. J.

Annotations:—*Consd.* *Dance v. Goldingham* (1873), 8 Ch. App. 902; *Re Cooper & Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802; *Morris v. Debenham* (1876), 2 Ch. D. 540. *Apld.* *Dunn v. Flood* (1885), 28 Ch. D. 586. *Refd.* *Hiatt v. Hillman* (1871), 25 L. T. 55; *Barclay v. Messenger* (1875), 43 L. J. Ch. 449; *Tolson v. Sheard* (1877), 5 Ch. D. 19.

— **Sale by trustees at inadequate price.**—*See* Sub-sect. 5, B., *post*.

— **Agreement for lease.**—*See* LANDLORD & TENANT, Vol. XXX., p. 407, Nos. 700–703; Vol. XXXI., p. 82, No. 2267.

SECT. 6.—OPPRESSIVENESS OF CONTRACT.

SUB-SECT. 1.—UNFAIRNESS.

A. In General.

327. Whether ground for refusing specific performance—General rule.—*TILLY v. PEERS* (1791), cited 10 Ves. at p. 301; 32 E. R. 860.

PART III. SECT. 6, SUB-SECT. 1.—A.

327 i. Whether ground for refusing specific performance—General rule.—A contract to be specifically performed must be equal, fair & certain in its terms, & founded on good consideration.—*EARLEY v. MCGILL* (1864), 11 Gr. 75.—**CAN.**

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327 ii. —.]—The ct. must see its way clearly before decreeing specific performance, & it must be satisfied of the integrity & good faith of the parties seeking its special interference. Where incapacity & inadequacy go hand in hand, the ct. may refuse to enforce a contract,

328. —.]—A ct. of equity will not decree a specific execution of articles, where they appear to be unreasonable or founded on a fraud.—*YOUNG v. CLERK* (1720), Prec. Ch. 538; 24 E. R. 241.

Annotations:—*Apld.* *Hick v. Phillips* (1721), Prec. Ch. 575. *Consd.* *Falcke v. Gray* (1859), 4 Drew. 651. *Refd.* *Bower v. Cooper* (1843), 2 Hare, 408.

329. —.]—*SQUIRE v. BAKER* (1726), 2 Eq. Cas. Abr. 58 22 E. R. 51.

330. —.]—*BUXTON v. LISTER*, No. 143, *ante*.

331. —.]—*UNDERWOOD v. HITCHCOX*, No. 226, *ante*.

—.]—It is true, if parties enter into legal contracts they are bound to fulfil them. But if parties enter into contracts which are enforced for purposes of harass & vexation, cts. of equity properly interfere (*LORD KENYON, M.R.*).—*SMITH v. MORRIS* (1788), 2 Bro. C. C. 311; 2 Dick. 697; 29 E. R. 171.

Annotations:—*Distd.* *Phillips v. Jones* (1839), 9 Sim. 519; *Mellers v. Devonshire* (1852), 16 Beav. 252; *Ridgway v. Sneyd* (1854), Kay, 627. *Consd.* *Simpson v. Ingleby* (1872), 26 L. T. 513.

333. —.]—*WALPOLE (LORD) v. ORFORD (LORD)*, No. 228, *ante*.

334. —.]—*HAMILTON v. GRANT*, No. 92, *ante*.

335. —.]—*GOULD v. KEMP*, No. 362, *post*.

336. —.]—*CROFT v. HAWK* (1836), *Donnelly*, 82; 5 L. J. Ch. 305; 47 E. R. 241.

337. —.]—Where a contract between two cos. proves to be one by which one of the contracting parties will gain considerable advantages, at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or not legally valid, equity will not aid in enforcing it by a decree for specific performance.

A private Act of Parliament authorised one railway co. to accept a lease of another railway: the directors of the first co. then entered into an agreement with the directors of a third co., the stipulations of which were to be performed "during the continuance" of such lease. No lease within the provisions of the Act was ever granted. The agreement appeared to be, if legally valid, at least unfair to the shareholders of one of the cos.:—*Held*: equity would not enforce it by a decree for specific performance.—*SHREWSBURY & BIRMINGHAM RY. CO. v. NORTH WESTERN RY. CO., ETC.* (1857), 6 H. L. Cas. 113; 26 L. J. Ch. 482; 29 L. T. O. S. 186; 3 Jur. N. S. 775; 10 E. R. 1237.

Annotations:—*Consd.* *Richmond Waterworks Co. & Southwark & Vauxhall Waterworks Co. v. Richmond Vestry* (1876), 34 L. T. 480. *Refd.* *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *Lancaster & Carlisle Ry. v. N. W. Ry.* (1856), 2 K. & J. 293; *L. B. & S. C. Ry. v. L. & S. W. Ry.* (1859), 4 De G. & J. 362; *A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449; *Sun Permanent Benefit Bldg. Soc. v. Western Suburban & Harrow Road Permanent Bldg. Soc.*, [1921] 2 Ch. 83. *Mentd.* *Beman v. Rufford* (1851), 1 Sim. N. S. 550; *Charlton v. Newcastle & Carlisle & N. E. Ry.* (1859), 34 L. T. O. S. 22; *Hare v. L. & N. W. Ry.* (1861), 2 John. & H. 80; *South Wales Ry. v. Redmond* (1861), 10 C. B. N. S. 675; *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356; *Riche v. Ashbury Railway Carriage & Iron Co.* (1874), L. R. 9 Exch. 224; *Hire Purchase Furnishing Co. v. Ritchens* (1887), 58 L. T. 460.

338. — **Agreement in part executed.**—Where the manner of obtaining an agreement is

although the purchaser was guilty of no greater fault than making a hard & unconscientious bargain.—*GOUGH v. BENCH* (1884), 6 O. R. 699.—**CAN.**

327 iii. —.]—*SHEIKH ABED HONSKIN v. LALLA RAMSARAN* (1870), 13 B. L. R. 516, n.; 13 W. R. 426.—**IND.**

Sect. 6.—Oppressiveness of contract: Sub-sect. 1, A.

not strictly just & regular, a ct. of equity ought not to decree a specific performance, although the agreement be in part executed.—**ROCHFORD v. CRESWICK** (1721), 1 Bro. Parl. Cas. 171; 1 E. R. 493.

339. ———.—[Agreement, if unreasonable, though in part executed, not specifically decreed.—**EDWARDS v. HEATHER** (1724), Cas. temp. King, 3; 25 E. R. 190.

340. ———.—[Agreement to purchase lands—Part discovered to be copyhold.]—A. articles with B. for the purchase of an estate of £180 *per annum* for which he was to give thirty-five years' purchase, upon granting & conveying to him, & pays £50 in part; but discovering that £30 *per annum* of the lands were copyhold, refused to go on. On a bill by B. equity will not decree a specific execution of this agreement, being unequitable, but will order the £50 to be paid back.—**HICK v. PHILLIPS** (1721), Prec. Ch. 575; 24 E. R. 258.

Annotations:—Distd. Adams v. Weare (1784), 1 Bro. C. C. 567. *Refd.* Davis v. Symonds (1787), 1 Cox, Eq. Cas. 402.

341. ———.—[When rescission of contract refused.]—There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this ct. will not set them aside; but will refuse its aid to carry them into execution; & if the party who obtained such articles has been in possession, & made lasting improvements, he shall be allowed for them on consenting to deliver up the articles & account for the profits; otherwise, if he goes to law, & fails there.—**SAVAGE v. TAYLOR** (1736), Cas. temp. Talb. 234; 25 E. R. 753.

Annotation:—Refd. Day v. Newman (1788), 2 Cox, Eq. Cas. 77.

342. ———.—[Bill for a specific performance of a covenant for renewal dismissed, it being either a covenant for perpetual renewal, & if so, obtained without consideration from the lessor, or else inserted by mistake; but there being no proof of its having been improperly obtained, a cross bill, to have it declared void, was dismissed with costs.

Though I see no equity to decree this agreement *in specie*, yet I see no reason to say that it was obtained fraudulently; & therefore I must leave plffs. to make what use they can of it at law (**HENLEY, LORD KEEPER**).—**REDSHAW v. BEDFORD LEVEL (GOVERNOR & CO.)** (1759), 1 Eden, 346; 28 E. R. 718.

Annotation:—Refd. Browne v. Tighe (1834), 2 Cl. & Fin. 396.

343. ———.—[A ct. of equity will exercise its discretion in cases of bills for specific performance by dismissing them, although the same circumstances would not induce the ct. to make a decree to cancel the agreement on a bill filed for that purpose.

The ct. will never decree a specific performance unless the case of plff. is perfectly clear from circumvention & deceit (*per CUR.*).—**DAVIS v. SYMONDS** (1787), 1 Cox, Eq. Cas. 402; 29 E. R. 1221.

344. ———.—[There are many cases in which the ct. will not disturb an agreement that has been executed, though it would have refused to carry that agreement into execution (*per CUR.*).

346 i. ———.—[Circumstances raising grave doubt of fairness.]—**MCDONALD v. ROSE** (1870), 17 Gr. 657.—**CAN.**

PART III. SECT. 6, SUB-SECT. 1.
—**B.**

n. *Infirmity of one party—Senile decay.*—**GOUGH v. BENCH** (1884), 6 O. R. 699.—**CAN.**

349 i. *Ignorance of one party—Improvident contract.*—**DODGE v. TURNER** (1860), 5 N. S. R. (1 Old.) 1.—**CAN.**

o. *Unfairness arising from relationship of parties.*—Where an intending purchaser, by disguising his intentions under the role of a disinterested friend, imposes on the confidence thus established, & induces

—**WILLAN v. WILLAN** (1810), 16 Ves. 72; 33 E. R. 911, L. C.

Annotation:—Refd. McCarthy v. De Caix (1831), 2 Russ. & M. 614.

345. ———.—[Unfairness arising from unintentional act.]—**TWINING v. MORRICE** (1788), 2 Bro. C. C. 326; 29 E. R. 182.

Annotations:—Consd. Townshend v. Staughton (1801), 6 Ves. 328; Mortlock v. Buller (1804), 10 Ves. 292. *Distd.* Mason v. Armitage (1806), 13 Ves. 25. *Apld.* Cutts v. Salomon (1852), 21 L. J. Ch. 750. *Refd.* Smith v. Clarke (1806), 12 Ves. 477; White v. Cuddon (1842), 8 Cl. & Fin. 766. *Mentd.* Er p. Lacey (1802), 6 Ves. 625; Ex p. Bennett (1805), 10 Ves. 381.

346. ———.—[Circumstances raising grave doubt of fairness.]—(1) Where a suit for specific performance comes on on motion for decree, the ct. may treat it as a motion & refuse it with costs.

(2) Where, on a bill filed for specific performance by a vendor, circumstances not appearing on the abstract are discovered, raising a grave doubt of the fairness of the transaction, the ct. will dismiss the bill with costs.—**WARDE v. DIXON** (1858), 28 L. J. Ch. 315; 32 L. T. O. S. 349; 5 Jur. N. S. 698; 7 W. R. 148.

Annotations:—As to (2) *Apld.* Simpson v. Gilley (1922), 92 L. J. Ch. 191. *Generally, Refd.* Isaacs v. Towell, [1898] 2 Ch. 285. *Mentd.* Gray v. Fowler (1873), L. R. 8 Exch. 249.

B. What Amounts to Unfairness.

347. Conditional agreement—In nature of wager.—**PARKER v. PALMER** (1662), 1 Cas. in Ch. 42; 22 E. R. 685, L. C.

348. Infirmity of one party—Mental weakness—Sale of advowson.—If a father who is possessed of an advowson, which he apparently designed for his son, be prevailed on, when in an infirm state of mind, to enter into articles for the sale of it to another person, a Ct. of Equity will not compel a specific performance, although there is no imposition or fraud imputable to the purchaser.—**BELL v. HOWARD** (1742), 9 Mod. Rep. 302; 88 E. R. 467.

FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 253-257, Nos. 802-831.

349. Ignorance of one party—Improvident contract.—Specific performance refused, of a contract improvidently entered into by ignorant persons.—**MARTIN v. MITCHELL, MARTIN v. PEILE** (1820), 2 Jac. & W. 413; 37 E. R. 685.

Annotations:—Mentd. Laythorpe v. Bryant (1836), 2 Hodg. 25; Morgan v. Holford (1852), 1 Sm. & G. 101; Heather v. O'Neil (1858), 2 De G. & J. 399; Reuss v. Pickley (1866), L. R. 1 Exch. 342; Re National Savings Bank Assocn., Hebb's Case (1867), L. R. 4 Eq. 9; Jones v. Davies (1878), 8 Ch. D. 205.

—[See **FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., p. 255, Nos. 814, 815.**

350. Absence of legal advice—Where plaintiff solicitor.—An agreement for a reversionary lease having been obtained by an attorney from the son of his employer, who was remainderman in a settlement under which his father who had granted the existing lease was tenant for life. On a bill for specific performance, the ct. refused under the circumstances to enforce the agreement.

F. under a settlement executed in 1716 was tenant for life of certain lands, with a power to lease for any term not exceeding thirty-one years,

the owner of land to accept an offer for the purchase of it, which probably would not otherwise have been accepted without independent investigation, specific performance of an agreement for sale thus procured will not be enforced.—**HENDERSON v. THOMPSON (B. C.)** (1909), 41 S. C. R. 445.—**CAN.**

remainder to his first & other sons successively in tail male. In 1745 F. granted to S., who was then acting as his attorney, a lease of lands, comprising two hundred acres of good land, Irish plantation measure, for three lives or thirty-one years, whichever should last the longest. M. was the only son of F. In 1749 M. by a writing indorsed upon that part of the lease of 1745, which was in the possession of S. in consideration of £20, agreed to ratify that lease, & on the expiration of the term, to grant a renewal for a further term of lives, a blank being left in the agreement as to the number of lives. The agreement was not indorsed on the counterpart of the lease in the possession of F. & was not registered till June, 1760. In May, 1760, F. died, leaving M. surviving, who by deed in 1760, settled the lands in trust for himself for life; remainder to his two daughters as tenants in common. Resp. became entitled to one moiety of the lands, as the only son of one of the daughters; & at a sale under a decree in Chancery in 1814, purchased the other moiety. At the time of the sale, it was mentioned that the lands were sold subject to the lease of 1745. S. died in 1780, leaving L., who was the last surviving life in the lease of 1745, & held the lands under the lease till his death, which took place in 1817. Appls. claimed as devisees of L. In 1820 appls. filed a bill in Chancery, stating the facts above-mentioned, & praying a specific performance of the agreement to grant a renewal of the lease:—*Held*: appls. were not entitled to such relief.—*BLAKENEY v. BAGOTT* (1829), 3 Bl. N. S. 237; 1 Dow. & Cl. 105; 4 E. R. 1326, H. L.

351. ———.]—Where defts., vendors, sign a contract of sale, without professional assistance, & pltf., purchaser, is a solr., circumstances of evidence, generally leading to the notion of surprise or mistake, & objections, otherwise not decisive *per se*, will be sufficient to induce the ct. to withhold a decree for specific performance.

I cannot help thinking . . . that pltf. should not have sufficient defts. to sign, without previously consulting their solr. (*ALDERSON, B.*).—*DEARDON v. BAMFORD* (1841), 10 L. J. Ex. Eq. 54.

352. ——— Where no fraud proved.]—Specific performance decreed in favour of a purchaser, though no solr. acted for the vendor; & though the contract was executed under circumstances which might easily have led to fraud; no fraud being proved in the vendor or his agent.—*LIGHT-FOOT v. HERON* (1839), 3 Y. & C. Ex. 586; 160 E. R. 835.

Annotations:—*Reid. Cox v. Smith* (1868), 19 L. T. 517. *Lumley v. Timmis* (1873), 28 L. T. 157.

353. Signature induced by promise of plaintiff.]—A farm was put up to auction on certain conditions of sale, but was bought in by the vendor. Subsequently the vendor entered into an agreement for sale thereof, with a purchaser who had not then seen the conditions of sale, but who represented to the vendor that, if the agreement entered into were not in accordance with the conditions of sale already prepared, he would alter & adapt it thereto. The vendor was a decrepit old man, but not incompetent to transact business; but in entering into the agreement he had no solr. nor agent. The purchaser having declined to adapt the agreement to the conditions of sale, in the particulars in which it differed, & having filed a bill for specific performance:—*Held*: specific performance could not be enforced, because the promise to adapt the agreement to the conditions of sale might have operated as an inducement to the vendor to sign it, but as imbecility & fraud were set up as a defence, & not proved, no

costs were given.—*MICKLETHWAIT v. NIGHTINGALE* (1848), 12 L. T. O. S. 82; 12 Jur. 638.

354. ——— Agreement for building lease.]—In the year 1852, deft. was entitled to the residue of a term of years of some lands of which pltfs. were seised in fee. After much negotiation, drawing up of agreements, & alterations & modifications of these agreements, deft. signed in Apr. 1854, an agreement to surrender his existing interest, & to take a new lease, by which he was to covenant to build a large number of houses, & to lay out the premises & roads, & to build drains in the manner therein stated. He agreed further to covenant not to underlet or assign the premises without permission from pltfs., & in case of any breach of any of these covenants pltfs. were to be at liberty to re-enter on the whole of the premises. During the earlier part of this negotiation deft. had been assisted by his own solr., but for some time previously to the execution of the agreement of Apr. 1854, he appeared not to have consulted any professional man, except his own surveyor. At the execution of the agreement deft. had had no assistance whatever, & in fact no one was present on his behalf, deft. observing at that time that he was sure the solr. for pltfs. "would not allow him to do anything wrong." The permission of the Charity Comrs. was obtained, but upon pltfs. delivering to deft. an abstract of their title, deft. handed the matter over to his original solr. who requested that some minor alterations might be made in the terms of the agreement, to many of which pltfs. yielded. Ultimately, however, deft. demanded that the clause against underletting should be omitted in preparing the lease, & on pltfs. declining to accede to this demand, deft. refused to complete his contract on the ground of surprise & undue influence over him. Pltfs. then instituted this suit, praying by their bill a specific performance of the agreement:—*Held*: there existed no reason whatever for releasing deft. from the contract into which he had thus entered.—*HABERDASHERS CO. v. ISAAC* (1857), 29 L. T. O. S. 350; 5 W. R. 855, L. J.J.

355. ——— Vendor's knowledge of disapproval of purchaser's solicitor—Exorbitant price.]—An estate was put up to sale by auction. The conditions of sale were drawn out in manuscript, but were not printed or circulated. They were shown in this state to B., a solr. for a person who was likely to be a purchaser. He objected at once to one of the conditions of sale, as one to which the contemplated purchaser could not be advised to assent. The auction took place, & the objection to this condition was publicly noticed by an indifferent attendant at the sale. The property was bought in.

On the following day the proprietor of the estate called upon the contemplated purchaser, & persuaded him to sign an agreement for the purchase of the estate, as it was alleged at a most exorbitant price, & containing, by reference to, the objected condition of sale:—*Held*: under such a state of circumstances, specific performance of the agreement could not be enforced.—*LEE v. DAWSON* (1861), 4 L. T. 464.

356. Signature by illiterate person—Agent of defendant—Contract drawn up by plaintiff.]—On a bill for the specific performance of an agreement by which A., as agent for B., contracted to let to C. a piece of ground for a term of years at a yearly rent; it appearing from the evidence that B. intended to let the ground for the building of houses of a particular class, & that if he had authorised A. to act as agent in the letting of the ground, which was disputed, he had told him the purposes for which it was to be let:—*Held*: as

Sect. 6.—Oppressiveness of contract: Sub-sect. 1, B.; sub-sect. 2, A. & B. (a).]

the agreement did not contain any reference to building, nor any covenant to build, it was not under the circumstances such an agreement as ought to be performed; & a decree for a specific performance was refused.

Supposing the authority to B. to enter into the agreement with pltf. to be clearly proved it does not follow that it is such an agreement as a Ct. of Equity will decree to be specifically performed. The agreement appears to have been signed by an illiterate person, as agent for deft. L., & to have been drawn by one of the pltf. (*per CUR.*).—*HELISHAM v. LANGLEY* (1841), 1 Y. & C. Ch. Cas. 175; 62 E. R. 842.

—*See CONTRACT*, Vol. XII., p. 92, No. 565; *FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., p. 256, Nos. 825–827.

357. Unreasonable covenant in lease—Lease of mines.—A lease of mines contained a covenant that, if the lessor should at any time before the expiration or determination of the lease give notice, in writing, to the lessee, of his desire to take all or any part of the machinery, stock-in-trade, implements, etc., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor on his paying the value of them, such value to be ascertained in the manner therein mentioned:—*Held*: the covenant was so injurious & oppressive to the lessee, that the ct. ought not to enforce it, or to grant an injunction to prevent a breach of it.—*TALBOT v. FORD* (1842), 13 Sim. 173; 6 Jur. 843; 60 E. R. 66.

358. ——— Sale of leasehold—No opportunity for defendant to examine.—*MIDGLEY v. SMITH*, [1893] W. N. 120.

—*See LANDLORD & TENANT*, Vol. XXX., pp. 412–414, Nos. 743, 744, 754–756.

359. Unfairness arising from relationship of parties—Contract with heir of plaintiff.—Bill for specific performance of a contract against the heir-at-law of the vendor dismissed without costs, & the parties left to their remedy at law, the ct. not being satisfied with the evidence as to the circumstances under which the contract was signed by the vendor.—*VALENTINE v. DICKINSON* (1861), 7 Jur. N. S. 857; 9 W. R. 625.

—*Solicitor & client.*—*See SOLICITORS.*

—*See, generally, CONTRACT*, Vol. XII., pp. 98–112, Nos. 611–738; *FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 257–266, Nos. 832–902.

Drunkenness.—*See CONTRACT*, Vol. XII., pp. 41, 42, Nos. 199–217; *FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., p. 255, Nos. 817–819.

Duress.—*See CONTRACT*, Vol. XII., pp. 92–98, Nos. 566–610.

Lunacy.—*See LUNATICS*, Vol. XXXIII., pp. 128–136, Nos. 47–139.

Agreements in restraint of trade.—*See TRADE & TRADE UNIONS.*

Agreements for salvage.—*See SHIPPING*, Vol. XII., pp. 857–861, Nos. 7235–7251, 7267–7282.

Family arrangements.—*See FAMILY ARRANGEMENTS*, Vol. XXIV., pp. 955–960, Nos. 87–135.

SUB-SECT. 2.—HARDSHIP.

A. In General.

360. Whether ground for refusing specific performance.—*ELY (DEAN & CHAPTER) v. STEWARD* (1740), Barn. Ch. 170; 2 Atk. 44; 27 E. R. 600, L. C.

Annotation:—*Mentd.* *Robinson v. Dulceep Singh* (1879), 11 Ch. D. 798.

361. ———.—The ct. is not obliged to decree a specific performance, & will not, where it would be a hardship (*LORD HARDWICKE, C.*).—*CITY OF LONDON v. NASH* (1747), 3 Atk. 512; 1 Ves. Sen. 12; 27 E. R. 859, L. C.

Annotations:—*Refd.* *Lucas v. Comerford* (1790), 8 Sim. 499; *Bracebridge v. Buckley* (1816), 2 Price, 200; *Storer v. G. W. Ry.* (1842), 6 Jur. 1009. *Mentd.* *Casberd v. Ward, Jones & A.-G.* (1819), 6 Price, 411.

362. ———.—Any circumstance of unfairness on the part of pltf. or those under whom he claims, or even any circumstance of hardship in deft.'s situation will incline the ct. not to interfere (*LORD BROUGHAM, C.*).—*GOULD v. KEMP* (1834), 2 My. & K. 304; 39 E. R. 959, L. C.

Annotations:—*Mentd.* *Re Wilks, Child v. Bulmer*, [1891] 1 Ch. 59; *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192.

363. ———.—*KIMBERLEY v. YEO, KIMBERLEY v. JENNINGS*, No. 26, *ante*.

364. ———.—In cases of specific performance, cts. of equity exercise a discretion. In cases of great hardship, they will not interfere, but will leave pltf. to his remedy by recovery of damages at law.

Trustees joined their *cestui que trust* in a contract for sale, & personally agreed to exonerate the estate from any incumbrances thereon. They were considerable incumbrances, & it did not appear whether the purchase-money would be sufficient to discharge them, or what would be the extent of the deficiency. The ct. refused to decree a specific performance against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages.—*WEDGWOOD v. ADAMS* (1843), 6 Beav. 600; 49 E. R. 958; *subsequent proceedings* (1844), 8 Beav. 103.

Annotations:—*Apprvd.* *Watson v. Marston* (1853), 4 De G. M. & G. 230. *Consd.* *Falcke v. Gray* (1859), 4 Drew. 651. *Refd.* *Helling v. Lumley* (1858), 28 L. J. Ch. 249.

365. ———.—A ct. of equity will not decree specific performance of an agreement more favourable to pltf. than to deft., involving hardship upon deft. & damage to his property, if he entered into it without advice or assistance, & there be reasonable ground for doubting whether he entered into it with a knowledge & understanding of its nature & its consequences.

Suit for specific performance of a partnership agreement, prepared & written by pltf., dismissed, & pltf. left to his remedy, if any, at law for damages for non-performance thereof; deft., an illiterate man, being at the time of the execution of the agreement considerably in liquor, without professional advice, & without knowledge of its nature & consequences, which were highly favourable to pltf., & the agreement with respect to the property affected by it being moreover vague & obscure.—*VIVERS v. TUCK* (1863), 1 Moo. P. C. C. N. S. 516; 9 L. T. 554; 15 E. R. 794, P. C.

PART III. SECT. 6, SUB-SECT. 2.—A.

360 i. Whether ground for refusing specific performance.—*DOWSETT v. REID* (1912), 15 C. L. R. 695.—*AUS.*

360 ii. ———.—*HILL v. BUFFALO & LAKE HURON RY. CO.* (1864), 10 Gr. 506.—*CAN.*

360 iii. ———.—To entitle the ct. to interfere with the contractual rights

of the parties & to grant the equitable relief of specific performance after default has been made by the purchaser in the performance of his contract, it must appear that this can be done without injustice to the vendor.—*FREDERIKSEN v. STANTON & RICHARDS* (1913), 24 W. L. R. 891; 4 W. W. R. 1224; 12 D. L. R. 565; 6 Sask. L. R. 105.—*CAN.*

360 iv. ———.—If a person contracts to do a thing which he may do himself, or has the means of compelling others to do, equity will compel him to do it, unless it be highly unreasonable, in which case the other party shall not be held to the contract.—*COSTIGAN v. HASTLER* (1804), 2 Sch. & Lef. 159.—*IR.*

366. —.]—*Re* HIGGETT & BIRD'S CONTRACT, [1903] 1 Ch. 287; 72 L. J. Ch. 220; 87 L. T. 697; 51 W. R. 227; 47 Sol. Jo. 204, C. A.

Annotations:—*Mentd.* *Re* Allen & Driscoll's Contract, [1901] 2 Ch. 226; *Re* Taunton & West of England Perpetual Benefit Bldg. Soc. & Roberts' Contract, [1912] 2 Ch. 381.

367. — Must be inconsistent with intention of parties.]—On the question of executing an agreement, hardship cannot be regarded, unless it amounts to a degree of inconvenience & absurdity, so great as to afford judicial proof that such could not be the meaning of the parties.—*PREBBLE v. BOGHURST* (1818), 1 Swan. 309; 1 Wils. Ch. 161; 36 E. R. 402, L. C.

Annotations:—*Refd.* *Hill v. Gomme* (1839), 5 My. & Cr. 250; *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561. *Mentd.* *Maxwell v. Ward* (1822), 11 Price, 3; *Maclurcan v. Lane*, *Melhuish v. Maclurcan* (1858), 5 Jur. N. S. 56.

368. — Hardships within knowledge of defendant.]—Deft. entered into a contract to purchase leaseholds, after his solr. had perused the leases. He intended to apply the property to a purpose which it turned out was prohibited by the lease:—*Held*: whether the vendor knew the purchaser's intention or not, the purchaser was bound specifically to perform his contract.—*MORLEY v. CLAVERING* (1860), 29 Beav. 84; 54 E. R. 558; *subsequent proceedings* (1861), 30 Beav. 108; 9 W. R. 801.

Agreements for leases.]—*See* LANDLORD & TENANT, Vol. XXX., pp. 411, 412, Nos. 739, 744.

B. What Hardship Sufficient.

(a) In General.

369. Where performance would involve forfeiture.]—*FAINE v. BROWN* (1750), cited in 2 Ves. Sen. at p. 307; 28 E. R. 198, L. C.

Annotation:—*Consd.* *Howell v. George* (1815), 1 Madd. 1.

370. —.]—(1) A person not a party to the contract ought not to be made party to a suit for specific performance.

(2) One stipulation in a contract for purchase was, that the vendor should make a certain road, which it turned out he could not make without incurring a forfeiture:—*Held*: the purchaser was entitled to a decree for specific performance with a compensation for the damage, if any, in consequence of the road not being formed.—*PEACOCK v. PENSON* (1848), 11 Beav. 355; 18 L. J. Ch. 57; 12 L. T. O. S. 329; 12 Jur. 954; 50 E. R. 854.

Annotations:—*As to* (2) *Refd.* *Ramsden v. Hirst* (1858), 4 Jur. N. S. 200. *Generally, Mentd.* *Sidney v. Clarkson* (1865), 11 W. R. 157; *Furness Ry. v. Cumberland Co-op. Bldg. Soc.* (1884), 52 L. T. 144; *Birmingham & District Land Co. v. Alday*, [1893] 1 Ch. 312.

371. —.]—When deft. resists specific performance of a contract on the ground that he would thereby incur a forfeiture, the ct. will look at the circumstance which gave rise to the danger of forfeiture, & if it arise out of deft.'s own acts subsequent to the contract, it will decree specific performance, & leave deft. open to the consequences of his acts.—*HELLING v. LUMLEY* (1858), 3 De G. & J. 493; 28 L. J. Ch. 249; 33 L. T. O. S. 18; 23 J. P. 356; 5 Jur. N. S. 301; 7 W. R. 152; 44 E. R. 1358, L. J.

Annotation:—*Refd.* *Willmott v. Barber* (1880), 15 Ch. D. 96.

— **Agreement for lease.**]—*See* LANDLORD & TENANT, Vol. XXX., p. 411, Nos. 737, 738.

372. Difficulty & expense of performance.]—*Re* BRIGHTON RY. CO. (circa 1840), cited in 6 Jur. at p. 1010, L. C.

Annotation:—*Consd.* *Storer v. G. W. Ry.* (1842), 6 Jur. 1009.

373. —.]—*STORER v. GREAT WESTERN RY. CO.*, No. 50, *ante*.

374. —.]—*WEBB v. DIRECT LONDON & PORTSMOUTH RY. CO.*, No. 380, *post*.

375. Risk of opening foreclosure—Purported sale by mortgagee under power of sale.]—A mtgee, with power of sale, obtained a foreclosure decree, & then entered into an agreement to sell the estate, with a clause providing that as the vendor was mtgee., with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, & insisted upon having the conveyance under the power of sale; & on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence, showing that the above-mentioned clause was inserted by inadvertence, & that she never intended to incur the risk of opening the foreclosure by conveying under the power:—*Held*: the misapprehension was a sufficient defence to the enforcement of a conveyance under the power.—*WATSON v. MARSTON* (1853), 4 De G. M. & G. 230; 1 W. R. 362; 43 E. R. 495, L. J.

Annotations:—*Refd.* *Falcke v. Gray* (1859), 4 Drew. 651; *Carroll v. Keays*, *Keays v. Carroll* (1873), 22 W. R. 243; *Hickman v. Berens*, [1895] 2 Ch. 638; *Stevens v. Theatres*, [1903] 1 Ch. 857.

376. Sale of land without means of access.]—In the absence of special circumstances, a ct. of equity will not enforce specific performance of a contract for the purchase of land which is silent as to the means of access to it, when it is reasonably uncertain whether any means of entering on the land at all times can be conferred on the purchaser; & where the circumstances of such a case did not appear to the ct. sufficient to constitute a waiver of the objection, a bill for specific performance was dismissed with a fixed amount of costs.—*DENNE v. LIGHT* (1857), 8 De G. M. & G. 774; 26 L. J. Ch. 459; 29 L. T. O. S. 60; 21 J. P. 437; 3 Jur. N. S. 627; 5 W. R. 430; 44 E. R. 588, L. J.

377. Solicitor contracting in own name—For purchase of land on behalf of client.]—A solr. contracted, in his own name, to purchase a freehold; he resisted the performance of it on the ground that he had acted as the mere agent of a client, & that, it being a case of hardship, damages at law would be an adequate remedy to the vendor:—*Held*: he was bound to perform the contract.—*SAXON v. BLAKE* (1861), 29 Beav. 438; 54 E. R. 697.

378. Where performance would expose defendant to criminal proceedings.]—Property sold by auction under the description of an eligible freehold property for investment, comprising a house & shop let on a quarterly tenancy, was discovered before completion to be used by the tenant as a disorderly house. Neither the vendors nor the purchaser knew previously that the house was being improperly used. The agreement of tenancy contained a covenant by the tenant not to use the house as a disorderly house, & a proviso for re-entry in case of breach of covenants:—*Held*: specific performance ought not to be granted, inasmuch as the purchaser, unless he took steps to prevent the improper use of the property by the tenant, would become liable as lessor to criminal proceedings under Criminal Law Amendment Act,

PART III. SECT. 6, SUB-SECT. 2.— B. (a).

p. Mistake in description of title by agent of vendor.]—Deft.'s agent for sale agreed to sell to pltf. certain lands with a title under Real Property Act.

The lands were not under the Act, but, by a mistake of the agent, were so described in the contract. Deft. refused to bring the lands under the Act & purported to rescind:—*Held*: the contract should be specifically en-

forced, there being no such hardship arising from the agent's mistake as would be a defence in equity to deft.—*FISCHER v. BENNETT* (1911), 11 S. R. N. S. W. 399; 28 N. S. W. N. 113.—AUS.

Sect. 6.—Oppressiveness of contract: Sub-sect. 2, B. (a) & (b), & C.; sub-sect. 3.]

1885 (c. 69), by reason of the state of the property at the time of the sale.—*HOPE v. WALTER*, [1900] 1 Ch. 257; 69 L. J. Ch. 166; 82 L. T. 30; 16 T. L. R. 160, C. A.

Annotation:—Consd. Re Leyland & Taylor's Contract (1900), 83 L. T. 380.

Insolvency of tenant—Agreement for lease.]—*Sec LANDLORD & TENANT*, Vol. XXX., p. 414, Nos. 758–765.

(b) Hardship Arising Subsequent to Contract.

379. General rule—Specific performance decreed.]—*GRAVES v. WHITE* (1680), *Freem. Ch.* 57; 2 *Eq. Cas. Abr.* 652; 22 *E. R.* 1057, L. C.

380. ———.]—*Semble*: the fact that the performance of an agreement has, owing to circumstances which have subsequently occurred, become hard in its consequences to one of the parties, or that he is called upon to perform it under circumstances which he had not contemplated, is no objection to the specific performance of the contract in equity, there being nothing doubtful in the meaning of the agreement, & nothing hard or oppressive in its terms at the time it was made.

WEBB v. DIRECT LONDON & PORTSMOUTH RY. CO. (1851), 9 *Hare*, 129; 20 L. J. Ch. 566; 17 L. T. O. S. 210; 15 *Jur.* 697; 68 *E. R.* 444; *on appeal* (1852), 1 *De G. M. & G.* 521, L. J.J.

Annotations:—Consd. Parkin v. Thorold (1852), 16 *Beav.* 59; *Stuart v. L. & N. W. Ry.* (1852), 15 *Beav.* 513; *Eastern Counties Ry. v. Hawkes* (1855), 5 *H. L. Cas.* 331. *Refd. Gage v. Newmarket Ry.* (1852), 18 *Q. B.* 457; *Gooday v. Colchester, etc. Ry.* (1852), 17 *Beav.* 132; *Stuart v. L. & N. W. Ry.* (1852), 1 *De G. M. & G.* 721; *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 *De G. M. & G.* 115; *Norwich Corp'n. v. Norfolk Ry.* (1855), 4 *E. & B.* 397. *Mentd. Tiverton & North Devon Ry. v. Loosemore* (1884), 9 *App. Cas.* 180.

—.]—*HAYWOOD v. COPE*, No.

ante.

382. ———.]— *C. LUMLEY*, No. 371, *ante.*

383. Losing bargain.]—*CITY OF LONDON v. RICHMOND* (1701), *Prec. Ch.* 156; 2 *Vern.* 421; 23 *E. R.* 870; *on appeal, sub nom. RICHMOND v. CITY OF LONDON* (1702), 1 *Bro. Parl. Cas.* 516, *H. L.* *Annotations:—Mentd. Bally v. Wells* (1769), *Wilm.* 311; *Meux v. Maltby* (1818), 2 *Swan.* 277; *Small v. Attwood* (1832), *You.* 407.

384. ——— Value of subject-matter unknown at time of contract.]—*ANON.* (circa 1725), cited in 6 *Ves.* at p. 24; 31 *E. R.* 919.

Annotation:—Consd. Mortimer v. Capper (1782), 1 *Bro. C. C.* 156.

385. ———.]—(1) A contract for the sale & purchase of an uncertain thing, the extent & value of which is understood to be unknown to both parties, is valid, & neither party can resist completing merely because the reality has turned out to be different from what was anticipated. But where something different from what is claimed by the purchaser was intended to be sold by the vendor, this ct. will not compel the latter specifically to perform the contract, which, in substance, though not in terms, is really different from that which was entered into.

(2) Where the terms of a contract are ambiguous, & by adopting the construction of the purchaser, would compel the vendor to convey property not intended or believed by him to be included in the contract, this ct. will not decree a specific per-

formance.—*BAXENDALE v. SEALE* (1855), 19 *Beav.* 601; 24 L. J. Ch. 385; 24 L. T. O. S. 306; 1 *Jur.* N. S. 581; 52 *E. R.* 484.

Annotation:—As to (1) Refd. Bottyes v. Maynard (1882), 46 L. T. 766.

386. Hardship arising through death of party—Sale in consideration of annuity.]—Sale of an estate for a certain sum of money & an annuity for life. The agreement being fair, a ct. of equity will decree a specific performance, although the party die before any payment of the annuity.—*MORTIMER v. CAPPER* (1782), 1 *Bro. C. C.* 156; 28 *E. R.* 1051, L. C.

Annotations:—Consd. Pritchard v. Ovey (1820), 1 *Jac. & W.* 396. *Apld. Kenney v. Wexham* (1822), 6 *Madd.* 355. *Expld. Davies v. Cooper* (1840), 5 *My. & Cr.* 270. *Distd. Counter v. Macpherson* (1845), 5 *Moo. P. C. C.* 83. *Consd. Coles v. Bristowe* (1868), L. R. 6 *Eq.* 149. *Refd. Bower v. Cooper* (1843), 2 *Hare*, 408; *Strickland v. Turner* (1852), 7 *Exch.* 208.

387. Failure of defendant's purpose.]—B. treats with A. for a piece of land, having an intention to build a mill, to which the consent of a corp'n. is necessary; but A. refuses to treat on condition, B. fails in obtaining consent. This failure in his speculation is no defence against a bill for specific performance.—*ADAMS v. WEARE* (1784), 1 *Bro. C. C.* 567; 28 *E. R.* 1301, L. C.

Annotation:—Expld. Bray v. Briggs (1872), 26 L. T. 817.

388. Hardship arising from conduct of plaintiff—Covenants restricting use of land—Character of surrounding land altered with acquiescence of plaintiff.]—Where land is conveyed in fee, by deed of feoffment, subject to a perpetual ground rent, & the feoffee covenants for himself, his heirs & assigns, with the feoffor, the owner of adjoining lands, his heirs, exors., administrators & assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, & the subsequent acts of the feoffor or of those claiming under him, have so altered the character & condition of the adjoining lands that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent & spirit of the contract, a ct. of equity will not interpose to enforce the covenant, but will leave the parties to law.—*BEDFORD (DUKE) v. BRITISH MUSEUM TRUSTEES* (1822), 2 *My. & K.* 552; 1 *Coop. temp. Cott.* 90; 2 L. J. Ch. 129; 39 *E. R.* 1055, L. C.

Annotations:—Apld. Hawkins v. Scarborough (1833), 2 L. J. Ch. 126. *Distd. Kemp v. Sober* (1851), 1 *Sim. N. S.* 517; *Western v. Macdermott* (1866), 2 *Ch. App.* 72. *Apld. Peck v. Matthews* (1867), L. R. 3 *Eq.* 515. *Distd. Kilby v. Haviland* (1871), 24 L. T. 353. *Consd. Doherty v. Allman* (1878), 3 *App. Cas.* 709. *Expld. Sayers v. Collyer* (1884), 28 *Ch. D.* 103. *Distd. Brown v. Inskip* (1884), *Cab. & El.* 231; *Knight v. Simmonds*, [1896] 2 *Ch.* 294. *Expld. Osborne v. Bradley*, [1903] 2 *Ch.* 446. *Refd. Keppell v. Bailey* (1834), 2 *My. & K.* 517; *Squire v. Campbell* (1836), 1 *My. & Cr.* 459; *Dietrichsen v. Cabburn* (1846), 7 L. T. O. S. 445; *Kirk v. Bromley Union* (1846), 16 L. J. Ch. 114; *Tulk v. Moxhay* (1848), 11 *Beav.* 571; *Patching v. Dubbins* (1853), *Kay*, 1; *Child v. Douglas* (1854), 23 L. T. O. S. 140; *Child v. Douglas* (1856), 2 *Jur. N. S.* 950; *Johnstone v. Hall* (1856), 2 *K. & J.* 414; *Wilson v. Hart* (1865), 2 *Hem. & M.* 551; *Mitchell v. Steward* (1866), L. R. 1 *Eq.* 541; *Bowes v. Law* (1870), L. R. 9 *Eq.* 636; *German v. Chapman* (1877), 7 *Ch. D.* 271; *Renals v. Cowlishaw* (1879), 11 *Ch. D.* 866; *Mackenzie v. Childers* (1889), 43 *Ch. D.* 265; *Meredith v. Wilson* (1893), 69 L. T. 336; *Sobey v. Sainsbury*, [1913] 2 *Ch.* 513. *Mentd. A.-G. v. Clapham* (1853), 10 *Hare*, 540; *Ford v. Tynte* (1865), 34 L. J. Ch. 452; *Alliance Economic Investment Co. v. Berton* (1923), 92 L. J. K. B. 750.

389. ——— Forfeiture of lease.]—Leasehold property was sold by auction on June 8, 1858, with a condition for completion on July 20 following.

4. Where performance would involve purchaser in lawsuit to render property fit for his purpose.]—*IMPERIAL BANK OF CANADA v. METCALFE* (1886), 11 O. R. 167.—CAN.

PART III. SECT. 6, SUB-SECT. 2.

B. (b).

r. Hardship arising from depreciation in value of subject-matter.]—*COTTON v. CORBY* (1859), 7 *Gr.* 50;

affd. (1860), 2 *Gr.* 98.—CAN.

t. Hardship arising from delay in granting possession.]—*MAJOR v. SHEPHERD* (1909), 18 *Man. L. R.* 501; 10 *W. L. R.* 293.—CAN.

The title was accepted by the purchaser on July 16, but owing to disputes as to the value of the fixtures the meeting for completion did not take place till Aug. 26. The purchaser then discovered that the vendors had renewed the insurance, which expired on June 24, for one month only, so that the property became uninsured on July 24, & thereupon became forfeited to the lessors. On Sept. 7, the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, & obtained a waiver of the forfeiture from the lessors, & the purchaser refusing to complete, they filed a bill for specific performance:—*Held*: although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the ct. would not decree specific performance, & the bill was dismissed, but without costs.—*DOWSON v. SOLOMON* (1859), 1 Drew. & Sm. 1; 29 L. J. Ch. 129; 1 L. T. 246; 6 Jur. N. S. 33; 8 W. R. 123; 62 E. R. 278.

Annotation:—*Reid*. *Newman v. Maxwell* (1899), 80 L. T. 681.

390. Hardship arising from conduct of defendant—Company disabling themselves from taking land.]—*Qu.*: whether a ct. of equity will decree the specific performance of a contract by a railway co. to purchase land, if the co. should afterwards so exercise their powers as to disable themselves from taking the same land; & whether the vendor has any & what remedy in such a case.

The ordinary rule is where possession has been taken by a purchaser, & he is in possession, not to permit him to retain possession & at the same time keep back the purchase-money (*SHADWELL, V.-C.*).—*TOMLINSON v. MANCHESTER & BIRMINGHAM RY. CO.* (1840), 2 Ry. & Can. Cas. 104.

— **Abandonment of undertaking.]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 229, Nos. 1165–1169.

Hardship arising through subsequent legislation—Sale of burial ground.]—*See* BURIALS, Vol. VII., p. 555, No. 318.

Hardship arising from changes in rights of parties—Family arrangements.]—*See* FAMILY ARRANGEMENTS, Vol. XXIV., p. 952, Nos. 52–54.

C. Specific Performance Granted on Terms.

391. Agreement for lease—Direction as to liability for repairs.]—Bill for a specific performance of articles for a lease of lands in Norfolk, where by custom the landlords repair; but the rent reserved on this lease appearing to be under the value, decreed the tenant should covenant to repair.—*BURRELL v. HARRISON* (1691), 2 Vern. 231; 23 E. R. 749; *sub nom.* *BURWELL v. HARRISON*, Prec. Ch. 25.

392. Contract for sale of land—Land subject to covenants—Provision for purchaser to be bound by covenants.]—A vendor of freehold property who, on his own purchase of it, had entered into a covenant to observe the covenants entered into with a former vendor, & which prohibited building on the land, put it up for sale pursuant to particulars & conditions, noticing the existence of the covenant but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance filed by the purchaser:—*Held*: pltf. was not entitled to a

conveyance unless on the terms of giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of pltf., his heirs, appointees or assigns.

It would be unjustifiable to enforce the contract without protecting the vendor from the consequences of the covenant into which he entered with B. previous vendor (*Knight Bruce, V.-C.*).—*MOXHAY v. Inderwick* (1847), 1 De G. & Sm. 708; 63 E. R. 1261.

Annotation.—*Apld.* *Lukey v. Higgs* (1855), 3 Eq. Rep. 510.

393. ———.]—Contract for purchase of lands, which afterwards proved to be subject to covenants, of which there was no notice on the face of the contract. Specific performance of such a contract refused as against the purchaser, on the ground that he could not be compelled to enter into similar covenants, or to have them recited in the deed of conveyance, but that he might elect either to rescind the contract or to accept a conveyance with the covenants.—*LUKEY v. HIGGS* (1855), 3 Eq. Rep. 510; 24 L. J. Ch. 495; 25 L. T. O. S. 7; 1 Jur. N. S. 200; 3 W. R. 306.

Compare SALE OF LAND, Vol. XL., p. 285, Nos. 2463–2466.

Specific performance with compensation.]—*See* Part V., Sect. 6, sub-sect. 8, *post*.

SUB-SECT. 3.—INJURY TO THIRD PARTY.

394. Whether ground for refusing specific performance—General rule.]—The interest, which a third party may have against the specific performance of a contract, may preclude the execution of it, as between trustee & *cestui que trust*; as where an insolvent tenant made over his lease to another; who treated for a renewal under a secret agreement in trust for the original tenant.—*FEATHERSTONHAUGH v. FENWICK* (1810), 17 Ves. 298; 34 E. R. 115.

Annotations:—*Mentd.* *Rugden v. Pierce* (1822), 6 Madd. 353; *Cook v. Collingridge* (1823), Jac. 607; *Heath v. Sanson* (1832), 4 B. & Ad. 172; *Portlock v. Gardner* (1842), 11 L. J. Ch. 313; *Willet v. Blanford* (1842), 1 Hare, 253; *Blisset v. Daniel* (1853), 10 Hare, 493; *Darby v. Darby* (1856), 3 Drew. 495; *Wedderburn v. Wedderburn* (1856), 22 Beav. 84; *Cassels v. Stewart* (1881), 11 App. Cas. 64; *Neilson v. Mossend Iron Co.* (1886), 11 App. Cas. 298; *Re Biss, Biss v. Biss*, [1903] 2 Ch. 10; *Stevenson v. Akt. Fur Cartonnagen Industrie*, [1918] A. C. 239.

395. ———.]—E. D. was beneficially entitled, under his marriage settlement, to an estate for his life, & to the ultimate reversion in fee in default of issue male; & the trustees of the settlement had a power to sell at the request & by the direction of the tenant for life. There was issue of the marriage. E. D. acting, as absolute owner, entered into a contract by correspondence to sell the estate to T., & the trustees afterwards refused to concur in the sale:—*Held*: (1) on a bill for specific performance, there was a binding contract between the vendor & purchaser, & the vendor was bound to perform it, if he was able; (2) the vendor ought not to be decreed to request or direct the trustees to execute a conveyance, unless the trustees ought to comply with the request; (3) the trustees had a discretion, under the power of sale, which the ct. had no power or jurisdiction to control; (4) the purchaser was not

PART III. SECT. 6, SUB-SECT. 3.

a. Whether grounds for refusing specific performance—Where performance would involve breach of contract—Subsequent purchaser not before court.]—*Held*: specific performance of an accepted option to sell certain lands, contained in an informal lease, could not be granted a purchaser, where the

property had been subsequently sold & the buyer was not before the ct.—*BENNETT v. STODGELL* (1914), 26 O. W. R. 188; 6 O. W. N. 163; 17 D. L. R. 835.—*CAN.*

b. ———.]—Specific performance of a contract of purchase & sale will not be granted where the subject matter has been disposed of

to a *bona fide* purchaser.—*SHAKINOVSKY v. LAWSON*, [1904] T. S. 326.—*S. AF.*

c. ———.]—*Prior contract.*—*CASEY v. JORDAN* (1856), 5 Gr. 467.—*CAN.*

d. ———.]—A purchase of the legal estate for value, without notice, is not a defence to a suit for specific performance of a contract,

Sect. 6.—Oppressiveness of contract: Sub-sect. 3 & 4, A.]

entitled, in such a case, to have the contract performed to the extent of the vendor's interest, by a conveyance of his life estate & his ultimate reversion.

I apprehend that, upon the general principle that the ct. will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, the ct., before directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor (LORD LANGDALE, M.R.).—THOMAS v. DERING (1837), 1 Keen, 729; 6 L. J. Ch. 267; 1 Jur. 211, 427; 48 E. R. 488.

Annotations.—As to (1) **Refd.** Ridgway v. Wharton (1857), 6 H. L. Cas. 238; Chinnock v. Ely (1865), 4 De G. J. & Sm 638; Rossiter v. Miller (1878), 3 App. Cas. 1124; Hawkesworth v. Chaffey (1886), 54 L. T. 72; Chillingworth v. Esche (1923), 129 L. T. 808. As to (4) **Consd.** Stewart v. Kennedy (1890), 15 App. Cas. 75. **Refd.** Graham v. Oliver (1840), 3 Beav. 124; Wythes v. Lee (1855), 26 L. T. O. S. 192; Wilson v. Williams (1857), 3 Jur. N. S. 810; Barnes v. Wood (1869), L. R. 8 Eq. 424. **Generally, Refd.** Bell v. Barchard (1852), 16 Beav. 8; Lumley v. Ravenscroft, [1895] 1 Q. B. 683; Rudd v. Lascelles, [1900] 1 Ch. 815.

396. — Injury to remainderman—Sale by tenant for life.]—THOMAS v. DERING, No. 395, *ante*.

397. — Where performance would involve breach of contract—Subsequent contract—Sale of land.]—Where a contract is fairly & in good faith entered into, it is not competent for one of the contracting parties, or his confidential agent, to enter into another contract which shall have the effect of depriving the other party to the original contract of a benefit under it.

It was proposed by a co. to carry a railway through two contiguous estates belonging to A. & B. A., who had been previously in treaty with B. for his property, opposed the line, but eventually withdrew his opposition on an agreement between himself & the co.'s solr., that if the co. purchased a certain part of B.'s property they would sell it to A. This agreement was subsequently executed by the co., but pending its execution, the co.'s solr. purchased B.'s property, as he alleged, on his own account, & after selling a part of it to the co., for their purposes, retained the residue. On the completion of the line, the co. agreed to sell a portion of that residue to a second railway co. Thereupon A. filed a bill against the first co. & their solr. for specific performance of his agreement:—**Held:** he was entitled to a decree & to the execution of a proper conveyance of the property.—HENDERSON v. ROY (1867), 17 L. T. 435.

398. — Prior contract—Covenant not to assign.]—The ct. will not compel deft. specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person. The lessee of three acres of land agreed in Jan. 1874, to let 1 acre to pltf. for the whole of the residue to his term, & he agreed also to sell to pltf. his interest in the whole three acres at any time within five years from the date of the agreement. The lease contained a covenant by the lessee not to assign the property, or to part with the possession of it, or any part of it, without the written consent of

the lessor. Pltf. was not, in fact, aware of this covenant. He was let into possession of the 1 acre & he laid out money upon it, & also upon adjoining property of his own, with the view of occupying the two together. The lessor was aware of this expenditure. In Oct. 1877, the lessee, without pltf.'s knowledge, surrendered the lease to the lessor, in exchange for a new lease for a longer term of the 3 acres, together with other property. The new lease contained a similar covenant by the lessee not to assign, etc., without licence. In Nov. 1877, pltf. gave the lessee notice of his desire to exercise his option to purchase his interest under the original lease in the 3 acres. The lessee declined to perform his agreement, on the ground that the lessor refused to give his licence to an assignment. Pltf. brought the action against the lessee & the lessor, claiming specific performance of the agreement by the lessee, & to compel the lessor to give his licence, on the ground, (*inter alia*), that he had acquiesced in pltf.'s expenditure, knowing that he was acting in the mistaken belief that the lessee was able to assign the property to him. It appeared that the lessor was not, when pltf.'s expenditure was incurred, aware of the existence of the lessee's covenant not to assign without licence:—**Held:** the lessee could not be compelled to perform his agreement, inasmuch as his doing so would involve a breach of his prior covenant not to assign without licence, for that, as pltf. was seeking to treat the original lease as still subsisting for one purpose he must treat the covenant not to assign contained in it as still subsisting.—WILLMOTT v. BARBER (1880), 15 Ch. D. 96; 49 L. J. Ch. 792; 43 L. T. 95; 28 W. R. 911; *on appeal*, 17 Ch. D. 772, C. A.

Annotations:—**Appld.** Manchester Ship Canal Co. v. Manchester Racecourse Co., [1901] 2 Ch. 37. **Refd.** Hoare v. Kingsbury U. C., [1912] 2 Ch. 452; Morrell v. Studd & Millington, [1913] 2 Ch. 648. **Mentd.** Middleweek v. Dearsley (1881), 50 L. J. Ch. 777; Russell v. Watts (1883), 25 Ch. D. 559; Preston Corpn. v. Fullwood L. B. (1885), 53 L. T. 718; *Re* Gorton, Dowse v. Gorton (1889), 60 L. T. 305; Roberts v. Jones, Willey v. G. N. Rty., [1891] 2 Q. B. 194; Bradford Corpn. v. Pickles, [1894] 3 Ch. 53; Civil Service Musical Instrument Assn. v. Whiteman (1899), 68 L. J. Ch. 184; Marriott v. Reid (1900), 82 L. T. 369; King v. Bird (1909), 100 L. T. 478; *Re* Chaplin, Milne, Grenfell (1915), 31 T. L. R. 279; Jones (Holloway) v. Woodhouse, [1923] 1 K. B. 117.

399. — Right of first refusal.]—An agreement between a racecourse co. & a canal co. contained a clause that if the racecourse should be at any time proposed to be used for dock purposes, the racecourse co. should give the canal co. the "first refusal" thereof:—**Held:** (1) "first refusal" imported either a fair & reasonable offer to sell to the canal co., or that the price at which the racecourse co. were to give the canal co., the "first refusal" was a price which the racecourse co. would accept from other wouldbe buyers in the event of the refusal of the canal co. to buy at that price: *i.e.*, that the canal co. had a "right of pre-emption"; & an offer to the canal co. at an extravagant price which the racecourse co. did not reasonably expect would be given either by the canal co. or any other wouldbe buyer was not giving a "first refusal" within the meaning of the clause; (2) the clause did not create an interest in land so as to entitle the canal co., on that ground to enforce their right of pre-emption as against an intending purchaser with notice of the right; but that the canal co. were entitled to enforce their right as against the racecourse co. & the intending purchaser, on the ground that the contract to give

relating to the lands, contained in a prior duly registered instrument.—**v. NORBURY (EARL)** (1846), 9 L. Eq. R. 521; 3 Jo. & Lat 267.—**IR.**

e. — — — — —.]—The ct. will not compel a promisor to perform an agreement when the result of so doing will be to force him to commit

a breach of a prior subsisting agreement.—**FICK v. WOOLCOTT & OHLSOHN'S CAPE BREWERIES, LTD.**, [1911] App. D. 211.—**S. AF.**

the canal co. the "first refusal" involved a negative not to part with the racecourse to any one else without giving them that "first refusal."

It seems however, from the decision in *Willmott v. Barber*, No. 398, *ante*, that the Trafford Park co., [the racecourse co.] could not obtain a decree for specific performance of a contract for sale & purchase of land, if that sale would be a breach of a prior contract with a third person (VAUGHAN WILLIAMS, L.J.).—MANCHESTER SHIP CANAL CO. v. MANCHESTER RACECOURSE CO. [1901] 2 Ch. 37 70 L. J. Ch. 468; 84 L. T. 436 49 W. R. 418 17 T. L. R. 410; 45 Sol. Jo. 394, C. A.

Annotations:—As to (1) *Refd.* Ryan v. Thomas (1911), 55 Sol. Jo. 364. *Generally, Mentd.* Crossfield v. Manchester Ship Canal Co. (1904), 73 L. J. Ch. 345; *Re* Wilton's S. E., [1907] 1 Ch. 50; Talbot v. Scarisbrick (1908), 77 L. J. Ch. 436; Sharpe v. Durrant (1911), 55 Sol. Jo. 423.

400. — Inconvenience to public—Interference with traffic.—Pltf., a landowner, had withdrawn his opposition to a railway bill in consideration of the co. agreeing to make a road & an approach in a particular manner. The co. altered the level of their line, & varied the course & inclination of the road. The bill was filed pending the works, & a motion for injunction had been ordered to stand to the hearing, on the co. undertaking to abide by the direction of the ct. as to altering their works. The railway had since been opened for traffic:—*Held*: pltf. was entitled to specific performance & the co. could not set up the inconvenience to the public by the interference with the traffic as a reason for not performing their agreement.—RAPHAEL v. THAMES VALLEY RY. CO. (1867), 2 Ch. App. 147 36 L. J. Ch. 209; 16 L. T. 1; 31 J. P. 343; 15 W. R. 322, L. C.

Annotations:—*Mentd.* *Re* Cambrian Ry. (1868), 16 W. R. 316; Hood v. N. E. Ry. (1870), 19 W. R. 266; Greenhill v. Isle of Wight (Newport Junction) Ry. (1871), 23 L. T. 885; Dowling v. Pontypool, Caerleon & Newport Ry. (1874), L. R. 18 Eq. 711.

401. — Injury to public interest—Contract by Improvement Commissioners.—These [Statutory Improvement] Comrs. are not invested with judicial or even quasi-judicial authority. They are to act according to the best of their judgment for the promotion of the objects prescribed; & in the performance of their duty they may enter into reasonable negotiations & contracts, which will bind them, & hold good permanently, unless subsequently displaced under the statutory provisions.

Where the Comrs. had accepted an offer made to arrest litigation; where the acceptance was carried by only fourteen votes against thirteen; & where they afterwards repudiated the contract as likely to prove injurious to the public interest, the House decreed a specific performance, on the ground that the party with whom the agreement was made had relied & had acted upon it, & that they were bound by it.—SMEATON v. ST. ANDREWS MAGISTRATES (1871), L. R. 2 Sc. & Div. 107, H. L.

402. — Injury to creditors—Giving secret advantage to one.—A banker holding bills & acceptances as a security for advances made to a customer, took a guarantee from the brother of the customer that the loss of the bank should not exceed £2,000. This transaction took place after the customer had commenced proceedings for the liquidation of his affairs, & unknown to his other creditors, with a view to prevent the bank from opposing a composition:—*Held*: upon a bill filed by the banker to enforce performance of the agree-

ment, the arrangement which would have the effect of giving one creditor a secret advantage over the others, could not be sustained, & the bill was dismissed with costs.—MCKEWAN v. SANDERSON (1875), L. R. 20 Eq. 65; 44 L. J. Ch. 447; 32 L. T. 385; 23 W. R. 607.

403. — Inconvenience to co-tenant in common.—An agreement by one of two tenants in common of land to make a lease of the minerals contained in his share can be enforced by specific performance.

Inconvenience caused by the other tenant in common having granted a lease of the minerals contained in his share to another person is not sufficient ground for the ct. to refuse specific performance in such a case.—HEXTER v. PEARCE, [1900] 1 Ch. 341; 69 L. J. Ch. 146; 82 L. T. 109; 48 W. R. 330; 16 T. L. R. 94; 41 Sol. Jo. 133.

Annotation:—*Refd.* Rudd v. Lascelles, [1900] 1 Ch. 815.

—**Sale by grantor of voluntary settlement.**—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 247, 248, Nos. 743-747.

SUB-SECT. 4.—INADEQUATE OR EXCESSIVE CONSIDERATION.

A. In General.

See CONTRACT, Vol. XII., pp. 204-206, Nos. 1610-1658; FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 183, 266-268, Nos. 245-248, 906-924.

404. Whether ground for refusing specific performance.—UNDERWOOD v. HITCHCOX, No. 226, *ante*.

405. ——Inadequacy of value is not in itself sufficient to set aside a contract.

I never can agree that inadequacy of consideration is in itself a principle upon which a party may be relieved from a contract which he has wittingly & willingly entered into. It may, indeed, be strong evidence of fraud, when the transaction is such as to be inconsistent with the sober manner of a man's conducting his affairs (EYRE, C.B.).—GRIFFITH v. SPRATLEY (1787), 1 Cox, Eq. Cas. 383; 2 Bro. C. C. 179, n.; 29 E. R. 1213.

Annotations:—*Consd.* Day v. Newman (1788), 2 Cox, Eq. Cas. 77. *Refd.* Copis v. Middleton (1817), 2 Madd. 410.

406. ——TILLY v. PEERS (1791), cited in 10 Ves. at p. 301; 32 E. R. 800.

407. ——An insolvent debtor is not a necessary party to a bill by a purchaser of his interest in stock, against his assignee. But if it has been sold for an apparently under-price, the ct. will inquire into the real value, previous to decreeing a specific performance.—COLLET v. WOLLASTON (1791), 3 Bro. C. C. 228; 29 E. R. 504.

408. ——Purchase of a contingent reversionary interest set aside chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of the vendor, whose life was a bad one, & was better known to the purchaser than to the vendor to be such.—DAVIES v. COOPER, COOPER v. JACKSON (1840), 5 My. & Cr. 270; 41 E. R. 373, L. C.

Annotation:—*Distd.* Lord v. Jeffkins (1865), 35 Beav. 7.

409. — Necessity for evidence of fraud.—Contract, executed, though the consideration was inadequate; not amounting to fraud; but with-

PART III. SECT. 6, SUB-SECT. 4.—A.

404.1. Whether ground for refusing specific performance.—A contract to be specifically performed must be equal, fair & certain in its terms, &

founded on good consideration.—EARLEY v. MCGILL (1861), 11 Gr. 75.—CAN.

1. *Waiver of defence.*—Where, in an action for specific performance it

appears that the vendor, after deliberation, had demanded of the purchaser that he carry out the contract in question, he, the vendor, cannot then plead inadequacy of con-

Sect. 6.—Oppressiveness of contract: Sub-sect. 4, A., B. & C. Sect. 7: Sub-sect. 1, A.]

out costs.—**BURROWES v. LOCK** (1805), [1891] 3 Ch. 94, n.; 10 Ves. 470; 32 E. R. 927.

Annotations:—Consd. Price v. Macaulay (1852), 2 De G. M. & G. 339; Slim v. Croucher (1860), 1 De G. F. & J. 518; Low v. Bouverie, [1891] 3 Ch. 82. *Refd.* Gibson v. D'Este (1843), 2 Y. & C. Cas. 542; Ingram v. Thorp (1848), 7 Hare, 67; Pulsford v. Richards (1853), 17 Beav. 87; Stephens v. Venables (No. 2) (1862), 31 Beav. 124; Re Ward (1862), 31 Beav. 1; Re Overend, Gurney, *Ex p.* Oakes & Peck (1867), L. R. 3 Eq. 576; Ramshire v. Bolton (1869), L. R. 8 Eq. 294; Hill v. Lane (1870), L. R. 11 Eq. 215; Peck v. Gurney (1873), L. R. 6 H. L. 377; Eaglesfield v. Londonderry (1876), 4 Ch. D. 693; Brownlie v. Campbell (1880), 5 App. Cas. 925; Mathias v. Yetts (1882), 46 L. T. 497; Re Dangar's Trusts (1889), 58 L. J. Ch. 315; Derry v. Peck (1889), 14 App. Cas. 337; L. & N. W. Ry. v. Boulton (1890), 63 L. T. 727; Whittington v. Seale-Hayne (1900), 82 L. T. 49; Exploring Land & Minerals Co. v. Kolekman (1905), 94 L. T. 234; Nocton v. Ashburton, [1914] A. C. 932. *Mentd.* Lake v. Brutton (1856), 8 De G. M. & G. 440; Robson v. Devon (1857), 5 W. R. 724; Re Tichener (1865), 35 Beav. 317; Lloyd v. Banks (1867), L. R. 4 Eq. 222; Thisdou v. Tindall (1891), 40 W. R. 141; Balkis Consolidated Co. v. Tomkinson (1893), 42 W. R. 204; Williams v. Pluckney (1897), 67 L. J. Ch. 34.

410. ———.]—Inadequacy of price, unless amounting in itself to conclusive & decisive evidence of fraud is not itself a sufficient ground for refusing a specific performance.—**COLES v. TRE-COTHICK** (1804), 9 Ves. 234; 1 Smith, K. B. 233; 32 E. R. 592, L. C.

Annotations:—Consd. Copis v. Middleton (1817), 2 Madd. 410. *Refd.* Peacock v. Evans, Evans v. Peacock (1809), 16 Ves. 512; Kenney v. Wexham (1822), 6 Madd. 355; Strickland v. Turner (1852), 7 Exch. 208; Tottenham v. Green (1863), 32 L. J. Ch. 201; Coles v. Bristowe (1868), L. R. 6 Eq. 149; Plowright v. Lambert (1885), 52 L. T. 646. *Mentd.* Randall v. Errington (1805), 10 Ves. 123; Blagden v. Bradbear (1806), 12 Ves. 466; Morse v. Royal (1806), 12 Ves. 355; Buckmaster v. Harrop (1807), 13 Ves. 456; Emmerson v. Heelis (1809), 2 Taunt. 38; Kemeys v. Proctor (1813), 3 Ves. & B. 57; Henderson v. Barnwell (1827), 1 Y. & J. 387; Gosbell v. Archer (1835), 2 Ad. & El. 500; Graham v. Musson (1839), 7 Scott, 769; Re Robinson & Farrand, *Ex p.* Holdsworth (1841), 1 Mont. D. & De G. 475; Carter v. Palmer (1842), 8 Cl. & Fin. 657; Seal v. Claridge (1881), 7 Q. B. D. 516; Luddy's Trustee v. Peard (1886), 33 Ch. D. 500; Potter v. Peters (1895), 64 L. J. Ch. 357; Re Boles & British Land Co's Contract (1901), 71 L. J. Ch. 130.

411. ———.]—**CALLAGHAN v. CALLAGHAN**, No. 248, *ante*.

412. ———.]—Even in ordinary cases & *a fortiori* in cases of sales by public auction mere inadequacy of consideration is not a ground even for refusing a claim for specific performance of an unexecuted contract. . . . The only exception which I believe can be stated is, where the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser (**WIGRAM, V.-C.**).—**BORELL v. DANN** (1843), 2 Hare, 440; 67 E. R. 181.

413. ———.]—**Parties on unequal footing.**—The ct. will enforce specific performance of a contract to purchase chattels, if damages will not be an adequate compensation.

But where the contract, although not actually fraudulent, was one in which the parties were not on an equal footing, pltf. knowing, & the purchaser being ignorant, of the value of the thing sold, & the price appeared to be inadequate, the ct. refused relief.—**FALCKE v. GRAY** (1859), 4 Drew. 651; 29 L. J. Ch. 28; 33 L. T. O. S. 297; 5 Jur. N. S. 645; 7 W. R. 535; 62 E. R. 250.

Annotation:—Consd. Macdonald v. Eyles, [1921] 1 Ch. 631.

sideration or unfair dealing on the part of the purchaser when the contract was entered into.—**BAXTER v. BRADFORD** (1913), 18 B. C. R. 369.—**CAN.**

PART III. SECT. 6, SUB-SECT. 4.—B.

414 i. Price inadequate.—**FOXWELL v. KENNEDY** (1912), 22 O. W. R. 21;

3 O. W. N. 1225; 3 D. L. R. 703.—**CAN.**

g. ———.]—*Sale in consideration of payment of land tax & perfection of title—Contract between brother & sister.*—**PARK v. DUNN**, [1916] N. Z. L. R. 761.—**N.Z.**

426 i. Price excessive.—**JOON v. HENSCHALL** (Sask.) (1911), 18 W. L. R.

B. Contract for Sale of Land.

414. Price inadequate.—Mere inadequacy of price where it cannot be used as evidence of fraud is not of itself sufficient to prevent the ct. from decreeing a specific performance of an agreement for the purchase of land.—**COLLIER v. BROWN** (1788), 1 Cox, Eq. Cas. 428; 29 E. R. 1234.

415. ———.]—**WESTERN v. RUSSELL**, No. 124, *ante*.

416. ———.]—The ct. may not perhaps enforce the specific performance of a contract for the sale of an estate where the consideration is uncertain, as a life annuity, if such consideration be greatly inadequate; but a difference of 7 or 8 per cent. is not such inadequacy.—**BOWLER v. COOPER** (1843), 2 Hare, 408; 11 L. J. Ch. 287; 6 Jur. 681; 67 E. R. 168.

417. ———.]—**Sale by public auction.**—*Ex p.* **LATHAM** (1803), 7 Ves. 35, n.; 32 E. R. 15, L. C.

Annotation:—Consd. Borell v. Dann (1843), 2 Hare, 410.

418. ———.]—**WHITE v. DAMON**, No. 12, *ante*.

419. ———.]—**BORELL v. DANN**, No. 412, *ante*.

420. ———.]—**Through negligence of agent.**—**MORTLOCK v. BULLER**, No. 19, *ante*.

421. ———.]—**Sale by trustees—Mistake.**—*Qu.*: trustees not to be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration.—**BRIDGER v. RICE** (1819), 1 Jac. & W. 74; 37 E. R. 303.

Annotation:—Refd. Shrewsbury & Birmingham Ry. v. L. & N. W. Ry. (1853), 4 De G. M. & G. 115.

422. ———.]—**Sale by expectant heir.**—Inadequacy of price is alone a sufficient ground of defence to a bill in equity by a purchaser, for specific performance, where the party contracting to sell was an expectant heir.—**RYLE v. BROWN** (1824), 13 Price, 758; 147 E. R. 1145; *sub nom.* **RYLE v. SWINDELLS**, M'Cle. 519.

423. ———.]—The rule, that the purchaser of a reversion must prove that he gave a full price, has so long been considered as settled, that it can be altered only by the Ct. of Appeal.—**HINCKSMAN v. SMITH**, **SMITH v. HINCKSMAN** (1827), 3 Russ. 433; 38 E. R. 638.

Annotation:—Consd. Newton v. Hunt (1833), 5 Sim. 511.

— — — — —.]—*See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., pp. 269-279, Nos. 933-1019.

424. ———.]—**Contract between solicitor & client.**—Solr., having agreed to purchase of his client a certain property, filed a bill for specific performance:—*Held*: under the circumstance of the case the burden of supporting the contract lay on pltf. & whatever the rule might be in other cases, this was one in which demonstration of the full value having been given was part of the burden thrown on him who supported the contract & he not having proved that full value was given, the contract could not be enforced.—**THOMAS v. PHILLIPPS** (1846), 8 L. T. O. S. 272; 11 Jur. 80.

425. ———.]—**Sale by assignees of bankrupt.**—**ATTENBOROUGH v. EDWARDS**, No. 508, *post*.

— — — — —.]—**Price fixed by third person.**—*See Sub-sect. 5, C., post.*

426. Price excessive.—**KIEN v. STUKELEY** (1722), 1 Bro. Parl. Cas. 191; 1 E. R. 506; *sub*

191.—**CAN.**

h. ———.]—*Purchase for special use—Failure of special purpose.*—**BLACKWOOD v. PAUL** (1851), 4 Gr. 550.—**CAN.**

k. *Agreement to convey land in consideration of house being built thereon.*—**LORANGER v. HAINES** (1921), 64 D. L. R. 361; 50 O. L. R. 268.—**CAN.**

nom. KEEN v. STUCKLEY, 2 Eq. Cas. Abr. 19 ; Gilb. Ch. 155, H. L.

Annotation :—**Refd.** Falccke v. Gray (1850), 4 Drew. 651.

427. —.—Where a written agreement is entered into for the purchase of an estate at a price far beyond its value, but without any circumstances of fraud or surprise, the ct. will not decree a specific performance of such a contract, but on the other hand will not rescind it.—*DAY v. NEWMAN* (1788), 2 Cox, Eq. Cas. 77 ; 30 E. R. 36.

Annotations:—**Consd.** Bower v. Cooper (1843), 2 Hare, 408. **Apd.** Falcke v. Gray (1859), 4 Drew. 651. **Reid.** Hodder v. Pugh (1864), 10 Jur. N. S. 534. **Mentd.** Dodd v. Lydall, Lydall v. Dodd (1842), 1 Hare, 333.

428. —.]—Where a purchaser, who was a solr., after viewing a farm, & being informed of the rent at which it was let, agreed to buy at £5,000 :—*Held* : (1) the difference between this price & £3,500, which the ct. considered to be the value of the property, was not so great as to shock the conscience, & thus constitute of itself a defence, on the ground of exorbitancy, to a suit of the vendor for a specific performance ; (2) the omission on the part of the vendor to inform the purchaser of the result of a late valuation, or of the tenant having complained of the rent being excessive, & of the full amount not having been exacted, did not constitute a defence to such a suit ; (3) the refusal by deft. to complete having arisen from a cause other than that of insufficiency of title, he ought to pay the general costs of the suit, although the original decree directed an inquiry when the title was first shown, & the report found it to have been first shown in the master's office.—ABBOTT v. SWORDER (1852), 4 De G. & Sm. 448 ; 22 L. J. Ch. 235 ; 19 L. T. O. S. 311 ; 61 E. R. 907 ; *affd.*, 4 De G. & Sm. p. 460, L. C.

Annotation :— **Mentd.** *Abbott v. Calton* (1853), 22 L. J. Ch. 936.

429. ———.] — LEE v. DAWSON, No. 355, *ante*.

430. — Sale by court.—Purchaser before a master submitting to forfeit his deposit, not bound to proceed in the purchase.

As upon a contract betwixt party & party, the contractor would not be decreed to pay an unreasonable price for an estate, so neither ought the ct. to be partial to itself & do more upon a contract made with itself, or carry that further, than it would a contract betwixt party & party (*per* CUR.).—*SAVILLE v. SAVILLE* (1721), 1 P. Wms. 745; 2 Eq. Cas. Abr. 679; 24 E. R. 596, 1. C.

Annotation — **Refd.** *Palmer v. Temple* (1839), 9 Ad. & El. 508.

431. — **Unconscionable bargain.**] — **SHEPHERD v. BLANK** (1894), 38 Sol. Jo. 631.

— Price fixed by third person.]—See Subsect. 5, C., *post*.

C. Consideration Fixed by Third Persons.

432. Price to be fixed by arbitration.—Though a person may agree to sell at a price to be fixed

PART III. SECT. 7, SUB-SECT. 1.—A.

436 i. *Whether defence to action for specific performance.*—In bargains between vendor & purchaser, any representations by the vendor, relied on by the purchaser, ought properly to be introduced into the contract by way of warranty. If, however, this be not done & the representation amount to a wilful falsehood by the vendor, the deceit will release the purchaser from the bargain; but to enable the purchaser so to take advantage of the falsehood, he must show that at the time of the bargain, he made the vendor understand definitely that he relied upon the representation & would hold him to it.—**BRADSHAW v. GOER** (1879), 5 V. L. R. (Eq.) 26.—**AUS.**

436 ii. — — — — —) ~ Pltfr. brought suit to

by arbn., & the award can be impeached upon the grounds affecting all awards, as fraud or gross mistake, yet, upon such an agreement, where some of the persons to be bound were married women, of whom also one had not executed, the ct. refused a specific performance.—*EMERY v. WASE* (1801), 5 Ves. 846 ; 31 E. R. 889 ; *affd.* (1803), 8 Ves. 504, L. C.

Annotations :- **Apprvd.** *Mortlock v. Buller* (1801), 10 Ves. 292. **Apid.** *Gollier v. Mason* (1858), 25 Beav. 200. **Refd.** *Gourlay v. Somerset* (1815), 19 Ves. 429; *Howell v. George* (1815), 1 Madd. 1; *White v. Cuddon* (1842), 8 Cl. & Fin. 766. *Castle v. Wilkinson* (1870), 5 Ch. App. 534. **Mentd.** *Smyth v. Smyth* (1817), 2 Madd. 75; *Anderson v. Wallace* (1835), 3 Cl. & Fin. 26; *Proctor v. Williams* (1860), 8 C. B. N. S. 386.

433. Price to be fixed by valuation—Inadequate price fixed.]—Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the ct. sees reason to believe, that the price, subsequently fixed by these persons, is considerably below the real value of the property.—**PARKEN v. WHITBY** (1823), Turn. & R. 366; 37 E. R. 1142.

Annotations — **Reid.** Bower v. Cooper (1843), 2 Hare, 408.
Mentd. Handley & Jones v. Edwards (1838), 1 Curt. 722.

434. --- --. A. entered into a contract with B. for the sale of certain property to him at a price to be fixed by two valuers, named in the contract, who afterwards valued the property at an inadequate price : —*Held* : nevertheless, B. was entitled to a decree for specific performance, there being no proof of fraud or collusion on the part of the valuers.—*WEEKES v. GALLARD* (1869), 21 L. T. 655 ; 18 W. R. 331.

435. — **Excessive price fixed.**]—Deft. agreed to purchase a property at a valuation to be made by A. The ct., though it considered A.'s valuation very high, " & perhaps exorbitant," decreed specific performance, there appearing neither "fraud, mistake or miscarriage."—*COLLIER v. MASON* (1858), 25 Beav. 200 ; 53 E. R. 613.

SECT. 7.- MISREPRESENTATION, FRAUD AND MISTAKE.

SUB-SECT. 1.—MISREPRESENTATION AND FRAUD.

A. In General.

See, generally, MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 6 et seq.; SALE OF LAND, Vol. XL., pp. 42-51, 58-61 et seq.

436. Whether defence to action for specific performance.—**PHILLIPS v. BUCKS (DUKE)** (1683), 1 Vern. 227; 23 E. R. 432.

Annotations:—**Refd.** *Iruham v. Child* (1781), 1 Bro. C. C. 92; *Bonnett v. Sadler* (1808), 14 Ves. 526. **Mentd.** *Downes v. Thomas* (1802), 7 Ves. 206.

437. ———.]—**YOUNG v. CLERK**, No. 328, *ante*.

438. ———. —HOWARD v. HOPKINS, No. 180, *ante*.

THOMSON v. LONGARD (1874), R. E. D.
181.—CAN.

436 iii. ———.]—WALMSLEY v. GRIF-
FITH (1884), 10 A. R. 327.—CAN.

436 iv. ———.]—McKENZIE v. McKENZIE (1896), 29 N. S. R. (17 R. & G.) 231. —CAN.

436 v. ———.]—NEWTON v. BOTSFORD
(Man.), [1918] 3 W. W. R. 722; 43
Sask. L. R. 339.—**CAN.**

436 vi. —.]—The ct. will not decree specific performance of a contract obtained by fraud of plff. even when deflt. has not offered to return money received under the contract.—**SHAW v. MASSON** (Ont.), [1923] S. C. R. 187.—**CAN.**

1 — — Parties alleged to be in *pari delicto*.]--In an action for money had

compel the performance by deft. of a contract in writing for the purchase of a house. During the negotiations deft. asked expressly as to the drainage which pltf. assured him was perfect, but which in fact was seriously defective. It appeared that the representations had been made by pltf. in good faith & in ignorance of the facts, & the house being occupied deft. could not inspect it for himself. Nothing was said about the matter in the written contract:—*Held*: in the suit for specific performance the verbal representations made previous to the written contract must be taken into consideration & that, being material representations, on the faith of which deft. entered into the contract, they constituted a defence, although pltf. did not know them to be untrue.—

Sect. 7.—Misrepresentation, fraud and mistake:
Sub-sect. 1, A.]

439. —.]—(1) Contract for the sale of an existing & a reversionary lease not specifically performed without a production of the title of the lessors.

The proposition, that the vendor of a leasehold interest cannot produce his lessor's title, is not to be represented as universally true. I know instances to the contrary. The vendor ought, therefore, where he sells with that restriction, to describe that it is the interest he has that is to be sold (LORD ELDON, C.).

(2) Purchaser under a particular, giving a false description, not bound at law or in equity.—*DEVERELL v. BOLTON* (LORD) (1812), 18 Ves. 505; 34 E. R. 409, L. C.

Annotations:—As to (1) Consd. Ogilvie v. Foljambe (1817), 3 Mer. 53. *Refd. Fildes v. Hooker* (1817), 2 Mer. 424; *Souter v. Drake* (1834), 5 B. & Ad. 992. *As to (2) Refd. Spratt v. Jeffery* (1829), 5 Man. & Ry. K. B. 188.

440. —.]—The ct. may not decree specific performance of a contract for the sale of a reversion if the vendor had misled the purchaser by stating that it was subject to a lease containing all the usual covenants for repairs, etc., the vendor knowing at the same time that there was no person against whom the covenants could be enforced.—*FLINT v. WOODIN* (1852), 9 Hare, 618; 22 L. J. Ch. 92; 19 L. T. O. S. 240; 16 Jur. 719; 68 E. R. 660.

Annotations:—Refd. McMurray v. Spicer (1868), L. R. 5 Eq. 527. *Mentd. Mortimer v. Bell* (1865), 1 Ch. App. 10.

441. —.]—On a sale by auction of property, described in the particulars as freehold, one of the conditions contained the following words: "The vendors derived their title under the will of J. R. B. In 1861 the said J. R. B. contracted to purchase the houses described in the particulars from E. T., & a document under seal, dated Dec. 27, 1861, was executed by the parties. From 1861 to the present time quiet & undisturbed possession has been held of the said freehold houses by the said J. R. B. & the vendors. . . . The said document can be seen at the office of the vendors' solrs. at any time previous to the sale, & the purchaser shall be deemed to have knowledge of the contents. The title shall commence with the said document of Dec. 1861. The purchaser shall assume that the said J. R. B. by the said document, & by his undisturbed possession, was at the time of his death seized in fee of the said freehold houses." From the abstract of title, which consisted merely of the document referred to in the condition, & the will of J. R. B., it did not appear that the vendors had more than a *prima facie* possessory title to the property at the time of the sale.

Upon an action by the purchaser for rescission, & upon counterclaim by the vendors for specific performance:—*Held*: the condition amounted neither to an express or implied *suggestio falsi*, nor to a *suppressio veri*; & the contract must be specifically performed.—*BLENKHORN v. PENROSE* (1880), 43 L. T. 668; 29 W. R. 237.

Annotation:—Refd. Dougherty v. Oates (1900), 45 Sol. Jo. 119.

442. Misrepresentation as to value.]—Wilful misrepresentation of the yearly value of an estate is a good reason for a ct. of equity to refuse decreeing a specific performance of a contract for

& received debt. pleaded, by way of set-off, a promissory note given by pltf. to deft. From the evidence it was apparent that the transactions between the parties, out of which the present cause of action arose, were intended to defraud the creditors of

pltf., & that pltf. & deft. were *in pari delicto*:—*Held*: such being the case, pltf. should not be aided by the ct. in enforcing his contract, & the verdict for him must be set aside.—*BLAKE v. STEWART* (1870), 8 N. S. R. (2 G. & O.), 70.—CAN.

the sale of it.—*BRERETON v. COWPER* (1721), 1 Bro. Parl. Cas. 211; 1 E. R. 521, H. L.

443. —.]—Misrepresentation of the value of an estate a sufficient ground to resist a specific performance.—*WALL v. STUBBS* (1815), 1 Madd. 80; 56 E. R. 31.

444. Agreement in part performed.]—If an agreement is in part performed by one of the parties, it is too late for the other to complain of fraud, surprise, etc., or attempt to set the agreement aside on that account; for a ct. of equity will decree a specific performance of the remaining part of it.—*ANGLESEY (EARL) v. ANNESLEY* (1741), 1 Bro. Parl. Cas. 289; 1 E. R. 573, H. L.

Annotation:—Refd. Penn v. Baltimore (1750), 1 Ves. Sen. 444.

445. Vague & indefinite misrepresentation.]—Effect of an indefinite representation by a vendor; as that a leasehold estate was nearly equal to freehold being renewable upon a small fine; putting the purchaser upon inquiry; though, connected with certain circumstances, such representation may be fraudulent, & form a ground for rescinding the contract. Vendor, resisting an application by the purchaser for payment into ct. of the deposit in the hands of the vendor's agent, charged with a loss by the agent's failure. Specific performance prayed both by original & cross bill, after considerable delay upon the title: the rents to be received, & interest paid, from the time stipulated.—*FENTON v. BROWNE* (1807), 14 Ves. 144; 33 E. R. 476.

Annotations:—Refd. Brooke v. Rounthwaite (1846), 5 Hare, 298. *Mentd. Smith v. Jackson & Lloyd* (1816), 1 Madd. 618.

446. —.]—Specific performance decreed against a purchaser at a public auction, where the representation in the particulars of sale, complained of as calculated to mislead, was so vague & indefinite that it ought to have put the purchaser on making previous inquiry.—*TROWER v. NEWCOME* (1813), 3 Mer. 704; 36 E. R. 270.

Annotations:—Apld. Scott v. Hanson (1826), 1 Sim. 13. *Consd. Smith v. Land & House Property Corpn.* (1884), 28 Ch. D. 7. *Refd. Brooke v. Rounthwaite* (1846), 5 Hare, 298.

447. —.]—Vague & indefinite words in particulars of sale ought to be considered by a purchaser merely as a ground of inquiry; & their inaccuracy does not form a sufficient objection to a suit for specific performance.—*SCOTT v. HANSON* (1826), 1 Sim. 13; 5 L. J. O. S. Ch. 67; 57 E. R. 483; *on appeal*, 1 Russ. & M. 128, L. C.

Annotations:—Distd. Higgins v. Samels (1862), 2 John. & H. 460. *Refd. Smith v. Land & House Property Corpn.* (1884), 28 Ch. D. 7; *Re Fawcett & Holmes* (1889), 42 Ch. D. 150.

448. Slight misrepresentation.]—Misrepresentation, though in a slight degree, is an objection to a specific performance.—*CADMAN v. HORNER* (1810), 18 Ves. 10; 34 E. R. 221.

Annotations:—Apld. Clermont v. Tasburgh (1819), 1 Jac. & W. 112. *Consd. Fisher v. Tully* (1878), 3 App. Cas. 627.

449. Wilful misrepresentation.]—*BRERETON v. COWPER*, No. 442, *ante*.

450. —.]—(1) Land was advertised to be sold in lots as freehold, subject to conditions, one of which was, that all objections to the title, not made within a prescribed time, should be considered as waived, & another of which provided that any misstatement of the quality, tenure, outgoings, or other particulars, should be the subject of compensation. An objection to the title of

m. —.]—*MACKENZIE v. MACKENZIE* (1897), 1 Cout. Dig. 1473.—CAN.

n. *Misrepresentation of vendor's agent as to situation of land.*—*CAIRNS v. CRAWFORD* (Man.) (1908), 8 W. L. R. 449.—CAN.

one lot was taken after the prescribed time, that it was of copyhold tenure. It however appeared that, under a composition with the lord, the rights of the copyhold were such as to render the tenure hardly different from that of freehold:—*Held*: the misdescription did not form a ground for resisting a specific performance, although the decision might have been otherwise had the misdescription been wilful.

(2) Another lot was described in the advertisements as being sold with a certain reservoir & waterworks, yielding a yearly rental of £60, exclusively of the land & buildings. An objection was taken after the prescribed time, & was supported by the fact that this rent arose from supplying with water certain houses separated from the reservoir by the property of strangers, over which the vendor had no right to carry it, beyond a licence from year to year by payment of a rent:—*Held*: the description contained such a misrepresentation as to preclude the vendor from enforcing a specific performance; & the objection was not one as to title, & therefore was not obviated by the stipulation as to time.—*PRICE v. MACAULAY* (1852), 2 De G. M. & G. 339; 19 L. T. O. S. 238; 42 E. R. 903, L. J.J.

Annotations:—*Generally*, *Reid*, *Lovland v. Illingworth, Ex p. Webster* (1860), 2 L. T. 456; *Re Fawcett & Holmes* (1889), 42 Ch. D. 150.

451. Misrepresentation as to quantity—Statements by auctioneer.—Purchaser not entitled to an abatement for a deficiency in quantity; the particular describing the estate, as containing by estimation 41 acres be the same more or less. Parol evidence of declarations by the auctioneer at the sale, warranting the quantity, received in opposition to a specific performance, on the ground of fraud; not to enforce performance.—*WINCH v. WINCHESTER* (1812), 1 Ves. & B. 375; 35 E. R. 146.

Annotations:—*Consd.* *Denny v. Hancock* (1870), 18 W. R. 566. *Mentd.* *Huddersfield Corpn. v. Jacob* (1874), 30 L. T. 78; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255.

452. Necessity for proof of intention to deceive.—*KEYSE v. HAYDON* (1852), as reported in 1 W. R. 73.

453. Vendor representing himself as agent—Necessity for proof of loss by purchaser.—It is no defence to a bill for specific performance by the vendor, that during the treaty he falsely assumed the character of agent for another, when, in fact, he was dealing on his own behalf, & that he thereby deceived the purchaser as to the party with whom the contract was made, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise.—*FELLOWES v. GWYDYR (LORD)* (1829), 1 Russ. & M. 83; 39 E. R. 32, L. C.

Annotation:—*Reid*, *Said v. Butt*, [1920] 3 K. B. 497.

454. Sale of life interest in funds—Misdescription of life.—*BREALEY v. COLLINS*, No. 173, *ante*.

455. Purchaser's failure to inquire.—*COX v. MIDDLETON*, No. 7, *ante*.

456. — Vendor asserting good title.—Pltf. agreed to sell to deft. all his estate, right, & interest in certain lands. pltf. only to produce a title from A. B., the last owner, to himself. It appeared that deft. knew that A. B. was one of four supposed owners of the property, & was anxious to buy up such title as he had in order to

get rid of his opposition to a bill in Parliament:—*Held*: deft. was not at liberty to show *aliunde*, A. B. had no title, & pltf. was entitled to specific performance. The mere assertion by the vendor that he has a good title, on the faith of which the purchaser relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract.—*HUME v. POCOCK* (1866), 1 Ch. App. 379; 35 L. J. Ch. 731; 14 L. T. 386; 12 Jur. N. S. 445; 14 W. R. 681, L. J.J.

457. Partial misrepresentation.—The effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, & to operate as a personal bar, to the party who has practised it.—*BARTLETT v. SALMON* (1855), 6 De G. M. & G. 33; 26 L. T. O. S. 82; 4 W. R. 32; 43 E. R. 1142, L. C.

Annotation:—*Reid*, *Re Beyfus & Masters' Contract* (1888), 39 Ch. D. 110.

458. — Waiver of part affected.—Party obtaining an agreement by a partial misrepresentation, not entitled to a specific performance, on waiving the part affected by the misrepresentation. The effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, & to operate as a personal bar to the party who has practised it.—*CLERMONT (VISCOUNT) v. TASBURGH* (1819), 1 Jac. & W. 112; 37 E. R. 318.

Annotations:—*Consd.* *Rawlins v. Wickham* (1858), 3 De G. & J. 301. *Reid*, *Gorsuch v. Cree* (1860), 8 C. B. N. S. 574; *Hallows v. Fernie* (1868), 3 Ch. App. 467.

459. Misrepresentation as to title—By solicitor purchaser.—Where a person having a clear title to £12 for rent, & claiming the property of the land, is induced, by the representations of two professional persons that he had no right to either rent or land, to agree to accept £10 in full, for rent & land, the ct. will not entertain a bill for the specific performance of the agreement.—*STANLEY v. ROBINSON* (1830), 1 Russ. & M. 527; 39 E. R. 203.

460. ——A solr. contracts to purchase from A. B., not at that time his client & being ignorant of his legal position, an estate at a low price, informing A. B. that the nature & title of the property were such as that no one but a professional man would purchase it, such representation not being justified by the state of the property, & no solr. having been employed on behalf of A. B. in the transaction. Specific performance of the contract refused to the solr.—*DAVIS v. ABRAHAM* (1857), 5 W. R. 465.

461. Representations demanding investigation—Full facilities afforded—Investigations partially made.—Where specific performance of a contract for the purchase of a brewery & leasehold houses, was resisted by the purchaser on the ground of misrepresentation, & it turned out that, as to two heads of alleged misrepresentation, the number of barrels of beer sold weekly & the value of the rents of the houses, he had obtained access to the brewery books, & obtained full information; & as to the third, the loans or debts due to the concern agreed to be taken to by the purchaser, he had, previous to completion, obtained in a subsequent statement full & accurate representation; he was held to his contract, notwithstanding some vague & inconsistent statements, & some incorrect representations, contained in an advertisement

o. — Innocent misrepresentation.—*STEWART v. WHITE* (1910), 14 W. L. R. 596.—*CAN.*

p. ——An action by the vendor to enforce a contract for the sale to defts. of his tea business

was dismissed because of material misrepresentations made by pltf.—assumed to be innocently made,—which induced defts. to enter into the contract.—*KIDD v. NELSON* (1913), 24 W. L. R. 950, 12 D. L. R. 417;

18 B. C. R. 217.—*CAN.*

q. ——*MOLONY v. O'BRIEN* (1819), 13 L. T. O. S. 12.—*IR*

r. — Representation as to peaceable possession.—*GUERIN v. HEFFERNAN*, [1925] 1 I. R. 57.—*IR.*

Sect. 7.—Misrepresentation, fraud and mistake :

& in a written particular of sale.—*CLARKE v. MACKINTOSH, MACKINTOSH v. CLARKE* (1862), 4 Giff. 134; 1 New Rep. 160; 7 L. T. 558; 27 J. P. 259; 9 Jur. N. S. 114; 11 W. R. 183; 66 E. R. 651; *on appeal*, 11 W. R. 652, L. C.

462. Onus of proof—Of fraud.]—In general the burthen of proof is thrown upon the party who resists performance of an agreement, on the ground of fraud & surprise; but the rule is by no means universal. If the agreement be suspicious on the face of it, the burthen of proof may be shifted on to the party seeking to enforce it (*LORD LANGDALE, M.R.*).—*WEST v. HARGOOD* (1837), 6 L. J. Ch. 369; 1 Jur. 259.

463. — Of good faith.]—(1) The jurisdiction of the ct. to decree specific performance will not be exercised in favour of a vendor who fails to satisfy the ct. that he has done all he can to avoid misrepresentation.

(2) Specific performance being refused & the bill dismissed with costs, plff. vendor was ordered to repay the purchaser the deposit with interest at the rate of 4 per cent. *per annum* from the time of payment, deft. undertaking to bring no action & to restore the property to the condition it was in before the alterations.—*TURQUAND v. RHODES* (1868), 37 L. J. Ch. 830; 18 L. T. 814; 16 W. R. 1074.

464. — Sale under direction of court.]—Plff. having obtained an order for sale in the suit, put up a lot described as being in the occupation of C. at a yearly rent of £42. It appeared that C. was holding as tenant under another party, hostilely to the vendor. The ct. discharged the purchaser, & directed plff. to pay his costs, & refused to give time to the vendor to recover the premises by ejectment.

If there is any one thing which the ct. requires more than another, it is that in a case where specific performance is asked, there shall appear to have been perfect good faith on the part of a vendor in his description of the property & his representations to a purchaser. This is not less the case when the sale takes place under the direction of the ct. (*WOOD, V.-C.*).—*LACHLAN v. REYNOLDS* (1853), Kay, 52; 2 Eq. Rep. 713; 23 L. J. Ch. 8; 22 L. T. O. S. 211; 2 W. R. 49; 69 E. R. 23.

465. Effect of agreement for sale to third party — By person alleging misrepresentation.]—A purchaser agreed to buy an estate, upon a statement in the particulars of sale that it lay upon a valuable vein of coal, which vein afterwards proved to have been mostly worked out. Subsequently the purchaser entered into an agreement with a third party to sell the colliery at a price implying the existence of a considerable quantity of coal, & afterwards discovered the fact of the exhaustion of the coal:—*Held*: the transaction between the purchaser & the third party did not invalidate the purchaser's defence of misrepresentation to a bill by the vendor for specific performance, though it might have been an answer to a claim by the purchaser for an abatement of the purchase-money.—*COLBY v. GADSDEN* (1867), 17 L. T. 97; 15 W. R. 1185, L. C.

466. Performance involving fraud on public.]—(1) Pltfs. claimed the specific performance of an

agreement for the composition of a literary work by deft., alleging that the agreement was contained in three written documents. At the trial the first & third of the documents were proved; the second was not produced, nor was any evidence given of its contents. Deft., by his statement of defence, denied that he had agreed with pltfs., as alleged by them, with reference to the second document:—*Held*: pltfs. were not entitled to specific performance of the agreement contained in the first & third documents, or to damages for the breach of it.

(2) Pltfs. alleged that deft. had agreed that his name should not appear on the title-page of the work as the author of it; deft. alleged that it was part of the agreement that his name should so appear. Pltfs. proposed to publish the book with a title page, stating that it was "edited by K., assisted by M. (deft.)." K. was known as having published other books of a similar description, & had allowed pltfs. to make use of his name, but he had taken no part whatever in the compilation:—*Held*: the proposed title page would be a fraud on the public, & on this ground also pltfs. were disentitled to relief.—*POST v. MARSH* (1880), 16 Ch. D. 395; 50 L. J. Ch. 287; 43 L. T. 628; 29 W. R. 198.

467. Misstatement as to length of term—Held by tenant—Sale of land.]—A misstatement in the particulars of sale, of the length of the term for which a tenant of the vendor holds a portion of the property, is not, in the absence of any evidence as to whether such misstatement is to the advantage of the purchaser or not, such a misrepresentation as will enable him to resist specific performance.

Seven cottages, let to weekly tenants, were put up for sale, & described as "producing £73 14s. a year." When the particulars were issued the cottages did not produce this rental. Before the sale the vendors had entered into a contract to do certain repairs, & had given notice to the tenants that their rents would be raised, & before the day fixed for completion repairs were done, & the rents were raised 3d. a week; so that, on the day of completion, the statement in the particulars was quite accurate:—*Held*: this was not such a misrepresentation as would enable a purchaser to resist specific performance.—*GODDARD v. JEFFREYS* (1881), 51 L. J. Ch. 57; 45 L. T. 674; 30 W. R. 269; *on appeal* (1882), 46 L. T. 904, C. A. *Annotation.*—*Consd. Van Praagh v. Everidge*, [1902] 2 Ch.

468. Misrepresentation by agent.]—An agent, commissioned by a vendor to find a purchaser, has authority to describe the property & to state any fact or circumstance which may affect the value, so as to bind the vendor; & if an agent so commissioned, makes a false statement as to the description or value, though not instructed so to do, which the purchaser is led to believe, & upon which he relies, the vendor cannot recover in an action for specific performance. A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to deft. that another person, H., was ready to buy the property for £700, & that if deft. were to give £50 more, he would make a clear profit of 7 per cent.; that H. had further offered to rent the property at £300, or the ground floor only at £200. Deft., relying

463 i. Onus of proof—Of good faith.]—When a vendor of land who does not understand English is induced by the purchaser, who understands both English & the language of the vendor, to execute an agreement of sale, in

English, the purchaser himself being the only interpreter, there is a heavy onus upon the purchaser seeking to enforce the agreement to satisfy the ct. that the agreement was freely executed by the vendor after its effect

was fully and clearly explained to him—an onus that is not satisfied by the evidence of the purchaser alone.—*WEIDMAN v. PELAKISE* (Man.) (1905), 2 W. L. R. 308.—*CAN.*

on the above representations & others which were unauthorised by the vendor, & untrue, contracted to purchase for £750; but afterwards, finding out the falsehood, refused to complete. The vendor himself also made a misleading statement to the purchaser:—*Held*: independently of the statement made by the vendor himself, the false statements made by the agent, being within his authority, were sufficient to vitiate the contract; & specific performance refused.—*MULLENS v. MILLER* (1882), 22 Ch. D. 194; 52 L. J. Ch. 380; 48 L. T. 103; 31 W. R. 559.

Annotation:—*Refd.* *Re Consort Deep Level Gold Mines, Ex p. Stark, Ex p. Elliston* (1896), 45 W. R. 227.

469. Misrepresentation as to true purchaser.]—A. signed a contract for the sale of a house to B. Before signing he asked “are you buying for C. or his nominees?” B. answered “No.” He was, in fact, buying for nominees of C., to whom he afterwards assigned his contract. He & they brought an action for specific performance:—*Held*: the contract could not be specifically performed.—*ARCHER v. STONE* (1898), 78 L. T. 34.

Annotations:—*Distd.* *Nash v. Dix* (1898), 78 L. T. 445. *Consd.* *Dyster v. Randall*, [1926] Ch. 932 *Refd.* *Said v. Butt*, [1920] 3 K. B. 497.

470. —.]—In 1895 defts., who were trustees of a Congregational chapel, put up for sale by public auction a building, which had formerly been used as their chapel. The conditions of sale imposed no restrictions on the user of the building. After the sale C. made an offer for the building, but defts. declined to accept it, on the ground that it was made on behalf of a committee of Roman Catholics, who intended to use the building as a Roman Catholic place of worship, & defts. objected to sell for that purpose. The committee then told pltf., who was the manager of a mineral water co., that if he could get the property they would buy it of him at £100 profit. Pltf.’s solrs. wrote to defts.’ agent, making an offer for the property “on behalf of our client, the manager of the E. Mineral Water co.” After some negotiations, a contract was signed by defts. for sale of the building to pltf. at £1,025, a price less than C.’s offer. No direct statement was made that pltf. was buying for the co., but it was admitted that defts., during the negotiations, believed that he was, & that pltf. knew it. Pltf. signed the contract as principal without protest from defts.’ agent. Defts. refused to complete on the ground that pltf. was buying, as agent, for the Roman Catholic committee, to whom he knew they would not sell, & had obtained the contract by misrepresentation:—*Held*: on the evidence pltf. was not buying as agent for the Roman Catholic committee, but for himself with a view to resell to them at a profit; the misrepresentation as to the Mineral Water co. was immaterial because the vendors did not care whether they sold to the co. or pltf., & as between them no consideration of the person with whom they were contracting entered as an element into the contract.—*NASH v. DIX* (1898), 78 L. T. 445.

Annotation:—*Refd.* *Dyster v. Randall*, [1926] Ch. 932.

471. Sale in lots—Misrepresentation as to one lot.]—Where a purchaser separately acquires two lots of property at an auction in reliance on an innocent misrepresentation of the vendor as to the second lot, entitling the purchaser to rescission

as to that lot, he cannot also rescind the contract for the first lot, unless from the circumstances known & understood by both parties at the time of sale the ct. can infer that the two transactions were to the knowledge of both interdependent.

If, however, the ct. is satisfied that, apart from the misrepresentation, the particular purchaser would not have bought either lot, it will refuse the vendor specific performance as to the first lot.—*HOLLIDAY v. LOCKWOOD*, [1917] 2 Ch. 47; 86 L. J. Ch. 556; 117 L. T. 265; 61 Sol. Jo. 525.

472. Non-disclosure of person entitled to benefit of contract.]—Unless the possession by one of the contracting parties of some personal quality is a material ingredient of the contract, the mere non-disclosure of the person actually entitled to the benefit of the contract for the sale of land is no defence to an action for specific performance, even although pltf. knows that, if the disclosure had been made, deft. would not have entered into it.—*DYSTER v. RANDALL & SONS*, [1926] Ch. 932; 95 L. J. Ch. 504; 135 L. T. 596; 70 Sol. Jo. 797; [1926] B. & C. R. 113.

See *SALE OF LAND*, Vol. XL., pp. 43, 44, Nos. 273–275.

Agreements for lease.]—*See* *LANDLORD & TENANT*, Vol. XXX., pp. 414, 415, Nos. 766–773.

Conduct of sale at auction.]—*See, generally,* *AUCTION*, Vol. III., pp. 12–22.

Effect of misrepresentation on family arrangements.]—*See* *FAMILY ARRANGEMENTS*, Vol. XXIV., pp. 957–959, Nos. 110–126.

Disclosure of material facts generally.]—*See* *SALE OF LAND*, Vol. XL., pp. 42 *et seq.*

Notice to purchaser.]—*See* *SALE OF LAND*, Vol. XL., pp. 153–158, Nos. 1223–1267.

B. Material Misrepresentation.

473. Whether defence to action.]—A purchaser cannot be compelled to complete a contract entered into by him, on the faith of a balance sheet produced by the vendor, as being, though subject to slight errors, substantially correct; the errors being, in fact, so serious as to amount to nearly £1,480 & reducing the balance of £1,500 stock in favour of the business to some £20 or £30 & showing that the concern was barely solvent.—*CHARLES-WORTH v. JENNINGS* (1864), 34 Beav. 96; 11 L. T. 439; 55 E. R. 569.

474. —.]—S. signed a written contract with R. to purchase a brickfield for “£17,000,” to be paid as follows: £16,000 in cash & £1,000 in freehold equities to pay on the £1,000 12 per cent. *per annum*. Before signing S. had made out & given to R. a list of freehold houses, in which he was entitled to the equity of redemption, but this document was not referred to in the contract. In the negotiations S. asked R. whether he had ever put the property into the hands of an agent to sell for less money than he was then asking, saying that he fancied, as the fact was, that it must be the same as had been offered to him for less. R. falsely answered “No”:—*Held*: this was such a material misrepresentation as to prevent the ct. enforcing the contract in an action brought by R.—*ROOTS v. SNELLING* (1883), 48 L. T. 216.

475. —.]—*BIRD v. ANDREW* (1887), 4 T. L. R. 31, C. A.

PART III. SECT. 7, SUB-SECT. 1.—B.

t. Failure to carry out representations.—In an action to compel specific performance of an agreement to purchase:—*Held*: pltf. co. having failed to carry out some of the material representations made by its agent at the time of & as an inducement to deft. to

enter into the contract, specific performance would be refused.—*CROW'S NEST PASS COAL CO., LTD. v. MILLS* (1907), 12 B. C. R. 402, 5 W. L. R. 218.—*CAN.*

*a. Misrepresentation as to principal.]—**LANE v. RICE (MAN.)* (1911), 18 W. L. R. 557.—*CAN.*

*b. Representations stronger than simplex commendatio.]—**JOHNSTON v. DOWSETT* (1913), 21 W. L. R. 759; 4 W. W. R. 971; 13 D. L. R. 57; 23 Man. L. R. 492.—*CAN.*

*c. Representation by vendor of “substantial correctness” of description—**Failure to show “substantial correct-*

Sect. 7.—Misrepresentation, fraud and mistake:
Sub-sect. 1, B.; sub-sect. 2, A. (a).]

476. —.]—*CREE v. STONE* (1907), *Times*, May 10.

477. Concealment of material fact.—By an agreement for the sale of a reversionary estate in fee, it was stipulated, that a statement in a deed of 1836, to the effect that a life annuity granted to A. had not been paid or claimed for eight years, supported by a declaration of the vendor that no claim had been made upon him since 1841, & that he believed that the annuity had not been claimed for the last twenty years, should be conclusive evidence that the annuity had determined. It appeared that the annuity was granted by a person entitled in reversion, & was granted for the life of the survivor of four persons, two at least of whom were living:—*Held*: the omission to state these circumstances disentitled the vendor to enforce the stipulation in a specific performance suit instituted by him.—*DRYSDALE v. MACE* (1854), 5 De G. M. & G. 103; 2 Eq. Rep. 386; 23 L. J. Ch. 518; 2 W. R. 341; 43 E. R. 809, L. JJ.

478. —.]—Pltfs., who were owners of a ship's cargo, alleged that by the custom of underwriters, before a policy of marine insurance was effected, a paper called a "slip" was offered by way of memorandum to the underwriters, & subscriptions were taken upon it; & that such slip, & the proposals on which it was founded, were regarded & usually acted upon by both parties as a valid contract. Pltfs. having by their agent offered such a slip to deft. & other underwriters, & obtained there signatures thereto, filed a bill for specific performance of the alleged agreement to grant a policy.

The "slip" or agreement was not stamped, & pltfs., though alleging that it could not be proceeded on at law on that account, refused to stamp it, but claimed the relief of the ct. on the unstamped instrument.

It appearing in evidence that the agent of pltfs., in dealing with the deft.'s broker, had suppressed a material fact, namely, that the ship was about to be navigated, not, as they supposed, by the master, but by the mate:—*Held*: this suppression of fact was a sufficient ground to induce the ct. to withhold its discretionary power of decreeing specific performance.—*MOROCCO LAND CO. v. FRY* (1865), 5 New Rep. 234; 11 L. T. 618; 11 Jur. N. S. 76; 13 W. R. 310; 2 Mar. L. C. 157.

479. —.]—Trustees under restrictions for sale agreed to sell land to B. for a purpose understood between the parties, though not embodied in the agreement. Pending the negotiation, B. with knowledge of the restrictions, entered into a sub-contract to sell the land for a purpose at variance with the trusts. This arrangement was concealed from the vendors until after the signing of the original contract, & they then refused to complete:—*Held*: the agreement could not be enforced.—*TRAPPES v. COBB* (1867), 17 L. T. 236; 32 J. P. 71; 16 W. R. 117.

480. —.]—*LLOYD'S BANKING CO., LTD. v. WIGHAM* (1884), 1 T. L. R. 58.

481. —.]—On July 31, 1924, deft. purchased from pltfs. two leasehold houses & paid a deposit. Completion was fixed for Aug. 21, 1924. Under the lease vendors were bound to do the inside & outside repairs. The conditions of sale provided that purchaser should execute all necessary repairs.

Requisitions on title were delivered, one of which asked whether any notices from landlords had been served on the property. The answer was that vendors were not aware of any. The answer was made in good faith, but in fact vendors had received landlord's notices on July 7, 1924, calling upon them, within three months of July 4, 1924, to make good the dilapidations found to have accrued on the premises "as per the schedule hereto annexed." On discovering their mistake vendors, on Aug. 20, 1924, sent copies of the notices to the purchaser, who then declined to complete unless the vendors complied with the notices at their own expense. Condition 6 of the conditions of sale provided that the production of the last receipt for rent should be conclusive evidence that all the covenants had been complied with. Condition 8 provided that if any notices were outstanding they should be complied with at the expense of the purchaser. Pltfs. brought an action for specific performance of the contract by deft. Deft. counterclaimed for the rescission of the contract & the return of his deposit:—*Held*: the notices contained material facts which it was the duty of the vendors to disclose, & the non-disclosure deprived them of the right to the special relief of specific performance.—*BEYFUS v. LODGE*, [1925] Ch. 350; 95 L. J. Ch. 27; 133 L. T. 265; 41 T. L. R. 429; 69 Sol. Jo. 507.

482. — Defect in title.—Where a vendor has knowingly suppressed a defect in title, the ct. will not allow him to force the title upon a purchaser, although in the conditions of sale he has employed general words large enough to include the defect.—*EDWARDS v. WICKWAR* (1865), L. R. 1 Eq. 68; 35 L. J. Ch. 48; 13 L. T. 428; 29 J. P. 820; 14 W. R. 79.

Annotations:—Consd. *Beyfus v. Lodge*, [1925] Ch. 350. *Refd.* *Re Scott & Alvarez's Contract*, *Scott v. Alvarez* (1895), 12 R. 474.

483. Unusual restrictive covenant.—It is a sufficient defence to a vendor's action for specific performance of an agreement to purchase land that the purchaser was induced or allowed to sign the agreement on the faith of an assumption that the property was not subject to any "unusually restrictive" covenants, whereas in fact it was subject to a covenant to build at the request of the original grantor, such covenant, though probably not enforceable against the purchaser, yet rendering it possible that he might be called upon to allow buildings to be erected, or be harassed by claims to that effect.

A. agreed to purchase from B. a plot of land & dwelling-house, in the neighbourhood of a large town of which B. was mtgee., with power of sale, & which were held by his mtgor. subject to a covenant "that he, his heirs, exors., administrators, or assigns . . . would, at the request of the original grantor, his heirs or assigns, erect & build upon the plot of land one or more dwelling-house or dwelling-houses." In the margin of the draft agreement A.'s solrs., who had not seen the deed containing the covenant, had written the following note: "We assume that the covenants . . . include nothing unusually restrictive." This assumption was not negatived by B., & the agreement was eventually signed by A. on the faith of its being correct. Upon the discovery, however, of the existence of the above covenant, A. refused to complete his purchase. In an action by B. for

ness."—*HOLLISTER v. GEHRMAN* (Alta.), [1919] 1 W. W. R. 369.—*CAN.*

d. Misrepresentation as to liability to floods.—A statement by a vendor

of land that the land was drained, fit for the plough, & not liable to be flooded, when as a fact in ordinary winter floods the water of a creek was backed up & a considerable portion of

the land rendered unfit for cultivation, is a material misrepresentation & a bar to specific performance.—*ELLIOT v. MORRISON* (1885), 4 N. Z. L. R. 194 (S. C.).—*N.Z.*

specific performance:—*Held*: A. could not be compelled to complete: since, though he probably could not be forced actively to fulfil the covenant, he might nevertheless be called upon under it to allow B. to build upon the land, or at any rate be harassed by claims to that effect or otherwise under the covenant.—*ANDREW v. AITKEN* (1882), 22 Ch. D. 218; 52 L. J. Ch. 294; 48 L. T. 148; 31 W. R. 425.

484. — Mere silence as regards material fact.—Mere silence as regards a material fact, which the one party is not bound to disclose to the other, is not a ground for rescission, or a defence to specific performance.—*TURNER v. GREEN*, [1895] 2 Ch. 205; 64 L. J. Ch. 539; 72 L. T. 763; 43 W. R. 537; 39 Sol. Jo. 484; 13 R. 551.

Annotation:—*Reid*. *Carlisle v. Salt*, [1906] 1 Ch. 335.

485. — By person in fiduciary position.—Pltf. contracted to purchase from H. & C., who were trustees, a portion of their property. H. was a solr. & C. was his managing clerk. Throughout the transaction H. acted, through C., as solr. both for vendors & purchasers. C. failed to disclose to pltf. certain valuations previously obtained showing that the property was not worth the price which pltf. agreed to pay. Pltf. knew that the vendors were trustees. In the course of the negotiations pltf. offered & C. accepted a bribe. In an action by pltf. for rescission of the contract defts. counterclaimed for specific performance:—*Held*: H., as pltf.'s solr., was bound to disclose to him all material facts relating to the matter, & he was not relieved of that obligation by the fact that he owed a conflicting duty to his *cestuis que trust*. By the claim for specific performance the contract, which might have been repudiated on the ground of the bribe, was affirmed, & pltf. was not therefore deprived of his equitable right to rescission on the independent ground of the non-disclosure by his solr. of material facts.—*MOODY v. COX & HATT*, [1917] 2 Ch. 71; 86 L. J. Ch. 424; 116 L. T. 740; 61 Sol. Jo. 398, C. A.

486. — — — — ——*JMESON v. LISTER* (1920), 149 L. T. Jo. 446.

SUB-SECT. 2.—MISTAKE.

A. Mistake which excludes Consent.

(a) In General.

See, generally, MISTAKE, Vol. XXXV., pp. 86 et seq.

487. Where no consensus ad idem.—Purchaser not entitled to a conveyance of part, though answering the general description in the advertisement of sale, as it was not in the contemplation of either party at the time of the purchase or conveyance; purchaser being referred to a more particular description, which did not include that part; & the surrender having been made according to that & from his own instructions.

If one party thought he had purchased *bonâ fide* part of an estate, which the other thought he had not sold, it is a ground to set aside the contract. If both understood the whole was to be conveyed, it must; otherwise if neither understood so.—

CALVERLEY v. WILLIAMS, WILLIAMS v. CALVERLEY (1790), 1 Ves. 210; 30 E. R. 306.

Annotations:—*Apld.* *Clowes v. Higginson* (1813), 1 Ves. & B. 524; *Manser v. Back* (1848), 6 Hare, 443; *Price v. Ley* (1863), 4 Giff. 235; *Douglas v. Baynes*, [1908] A. C. 477.

488. — — — — ——If there is such a degree of doubt & ambiguity that the ct. can come to no other conclusion, than that the parties did not rightly understand what the one meant to buy, & the other to sell, & upon that ground of mistake the one has been let off, that is a ground for refusing in a ct. of equity to perform a contract (*PLUMER, V.-C.*).—*CLOWES v. HIGGINSON* (1813), 1 Ves. & B. 524; 35 E. R. 204.

Annotations:—*Apld.* *Price v. Ley* (1863), 4 Giff. 235. *Reid*. *Manser v. Back* (1848), 6 Hare, 443; *Dear v. Verity* (1869), 38 L. J. Ch. 297; *Douglas v. Baynes*, [1908] A. C. 477; *Holliday v. Lockwood* (1917), 86 L. J. Ch. 556; *Berners v. Fleming*, [1925] Ch. 264.

489. — — — — ——In a suit for specific performance, the nature of a case being such as, even in the absence of parol evidence, to impress the mind of the ct. with the belief that there has been surprise or mistake, pltf. should be left to his legal remedy.—*NEAP v. ABBOTT* (1838), Coop. Pr. Cas. 333; 1 Coop. temp. Cott. 382; 47 E. R. 907, L. C.

Annotation:—*Reid*. *Manser v. Back* (1848), 6 Hare, 443.

490. — — — — ——Extent of lien on a fund, where the grantor of an annuity agreed to sell to the grantee the fund on which the annuity was secured, & to repurchase the annuity, but, in consequence of a mutual mistake, the contract for the sale of the fund could not be specifically performed.—*COLYER v. CLAY* (1843), 7 Beav. 188; 49 E. R. 1036; *sub nom.* *COLLYER v. CLAY*, 1 L. T. O. S. 311.

Annotation:—*Consd.* *Scott v. Coulson*, [1903] 1 Ch. 453.

491. — — — — ——Premises were advertised to be sold according to certain printed particulars & conditions of sale. Before the sale took place several of the printed copies were altered by the vendor's solr., who introduced in writing a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction room, without any remark with regard to the alteration, & an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the purchaser did not hear or notice the alteration. The contract was signed by the auctioneer, inadvertently, & by the purchaser, on a copy of the particulars of sale not containing the reservation. After the purchase-money was paid & possession given, the purchaser filed his bill for a specific performance of the contract by a conveyance from the vendor, without a reservation of the right of way; & the bill was dismissed without costs.

An authority given to an auctioneer to sell may be revoked by the vendor at any time before the sale, & such revocation is valid against parties dealing without knowledge of it; therefore, in a suit by a purchaser to enforce specific performance of a contract entered into by the auctioneer by mistake or inadvertence, for the sale of property, as to part of which, a right of way over the land sold, his authority had been revoked, it is competent to deft. to insist upon such revocation, &

PART III. SECT. 7, SUB-SECT. 2.— A. (a).

487 i. Where no consensus ad idem.—*STEPHENSON v. CLINCH* (1881), 21 Q. B. R. 189.—CAN.

487 ii. — — — — ——The ct., when it is satisfied that there is a *bonâ fide* misunderstanding on the part of one of the parties to a contract as to the
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provisions of an agreement, will decree specific performance of it.—*McDONELL v. McDONELL* (1874), 21 Gr. 342.—CAN.

487 iii. — — — — ——*GARLAND v. R.* (1910), 13 Exch. C. R. 284.—CAN.

487 iv. — — — — ——Specific performance of a contract for the sale of certain machinery on the ground of mutual

mistake was refused, where both parties had acted in good faith & believed the machinery to be at a certain place, whereas, the fact was that it had been wrongfully seized by a third party & taken away, & pltf., although claiming that the title therein had passed to him, refused to take any steps to recover the same.—*HAMILTON v. SMYTHE* (1913), 24 O. W. R. 809;

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Sub-sect. 2, A. (a) & (b).]

parol evidence is admissible in support of that defence.

It is, however, a well-established principle of equity, that the ct. will not enforce the specific performance of an agreement in writing, where, from fraud, mistake, or surprise, injustice would be done to deft. by a decree for that purpose, & therefore, where the terms of the written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which deft. did not contemplate, the ct. has, upon that ground only, refused to enforce the agreement (*WIGRAM, V.-C.*).—*MANSER v. BACK* (1848), 6 Hare, 443; 67 E. R. 1239.

Annotations—*Appld. Re Hare & O'More's Contract*, [1901] 1 Ch. 93. *Refd. Tamplin v. James* (1880), 15 Ch. D. 215; *Douglas v. Baynes*, [1908] A. C. 477. *Mentd. Rainbow v. Howkins*, [1904] 2 K. B. 322.

492. —.—.]—*BAXENDALE v. SEALE*, No. 385, *ante*.

493. —.—.]—This ct. will not enforce or act upon an agreement, more especially if entered into by an agent, where there has been a mistake or misunderstanding as to the terms of the agreement (*TURNER, L.J.*).—*MORRISON v. BARROW* (1860), 1 De G. F. & J. 633; 45 E. R. 506.

Annotations—*Mentd. Jenkins v. Bushby* (1867), 16 W. R. 189; *Re Simpson, Ex p. Morgan* (1876), 2 Ch. D. 72.

494. —.—.]—Where on a sale of a mill, etc., it appeared clearly that pltf. believed he was buying what deft. believed he was not selling, a bill for the specific performance of the contract for sale was dismissed.—*BUTTERWORTH v. WALKER* (1864), 11 L. T. 436; 13 W. R. 168.

495. —.—.]—A tenant in tail, expectant on the death of a tenant for life who was insolvent, being desirous of preserving the timber on the estate from being cut, signed an agreement with the agent of the assignee of the tenant for life, agreeing that the assignee should have the same right to the timber as if he had actually cut it, on a past day named, which was prior to the death of the tenant for life; & the assignee agreed to refrain from cutting it for a month. It turned out that the tenant for life was dead at the date of the agreement, although both the tenant in tail & the agent of the assignee were ignorant of the fact:—*Held*: the agreement was founded on a mistake, & was without consideration, & the ct. refused to enforce it.—*COCHRANE v. WILLIS* (1865), 1 Ch. App. 58; 35 L. J. Ch. 36; 13 L. T. 339; 11 Jur. N. S. 870; 14 W. R. 19, L. J.J.

Annotations:—*Consd. Scott v. Coulson*, [1903] 1 Ch. 453. *Refd. Jones v. Clifford* (1876), 3 Ch. D. 779; *Huddersfield Banking Co. v. Lister* (1895), 72 L. T. 703; *Re Thellusson, Ex p. Abdy*, [1919] 2 K. B. 735.

496. —.—.]—Upon a contract for sale of lands, it was shown that the purchaser intended & understood one thing, while the vendor's agent stated by affidavit that he intended & understood another thing:—*Held*: upon bill for specific performance, although the construction of the contract was clearly in favour of the purchaser, the mistake thus established would prevent a decree.—*WYCOMBE RY. CO. v. DONNINGTON HOSPITAL* (1866), 1 Ch. App. 268; 14 L. T. 179; 12 Jur. N. S. 347; 14 W. R. 359, L. J.J.

Annotation:—*Appld. Bridgend Gas & Water Co. v. Dunraven* (1885), 31 Ch. D. 219.

4 O. W. N. 1572; 13 D. L. R. 55.—**CAN.**

e. Mutual mistake—Whether court will rectify agreement.—Pltf. agreed to sell to deft. Lot 4 on a certain subdivisional plan of land. The agree-

ment was reduced to writing, & by mistake the lot was described as Lot 3, but the land agreed to be sold was otherwise clearly identified. After the agreement had been signed by the parties pltf. discovered the mistake, &

497. —.—.]—Contract by a railway co. to grant a lease of the whole of a house A. & part of a house B.:—*Held*: part of the house A. being evidently intended to be retained by the co., only that other part of it designated in a certain plan was meant to be included in the lease, & a bill to compel a lease of the whole house dismissed.—*RICHARDS v. NORTH LONDON RY. CO.* (1871), 20 W. R. 194.

498. —.—.]—Pltf. filed a bill for a specific performance of an agreement into which he had entered with deft. The parties disputed the construction of one of the clauses in the agreement, deft. swearing that his intention at the time of executing the agreement was not according to the construction contended for by pltf.

The ct. was of opinion that deft.'s construction was plainly the correct one, but independently of that, being satisfied that there had been no concord between the parties, dismissed the bill.—*GRIFFIN v. COLEMAN* (1873), 28 L. T. 493.

499. —.—.]—*TAMPLIN v. JAMES*, No. 524, *post*.

500. —.—.]—At a sale by auction of landed property on Nov. 18, 1901, deft. bid for one lot by mistake for another, & it was knocked down to him. On discovering his mistake he refused to sign the contract, whereupon the auctioneer signed it as his "agent."

The printed particulars, conditions, & annexed form of contract had been prepared for a sale on "Oct. 17, 1901," which was postponed till Nov. 18, but by inadvertence the original date, though altered in the particulars, remained in the conditions & form of contract:—*Held*: there was no contract within Stat. Frauds, nor, *semble*, any *consensus ad idem* to support an action by the vendor for specific performance.—*VAN PRAAGH v. EVERIDGE*, [1903] 1 Ch. 434; 72 L. J. Ch. 260; 88 L. T. 249; 51 W. R. 357; 19 T. L. R. 220; 47 Sol. Jo. 318, C. A.

Annotation:—*Refd. Chaney v. Maclow* (1928), 15 T. L. R. 135.

501. —.—.]—*KENSINGTON BOROUGH COUNCIL v. WILLETT* (1905), *Times*, Nov. 16.

See, also, CONTRACT, Vol. XII., pp. 90-92, Nos. 555-565; *MISTAKE*, Vol. XXV., pp. 111, 112, Nos. 159-171; *SALE OF LAND*, Vol. XL., p. 16, Nos. 35-39.

502. Erroneous construction—Right of plaintiff to specific performance—According to construction admitted by defendant.—A negotiation took place as to the sale by L. to P. of a British patent & certain foreign patents for the same inventions, & ultimately an offer was made for the sale at £500 & accepted by letter, but it was not quite clear whether the offer & acceptance related to all the patents, or to the British patent only. P. brought his action for specific performance, treating the contract as including all the patents, & moved for an injunction to restrain L. from parting with them. At the hearing of the motion he asked for leave to amend his writ, & for an injunction as to the British patent only:—*Held*: an injunction should be granted, for where a written agreement has been signed, though it is in some cases a defence to an action for specific performance according to its terms that deft. did not understand it according to what the ct. holds to be its true construction, the fact that pltf. has put an erroneous construc-

his agent altered the agreement to read Lot 4, the alteration being initialled by pltf. Deft. subsequently refused to carry out the agreement. In an action for specific performance:—*Held*: the mistake was a mutual

tion upon it, & insisted that it included what it did not include, does not prevent there being a contract, nor preclude pltf. from waiving the question of construction & obtaining specific performance according to what deft. admits to be its true construction.—*PRESTON v. LUCK* (1884), 27 Ch. D. 497; 33 W. R. 317, C. A.

Annotations:—*Apld.* *Berners v. Fleming*, [1925] Ch. 264. *Refd.* *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs* (1890), 41 Ch. D. 616.

503. ——— Time for election.—(1) A vendor who claims specific performance of a written contract for sale & insists upon a wrong interpretation of the contract down to & at the trial, does not thereby forfeit his right to elect to have specific performance of the contract as rightly interpreted, the purchaser's offer, contained in his defence, to complete on those terms not having been withdrawn.

(2) A party to a contract who desires to avail himself of an act of repudiation by the other party must evidence his election to do so with every reasonable dispatch.

Accordingly, it is too late for a purchaser, who in his defence to an action by the vendor for specific performance has pleaded that he was willing to complete on the right interpretation of the contract, to seek at the trial to amend that offer & ask for rescission & recovery of his deposit, on the ground that pltf. by his conduct in insisting upon a wrong interpretation had repudiated the contract & had thereby given deft. the option to accept that repudiation.—*BERNERS v. FLEMING*, [1925] Ch. 264; 94 L. J. Ch. 273; 132 L. T. 822; 69 Sol. Jo. 507, C. A.

Annotation:—*Generally, Refd.* *Never Stop Ry. (Wembley) v. British Empire Exhibition* (1921) Incorporated, [1926] Ch. 877.

504. Clerical error—Party claiming to be misled having knowledge of true facts.—A., who was tenant for life of coal mines under a will with remainder to his children, filed a bill in which he set out his title, & the will under which he took, alleging, however, by a clerical error that he was tenant in tail, although in the interrogatory founded on that statement, he asked whether he was tenant for life. The bill, which was filed against the lessees of a conterminous mine, prayed on account of coals raised by them, & payment to him of the value thereof, & for an injunction to restrain them from getting any coals, & that pltf. might have liberty to view the workings. An interim order was obtained, & from time to time continued, whereupon a compromise was entered into between the solrs. of the parties, by which defts. were to pay to pltf. £400 for the full value of the coals to be raised from the mine, with costs of suit to be taxed in Michaelmas Term then next, as between solr. & client, & if reasonable security were given to the satisfaction of pltf., six months time from the date thereof for payment of the £400 was to be given. First a petition to which an objection was taken & allowed, & then a claim, was filed for the purpose of enforcing the agreement for a compromise:—*Held*: as the statement in the bill that pltf. was tenant for life was clearly a clerical error, & could not, as pltf.'s title was stated on the bill, have misled defts., the ct. was not precluded from decreeing specific performance on the ground that the agreement for a compromise was entered into by mistake or under an erroneous impression.—

RICHARDSON v. EYTON (1852), 2 De G. M. & G. 79; 20 L. T. O. S. 194; 42 E. R. 800, L. JJ.

Annotation:—*Mentd.* *Dawson v. Newsome* (1860), 6 Jur. N. S. 625.

Agreements for leases.—*See* LANDLORD & TENANT, Vol. XXX., pp. 415, 416, Nos. 774–781.

Specific performance with compensation.—*See* Part V., Sect. 6, sub-sect. 8, *post*.

(b) *Error of Defendant Aided by Plaintiff.*

See MISTAKE, Vol. XXXV., pp. 107, 108, Nos. 126–131.

505. Refusal to take new lease—Mistake as to time for commencement—Negligence of lessor.—Agreement in writing between landlord & tenant, signed by the landlord, for a new lease to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed, but blanks were left for the day of the commencement; the repairs being completed, the landlord tendered a lease to commence from that time, & on refusal filed a bill; the answer admitted that the agreement was accepted, but insisted that the new lease was not to commence till the expiration of the old; & so it was decreed parol evidence being refused.

Pltf. by his negligence, has drawn himself into an agreement he never meant to make . . . I cannot do what pltf. desires (*LORD ABRANBY, M.R.*).—*PYM v. BLACKBURN* (1796), 3 Ves. 34; 30 E. R. 878.

506. Sale by auction—Purchaser pretending to be puffer.—*MASON v. ARMITAGE* (1806), 13 Ves. 25; 33 E. R. 201, L. C.

Annotations:—*Apld.* *Day v. Wells* (1861), 30 Beav. 220. *Mentd.* *Hughes v. Chester & Holyhead Ry.* (1861), 1 Drew. & Sim. 524.

507. ——— Ambiguous conditions.—Though deft. to a bill for specific performance of a contract may have a decree for performance according to his construction, if adopted by the court, without a cross-bill the decision being not according to his construction but only that he had contracted under a mistake created by pltf. the bill was merely dismissed.—*HIGGINSON v. CLOWES* (1808), 15 Ves. 516; 33 E. R. 850; *subsequent proceedings, sub nom. CLOWES v. HIGGINSON* (1813), 1 Ves. & B. 524.

Annotations:—*Consd.* *Wall v. Stubbs* (1815), 1 Madd. 79. *Refd.* *Gallaghan v. Gallaghan* (1841), 8 Cl. & Fin. 374. *Manser v. Back* (1848), 6 Hare, 443; *Eastes v. Russ* (1913), 110 L. T. 296; *Berners v. Fleming*, [1925] Ch. 264. *Mentd.* *Squire v. Campbell* (1836), 1 My. & Cr. 459.

508. ——— Sale at undervalue—Knowledge of plaintiff as to true value.—Specific performance of a contract, where the property was sold considerably below its value, the vendors being the assignees of a bkpt., & the sale having been made under mistake, refused.—*ATTENBOROUGH v. EDWARDS* (1854), 3 Eq. Rep. 124; 24 L. T. O. S. 86; 3 W. R. 39.

509. ——— Misleading particulars.—W., by agreement indorsed on printed particulars of sale, sold to B. a house, in front of which a piece of common ground was railed in, but divided from the house, by a road, to which common W. had a possessory title only. B., alleging that on the plan he considered the common land part of the purchase, refused to complete. On claim filed by W.:—*Held*: inasmuch as the plan might have misled B. no decree for specific performance could be made; but as there was enough doubt to

mistake which a ct. of equity would have rectified.—*ADAMS v. MCKAY* (1906), 26 N. Z. L. R. 585.—N.Z.

f. ———.]—*TORSTENSON v. WHITING*, [1921] N. Z. L. R. 183.—N.Z.

PART III. SECT. 7, SUB-SECT. 2.—A. (b).

509 i. Sale by auction—Misleading particulars—*JENNINGS v. HART* (1875), 10 N. S. R. (1 R. & C.) 15.—CAN.

g. *Insertion of "east" instead of "west" in contract.*—The owner of the west half of a lot, supposing himself to own the east half, not the west half, contracted to exchange the east half

*Sect. 7.—Misrepresentation, fraud and mistake:
Sub-sect. 2, A. (b) & (c) i. & ii.]*

induce investigation, the claim must be dismissed without costs.—*WESTON v. BIRD* (1853), 2 W. R.

510. ———. ———.]—When the description of the property sold is ambiguous, & the purchaser swears he made a mistake, & this is not disproved, the contract will not be enforced: but if there appear no ground, on the particulars, for the mistake, it is not sufficient for the purchaser to swear that he has made a mistake.

An undivided moiety of a property was sold by auction, the rent of which was described as £16; but that was the rental of the whole & not of a moiety. The purchaser might have discovered this from the rest of the particulars; but having sworn that he had purchased, under a mistake that £16 was the rental of a moiety, the ct. refused to decree a specific performance against him.—*SWAISLAND v. DEARSLEY* (1861), 29 Beav. 430; 30 L. J. Ch. 652; 4 L. T. 432; 7 Jur. N. S. 984; 9 W. R. 526; 54 E. R. 694.

Annotation:—Consd. *Tamplin v. James* (1880), 15 Ch. D. 215.

511. ———. ———.]—Specific performance of a contract will not be enforced where deft. has contracted under a mistake to which pltf has by his acts even unintentionally contributed.—*BASCOMB v. BECKWITH* (1869), L. R. 8 Eq. 100; 38 L. J. Ch. 536; 33 J. P. 580; 17 W. R. 812; *sub nom.* *BASCOMB v. BECKWITH*, 20 L. T. 862.

Annotation:—Consd. *Denny v. Hancock* (1870), 18 W. R. 566.

512. ———. ———.]—On a sale of a small residential property the plan exhibited showed the western side as bounded by a strip of ground covered with a mass of shrubs or trees. An intending purchaser went with the plan in his hand, inspected the property, found on the western side a belt of shrubs bounded on the west by an iron fence, & including three magnificent trees. He then bid for the property, believing that he was buying everything up to the fence. He afterwards discovered that the three trees & the iron fence stood on the glebe land which adjoined this property, the real boundary being denoted by stumps, which were so shrouded by the shrubs as not easily to be seen. The plan represented in a conspicuous way all the detached trees standing on the property, none of which were nearly so large as the trees in question, but did not show these trees. It was admitted that the existence of these trees was a material element in the value of the property as a residence:—*Held*: (1) the purchaser inspecting the property with the plan in his hand would naturally conclude the iron fence to be the boundary; there was nothing to put him on inquiry whether it was not; he had been misled by the fault of the vendors; & specific performance could not be decreed against him.

(2) *Qu.*: if a purchaser insists on a requisition on a matter of conveyance with which the vendor refuses to comply, & the purchaser rescinds the contract, whether if the ct. holds the purchaser to have been right in his contention, a decree will be made for specific performance at the suit of the vendor.—*DENNY v. HANCOCK* (1870), 6 Ch. App. 1; 23 L. T. 686; 35 J. P. 295; 19 W. R. 54, L. JJ.

Annotations:—As to (1) Consd. *Brewer v. Brown* (1884), 28 Ch. D. 309. *Generally, Refd.* *Goddard v. Jeffreys* (1881), 51 L. J. Ch. 57.

for other lands, & conveyed it accordingly. He filed a bill to compel the other party to accept the west half & perform the contract by conveying the lands agreed to be given for the east

half, alleging mistake in the insertion of east instead of west. It appeared that the two halves were of about equal value, & that deft. had no personal knowledge of either; but, as the mis-

513. ———. ———.]—The ct. has refused specific performance even where the mistake of the purchaser has not been induced by any act or omission of the vendor & *a fortiori* it ought to be refused where the omission of the vendor to draw his particulars in the fair & ordinary way has conduced to that mistake (*JESSEL, M.R.*).—*JONES v. RIMMER* (1880), 14 Ch. D. 588; 49 L. J. Ch. 775; 43 L. T. 111; 29 W. R. 165, C. A.

Annotation:—Refd. *Blenkhorn v. Penrose* (1880), 43 L. T. 668.

514. ———. *Purchaser acting as puffer—On request of plaintiffs' agent.*]—In an action for specific performance of a contract of sale by auction of freeholds, deft. to whom the property was knocked down, alleged that on going into the saleroom he had a conversation with the auctioneer, who asked him to give him a bid, which was admitted by pltf's., the vendors, & that in consequence of that request he bid for the property, but without any intention of becoming the purchaser:—*Held*: on the evidence, deft. did bid for the property under a *bond fide* mistake, which prior to the Judicature Acts would have been fatal to the action; but, having regard to the decision in *Tamplin v. James*, No. 524, *post*, it was not so, & pltf's. were still entitled to relief.—*BELL v. BALLS*, [1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 45 W. R. 378; 13 T. L. R. 274; 41 Sol. Jo. 331.

Annotation:—Mentd. *Chaney v. Macleod* (1928), 97 L. J. Ch. 349.

515. *Plaintiff solicitor—Permitting defendants to contract without legal advice.*]—*DEARDON v. BAMFORD*, No. 351, *ante*.

516. *Trifling error in advertisement.*]—An agreement for the purchase of an estate may be specifically enforced, although an error of a trifling nature in the character of the property shall have appeared in the advertisements for sale.—*SMITHSON v. POWELL, POWELL v. SMITHSON* (1852), 20 L. T. O. S. 105, L. C.

517. *Mistake in parcels—Defendant obtaining actual thing contracted for.*]—H. the lessee of several houses, demised the house No. 7, to L. by whom it was afterwards assigned to A. The original leases were, by an order of the ct., sold by auction, & the house of No. 7, was knocked down to C. The abstract showed that the parcels set out in the lease of No. 7, were by an error those of No. 6; thereupon C. refused to complete his purchase:—*Held*: the purchaser had got the actual thing for which he contracted, & he ought to complete his purchase.—*GRISSELL v. PETO* (1854), 2 Sm. & G. 39; 18 Jur. 591; 2 W. R. 178; 65 E. R. 292.

518. ———. *Erroneous statements by plaintiff's solicitor.*]—B., after a view of premises which seemed to have a piece of land at the back inclosed in the natural boundaries of the premises, agreed to purchase the premises from M. The abstract of title stated the parcels to be "all that dwelling-house, outhouses, coal-house, garden, & the piece of land behind, bounded by the river excepting thereout a small piece of land sold to M." The vendor, when asked, declined to show what part was sold to M., & ultimately the purchaser discovered that the whole piece of land had been sold to M., having been led from the first to believe only a trifling part of it had been so sold:—*Held*: B. having acted under a mistake which it was the duty of M. to correct, it was inequitable to enforce

take was that of the pltf. alone:—*Held*: the west could not be substituted for the east half; & relief was refused.—*COTTINGHAM v. BOULTON* (1857), 5 Gr. 186 —CAN.

specific performance against B.—*MOXEY v. BIGWOOD* (1864), 10 L. T. 466; 10 Jur. N. S. 597; 12 W. R. 811, H. L.

519. Unintentional misrepresentation by plaintiff.]—*TAMPLIN v. JAMES*, No. 524, *post*.

(c) *Error of Defendant Not Aided by Plaintiff.*

i. *No Excuse for Mistake.*

See *MISTAKE*, Vol. XXXV., p. 107, Nos. 123–125.

520. General rule—Specific performance decreed.]—The ct. will not refuse the specific performance of a contract, by reason of deft. having made a mistake as to the extent of the property where there is no proof of misrepresentation by the vendor.—*NOCK v. NEWMAN* (1832), 1 L. J., Ch. 175.

521. ———.]—A purchaser of a lease, having, with his attorney, had inspection of it, & the purchaser having taken possession, cannot refuse specific performance, on the ground of a covenant in the lease.—*COSSER v. COLLINGE* (1832), 3 My. & K. 283; 1 L. J. Ch. 130; 40 E. R. 108.

*Annotations:—***Consd.** *Smith v. Capron* (1849), 7 Hare, 185; *Brumfit v. Morton* (1857), 30 L. T. O. S. 98. **Refd.** *Hyde v. Warden* (1877), 3 Ex. D. 72; *Melzak v. Lillienfeld*, [1926] Ch. 480. **Mentd.** *Hargraves v. Rothwell* (1836), 5 L. J. Ch. 118; *Porter v. Drew* (1880), 5 C. P. D. 143; *Reeve v. Berridge* (1888), 20 Q. B. D. 523; *Re White & Smith's Contract*, [1896] 1 Ch. 637; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487.

522. ———.]—*SWAISLAND v. DEARSLEY*, No. 510, *ante*.

523. ———.]—Pltf. being the lessor of a public-house subject to a covenant against Sunday trading, put same up for sale, having previously obtained from the freeholder a letter which was stamped as an agreement offering to release the restrictive covenant. Deft. at the sale became the purchaser, both parties being under the impression that the freeholder could alone release the covenant. The abstract delivered to the purchaser showed that pltf. held under an underlease by demise, a reversion of one day being vested in A. & B., whose consent to a release of the covenant was necessary, which fact was overlooked by the purchaser, he taking an underlease at an increased rent, in which the covenant was omitted, & he paid his purchase-money partly by a cheque & entered into possession. The day after the mistake as to the parties to release the covenant was discovered, & deft. stopped payment of the cheque. Pltf. had offered to rescind the contract:—*Held*: deft. not having discovered the mistake until after completion through his own negligence was too late in taking his objection, & specific performance was decreed.—*ALLEN v. RICHARDSON* (1879), 13 Ch. D. 524; 49 L. J. Ch. 137; 41 L. T. 615; 28 W. R. 313.

*Annotations:—***Mentd.** *Brett v. Clowser* (1880), 5 C. P. D. 376; *Turner v. Turner*, *Hall v. Turner* (1880), 28 W. R. 859; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Re Perriam*, *Perriam v. Perriam* (1883), 49 L. T. 710; *Palmer v. Johnson* (1884), 13 Q. B. D. 351; *Clayton v. Leech* (1889), 41 Ch. D. 103.

524. ———.]—Property was put up for

sale under the description of "All that inn with the brewhouse, outbuildings, & premises known as The Ship, together with the saddler's shop & premises adjoining thereto, situate at N., Nos. 454 & 455 on the tithe map, & containing by admeasurement twenty perches more or less." In the saleroom were plans of the property, which consisted of the closes numbered 454 & 455 on the tithe map. At the back of the property were two pieces of garden ground, containing together about twenty perches, not belonging to the vendors, one of which had for many years been occupied with the inn, & the other with the saddler's shop, & which were hardly at all fenced off from the premises with which they were occupied. Deft. who was acquainted with the property & knew that the gardens were occupied along with the inn & saddler's shop, did not look at the plans, & bought in the belief that he was buying the whole of the property in the occupation of the tenants:—*Held*: the purchaser could not resist specific performance on the ground of mistake.

It is doubtless well established that a Ct. of Equity will refuse specific performance of an agreement when deft. has entered into it under a mistake, & where injustice would be done to him were performance to be enforced. The most common instances of such refusal on the ground of mistake are cases in which there has been some unintentional misrepresentation on the part of pltf., & I am not now referring to cases of intentional misrepresentation which would fall rather under the category of fraud, or where from the ambiguity of the agreement different meanings have been given to it by the different parties (*BAGGALLAY, L.J.*):—*TAMPLIN v. JAMES* (1880), 15 Ch. D. 215; 43 L. T. 520; 29 W. R. 311, C. A.

*Annotations:—***Consd.** *Goddard v. Jeffreys* (1881), 51 L. J. Ch. 266. **Distd.** *Van Praagh v. Everidge*, [1902] 2 Ch. 266. **Consd.** *Hodson v. Thetard* (1907), 51 Sol. Jo. 482. **Consd.** *Eastes v. Russ*, [1914] 1 Ch. 468. **Refd.** *Preston v. Luck* (1884), 27 Ch. D. 497; *Bell v. Balls*, [1897] 1 Ch. 663; *Re Hare & O'More's Contract*, [1901] 1 Ch. 93; *Holliday v. Lockwood*, [1917] 2 Ch. 47. **Mentd.** *Aspinalls to Powell & Scholefield* (1889), 60 L. T. 595; *Pope & Pearson v. Buenos Ayres New Gas Co.* (1892), 8 T. L. R. 758.

525. ———.]—*GODDARD v. JEFFREYS*, No. 467, *ante*.

526. Mistake of law.]—The ct. will not refuse to decree the specific performance of an agreement on the ground that one of the contracting parties has mistaken its legal effect.—*POWELL v. SMITH* (1872), L. R. 14 Eq. 85; 41 L. J. Ch. 734; 26 L. T. 754; 20 W. R. 602.

*Annotations:—***Refd.** *McKenzie v. Hesketh* (1877), 38 L. T. 171; *Eastes v. Russ*, [1914] 1 Ch. 468. **Mentd.** *Wilding v. Sanderson*, [1897] 2 Ch. 534.

527. ———.]—*HART v. HART*, No. 284, *ante*.

—,]—*See, also*, *MISTAKE*, Vol. XXXV., pp. 93–95, Nos. 27–36.

ii. *Mistake.*

528. Specific performance refused.] *MOXEY v. BIGWOOD*, No. 518, *ante*.

PART III. SECT. 7, SUB-SECT. 2.—

A. (c) i.

520 i. General rule—Specific performance decreed.]—Specific performance of an agreement will not be refused on the ground of a mistake of one of the parties to it, where the mistake was not known to the other party, & there was nothing in the language or conduct of the other party which led or contributed to the mistake, unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, & it would be unreasonable to hold him to it, or give the other party an unconscionable advantage.—*MILLER v. DAHL* (1894), 9 Man. L. R. 111.—**CAN.**

520 ii. ———.]—*HOBBS v. ESQUIMALT & NANAIMO RY. CO.* (1898), 29 S. C. R. 450.—**CAN.**

520 iii. ———.]—*SILVERT v. CARLSON* (1914), 28 W. L. R. 413, 17 D. L. R. 711; 24 Man. L. R. 790.—**CAN.**

h. Specific performance refused.]—A ct. of equity will refuse to decree specific performance by a purchaser of a contract for the sale of land & leave the vendor to his remedy at law, where the purchaser has made a mistake as to the land he is purchasing though the vendor was innocent of any deception.—*CLARKE v. BYRNE* (1872), 3 V. R. (Eq.) 56.—**AUS.**

k. Sale of wild lands by executors—Unknown quantity of land—Liability of executors.]—A sale of a lot of wild land of unknown area at so much per acre, by exors. under powers to sell such portion as might be necessary to pay debts due by their testator, proved upon survey to exceed the estimate made before the sale both as to the quantity of land & the amount necessary to meet the liabilities:—*Held*: the purchaser at a rate per acre was entitled to conveyance of the whole of the lot so sold, & the execution of such conveyance would not constitute a breach of trust under the will.—*SEA v. McLEAN & ANDERSON* (1887), 41 S. C. R. 632.—**CAN.**

Sect. 7.—Misrepresentation, fraud and mistake: Sub-sect. 2, A. (c) ii., & B. Sect. 8: Sub-sects. 1 & 2.]

529. —.]—JONES *v.* RIMMER, No. 513, *ante*.

530. —.]—The ct. will not be active in assisting one party to an agreement who has always his remedy in damages to take advantage of the mistake of the other so as to involve him in serious & unforeseen consequences (LORD MACNAGHTEN). — STEWART *v.* KENNEDY (No. 1) (1890), 15 App. Cas. 75, H. L.

Annotation:—Refd. Wilding *v.* Sanderson, [1897] 2 Ch. 534.

531. **Mistake as to title by vendor.**—Specific performance refused of an agreement, to sell an estate in fee, by one who supposed he was absolute owner of the estate, when he was only tenant for life under a settlement, with a proviso empowering him to purchase "an estate in fee simple in possession, in some convenient place or places in England, of equal or better value, & to settle the same to him in lieu of the settled estate, which was then to be his own."—HOWELL *v.* GEORGE (1815), 1 Madd. 1; 56 E. R. 1.

Annotation:—Apld. Hood *v.* Oglander (1865), 31 Beav. 513.

532. **Mistake as to lot put up for sale.**—Where an estate is purchased at an auction under a mistake as to the lot put up for sale, the ct. will not decree specific performance against the purchaser, but leave the vendor, if he has sustained any damage by the mistake of the purchaser, to his remedy at law. A bill for specific performance was accordingly, under such circumstances, dismissed without costs.—MALINS *v.* FREEMAN (1837), 2 Keen, 25; 6 L. J. Ch. 133; 1 Jur. 19; 48 E. R. 537.

Annotations:—Distd. Swaisland *v.* Dearsley (1861), 29 Beav. 430; Tamplin *v.* James (1880), 15 Ch. D. 215. *Dbtd.* Van Praagh *v.* Everidge, [1902] 2 Ch. 266. *Refd.* McKenzie *v.* Hesketh (1877), 7 Ch. D. 675; Allen *v.* Richardson (1879), 49 L. J. Ch. 137; Andrew *v.* Aitken (1882), 48 L. T. 148. *Mentd.* *Re* National Coffee Palace Co., *Ex p.* Panmure, Gordon (1883), 32 W. R. 236.

533. **Mistake of agent—Alteration of conditions of sale—Contract signed by auctioneer on copy not containing alterations—Revocation of authority.**—MANSER *v.* BACK, No. 491, *ante*.

534. **Wrong property offered for sale—Mistake of vendor's agent.**—If property not intended to be sold be, by the ignorance or neglect of vendor's agent, included in a contract for sale with other property intended to be sold, a case may arise in which the ct. will refuse to compel a specific performance of the whole contract; & if in such case the purchaser should decline to take so much as was intended to be sold, the course which the ct. might adopt would probably be to abstain from interfering, leaving the purchaser to his remedy at law; but it certainly would not rescind the contract. This course, however, cannot be followed in reference to sales under orders of the ct. in which the ct. must decide whether the sale is to be carried into effect or the property resold; but in these cases it is expedient, as far as possible, to adopt the rules which regulate the practice as between ordinary vendors & purchasers. Thus, in the case of a sale under the order of the ct., it being clear that a certain portion of the property was not intended by the vendor to be included in the contract of sale, the ct., in the absence of any proof of misconduct in the purchaser or his agent, refused to compel a specific performance by the purchaser excluding the portion in question. The purchaser, however, electing to take exclusive of the portion of property in dispute, the ct. ordered accordingly, & without compensation.—ALVANLEY *v.* KINNAIRD (1849), 2 Mac. & G. 1; 16 L. T. O. S. 165; 14 Jur. 897; 42 E. R. 1, L. C.

Annotation:—Consd. McKenzie *v.* Hesketh (1877), 7 Ch. D. 675.

535. — **Sale under order of court.**—ALVANLEY *v.* KINNAIRD, No. 534, *ante*.

536. **Mistake as to extent of property sold—Mistake based on report of surveyor.**—After a sale by auction of a messuage & lands, one of the conditions of which was that any mistake or error in the description of the property, or any other error in the particulars, should not annul the sale, but, except where otherwise provided for by the conditions, a compensation should be given or taken, to be settled by two referees or an umpire, it was found that one of the lots contained about 20 more, & another about 10 acres less, than the quantity of land described in the particulars:—*Held*: whether a vendor could or could not in equity be relieved on the ground of mistake from a contract for the sale of lands inaccurately described as to quantity, & which description has been prepared by his solr. from former particulars & conditions relating to the same property, drawn up by another solr. on the report of a surveyor, equity would not in such circumstances enforce the contract against vendor, unless the case should be one for compensation, & purchaser should submit to make such compensation.—LESLIE *v.* TOMPSON (1851), 9 Hare, 268; 20 L. J. Ch. 561; 17 L. T. O. S. 277; 15 Jur. 717; 68 E. R. 503.

Annotations:—Distd. Painter *v.* Newby (1853), 11 Hare, 26. *Refd.* Bettyes *v.* Maynard (1882), 46 L. T. 766.

537. **Sale by executor—Erroneous belief that sale authorised by co-executor.**—One of two exors. erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of testator's estate:—*Held*: the purchaser could not enforce a specific performance of the contract.—SNEESBY *v.* THORNE (1855), 7 De G. M. & G. 399; 3 Eq. Rep. 849; 25 L. T. O. S. 250; 1 Jur. N. S. 1058; 3 W. R. 605; 44 E. R. 156, L. J.J.

Annotations:—Apld. Naylor *v.* Goodall (1877), 47 L. J. Ch. 53. *Refd.* *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352.

538. **Mistake as to authority given to vendor's agent.**—Pltf. purchased a small freehold property by auction. The ct. refused specific performance, on the ground of a mistake, & misunderstanding between the vendor & the auctioneer as to the reserved price.—DAY *v.* WELLS (1861), 30 Beav. 220; 25 J. P. 787; 7 Jur. N. S. 1001; 9 W. R. 857; 54 E. R. 872.

Annotation:—Refd. Bell *v.* Balls, [1897] 1 Ch. 663.

539. **Defendant misled by private information.**—Where a person bidding at a sale has private information as to the property sold, which misleads him, he may be entitled to adduce his mistake as a defence to a suit for specific performance; but he cannot bring it forward as a ground on which to maintain such a suit.

A purchaser, who was well acquainted with the property that he was buying at a sale, filed a bill against the vendors to compel them to assign him certain leaseholds, which he said he thought they intended to sell, together with some freeholds which he had bought at the same time. He adduced evidence to show what he considered to be the intention of vendors, & endeavoured to import his knowledge of that intention into the contract for sale:—*Held*: the bill must be dismissed; & pltf. was ordered, under the circumstances, to pay defts. their costs.—FAIRHEAD *v.* SOUTHEE (1863), 8 L. T. 818; 9 Jur. N. S. 764; 11 W. R. 739.

540. **Mistaken belief that building not subject to restriction.**—A. entered into a contract to purchase from B. a house with a forecourt, situate in Queen's Road, Bayswater, in the belief that he could build upon the whole of the property. He

afterwards ascertained that by the Metropolis Management Act, 1862 (c. 102), no building can be erected, or alteration made in any existing building, without the consent of the Metropolitan Board of Works, & that the Board had given a consent to the erection of a building on the forecourt, which was not to be of a greater height than 10 feet, & he thereupon repudiated the contract, the premises being useless for the purpose for which he required them.

On a bill for specific performance of the contract against A.:—*Held*: the ct. would not enforce specific performance, the contract having been entered into by A. in the belief that he could build over the whole property without restriction as to height.—*BRAY v. BRIGGS* (1872), 26 L. T. 817; 20 W. R. 962.

541. Mistake as to value—Recent valuation at higher figure forgotten.—Deft. offered freehold land to pltf. at a price based upon a valuation made in 1895, forgetting the existence of a recent valuation at a much higher figure. Pltf. accepted the offer in terms which were not identical in every respect, but sufficient to constitute an open contract:—*Held*: the ct., in the exercise of its discretion, would not enforce the contract.—*HODSON v. THETARD* (1907), 51 Sol. Jo. 482.

B. Mistake in Expression of Consent.

See, generally, MISTAKE, Vol. XXXV., pp. 86 et seq.

542. Specific performance refused—Error of third party.—*HUNBURN v. CURTIS* (1730), Fitz-G. 118; 94 E. R. 680, L. C.

543. — Omission of term of agreement.—Specific performance of a written agreement refused, on parol evidence that one term of the actual agreement was omitted.—(*GARRARD v. GRINLING* (1818), 2 Swan. 244; 1 Wils. Ch. 460; 36 E. R. 608.

Misdescription of party to bond.—*See BONDS, Vol. VII., pp. 164, 165, Nos. 10–22*

Specific performance with variation.—*See Part V., Sect. 6, sub-sect. 10, post.*

8.—DEFECT IN SUBJECT-MATTER OF CONTRACT.

SUB-SECT. 1.—IN GENERAL.

Compare SALE OF LAND, Vol. XL., pp. 44–49, Nos. 279–317.

544. Defect must be latent.—Objections by a purchaser by auction, (a) that a way round & across a meadow was not specified; (b) on account of a bidding for pltf.: a specific performance was decreed with costs.

I cannot help the carelessness of the purchaser who does not choose to inquire. It is not a latent defect (*LORD LOUGHBOROUGH, C.*).—*OLDFIELD (BOWLES) v. ROUND* (1800), 5 Ves. 508; 31 E. R. 707, L. C.

Annotations:—**Distd.** *Simpson v. Gilley* (1922), 92 L. J. Ch. 194. **Expld.** *Yandle v. Sutton, Young v. Same*, [1922] 2 Ch. 199. **Refd.** *Cato v. Thompson* (1882), 9 Q. B. D. 616; *Ashburner v. Sewell*, [1891] 3 Ch. 405.

545. ——Specific performance of an agreement for the sale of an estate decreed, notwith-

standing a variance from the description; with compensation for the deficiency in value; though a minute examination might have discovered the defects; as in the state of the house & the cultivation of the lands; not for a variance from the description, as lying within a ring fence; as being an object of sense; & upon the evidence the purchaser being apprised of it.—*DYER v. HARGRAVE, HARGRAVE v. DYER* (1805), 10 Ves. 505; 32 E. R. 941.

Annotations:—**Consd.** *Knatchbull v. Grueber* (1817), 3 Mer. 124; *Jennings v. Broughton* (1851), 5 De G. M. & G. 126; *Re Fawcett & Holmes' Contract* (1889), 42 Ch. D. 150. **Refd.** *Aberaman Ironworks v. Wickens* (1868), L. R. 5 Eq. 485.

546. ——*LUCAS v. JAMES*, No. 553, *post*.

— **What amounts to latent defect.**—*See Sub-sect. 2, post.*

547. Effect of ignorance of plaintiff.—*LUCAS v. JAMES*, No. 553, *post*.

548. Defect must be material.—A contract was entered into for the sale of a house & lands adjoining described as a "residential property," but which in fact possessed advantages for the formation of building sites. The contract stated that the property was sold subject to all drainage, sewer, & other easements, if any, affecting same, & clause 11, that if any error or misstatement in the particulars or contract should be disclosed, same should not annul the sale, nor should any compensation be claimed or made in respect thereof by either party. Neither the particulars nor contract, nor the plan annexed, disclosed or indicated the existence of a natural underground watercourse which ran through the grounds & the lands of adjoining owners in a culvert or piping constructed by the owners of the several lands. The vendors knowing of the existence of the watercourse, did not disclose it to the purchaser, & the purchaser's agents, when inspecting the property prior to the contract, did not see the piping, although it was then exposed to view in a hole in the lawn of the house. The purchaser bought the property primarily as a residence, but with a view in certain events to using it for building purposes. In an action by the vendors for specific performance they waived clause 11 of the contract:—*Held*: the watercourse was not a sewer or drain vested in the local authority, nor an easement affecting the property, nor a defect in title, but that it was a latent defect in the property, although not of such materiality as would prevent the purchaser from getting substantially what she had contracted for if the contract was specifically enforced against her; & the vendors were entitled to specific performance subject to their paying compensation to the purchaser for the defect by reason of the existence of the watercourse.—*SHEPHERD v. CROFT*, [1911] 1 Ch. 521; 80 L. J. Ch. 170; 103 L. T. 874.

Specific performance with compensation.—*See Part V., Sect. 6, sub-sect. 8, post.*

SUB-SECT. 2.—WHAT AMOUNTS TO LATENT DEFECT.

549. General rule.—Where there runs across land an unmetalled open track of a character that is compatible with the existence of a public or

PART III. SECT. 8, SUB-SECT. 1.
1. *Whether bar to specific performance—Necessity for repudiation as soon as defect ascertained.*—The right of a purchaser of immovable property to repudiate the contract on the discovery of the existence of a material defect, which was known to but not

disclosed by the vendor, must be exercised as soon as the defect is ascertained. If so exercised it will be a bar to any relief by way of specific performance subsequently sought by the vendor, even though the defect has been removed before trial. If, however, after ascertaining the existence of the defect,

the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose, but must give the vendor a reasonable time in which to cure the defect.—*BAI DOSIBAI v. BAI DHANBAI* (1924), 1 L. R. 49 Bom. 325.—**IND.**

Sect. 8.—Defect in subject-matter of contract: Sub-sect. 2. Sect. 9. Sect. 10: Sub-sect. 1.]

private right of way or of a mere accommodation track for the use of persons entitled to the land & there is, in fact, a public right of way along the track, it does not constitute a patent defect so that a decree for specific performance can be obtained against a purchaser of the land under an open contract.

It is not enough that there exists on the land an object of sense that might put a careful purchaser on inquiry. In order to be a patent defect, the defect must either be visible to the eye, or arise by necessary implication from something visible to the eye.—*YANDLE & SONS v. SUTTON, YOUNG v. SAME*, [1922] 2 Ch. 199; 91 L. J. Ch. 567; 127 L. T. 783.

Annotation:—Apld. Simpson v. Gilley (1922), 92 L. J. Ch. 191.

550. Right of way.]—*OLDFIELD (BOWLES) v. ROUND*, No. 544, *ante*.

551. —.]—*YANDLE & SONS v. SUTTON, YOUNG v. SAME*, No. 549, *ante*.

552. Land misdescribed as lying within ring-fence.]—*DYER v. HARGRAVE, HARGRAVE v. DYER*, No. 545, *ante*.

553. Nuisance.]—(1) If the vendor at the time of the contract does not know of the existing defect in the estate the ct. will enforce the contract; otherwise, perhaps, if the defect be known to the vendor, & be one which a provident purchaser could not discover. The same law exists, where the purchase is vitiated by a nuisance in the neighbourhood (*WIGRAM, V.-C.*).

(2) I do not in the least degree doubt the power of the ct. to enter upon the question of title at the hearing of the cause or to make such a question a ground for dismissing the bill, but in order that it may be proper so to deal with a case, the defect, or supposed defect, in the title should be prominently put forward in the pleadings (*WIGRAM, V.-C.*).—*LUCAS v. JAMES* (1849), 7 Hare, 410; 18 L. J. Ch. 329; 14 L. T. O. S. 308; 13 Jur. 912; 68 E. R. 170.

Annotations:—As to (1) Consd. Hope v. Walter, [1900] 1 Ch. 257. *Generally, Mentd. Andrew v. Aitken* (1882), 22 Ch. D. 218.

554. Underground watercourse.]—*SHEPHERD v. CROFT*, No. 548, *ante*.

Defects of title.]—See Sect. 9, Sub-sect. 2, A., *post*.

Specific performance with compensation.]—See Part V., Sect. 6, sub-sect. 8, *post*.

SECT. 9.—MISDESCRIPTION.

Misdescription in sale of land generally.]—See *SALE OF LAND*, Vol. XL., pp. 99-110.

555. Whether specific performance granted—Underlease sold as lease.]—The lessee's bill for a specific performance dismissed: his interest, described as fifty years, the residue of a term, free from incumbrances, being a few years only of an old term, & a reversionary term, from another lessor; & old incumbrances not shown to be discharged.—*WHITE v. FOLJAMBE* (1805), 11 Ves. 337; 32 E. R. 1118, L. C.

Annotations:—Apld. Deverell v. Bolton (1812), 18 Ves. 505. *Consd. Fildes v. Hooker* (1817), 2 Mer. 424. *Refd. Fane v. Spencer* (1815), 2 Madd. 438; *Ogilvie v. Foljambe* (1817), 2 Mer. 53; *Purvis v. Rayer* (1821), 9 Price, 488; *Spratt v. Jeffery* (1829), 5 Man. & Ry. K. B. 188; *Souter v. Drake* (1834), 5 B. & Ad. 992. *Mentd. Vancouver v. Bliss* (1805), 11 Ves. 458; *Temple v. Brown* (1815), 1 Taunt. 60; *Shepherd v. Keatley* (1834), 4 Tyr. 571.

556. ——— Omission of covenants.]—An underlessee, for a term of years put up the underlease for sale by auction, describing it as a lease, &

subject to a condition that the lessor's title should not be inquired into. The purchaser, however, discovered that the property was included in the original lease with other property, subject to general covenants; although the rent was reserved separately in respect of the several parts of the property, & there was a provision restricting the right of re-entry to the part of the property in respect of which the rent should be unpaid or any of the covenants broken:—*Held*: the vendor was not entitled to specific performance of the contract.—*DARLINGTON v. HAMILTON* (1854), Kay, 550; 2 Eq. Rep. 906; 23 L. J. Ch. 1000; 24 L. T. O. S. 33; 69 E. R.

Annotations:—Consd. Camberwell & South London Bldg. Soc. v. Holloway (1879), 13 Ch. D. 751. *Apld. Creswell v. Davidson* (1887), 56 L. T. 811. *Refd. Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515; *Re Marsh's Purchase* (1894), 64 L. J. Ch. 255; *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190; *Re Lloyds Bank & Lillingston's Contract*, [1912] 1 Ch. 601; *Hurd v. Whaley* (1918), 118 L. T. 593. *Mentd. Best v. Hamand* (1879), 12 Ch. D. 1.

557. ——— Sale of existing & reversionary lease—Lessor's title not produced.]—*DEVERELL v. BOLTON (LORD)*, No. 439, *ante*.

558. ——— Land partly freehold sold as copyhold.]—Property, sold as copyhold, turned out to be partly freehold:—*Held*: the vendor could not compel a specific performance, & special conditions, providing that errors in the description should not invalidate the sale, & for a compensation, did not alter the case.—*AYLES v. COX* (1852), 16 Beav. 23; 20 L. T. O. S. 4; 51 E. R. 684.

Annotation:—Refd. Hopcraft v. Hopcraft (1897), 76 L. T. 311.

559. ——— Customary leasehold held for term sold as customary renewable leasehold.]—Customary leasehold property held for a term of twenty-one years was described as customary renewable leasehold, & sold subject to the usual condition as to compensation in case of misdescription, error or mistake in the particulars:—*Held*: on claim by the purchaser, that the error was one of description, & not a defect of title, & pltf. was entitled under the condition to a decree for specific performance; & an inquiry was directed in respect of the compensation for the difference in value between the actual & the stated tenure of the property.—*PAINTER v. NEWBY* (1853), 11 Hare, 26; 1 Eq. Rep. 173; 1 W. R. 284; 68 E. R. 1172; *sub nom. NEWBY v. PAYNTER*, 22 L. J. Ch. 871; 21 L. T. O. S. 299; 17 Jur. 483.

Annotations:—Consd. Mawson v. Fletcher (1870), L. R. 10 Eq. 212. *Refd. Ashburner v. Sewell*, [1891] 3 Ch. 405.

560. ——— Customary freehold sold as freehold.]—*WADMORE v. TOLLER* (1889), 6 T. L. R. 58, D. C.

561. ——— Misleading conditions.]—*GROOM v. BOOTH*, No. 320, *ante*.

562. ——— ———.]—Conditions of sale must express in distinct terms a difficulty of title, & therefore where a condition set out facts from which the conclusion in law was that the vendors showed no title, but this conclusion was one which would not occur to an ordinary purchaser, & was not stated in the condition:—*Held*: the sale could not be enforced.—*WILLIAMS v. WOOD* (1868), 16 W. R. 1005.

563. ——— ———.]—A dwelling-house & offices were put up for sale by public auction under a printed condition in a common form that the lot was sold subject to any existing rights & easements of whatever nature, & the printed particulars made no mention of any easement or of any claim to an easement. As the result of evidence it appeared that the house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes & that the vendor's solr. knew of the

rumoured existence of some such easement but forbore to make inquiries. No grant of an easement appeared from the abstract & its existence was, in fact, disputed on the pleadings. In the auction room pltf.'s solr. said he had heard of some such claim but had no definite information about it & the auctioneer in hearing of pltf.'s solr. on being questioned told the audience that they might dismiss the subject of the rumoured claims from their minds as nobody would probably ever hear of them again:—*Held*: the conditions were misleading & the statements in the auction room insufficient & specific performance of the contract refused.—*HEYWOOD v. MALLALIEU* (1883), 25 Ch. D. 357; 53 L. J. Ch. 492; 49 L. T. 658; 32 W. R. 538.

Annotations:—*Appld.* Nottingham Patent Brick & Tile Co. v. Butler (1886), 16 Q. B. D. 778. *Consd.* Beyfus v. Lodge, [1925] Ch. 350. *Refd.* Simpson v. Gilley (1922), 92 L. J. Ch. 194.

564. — Misdescription as to quantity of land in mining lease.—The owners of land agreed to demise to A. the minerals under it to the west of a certain fault supposed to run through the land in the direction of a line drawn on a certain plan, the quantity of the land being described as supposed to be 83 acres or thereabouts. The owners made a similar agreement with B. as to the minerals under the land to the east of the fault, supposed to contain 98 acres or thereabouts. The fault was afterwards found to run so as to leave on the west 8 acres only:—*Held*: on a bill filed by B. to restrain A. from working coal to the east of the fault, the ct. would not in a suit by B. for specific performance against the owners have decreed a demise of all the minerals to the east of the fault, & he could not be deemed in constructive possession so as to maintain his suit against A.—*DAVIS v. SHEPHERD* (1866), 1 Ch. App. 110; 35 L. J. Ch. 581; 15 L. T. 122, L. C. & L. JJ.

Annotation:—*Mentd.* Low Moor Co. v. Stanley Coal Co. (1875), 33 L. T. 436.

565. — Slight & immaterial misdescription.—A slight & immaterial misdescription of the term in the agreement for the sale of a lease will not relieve a purchaser from the obligation of completing his purchase.—*JENNINGS v. BRUNT* (1869), 19 L. T. 705.

566. — Public-house stated to be in occupation of tenant—House leased to brewer for term not yet expired.—The conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired:—*Held*: the purchaser was not bound to ascertain from the tenant the terms of his tenancy; & in such a case the vendor could not enforce specific performance.—*CABALLERO v. HENTY* (1874), 9 Ch. App. 447; 43 L. J. Ch. 635; 30 L. T. 314; 22 W. R. 446, L. JJ.

Annotations:—*Consd.* L. & N. W. Ry. v. Boulton (1890), 62 L. T. 393. *Refd.* Phillips v. Miller (1875), L. R. 10 C. P. 420; Manson v. Thacker (1878), 7 Ch. D. 620.

PART III. SECT. 9.

565 i. Whether specific performance granted—Slight & immaterial misdescription.—*McDONALD v. McDONALD* (1893), 26 N. S. R. (14 R. & G.) 103.—*CAN.*

565 ii. ——*COOTE v. BORLAND* (B.C.) (1904), 35 S. C. R. 282; 25 C. L. T. 28.—*CAN.*

m. — Depth of building lot one hundred & thirty feet "more or less"—Deficiency of thirteen feet.—*MOORHOUSE v. HEWISH* (1895), 22 A. R. 172.—*CAN.*

PART III. SECT. 10, SUB-SECT. 1.

567 i. General rule—*DEWITT v. THOMAS* (1858), 7 C. P. 565.—*CAN.*

567 ii. ——*FOSS v. STERLING LOAN* (1915), 31 W. L. R. 860; 23 D. L. R. 510; 8 Sask. L. R. 289.—*CAN.*

567 iii. ——*DUNLOP v. BOLSTER* (1912), 21 W. L. R. 695; 1 W. W. R. 981; 2 W. W. R. 550; 6 D. L. R. 468; 4 Alta. L. R. 408.—*CAN.*

567 iv. ——*One who asks the ct. for a decree for specific performance of an*

SECT. 10.—NON-PERFORMANCE OF CONDITIONS AND ESSENTIAL TERMS.

SUB-SECT. 1.—IN GENERAL.

Compare INJUNCTION, Vol. XXVII., pp. 433–435, Nos. 568–582.

567. General rule.—If you desire to enforce a contract, you must first put yourself right by performing your part of the contract or being willing to perform it (*LORD ST. LEONARDS, C.*).—*LUMLEY v. WAGNER* (1852), as reported in 19 L. T. O. S. 264; 16 Jur. 871, L. C.

Annotations:—*Refd.* Johnson v. Shrewsbury & Birmingham Ry. (1853) 3 De G. M. & G. 914; Hope v. Hope (1857), 8 De G. M. & G. 731. *Ogden v. Fossick* (1862), 4 De G. F. & J. 426. *Fechter v. Montgomery* (1863), 33 Beav. 22; *Daggett v. Ryman* (1868), 16 W. R. 302; *Wilkinson v. Clements* (1872), 8 Ch. App. 102, n.; *Donnell v. Bennett* (1883), 22 Ch. D. 835. *Mentd.* Dollfus v. Pickford (1854), 2 W. R. 220; *South Wales Ry. v. Wythes* (1854), 5 De G. M. & G. 880; *Paris Chocolate Co. v. Crystal Palace Co.* (1855), 3 Sm. & G. 119; *Stevens v. Bonning* (1855), 6 De G. M. & G. 223; *Stocker v. Wedderburn* (1857), 3 K. & J. 393; *De Mattos v. Gibson* (1859), 4 De G. & J. 276; *Gladstone v. Ottoman Bank* (1863), 1 Hem. & M. 505; *Messageries Impériales Co. v. Baines* (1863), 7 L. T. 763; *Peto v. Brighton, Uckfield & Tunbridge Wells Ry.* (1863), 1 Hem. & M. 468; *Brett v. East India & London Shipping Co.* (1864), 2 Hem. & M. 404; *Adamson v. Gill* (1868), 17 L. T. 464; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Cochrane v. Exchange Telegraph Co.* (1869), 65 L. J. Ch. 334; *Merchants' Trading Co. v. Banner* (1871), L. R. 12 Eq. 18; *Cornwall v. Hawkins* (1872), 20 W. R. 653; *Crosse v. Duckers* (1873), 21 W. R. 287; *Fothergill v. Rowland* (1873), L. R. 17 Eq. 132; *Montague v. Flockton* (1873), L. R. 16 Eq. 189; *Wolverhampton & Walsall Ry. v. L. & N. W. Ry.* (1873), L. R. 16 Eq. 433; *Leech v. Schweder* (1874), 9 Ch. App. 465, n.; *Warne v. Routledge* (1874), L. R. 18 Eq. 497; *Bowen v. Hall* (1881), 6 Q. B. D. 333; *Piperno v. Harinston* (1886), 3 T. L. R. 219; *Whitwood Chemical Co. v. Hardman*, [1891] 1 Ch. 416; *Lanner v. Palace Theatre, Eccarius & Armstrong* (1893), 9 T. L. R. 162, 165; *Ryan v. Mutual Tontine Westminster Chambers Assocn.*, [1893] 1 Ch. 116; *Silver v. Gatti* (1893), 37 Sol. Jo. 776; *Star Newspaper Co. v. O'Connor & Welton* (1893), 9 T. L. R. 526; *Davis v. Foreman*, [1891] 3 Ch. 654; *Keith Prowse v. National Telephone Co.*, [1894] 2 Ch. 147; *Mutual Reserve Fund Life Assocn. v. New York Life Insco. & Harvey* (1896), 75 L. T. 528; *Ehrman v. Bartholomew*, [1898] 1 Ch. 671; *Robinson v. Heuer*, [1898] 2 Ch. 451; *Alexander v. Mansions Proprietary* (1900), 16 T. L. R. 431; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Formby v. Barker*, [1903] 2 Ch. 539; *Yorkshire Miners' Assocn. v. Howden*, [1905] A. C. 256; *Kirchner v. Gruban*, [1909] 1 Ch. 413; *Chapman v. Westerby* (1913), 58 Sol. Jo. 50; *Mortimer v. Beckett*, [1920] 1 Ch. 571; *Lord Stratheona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108; *Rely-A-Bell Burglar & Fire Alarm Co. v. Eisler*, [1926] Ch. 609, *Re Wait*, [1927] 1 Ch. 606.

568. ——When a covenant is penned by way of condition precedent, in such case the covenantor shall not be compelled in equity to perform his part before the other has performed his part.—*FEVERSHAM (EARL) v. WATSON* (1680), *Cas. temp. Finch*, 445; *Freem. Ch.* 35; 23 E. R. 242, L. C.; *reversd.* (1681), *see* 1 Vern. at p. 83, II. L.

Annotations:—*Refd.* Popham v. Bampfild (1682), 1 Vern. 79. *Mentd.* Garth v. Cotton (1753), 3 Atk. 751; *Paget v. Gee* (1753), Amb. 807.

569. ——Demurrer to a bill by a contractor against a company, praying relief in the nature of specific performance. Allowed, with costs, on the ground that pltf. had omitted to perform a material stipulation which was a condition prece-

agreement must show that he is willing & able to carry it out in all its material parts so far as he is concerned, & also that no act of his own in relation to the agreement has in any material degree damaged his opponent. He cannot select one part of the agreement for breach & another for performance. He must be prepared to carry out the entire of his own part of the contract before he can call upon his adversary, through the instrumentality of the ct., to specifically execute the latter's part of the agreement.—*VISHVANATH ATMA-*

Sect. 10.—Non-performance of conditions and essential terms: Sub-sects. 1 & 2, A. (a).]

dent to the performance of the contract by the co.—*DOUGLAS v. SIDMOUTH RAILWAY & HARBOUR Co.* (1868), 13 L. T. 788; 14 W. R. 361.

570. Effect of defendant's knowledge of reasons preventing performance.]—In an agreement for the purchase of an estate, one of the stipulations was, that the vendor should be tenant from year to year to the purchaser:—*Held*: the liability of the vendor to perform this stipulation by reason of embarrassments of which the purchaser must have some notice, was no bar to the specific performance of the contract.—*LORD v. STEPHENS* (1835), 1 Y. & C. Ex. 222; 160 E. R. 90.

571. Right of purchaser to refuse completion—Until restrictive covenants made applicable to vendor as well as purchaser.]—The particulars & conditions of sale of property, put up for sale in lots at an auction, contained certain conditions as to the manner in which the lots were to be fenced, & as to the maintenance, etc., of roads, & also provided that the purchasers of several lots specified should be restricted as to the character of houses to be erected, & that only houses of a certain class should be built on such lots; that a statement to this effect should be inserted in the conveyance to purchasers, & that the vendor reserved to himself the right of selling unsold lots either subject to or not subject to the stipulations "as to fencing or otherwise," contained in the particulars & conditions. At the auction defts. became the purchasers of two of the specified lots; others of such lots remained unsold:—*Held*: pltf., the vendor, was not bound, as to the lots remaining unsold, by the restrictions as to building contained in the conditions of sale, & he was entitled to have disclosed on the conveyance to defts. the fact that they were bound, & he was not bound by such restrictions.—*SIDNEY v. CLARKSON* (1865), 35 Beav. 118; 14 W. R. 157; 55 E. R. 839; *sub nom.* SYDNEY v. CLARKSON, 13 L. T. 659.

Annotation:—*Refd.* *Re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 312.

572. — Insertion of restriction in habendum.]—On a sale by auction by trustees one of the conditions was that the property was sold, & would "be conveyed," subject to all rents & rights of way, if any, & to all liabilities & existing tenancies, & to all rights & claims, if any, of the tenants. The vendors declined to complete unless the condition was substantially set out at length in the *habendum* in the conveyance, to which the purchaser objected. On an action for specific performance, by the vendors:—*Held*: the proviso, that the property "would be conveyed" subject to such rights, entitled the vendors to have the reservation on the face of the conveyance; & specific performance was accordingly decreed on that footing.—*GALE v. SQUIER* (1876), 4 Ch. D. 226; 46 L. J. Ch. 373; 25 W. R. 226; *affd.* (1877), 5 Ch. D. 625; 46 L. J. Ch. 672; 36 L. T. 632, C. A.

573. Whether partial performance sufficient—Where part of agreement is separable.]—Where the conditions of an agreement between landlord & builder, whereby the landlord agrees to grant leases of successive plots of land as the houses

upon each of them are built to a certain stage, are by the terms of the contract separable, there is no rule of equity to prevent them from being separately enforced by way of specific performance. Therefore, where the assignee of the builder's interest had completed the houses upon some only of the plots agreed to be built upon, upon bill for specific performance:—*Held*: he was entitled to the leases of those plots, even though disclaiming all interest in the remaining plots.—*WILKINSON v. CLEMENTS* (1872), 8 Ch. App. 96; 42 L. J. Ch. 38; 27 L. T. 834; 36 J. P. 789; 21 W. R. 90, L. J.

Annotations:—*Consd.* *Lowther v. Heaver* (1889), 41 Ch. D. 248. *Refd.* *Odessa Tram. Co. v. Mendel* (1878), 8 Ch. D. 235. *Mentd.* *Pocahontas Fuel Co. (Incorporated) v. Ambatielos* (1922), 27 Com. Cas. 148.

574. Effect of independence of covenants.]—A deed, which purported to assign some shares in a foreign trading co., contained covenants by the assignor for further assurance of the shares, & by the assignee for the indemnity of the assignor against certain partnership liabilities. It was subsequently found that the transfer of the shares could not be completed without a further act of the assignor. To a suit of the assignee for specific performance of the covenant for further assurance, the assignor alleged, in defence, that pltf. had failed to indemnify him against some of the partnership liabilities:—*Held*: the covenants were independent, & the breach of one was no bar to the specific performance of the other.—*GIBSON v. GOLDSMID* (1854), 5 De G. M. & G. 757; 3 Eq. Rep. 106; 24 L. J. Ch. 279; 24 L. T. O. S. 176; 1 Jur. N. S. 1; 3 W. R. 79; 43 E. R. 1064, L. J.

Annotation:—*Mentd.* *U.S.A. v. McKee* (1867), 3 Ch. App. 79.

Contracts capable of partial enforcement only.]—*See Part II., Sect. 2, ante.*

SUB-SECT. 2.—PARTICULAR INSTANCES.

A. Vendors' Title—Defective or Doubtful Title as Ground for Relief.

(a) *In General.*

What title court will force upon purchaser generally.]—*See SALE OF LAND*, Vol. XL., pp. 146, 148–153, Nos. 1158, 1179–1222.

575. Duty to make title.]—*KIEN v. STUKELEY* (1722), 1 Bro. Parl. Cas. 191; 1 E. R. 506; *sub nom.* *KEEN v. STUCKLEY*, 2 Eq. Cas. Abr. 19; *Gilb. Ch.* 155, II. 1.

Annotation:—*Refd.* *Falcke v. Gray* (1859), 4 Drew. 651.

576. —.]—Vendor filed a bill for specific performance, but not being able to make a good title his bill was dismissed, & he was ordered to return the deposit, with interest.—*ANSON (LORD) v. HODGES* (1832), 5 Sim. 227; 58 E. R. 322.

Annotations:—*Refd.* *Cowgill v. Oxmantown* (1839), 3 Y. & C. Ex. 369; *Haig v. Homan* (1811), 8 Cl. & Fin. 320; *Cox v. Coventon* (1862), 8 Jur. N. S. 1142.

577. — Agreement to purchase from co-owners.]—When pltf. & deft. claim leasehold under the same instruments, & deft. purchases pltf.'s share, he cannot object that the lessor's title is not shown.

Deft. admitting by his answer that at the date of the contract pltf. was entitled, cannot at the hearing object that no abstract was delivered &

the purchaser will not be allowed to set up the vendor's lack of title as a defence to the vendor's action for specific performance.—*McKAY v. PROHAR & PAINE* (Sask.), [1925] 2 W. W. R. 665.—CAN.

q. —.]—*WILKIN v. BROWN* (Alta.), [1927] 2 D. L. R. 87.—CAN.

RAM v. BAPU NARAYAN & KAJABAI (1884), 1 Bom. 262.—IND.

587 v. —.]—*HARDLEY v. HUGHES* (1909), 29 N. Z. L. R. 188.—N.Z.

n. Effect of defendant's preventing performance.]—*MALONEY v. WHITLOCK* (1908), 7 W. L. R. 460; 1 Sask. L. R. 41.—CAN.

o. —.]—*FRASER v. NOWE* (N. S.) (1912), 11 E. L. R. 274.—CAN.

p. —.]—Where the purchaser under an agreement for the sale of mtged. land agrees to make the payments falling due thereafter on the mtge. but fails to do so & the mtgee. forecloses & obtains title to the land,

no title shown.—*PHIPPS v. CHILD* (1857), 3 Drew. 709; 61 E. R. 1074.

578. — What constitutes performance of duty.—By the conditions of sale of the property of a co. in the course of being wound up it was stipulated that the purchaser should accept a conveyance from the official manager under the powers of Winding-up Acts, 1848 & 1849, or one of them, without requiring the concurrence of any of the shareholders or any other person; but that, if the purchaser should consider the legal estate outstanding & should require a conveyance thereof, he should bear the expenses of obtaining such conveyance or conveyances as he might require & all other expenses incident to getting in such legal estate:—*Held*: on the general scope of the conditions, the purchaser was to be at the risk of getting in the legal estate, & the vendor was entitled to a specific performance on executing a conveyance of the equitable interest & undertaking, at the expense of the purchaser, to obtain all such conveyances & render all such assistance to the getting in of the legal estate as the purchaser should require & as the vendor was able to obtain or give.—*SHEERNESS WATERWORKS CO. v. POLSON* (1861), 3 De G. F. & J. 36; 4 L. T. 568; 45 E. R. 791, L. C.

579. — Sale of land & timber—Contracts separate.—On [an entire] contract for the sale of lands, described as partly freehold & partly copyhold, & the timber thereupon, the latter at a specified valuation, upon a condition that the vendor should not be required to distinguish the freehold land from the copyhold, nor the respective boundaries thereof, it was held that, upon the particulars & conditions, the contract for the land & timber was one contract, & not separate contracts; & that the purchaser was bound to pay for the timber at the valuation, notwithstanding the fact that it might be wholly upon the copyhold land, & therefore subject to the rights of the lord, & the restrictions of the custom.

Where, upon a contract for the sale of an estate, a separate & distinct contract is made for the sale of the timber upon it, the ct. will not enforce the latter contract unless the vendor can give the purchaser such possession & dominion over the timber as will entitle him to fell & remove it; but, if an entire contract be made for the sale, both of the estate & the timber, notwithstanding the purchase-money is made up of distinct sums for each, the vendor is only bound to make out his title to the land according to the contract; & the title to the land is the title to the timber upon it.—*CROSSE v. LAWRENCE* (1852), 9 Hare, 462; 21 L. J. Ch. 889; 18 L. T. O. S. 314; 16 Jur. 142; 68 E. R. 591.

580. — Contract entire.—*CROSSE v. LAWRENCE*, No. 579, *ante*.

581. ——A contract for the purchase of copyhold land at a certain price, & the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not show any custom in the manor, or licence from the lord, enabling the tenants of the manor, or himself, or his assigns, to fell the timber.—*CROSSE v. KEENE* (1852), 9 Hare, 460; 21 L. J. Ch. 892; 18 L. T. O. S. 314; 16 Jur. 144; 68 E. R. 595.

—.]—*See, generally, SALE OF LAND*, Vol. XL., pp. 136 *et seq.*

582. Whether doubtful title forced on purchaser.—If it was only doubtful he would not oblige the purchaser to take the title (*LORD THURLOW, C.*).—*SHAPLAND v. SMITH* (1780), 1 Bro. C. C. 75; 28 E. R. 994, L. C.

Annotations:—*Apld.* *Cooper v. Denne* (1792), 4 Bro. C. C. 80. *Distd.* *Vancouver v. Bliss* (1805), 11 Ves. 458. *Apld.* *Stapylton v. Scott* (1809), 16 Ves. 272; *Jervoise v. Northumberland* (1820), 1 Jac. & W. 559. *Apprvd.* *Elliot v. Pott* (1821), 3 Bl. 134. *Consd.* *Colmore v. Tyndall* (1828), 2 Y. & J. 605. *Apld.* *Lincoln v. Arce-deckne* (1844), 1 Coll. 98. *Refd.* *Gale v. Gale* (1789), 2 Cox, Eq. Cas. 136. *Mentd.* *Silvester d. Law v. Wilson* (1788), 2 Term Rep. 441; *Kenrick v. Beauchereck* (1802), 3 Bos. & P. 175; *Doe d. White v. Simpson* (1804), 5 East, 162; *Doe d. Leicester v. Biggs* (1809), 1 Taunt. 109; *R. v. Holm East Waver Quarter* (1812), 16 East, 127; *Ireson v. Pearman* (1825), 3 B. & C. 799; *Tenny d. Gibbs v. Moody* (1825), 3 Bing. 3; *White v. Parker* (1835), 1 Bing. N. C. 573; *R. v. Burgate* (1854), 23 L. T. O. S. 155.

583. ——*VANCOUVER v. BLISS* (1805), 11 Ves. 458; 32 E. R. 1161, L. C.

Annotations.—*Refd.* *Grove v. Bastard* (1851), 1 De G. M. & G. 69. *Mentd.* *Smedley v. Philpot* (1838), 3 M. & W. 573.

584. ——A purchaser is not bound to accept a doubtful title.—*WILDE v. FORT* (1812), 4 Taunt. 334; 128 E. R. 359.

Annotations.—*Refd.* *Howe v. Smith* (1884), 27 Ch. D. 89; *Stickney v. Keeble*, [1915] A. C. 386. *Mentd.* *Barrymore v. Ellis* (1836), 8 Sim. 1.

585. ——Purchaser not compelled to take a doubtful title.—*SLOPER v. FISH* (1813), 2 Ves. & B. 145; 35 E. R. 274, L. C.

Annotations:—*Consd.* *Pyrke v. Waddingham* (1852), 10 Hare, 1. *Refd.* *Collard v. Sampson* (1853), 4 De G. M. & G. 224.

586. ——In compelling a purchaser to take a title, the ct. formerly acted upon its own opinion; but now it will not compel him to take it if the point is doubtful.—*JERVOISE v. NORTH-UMBERLAND (DUKE)* (1820), 1 Jac. & W. 559; 37 E. R. 481, L. C.

Annotations:—*Apld.* *Lincoln v. Arcedeckne* (1844), 1 Coll. 98. *Consd.* *Pyrke v. Waddingham* (1852), 10 Hare, 1. *Refd.* *Collard v. Sampson* (1853), 4 De G. M. & G. 224. *Mentd.* *Stonor v. Curwen* (1832), 5 Sim. 264; *Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Archer v. Slater* (1841), 11 Sim. 507; *Jones v. Price* (1841), 11 Sim. 557; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540.

587. ——Where in a suit by a vendor for specific performance the master reported in favour of the title, but the ct. on an exception taken by the purchaser deemed the title doubtful, an order was made dismissing the bill without costs but neither allowing nor disallowing the exception.—*WILCOX v. BELLAERS* (1825), Turn. & R. 491; 37 E. R. 1189; *affd.* (1827), Turn. & R. at p. 495, L. C.

Annotations:—*Consd.* *Pyrke v. Waddingham* (1852), 10 Hare, 1. *Refd.* *Lees v. Mosley* (1835), 1 Y. & C. Ex. 589.

588. ——*PORT v. TURNER*, No. 681, *post*.

589. ——Where, upon a contract to purchase, a third party puts in a claim, which is not merely a frivolous one, but upon which there is a reasonable doubt, the ct. will not decree specific performance against the purchaser.

Where a third person, not a party to a suit for specific performance of a contract for sale, make such a claim independently of vendor & purchaser, the bill was dismissed without costs.—*HESELTINE v. SIMMONS* (1858), 6 W. R. 268; *subsequent proceedings, sub nom. SIMMONS v. HESELTINE*, 5 C. B. N. S. 554.

PART III. SECT. 10, SUB-SECT. 2.—A. (a).

582 i. Whether doubtful title forced on purchaser.—Before the ct. will compel a purchaser to accept a title, it must be shown to be reasonably clear & marketable, without doubt as to the evidence

of it.—*FRANCIS v. ST. GERMAIN* (1858), 6 Gr. 636.—CAN.

582 ii. ——*LONDON & CANADIAN LOAN & AGENCY CO. v. GRAHAM* (1888), 16 O. R. 329.—CAN.

582 iii. ——*MAJOR v. SHEPHERD* (1900), 18 Man. L. R. 504.—CAN.

582 iv. ——*CAMERON v. HULL* (1913), 23 O. W. R. 736; 4 O. W. N. 581, 9 D. L. R. 843.—CAN.

r. — Vendor ignorant of defect at time of agreement—Defect cured within reasonable time.—A vendor is entitled to specific performance of an agree-

performance, the opinion of the ct. was in favour of the title, the question on which turned on the construction of a particular will; but the ct., being unable to found that opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy the ct. that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial & not merely idle litigation, refused to decree a specific performance.

A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the ct. entertains doubts, but includes also a title which, although the ct. has a favourable opinion of it, yet may reasonably & fairly be questioned in the opinion of other competent persons; for the ct. has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favour of the title should turn out not to be well founded.

If the doubts as to a title arise upon a question connected with the general law, the ct. is to judge whether the general law on the point is or is not settled; & if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the ct. can satisfactorily investigate, specific performance will be refused.—*PYRKE v. WADDINGHAM* (1852), 10 Hare, 1; 68 E. R. 813.

Annotations:—*Appld.* *Collard v. Sampson* (1853), 4 De G. M. & G. 224; *Freer v. Hesse* (1853), 4 De G. M. & G. 495; *Falkner v. Equitable Reversionary Soc.* (1858), 4 Drew. 352. *Expld.* *Bull v. Hutchens* (1863), 32 Beav. 615. *Consd.* *Collier v. M'Bean* (1865), 35 L. J. Ch. 144; *Hamilton v. Buckmaster* (1866), 36 L. J. Ch. 58. *Consd. & N.F.* *Mullings v. Trinder* (1870), L. R. 10 Eq. 449. *Apprvd.* *Palmer v. Locke* (1881), 18 Ch. D. 381. *Refd.* *Bradshaw v. Fane* (1856), 3 Drew. 534; *Green v. Jenkins* (1860), 1 De G. F. & J. 454; *Hood v. Oglander* (1865), 34 Beav. 513; *Re Frith's Contract*, *Frith v. Osborne* (1876), 24 W. R. 1061; *Burnaby v. Equitable Reversionary Interest Soc.* (1885), 54 L. J. Ch. 466.

595. —.]—We do not say that there may not be cases in which a question of law may be

590. —.]—By will, dated Jan. 4, 1873, M. G. appointed a reversionary interest in a sum in ct. in favour of J. G. On Mar. 3, 1873, J. G. filed a petition for liquidation. On June 4, 1873, T. was appointed trustee in the liquidation. On July 17, 1873, J. G. mortgaged his expectant interest under the appointment to E. On Apr. 1, 1875, J. G. mortgaged the same expectant interest to P. On Sept. 24, 1875, M. G. died. On Oct. 22, 1875, P. put a stop order on the fund. On Nov. 8, 1875, E. put a stop order on the fund. On Nov. 26, 1875, J. G. mortgaged the reversionary interest to X. On Dec. 7, 1875, X. put a stop order on the fund. On Mar. 20, 1876, T. put a stop order on the fund. On Jan. 2, 1878, T., with the concurrence of J. G. assigned the reversionary sum to one of plffs.' predecessors in title, the assignment being expressed to be subject to the rights, if any, of E., P., & X. On Jan. 14, 1879, E., under the power of sale in his mtge., sold the reversionary interest to plffs. On Jan. 20, 1879, an order gave plffs. the benefit of E.'s stop order. On Apr. 16, 1879, P., under the power of sale in his mtge., sold the reversionary interest to plffs. On June 25, 1879, J. G. obtained his discharge from the Bkpcy. Ct. Plffs., having contracted to sell the reversionary interest to deflt., brought an action, for specific performance to the contract:—*Held*: considering the conflict of decisions, the title was too doubtful to be forced on the purchaser.—*PALMER v. LOCKE* (1881), 18 Ch. D. 381; 51 L. J. Ch. 124; 45 L. T. 229; 30 W. R. 419, C. A.

Annotations:—*Consd.* *Burnaby v. Equitable Reversionary Interest Soc.* (1885), 54 L. J. Ch. 466; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213. *Mentd.* *Re Jakeman's Trusts* (1883), 23 Ch. D. 344; *Re Stone's Estate* (1893), 9 T. L. R. 346; *Mercer v. Vans Collna* (1897), [1900] 1 Q. B. 130, n.

—.]—*Sec. also*, SALE OF LAND, Vol. XL., p. 151, Nos. 1203, 1204.

ment for sale notwithstanding a defect in title, of which, or the materiality of which, he was not aware when entering into the agreement & which he has actually removed within a reasonable time.—*PUGH v. KNOTT* (Alta.), [1917]

3 W. W. R. 95; 36 D. L. R. 52.—**CAN.**
t. *Title subject to outstanding equity.*
—A supposed equity in a person who died in 1808, where the possession since that time has been enjoyed by another, claiming it as his own, &

having a perfect legal title, is no ground for refusing to enforce an agreement in which the condition precedent was, that a party should "show, make, & complete a perfect legal title," as, even if such equity existed, a ct. of

597. Patent defect—Discoverable by inquiry.]—OLDFIELD (BOWLES) *v.* ROUND, No. 544, *ante*.

598. Effect of delay in objecting to title.]—Even after great delay & acquiescence, the ct. will not compel a purchaser to complete, if the title appears to be manifestly bad.—BLACHFORD *v.* KIRKPATRICK (1842), 6 Beav. 232; 49 E. R. 814; *sub nom.* BLACHFORD *v.* KIRKPATRICK, OGLANDER *v.* KIRKPATRICK, 12 L. J. Ch. 108.

599. —.]—The assignees of an insolvent put up for sale an estate, which had been impressed with the character of personalty, & which, if it retained that character, belonged absolutely to the insolvent. A purchaser, upon investigation of the title, discovered that there was good reason to contend that a prior owner had elected to take the estate as realty, in which case the fee belonged to the heir of the insolvent's late wife, the insolvent himself being only tenant by the curtesy. The purchaser, after some correspondence, in which he required the concurrence of the heir, abruptly gave notice to determine the contract, & immediately afterwards bought up the title of the heir:—*Held*: he could not avail himself of this purchase to defeat his contract, but he had thereby removed the objections to the title, & specific performance was decreed against him, allowing him the expenses of his purchase from the heir.

Semble: a vendor who *bonâ fide* puts up a property for sale, believing himself absolute owner, when he has in fact only a partial interest, is entitled to enforce the contract if he can perfect the title.

If a purchaser is entitled at all to insist that the vendor's having only a partial interest makes the contract void, he must insist upon the objection at once, & cannot avail himself of it after having treated the contract as good & required the concurrence of the persons who can complete the title.—MURRELL *v.* GOODYEAR (1860), 1 De G. F. & J. 432; 29 L. J. Ch. 425; 2 L. T. 268; 6 Jur. N. S. 356; 8 W. R. 398; 45 E. R. 426, L. JJ.

Annotations:—**Consd.** Hume *v.* Pocock (1866), L. R. 1 Eq. 662; Halkett *v.* Dudley, [1907] 1 Ch. 590. **Refd.** Reed *v.* Don Pedro North Del Rey Gold Mining Co. (1864), 10 L. T. 836.

600. —.]—Pltf. agreed to let, & deft. to take, a dwelling-house & land for a term of years. Pltf. represented himself to be the owner in fee of the whole of the land, but in fact he was only lessee of part of the land for a shorter term than that which he proposed to grant to deft., with an alleged assurance of renewal from his lessor. The demise to pltf. contained covenants which were very objectionable. Pltf.'s title was not disclosed to deft. until after the commencement of the suit for specific performance. The bill was dismissed, with costs, although deft. had refused to perform his contract on different grounds, which were not gone into at the hearing, & in consequence of which this suit was instituted.—BASKCOMB *v.* PHILLIPS (1859), 29 L. J. Ch. 380; 1 L. T. 288; 6 Jur. N. S. 363.

601. —.]—ALLEN *v.* RICHARDSON, No. 523, *ante*.

602. Objection to conveyance not to title.]—JUMPSON *v.* PITCHERS, No. 615, *post*.

603. —.]—LONDON & GREENWICH RY. Co. *v.* GOODCHILD, No. 1598, *post*.

604. —.]—A bill by a vendor for specific performance of a contract to sell, stating or

showing by reasonable inference that the vendor cannot give a valid conveyance, is demurrable—otherwise, where the allegations only disclose difficulties in the mode of conveyance.

Qu.: whether the ct., in the absence of express stipulation or of conduct, waiving the objection, will decree specific performance of a contract, where the execution by a necessary party can only be obtained under a power of attorney.—BEAUFORT (DUKE) *v.* GLYNN (1855), 3 Sm. & G. 213; 25 L. T. O. S. 171; 1 Jur. N. S. 888; 3 W. R. 463; 65 E. R. 630; *affd.* 3 W. R. 502, L. JJ.

605. Purchaser to be protected from probable litigation.]—The ct. has to take care . . . that the party against whom interference is sought is not exposed to the danger & expense of contesting a claim, which may be founded upon substantial grounds (TURNER, V.-C.).—GLASS *v.* RICHARDSON (1852), 9 Hare, 698; 68 E. R. 294; *on appeal*, 2 De G. M. & G. 658, L. JJ.

Annotations:—**Mentd.** Eddleston *v.* Collins (1853), 3 De G. M. & G. 1; Flack *v.* Downing College, Cambridge (1853), 13 C. B. 945; Garland *v.* Mead (1871), L. R. 6 Q. B. 441; Everingham *v.* Ivatt (1873), L. R. 8 Q. B. 388; Hall *v.* Bromley (1887), 35 Ch. D. 612; *Re* Townsend's Contract, [1895] 1 Ch. 716; *Re* Heathcote & Rawson's Contract (1913), 108 L. T. 185. **Mentd.** Sissons *v.* Chichester-Constable, [1916] 2 Ch. 75.

606. —.]—On Mar. 28, 1894, pltf. & deft. signed a memorandum of agreement, by which deft. was to take an underlease of a house on certain terms. The date from which the underlease was to commence was omitted in this agreement, but it was understood by the parties, at the time, that it was to be Apr. 7, 1894. This date was specifically agreed to in writing by subsequent letters. By the lease under which pltf. held, there was a covenant that the lessee would not assign or underlet without the licence in writing of the lessor, but the licence was not to be withheld in the case of the lessee obtaining a respectable & responsible person as tenant. Deft. was a respectable & responsible tenant, but the lessor declined to consent to the underlease, unless a certain undertaking was given by deft. This refusal to consent was also pleaded as a defence to an action by pltf. for specific performance of the agreement:—*Held*: deft. would get a good title & run no substantial risk of having it impeached on the ground of any breach of covenant by the granting of the underlease. He was therefore ordered to specifically perform the contract.

I am satisfied that deft. here will get a good title. . . . If I thought that there was any substantial chance of his having to run the risk of a lawsuit, or it was a doubtful question, I should not enforce specific performance against him (ROMER, J.).—WHITE *v.* HAY (1895), 72 L. T. 281.

Annotation—**Refd.** Douglas *v.* Deroy (1895), 39 Sol. Jo. 481.

607. Court must be clearly in favour of vendor.]—Though the ct. may entertain a strong opinion in favour of the title of a party, if it were a contest between him and another claiming title, that is not sufficient in a suit for specific performance. To force a title on a purchaser, the opinion of the ct. must be so clear that it does not apprehend that another judge would form a different opinion.—ROGERS *v.* WATERHOUSE (1858), 4 Drew. 329; 6 W. R. 823; 62 E. R. 127.

equity would not enforce it under the circumstances.—DEWITT *v.* THOMAS (1863), 10 Gr. 21.—CAN.

a. Objection to title must be pleaded.]—In an action by a vendor for specific performance of an agreement

for the sale of land, if the purchaser wishes to rely on want of title he must raise the point expressly in his defence.—PITURA *v.* HARASYM, [1925] 3 D. L. R. 473; [1925] 2 W. W. R. 252; 35 Man. L. R. 26.—CAN.

b. Good title question for court.] In a suit for specific performance it for the ct. to determine whether or not the vendor can make a good title.—BURKE *v.* DRAKE (1876), 2 N. Z. Jur. N. S. 102.—N.Z.

Sect. 10.—Non-performance of conditions and essential terms: Sub-sect. 2, A. (a), (b), (c), (d) & (e).]

608. —[There can be no decree for specific performance where a judge of the ct. entertains doubts as to the title (TURNER, L.J.). —DICKSON v. FRASER (1862), 10 W. R. 411, L. JJ.

609. —[But although the Ct. of Appeal undoubtedly possesses the right of expressing & acting upon an opinion as to title contrary to that of the judge appealed from, yet where a vendor has filed a bill for specific performance, which has been dismissed, it requires a very clear case indeed to induce the ct. to force the title upon the purchaser.—COLLIER v. McBEAN (1865), 1 Ch. App. 81; 35 L. J. Ch. 144; 13 L. T. 484; 30 J. P. 99; 12 Jur. N. S. 1; 14 W. R. 156, L. JJ.

*Annotations:—*Consd. Beoley v. Carter (1869), 4 Ch. App. 230. *Refd.* Collier v. Walters (1873), L. R. 17 Eq. 252.

610. Contract voidable at will of third party.]—The ct. will not enforce a contract for sale at the instance of the vendor when it is in the power of a third person to destroy the title.—BREWER v. BROADWOOD (1882), 22 Ch. D. 105; 52 L. J. Ch. 136; 47 L. T. 508; 31 W. R. 115.

*Annotations:—*Consd. Ellis v. Rogers (1885), 29 Ch. D. 661, Lee v. Soames (1888), 59 L. T. 366. *Distd.* Farnham Brewery Co. v. Hunt (1893), 68 L. T. 440; Brickles v. Snell, [1916] 2 A. C. 599. *Refd.* Wylson v. Dunn (1887), 34 Ch. D. 569; Bolton Partners v. Lambert (1889), 41 Ch. D. 295; Bellamy v. Debenham (1891), 60 L. J. Ch. 166; Re Bayley & Shoesmith's Contract (1918), 87 L. J. Ch. 626.

Title depending on adverse possession.]—See LIMITATION OF ACTIONS, Vol. XXXII., pp. 487, 488, Nos. 1492-1497.

Vendor's title generally.]—See SALE OF LAND, Vol. XL., pp. 134 *et seq.*

(b) Effect of Decision of Court.

See, also, SALE OF LAND, Vol. XL., p. 149, Nos. 1187-1191.

611. General rule.]—Where a doubt arises upon the validity of a title, the decision of the ct. removes the doubt, & specific performance will be enforced.—BELL v. HOLTBY (1873), L. R. 15 Eq. 178; 42 L. J. Ch. 266; 28 L. T. 9; 21 W. R. 321.

*Annotation:—*Mentd. Cohen v. Bayley-Worthington (1908), 98 L. T. 461.

612. Certificate of another court.]—CLONMERT v. WHITAKER (1807), 2 Jarman on Wills, 5th ed. p. 1299, n. L. C.

*Annotation:—*Refd. Pyrke v. Waddingham (1852), 10 Hare, 1.

613. Decision of another court on similar case.]—Where, in a suit for specific performance, the purchaser rests his objection to the vendor's title on an express decision of a ct. of law in a similar case, the ct. will not take upon itself to determine the question between the parties without their consent, but will send a case for the opinion of a ct. of law, although the ct. may entertain a strong opinion against the correctness of such decision.—PEPPERCORN v. PEACOCK (1840), 4 Jur. 1122, L. C.

614. Defendant served with notice of prior decision as to same title.]—Specific performance decreed, with costs, in a case, where deft., objecting to title, had been served with notice of a prior decision in a different cause in favour of the same title, against a similar objection.—BISCOE v. WILKS (1817), 3 Mer. 456; 36 E. R. 175, L. C.

615. Informal order in Chancery.]—In 1772 a woman who was a party to a suit in chancery & who was married, but whose marriage did not appear in any of the proceedings in the suit, was, by an order in the suit treating her as a *feme sole* directed to convey a freehold estate to F., a purchaser. She afterwards, together with her

husband, executed a conveyance of the estate to F., in which conveyance the husband covenanted with F. that he & his wife would levy a fine of the estate. It did not appear that a fine was ever levied. On a bill filed by a vendor claiming under F. against a purchaser for specific performance, the purchaser objected to the title on the ground of the want of a fine & the defectiveness of the proceedings in chancery:—*Held:* the objection was not one of title but of conveyance inasmuch as the order in chancery notwithstanding its informality, was binding on the married woman, & rendered her a trustee for the purchaser, & she was therefore compellable to complete the legal title.—JUMPSON v. PITCHERS (1844), 1 Coll. 13; 13 L. J. Ch. 166; 63 E. R. 300.

616. Court of Appeal differing from court below.]—COLLIER v. McBEAN, No. 609, *ante*.

617. —[In a suit for specific performance, a purchaser will be forced to take a title which appears to the Ct. of Appeal to be good, although the judge of the ct. below was of a different opinion; that fact not being sufficient to constitute a doubtful title.—BEIOLEY v. CARTER (1869), 4 Ch. App. 230; 38 L. J. Ch. 283; 20 L. T. 381; 17 W. R. 300, L. JJ.

*Annotations:—*Refd. Alexander v. Mills (1870), 6 Ch. App. 124; Bell v. Holtby (1873), L. R. 1 Eq. 178. *Mentd.* Re Shopheard's S. E. (1869), L. R. 8 Eq. 571; Re Strutt's Trusts (1873), L. R. 16 Eq. 629; Bailey v. Holmes (1876), 24 W. R. 1068; Re Frith's Contract, Frith v. Osborne (1876), 24 W. R. 1061; Re Ives, Bailey v. Holmes (1876), 3 Ch. D. 690; Debenham v. Sawbridge (1901), 70 L. J. Ch. 525.

618. Vendor refusing to comply with requisition—Rescission by purchaser—Court holding purchaser's contention to be right.]—DENNY v. HANCOCK, No. 512, *ante*.

(c) Production of Documents of Title.

See, generally, SALE OF LAND, Vol. XI., pp. 163, 164, Nos. 1324-1332.

619. General rule.]—A vendor seeking a specific performance should have his title prepared, & therefore, where the abstract delivered is imperfect, he pays the costs of the suit up to the time of the defects being supplied.—WILSON v. ALLEN (1820), Jac. & W. 611; 37 E. R. 501.

*Annotations:—*Distd. McNicol v. Kay (1856), 28 L. T. O. S. 20. *Apld.* Flood v. Pritchard (1879), 40 L. T. 873. *Refd.* Minton v. Kirwood (1868), 3 Ch. App. 614. *Mentd.* Cooper v. Norfolk Ry. (1849), 3 Exch. 546; Ecclesiastical Comrs. v. L. & S. W. Ry. (1851), 2 C. L. R. 1796.

620. Whether specific performance granted.]—Bill for specific performance of articles for the purchase of an estate, dismissed with costs; because the title was not laid before the vendee's counsel within the time limited.—LEWIS v. LECHMERE (LORD) (1722), 10 Mod. Rep. 503; 88 E. R. 828, L. C.

621. —[Specific performance without costs, the suit being occasioned by the refusal of the vendor to produce documents insisted on by the purchaser, some of which were necessary & the others not.—NEWALL v. SMITH (1820), 1 Jac. & W. 263; 37 E. R. 375, L. C.

622. Documents missing—Admissibility of secondary evidence—Of contents & execution.]—If, after a contract for sale of an estate, but before the title is accepted, the title deeds be destroyed by fire, this ct. will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of showing what were the contents of the destroyed deeds, & of proving that such deeds were duly executed & delivered.—BRYANT v. BUSK (1827), 4 Russ. 1; 38 E. R. 705.

*Annotation:—*Apld. Re Halifax Commercial Banking Co. & Wood (1898), 79 L. T. 536.

623. ———.]—(1) In a vendor's suit for specific performance the abstract showed a seisin in fee in B. in 1798, & a devolution of the title both legal & equitable from him to pltf. & uninterrupted enjoyment thereunder. In one of the deeds abstracted, dated in 1815, there was, however, a recital of seisin in A. in 1779, & that by mesne conveyances, the premises came to B. The deeds recited were missing, but affidavits were produced verifying extracts from the account books of deceased solrs. who had been concerned in framing the recited deeds in which charges were made for preparing those deeds & for attending to witness their execution:—*Held*: the recital coupled with the abstracts was good secondary evidence of the execution & contents of the missing deeds.

(2) The abstracted deed of 1815 also contained recitals of deeds purporting to be mtges. of the premises in question by B., & subsequent reconveyances to him by the mtgees. These deeds were also missing; but were abstracted in an abstract produced to the purchaser, which had been made out & examined by a conveyancer in 1815, & from which the recitals in the deed of 1815 had been prepared:—*Held*: the abstract of 1815 was sufficient secondary evidence of the execution & contents of the missing deeds.—*MOULTON v. EDMONDS* (1859), 1 De G. F. & J. 246; 29 L. J. Ch. 181; 1 L. T. 391; 6 Jur. N. S. 305; 8 W. R. 153; 45 E. R. 352, L. C.

Annotations:—*Generally*, *Refd.* *Re* Halifax Commercial Banking Co. & Wood (1898), 79 L. T. 536; *Re* Nisbet & Potts' Contract, [1905] 1 Ch. 391.

624. ——— & stamping.]—The mere fact that the title deeds to property sold have been lost or mislaid does not release the purchaser from the performance of his contract; but he can be compelled to complete if he is furnished in proper time with satisfactory secondary evidence as to the contents of the lost documents, & as to their having been duly executed & properly stamped.—*Re* HALIFAX COMMERCIAL BANKING CO., LTD. & WOOD (1898), 79 L. T. 536; 47 W. R. 191; 15 T. L. R. 106; 43 Sol. Jo. 124, C. A.

Right of purchaser to insist on stamping.—*See, generally*, *SALE OF LAND*, Vol. XL, p. 165 Nos. 1344-1347.

(d) *Title Defective in Part.*

625. Whether specific performance granted.—*HANGER v. EYLES* (1722), 2 Eq. Cas. Abr. 20; 22 E. R. 17.

626. ———.]—A contract to purchase lots; to two of the lots a title could not be made, & in others there had been a deterioration in point of value; if the value of the remaining lots is not affected by that deterioration a specific performance shall be decreed as to all but the two.—*POOLE v. SHERGOLD* (1786), 2 Bro. C. C. 118; 1 Cox, Eq. Cas. 273; 29 E. R. 68; *previous proceedings* (1785), 1 Cox, Eq. Cas. 160, L. C.

Annotations:—*Appld.* *Lowin v. Guest* (1826), 1 Russ. 325. *Consd.* *Casamajor v. Strode* (1834), 2 My. & K. 706. *Distd.* *Croome v. Lediard* (1834), 2 My. & K. 251.

627. ———.]—*WESTERN v. RUSSELL*, No. 124, *ante*.

628. ———.]—A purchaser who has contracted for the entirety of an estate will not be compelled to take six undivided seventh parts of it.—*DALBY v. PULLEN* (1829), 3 Sim. 29; 57 E. R. 911; *affd.* (1830), 1 Russ. & M. 296, L. C.

Annotations:—*Distd.* *Croome v. Lediard* (1834), 2 My. & K. 251. *Refd.* *Casamajor v. Strode* (1834), 2 My. & K. 706.

629. ———.]—A contract of sale described the property purchased as "The cottage & paddock

comprising 1 acre, 2 roods, 8 poles, situate at, etc., described in the particulars as Lot 1." The description of Lot 1 in the particulars was: "The property comprises 1 acre, 2 roods, 8 poles, situate, etc., consisting of a cottage & paddock in the occupation of Mr. P." By the contract of sale, the title & conveyance were to be completed according to the conditions of sale. One of these was "The property comprised in the particulars is presumed to be correctly described & the quantity of the land shall be taken as stated whether more or less, although the title deeds state such quantity to be less, without any compensation on either side & no other evidence of identity shall be required than that furnished by the title deeds, & the statements therein shall be deemed conclusive evidence of the identity of the property." On default of completion the deposit money was to be forfeited. The vendor delivered an abstract of title to 3 roods, 22 poles only:—*Held*: the mere fact of a title to land described as consisting of 3 roods, 22 poles, being made by the vendor, did not, under the circumstances, authorise the purchaser to contend that the title had not been made according to the conditions of sale, & he was bound to complete.—*NICOLL v. CHAMBERS* (1852), 11 C. B. 996; 138 E. R. 770; *sub nom.* *NICHOLL v. CHAMBERS*, 21 L. J. C. P. 54; 18 L. T. O. S. 243. *Annotation*:—*Mentd.* *Farmer v. Turner* (1899), 15 T. L. R. 522.

(e) *Necessity for Concurrence of Third Party.*

630. Execution by necessary party requiring power of attorney.—*BEAUFORT (DUKE) v. GLYNN*, No. 604, *ante*.

631. Of tenant for life.—Where by the terms of a devise or settlement of real estates the consent of the tenant for life is necessary to enable the trustees to sell the estates, upon a bill filed by the trustees to compel the specific performance of a contract for sale plf's., in order to obtain a decree for specific performance at the hearing, must prove that the requisite consent to the contract was given before the filing of the bill. It is not sufficient for the purpose of obtaining an immediate decree to prove that such consent was given before the hearing.

The contract on which an immediate decree for specific performance is sought must have been complete in all its essential parts before the filing of the bill.—*ADAMS v. BROKE* (1842), Y. & C. Ch. Cas. 627; 62 E. R. 1046.

632. Of judgment creditor.—An unmarried female was appointed by a testator sole trustee for sale of real estate, & to stand possessed of the clear proceeds as to one-third for herself, & as to the other two-thirds for A. & B. Testator died in 1856. On Sept. 14, 1847, the trustee married. On Oct. 14 following, she, as such sole trustee, entered into a contract to sell part of such real estate. After the delivery of the abstract of title & the draft conveyance prepared, two judgments against her husband were duly entered up & registered:—*Held*: (1) the husband & wife could execute a proper conveyance of such real estate to the purchaser under the contract for sales; (2) the judgment creditors were not necessary parties to such a conveyance.—*DRUMMOND v. TRACY* (1860), John. 608; 29 L. J. Ch. 304; 1 L. T. 364; 6 Jur. N. S. 369; 8 W. R. 207; 70 E. R. 562.

Annotation:—*Generally*, *Mentd.* *Re* Solomon & Davey (1875), 10 Ch. D. 366, n.

PART III. SECT. 10, SUB-SECT. 2.—A. (d).

a. *Whether specific performance granted—Purchaser with notice of reservation.*—*MORRIS v. KEMP* (1867), 13 Gr. 487.—CAN.

Sect. 10.—Non-performance of conditions and essential terms: Sub-sect. 2, A. (e), (f) & (g) i. & ii.]

633. Of beneficiaries under will.]—Testator, after devising real estate to trustees upon trust to sell & hold the proceeds in trust for his sons & daughters, declared that no sale should be made without the consent of his sons & daughters. By a subsequent clause of his will he settled the share of each son & daughter upon him or her & his or her issue, or in default of issue, as he or she should by will appoint:—*Held*: after the death of one of testator's daughters without issue, the trustees could not enforce specific performance of an agreement for the sale of testator's real estate with the concurrence of the surviving children & the appointee of the deceased daughter.—*SYKES v. SHEARD* (1863), 2 De G. J. & Sm. 6; 33 Beav. 114; 3 New Rep. 144; 33 L. J. Ch. 181; 9 L. T. 430; 9 Jur. N. S. 1262; 12 W. R. 117; 46 E. R. 276, L. JJ.

Annotations:—*Mentd.* *Jefferys v. Marshall* (1870), 23 L. T. 519; *Re Goswell's Trusts*, [1915] 2 Ch. 106.

634. —.—Testator devised lands, subject to a charge of £3,000 for his wife, & a charge of debts, if his personal estate should be deficient, upon trust to pay rents & profits to his wife for life, & afterwards for the children of his brother, as the exor. & trustee of the will should appoint, upon the youngest attaining twenty-one. The will also gave the trustee a power of sale. All the existing children having attained twenty-one, the widow & the brother still living, the trustee appointed in their favour. Thirteen years after testator's death he sold the premises by auction. The purchaser required the concurrence of the appointees, as beneficiaries & necessary parties to the sale. On a suit for specific performance:—*Held*: their concurrence was not necessary, & the ct. enforced the contract.—*GREETHAM v. COLTON* (1865), 34 Beav. 615; 6 New Rep. 311; 13 L. T. 34; 11 Jur. N. S. 848; 13 W. R. 1009; 55 E. R. 773.

Annotations:—*Mentd.* *Bank of Ireland v. McCarthy*, [1898] A. C. 181; *Re Richards, Uglow v. Richards*, [1902] 1 Ch. 76.

635. Of trustees.]—Where property was devised to trustees upon trust for A. for life, for her sole & separate use, & after her decease in trust for such person as she should appoint; & A. conveyed to B.:—*Held*: on a conveyance to a third party, C., A. being still living, the trustees were necessary parties.—*HALL v. LONDON, CHATHAM & DOVER RY. CO.* (1866), 14 L. T. 351.

Of mortgagor.]—See MORTGAGE, Vol. XXV., p. 489, Nos. 2211–2214.

Parties to make conveyance generally.]—See SALE OF LAND, Vol. XL., pp. 271–274. Nos. 2365–2387.

(f) Non-Disclosure.

636. Undisclosed covenant.]—*BRISTOW v. WOOD* No. 1585, *post*.

637. — Purchaser with constructive notice.]—A purchaser, on contracting to purchase a leasehold interest near London at rack rent did not ask to see & was not shown the lease. On investigating the title it appeared that the lease contained a covenant not to assign without the lessor's licence. The vendor sought specific performance:—*Held*: such a covenant, though not a usual covenant is so common & ordinary in & near London & its existence was no answer to such a claim.—*STRANGWAYS v. BISHOP* (1857), 29 L. T. O. S. 120.

638. Undisclosed easements.]—The owner of land situated on an acclivity, conveyed by a deed of 1816 a portion of lower land, with liberty to

enter on upper lands, & fetch water from a spring & to cut open, cleanse & cover in such gutters & drains as might be necessary for the purpose of conducting the spring to the conveyed land; & also with liberty to pass & repass for ingress & egress on the upper land around or adjoining the conveyed land, & to put any ladders against the cottages then intended to be built upon the conveyed land. By another deed of 1820 other part of the lower land was conveyed, with liberty to take water from specified springs in the higher land, & to make such reservoirs in a particular field, part thereof, as might be necessary for taking up water for family use & other necessary purposes, & with liberty to pass for ingress & egress in the upper land surrounding or adjoining the conveyed land. By other deeds of 1824 other portions of the lower land were released, with all watercourses, particularly as same ran to an inn on the conveyed land from the upper land. By other deeds of 1825 further portions of the lower land were released, with liberty to fetch water for family & domestic uses at a well on the higher land.

By other deeds of 1834 other part of the lower land was released with liberty to the releasee to make a covered goit, or watercourse across the bottom part of a field, part of the upper land, & to open & repair the same when necessary. Several years afterwards the upper land was sold, according to a particular describing it as fit for building, & subject to conditions of sale, providing that if any mistake were made in the description of the premises or if any other error should appear in the particulars such error or omission should not annul the sale, but compensation should be given or taken. The existence of the easements was not stated in the particulars or conditions:—*Held*: (1) the existence of the easements granted by any one of the deeds of 1816, 1820 & 1834 alone constituted a material defect in the title to the upper land; (2) the existence of the easements granted by the deeds of 1825 & 1825 would have been alone sufficient to render the title subject to such serious doubt that a purchaser could not be compelled to accept it; (3) under the circumstances, & inasmuch as the whole purchased land did not exceed 30 acres, the purchaser could not be compelled to take the title, with compensation as to the lands prejudicially affected, which admeasured about four acres & a half.—*SHACKLETON v. SUTCLIFFE* (1847), 1 De G. & Sm. 609; 10 L. T. O. S. 411; 12 Jur. 199; 63 E. R. 1217.

Annotations—*Generally, Rejd.* *Manson v. Thacker* (1878), 7 Ch. D. 620; *G. W. Ry. v. Fisher* (1905), 74 L. J. Ch. 211; *Yandle v. Sutton, Young v. Same*, [1922] 2 Ch. 199.

639. —.—Trustees put up for sale by auction two adjoining freehold properties. Lot 2 was a hotel standing in its own grounds & approached from the main road by a carriage drive. Lot 3 was a house the only access to which from the road was by a carriage sweep opening into the carriage drive of lot 2. Both properties were leased, & the lease of lot 2 reserved to the lessors a right of way over the carriage drive to get access to lot 3. By an error the particulars of sale of both lots 2 & 3 made no mention of the right of way, but on the sale plan, which formed no part of the contract, it was apparent that the only access to lot 3 was over the carriage drive. By the conditions of sale the properties were sold subject to all rights of way & other easements "whether or not the same shall be mentioned . . . in or upon the particulars . . . or the sale plan, if any . . . but if there shall be found to be any such . . . easement . . . not disclosed or partially or inaccurately disclosed in the particulars . . . or the sale plan, if any, such non-

disclosure or partial or inaccurate disclosure shall be deemed to be an omission or error within the meaning of the 15th clause." By condition 15, "if any error misstatement or omission shall be discovered in the particulars of sale plan, if any, . . . the same shall not annul the sale, nor shall any abatement or compensation be allowed or paid by the vendor or purchaser." The lease of lot 2 was produced to G., the purchaser, before the auction & was perused by his solr. G. was almost blind; but the particulars were read to him, & he bought lot 2 with the intention of building over the carriage drive. The abstract included in the lease of lot 2, with a plan showing the carriage sweep to lot 3, but G.'s solr. made no requisition about it, & sent a draft conveyance of the property unincumbered in which the vendor's solr. inserted a reservation of the right of way to lot 3. G. refused to accept this addition. The vendors brought an action for specific performance with the reservation, or, alternatively, rescission & retention of the deposit. G. counterclaimed for rescission & return of the deposit:—*Held*: the vendors were not entitled to specific performance with a reservation of the right of way; there was not, in the circumstances, any patent defect on the title; the condition as to errors only applied to errors which were not known to the vendors; that the purchaser was not bound to make a requisition as to the right of way, when the abstract showed a title to an unincumbered freehold; & the purchaser was entitled to rescission & return of the deposit.—*SIMPSON v. GILLEY* (1922), 92 L. J. Ch. 194; 128 L. T. 622.

Duty to disclose generally.—*See* SALE OF LAND, Vol. XL., pp. 134–136, Nos. 1055–1075.

(g) *Title Depending on Construction of Documents.*
i. *In General.*

640. Inaccurate document.—A. being entitled under his marriage settlement, to a life interest in certain freehold estates, with remainder to the use of trustees for a term of a thousand years, to secure a jointure & portions, with remainder to himself in fee, conveyed part of the lands to B. in fee, in exchange for other lands. B.'s heir afterwards having contracted for the sale of the land, the purchaser refused to complete the contract, on the ground that A. had no power to exchange the lands in fee. The vendor then procured the execution of certain deeds, with a view of bringing the exchange within the terms of a power of sale & exchange, given to the trustees under the settlement:—*Held*: under these circumstances, & likewise on the ground that the after executed deeds were grossly inaccurate, the purchaser was not bound specifically to perform the agreement.—*COWGILL v. OXMANTOWN (LORD)* (1839), 3 Y. & C. Ex. 369; 3 Jur. 313; 160 E. R. 745.

Annotation:—*Refd.* *Garnett v. Acton* (1860), 28 Beav. 333.

641. Act of Parliament—Sale under statutory powers—Inconsistent statutory provisions.—Trustees were empowered by Act of Parliament to sell & exchange all or any of the hereditaments mentioned in the schedule to the Act, amongst which was a farm, called the Mountain Farm, parcel of the manor of W. In the body of the act there was a proviso that the manor of W. should not be sold. The trustees having contracted to sell the Mountain Farm:—*Held*: the purchaser was not bound to accept the title.—*LINCOLN*

(*EARL*) *v. ARCEDECKNE* (1844), 1 Coll. 98; 63 E. R. 338.

Annotation:—*Refd.* *Pyrke v. Waddingham* (1852), 10 Hare, 1.

642. Sale by personal representative of assignee of mortgagee—Under power of sale given to original mortgagee.—The administrator of the assign of a mtgee. who has obtained a conveyance from the heir of such assign to a trustee for himself, can exercise a power of sale given by the mtge. deed to the original mtgee., his heirs, exors., administrators, & assigns, with a direction that the receipts of the same persons should be good discharges; for the legal representatives of an "assign," must be considered to be assigns within the meaning of such a power.—*SALOWAY v. STRAWBRIDGE* (1855), 1 K. & J. 371; 3 Eq. Rep. 843; 24 L. J. Ch. 393; 3 W. R. 335; 69 E. R. 502; *affd.*, 7 De G. M. & G. 594; 25 L. J. Ch. 121; 1 Jur. N. S. 1194; 4 W. R. 34, L. J.J.

Annotations:—*Consd.* *Ashton v. Wood* (1857), 30 L. T. O. S. 85. *Refd.* *Re Rumney & Smith*, [1897] 2 Ch. 351.

643. Ambiguous document.—*ALEXANDER v. MILLS*, No. 595, *ante*.

ii. *Wills.*

Construction of wills, generally, *see* WILLS.

644. Question turning on general rule of construction.—Testator gave his estates to trustees upon trust to pay the rents to his two daughters, both then unmarried, in equal shares during their respective lives "independently of the control of any husband or husbands with whom they or either of them might happen to intermarry"; & after their respective decease, upon trust to convey the estates "unto & equally between the respective husbands of them, my daughters, to hold them respectively, & their respective heirs & assigns"; with a proviso, that if either of his daughters should "depart this life unmarried," her share should go to the survivor for her life, & on her decease the whole should be conveyed to the husband of the surviving daughter. Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—*Held*: the surviving daughter could make a good title to a moiety of the estate; for a gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasibly vested remainder in fee to her first husband; as the question turned on a general rule of construction, unaffected by any special context in the will, the title would be forced on a purchaser.—*RADFORD v. WHILLS* (1871), 7 Ch. App. 7; 41 L. J. Ch. 19; 25 L. T. 720; 20 W. R. 132, L. J.J.

Annotations:—*Refd.* *Bell v. Holtby* (1873), L. R. 15 Eq. 178; *Re Grayson* (1879), 18 L. J. Ch. 354; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *Re Drew, Drew v. Drew*, [1899] 1 Ch. 336.

645. Condition for forfeiture—Uncertain in terms.—Devise of several estates to A. for life with remainder to trustees to preserve contingent remainders, with remainder to the first & other sons of A., in tail male, with divers remainders over with power to the persons from time to time entitled to the estates devised, to lease all such estates except an estate called Juts; & with a direction that the persons who should be entitled to & possessed of the devised estates should not lease the estate called Juts or any part thereof, & that every such person should live & reside on the estate called Juts; & for default thereof, all the

PART III. SECT. 10, SUB-SECT. 2.—
A. (g) ii.

644.1. Question turning on general rule of construction.—By the terms of the J.—VOL. XLII.

whole will it was doubtful whether the testator so used the word "heir" as to make the rule in *Shelley's Case* applicable, & thereby confer a fee simple on the devisee:—*Held*: the devisee could

not get specific performance of a contract for the purchase of land, his title to which depended on the will.—*GARRIEPIE v. OLIVER* (1901), 8 B. C. R. 89.—CAN.

Sect. 10.—Non-performance of conditions and essential terms: Sub-sect. 2, A. (g) ii.]

devised estates to go over to the person next in succession as if the person refusing or neglecting to reside or live at Juts was actually dead. In a suit by parties making title under a recovery suffered by A. & his eldest son against a purchaser for specific performance:—*Held*: it was too uncertain what testator meant by the words live & reside for the ct. to determine that there had been a forfeiture & a specific performance decreed.—*FILLINGHAM v. BROMLEY* (1823), Turn. & R. 530; 37 E. R. 1204, L. C.

Annotations:—*Consd.* *Walcot v. Botfield* (1854), Kay, 531. *Refd.* *Jeffreys v. Jeffreys* (1901), 84 L. T. 417. *Mentd.* *Potter v. Richards* (1855), 24 L. J. Ch. 488; *Clavering v. Ellison* (1859), 7 H. L. Cas. 707; *Duddy v. Gresham* (1878), 39 L. T. 48; *May v. May* (1881), 44 L. T. 412; *Re Tyler* (1901), 45 Sol. Jo. 204; *Re Vivian, Vivian v. Swansea* (1920), 36 T. L. R. 222.

646. Devise for payment of debts—One estate to be sold if other estate not sufficient—Necessity for proof that debts not paid.]—Testator devises lands in trust for the payment of his debts generally, & desires that his estate at A. shall be sold first, & if the produce of that estate be insufficient, then his estate at B. A. purchaser will not be compelled to accept the title to B., unless the ct. is satisfied beyond suspicion that the debts have not been paid.—*PIERCE v. SCOTT* (1835), 1 Y. & C. Ex. 257; 4 L. J. Ex. Eq. 36; 160 E. R. 105.

647. — Implied power of sale to executor.]—A general charge of debts on the real estate gives to the exors. an implied power of sale.

Testator ordered his debts & legacies "to be paid & discharged out of his real & personal estate." He subsequently devised his real estates to trustees for five hundred years, & subject thereto, to his five sons as tenants in common in fee "upon condition" that they should pay, in equal shares, certain legacies & his debts; & in case any son should neglect to pay his portion, the trustees of the term were, out of the rents of his share, to raise the amount. He appointed the five sons exors. Thirty-three years after the death of testator, the surviving exors. sold the estate, as they alleged, to pay the debts. The ct. held, that they had power to sell, & decreed a specific performance against the purchaser.—*WRIGLEY v. SYKES* (1856), 21 Beav. 337; 25 L. J. Ch. 458; 26 L. T. O. S. 252; 2 Jur. N. S. 78; 4 W. R. 228; 52 E. R. 889.

Annotations:—*Mentd.* *Poad v. Watson* (1856), 6 E. & B. 618; *Re Whistler* (1887), 35 Ch. D. 561.

648. Devise to trustees for certain purposes—Power to trustees to sell fee simple.]—*HEARSDEN v. WILLIAMSON* (1836), Donnelly, 6; 47 E. R. 190.

649. — Revocation of appointment of one trustee—Appointment of new trustee—Sale by trustees of after-acquired lands.]—Testator, by his will, made a general devise of his lands to A. & B., as trustees, upon certain trusts for sale, for the benefit of his family; he then purchased other lands, & afterwards made a codicil to his will, whereby, after reciting the devise of his lands by his will to A. & B., & that he was desirous of revoking the appointment of B. as trustee of his will, he revoked & made void the appointment, devise, & gift, in the will contained, so far as regarded B., & appointed C. to be a trustee, to act in conjunction with A. in the place of B.:—*Held*: (1) a purchaser from A. & C., of the after-acquired lands, could not be compelled to accept the title, on a bill being filed by A. & C. against him, unless the heir-at-law would concur with them in the conveyance; (2) in a doubtful case of title, where the doubt is only removed at the

hearing by an act of plffs. that plffs. must pay deft.'s costs.—*ASHLEY v. WAUGH* (1839), 9 L. J. Ch. 31; 4 Jur. 572, L. C.

Annotations:—*Generally, Mentd.* *Doe d. York v. Walker* (1844), 12 M. & W. 591; *Hughes v. Hosking* (1850), 11 Moo. P. C. C. 1.

650. Devise to trustees for sale—Sale by devisees of surviving trustee.]—(1) Devise to trustees & the survivor of them, & the heirs & assigns of such survivor, upon trust to sell, the surviving trustee having devised the trust estate to persons who sold & who filed a bill to enforce specific performance of the contract to sell:—*Held*: there was sufficient doubt upon the point to prevent the ct. from forcing the title upon the purchaser.

(2) Vendors who by the contract bound themselves to make out a good title to all the lands included in the contract, but were unable to show a title to one three hundred & thirtieth part, not necessary to the enjoyment of the other parts included in the contract, which provided for compensation for errors in dimensions in the land, the bill averring that they could make title to all the lands sold, seeking specific performance as to all:—*Held*: it was not competent to the vendors at the hearing to seek specific performance with compensation.—*ASHTON v. WOOD* (1857), 3 Sm. & G. 436; 30 L. T. O. S. 85; 3 Jur. N. S. 1164; 65 E. R. 727.

Annotations:—*As to* (1) *Consd.* *Stevens v. Austen* (1861), 3 E. & E. 685; *Osborne to Rowlett* (1880), 13 Ch. D. 774.

651. Power of sale to surviving executor.]—Testator, after directing all his just debts to be paid, devised a freehold messuage to his wife "for her natural life, with liberty to sell it in case a good offer is made, & invest the proceeds of it in the 5 per cent. stock, for her benefit during her life." In a subsequent part of the will testator said, "I desire that at the death of my wife, the residue of my estate may then be collected, including the proceeds of the house & lot, if not previously sold, to be then disposed of to good advantage, to be divided as follows," etc. He appointed his wife & others to be extrix. & exors. After the death of the widow, the surviving exor. contracted to sell the messuage. A bill being filed for specific performance:—*Held*: the surviving exor. had, under the will, a power of sale.—*FORBES v. PEACOCK* (1840), 11 Sim. 152; 9 L. J. Ch. 367; 59 E. R. 832.

Annotation:—*Consd.* *Stroughall v. Austey* (1852), 1 De G. M. & G. 635.

652. Power of sale to heir of surviving trustee—Sale by devisee of surviving trustee.]—Testator devised his real estates to A., B., & C., in trust that they, or the survivors or survivor of them, or the heirs of the survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell the same; & he empowered them & their heirs to make contracts with & conveyances to the purchasers; & declared that the receipts of them or the survivors or survivor of them, or the heirs, exors. or administrators of such survivor, should be good discharges to the purchasers; & he directed that they, their heirs, administrators, & assigns, should hold the proceeds of the sale upon certain trusts. A. & B. disclaimed, & C. alone acted. He devised the estates to M. & N. upon the trusts affecting the same. After his death, M. & N. agreed to sell the estates to P.:—*Held*: M. & N. were not entitled to execute the trust for sale, as they were the devisees & not the heirs of C.—*COOKE v. CRAWFORD* (1842), 13 Sim. 91; 11 L. J. Ch. 406; 6 Jur. 723; 60 E. R. 36.

Annotations:—*Consd.* *Macdonald v. Walker* (1851), 14 Beav. 556. *Expld.* *Wilson v. Bennett* (1852), 5 De G. & Sm. 475. *Distd.* *Saloway v. Strawbridge* (1855), 1 K. & J. 371; *Ashton v. Wood* (1857), 3 Sm. & G. 436. *Hall v.*

May (1857), 3 K. & J. 585. **Consd.** *Stevens v. Austen* (1861), 3 E. & E. 685; *Re Morton & Hallett* (1880), 15 Ch. D. 143. **Dbtd. & N.F.** *Osborne to Rowlett* (1880), 13 Ch. D. 774. **Consd.** *Re Rumney & Smith*, [1897] 2 Ch. 351. **Refd.** *Titley v. Wolstenholme* (1844), 3 L. T. O. S. 279; *Lane v. Debenham* (1853), 11 Hare, 188; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

653. ———.]—Copyhold hereditaments were devised to three trustees, & their "heirs, exors., & administrators," in trust for two tenants for life successively, with a power to the trustees, & the survivors & survivor of them, his heirs, exors., or administrators, to sell same. The survivor of the three trustees devised all estates vested in him as trustee to two trustees, whom he also appointed his exors., of whom one was his customary heir; the two contracted to sell, & the purchaser declined to complete. On a special case stated for the opinion of the ct.:—**Held**: the title was too doubtful for the ct. to compel the purchaser to take it.—**WILSON v. BENNETT** (1852), 5 De G. & Sm. 475; 21 L. J. Ch. 741; 19 L. T. O. S. 243; 16 Jur. 966; 64 E. R. 1205.

Annotations:—**Folld.** *Macdonald v. Walker* (1851), 14 Beav. 556. **Consd.** *Stevens v. Austen* (1861), 3 E. & E. 685. **Expld.** *Osborne to Rowlett* (1880), 13 Ch. D. 774. **Mentd.** *Hall v. May* (1857), 3 K. & J. 585.

654. ———.]—Devise upon trust that the trustees & the survivors & survivor of them, his heirs & assigns, should, at such time as they should think most advisable, sell, & give receipts which should be good discharges; with a power for the trustees or the survivor to appoint new trustees, in the usual form. The surviving trustee devised his trust estates:—**Held**: his devisees could make a good title; & *semble*, the word "assigns" would have been sufficient for this purpose, without the power to appoint new trustees.—**HALL v. MAY** (1857), 3 K. & J. 585; 26 L. J. Ch. 791; 30 L. T. O. S. 64; 3 Jur. N. S. 907; 5 W. R. 869; 69 E. R. 1242.

Annotations:—**Consd.** *Osborne to Rowlett* (1880), 13 Ch. D. 774. **Mentd.** *Re Waidanis, Rivers v. Waidanis*, [1908] 1 Ch. 123.

655. ———.]—(1) Where real estate is devised to trustees & "their heirs," omitting "assigns," in trust for sale, the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee. Testator by his will, dated in 1845, devised & bequeathed his real & personal estate to his wife for life, subject to the payment of his debts, & from & after her decease to A. & B., "their heirs, exors., & administrators, upon trust to sell & dispose thereof at such times & in such manner as they may said trustees shall deem expedient." A. & B. both predeceased the tenant for life, B., the surviving trustee, having devised his trust estates. Upon the death of the tenant for life, B.'s devisees contracted to sell part of the real estate of original testator:—**Held**: B.'s devisees could make a good title, & one which the ct. would force upon a purchaser.

(2) I cannot help saying that, in the interests of the purchaser, who has a right to be protected, the old rule was the best, namely that a doubtful title ought not to be forced upon a purchaser (**JESSEL, M.R.**).—**OSBORNE TO ROWLETT** (1880), 13 Ch. D. 774; 49 L. J. Ch. 310; 42 L. T. 650; 28 W. R. 365.

Annotations:—**As to** (1) **Dbtd.** *Re Morton & Hallett* (1880), 15 Ch. D. 143; *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690. **Refd.** *Re Pixton & Tong's Contract* (1897), 46 W. R. 187; *Re Rumney & Smith*, [1897] 2 Ch. 351. **As to** (2) **Refd.** *Johnson v. Clarke*, [1928] 1 Ch. 817. **Generally, Mentd.** *Re Ravensworth, Ravensworth v. Tindale*, [1905] 2 Ch. 1.

656. Vendor having vested remainder.]—Testator devised all his freehold estates in three several parishes to trustees, to hold to them, their heirs

& assigns for ever, upon trust to receive the rents & profits till C., his daughter came of age, with a provision for her maintenance, & to account for & pay the surplus rents upon her coming of age; from that period "as to his estates" to the use of the trustees, their heirs, & assigns, upon trust during the life of C. to preserve contingent remainders, C. & her assigns to receive the rents nevertheless during her life; after her death then to the use of all & every the children of C., share & share alike, as tenants in common; in case C. should die under twenty-one & without issue, then the trustees were to account with & pay the balance of the trust account unto & to the use of such person as should be the will be next in remainder, & entitled to the "aforesaid estates & hereditaments" after the death of C.; in case C. should die before she attained twenty-one, or surviving should die without lawful issue, then as to the aforesaid estates to the use of F. in tail male with remainders over in default of such issue. C. attained twenty-one, married, & had six children. E., one of the children, contracted to sell her undivided sixth share in the devised estates expectant upon the death of C. On demurrer to a bill for specific performance against the intended purchaser:—**Held**: there was a remainder in fee to the children of C. which vested at their birth, & E. could make a good title to her share, which she had contracted to sell.—**HAWKER v. SAUNDERS** (1860), 2 L. T. 132; 8 W. R. 332.

657. Will relating to personal property—Land acquired after execution of will—Intention of testator to dispose of all property.]—Testator commenced his will, by stating that he disposed of all his worldly estate & effects, & he directed his debts to be paid out of his personal estate, & also directed his exors. to make sale of all his stocks, shares, & securities, & such other part of his personal estate as was in its nature saleable, & to collect all sums due, & all other his estate, & convert same into money. After the date of his will testator acquired some freehold property, which, on his death, his widow, being sole extrix., put up for sale with the concurrence of mtgees., but the purchaser objected that she could not make a title. In a suit for specific performance against the purchaser:—**Held**: the widow had a clear power to sell the real estate, & the title was forced upon him in the absence of the heir.—**HAMILTON v. BUCKMASTER** (1866), L. R. 3 Eq. 323; 36 L. J. Ch. 58; 15 L. T. 177; 12 Jur. N. S. 986; 15 W. R. 149.

658. Trustee with power to appoint new trustees—Tenant for life appointed as one trustee—Sale by tenant for life as trustee.]—Testator devised his real estate to trustees in trust for his wife for life, with remainder to F. for life, with remainders over, & with a power of sale, at the discretion of the trustees or trustee for the time being, & with the usual power for the surviving or acting trustee or trustees, with the consent of the tenant for life, to appoint new trustees. The sole acting trustee appointed testator's widow & F. new trustees jointly with himself. F. being sole surviving trustee contracted for the sale of part of the property:—**Held**: the power to appoint new trustees had been well exercised, there being nothing in the will to prevent the appointment of a tenant for life as trustee; & F. could make a good title to the property, which the ct. could enforce upon a purchaser.—**FORSTER v. ABRAHAM** (1874), L. R. 17 Eq. 351; 43 L. J. Ch. 199; 22 W. R. 386.

Annotations:—**Refd.** *Hickley v. Hickley, Same v. Same* (1876), 2 Ch. D. 190; *Re Kemp's S. E.* (1883), 24 Ch. D. 485; *Re Stamford, Payne v. Stamford*, [1896] 1 Ch. 288; *Montefiore v. Guedalla* (No. 2) (1903), 73 L. J. Ch. 13.

Sect. 10.—Non-performance of conditions and essential terms: Sub-sect. 2, A. (g) ii., (h), (j) & (k).]

659. Devise of copyholds—To pay or permit beneficiary to receive rents.—Testator devised freehold & copyhold estates to trustees, their heirs, exors., administrators & assigns, upon trust during the natural life of his son A. to receive the rents & profits thereof, & to pay same to A. & his assigns during his life, or permit him to receive the same. After the decease of A., testator devised same to the sole use & behoof of the heirs of his body lawfully begotten. Testator appointed the trustees & another, exors., & declared that the receipts of his trustees & exors. should be good discharges. On demurrer to a bill for specific performance of an agreement for the sale of freeholds & copyholds:—*Held*: there was a legal estate in the trustees & their heirs during the life of A. in the copyholds, & demurrer allowed as to the copyholds.—*BAKER v. WHITE* (1875), L. R. 20 Eq. 166; 44 L. J. Ch. 651; 53 L. T. 347; 23 W. R. 670.

Annotations:—*Reid*. *Allen v. Bewsey* (1877), 7 Ch. D. 453; *Re Allsopp & Joy's Contract* (1889), 61 L. T. 213; *Re Brooke, Brooke v. Brooke*, [1891] 1 Ch. 43, *Re Townsend's Contract*, [1895] 1 Ch. 716; *Re Brooke, Brooke v. Dickson*, [1923] 1 Ch. 265.

660. Sale of leaseholds by executor—Purchaser with notice that no debts of testator outstanding.—Testator by his will appointed his wife sole trustee & extrix. thereof, & gave to her all his estate upon trust for sale or conversion for the benefit of herself during life or widowhood, & declared it to be his wish that, unless circumstances otherwise required it, his leasehold estates should not be converted during the life or widowhood of his wife, & at her death or marriage he bequeathed a leasehold house to his son. Eighteen years after the death of testator the widow entered into a contract for sale of the leasehold house. Her solrs. informed the purchaser that there were no debts of testator remaining unpaid. No reason for selling was suggested. The purchaser objected to the title, unless the concurrence of the son was obtained, but this was refused:—*Held*: under the peculiar circumstances of the case, the purchaser having actual notice that there were no debts of testator remaining unpaid, & no reason being suggested for the sale, the title was not one which ought to be forced on a purchaser.—*Re VERRELL'S CONTRACT*, [1903] 1 Ch. 65; 72 L. J. Ch. 44; 87 L. T. 521; 51 W. R. 73; 47 Sol. Jo. 71.

Annotation:—*Reid*. *Solomon v. Attenborough*, [1911] 2 Ch. 159.

(h) *Condition that Title be Accepted.*

See, generally, SALE OF LAND, Vol. XL, pp. 79, 80, Nos. 609–623.

Proviso against impeachment of title—Sale by mortgagee under statutory powers.—*See*, MORTGAGE, Vol. XXXV., p. 512, Nos. 2424, 2425.

(j) *Defect Rectified.*

661. Rectification before hearing.—Where the time, at which the contract was to be executed, is not material, & there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a title at the hearing, is entitled to a specific performance.—*WYNN v. MORGAN* (1802), 7 Ves. 202; 32 E. R. 82.

Annotation:—*Consd.* *Halkett v. Dudley*, [1907] 1 Ch. 590.

662. —.—.]—If on a bill for specific performance by the vendor a good title can be made before or when the cause comes on upon further directions, a specific performance will be decreed.—*PATON v. ROGERS* (1822), 6 Madd. 256; 56 E. R. 1088.

Annotation:—*Reid*. *De Visne v. De Visne* (1849), 1 Mac. & G. 222.

663. —.—.]—*COWGILL v. OXMANTOWN* (LORD), No. 640, *ante*.

664. —.—.]—Upon a bill filed by a vendor for the specific performance of the contract, it appeared, that he could make a good title before the commencement of the suit, but did not show a good title to the purchaser until afterwards:—*Held*: though a specific performance must be decreed, the purchaser was entitled to the costs of the suit generally.—*TOWNSEND v. CHAMPERNOWNE* (1839), 3 Y. & C. Ex. 505; 160 E. R. 801.

665. —.—.]—*MURRELL v. GOODYEAR*, No. 599, *ante*.

666. —.— Not complete before bill filed.]—It being necessary, in order to make a title perfect, that a recovery should be suffered for the purpose of barring an old estate tail vested in a person who was not a trustee for the vendor, the deed making the tenant to the *præcipe* & the warrant for suffering the recovery were executed before the filing of the bill for specific performance, but the recovery was not completed till a few days afterwards:—*Held*: a good title was not shown before the commencement of the suit. A person, who purchases two lots is not justified in refusing to perform his contract for the purchase of the second lot, because a good title is not shown to the first lot.—*LEWIN v. GUEST* (1826), 1 Russ. 325; 38 E. R. 126.

667. Advantage arising on either side after contract—Effect of—Where title accepted.—Where a purchaser has actually accepted a title after contract of sale, if advantage arise on either side before the execution of the conveyance as by the lapse of a life in the mean time, a ct. of equity will enforce a specific performance without regarding which party may happen to be benefited or prejudiced by the accident of unforeseen events, but where the title had not been accepted, the ct. refuses to decree performance (*MACDONALD, C.B.*).—*WYVILL v. EXETER* (BP.) (1815), 1 Price, 292; 145 E. R. 1406.

668. —.— — — Where title not accepted.]—*WYVILL v. EXETER* (BP.), No. 667, *ante*.

669. Whether court will allow time for rectification.—In a suit for specific performance, where the vendor cannot make a good title, when the cause comes on to be heard on further directions, the ct. will not allow the cause to stand over, in order that he may be able to cure the defects in his title.—*BOSWELL v. MENDHAM* (1823), 1 L. J. O. S. Ch. 160.

670. Title acquired after conveyance.—J. S., under the belief that he had the fee simple in an estate subject to a life interest in his mother, conveyed all his interest to trustees for the benefit of his creditors. The conveyance contained covenants for title & for further assurance. It turned out that at the time of the conveyance the mother had the fee simple, which, upon her death descended to J. S. as her heir-at-law:—*Held*: although no estate passed by the conveyance, yet the transaction amounted to a contract for sale of the specific estate, & J. S., unless he could set aside the contract for fraud, was in equity compellable to carry it into execution.—*SMITH v. BAKER* (1842), 1 Y. & C. Ch. Cas. 223; 62 E. R. 864.

Annotations:—*Reid*. *Smith v. Osborne* (1857), 30 L. T. O. S. 57. *Mentd.* *Re Bridgwater's Settlement*, *Partridge v. Ward*, [1910] 2 Ch. 342.

671. Power of sale to trustees of testator—& heirs of survivor—Sale of devisee in trust of survivor—Release by cestuis que trust.—Testator gave a power of sale to two trustees & the survivor, "his heirs, exors. & administrators":—*Held*: a title dependent on a sale by the devisee in trust

of the survivor, was too doubtful to force on a purchaser; & the defect was cured, by the release of all the *cestuis que trust* to the representatives of the surviving trustee.—**MACDONALD v. WALKER** (1851), 14 Beav. 556; 51 E. R. 399.

Annotations:—**Consd.** Osborne to Rowlett (1880), 13 Ch. D. 774. **Refd.** Lane v. Debenham (1853), 11 Hare, 188, *Re* Morton & Hallett (1880), 15 Ch. D. 143.

672. Purchaser having means of curing defect.—Deft. purchaser in possession, who, by decree directing an inquiry as to title, was ordered to pay into ct. the interest on his purchase-money; the decree also declaring the purchase-money a lien on the estate:—**Held**: not entitled to dismiss the bill for specific performance, although the certificate was that pltf. could not show a good title, it appearing on the evidence that deft. had since the purchase, by his own act, acquired the means of curing the defect in the title.—**HUME v. POCOCK** (1866), L. R. 1 Eq. 662; 11 L. T. 127; 12 Jur. N. S. 223; 14 W. R. 495.

673. Rectification after reference as to title.—A person contracted to sell an estate, who at the time of the contract had no legal or equitable title to it by reason of the alienage of a party through whom he claimed. The purchaser by his own inquiries ascertained the defect of title, but did not, till after some months of negotiation with the vendor repudiate the contract. The vendor then filed his bill for specific performance, & pending the investigation of the title in the master's office, obtained a grant of the estate from the Crown:—**Held**: he was entitled to a decree.—**EYSTON v. SIMONDS** (1842), 1 Y. & C. Ch. Cas. 608; 11 L. J. Ch. 376; 6 Jur. 817; 62 E. R. 1038.

Annotation:—**Consd.** Halkett v. Dudley, [1907] 1 Ch.

674.—The purchaser of a house in London having taken various objections to the title, the vendor filed a bill for specific performance, & obtained the usual reference as to title. All the above objections were overruled; but before the certificate had been signed, the purchaser discovered in a long blank wall, which formed one side of the house, & fronted on a street, a stone with an inscription dated in 1776, stating that the wall had been built by & belonged to the East India Co., who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831 by the tenant of the house, and the stones set up again; but under what circumstances did not appear. No rent had from that time been paid to the co., nor any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, & the vendor obtained a release from them:—**Held**: (1) the vendor had not a good title when the bill was filed, for there was no ground for holding a title to have been gained by possession adverse to the East India Co.; (2) the vendor was to blame, as he might, with reasonable diligence, have informed himself of this defect before selling, & therefore, although he had been right on all points which arose before the bill was filed, he ought not to receive costs.

In almost every case it is the duty of a vendor where there is no question but that of title between him & the purchaser, to avail himself of the opportunity of having an immediate reference as to title & so saving the multiplication of unnecessary costs (**JAMES, L.J.**).—**PHILLIPSON v. GIBBON**

(1871), 6 Ch. App. 428; 40 L. J. Ch. 406; 24 L. T. 602; 35 J. P. 676; 19 W. R. 661, L. JJ.

Annotation:—*As to* (2) **Refd.** Union Lightorage Co. v. London Graving Dock Co., [1902] 2 Ch. 557.

(k) Other Cases.

675. Settlement discovered after purchase.—**BEATNIFF v. SMITH** (1727), 1 Eq. Cas. Abr. 357; 21 E. R. 1100.

676. Title under will not proved against heir.—One articles to buy land & the title is under a will not proved in equity against the heir; yet in some cases equity will compel the purchaser to accept the title.—**COLTON v. WILSON** (1733), 3 P. Wms. 190; 24 E. R. 1025.

Annotations:—**Consd.** Boyse v. Rossborough (1854), 3 De G. M. & G. 817. **Refd.** A.-G. v. Sitwell (1835), 1 Y. & C. Ex. 559.

677. Transfer of lease by unattested will—**Lease devolving on heir as special occupant.**—Testator devised all his manors, messuages, lands, tenements, tithes, & hereditaments, & all his real estate whatsoever "except what is hereinafter mentioned & devised" to the use of all his children successively in strict settlement. He gave part of his personal estate specifically; & directed the residue to be laid out in land to be settled to the same uses as his real estate; but afterwards by a testamentary paper unattested he disposed of his personal estate otherwise: the heir contracted to sell lease of rectory; & upon a case directed to the Ct. of K. B. on his bill for specific performance the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant; but the Lord Chancellor considered that title too doubtful to be forced on a purchaser.—**SHEFFIELD v. MULGRAVE** (LORD) (1795), 2 Ves. 526; 30 E. R. 758, L. C.

Annotations:—**Apld.** Willcox v. Bellairs (1823), Turn. & R. 491. **Consd.** Fitzroy v. Howard (1828), 3 Russ. 225. **Apld.** Pyrke v. Waddingham (1852), 10 Hare, 1.

678. Validity of deed depending on bona fides of transaction—**Bona fides collected from extrinsic circumstances.**—Where the validity of a deed depends upon the *bona fides* of the transaction to be collected from extrinsic circumstances, a ct. of equity will not compel a purchaser to accept a title under the deed, because neither the purchaser nor the ct. has adequate means of ascertaining those circumstances.—**HARTLEY v. SMITH** (1819), Buck, 368.

Annotations:—**Apld.** Pott v. Turner (1830), L. & Welsb. 293. **Consd.** Cattell v. Corral (1810), 4 Y. & C. Ex. 228. **Apld.** Pyrke v. Waddingham (1852), 10 Hare, 1.

679. Title depending on recovery suffered by tenant in tail—**Reversion vested in Crown by attainder.**—A title, depending upon a recovery suffered by a tenant in tail of lands, the reversion of which had vested in the Crown by attainder of the reversioner is not such a title as a purchaser is bound to accept.—**BLOSSE v. CLANMORRIS** (1821), 3 Bli. 62; 4 E. R. 527, H. L.

Annotations:—**Consd.** Pyrke v. Waddingham (1852), 10 Hare, 1. **Refd.** Collard v. Sampson (1853), 4 De G. M. & G. 224.

680. Descent of estate to infant heir.—(1) Great delay in the completion of a contract is no defence to a purchaser who has himself been accessory to that delay. (2) Where a contract of purchase is made & delay is occasioned by the purchaser, & during that delay the legal estate descends to an infant heir, the purchaser cannot

PART III. SECT. 10. SUB-SECT. 2.—

A. (k).

d. Title subject to approval of solicitor of vendee.]—It was agreed by between a vendor & purchaser, that

so soon as a title satisfactory to the solrs. of the vendee could be afforded him, the vendee should purchase the land for \$4,000 cash:—**Held**: in the absence of *mala fides*, the approval of the title by the solrs. of the vendee was

a condition precedent to the right of the vendor to call for a specific performance of the agreement.—**BOULTON v. BETHUNE** (1874), 21 Gr. 110, 478.—**CAN.**

Sect. 10.—Non-performance of conditions and essential terms: Sub-sect. 2, A. (k).]

avail himself of that difficulty in the title to protect himself from specific performance.

Qu.: whether the descent of the legal estate to an infant heir, after the contract, will prevent the ct. from decreeing specific performance, where there has been no improper delay on the part of the purchaser.—*KING v. TURNER* (1824), 3 L. J. O. S. Ch. 58.

681. Title under assignment for benefit of creditors.]—A purchaser is not bound to take a doubtful title. Therefore, where the vendors derived title under an assignment made by a party for the benefit of his creditors, in itself an act of bkpcy.:—*Held*: they could not compel the purchaser to accept the title, without proof that there was no creditor in a situation to sue out a commission against the assignor.—*POTT v. TURNER* (1830), 6 Bing. 702; L. & Welsb. 293; 4 Moo. & P. 551; 8 L. J. O. S. C. P. 282; 130 E. R. 1451.

682. Settlement made by infant.]—Leasehold property given by a will to the separate use of a female infant. On her marriage, a settlement is made under the orders of the ct., she being still an infant, containing certain trusts for sale. The trustees offer the property for sale by auction, & file a bill against the purchaser for a specific performance:—*Held*: the settlement of the female infant's chattel interest, already secured to her separate use, though made under the orders of the ct., was invalid, & the purchaser not bound to take the title.—*SIMSON v. JONES* (1831), 2 Russ. & M. 365; 9 L. J. O. S. Ch. 106; 39 E. R. 433.

Annotations:—*Refd.* *Davies v. Thornycroft* (1836), 6 Sim. 420; *Johnson v. Johnson* (1837), 1 Keen, 648; *Tullett v. Armstrong* (1840), 9 L. J. Ch. 41. *Mentd.* *Scarborough v. Borman* (1840), 4 Jur. 38; *Pham v. Insall* (1849), 1 Mac. & G. 449; *Field v. Moore*, *Field v. Brown* (1855), 7 De G. M & G. 691; *Cooper v. Cooper* (1888), 13 App. Cas. 88.

683. —.]—A female infant joint tenant can, by covenant in her marriage settlement to settle after-acquired property, effect a severance of her share under the joint tenancy without actual confirmation, non-revocation being enough.

Upon an agreement to purchase such a reversionary share, the husband, who claimed through the settlement, having survived the wife, who died before the property fell into possession, an imperfect abstract of title was delivered, from which it did not appear that the property was touched by the settlement at all, but only that the husband assigned to the trustees all his interest in property coming to him in right of his wife. The purchasers objected to complete, on the ground that there had been no severance of the joint tenancy. A supplemental abstract was then delivered, setting out a clause by which it was agreed that the husband & wife should concur in settling property coming to him in her right. The purchasers, however, still declined to complete, contending (a) that the property was not touched by the settlement; (b) that an infant, by a voidable deed, could not sever a joint tenancy; (c) that there could, on her coming of age, be no confirmation by a married woman of a voidable deed purporting to deal with reversionary property:—*Held*: the severance was effectual, the settlement not having been revoked by the infant upon her coming of age, & the purchase must therefore be completed, the purchasers, however, to be charged with costs only from the date of the delivery of the supplemental abstract.—*BURNABY v. EQUITABLE REVERSIONARY INTEREST*

SOCIETY (1885), 28 Ch. D. 416; 54 L. J. Ch. 466; 52 L. T. 350; 33 W. R. 639.

Annotations:—*Refd.* *Re Hewett, Hewett v. Hallett* (1893), 63 L. J. Ch. 182. *Mentd.* *Re Hodson Williams v. Knight*, [1894] 2 Ch. 421; *Vidity v. O'Hagan* (1899), 68 L. J. Ch. 553.

684. Mortgage not properly discharged.]—A sum of money having been given to four trustees, one of them lent a part on mtge., & there was notice of the trust on the mtge., which was made to that one trustee only; he subsequently called in the money, which the mtgor. procured from another person, to whom the mtge. was then assigned, & who paid the money to the single trustee alone. The mtgor. afterwards sold the property, & the purchaser objected that the payment of the mtge. money to the one trustee alone was not a good discharge: but the ct. was of opinion that that payment was a good discharge; the true principle being, that no person could be allowed to deal with trust money to the prejudice of the *cestui que trust*, & the ct. being of opinion that there had not been any such dealing by the vendor in this case; yet, inasmuch as equity will not impose the expenses of litigation upon a purchaser, the ct. refused to decree specific performance, & dismissed the bill.—*HANSON v. BEVERLEY* (1832), 1 L. J. Ch. 132.

685. Title under revoked will.]—*BULLIN v. FLETCHER* (1837), 1 Keen, 600; 2 My. & Cr. 432; *Donnelly*, 213; 47 E. R. 347, L. C. *Annotation*:—*Apld.* *Plowden v. Hyde* (1852), 2 Sim. N. S. 171.

686. Estate vested in assignee in bankruptcy—Assignee offering to concur.]—Assignees of a bkpt. agreed to sell a part of his estate, & filed a bill for specific performance. It turned out that the estate was vested in an assignee under a previous insolvency. After the master had made his report, upon a reference as to title, the assignee in insolvency offered to concur in the sale:—*Held*: a good title could be made.—*SIDEBOTHAM v. BARRINGTON* (1841), 4 Beav. 110; 10 L. J. Ch. 302; 49 E. R. 280; *subsequent proceedings* (1842), 5 Beav. 261.

Annotation:—*Refd.* *Fraser v. Wood* (1845), 8 Beav. 339.

687. Direction by testator for sale after death of specified person—Sale during life of specified person.]—Where an estate was directed by testator to be sold after the death of a certain person, & the sale was made during the life of that person, after a decree, some of the persons interested in the proceeds being infants or not *sui juris*, the ct. would not compel the purchaser to accept the title.—*BLACKLOW v. LAWS* (1842), 2 Hare, 40; 6 Jur. 1121; 67 E. R. 17.

Annotations:—*Apld.* *Want v. Stallibrass* (1873), L. R. 8 Exch. 175. *Mentd.* *Goulder v. Camm* (1859), 29 L. J. Ch. 135.

688. Title dependent on validity of will.]—*GROVE v. BASTARD*, No. 1590, *post*.

689. Condition for assignment of beneficial interest—Legal estate outstanding in trustees—Administration to be taken out to surviving trustee.]—Where the conditions of sale provided that the purchasers of a leasehold should be satisfied with an assignment of the beneficial interest only, & the legal estate was outstanding in trustees, who, at the time of the sale, were dead. On a claim filed by the vendor:—*Held*: the purchaser was not bound to complete the contract without administration being taken out by the vendors to the survivor of the trustees; & though the vendor only undertook to convey the beneficial interest, & not the legal estate, yet the whole beneficial interest was to be assigned, & it could not be ascertained whether the vendor could assign it till there was a personal repre-

sentative to the survivor of the trustees.—*SMITH v. ELLIS* (1850), 15 L. T. O. S. 451; 14 Jur. 682.

690. Covenant by lessee to insure in joint names—Insurance by sub-lessee in name of original lessor.]—A lessee covenanted to insure in the names of himself or the lessor. The lessee subdemised, & the sub-lessee insured in the name of the original lessor, it being unknown whether the original lessee was alive. The lease became vested in trustees for sale, & the purchaser at the sale refused to complete, on the ground of breach of the covenant to insure. On a bill filed by the vendors for specific performance against the purchaser:—*Held*: there had been a sufficient compliance with the covenant in the original lease, so as to prevent the original lessor from taking advantage of the usual proviso for re-entry, & the purchaser was bound to perform his contract.—*HAVENS v. MIDDLETON* (1853), 10 Hare, 641; 22 L. J. Ch. 746; 22 L. T. O. S. 62; 17 Jur. 271; 1 W. R. 256; 68 E. R. 1085

691. Sale by mortgagee—Power of sale inserted in mortgage by personal representative.]—An exor. or administrator has power to insert a power of sale in a mtge. made of the personal estate of testator or intestate, for the purpose of administering the assets; & a person contracting to purchase from the mortgagee will be compelled to specifically perform his contract.—*RUSSELL v. PLAICE* (1854), 18 Beav. 21; 2 Eq. Rep. 1149; 23 L. J. Ch. 441; 22 L. T. O. S. 326; 18 Jur. 254; 2 W. R. 243; 52 E. R. 9.

Annotations —*Folld. Crulkshank v. Duffin* (1872), L. R. 13 Eq. 555. *Refd. Vane v. Rigden* (1870), 5 Ch. App. 663; *Re Kennal & Still's Contract*, [1923] 1 Ch. 293. *Mentd. Ricketts v. Lewis* (1882), 20 Ch. D. 715.

692. — — —.]—An exor. effected a mtge. of leasehold property, for exorship. purposes, with a power of sale, to a building society, to secure the repayment of the money advanced, as well as all fines, premiums, & interest on certain advanced shares in the society, taken by the exor. for the purpose of obtaining the loan. Upon bill filed by the society against a purchaser under the power of sale, for specific performance:—*Held*: the exor. might legally effect a mtge. with power of sale & with the incidents of a building society mtge. on advanced shares.—*CRULKSHANK v. DUFFIN* (1872), L. R. 13 Eq. 555; 41 L. J. Ch. 317; 26 L. T. 121; 36 J. P. 708; 20 W. R. 351.

Annotation —*Refd. Thorne v. Thorne*, [1893] 3 Ch. 196.

693. Title depending on validity of purchase by solicitor from client.]—A title depending on the validity of a purchase by a solr. from his client forced on an unwilling purchaser, on proof of the validity of the transaction, though given in the absence of the client.—*SPENCER v. TOPHAM* (1856), 22 Beav. 573; 28 L. T. O. S. 56; 2 Jur. 865; 52 E. R. 1229.

Annotation —*Apld. Powell v. Browne* (1907), 97 L. T. 167.

694. Partition depending on power of sale & exchange.]—A power to sell & exchange merely does not so clearly authorise a partition that the ct. will force on a purchaser a title taken under it. But where a power was to make sale & dispose of or convey in exchange & the powers to revoke & limit new uses for carrying these powers into effect also referred to disposition, & the declaration as to the application of the money to be obtained referred also in terms to partition; it was held that on the whole context there was good power to partition & the title taken under it was a good title.—*BRADSHAW v. FANE* (1856), 3 Drew. 534; 25 L. J. Ch. 413; 27 L. T. O. S. 25; 2 Jur. N. S. 247; 4 W. R. 422; 61 E. R. 1006.

Annotation —*Refd. Re Frith & Osborne* (1876), 3 Ch. D. 618.

695. Land conveyed to trustees to secure stock—Sale of land—Uncertain whether proceeds invested in stock.]—C., to pay for an estate he had purchased, borrowed from the trustees & exors. of Y.'s will two large sums of stock in a moiety of which he had a life interest with remainder to his children. The estate was conveyed to him subject to a mtge. to the trustees to secure these two sums of stock. C.'s son on his marriage assigned his share of the interest in the estate to trustees, for himself, his wife & the children of the marriage; a similar settlement was made on the marriage of C.'s daughter. After the death of C. a portion of the estate was sold to pltf., & a moiety of the purchase-money was paid to the trustees of the son's & daughter's marriage settlement in money; but it did not appear that the trustees invested the money they received in stock, & on this estate in 1856 being sold to deft. he objected to the title, contending that he was entitled to have it ascertained that this money did eventually become stock. There were the usual powers for the varying of securities:—*Held*: the objection was a valid one, & the appeal was dismissed with costs.—*PELL v. DE WINTON* (1857), 2 De G. & J. 13; 27 L. J. Ch. 230; 30 L. T. O. S. 252; 4 Jur. N. S. 225; 6 W. R. 179; 44 E. R. 892, L. C.

Annotation —*Mentd. Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333.

696. Title depending on voluntary settlement.]—Bill by purchaser against the vendor, who had previously executed a voluntary settlement of the property, & against the trustees & *cestui que trusts* under the settlement to have the settlement declared void & delivered up, & for a specific performance, sustained, the only objection to the title being the voluntary settlement.—*DAKING v. WHIMPER* (1859), 26 Beav. 568; 53 E. R. 1017.

Annotations —*N.F. Fletcher v. Kettelman* (1871), 40 L. J. Ch. 624. *Mentd. Re Walhampton Estate* (1884), 26 Ch. D. 391.

697. — — —.] In a suit for specific performance against a vendor & those claiming under a voluntary settlement made by him previous to the contract for sale, the ct. refused to declare that the settlement was void under stat. 27 Eliz. c. 4.—*FLETCHER v. KETTEMAN* (1871), 40 L. J. Ch. 624.

698. Obligation to repair fences doubtful.]—Where in a suit for specific performance it appears that a covenant has been entered into by a former purchaser of the property for himself, his appointees, heirs, & assigns, to the intent that it should run with the land, with the owners & occupiers for the time being of certain adjoining lands, at all times thereafter at his & their expense to make & maintain the boundary fences between the lands, & abutting on a road, afterwards made; the question of the obligation being binding on a future purchaser is too doubtful to admit of the title being forced upon him.—*POTTER v. PERRY* (1859), 23 J. P. 644; 7 W. R. 182.

699. Notice of lis pendens.]—Notice of a *lis pendens* is not necessarily notice of an incumbrance. It only amounts to a notice of a claim upon the subject of the suit which may possibly be unfounded. Such a notice affords no ground for resisting specific performance.—*BULL v. HUTCHENS* (1863), 32 Beav. 615; 2 New Rep. 306; 9 L. T. 716; 9 Jur. N. S. 954; 11 W. R. 866; 55 E. R. 242.

Annotations —*Refd. Bell v. Holtby* (1873), L. R. 15 Eq. 178; *Lawrie v. Lees* (1880), 14 Ch. D. 249; *Re Highett & Bird's Contract*, [1902] 2 Ch. 214.

700. Appointment in fraud of power.]—The tenant for life of real estate under a marriage

lessor agreeing not to withhold his consent from any assignment to a respectable & responsible person:—*Held*: the fact that the lessor's consent had not been obtained at the time of the agreement to take an assignment was not enough to enable defts. to resist a claim for specific performance.

Where two distinct properties, held under separate titles, are comprised in one lease, & the reversion of one of them becomes vested in the lessee, this does not extinguish a right of re-entry in respect of the property of which the reversion remains in the lessor; the rules as to severance of reversion by assignment to third parties not being applicable to cases where a portion of the reversion is vested by assignment in the lessee himself.—*HYDE v. WARDEN* (1877), 3 Ex. D. 72; 47 L. J. Q. B. 121; 37 L. T. 567; 26 W. R. 201, C. A.

Annotations:—*Reid*. *Willmott v. Barber* (1880), 15 Ch. D. 96; *Re Davis & Cavey* (1888), 58 L. J. Ch. 113; *Reeve v. Berridge* (1888), 20 Q. B. D. 523; *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Dougherty v. Oates* (1900), 45 Sol. Jo. 119; *Molynaux v. Hawtrey*, [1903] 2 K. B. 487; *Melzak v. Lilienfeld*, [1926] Ch. 480. *Mentd.* *Evans v. Davis* (1878), 10 Ch. D. 747; *Burford v. Unwin* (1885), Cab. & El. 491; *Bishop v. Taylor & Harris* (1891), 60 L. J. Q. B. 556; *Re White & Smith's Contract*, [1896] 1 Ch. 637; *Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835; *Harman v. Ainslie*, [1901] 1 K. B. 698; *Lewis v. Baker*, [1905] 1 Ch. 16.

710. Sale of leaseholds—Premises subject to building agreement—What amounts to performance of agreement.—In a suit by the owner of leasehold premises against a purchaser, to enforce the specific performance of a contract to purchase, it appeared that the original lessee had, in 1835, covenanted with the lessors, in or before 1836, to build two houses on the property, worth £100, to the satisfaction of the lessors' surveyor. The lessee, instead of so doing, built, with the sanction of the lessors' surveyor, five houses worth, in the aggregate, more than £400, but no two being worth that sum. The lessors thenceforth received the rents yearly accruing due on the premises:—*Held*: though the covenant had not been performed *modo et forma*, yet that it had been substantially performed; and the ct. decreed specific performance.—*HUME v. BENTLEY* (1852), 5 De G. & Sm. 520; 21 L. J. Ch. 760; 16 Jur. 1109; 61 E. R. 1225.

Annotations:—*Reid*. *Drysdale v. Mace* (1854), 2 Eq. Rep. 386; *Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515; *Harnett v. Baker* (1875), L. R. 20 Eq. 50; *Re Banister, Broad v. Munton* (1879), 12 Ch. D. 131; *Best v. Hamand* (1879), 12 Ch. D. 1; *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190; *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 2 Ch. 603. *Mentd.* *Nunn v. Hancock* (1871), 21 L. T. 569.

711. — Purchaser entering into possession—Suit by lessors for rectification of lease—Suspension of completion until suit decided.—A purchaser bought the lease of certain premises under the decree of the ct. & entered into possession & paid the purchase-money into ct. Afterwards the lessors instituted a suit against the original lessee for the purpose of altering the lease in a material particular:—*Held*: the ct. would not compel the purchaser to complete the purchase until that suit was decided, although he had notice at the time of accepting the title that there were grounds for the lessors' claim.—*BENTLEY v. CRAVEN* (1853), 17 Beav. 204; 21 L. T. O. S. 215; 1 W. R. 401; 51 E. R. 1011.

712. — Option to purchase—Exercise independent of contract of letting—Forfeiture of lease.—The owner of a plot of ground agreed to grant a lease of it to A. B. as soon as the latter had erected a villa thereon. But it was stipulated, that if A. B. should not perform the agreement on his part, the agreement for a lease was to be

void, & that the owner might re-enter. A. B. was to insure in a particular way, & he was to have the option of purchasing the fee within two years. A. B. erected the villa, but insured in the wrong office and in the wrong name:—*Held*: the contract for a lease was independent of the option to purchase, & notwithstanding the forfeiture of the first, the latter still subsisted, & a specific performance of the contract for sale was decreed.—*GREEN v. LOW* (1856), 22 Beav. 625; 27 L. T. O. S. 269; 20 J. P. 564; 2 Jur. N. S. 848; 4 W. R. 669; 52 E. R. 1249.

Annotations:—*Distd.* *Re Adams & Kensington Vestry* (1884), 27 Ch. D. 391. *Reid*. *Woodall v. Clifton* (1905), 93 L. T. 257.

Necessity for performance of conditions precedent—Enforcement of agreements for lease.—*See LANDLORD & TENANT*, Vol. XXX., pp. 399, 400, Nos. 626–634, Vol. XXXI., p. 119, No. 2532.

Enforcement of options to purchase.—*See LANDLORD & TENANT*, Vol. XXX., pp. 475, 476, Nos. 1376–1385.

Enforcement of covenants for renewal of lease.—*See LANDLORD & TENANT*, Vol. XXXI., pp. 73–78, 86, Nos. 2202–2229, 2303.

Commencement of tenant's liability under covenant to repair.—*See LANDLORD & TENANT*, Vol. XXXI., pp. 321–323, Nos. 4621–4644.

C. Compulsory Purchase of Land.

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 167, 168, Nos. 448–451.

D. Time of Performance.

See Sect. 10, *post*.

E. Representations as to Future Acts.

713. General rule.—Specific performance refused, on the ground of representations having been made at the sale on the part of the vendor, of improvements affecting the value of the premises intended by him, which were not carried into effect.—*BEAUMONT v. DUKES* (1822), Jac. 422; 37 E. R. 910.

714. ——A. agreed to purchase part of an estate on the faith of representations made to him by the vendor's agent, that the vendor would do certain acts on the remainder of the estate. Those acts, however, were not done; in consequence of which the value of the land purchased was considerably diminished. A bill for specific performance, filed by persons claiming under the vendor, was dismissed with costs.—*MYERS v. WATSON* (1851), 1 Sim. N. S. 523; 61 E. R. 202.

Annotation:—*Reid*. *Cox v. Smith* (1868), 19 L. T. 517.

715. Exhibition of plan—Small deviations from plan immaterial.—Small deviations from a plan agreed upon for building not material; otherwise if obstinate or corrupt.—*CRAVEN v. TICKELL* (1789), 1 Ves. 60; 30 E. R. 230, L. C.

Annotations:—*Mentd.* *Arnott v. Redfern* (1826), 3 Bing. 353; L. C. & D. Ry. v. S. E. Ry., [1893] A. C. 429.

716. — Plan showing rights of way not given by contract.—Upon a sale by auction of a large parcel of land, in sixty lots, the particulars & conditions of sale referred to a plan on which several roads were marked out so as to provide frontages for all the lots, but there was no intention that any lot was to have rights of way beyond the road adjoining it & directly leading into the public highway. In a suit by a purchaser of two lots for specific performance, the questions arose as to what rights of way he was entitled to have conveyed to him:—*Held*: the ct. could only act on the footing of the contract, & the purchaser could only claim a right of way over the road adjoining the lots, & directly thence into the public high-

Sect. 10.—Non-performance of conditions and essential terms : Sub-sect. 2, E. & F.; sub-sect. 3.]

way.—*RANDALL v. HALL* (1851), 4 De G. & Sm. 343; 64 E. R. 861.

717. — Plan incorporated in contract.] — The N. Comrs. agreed to sell a property to deft. D. The contract did not refer to any plan, but the agents who signed it for the parties signed at the same time the following memorandum written upon a plan of the property "Plan of property sold to & purchased by D. Oct. 23, 1874. N.B. The property included in the purchase is edged with red colour":—*Held*: the plan was sufficiently incorporated, & the description in the contract was controlled by it.—*NENE VALLEY DRAINAGE COMRS. v. DUNKLEY* (1876), 4 Ch. D. 1; 41 J. P. 101, C. A.

718. Promise to alter agreement—To conform with certain conditions of sale.]—*MICKLETHWAIT v. NIGHTINGALE*, No. 353, *ante*.

F. Other Cases.

719. Settlement to be made by wife's father.]—*BACON v. CLERKE* (1876), *Cas. temp. Finch*, 244; 23 E. R. 134, L. C.

720. —.]—*FEVERSHAM (EARL) v. WATSON* (1880), *Cas. temp. Finch*, 445; *Freem. Ch.* 35; 23 E. R. 242, L. C.; *reversd.* (1881), *see* 1 Vern. 83, H. L. *Annotation*:—*Consd. Popham v. Bamfield* (1882), 1 Vern. 79.

721. Interdependence of contracts—Purchase of several lots at auction—Failure of vendor to show title to one lot.]—*LEWIN v. GUEST*, No. 666, *ante*.

722. — Mutual contracts contained in one instrument—Not expressed to be interdependent—Admissibility of evidence that agreement intended to operate as exchange.]—By a written agreement between pltf. & deft., pltf. agreed to sell, & deft. agreed to purchase, upon the terms stated, a certain property called the L. estate; & by the same agreement deft. agreed to sell, & pltf. agreed to purchase, another estate called the H. estate; & it was not expressed that the two contracts were to be dependent on each other. Deft. was eventually unable to make a good title to the H. estates:—*Held*: pltf. was entitled to a specific performance of the contract as to the L. estate.

Evidence *aliunde* was not admitted, to show that it was the real intention of the parties that the agreement should take effect on the basis of a mutual exchange.—*CROOME v. LEDIARD* (1834), 2 My. & K. 251; 3 L. J. Ch. 98; 39 E. R. 940, L. C.; *subsequent proceedings* (1835), 2 My. & K. 293.

Annotation:—*Mentd. Mainland v. Upjohn* (1889), 41 Ch. D. 126.

723. Failure to present cheque given by purchaser.]—Where a void cheque was given by purchasers & received by vendors for the consideration money for an estate, & presentation of the cheque was delayed by the vendors until after an event, which never happened, at the request of the authorised agent of the purchasers, & the bankers became bkpt.:—*Held*: there was no laches in the non-presentation of the cheque, & no payment or equitable satisfaction of the cheque; & further, the vendor was entitled, on a bill filed by him for specific performance of the agreement to a decree for that purpose, & full payment of the consideration money.—*WARD (LORD) v. OXFORD RY. CO.* (1852), 2 De G. M. & G. 750; 22 L. J. Ch. 905; 22 L. T. O. S. 13; 1 W. R. 9; 42 E. R. 1065, L. JJ.

724. Sale of land occupied by third party—Purchaser to have possession on day of completion—Vendor unable to give personal occupation.]—Pltf. agreed to sell deft. an orchard, described as being in the "occupation of P.," & that the purchaser should have "possession" on the day appointed for completion:—*Held*: "possession" did not mean "personal occupation," & a decree for specific performance was made against deft., although pltf. was unable, by reason of P.'s tenancy, to put him in actual occupation of the premises.—*LAKE v. DEAN* (1860), 28 Beav. 607; 54 E. R. 499.

725. Physical condition of subject-matter—Stipulation that vendor should make road—Part of agreement for sale of land.]—(1) Pltf. agreed to sell, & deft. to purchase a piece of land, upon which deft. agreed to build a residence within eighteen months of the execution of the conveyance:—*Held*: the nature of the contract did not in itself make time of the essence of the contract.

(2) It was part of the agreement that the vendor should forthwith form & make a road to be used in common by the vendor & deft. Assuming the vendor not to have performed this part of the agreement, it was held not to be a ground for refusing specific performance of the contract.—*WELLS v. MAXWELL* (No. 1) (1863), 32 Beav. 408; 33 L. J. Ch. 46, n.; 8 L. T. 591, 9 Jur. N. S. 565; 11 W. R. 676; 55 E. R. 160; *affd.*, 33 L. J. Ch. 44; 8 L. T. 713; 9 Jur. N. S. 1021; 11 W. R. 842, L. JJ.

Annotations:—*As to* (1) *Consd. Green v. Sevin* (1879), 13 Ch. D. 589. *As to* (2) *Consd. Greenhill v. Isle of Wight (Newport Junction) Rty.* (1871), 23 L. T. 885.

726. — Premises not completed.]—*HEMBROW v. TALBOT* (1892), 36 Sol. Jo. 712.

727. License not to be affected before completion.]—By an agreement in writing, defts., W. & others, agreed to sell, & pltf., the T. co., agreed to purchase, a freehold house & shop, with the off beer license attached thereto & other premises, at the price of £725; & it was further agreed that if the license or magistrates certificate in respect of the said house & shop should be indorsed or otherwise affected prior to the completion of the purchase, the agreement should at the option of pltf. be at an end, & the deposit returned.

Pltf. postponed the completion of the purchase, & then, without previously consulting the vendors or obtaining any indorsement of the license, or asking the vendors to attend or assist pltf., applied to the magistrates for temporary authority till the next transfer day to carry on the licensed business in the name of their nominee. The magistrates declined to give this temporary authority.

Pltf. claimed to have the contract set aside, & the deposit returned.

Defts. counterclaimed for specific performance of the contract:—*Held*: license never having been "affected" within the meaning of the contract, & there being no obligation on defts. under the contract to procure such temporary authority from the magistrates, or to do more than join with the purchasers, or authorise them to use their name, in any application to the magistrates, pltf.'s claim failed, & defts. were entitled to specific performance of the contract.—*TADCASTER TOWER BREWERY CO. v. WILSON*, [1897] 1 Ch. 705; 66 L. J. Ch. 402; 76 L. T. 459; 61 J. P. 360; 45 W. R. 428; 13 T. L. R. 295; 41 Sol. Jo. 387.

PART III. SECT. 10, SUB-SECT. 2.—F.

g. Physical condition of subject-matter—Stipulation that vendee should build house & fence land.]—*ALLAN v.*

BOWN (1854), 4 Gr. 439.—**CAN.**

f. Sale of land to railway company for station—Conditional on crossings made for benefit of vendor.]—*JACKSON v. JESSOP* (1857), 5 Gr. 524.—**CAN.**

g. Failure to tender full amount of purchase-money—Trifling deficiency.]—*GILLESPIE v. WELLS* (1912), 21 W. L. R. 231; 2 W. W. R. 272; 22 Man. L. R. 355.—**CAN.**

SUB-SECT. 3.—EFFECT OF BANKRUPTCY OR INSOLVENCY.

728. Whether bar to specific performance — Where plaintiff is purchaser.]—An act of bkpcy. & a docket struck, though no commission issued, a sufficient objection to a bill for specific performance of a previous contract for the sale of an estate to pltf.; in a case even, where part of the money had been paid: the sub-contracts for sale of part entered into by pltf.; & defts. had agreed to convey accordingly.—*FRANKLIN v. BROWNLOW* (LORD) (1808), 14 Ves. 550; 33 E. R. 632.

Annotation:—*Distd.* *Dyster v. Randall*, [1926] Ch. 932.

729. ——— Certified bankrupt purchasing reversionary interest.]—A bkpt., after obtaining his certificate, contracted with creditors' assignee for the purchase of his reversionary interest in a legacy to which he was entitled under the will of his father-in-law. Shortly after the agreement had been signed, the reversion fell into possession. On the day named in the contract for the payment of the purchase-money the bkpt. tendered the amount to the official assignee, who refused either to receive it or to recognise the contract. Upon a petition by the purchaser:—*Held*: in the absence of fraud or proof of insufficient value, the contract was valid, & ought to be completed.—*Re WARD'S LEGACY* (1858), 26 Beav. 207; 28 L. J. Ch. 175; 32 L. T. O. S. 189; 5 Jur. N. S. 164; 53 E. R. 876.

730. ——— Agreement to set off debt of vendor against purchase-money.]—By two contracts dated respectively June 18 & July 2, 1908, debtor agreed to sell for £880 four houses which were subject to a mtge. for £600. Debtor was indebted to the purchaser in the sum of £257 for work done by the purchaser to certain houses, including those agreed to be sold. On July 11, 1908, the purchaser heard for the first time that the debtor had committed an act of bkpcy. on the previous June 30. On Oct. 12, 1908, a receiving order was made against the debtor in a county ct., & adjudication followed. The purchaser, having accepted the title & entered into possession, applied to the county ct. judge, against the trustee in bkpcy. for specific performance of the two contracts & for a declaration that he was entitled to set off the £257 due to him from debtor against the balance of the purchase-money due from him to the debtor after deducting the amount due on the mtge. The county ct. judge held that the purchaser was only entitled to specific performance on payment of the balance of the purchase-money in full to the trustee:—*Held*: there had been mutual dealings between the debtor & the purchaser within Bkpcy. Act, 1883 (c. 52), s. 38, & the purchaser was therefore entitled to specific performance upon the terms that the £257 due to him from debtor be set off against the balance of the purchase-money.—*Re TAYLOR, Ex p. NORVELL*, [1910] 1 K. B. 562; 79 L. J. K. B. 610; 102 L. T. 84; 17 Mans. 145; *sub nom.* *Re TAYLOR, Ex p. SUTCLIFFE*, 26 T. L. R. 270; 54 Sol. Jo. 271, C. A.

Annotations:—*Reid.* *Ellis' Trustee v. Dixon-Johnson*, [1924] 2 Ch. 451; *Re City Life Assce., Grandfield's Case*, [1926] Ch. 191.

731. ——— Where plaintiff is vendor.]—An act of bkpcy. a sufficient objection to title; without showing a debt, upon which a commission could issue.—*LOWES v. LUSH* (1808), 14 Ves. 547; 33 E. R. 631.

Annotations:—*Apld.* *Smith v. Death* (1820), 5 Madd. 371. *Consd.* *Pyrke v. Waddingham* (1852), 10 Hare, 1. *Reid.* *Franklin v. Brownlow* (1808), 14 Ves. 550; *Pott v. Turner* (1830), 11 Bing. 702.

732. ———.]—Pltf. & his two partners filed a liquidation petition under which the joint creditors resolved upon a liquidation, appointed a trustee, & granted the debtors their discharge. The separate creditors were summoned but did not attend the meeting. After the discharge, but before the close of the liquidation pltf. acquired a lease of a piece of ground on which he built a house & entered into an agreement to sell it to debt.

Pltf. filed his bill for specific performance of the agreement & debt. demurred:—*Held*: the separate estate of each partner, as well as the joint estate, vested in the trustee appointed by the joint creditors & the discharge given by the joint creditors did not operate to discharge pltf. or his separate estate, from his separate debts, & therefore pltf. could not make a good title to the property.—*EBBS v. BOULNOIS* (1875), 10 Ch. App. 479; 33 L. T. 342; 23 W. R. 820, L. JJ.

Annotations:—*Reid.* *Moggy v. Imperial Discount Co.* (1878), 3 Q. B. D. 711. *Mentd.* *Re Caughey, Ex p. Ford* (1876), 1 Ch. D. 521; *Re Pettit's Estate* (1876), 1 Ch. D. 478; *Re Chatterton, Ex p. Hemming* (1879), 13 Ch. D. 163; *Re Wainwright, Ex p. Wainwright* (1881), 19 Ch. D. 140; *Re Smith, Green v. Smith* (1883), 24 Ch. D. 672; *Cholmeley School, Highgate v. Sewell*, [1894] 2 Q. B. 906; *Imray v. Oakshette*, [1897] 2 Q. B. 218; *Re Powell, Powell v. Powell* (1904), 20 T. L. R. 374.

733. ——— Where plaintiff is assignee of lessee.]—The ground of a demurrer must be a short point, upon which it is clear, the bill would be dismissed with costs at the hearing; therefore upon a bill by assignees of a bkpt. for specific performance of an agreement previous to the bkpcy. to grant a lease, the case consisting of a combination of circumstances, the evidence might sustain the relief with some modification; upon which a demurrer was overruled.—*BROOKE v. HEWITT* (1796), 3 Ves. 253; 30 E. R. 997, L. C.

Annotations:—*Distd.* *Weatherall v. Geering* (1806), 12 Ves. 504. *Consd.* *Crosbie v. Tooke* (1833), 1 My. & K. 431. *Reid.* *Buckland v. Papillon* (1866), 15 L. T. 378.

734. ———.]—Under an agreement for a lease, containing a covenant against alienations, & a proviso for re-entry for breach of the covenant: the lessee, after having been in possession for many years, conveyed all his property to trustees, for the benefit of his creditors, & subsequently a commission of bkpt. issued against him, & he was found bkpt. On the trial of an ejectment at law, it was held that the deed was an act of bkpcy., & void, & that it did not operate as a valid assignment of the lease, & was therefore no forfeiture.

On a bill by the assignees for the specific performance of the agreement: the ct. decreed that the assignees were entitled to a lease, according to the agreement, on personally entering into those covenants, the which bkpt., if solvent, would have bound to enter into.

In decreeing a specific performance, a ct. of equity exercises a discretion, & will not exert its authority for that purpose, if, by so doing, injustice will be done.—*POWELL v. LLOYD* (1827), 2 Y. & J. 372; 148 E. R. 962.

Annotations:—*Consd.* *Crosbie v. Tooke* (1833), 1 My. & K. 431. *Reid.* *Buckland v. Papillon* (1866), 15 L. T. 736.

735. ——— Where plaintiff is lessee.]—The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease.—*PRICE v. ASSHETON* (1835), 1 Y. & C. Ex. 441; 160 E. R. 180.

Annotations:—*Reid.* *Lewis v. Stephenson* (1898), 67 L. J. Q. B. 296. *Mentd.* *Rickards v. Rickards* (1844), 13 L. J. Ch. 344.

PART III. SECT. 10, SUB-SECT. 3.

731. Whether bar to specific performance—Where plaintiff is vendor.]—*FACEY v. RAWSTHORNE* (1925), 35 C. L. R. 566; 30 Argus L. R. 302,—AUS.

Sect. 10.—Non-performance of conditions and essential terms: Sub-sects. 3, 4 & 5. Sect. 11: Sub-sect. 1.]

— *Against debtor's trustee.]—See BANKRUPTCY, Vol. V., p. 993, Nos. 8111-8114.*

SUB-SECT. 4.—EFFECT OF SUBSEQUENT IMPOSSIBILITY.

See Sect. 14, post.

SUB-SECT. 5.—WAIVER.

736. What constitutes waiver—General rule.]—A landowner entered into an agreement with a railway co. by which the latter agreed to make & maintain so many crossings across the estate of the former as the engineer or surveyor of the landowner should, within one month after the co. obtained possession of the land, direct & notify in writing to the co. or their engineer. No notification in writing of the crossings required was given to the co. or their engineer until nearly three months after the co. obtained possession of the land, & the co. refused to make a certain crossing directed in the certificate or award:—*Held*: time was of the essence of the contract, & the landowner was not, under the circumstances, entitled to specific performance of the agreement, & the rights of the parties under the agreement having been lost, the ct. had no power to substitute for that agreement an agreement to give all necessary & proper crossings, & the general rights of the landowner under the Railway Acts, to have proper crossings, etc., were impliedly taken away by the private agreement he had made with the co.

A waiver must be an intentional act with knowledge. Where, therefore, there is an agreement to refer to arbn., & it is agreed that the award shall be made within a specified time, & the award is not made until after the expiration of such time, & one of the parties, in ignorance of that fact, takes it up & pays the charges for it, his doing so will not amount to a waiver of the condition as to time specified in the agreement.—*DARNLEY (EARL) v. LONDON, CHATHAM & DOVER RY. CO.* (1867), L. R. 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817, H. L.; *affg.* (1863), 1 De G. J. & Sm. 204, L. J.J.; & (1865), 3 De G. J. & Sm. 24, L. J.J.

Annotations:—Mentd. Gossip v. Wright (1863), 2 New Rep. 152; *A.-G. v. Cambridge Consumers Gas Co.* (1868), L. R. 6 Eq. 282; *Breckon v. Russell* (1868), 19 L. T. 81, 468; *Budding v. Murdoch* (1875), 1 Ch. D. 42; *Samuel v. Dumas*, [1921] A. C. 431.

737. — Admitting title in action.]—A. contracts with B. to purchase an estate, & after accepting the title, agrees to sell to C., who refuses to complete his purchase on the ground of his having discovered a will made eighty years ago, not set forth in the abstract, but supposed to affect the title. Upon a bill for specific performance by the original vendor against A., who by his answer, which was put in, & the cause set down for hearing, before this discovery was made, admitted the title; *qu.* if he may be allowed to set up the will as an objection to the title by a supplemental answer. By consent of both parties, a reference was directed to the master to inquire whether a good title could be made, regard being had to the will only.—

CONST v. BARR (1816), 2 Mer. 57; 35 E. R. 862, L. C.

738. — — —.]—*PHIPPS v. CHILD*, No. 577, *ante.*

739. — Acceptance of title with knowledge of defect.]—*EBDEL v. NICHOLSON* (1836), Donnelly, 111; 47 E. R. 260.

740. — — —.]—It is no defence to a suit for specific performance against trustees of a turnpike road that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under Turnpike Roads, 1822 (c. 126), s. 39; even where the offer required has not, through inadvertence, been made to such owner, & it is in evidence that the owner insists on his right, the purchaser making no objection to the title, & being content to take such estate as the trustee could convey.—*BARRETT v. RING* (1854), 2 Sm. & G. 43; 65 E. R. 294.

741. — Long possession by purchaser—Vexatious objections to completion.]—Purchaser after long possession & vexatious objections to complete the purchase, held to have waived his right to an investigation of the title, & decreed to perform the agreement specifically, to pay interest at £4 per cent. on the unpaid purchase-money, from the time of taking possession, & to pay the costs of the suit.

Original vendee of an estate not a necessary party to a bill against his assignee for specific performance of an agreement to purchase.—*HALL v. LAVER* (1838), 3 Y. & C. Ex. 191; 160 E. R. 669.

Annotation:—Distd. Corless v. Sparling (1873), 21 W. R. 876.

742. — Delay in repudiation.]—*EYSTON v. SIMONDS*, No. 673, *ante.*

743. — — —.]—*LAMARE v. DIXON*, No. 9, *ante.*

744. — Acceptance of supplemental agreement.]—A. became the purchaser of a mansion house & park under conditions of sale, which stated that the whole property was freehold except 8 acres, which were copyhold, but undistinguished except as to not including any of the buildings. The abstract of the title having been delivered & discussions thereon having taken place, which raised difficulties in the way of completing the purchase, a supplemental agreement was entered into, detailing what requisitions as to title, etc., should be complied with. Among these requisitions was one in the following words: "Declaration of identity of lands mentioned in deeds to those now sold":—*Held*: on a bill filed by the vendor for specific performance, the supplemental agreement was a substitution for the original contract, & A. was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises so as to show that the latter did not include any of the buildings.—*DAWSON v. BRINCKMAN* (1850), 3 Mac. & G. 53; 42 E. R. 181, L. C.

745. — Purchase of outstanding estate by defendant.]—*MURRELL v. GOODYEAR*, No. 599, *ante.*

746. — Contract to take premises in existing condition—Lack of repair amounting to breach of covenant.]—On Jan. 15, 1921, the purchasers having inspected leasehold premises & ascertained their bad state of repair agreed to buy them for £150, & to take an assignment of the lease subject

PART III. SECT. 10, SUB-SECT. 5.
h. *What constitutes waiver—Submission to judgment by default—On notes given for conveyance.]—FLEMING v. DUNCAN* (1870), 17 Gr. 76.—CAN.

k. — *Refusal to accept title if tendered.]—McDOUGALL v. HALL* (1886), 13 O. R. 160.—CAN.

l. — — —.]—*BURNEY v. MOORE* (1912), 23 O. W. R. 161; 4 O. W. N.

173; 7 D. L. R. 357.—CAN.

m. — *Delay in investigation of title.]—CORLESS v. SPARLING* (1874), 8 I. R. Eq. 335.—IR.

to the landlord's consent being obtained & to the premises being taken in their then present condition. The premises were not assignable without the landlord's licence.

On Feb. 1 the title, subject to the licence being obtained, was accepted & the draft assignment approved.

Two days later the landlord served a formal notice of breaches of covenant & a schedule of dilapidations on the vendors, & intimated that her licence to assign would be withheld until the notice was complied with. The vendors at once forwarded the notice & schedule to the purchasers, informed them of the landlord's intimation, & requested them to do the repairs. The purchasers refused to do any repairs & subsequently repudiated the purchase.

The vendors then did the repairs at a cost of £225, obtained the licence to assign, & claimed specific performance of the contract on the footing that the £225 & other outgoings since Feb. 1 must be borne by the purchasers:—*Held*: the vendors were entitled to the relief they claimed on the following grounds:—(a) By contracting to take the premises in their then present condition the purchasers had assumed liability for & agreed to indemnify the vendors against the cost of any subsequent repairs. (b) Although the £225 was in a sense part of the costs of making the title, it was an expense for which the purchasers had expressly assumed liability, & they were not entitled to prevent the vendors making a title by repudiating this liability. (c) From the date of the contract the vendors in the circumstances held the premises in their dilapidated condition as trustees for the purchasers with a corresponding right of indemnity against the cost of any subsequent repairs or outgoings.—*LOCKHARTS v. ROSEN (BERNARD) & Co.*, [1922] 1 Ch. 433; 91 L. J. Ch. 321; 127 L. T. 18; 66 Sol. Jo. 350.

— **Failure to make objections to title within time.**—*See* SALE OF LAND, Vol. XL., p. 87, Nos. 670–672.

— **Failure to demand abstract.**—*See* SALE OF LAND, Vol. XL., pp. 173, 174, Nos. 1425–1426.

747. Scheme for formation of joint stock company—Contract made before registration—Subsequent incorporation of company by statute—Clause saving rights of all parties.—*BROWN v. LONDON NECROPOLIS CO.* (1854), 24 L. T. O. S. 127.

748. Condition to be solely for defendant's benefit—Vendor agreeing not to trade—& giving licence to trade under his name.—A., B., C., & D. traded at E. under the firm of A. & co. A., who lived abroad, gave a power of attorney to B., by which he authorised him to sell, or concur in selling, any of A.'s property by auction, or privately, upon such terms, subject to such conditions, & in such manner as B. should think fit. B., C., & D. agreed to sell the business as a going concern to H., B. signing as attorney for A. as well as on his own behalf. H. agreed to pay the debts of the business, which were estimated at £15,000; if they did not exceed that amount the vendors were to be entitled to a share of profits calculated on £5,000 "deferred capital"; if the debts exceeded £15,000, £5 for every £2 of the excess was to be deducted from the £5,000 deferred capital; the vendors might require H. to take over their deferred capital, paying in cash two-fifths of its nominal amount; if the concern was converted into a limited co., the vendors were to receive shares for their deferred capital; & if the debts were less than £15,000, H.

was to pay the difference in cash at the end of two years. It was agreed that H. might carry on the business under the style of A. & co., & that the vendors should not carry on any like business within fifty miles of E. H. brought an action for specific performance:—*Held*: assuming the licence to trade under the name of A. & co. & the agreement by the vendors not to trade to be unauthorised by the power of attorney, they were stipulations for the benefit of H. which he might waive, & he having waived them, specific performance ought to be decreed.—*HAWKSLEY v. OUTRAM*, [1892] 3 Ch. 359; 62 L. J. Ch. 215; 67 L. T. 804; 2 R. 60, C. A.

Annotations:—*Distd.* *Lloyd v. Nowell*, [1895] 2 Ch. 744. *Appl.* *Morrell v. Studd & Millington*, [1913] 2 Ch. 648; *North v. Loomes*, [1919] 1 Ch. 378. *Mentd.* *Re Johnston Foreign Patents Co.*, *Re Johnston Die Press Co.*, *Re Johnston Engraving Co.*, *J. P. Trust v. The Above Cos.*, [1904] 2 Ch. 231.

749. — Contract subject to preparation of formal document.—A vendor & purchaser signed a memorandum purporting to be an agreement for the sale & purchase of a house at a stated price, "subject to the preparation by the vendor's solr. & completion of a formal contract":—*Held*: the vendor could not waive that stipulation as being intended for his benefit alone, so as to constitute the rest of the memorandum a final contract enforceable against the purchaser.—*LLOYD v. NOWELL*, [1895] 2 Ch. 744; 64 L. J. Ch. 744; 73 L. T. 154; 44 W. R. 43; 13 R. 712.

Annotations:—*Consd.* *North v. Percival*, [1898] 2 Ch. 128. *Distd.* *Marten v. Whale*, [1917] 1 K. B. 541. *Refd.* *Rosdale v. Denny*, [1921] 1 Ch. 57; *Chillingworth v. Esche*, [1923] 1 Ch. 576.

750. Condition securing payment of purchase money to vendor.—A purchasers' offer provided that the purchase-money should be paid as to £250 on completion & as to the balance within two years bearing interest at 5 per cent. & to be secured to the vendor's satisfaction.

The vendor accepted the offer subject to the purchase-money being secured to his satisfaction.

Two months before the date fixed for completion, & while the method of securing the balance of the purchase-money was still in negotiation, the purchasers withdrew their offer.

The vendor sued for specific performance or damages:—*Held*: the provision for securing the balance of the purchase-money to the vendor's satisfaction did not prevent the offer & acceptance from constituting a binding contract, & in any case, as the provision was solely for the vendor's benefit, he could waive it at the Bar.—*MORRELL v. STUDD & MILLINGTON*, [1913] 2 Ch. 648; 83 L. J. Ch. 114; 109 L. T. 628; 58 Sol. Jo. 12.

Annotation:—*Refd.* *Hartley v. Hyman*, [1920] 3 K. B. 475.

Waiver of production of lessor's title.—*See, generally*, LANDLORD & TENANT, Vol. XXX., p. 397, Nos. 603–608.

SECT. 11.—DELAY IN PERFORMANCE OF CONTRACT.

SUB-SECT. 1.—IN GENERAL.

See, generally, CONTRACT, Vol. XII., pp. 306–317, Nos. 2532–2621.

751. Whether defence to claim.—Specific performance refused on account of the laches of pltf., the vendor. A small incumbrance, which may be the subject of compensation, no objection to a specific performance.

PART III. SECT. 11, SUB-SECT. 1.
751 i. Whether defence to claim.—*See*
An intending purchaser of land who

has been guilty of laches, bad faith, & default for a considerable time in payment of the cash stipulated for, dis-

entitles himself to the exercise of the judicial discretion to grant specific performance in his favour.—*MABER v.*

Sect. 11.—Delay in performance of contract: Sub-sects. 1 & 2.]

There is nothing to show that he was proceeding with due diligence; & meant to proceed with the contract; nor that he was even holding the purchaser to it. It is clear, therefore, *pltf.* was called upon to be more quick than he had been; & has not done all he ought (*per CUR.*).—*GUEST v. HOMFRAY* (1801), 5 Ves. 818; 31 E. R. 875.

752. ———.]—(1) Bill for specific performance of an agreement dismissed upon the lapse of time, without proceeding in the performance.

(2) Specific performance is always the subject of discretion (*LORD ERSKINE, C.*).—*ALLEY v. DESCHAMPS* (1806), 13 Ves. 225; 33 E. R. 278, L. C.

Annotations:—As to (1) *Apld.* *Southcomb v. Exeter (Bp.)* (1847), 16 L. J. Ch. 378; *Firth v. Greenwood* (1855), 25 L. T. O. S. 51.

753. ———.]—*SOUTH EASTERN RY. CO. v. KNOTT*, No. 1079, *post*.

754. ———.]—*RIDGWAY v. WHARTON*, No. 279, *ante*.

755. ——— **Trifling conduct of plaintiff.]**—Where one party to an agreement trifles, or shows a backwardness in performing his part of it, equity will not decree a specific performance in his favour; especially, if the circumstances & situation of the other party are materially altered in the mean time.—*HAYES v. CARYLL* (1702), 1 Bro. Parl. Cas. 126; 1 E. R. 462, H. L.

Annotation:—Refd. *Southcomb v. Exeter (Bp.)* (1847), 16 L. J. Ch. 378.

756. ———.]—Specific performance refused on the laches & trifling conduct of *pltf.*—*SPURRIER v. HANCOCK* (1799), 4 Ves. 667; 31 E. R. 344.

Annotations:—Refd. *McDonald v. Hanson* (1806), 12 Ves. 277; *Southcomb v. Exeter (Bp.)* (1847), 16 L. J. Ch. 378.

757. ——— **Gross laches of plaintiff.]**—With respect to the performance of a contract the time is material. Therefore a bill for specific performance was upon the gross laches of *pltf.* dismissed with costs.—*HARRINGTON v. WHEELER* (1799), 4 Ves. 686; 31 E. R. 351, L. C.

Annotations.—Consd. *Alley v. Deschamps* (1806), 13 Ves. 225. *Apld.* *Firth v. Greenwood* (1855), 25 L. T. O. S. 51. *Refd.* *Seton v. Slade*, *Hunter v. Seton* (1802), 7 Ves. 265; *Carpenter v. Blandford* (1828), 7 L. J. O. S. K. B. 58; *Southcomb v. Exeter (Bp.)* (1847), 16 L. J. Ch. 378; *Venn v. Cattell* (1872), 27 L. T. 469.

758. ———.]—Where there has been great delay & there is little hope of perfecting the title within a reasonable time, the *ct.* will dismiss a purchaser with costs.

In 1842 *deft.* contracted to purchase an estate. A suit for specific performance having in the same year been instituted by the vendors, it appeared that the vendors claimed under testator who died in 1809, & subject to his debts, that a creditor's suit had been instituted in 1813, & a decree for an

account & sale made in 1817, since which time nothing effectual had been done in the suit, & no report of debts had been actually confirmed. After so great delay, no further time was given to the vendors to complete their title, & the bill for specific performance was dismissed with costs.—*FRASER v. WOOD* (1845), 8 Beav. 339; 14 L. J. Ch. 220; 4 L. T. O. S. 490; 50 E. R. 133.

759. ——— **Slight delay—Induced by fraud.]**—Specific performance; the lapse of time being trifling, & the result of fraud. The relief by delivering up a contract requires a stronger case than to resist a specific performance.—*SAVAGE v. BROCKSOPP*, *BROCKSOPP v. LUCAS* (1811), 18 Ves. 335; 34 E. R. 344, L. C.

760. ——— **Where no time fixed—Performance in reasonable time.]**—*SOUTHWELL v. NICHOLAS & ABDY* (1732), 1 Madd. 9, n.; 56 E. R. 4.

Annotation:—Consd. *Falcke v. Gray* (1859), 4 Drew. 651.

761. ——— **Agreement for compulsory purchase.]**—A railway co. contracted to purchase lands, agreeing to pay interest on the purchase-money, from the day they should commence their works on the lands till the purchase-money should be paid. The co. did not enter into possession, or commence works, for two years. Suit for immediate specific performance dismissed.—*BODINGTON v. GREAT WESTERN RY. CO.* (1849), 13 Jur. 144.

762. ——— **Delay in showing title.]**—By a contract it was agreed "that the parties should acknowledge the validity of each others' patent rights, & that the vendors will satisfy the purchasers as to their title to the patents in the schedule thereto":—*Held*: (1) each party was precluded from questioning the validity of the other's patents, & a delay of three years in showing such title was not a ground for refusing specific performance, there having been no intentional delay; (2) where the dispute was as to the validity of the contract, & not as to the title only, the practice is not to insert an inquiry as to when a good title was first shown.—*POTTER v. CROSSLEY* (1856), 28 L. T. O. S. 137; 5 W. R. 35.

763. ———.]—A delay of eleven years occurred in the completion of a contract for the sale of an estate but which was occasioned by the state of the title:—*Held*: the purchaser was not, after this delay compellable to complete; but if he did he must pay interest on the purchase-money according to the contract, his money not having in the meanwhile been lying idle.—*WILLIAMS v. GLENTON* (1865), 34 Beav. 528; 13 L. T. 10; 11 Jur. N. S. 801; 13 W. R. 1030; 55 E. R. 739; *on appeal* (1866), 1 Ch. App. 200, L. J.J.

Annotations:—Refd. *Re Riley to Streatfield* (1886), 34 Ch. D. 386; *Re Hetling & Merton's Contract*, [1893] 3 Ch. 269; *Re London Corpn. & Tubb's Contract*, [1891] 2 Ch. 521; *North v. Percival*, [1898] 2 Ch. 128; *Re Woods & Lewis' Contract*, [1898] 2 Ch. 211; *Day v. Singleton*, [1899] 2 Ch. 320; *Bennett v. Stone*, [1903] 1 Ch. 509.

PENSKALSKI (1904), 24 C. L. T. 407; 15 Man. L. R. 236.—**CAN.**

751 ii. ———.]—*HALL v. TURNBULL* (1909), 10 W. L. R. 536; 2 Sask. L. R. 89.—**CAN.**

751 iii. ———.]—*STEWART v. BORM* (1911), 19 W. L. R. 166; 4 Sask. L. R. 260.—**CAN.**

751 iv. ———.]—*STEWART v. MARSH* (Alta.) (1911), 17 W. L. R. 522.—**CAN.**

751 v. ———.]—*McGREEVY v. HODDER* (1912), 23 O. W. R. 699; 5 O. W. N. 536; 8 D. L. R. 755.—**CAN.**

751 vi. ———.]—*BENNETT v. NEWCOMBE* (B.C.) (1913), 24 W. L. R. 59; 11 D. L. R. 87.—**CAN.**

751 vii. ———.]—*Held*: wilful delay over a considerable period through the preliminary stages of an agreement to sell is good ground for a *ct.* refusing to

grant a decree for specific performance of the agreement.—*SWARATH RAM, RAM SARAN v. RAM BALLABH* (1925), 1 L. R. 47 All. 781.—**IND.**

751 viii. ———.]—*CROFTON v. ORMSBY* (1806), 2 Sch. & Lef. 581.—**IR.**

755 i. ——— **Trifling conduct of plaintiff.]**—*FULLER v. MAYNARD* (1912), 22 O. W. R. 809; 3 O. W. N. 1602; 5 D. L. R. 520.—**CAN.**

757 i. ——— **Gross laches of plaintiff.]**—Where there has been great & unexplained delay on the part of the purchaser, or his assignee, in carrying out a contract for the sale of land by payment of the purchase-money in instalments, & the vendor has given a notice of the termination of the contract, specific performance of the contract will not necessarily be decreed at the instance of the purchaser or his

assignee.—*VERMA v. DONOHUE* (1913), 26 W. L. R. 257; 5 W. W. R. 555; 14 D. L. R. 749; 18 B. C. R. 468.—**CAN.**

760 i. ——— **Where no time fixed—Performance in reasonable time.]**—Where the purchaser at the time of the contract knew that the vendor had not then title to the lands, but had contracted to buy them, & was entitled to call for a conveyance on payment of the purchase price, the vendor was held to be entitled to a reasonable time to make a good title.—*WILLIAMS v. WILSON & MORROW* (1895), 3 B. C. R. 613.—**CAN.**

n. ———.]—The purchaser under contract for the sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him

764. Unreasonable delay.]—Where a contract for the sale of shares did not fix the time for the delivery of them:—*Held*: the time for delivery could not depend upon circumstances which were unknown to the buyer, & delay in tendering the shares arising from the seller having sent his certificate to England for sub-division, as this circumstance was unknown to the buyer, was unreasonable & justified the buyer in refusing to accept the shares. Such delay was *mora*, assuming the law of *mora* to be applicable.—*DE WAAL v. ADLER* (1886), 12 App. Cas. 141; 56 L. J. C. P. 25; 3 T. L. R. 188, P. C.

765. — Delay caused by defendant.]—Specific performance of an agreement for the sale of an annuity, to commence from the date of the agreement, & to continue for three lives, to be named by the grantee, decreed where the lives had not been named, the delay having been occasioned by the grantor.—*PRITCHARD v. OVEY* (1820), 1 Jac. & W. 396; 37 E. R. 426.

Annotation:—*Refd.* *Hughes v. Morris* (1852), 21 L. J. Ch. 761.

766. — Defendant accessory to delay.]—*KING v. TURNER*, No. 680, *ante*.

767. — Application to mercantile contracts.]—It was argued . . . that equity enforced contracts though the time fixed therein for completion had passed. This was in cases of contracts such as purchases sales of land, where unless a contrary intention could be collected from the contract the ct. presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous & unreasonable (*COTTEN, L.J.*).—*REUTER v. SALA* (1879), 4 C. P. D. 239; 48 L. J. Q. B. 492; 40 L. T. 176; 27 W. R. 631; 4 Asp. M. L. C. 121, C. A.

Annotations:—*Refd.* *Lomas v. Barff, Frangopulo v. Lomas* (1901), 17 T. L. R. 137; *Jackson v. Rotax Motor & Cycle Co.*, [1910] 2 K. B. 937; *Hartley v. Hymans*, [1920] 3 K. B. 475; *Ballantine v. Cramp & Bosman* (1923), 129 L. T. 502.

768. — No injustice to parties.]—Where it [Equity] could do so without injustice to the contracting parties, it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion. . . . If since the Judicature Acts . . . it is established that equity would not under the then existing circumstances have prior to the Act greatest specific performance, . . . the section can in my opinion have no application (*LORD PARKER OF WADDINGTON*).—*STICKNEY v. KEEBLE*, [1915] A. C. 386; 84 L. J. Ch. 259; 112 L. T. 661, H. L.

Annotations:—*Consd.* *Bernard v. Williams* (1928), 139 L. T. 22. *Refd.* *Jamshed Khodiam Irani v. Burjorji Dhanjibhai* (1915), 32 T. L. R. 156; *Re Bayley & Shoo-smith's Contract* (1918), 87 L. J. Ch. 626.

769. — Effect of Judicature Acts.] —*STICKNEY v. KEEBLE*, No. 768, *ante*.

— **Delay in exercising option for renewal of lease.]—***See LANDLORD & TENANT*, Vol. XXXI., pp. 69, 72–78, Nos. 2167, 2195–2230.

— **Agreements for leases.]—***See LANDLORD & TENANT*, Vol. XXX., pp. 409–411, Nos. 718–731.

& always ready to carry out the contract on his part within a reasonable time, even though time was not of its essence, nor when he has declared his inability to perform his share of the contract.—*WALLACE & KEARNEY v. HESSELEIN (N.S.)* (1898), 29 S. C. R. 171.—*CAN.*

o. — — — — — *FREDERIKSEN v. STANTON & RICHARDS* (1913), 24 W. L. R. 891; 4 W. W. R. 1224; 12 D. L. R. 565; 6 Sask. L. R. 105.—*CAN.*

p. — — — *Delay in exercising option.]*

—*CUNNINGHAM v. STOCKHAM* (1910), 13 W. L. R. 312; 15 B. C. R. 141.—*CAN.*

q. — — — *Unavoidable delay.]—**GRAY v. REESOR* (1869), 16 Gr. 611.—*CAN.*

r. — — — *Dishonest delay.]—*Where the purchaser in a contract for the sale of land, under which the purchase price is payable by instalments, willfully neglects to pay the instalments as they become due, & holds off with the intention of paying if the market for land appears promising, & of abandoning the contract if the market

Option to purchase under will.]—*See WILLS.*
Delay in bringing action.]—*See Sect. 16, post.*

SUB-SECT. 2.—WHEN TIME THE ESSENCE OF THE CONTRACT.

770. Whether specific performance refused—Failure to make title by agreed date.]—*KIEN v. STUKELEY* (1722), 1 Bro. Parl. Cas. 191; 1 E. R. 506; *sub nom.* *KEEN v. STUCKLEY*, 2 Eq. Cas. Abr. 19; *Gilb. Ch.* 155, H. L.

Annotation:—*Refd.* *Falcke v. Gray* (1859), 4 Drew. 651.

771. — Failure to produce deeds or tender conveyance.]—Though the vendor of an estate does not produce his deeds, or tender a conveyance within the time limited by the articles, the ct. does not regard this neglect, but will decree a sale notwithstanding.—*GIBSON v. PATTERSON* (1737), 1 Atk. 12; *West temp. Hard.* 235; 26 E. R. 8, L. C.

Annotations:—*Expld.* *Lloyd v. Collett* (1793), 4 Ves. 689, n. *Dbtd.* *Fordyce v. Ford* (1794), 4 Bro. C. C. 491; *Harrington v. Wheeler* (1799), 4 Ves. 686; *Alley v. Deschamps* (1806), 13 Ves. 225.

772. — Failure to deliver abstract of title.]—When a contract for sale is entered into by which it is stipulated that the abstract is to be delivered on a particular day, & it is not delivered within a reasonable time after that day, the purchaser is at liberty to repudiate the contract.

The conditions of sale under which a purchase was made provided that the abstracts should be delivered within twenty-one days from the day of sale. When seventy-eight days had expired without any abstract having been delivered, the purchaser gave notice to the vendor that he declined to complete. After one hundred & eighteen days had elapsed, abstracts of the title to some of the lots were delivered to the purchaser, & the abstract of the remaining lot was delivered a fortnight later, but were returned by the purchaser on the same days on which they were delivered. On a bill to enforce specific performance of the contract:—*Held*: as the vendor had failed to deliver the abstracts within a reasonable time after the day named, he could not enforce the contract against the purchaser, & the bill must be dismissed with costs.—*VENN v. CATTELL* (1872), 27 L. T. 469.

773. — Unreadiness of purchaser to complete.]—In an agreement by a tenant at will of a public-house for the sale of the possession, trade, & goodwill of the house at a fixed sum, & of the stock & furniture at a valuation, one of the terms being that possession should be taken, & the money paid on a given day, time is of the essence of the contract; & a purchaser, who was not in a condition to fulfil his part of the contract on that day, cannot compel a specific performance, though he was ready on the following day to have proceeded to complete the purchase.—*COSLAKE v. TILL* (1826), 1 Russ. 376; 38 E. R. 146.

Annotations:—*Consd.* *Walker v. Jeffreys* (1842), 1 Hare, 341. *Appld.* *Macbryde v. Weekes* (1856), 22 Beav. 533. *Refd.* *Gray v. Smith* (1889), 43 Ch. D. 208.

price of land should fall, the ct. will not decree specific performance, though it may relieve against the forfeiture of that part of the purchase price already paid.—*VERMA v. DONOHUE* (1913), 18 B. C. R. 468.—*CAN.*

PART III. SECT. 11, SUB-SECT. 2.

770 i. Whether specific performance refused—Failure to make title by agreed date.]—*DAVIS v. DOUGALL* (1889), 15 V. L. R. 424.—*AUS.*

770 ii. — — — — —.]—*DYAS v. ROONEY* (1890), 27 L. R. Ir. 4.—*IR.*

Sect. 11.—Delay in performance of contract: Subsect. 2.]

774. — Delay in payment of purchase-money—Under right of pre-emption in will.]—A person having under a will a right of pre-emption of an estate for a given sum, provided he signified to the trustees within one month of testator's death his option to purchase, & paid the purchase-money within a further period of two months, duly signified his option to the trustees, & applied to their solicitor for an abstract of title. The solr. acknowledged this application, & promised to take an early opportunity of seeing his clients thereon. But no abstract was furnished; & hearing nothing further, the donee of the right of pre-emption allowed the two months to expire without paying his purchase-money, or taking any further step in the matter:—*Held*: under the circumstances & according to the true construction of the will, the trustees were not under any obligation to furnish an abstract; & the purchase-money not having been paid within the two months, the right of pre-emption was lost, the rule being that such a right must be strictly complied with.—*BROOKE v. GARROD* (1857), 2 De G. & J. 62; 27 L. J. Ch. 226; 30 L. T. O. S. 194; 6 W. R. 121; 41 E. R. 911, L. C.

Annotation:—Distd. Ward v. Wolverhampton Waterworks Co. (1871), L. R. 13 Eq. 243.

775. — — — Under option to purchase in lease.]—Articles of agreement for a lease contained a proviso that if, at any time within a certain period, the lessees should desire to purchase the fee simple, & should give three months' notice of such their desire, & should, "at the expiration of such notice, pay unto him, the lessor, the sum of £210 in respect of each plot, etc., then the lessor shall & will convey the freehold" to the lessee. Notice to purchase was given in due course; but the three months after the notice having been allowed to elapse without the money being paid the lessor refused to carry out the agreement for sale. Upon bill by lessee for specific performance:—*Held*: "at the expiration" meant the precise day on which the notice expired; until the condition of paying the money was performed, the relation of vendor & purchaser did not arise; time was of the essence of the contract; & the money not being paid at the fixed time the lessee had lost his right to purchase; and the ct. refused specific performance, & dismissed the bill with costs.—*RANELAGH (LORD) v. MELTON* (1864), 2 Drew. & Sm. 278; 5 New Rep. 101; 34 L. J. Ch. 227; 11 L. T. 409; 28 J. P. 820; 10 Jur. N. S. 1141; 13 W. R. 150; 62 E. R. 627.

Annotation:—Mentd. Re Adams & Kensington Vestry (1884), 27 Ch. D. 394.

776. — — — Effect of extending time.]—Where time is of the essence of the contract, the mere extension of time is only a waiver to the extent of substituting the extended time for the original time, & not an utter destruction of the essential character of the time.

By an agreement dated Jan. 1, 1873, the Clothworkers' co. agreed to grant a lease of a piece of land to M. & W. for eighty years from Dec. 25, 1872, M. & W. covenanting to erect a house of a

specified value thereon within one year from Dec. 25, 1872; & in case of default in completing the buildings for two months from the expiration of the year the Clothworkers' co. were entitled to put an end to the agreement & take possession of the premises. By an agreement dated July 15, 1873, M. & W. agreed to sell their interest under the agreement of Jan. 1, 1873, to plffs. for £2,000; of which sum £1,000 was paid on the execution of the agreement, & the remaining £1,000 was to be paid on July 31, 1873, or at such deferred date as the parties might agree upon, & it was provided that plffs. should accept the title of M. & W., & that they should not require a formal assignment of the agreement, & that the purchasers should take upon themselves every liability under which M. & W. were; & the agreement provided that if plffs. should fail to pay the £1,000 on July 31, or at such deferred date as the parties might agree upon, all money paid previously to such default should be absolutely forfeited, & the agreement should become null and void. The £1,000 was not paid on July 31, nor was any deferred time for payment agreed on. On Aug. 16, 1873, at which time plffs. were in possession of the ground, but had not commenced building, M. & W. gave plffs. notice that unless the works were commenced on the following Monday, the £1,000 must be paid within one week from the following Tuesday which would be Aug. 26. The works were not commenced, nor was the £1,000 paid; & on Oct. 2, M. & W. gave plffs. notice that in consequence of default having been made in the payment of the £1,000, the agreement had become void; & that they would proceed to deal with the property as if the agreement had not been entered into. On the same day plffs. gave M. & W. a counter notice requiring them to perform the agreement, but without offering to pay the £1,000. On Oct. 17, the Clothworkers' co. sent M. & W. a notice, requiring them to proceed with the buildings, & on Oct. 20, M. & W. assigned the benefit of the agreement to B., who, on Dec. 26, took possession of the ground, & commenced building.

On Jan. 8, 1874, plffs. filed a bill offering to pay the £1,000, & interest, & praying for specific performance of the agreement of July 15, 1873, & that B. might be restrained from continuing in possession of the ground, & M. & W. from assigning their interest under the agreement with the Clothworkers' co., except to plffs.:—*Held*: (1) time was of the essence of the contract, & the notice of Aug. 16, was only a qualified & conditional waiver, the terms of which were not complied with, & the waiver did not take effect; (2) plffs. had not used that diligence which was incumbent upon them to use, to obtain the aid of a ct. of equity.—*BARCLAY v. MESSENGER* (1874), 43 L. J. Ch. 449; 30 L. T. 351; 22 W. R. 522.

Annotation:—Refd. Bernard v. Williams (1928), 139 L. T. 22.

777. — — — Sale of land.]—On a sale of real estate the purchaser paid £500, which was stated in the contract to be paid "as a deposit, & in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, & that if the purchaser

775 i. — Delay in payment of purchase-money—Under option to purchase in lease.]—*MOIR v. PALMATIER* (1900), 13 Man. L. R. 34.—CAN.

776 i. — — — Effect of extending time.]—Where time is of the essence, but there has been no waiver by an extension of time to a fixed date, the purchaser will be entitled to specific

performance if he is ready & willing to complete on the extended date, & a notice of rescission based upon the earlier default given before the extended date has passed is inoperative.—*WILSON v. MCGEE*, [1925] N. Z. L. R. 241.—N.Z.

t. — Extension of time with penalty.]—*EMPIRE LOAN &*

SAVINGS CO. v. MCRAE (1903), 23 C. L. T. 229; 5 O. L. R. 710; 2 O. W. R. 325, 405.—CAN.

a. — — — — —.]—*MOODIE v. YOUNG* (1908), 8 W. L. R. 310; 1 Alta. L. R. 337.—CAN.

777 i. — — — Sale of land.]—Where a purchaser of land, who has agreed that time shall be of the essence

should fail to comply with the agreement the vendor should be at liberty to resell & to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, &, after repeated delays, the vendor resold the property for the same price. The original purchaser having brought an action for specific performance:—*Held*: the purchaser had lost by his delay his right to enforce specific performance.—*HOWE v. SMITH* (1884), 27 Ch. D. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 48 J. P. 773; 32 W. R. 802, C. A.

Annotations:—**Consd.** *Levy v. Stogdon*, [1898] 1 Ch. 478; *Stickney v. Keeble*, [1915] A. C. 386. **Refd.** *Cornwall v. Henson*, [1900] 2 Ch. 298; *Hall v. Burnell*, [1911] 2 Ch. 551; *Mayson v. Clouet*, [1924] A. C. 980; *Akt. Reider v. Arcos*, [1927] 1 K. B. 352. **Mentd.** *Soper v. Arnold* (1887), 37 Ch. D. 96; *Bishop v. Taylor & Harris* (1891), 60 L. J. Q. B. 556; *Barton v. Capewell Continental Patents Co.* (1893), 37 Sol. Jo. 442; *Jackson v. De Kadich* (1904), 48 Sol. Jo. 687; *Sprague v. Booth*, [1909] A. C. 576; *Harrison v. Holland & Hannen & Cubitts*, [1921] 3 K. B. 297; *Monnickendam v. Leanse* (1923), 39 T. L. R. 415; *Chillingworth v. Esche*, [1924] 1 Ch. 97; *Cohen v. Sellar*, [1926] 1 K. B. 536; *Farr, Smith v. Messers*, [1928] 1 K. B. 397.

778. ————.]—By an agreement in writing dated Dec. 9, 1909, land in the province of Saskatchewan was sold for 16,000 dollars, of which 1,000 dollars were paid on signing the agreement, & the balance was payable by six annual instalments on Dec. 1, of each year. The agreement provided that, if the purchaser should make default in any of the payments, the vendor should be at liberty to cancel the agreement & to retain, as liquidated damages, the payments already made, & that time was to be considered as of the essence of the agreement. Default having been made in the payment of the first instalment, the vendor cancelled the agreement, assignees of the purchaser sued for specific performance:—*Held*: the parties having made time of the essence of the agreement, specific performance could not be decreed, but that the forfeiture of the money paid was a penalty from which relief should be granted on proper terms. *STIEDMAN v. DRINKIE*, [1916 1 A. C. 275; 85 L. J. P. C. 79; 114 L. T. 248 32 T. L. R. 231, P. C.]

Annotation - **Alpd.** *Brickles v. Snell*, [1916] 2 A. C. 599.

779. ----- The purchaser under an agreement for the sale of land in Ontario, which made time of the essence, was in default at the date fixed for completion, & the vendor thereupon cancelled the agreement. At that date there was a small mtge. upon the land. The mtgee. had consented & was willing to accept repayment upon the completion taking place; the purchaser had been informed that the mtge.

of the contract, fails to pay the purchase-money on the appointed day, equity will not in the absence of waiver by the vendor decree specific performance of the contract & will treat the deposit as forfeited if the contract so provides.—*CRABB v. GLEESON*, [1920] V. L. R. 189.—AUS.

777 H. ———— J— STEWART
v. FREEMAN, 22 C. L. T. 211 —CAN.

777 Ill. ————.] - STRINGER
v. OLIVER (1907), 7 Tort. L. R. 126; 6
W. L. R. 519.—CAN.

777 iv. — — — — —.]—Notwithstanding that pltf., purchaser, had made default in payment of instalments of purchase-money due under a contract for the sale & purchase of land, & notwithstanding that by the terms of the contract time was of the essence, & deft., vendor, had given pltf. notice of cancellation pursuant to a provision of the contract, pltf. was relieved from the consequences of his

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would be paid off upon the completion & had raised no objection:—*Held*: the vendor was able & willing to convey at the date fixed for completion, & the purchaser being in default was not entitled to specific performance.—**BRICKLES v. SNELL**, [1916] 2 A. C. 599; 86 L. J. P. C. 22; 115 L. T. 568, P. C.

Annotation.—**Reid. Re** Hailes & Hutchinson's Contract,
[1920] 1 Ch. 233.

780. — Difficulties improperly raised by plaintiff—Agreement for sale of timber.—In a contract for the purchase of timber, time is of the essence of the contract; & if, by difficulties improperly raised by the vendor, the timber is prevented from being felled & carried away at the time limited by the agreement, the ct. will not afterwards enforce the performance of the contract.—**ARKWRIGHT v. STOVELD** (1824), Coop. Pr. Cas. 499; 3 L. J. O. S. Ch. 49; 47 E. R. 618.

781. — **Unpunctual payment of interest.**—
A contract of which time is the essence, & a chief
term in which is the punctual payment of interest.
Interest in arrear two or three days; upon a bill
filed for benefit of that agreement, relief refused.
—**HICKS v. GARDNER** (1837), 1 Jur. 541.

Annotation :—**Consd.** Leeds & Hanley Theatre of Varieties v. Broadbent, [1898] 1 Ch. 343.

782. — Failure to notify defendants of works required.—Under agreement for compulsory purchase.]—DARNLEY (EARL) v. LONDON, CHATHAM & DOVER RY. CO. No. 736, *ante*.

783. — Offer not accepted within time stipulated.—At a sale by auction D. became the purchaser for £6,000 of certain real estate. Before the sale took place the auctioneer had received a letter from S., stating that he had been prevented from attending the sale, & asking if any of the lots remained unsold. After the sale was concluded the auctioneer informed D. that a client of his was inquiring about the property, & D. then said that he was willing to resell same for £6,600, of which £100 should be paid to the auctioneer as commission, provided the offer was accepted within a specified time. The offer was communicated by the auctioneer by letter to S., who wrote a reply to the auctioneer accepting it. S. brought an action against D. for the specific performance of the agreement. The evidence was conflicting as to the time within which D.'s offer was to be accepted, & his contention was that it was not accepted in time:—*Held*: the action must be dismissed on the ground that the offer had not been accepted within the time limited by D.—**SAUNDERS v. DENCE** (1885), 52 L. T. 614; 29 Sol. Jo. 356.

Annotation.—**Refd.** *Rosenbaum v. Belson*, [1900] 2 Ch. 267.

784. — Time made essence of contract by

default, & specific performance was adjudged in his favour, the evidence affording no reason for concluding that an injustice would be done to deft. thereby.—**CHADWICK v. STUCKEY** (Alta.) (1912), 22 W. L. R. 787; 3 W. W. R. 549; 8 D. L. R. 357.—**CAN.**

777 v. — — — — —.]—FREEHOLD
INVESTMENT CO., LTD. v. WESTLAND
(Man.), [1918] 3 W. W. R. 312.—CAN.

777 vi. ————,]--BEAUMONT
v. HARRIS (1920), 59 D. L. R. 628; 28
B. C. R. 144.—CAN.

b. ——— Failure of vendor to give notice of forfeiture within terms of agreement.]—Specific performance of a contract for the sale of land was decreed at the suit of the purchaser, although time was of the essence, & default had, by inadvertence, been made in the payment of the second instalment of the purchase-money, notice of forfeiture not having been given in accordance with the agreement.—**MILLS v.**

MARRIOTT (1912), 20 W. L. R. 917; 1
W. W. R. 150; 17 B. C. R. 171; 2
D. L. R. 268.—CAN.

783 i. — Offer not accepted within time stipulated.]—CROSSFIELD v. GOULD (1883), 9 A. R. 218.—CAN.

7841. — *Time made essence of contract by notice.*—**WILLIAMS v. BLACK** (1915), 31 W. L. R. 844; 23 D. L. R. 287.—**CAN.**

281.—SAIN.
c. — [Excuse for delay.]—Where the agreement was that deft. should advance money on the purchase of the land, & that pltf. should have the right to repurchase the same by a certain day, upon payment of the amount so advanced, & interest, together with what was paid by deft. for improvements & insurance, & it was expressly stipulated that time should be of the essence of the contract.—*Held*: although the ct. as a general rule, will hold a party to perform such a contract within the time limited, yet it may &

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Sect. 11.—Delay in performance of contract: Sub-sects. 2, 3, 4 & 5. Sect. 12.]

notice.]—STEWART v. SMITH (1824), 6 Hare, 222, n.; 67 E. R. 1148.

Annotations:—Consd. Walker v. Jeffreys (1842), 1 Hare, 341. Apld. Southcombe v. Exeter (Bp.) (1847), 6 Hare, 213.

785. ———.]—Equity will not assist where there has been undue delay on the part of one party to the contract & the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or when other circumstances will render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties before the signing of the contract. But in such a case the intention must appear from what has passed before the contract, & its construction cannot be affected in the contemplation of equity by what takes place after it has once been entered into (LORD HALDANE). — JAMSHED KHODARAM IRANI v. BURJORJI DHUNJIBHAI (1915), 32 T. L. R. 156, P. C.

786. Whether time essence of contract—Question of fact for court.]—On a bill for specific performance, the questions, whether time was originally of the essence of the contract, & whether, being so, deft. has done any act whereby he has waived it as a ground of objection to the performance, are questions depending on evidence, & not to be decided except upon the hearing. — LEVY v. LINDO (1817), 3 Mer. 81; 36 E. R. 32, L. C.

Annotation:—Distd. Wells v. Maxwell (No. 1) (1863), 32 Beav. 408.

—— **Contracts for sale of land.]—**See SALE OF LAND, Vol. XL., pp. 86–89, 110–116, 250, 251, Nos. 664–688, 881–927, 2180–2182.

—— **Options to purchase in leases.]—**See LANDLORD & TENANT, Vol. XXX., pp. 475, 476, Nos. 1376–1378.

——.]—See, generally, CONTRACT, Vol. XII., pp. 310–317, Nos. 2557–2621.

SUB-SECT. 3.—WHEN TIME NOT THE ESSENCE OF THE CONTRACT.

787. Specific performance decreed.]—A. articles to buy land, & pays part of the purchase-money; afterwards he enters into several orders of ct. to pay the residue by such a day, & in default thereof to give up the articles, & lose what he had before paid; ct. will relieve, though these orders have not been complied with.

Lapse of time in payment may be recompensed with interest & costs. . . . Let pltf. be relieved upon payment of principal, interest & costs (LORD MACCLESFIELD, C.). — VERNON v. STEPHENS (1722), 2 P. Wms. 66; 24 E. R. 642, L. C.

will admit him to show a good & valid reason for non-performance within such time, & in that case may order specific performance. — MCSWENEY v. KAY (1868), 15 Gr. 432. — CAN.

d. — All possible acts of performance by party in default.]—In an action for specific performance, even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the ct. may, in the exercise of its discretion, grant the relief claimed. — CUDNEY v. GIVES (1890), 20 O. R. 500. — CAN.

e. — Short delay.]—BUSH v. HIGGS (1892), 11 N. Z. L. R. 614. — N.Z.

786 i. Whether time of essence of contract—Question of fact for court.]—Held: equity which governs the rights of the parties in cases of specific performance of contracts to sell real estates looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really & in substance intended more than that it should take place within a reasonable time. —

788. ———.]—Specific performance decreed: the abstract, though delivered very late, & under a notice, that the vendee would insist on his deposit, with interest, if the title should not be made out, & possession delivered, by the time of payment, having been received & kept without objection: & the vendee upon the construction & the circumstances not being entitled to insist on the time, as the essence of the contract. — SETON v. SLADE, HUNTER v. SETON (1802), 7 Ves. 265; 32 E. R. 108, L. C.

Annotations:—Consd. Hall v. Smith (1808), 14 Ves. 426. Apld. Hipwell v. Knight (1835), 1 Y. & C. Ex. 401. Consd. Parkin v. Thorold (1851), 2 Sim. N. S. 1. Reid. Halsey v. Grant (1806), 13 Ves. 73; Hicks v. Gardner (1837), 1 Jur. 541; Roberts v. Berry (1853), 3 De G. M. & G. 284; Leeds & Hanley Theatre of Varieties v. Broadbent, [1898] 1 Ch. 343. Mentd. Jenkins v. Reynolds (1821), 6 Moore, C. P. 86; Laythorpe v. Bryant (1836), 2 Bing. N. C. 735; Stains v. Banks (1863), 9 Jur. N. S. 1049.

789. Whether time made essential by notice.]—Lapse of time, if not an essential object of the contract, is no objection to a specific performance. Injunction upon that, combined with other circumstances.

Though the party has not a title in law, as he has not complied with the terms, so as to entitle him to an action as to the time, for instance, yet if the time, though introduced as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other, is not the essence of the contract, a material object, to which they looked, & the first conception of it, even though the lapse of time has not arisen from accident, a ct. of equity will compel the execution of the contract (LORD ERSKINE, C.). — HEARNE v. TENANT (1807), 13 Ves. 287; 33 E. R. 301, L. C.

790. ———.]—Pltf. agreed to take a house of deft. for two years. Afterwards, on Sept. 4, 1817, he agreed to buy the estate of the vendor, in consideration of £25 paid down, & of the further sum of £425 to be paid on Dec. 25, 1817, on or before which time the conveyance was to be executed. An abstract was delivered on Oct. 20, 1817, & afterwards a draft of the conveyance, with the abstract, was sent to pltf., with a note of deft.'s solr., stating that the deeds were with him, & desiring to hear from pltf. if any objections occurred; & many ineffectual applications were made to see pltf. A notice was served on pltf. on Dec. 22, 1817, that deft. would, on the 23rd, 24th & 26th, attend at pltf.'s house to execute the conveyance, & on default, he should consider pltf. as refusing to proceed in the purchase, & act accordingly. On Apr. 2, 1818, pltf. returned the abstract, with objections to the title. On the 13th deft. distrained on pltf. for rent. On a bill filed by the vendee for a specific performance: — *Held*: the vendor should have given notice that he considered the agreement as at an end, & should have returned the £25; & not having done so, the ct. directed the usual reference as to the title.

It has not been decided that where there is no special stipulation in the contract time may be

SADIQ HUSSAIN v. ANUP SINGH (1923), I. L. R. 4 Lah. 327. — IND.

1. — Presumption against for purposes of specific performance.]—JAMSHED KHODARAM IRANI v. BURJORJI DHUNJIBHAI (1915), 32 T. L. R. 156, P. C. — IND.

PART III. SECT. 11, SUB-SECT. 3.

787 i. Specific performance decreed.]—BLAAUW v. WATKINS (1914), 13 N. Z. L. R. 1375. — N.Z.

787 ii. —.]—JESSOP v. KING (1812), 1 Ball. & B. 81. — IR.

made essential by subsequent notice that it will be so considered (LEACH, V.-C.).—REYNOLDS v. NELSON (1821), 6 Madd. 18; 56 E. R. 995; *subsequent proceedings*, 6 Madd. 290.

Annotation :—*Consd.* Walker v. Jeffreys (1842), 1 Hare, 341.

791. —.]—WELLS v. MAXWELL (No. 1), No. 725, *ante*.

SUB-SECT. 4.—DELAY AMOUNTING TO ABANDONMENT.

792. Specific performance refused — Contract lain dormant for many years.—Where a contract has lain dormant for many years, & nothing done by either party in pursuance of it, a ct. of equity ought not to decree a specific performance.—WINGFIELD v. WHALEY (1722), 1 Bro. Parl. Cas. 200; 1 E. R. 513, H. L.

Annotation :—*Mentd.* Lloyd v. Johns (1804), 11 Ves. 37.

793. — Failure to deliver abstract of title.]—LLOYD v. COLLETT (1793), 4 Bro. C. C. 469; 4 Ves. 689, n.; 29 E. R. 992, L. C.

Annotations :—*Consd.* Fordyce v. Ford (1794), 4 Bro. C. C. 491.

Apld. Omerod v. Hardman (1801), 5 Ves. 722.

Distd. Seton v. Slade, Hunter v. Seton (1802), 7 Ves. 265.

Consd. Walker v. Jeffreys (1842), 1 Hare, 341; Firth v.

Greenwood (1855), 1 Jur. N. S. 866. *Apld.* Venn v.

Cattell (1872), 27 L. T. 469. *Consd.* Stiekney v. Keoble,

[1915] A. C. 386. *Refd.* Alley v. Deschamps (1806), 13

Ves. 225.

794. — Agreement not performed in lifetime of party.]—A father, tenant for life, & a son, tenant in tail, in 1831, joined in mortgaging the estate, to secure payment of a debt of the son, under an agreement between them to suffer a recovery, & resettle the estate, as to the remainder after the death of the tenant for life, in case the father should at any time be obliged to pay any part of the interest of the mtge. debt, or the son should not pay off that debt by a certain day, & the father should then pay it off & release the son therefrom, to the use of the father in fee; the father covenanting to convey or devise a seventh part of the estate to the son; &, in case the son should pay off the mtge. by the time mentioned, then to the son & the heirs of his body, charged with £500 for such persons as the father should by deed or will appoint. The son did not pay off the mtge. debt, nor did the father pay it off, or release the son therefrom, but the father paid the interest until his death in 1841, & after his death his devisees paid off the mtge. :—*Held* : neither party having performed the agreement, or apparently acted upon it, in the lifetime of the father, the ct. would not, after the death of the father, enforce the specific performance of the agreement; nor would the ct., in such a case, enforce specific performance of an agreement, which, apparently, was an agreement for the sale of the son's reversionary interest in the estate at an undervalue.

Where there is an obscurity in the terms of an agreement, & laches have been committed on both sides in performance of the conditions contained in it, the ct. will not decree a specific performance.

—PLAYFORD v. PLAYFORD (1845), 4 Hare, 546; 5 L. T. O. S. 89; 67 E. R. 764.

795. —.]—B. agreed to sell her estate, & raise £1,000 for A.'s use, & pay off two mtges. on his estate. In consideration of which, A. agreed to pay B. interest for life, & to settle his own estate on his wife, B.'s daughter, & their children. The £1,000 was raised on a mtge. of B.'s estate, & the joint & several covenant of A. & B. Seventeen years elapsed without any further steps being taken to carry the agreement into effect, & A. died :—*Held* : the agreement must be considered abandoned, & it could not be enforced.—CUBITT v. BLAKE (1854), 19 Beav. 454; 2 W. R. 604; 52 E. R. 426; *subsequent proceedings*, 2 W. R. 640.

796. — No step taken after notice of abandonment.]—A contract for the purchase of an estate was to be completed on Sept. 28. Notice was given on Nov. 24 following, by the purchaser, of his abandonment of the contract. No effectual step to complete was taken by the vendor till some months after that time; & the purchase-money, being trust property, was, in the meantime, invested in the purchase of another estate. A bill, filed by the vendor against the purchaser, for specific performance, was dismissed, with costs, but without prejudice to the plaintiff's right to bring his action if he should be so advised.—BENSON v. LAMB (1846), 9 Beav. 502; 15 L. J. Ch. 218; 7 L. T. O. S. 385; 50 E. R. 438.

Annotations :—*Distd.* Wells v. Maxwell (No. 1) (1863), 32 Beav. 408. *Refd.* Bernard v. Williams (1928), 139 L. T. 22.

SUB-SECT. 5.—WAIVER OF DELAY.

See, generally, CONTRACT, Vol. XII., pp. 316, 317, Nos. 2612–2621.

Contracts for sale of land.—*See* SALE OF LAND, Vol. XL., pp. 82, 83, 89, 114–116, Nos. 639–642, 689–694, 919–927.

Agreement for lease.—*See* LANDLORD & TENANT, Vol. XXX., p. 411, Nos. 729–731.

SECT. 12.—REPUDIATION BY PLAINTIFF.

See, generally, CONTRACT, Vol. XII., pp. 338–341, Nos. 2830–2874; SALE OF LAND, Vol. XL., pp. 213–258, Nos. 2124–2241.

797. General rule — Specific performance refused.—Where pltf. sought the specific performance of an agreement, & deft. set up by his answer a different agreement, the terms of which pltf. had always repudiated, it was held that pltf. was not entitled, upon the hearing, to have the agreement set up by deft. specifically performed.—JEFFREY v. STEPHENS (1860), 2 L. T. 716; 6 Jur. N. S. 947; 8 W. R. 427.

Annotation :—*Distd.* Smith v. Wheatcroft (1878), 9 Ch. D. 223.

Agreement for lease—Threat to abandon on delay in performance.—*See* LANDLORD & TENANT, Vol. XXX., p. 405, No. 681.

PART III. SECT. 11, SUB-SECT. 4.

g. Specific performance refused.—BATELL v. HUDSON'S BAY CO. (1908), 8 W. L. R. 760; 1 Sask. L. R. 169.—CAN.

h. —.]—SMEATON v. LYNN (1911), 18 W. L. R. 409; 4 Sask. L. R. 187.—CAN.

k. — Tender of balance of purchase-money after four years.]—HANDEL v. O'KELLY (1912), 22 W. L. R. 407; 22 Man. L. R. 562; 3 W. W. R. 367; 8 D. L. R. 44.—CAN.

l. Delay must amount to abandonment.—Laches to bar pltf.'s right must amount to waiver, abandonment, or acquiescence & to raise the presumption of any of these, the evidence of conduct must be plain & unambiguous.—PEER MAHOMED v. MAHOMED EBRAHIM (1905), 1 L. R. 29 Bom. 234.—IND.

PART III. SECT. 12.

797i. General rule—Specific performance refused.—CUSHING v. KNIGHT (1912), 22 W. L. R. 220; 46 S. C. R. 555; 6 D. L. R. 820.—CAN.

797ii. —.]—WINNIFRITH v. FINKLEMAN (1914), 26 O. W. R. 667; 6 O. W. N. 432; 32 O. L. R. 318; 7 O. W. N. 357.—CAN.

m. Abandonment by vendee—Subsequent sale by vendor—Assignment of agreement by original vendee—Whether assignee entitled to specific performance.—VAN WAGNER v. TERRYBERRY (1855), 5 Gr. 324.—CAN.

n. Proposal for abandonment—Whether bar to specific performance.—MCDONALD v. JARVIS (1856), 5 Gr. 568.—CAN.

SECT. 13.—ACTS BY PLAINTIFF INCONSISTENT WITH CONTRACT.

SUB-SECT. 1.—IN GENERAL.

798. Acts gross & wilful.]—The whole question is, as to whether or not there had been a non-performance of the covenant so gross as to prevent the lessee from coming to the ct. for specific performance of the covenant to renew . . . the breach must be gross to prevent the lessee from coming to this ct. ; & I very much doubt whether the renewal would be refused unless the breach were not only gross but wilful (TURNER, L.J.).—HARE v. BURGESS (1857), 5 W. R. 585, L. C. & L. J.J.

Annotations :—**Apld.** Parker v. Taswell (1858), 2 De G. & J. 559. **Refd.** Finch v. Underwood (1876), 3 Ch. D. 310.

799. —.]—PARKER v. TASWELL, No. 283, *ante*.

800. — Not acts of trifling character.]—Small instances of bad faith in pltf., where deft. has an adequate remedy for such breaches of faith in his own hands, will not induce the ct. to dismiss a bill where the result would be to leave pltf. without any adequate remedy ; but the ct. will mark its sense of pltf.'s misconduct by disallowing all costs.—HOLMES v. EASTERN COUNTIES RY. CO. (1857), 3 K. & J. 675 ; 29 L. T. O. S. 311 ; 3 Jur. N. S. 737 ; 5 W. R. 870 ; 69 E. R. 1280.

Annotations :—**Refd.** Greenhill v. Isle of Wight (Newport Junction) Ry. (1871), 23 L. T. 885. **Mentd.** Catt v. Tourle (1869), 4 Ch. App. 654 ; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

801. — Deed of separation.]—A husband is not debarred from enforcing a deed of separation & from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part.—BESANT v. WOOD (1879), 12 Ch. D. 605 ; 40 L. T. 445 ; 23 Sol. Jo. 443.

Annotations :—**Consd.** Kunski v. Kunski (1898), 68 L. J. P. 18 ; Kennedy v. Kennedy, [1907] P. 49. **Refd.** Hart v. Hart (1881), 18 Ch. D. 670 ; Gandy v. Gandy (1882), 7 P. D. 168 ; Rose v. Rose (1883), 8 P. D. 98 ; Russell v. Russell, [1895] P. 315. **Mentd.** Cahill v. Cahill (1883), 8 App. Cas. 420 ; Clark v. Clark (1885), 10 P. D. 188 ; Aldridge v. Aldridge (1888), 13 P. D. 210 ; McGregor v. McGregor (1888), 21 Q. B. D. 424 ; Wennhak v. Morgan (1888), 57 L. J. Q. B. 241 ; Gooch v. Gooch, [1893] P. 99 ; Sweet v. Sweet, [1895] 1 Q. B. 12 ; Bishop v. Bishop, Judkins v. Judkins, [1897] P. 138 ; Re Weston, Davies v. Tagart, [1900] 2 Ch. 164 ; Horwood v. Millars Timber & Trading Co., [1916] 2 K. B. 44 ; Eccl. Comrs. for England v. Inland Revenue, [1918] 2 K. B. 602 ; Hyman v. Hyman, Hughes v. Hughes (1928), 139 L. T. 416.

802. — Nuisance.]—Specific performance of an agreement to grant a building lease, decreed generally, although pltf. had built a brewhouse upon part of the land comprised in the agreement, & thereby injured the adjoining property of the lessor.

There is no covenant in the agreement to restrain the building of a brewhouse. A brewhouse is not necessarily a nuisance, & if it be so used as to become a nuisance, the law is open to deft. (LEACH, V.-C.).—GORTON v. SMART (1822), 1 Sim. & St. 66 ; 57 E. R. 26 ; *sub nom.* GORDON v. SMART, 1 L. J. O. S. Ch. 36.

803. Acquiescence or waiver by defendant.]—MUNDY v. JOLLIFFE, No. 297, *ante*.

804. —.]—The general rule in equity I take to be, that a party who asks the ct. to enforce an agreement in his favour must aver & prove that he has performed, or been ready & willing to perform, the agreement on his part. Where, however, the strict application of that general

rule would work injustice, the ct. will relax it. A breach of an agreement may have been committed, for which a jury would only give a nominal damage. A breach may have been committed, which a jury would consider as waived ; & if the party committing those breaches has substantially performed other parts of the agreement, whereby, at his expense, the other contracting party has derived benefits under the agreement, a ct. of equity might fail in doing justice, if it refused to decree a specific performance (WIGRAM, V.-C.).—WALKER v. JEFFREYS (1842), 1 Hare, 341 ; 11 L. J. Ch. 209 ; 6 Jur. 336 ; 66 E. R. 1064.

Annotations :—**Apld.** Southcomb v. Exeter (Bp.) (1817), 4 Hare, 213. **Consd.** Parkin v. Thorold (1852), 16 Beav. 59. **Refd.** Macbryde v. Weekes (1856), 22 Beav. 533 ; Bastin v. Bidwell (1881), 41 L. T. 742. **Mentd.** Kimber v. Ensworth (1842), 1 Hare, 293 ; Watson v. Charlesworth, [1905] 1 K. B. 71.

SUB-SECT. 2.—PARTICULAR INSTANCES.

805. Agreement for sale of land—Defendant purchaser let into possession—Subsequent ejectment by plaintiff vendor.]—KNATCHBULL v. GRUEBER, No. 1381, *post*.

806. — Subsidiary agreement to let part of property to defendant vendor.]—A subsidiary contract, by which deft., the vendor, became the occupant of part of the estate sold, at a fair annual rent, affords no impediment to a specific performance of the contract.—MACKRETH v. DUNN (1841), 10 L. J. Ch. 367, L. C.

807. — Provision for payment of total rents to defendant purchaser after completion—Intermediate tenant permitted to remain in possession.]—Houses described in the particulars as in the respective occupations of specified under-tenants, & as let to Messrs. J. "at the very low rent of £50 *per annum*, who have received notice to quit" at a day past, but with a subsequent written permission to occupy on the same terms as before until the tenements are sold, were contracted to be sold subject to a condition that the purchaser should be entitled to the rents from a specified day. On completion after that date the purchaser claimed to be allowed a rent at the rate of £150 a year, the sum which the undertenants paid the tenant, on the ground that, in allowing the tenant to continue in possession at the rent of £50 a year after the date of the contract for sale, the vendors were guilty of wilful default. On a claim by the vendors to enforce specific performance :—**Held** : the purchaser not having required the vendors to turn the tenant out, they were not guilty of wilful default in allowing him to remain at the lesser rent ; & specific performance was decreed, pltf's. accounting only for the lesser rent.—CROSSE v. BEAUFORT (DUKE) (1851), 5 De G. & Sm. 7 ; 64 E. R. 994.

808. — Expenses of title deeds payable by plaintiff purchaser—Plaintiff disputing liability for expenses.]—One of the conditions of a sale by public auction stated that the purchaser should not require the production of any title deeds, etc., which were not in the possession of the vendors, & all recitals of births, etc., or other facts contained in any deed dated thirty years since, should be deemed conclusive evidence thereof ; & all attested copies of or extracts from deeds, etc., & all other evidence as to deaths, etc., which might be required by the purchaser for the purpose of

PART III. SECT. 13, SUB-SECT. 2.

o. Agreement for sale of land—Purchaser acquiescing in resale by

vendor.]—Where it was shown that a purchaser could not pay for property, & after several demands upon him to complete the purchase, the vendor sold

to a third party with the knowledge of the original purchaser, who appeared to acquiesce in it ; but afterwards, when, by reason of the construction

examination with the abstract, should be respectively sought for & procured at the expense of the purchaser. A. became the purchaser of two lots. After the title had been approved, & a deed of conveyance prepared, a question arose as to whether or not the purchaser was entitled to attested copies of the title deeds at the expense of the vendors; & thereupon the vendors, under the power contained in the fourth condition, annulled the sale. On bill filed for the specific performance of the contract, the ct. held that the purchaser was not entitled to attested copies of the title deeds at the expense of the vendors, dismissed the bill, with costs.—*ABBOTT v. DARNELL* (1856), 2 Jur. N. S. 631; 4 W. R. 314.

809. — Plaintiff vendor declaring intention to resell—Where valid objections to title made by purchaser.]—A purchaser raised certain valid objections to his vendor's title, which the vendor refused to satisfy. The vendor gave notice, that if the purchaser refused to complete within five days, he should re-sell & charge the purchaser with the expenses. The purchaser thereupon gave the vendor notice, that he should bring an action for the deposit, if the requisitions were not complied with within a week. The action was commenced, & the vendor some time subsequently agreed to satisfy the requisitions at the purchaser's expense. Upon the purchaser's refusal, a bill was filed by the vendor for specific performance. The ct. held, that the notice of the vendor of an intention to resell, was equivalent to a declaration that he would not seek specific performance of the contract, & that the purchaser's action to rescind was effectual, & the bill was dismissed with costs.—*ROYOU v. PAUL* (1858), 28 L. J. Ch. 555.

*Annotation:—**Distd. Laughton v. Port Erin Comrs.*, [1910] A. C. 565.

810. — On purchaser's failure to complete by time specified.]—*LAUGHTON v. PORT ERIN COMRS.*, No. 858, *post*.

811. — Plaintiff purchasers resorting to compulsory powers—Powers obtained subsequent to agreement to purchase.]—(1) Before the formation of a co., deft. & other landowners, being desirous of obtaining certain railway communication, signed an agreement with a person acting for the promoters, but described as the agent of the co., that, if an Act were obtained in either of the two next sessions, they would sell such land as might be required for the railway at thirty years' purchase.

The bill was lost in the first session, & after an alteration in the course of the line, was passed in the second session:—*Held*: the agreement was binding on the landowners, & it might be specifically performed at the suit of the co., notwithstanding objections for want of privity, want of consideration, want of mutuality, & vagueness.

(2) After the passing of the Act, the co.—before claiming the benefit of the agreement—served the deft. with a common notice to treat, & did not formally insist on the agreement until the deft. had appointed an arbitrator.

The co. subsequently entered under Lands Clauses (Consolidation) Act, 1845 (c. 18), s. 85:—*Held*: this clause applied exclusively to compulsory purchases; the proceedings of the co. assumed the non-existence of any agreement; & on these grounds a bill by the co. & two promoters for specific performance of the agreement was dismissed.—*BEDFORD & CAMBRIDGE RY. CO. v. STANLEY* (1862), 2 John. & H. 746; 1 New Rep.

of a railway, the land had increased very much in value, filed a bill for specific performance, the ct. dismissed

the bill with costs.—*LANGSTAFFE v. MANSFIELD* (1854), 4 Gr. 607.—*CAN.*
p. — Acceptance of lease of pro

162; 32 L. J. Ch. 60; 7 L. T. 477; 9 Jur. N. S. 152; 11 W. R. 139; 70 E. R. 1260.

*Annotation:—**As to* (2) *Consd. Kemp v. S. E. Ry.* (1872), 7 Ch. App. 364.

812. Agreement for lease — Prior action to set aside agreement.]—By an award made in June, 1863, under a reference at *Nisi Prius*, the arbitrator awarded that deft. should execute to pltf. a lease of the right to use such part of a certain railway made by pltf. as was upon the land of deft., the lease to be in the words set out in the award; & that deft. should have a right of running carriages over the whole line on certain terms, & might require pltf. to supply engine-power, while pltf. should have an engine on the railway; & pltf. should during the term keep the whole railway in good repair. The lease did not provide for these privileges awarded to deft. Pltf. applied at law to set aside the award, & ultimately in Apr. 1864, the application was refused. In July, 1864, pltf. filed his bill for specific performance of the award:—*Held*: (1) specific performance could not be decreed, inasmuch as the provisions in favour of deft. could not be enforced at once, but gave deft. a right to have certain duties continuously performed by pltf. for a number of years, & the ct. could not undertake to see to such performance; (2) *semble*: even if the award had been one of which specific performance could have been decreed, pltf. could not, after taking proceedings to set it aside, have enforced specific performance.—*BLACKETT v. BATES* (1865), 1 Ch. App. 117; 35 L. J. Ch. 324; 13 L. T. 656; 12 Jur. N. S. 151; 14 W. R. 319, L. C.

*Annotations:—**As to* (1) *Distd. Wolverhampton & Walsall Ry. v. L. & N. W. Ry.* (1873), L. R. 16 Eq. 433. *Appld.* *Phipps v. Jackson* (1887), 56 L. J. Ch. 550. *Refd.* *Ryan v. Mutual Tontine Westminster Chambers Assocn.*, [1893] 1 Ch. 116; *Danubian Sugar Factories v. I. R. Comrs.*, [1901] 1 K. B. 245.

— **Breach of covenant.]—***See* LANDLORD & TENANT, Vol. XXX., pp. 395, 405–407, Nos. 582, 686–699.

— **Insertion of unusual clause in mining lease.]—***See* LANDLORD & TENANT, Vol. XXXI., p. 118, No. 2528.

Agreement for renewal of lease—Breach of conditions in expiring lease.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 73, 74, Nos. 2203, 2206.

— **Acts amounting to abandonment by plaintiff.]—***See* LANDLORD & TENANT, Vol. XXX., p. 405, Nos. 681.

Enforcement of covenant in lease—Approval of identical covenant in underlease.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 173, No. 3062.

Enforcement of deed of separation.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 238, No. 2090.

SECT. 14.—PERSONAL INCAPACITY OF DEFENDANT.

See, generally, CONTRACT, Vol. XII., pp. 41, 42, Nos. 199–217.

Infants — Contract for settlement.]—*See* INFANTS, Vol. XXVIII., pp. 205, 207, Nos. 652, 661; SETTLEMENTS, Vol. XL., p. 492, No. 406.

Members of corporations—Contract not under seal.]—*See* CORPORATIONS, Vol. XIII., pp. 397, Nos. 1206, 1207, 1209–1212.

— **Contract ultra vires.]—***See* COMPANIES, Vol. IX., p. 632, No. 4182.

Insolvency—Agreement for lease.]—*See* LANDLORD & TENANT, Vol. XXX., p. 414, Nos. 758–765.

Lunatics.]—*See* LUNATICS, Vol. XXXIII., p. 210, No. 1163.

*erty by purchase.]—*MATTHEWSON & BURNS (1913), 5 O. W. N. 573; 30 O. L. R. 186.—*CAN.*

SECT. 15.—IMPOSSIBILITY OF PERFORMANCE.

SUB-SECT. 1.—IN GENERAL.

See, generally, BONDS, Vol. VII., pp. 210-213, Nos. 509-550; BUILDING CONTRACTS, Vol. VII., pp. 402, 403, Nos. 279-287; CONTRACT, Vol. XII., pp. 368-407, Nos. 3075-3283.

813. General rule.]—CUDDEE v. RUTTER (1720), as reported in 5 Vin. Abr. 538, L. C.

Annotations:—**Mentd.** Buxton v. Lister (1743), 3 Atk. 383; Mason v. Armitage (1806), 13 Ves. 25; Stanton v. Percival (1855), 5 H. L. Cas. 257.

814. —.]—In bills for specific performance, this ct. never gives relief where the act is impossible to be done, but leaves the party to his remedy at law (LORD HARDWICKE, C.).—GREEN v. SMITH, SMITH v. GREEN (1738), West temp. Hard. 561; 1 Atk. 572; 25 E. R. 1085, L. C.

Annotations:—**Mentd.** Whittaker v. Whittaker (1792), 4 Bro. C. C. 31; Broome v. Monck (1805), 10 Ves. 597; Toft v. Stephenson (1848), 7 Hare. 1.

815. —.]—The ct. will not decree that which seems to be impossible.—FREDERICK v. COXWELL (1829), 3 Y. & J. 514; 148 E. R. 1283.

Annotation:—**Mentd.** Stewart v. Kennedy (1890), 15 App. Cas. 75.

816. Agreement to convey land—Land not in disposition of grantor—Decree for reconveyance of equivalent.]—A voluntary conveyance by the grantor of lands of which he was not possessed, established against him as an agreement to convey land of an equal value.—CARY v. STAFFORD (1725), Amb. 831; 27 E. R. 522; *sub nom.* CAREY v. STAFFORD, 3 Swan. 427, n.; *sub nom.* ANON., 1 Eq. Cas. Abr. 31.

Annotations:—**Distd.** Thurkettle v. Howorth (1727), Bunb. 241. **Refd.** Binnington v. Wallis (1821), 4 B. & Ald. 650; Knye v. Moore (1822), 1 Sim. & St. 61.

817. Agreement for sale of advowson—Vendor without right to sell.]—BOLINGBROKE'S (LORD) CASE (circa 1787), 1 Sch. & Lef. 19, n.

Annotation:—**Consd.** G. W. Ry. v. Birmingham & Oxford Junction Ry. (1848), 2 Ph. 597.

818. Agreement for sale of land—Vendor tenant for life only.]—HOWELL v. GEORGE, No. 531, *ante*.

819. —. Vendor husband of owner—Wife's separate property.]—CASTLE v. WILKINSON, No. 1425, *post*.

820. —. Failure to obtain power to sell—Speculative agreement.]—ADAMS v. WEARE, No. 387, *ante*.

821. —. Land liable to pre-emption by adjoining owner.]—BARRETT v. RING, No. 740, *ante*.

822. —. Agreement by trustee—Refusal of co-trustees to concur.]—One of three trustees, acting as if he were absolute owner, entered into a contract to sell the entirety of certain freehold property, in one-fifth part of which he had a beneficial interest, describing the property as "The Jolly Sailor, offices, etc." to pltf. The other trustees, afterwards, refused to concur in the sale. Pltf. having brought his action for specific performance of the contract:—**Held:** (1) the subject-matter of the contract was sufficiently defined as the vagueness, if any, about the meaning of the words: "Jolly Sailor, offices, etc." might be removed by an inquiry at chambers; (2) the contract for the sale of the entirety could not be enforced, & the property being trust property, it could not be

enforced against deft. as to his one-fifth share only.—NAYLOR v. GOODALL (1877), 47 L. J. Ch. 53; 37 L. T. 422; 26 W. R. 162.

823. Agreement to reconstruct party-wall—Necessity for reconstruction submitted to arbitration—Award compelling departure from agreement.]—The ct. will not decree specific performance of a building contract which provides that a party-wall shall be pulled down & rebuilt, after the adjoining owner has had the matter referred to arbn. under the clauses of the Metropolitan Building Act, 1855 (c. 122), & an award has been made declaring that it is not necessary to take down such party-wall.—SEAWELL v. WEBSTER (1859), 29 L. J. Ch. 71; 7 W. R. 691.

824. Agreement for delivery of scrip certificates—Defendants having no scrip to deliver.]—Demurrer to a bill against the provisional committee of a projected railway co. for the specific performance of an agreement to deliver to pltf. a certain number of scrip certificates, allowed; there being no allegation in the bill that defts. had in their possession any scrip to deliver, but statements, from which the contrary might rather be inferred. *Qu.*: whether such an agreement is a subject for specific performance.—COLUMBINE v. CHICHESTER (1846), 2 Ph. 27; 41 E. R. 851; *sub nom.* COLOMBINE v. CHICHESTER, 1 Coop. temp. Cott. 295; 4 Ry. & Can. Cas. 432; 15 L. J. Ch. 408; 10 Jur. 626, L. C.

Agreement for payment in shares—No shares available.]—*See* COMPANIES, Vol. IX., p. 230, No. 1472.

Agreement for lease.]—*See* LANDLORD & TENANT, Vol. XXX., pp. 413, 414, Nos. 750-757.

SUB-SECT. 2.—PERFORMANCE SUBSEQUENTLY POSSIBLE.

825. Agreement by heir—Performance ordered on accession to title.]—The heir sells in the life of the ancestor & receives the money; the ancestor dies & the heir is decreed to convey.—CLAYTON v. NEWCASTLE (DUKE) (1682), 2 Cas. in Ch. 112; 22 E. R. 871.

Annotation:—**Refd.** Morse v. Faulkner (1792), 3 Swan. 429, n.

826. Agreement to give sufficient security—No sufficient security at disposal of promisor—Order to procure & perform agreement.]—The vendor of an estate having lost his title-deeds, agreed to give the vendee a real security against such loss.

The vendor, on a bill for a specific performance of the agreement, stated he had not real property sufficient for such security, but offered ample personal security:—**Held:** vendor was bound to procure a sufficient real security.—WALKER v. BARNES (1818), 3 Madd. 247; 56 E. R. 500.

Annotation:—**Refd.** Stewart v. Kennedy (1890), 15 App. Cas. 75.

827. Agreement for sale of goods—No goods at disposal of vendor—Vendor ordered to procure.]—A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any

PART III. SECT. 15, SUB-SECT. 1.

813 i. General rule.]—The ct. will never decree a form of relief which it would be impossible to carry into effect, but will leave the party to his remedy at law.—Where, therefore, the declaration claimed specific performance of an agreement to sell an hotel, & transfer the license, & referred to certain Provincial Ordinances from

which it appeared that the license had expired, it was held bad on demurrer.—DAY v. HAMMET (1873), 1 N. Z. Jur. 64.—N.Z.

a. Agreement for sale of land—Vendor unable to make title through conduct of purchaser.]—NICOLA VALLEY LUMBER Co. v. MEEKER (B. C.), [1917] 1 W. W. R. 556.—CAN.

r. Agreement for exchange of equities

—*Failure of one party to secure assent of title owners to assignment.]*—DOUGLAS v. SHARPE (Sask.), [1917] 2 W. W. R. 1177.—CAN.

t. Contract to deliver property of another.]—The ct. will not grant specific performance of a contract to deliver property which does not belong to the contractor.—RISSIK v. PRETORIA MUNICIPALITY, [1907] T. S. 1024.—S.

a. Contract to cultivate specified lands for specified time—Tenancy lost through non-payment of rent by immediate landlord.]—INDER PERSHAD SINGH v. CAMPBELL (1881), I. L. R. 7 Calo. 474; 8 C. L. R. 501.—IND.

Sect. 15.—Impossibility of performance: Sub-sects. 3, 4 & 5. Sect. 16: Sub-sect. 1.]

interest had been paid. B. was living:—*Held*: the submission of the estimate to A. for approval was of the essence of the agreement of Feb. 6, 1869; & inasmuch as by his death the agreement was incapable of being performed in the manner & form therein specified, the ct. could not enforce performance of it. Specific performance decreed of the works according to the agreements of 1864 & 1867.—*FIRTH v. MIDLAND RY. CO.* (1875), L. R. 20 Eq. 100; 44 L. J. Ch. 313; 32 L. T. 219; 23 W. R. 509.

Annotation:—*Mentd. County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

—*See, also, SALE OF LAND, Vol. XI., pp. 207–209, Nos. 1727–1750.*

Frustration of adventure.—*See CONTRACT, Vol. XII., pp. 386–404, Nos. 3172–3252.*

Agreement for sale of house—Destruction by earthquake—Pending action.—*See SALE OF LAND, Vol. XL., p. 186, No. 1551.*

—*Destruction by fire.*—*See SALE OF LAND, Vol. XL., pp. 188, Nos. 1574–1580.*

838. Agreement with officer of company—Failure of company.—A co. having been formed, or attempted to be formed, for the improvement of H. island, & for constructing a floating bridge, pltf., who claimed to be lord of the manor, entered into a contract with deft., the solr. to the co., to grant a lease of a portion of the island, which was to be fully carried out by a certain specified time. In consequence, however, of pltf. not being in a position to make out a good title to the property, he failed to fulfil his agreement, whereupon deft. in equity commenced proceedings against him at law for damages, upon which pltf. filed his bill for an injunction & specific performance of the contract; this injunction was afterwards dissolved. Upon the hearing of the cause upon the application for a specific performance of the agreement:—*Held*: as the agreement had reference to an object which had utterly failed, namely, the formation of a co., it was against equity to call upon deft. to fulfil that agreement; & the bill must be dismissed with costs.—*PADWICK v. HANSLIP* (1850), 14 L. T. O. S. 543.

839. Agreement for transfer of shares—Transferring company wound up.—By an agreement in June, 1864, between two limited banking cos., it was agreed that co. L. should be dissolved and that their goodwill should be taken over by co. M.; that M. should increase their capital, & that 10,000 of the new shares, credited with £10 each, should be allotted "at par to the directors" of L. "for distribution amongst their shareholders," the L. directors paying £100,000 consideration for the new shares to be issued to them. Of the 10,000 shares only 9,740 were applied for and allotted to L. shareholders. In 1865 the L. directors issued a circular to their shareholders dissuading them from taking M. shares. In 1866 the M. bank made a call, which was badly met, & many shares were forfeited in consequence, including some held by the liquidators of the L. bank. In Mar. 1867, a mutual release was executed between the cos. It recited that the £100,000 had been paid & in inconsistently with the fact, that the M. bank had duly allotted to such persons as the liquidators of the L. bank directed the 10,000 shares mentioned in the agreement. In Nov. 1867, a right to "a large number" of

unissued M. shares was asserted by the secretary of the L. liquidators in a letter, but no step was taken. In Sept. 1868, a formal demand was made by the solrs. of the L. liquidators for the remaining shares. In Feb. 1869, the M. bank was wound up, & the M. liquidators made a return of £5 10s. per share to their shareholders, calls having been made upon them & paid for moneys which were found not to be required. Upon the L. liquidators claiming to be entitled, on behalf of the L. shareholders, to participate in the return to the extent of 260 £10 shares:—*Held*: the agreement was now incapable of specific performance; & summons dismissed.—*Re MERCANTILE & EXCHANGE BANK, Ex p. LONDON BANK OF SCOTLAND* (1871), L. R. 12 Eq. 268.

840. Agreement to supply apparatus for signal station—Suspension of station.—*LOYD'S v. MARCONI INTERNATIONAL MARINE COMMUNICATION CO.* (1907), *Times*, Feb. 16.

Annotation:—*Appld. Audenshaw U. D. C. v. Manchester Corpn.* (1907), 71 J. P. 342.

Covenant to repair in lease—Lease of copyhold land—Lease for period involving probable forfeiture.—*See COPYHOLDS, Vol. XIII., p. 68, No. 857.*

841. Waiver of conditions incapable of performance.—N. agreed to take a lease on C., the lessor, executing such repairs as they should jointly agree upon. N. entered into possession, & laid out money on the premises. C. sold the premises to J., & shortly afterwards died. The repairs were not done. N., ten years after he had taken possession, filed a bill to restrain an action of ejectment by J., & prayed for specific performance, he waiving the stipulations, which had become incapable of being performed, but he made no formal waiver. A demurrer to this bill was put in & overruled.—*NORRIS v. JACKSON* (1862), 3 Giff. 396; 5 L. T. 576; 8 Jur. N. S. 930; 10 W. R. 228; 66 E. R. 464; *previous proceedings* (1860), 1 John. & H. 319.

SUB-SECT. 1.—PARTIAL IMPOSSIBILITY.

842. Whether performance as part to decreed.—Where an equal agreement cannot, by reason of a subsequent Act of Parliament, or some other lawful impediment, be performed in the whole; yet the same shall be specifically executed in such part of it as remains lawful.—*BETTESWORTH v. ST. PAUL'S (DEAN & CHAPTER)* (1728), 1 Bro. Parl. Cas. 240; 2 Eq. Cas. Abr. 26; 1 E. R. 541, H. L.; *versg. S. C. sub nom. BETTESWORTH v. ST. PAUL'S (DEAN & CHAPTER)* (1726), Cas. temp. King, 66, L. C.

Annotations:—*Refd. Moore v. Clench* (1875), 34 L. T. 13
Tailby v. Official Receiver (1888), 13 App. Cas. 523.

843. — — — *A.-G. v. DAY*, No. 833, *ante*.

844. — — — A. contracted with B. for the purchase in fee of property in ignorance that B. was only entitled to an estate *pur autre vie*, & that C., B.'s wife, was entitled to the remainder in fee on the determination of the particular life. D., with full knowledge of A.'s contract, took a conveyance from B. & C. of the property, acknowledged by C. so as to pass her interest:—*Held*: A. was entitled, by way of specific performance, to a conveyance from D. of B.'s interest, with compensation in respect of C.'s interest, which B. was unable to bind or convey without her con-

PART III. SECT. 15 SUB-SECT. 4.

as decreed.—*GRAND TRUNK RY. CO. OF CANADA v. CANADIAN PACIFIC RY. CO. (Ont.)*
—CAN.

sent.—*BARNES v. WOOD* (1869), 1 L. R. 8 Eq. 424 ; 38 L. J. Ch. 683 ; 21 L. T. 227 ; 17 W. R. 1080.

Annotations:—**Expld.** *Castle v. Wilkinson* (1870), 5 Ch. App. 534. **Apld.** *Hooper v. Smart*, *Bailey v. Piper* (1874), L. R. 18 Eq. 683. **Distd.** *Rudd v. Lascelles*, [1900] 1 Ch. 815.

SUB-SECT. 5.—CONTRACTS IN THE ALTERNATIVE.

See *BONDS*, Vol. VII., pp. 210, 211, Nos. 518–531 ; *CONTRACT*, Vol. XII., p. 401, Nos. 3253–3259.

SECT. 16.—RESCISSION OR VARIATION OF CONTRACT.

SUB-SECT. 1.—RESCISSION.

See, generally, *CONTRACT*, Vol. XII., pp. 332–359, Nos. 2790–2989.

845. Whether defence to claim—Rescission by conduct.—If it clearly appears that pltf. in a ct. of equity insisting on such an agreement contained in letters, has by acts done, waived it, & thereby drawn in another to purchase, & complete his purchase, in such case it would be a good defence to be insisted on by the second purchaser, showing that he proceeded *bonâ fide*, & consequently would rebut any equity of the first purchaser (*LORD HARDWICKE, C.*).—*BUCKHOUSE v. CROSSBY* (1737), 2 Eq. Cas. Abr. 32 ; 22 E. R. 28 ; *sub nom.* *BACKHOUSE v. MOHUN*, 3 Swan. 434, n., L. C.

Annotation:—**Consd.** *Martin v. Mitchell*, *Martin v. Pelle* (1820), 2 Jac. & W. 113.

846. ———.]—Deft. having been left in possession as owner for a long time, & pltf. having done acts inconsistent with the notion of his being owner himself, which was considered as amounting to a waiver.—*ROSSE (EARL) v. STERLING* (1816), 4 Dow, 442 ; 3 E. R. 1221.

Annotation:—**Mentd.** *Wakefield v. Gibbon* (1857), 1 Giff. 401.

847. ——— **Rescission of written contract by parol—Necessity for clear proof.**—*BUCKHOUSE v. CROSSBY*, No. 845, *ante*.

848. ———.]—Though a parol waiver of a written contract, amounting to a complete abandonment, & clearly proved, would bar a specific performance, or even parol variations, so acted upon, that the original agreement could no longer be enforced without injury to one party ; variations, verbally agreed upon, are not sufficient to prevent the execution of a written agreement : the situation of the parties in all other respects remaining the same. In this case the variations were all for the advantage of deft. by gratuitous covenants of pltf.—*PRICE v. DYER* (1810), 17 Ves. 356 ; 31 E. R. 137.

Annotations:—**Apld.** *Vezev v. Rashleigh*, [1901] 1 Ch. 634. **Consd.** *Morris v. Baron*, [1918] A. C. 1. **Refd.** *Robinson v. Page* (1826), 3 Russ. 114 ; *Stowell v. Robinson* (1837), 3 Bing. N. C. 928.

849. ———.]—Although a parol waiver of a written agreement concerning land, amounting to a complete rescission of the original contract, may be a good defence to an action for specific performance, yet variations verbally agreed upon cannot be relied upon by way of defence, & the original agreement may, notwithstanding, be ordered to be specifically performed.—*VEZEY v. RASHLEIGH*, [1904] 1 Ch. 634 ; 73 L. J. Ch. 422 ; 90 L. T. 663 ; 52 W. R. 442 ; 48 Sol. Jo. 312.

Annotations:—**Consd.** *Williams v. Moss Empires*, [1915] 3 K. B. 242 ; *Morris v. Baron*, [1918] A. C. 1.

————— **Agreements for leases.**—See *LAND-*

& TENANT, Vol. XXX., pp. 388, 389, Nos. 523–525.

850. ——— **Rescission by novation—Subsequent parol contract inconsistent with written contract.**—

(1) Where an undated written contract for a lease omits to state the period of commencement, & contains nothing from which it may be inferred, a specific performance of it cannot be enforced as a written contract.

(2) Where a party to a written contract enters afterwards into a parol one, inconsistent with it, he thereby so far abandons the written contract, that he cannot enforce a specific performance of it in equity.—*GILBERT v. HALL* (1831), 1 L. J. Ch. 15.

851. ——— **Agreement with projected railway company.**—Certain persons intended to form a railway from A. to B., which was to pass over pltf.'s estate. Pltf. opposed the project ; but, on the agent for the projectors agreeing, in writing, to pay him £20,000 for the portion of his estate over which the railway was to pass, he consented to withdraw his opposition. At the same time certain other persons intended to form a railway between the same termini, but by a different line, which also passed through pltf.'s estate, but not through the same part of it as the former line : 14 acres of pltf.'s land were required for the former railway, & 16 acres for the latter. The pltf. opposed the latter railway also. The agents for the rival projectors then entered into & signed an agreement, which was approved of & signed by pltf.'s agent, by which they agreed that the first line should be abandoned & the second adopted, & that the adopted line should take the engagements entered into, with the landowners, by the abandoned line ; & thereupon, pltf. withdrew his opposition to the adopted line ; & the Act of Parliament for making the second railway & for incorporating the projectors of it was passed :—*Held* : the incorporated co. were bound to perform the agreement made with pltf. by the projectors of the first railway.—*STANLEY v. CHESTER & BIRKENHEAD RY. CO.* (1838), 3 My. & Cr. 773 ; 9 Sim. 261 ; 1 Ry. & Can. Cas. 58 ; 40 E. R. 1124.

Annotations:—**Apld.** *Preston v. Liverpool, Manchester & Newcastle-on-Tyne Junction Rty.* (1851), 7 Ry. & Can. Cas. 1. **Consd.** *Lindsey v. G. N. Ry.* (1853), 10 Hare, 661. **Apld.** *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331. **Consd.** *Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees* (1856), 27 L. T. O. S. 241. **Refd.** *Williams v. St. George's Harbour Co.* (1857), 24 Beav. 339 ; *Shrewsbury v. North Staffordshire Ry.* (1865), L. R. 1 Eq. 593.

852. ———.]—Two railways called A. & B. were projected, by different parties, to run from M. towards N. An Act was passed incorporating the projectors of both railways into one co., & for making a railway partly in the line of A., & partly in the line of B., the latter being the line selected with respect to pltf.'s estate. Pending the Act, the promoters of the two railways agreed with each other that, where either co. should have entered into contracts with landowners whose property might be affected by either line, though in a somewhat different mode, the contracts entered into by the co. proposing the rejected line should be adopted by the united co. A copy of this agreement was subsequently sent to pltf. by the united co. The projectors of line A. afterwards vacated their agreement with pltf. :—*Held* : pltf. could not enforce that agreement against the united co.—*GREENHALGH v. MANCHESTER & BIRMINGHAM RY. CO.* (1838), 3 My. & Cr. 784 ; 9 Sim. 416 ; 1 Ry. & Can. Cas. 68 ; 8 L. J. Ch. 75 ; 2

PART III. SECT. 16, SUB-SECT. 1.

b. *Whether defence to claim—Rescission by novation.*—*RUTHERFORD v. SING* (1881), 29 Gr. 511.—*CAN.*

c. ——— *Conditional rescission.*—*STUART v. McNAB* (1863), 10 Gr. 234.—*CAN.*

Sect. 16.—*Rescission or variation of contract: Sub-*

Jur. 1035 ; 40 E. R. 1128 ; *on appeal*, 3 My. & Cr. p. 789, L. C.

Annotations:—**Consd.** *Lindsey v. G. N. Ry.* (1853), 10 Hare, 664. **Refd.** *Galbreath v. Armour* (1845), 4 Bell, Sc. App. 374.

853. ————.]—**PRESTON v. LIVERPOOL, MANCHESTER & NEWCASTLE-UPON-TYNE RY. CO.** (1851), 1 Sim. N. S. 586 ; 7 Ry. & Can. Cas. 1 ; 21 L. J. Ch. 61 ; 61 E. R. 226 ; *on appeal* (1856), 5 H. L. Cas. 605, H. L.

Annotations:—**Consd.** *Lindsey v. G. N. Ry.* (1853), 10 Hare, 664 ; *Shrewsbury v. North Staffordshire Ry.* (1865), L. R. 1 Eq. 593. **Refd.** *Gage v. Newmarket Ry.* (1852), 7 Ry. & Can. Cas. 168 ; *Gooday v. Colchester & Stour Valley Ry.* (1852), 7 Ry. & Can. Cas. 375 ; *Stuart v. L. & N. W. Ry.* (1852), 15 Beav. 513 ; *Webb v. Direct London & Portsmouth Ry.* (1852), 1 De G. M. & G. 519 ; *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331 ; *Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees* (1856), 27 L. T. O. S. 241 ; *Scottish North Eastern Ry. v. Stewart* (1859), 33 L. T. O. S. 307 ; *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356 ; *Mann v. Edinburgh Northern Tram. Co.*, [1893] A. C. 69.

854. ———— **Agreement for lease.**]—In Aug. 1856, pltf. agreed to let a house to deft. for seven, fourteen, or twenty-one years, deft. to keep the premises in repair, & paint & paper as therein mentioned, & deft. was let into possession. In 1869 pltf. agreed with deft. to accept a Mr. W. as tenant in his room upon the same terms, deft. guaranteeing the rent. W. had just before this been let into possession by deft., & he paid rent till 1863. In that year deft. gave a notice to determine his tenancy at the end of the first seven years. W. & deft. having both denied their liability to paint & paper according to the terms of the original agreement, pltf., in Nov. 1864, filed his bill to compel deft. to accept a lease:—**Held**: deft. could not be compelled to accept a lease.

The agreement of 1859 was substitutionary for the agreement of 1856, & although pltf., if he had within a reasonable time called upon deft. to procure W. to take the lease, would probably, upon deft. failing to do so, have been entitled to call for performance of the original agreement, he was not so entitled after the time which had elapsed, & *semble*, deft.'s notice in 1863 would have been sufficient to prevent specific performance.—**MOORE v. MARRABLE** (1866), 1 Ch. App. 217 ; 13 L. T. 725, L. J.

———.]—*See, generally*, CONTRACT, Vol. XII., pp. 596–606, Nos. 4956–5027.

855. ———— **Contract abandoned.**]—A., by deed, contracted with B., that, in consideration of £100 expressed to be paid to A. by B. he, A., would maintain, educate, & apprentice B.'s child, a boy of five years, & that if he had no child of his own, B.'s child should, in case of his attaining twenty-one years, have all his, A.'s, real & personal estate at his death, subject to a life interest for his widow.

It appeared, from the circumstances of the case, probable, that the apparent consideration of £100 was not, in fact, paid, or intended by either party to be paid, & that it was stated in the deed *pro forma* only. There was some evidence that the child was at A.'s house after the date of the deed, but it appeared doubtful whether the child ever lived with A. in the manner provided by the contract, & he soon after was residing with his father, B., & the ct. was satisfied that A. & B., by agreement between themselves, abandoned the contract, & that the status of the child had not been altered by anything done by A. in pursuance of the contract. Upon a bill filed by the child, after the death of A.:—**Held**: the contract, having been abandoned by the contracting parties, could not be enforced by the child.

Qu.: whether this ct. would perform a contract, by which a person, for a sum of money, deprives himself of the possibility of realising property which he can dispose of by will, & thus destroys an active motive for bettering his condition in life.

Qu.: whether, if the contract had been so acted on by A. as to alter the status of the child, the child could have enforced the contract.—**HILL v. GOMME** (1839), 5 My. & Cr. 250 ; 9 L. J. Ch. 54 ; 4 Jur. 165 ; 41 E. R. 366, L. C.

Annotation:—**Mentd.** *Green v. Paterson* (1886), 32 Ch. D. 95.

856. ————.]—To hold that a contract can be put an end to by one of the contracting parties changing his mind with respect to it, whereby he has made the acquisition of the property a matter of no moment or use to him, would be introducing a most dangerous principle & innovation into the doctrines of this ct. with regard to the specific performance of contracts (**ROMILLY, M.R.**).—**STUART (LORD JAMES) v. LONDON & NORTH WESTERN RY. CO.** (1852), 15 Beav. 513 ; 7 Ry. & Can. Cas. 25 ; 16 Jur. 209 ; 51 E. R. 636 ; *on appeal*, 1 De G. M. & G. 721, L. J.

Annotations:—**Refd.** *Gage v. Newmarket Ry.* (1852), 18 Q. B. 457 ; *Gooday v. Colchester, etc., Ry.* (1852), 17 Beav. 132 ; *Shrewsbury & Birmingham Ry. v. L. & N. W. Ry.* (1853), 4 De G. M. & G. 115 ; *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331 ; *Norwich Corp'n. v. Norfolk Ry.* (1855), 4 E. & B. 397.

857. ————.]—S. contracted for the purchase of leasehold property subject to two mtges., & entered into possession of the property, under the contract, but the contract was afterwards abandoned. S. then paid off the mtges., still continuing in possession of the property. S. died. On a bill filed by the mtgor. against the representatives of S., for either the specific performance of the original contract, or redemption of the property, & an account:—**Held**: the contract could not be specifically enforced.—**PATCH v. WILD** (1861), 30 Beav. 99 ; 5 L. T. 14 ; 7 Jur. N. S. 1181 ; 9 W. R. 844 ; 54 E. R. 826.

858. ———— **Threat to rescind—If contract not completed at time stipulated.**]—In Mar. 1904, comrs. agreed to purchase land for a public purpose, subject to certain consents being obtained, which were in fact obtained in May, 1906.

In Apr. 1905, the vendor wrote: "After the expiration of the period named" for completion "I shall not consider myself bound by any agreement, but shall dispose of the lots as I may think fit"; & in June, 1906, he wrote: "The comrs. have most vexatiously delayed necessary procedure for upwards of two years. I therefore wish them clearly to understand that I shall not consent to extend the time of settlement for one day":—**Held**: the vendor had not debarred himself from asking for specific performance of the contract.—**LAUGHTON v. PORT ERIN COMRS.**, [1910] A. C. 565 ; 80 L. J. P. C. 73 ; 103 L. T. 148, P. C.

859. **Waiver of right to rescind—Long possession.**]—**HALL v. LAVER**, No. 741, *ante*.

860. ———— **Acceptance of instalments after breach of contract.**]—Several suits at law & in equity, to determine the title to certain lands, were pending between persons claiming to be mtgees. of such lands, & one who claimed the same lands in fee by title, under a settlement, paramount to the mtge. Pltf., claiming to be a subsequent mtgee. of the same lands, contracted to purchase the interests of the prior mtgees. in their principal moneys, arrears of interest & securities, & to pay the purchase-money at certain stipulated times, all of which, except an annuity, were to be paid in 1843 ; & to pay & indemnify the prior mtgees. against the past & future costs of the suits & proceedings ; & time was to be of the essence of the

contract. Pltf. did not pay the instalments until a considerable time after the stipulated period but such later payments were accepted by the vendors. The bill, filed in 1845, when some of the payments still remained to be made, alleged that defts. refused to perform the agreement, & prayed a specific performance:—*Held*: the time of performing the several acts by the agreement on both sides being past, the ct. would now enforce a contemporaneous performance of the contract by both parties.—*HUNTER v. DANIEL* (1845), 4 Hare, 420; 1 New Pract. Cas. 167; 14 L. J. Ch. 194; 4 L. T. O. S. 473; 9 Jur. 526; 67 E. R. 712. *Annotations*:—*Mentd.* Knight v. Bowyer (1858), 2 De G. & J. 421; *Hutley v. Hutley* (1873), L. R. 8 Q. B. 112.

861. — By conduct.]—*MONRO v. TAYLOR*, No. 259, *ante*.

862. — By defending proceedings.]—*HARRISON v. BROWN* (1861), 14 W. R. 193, n.

863. — By commencing proceedings.]—A. & B. had entered into a contract, & a dispute having arisen, B. commenced an action at law in respect of a portion of the contract. A. filed a bill for specific performance, & moved to restrain the action:—*Held*: B. could not, after having commenced an action at law on the contract, set up in equity the defence of an alleged previous waiver of it.—*WHITTAKER v. FOX* (1865), 13 L. T. 588; 14 W. R. 192.

Rescission under express contractual power.]—*SALE OF LAND*, Vol. XL., pp. 81, 90–98, Nos. 633, 695–755.

Rescission by vendor of land.]—*See SALE OF LAND*, Vol. XL., pp. 221–225, Nos. 1914–1918.

Repudiation by purchaser of land.]—*See SALE OF LAND*, Vol. XL., pp. 243–258, Nos. 2124–2241.

SUB-SECT. 2.—VARIATION.

Sec, generally, CONTRACT, Vol. XII., pp. 359–368, Nos. 2990–3074.

864. Whether defence to claim.]—A suit for the specific performance of an agreement with a variation cannot be supported.—*NURSE v. SEYMOUR (LORD)* (1851), 13 Beav. 254; 51 E. R. 98.

865. —.]—*PARIS CHOCOLATE CO. v. CRYSTAL PALACE CO.*, No. 98, *ante*.

866. — Parol variation of written contract—Where agreement oppressive.]—Bill for performance of written agreement; parol evidence read of different agreement; dismissed with costs; & pltf. cannot resort to agreement set up by deft. Parol evidence allowed, where a hard agreement or in part executed.—*LEGAL v. MILLER* (1750), 2 Ves. Sen. 299; 28 E. R. 193.

Annotations:—*Apld.* Pitcairn v. Ogbourne (1751), 2 Ves. Sen. 375. *Consd.* Price v. Dyer (1810), 17 Ves. 356; *Smith v. Wheatecroft* (1878), 9 Ch. D. 223. *Refd.* Rich v. Jackson (1794), 4 Bro. C. C. 514.

867. — — — Where part performance.]—*LEGAL v. MILLER*, No. 866, *ante*.

868. — — —.]—*PRICE v. DYER*, No. 848, *ante*.

869. — — — Where fraud alleged.]—*WOOL-LAM v. HEARN*, No. 1285, *post*.

870. — — —.]—(1) A., being indebted to B., enters into a written agreement, that B. may at any time while the money due to him remains unpaid, become the purchaser, for £450, of a house belonging to A., & that the money due to B. from the latter shall be part payment of the price: this is a contract of sale, & not a mortgage to secure the debt; & B., having duly declared his option to become the purchaser, is entitled to have the agreement specifically performed.

The agreement is not impaired or altered by proposals which the purchaser makes subsequently,

with a view to an amicable arrangement. Such proposals may have an influence on costs.

(2) *Qu.*: whether deft., resisting the specific performance of an agreement, on the ground of alleged surprise & fraud, will be allowed to give parol evidence of a term of the contract, said to have been made at the same time with, but contradictory to, those terms of it which were reduced into writing, & signed by him.—*BUNNING v. BUNNING* (1822), 1 L. J. O. S. Ch. 56.

871. — — —.]—*Qu.*: can a ct. of equity decree the performance of a written agreement, where the bill states that the written agreement was subsequently varied by parol, & prays, in the alternative, either that the agreement, with these variations, may be executed, or that it may be executed as it stands in writing?—*WRIGHT v. HOWARD*, *HOWARD v. WRIGHT* (1823), 1 Sim. & St. 190; 1 L. J. O. S. Ch. 91; 57 E. R. 76.

Annotations:—*Refd.* Macbryde v. Weekes (1856), 22 Beav. 533. *Mentd.* Mason v. Hill, (1833) 5 B. & Ad. 1; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Acton v. Blundell* (1843), 12 M. & W. 321; *Bower v. Cooper* (1843), 2 Hare, 408; *Embrey v. Owen* (1851), 6 Exch. 353; *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 590; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Ennor v. Barwell* (1860), 2 Giff. 410; *Wilts & Berks Canal Navigation Co. v. Swindon Water Works Co.* (1873), 9 Ch. App. 453, n.

872. — — —.]—*VEZEY v. RASHLEIGH*, No. 849, *ante*.

Agreements for leases.]—*See LANDLORD & TENANT*, Vol. XXX., pp. 387–389, Nos. 514–522, 527–529.

873. — — Variation by court.]—Performance cannot be decreed of an agreement with a variation made in it by the ct.—*JORDAN v. SAWKINS* (1793), 4 Bro. C. C. 477; 29 E. R. 997, L. C.; *previous proceedings* (1791), 3 Bro. C. C. 388, L. C. *Annotation*:—*Refd.* Robson v. Collins (1802), 7 Ves. 130.

874. — — Variation in writing—Of agreement for lease—Where no consideration.]—Decree for specific performance of an agreement to grant a lease, of which only one part, signed by pltf., was found, in the possession of deft., upon the circumstances; possession, drafts prepared & approved, & the execution deferred only till repairs completed. An extension of the term according to a variation of the agreement, also in writing, was refused on the ground of want of consideration.—*ROBSON v. COLLINS* (1802), 7 Ves. 130; 32 E. R. 53.

875. — — — Unsigned memorandum.]—Upon a bill, praying the performance of an agreement duly signed, but offering to deft. the benefit of certain variations contained in an unsigned memorandum of a subsequent date, the ct. will decree a specific performance of the agreement with those variations, if deft. elects to take advantage of them; & if deft. does not so elect, it will decree a specific performance of the original agreement.—*ROBINSON v. PAGE* (1826), 3 Russ. 114; 38 E. R. 519.

Annotations:—*Apld.* Vezev v. Rashleigh, [1904] 1 Ch. 634. *Consd.* Morris v. Baron, [1918] A. C. 1. *Refd.* Hussey v. Horne-Payne (1878), 8 Ch. D. 670.

876. — — — Specific performance granted of original contract.]—*FIRTH v. MIDLAND RY. CO.*, No. 837, *ante*.

877. — — — Specific performance granted with variation.]—In defence to an action for specific performance of a contract as expressed in a document stated by pltf., deft. pleaded that the document did not contain the true terms for the purchase, but he did not state what the true terms were. Deft. afterwards produced a written agreement for purchase containing terms differing from those in the document stated by pltf. Pltf. amended their statement of claim, but continued to claim specific performance of the contract

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as stated by them:—*Held*: plffs. asking at the trial to have specific performance with a variation according to the terms of the agreement produced by defts., the action would not be dismissed, but judgment would be given for specific performance with the variation.—*SMITH v. WHEATCROFT* (1878), 9 Ch. D. 223; 47 L. J. Ch. 745; 39 L. T. 103; 27 W. R. 42.

Annotations:—*Consd.* *Nash v. Dix* (1898), 78 L. T. 445. *Refd.* *Berners v. Fleming*, [1925] Ch. 261. *Mentd.* *Gordon v. Street*, [1899] 1 Q. B. 641; *Phillips v. Brooks*, [1919] 1 K. B. 243; *Said v. Butt*, [1920] 3 K. B. 497; *Lake v. Simmons*, [1927] A. C. 487.

878. — Condition added by vendor — As to payment of costs.—Where an agreement is entered into for the sale of an estate, & the parties differ as to the quantity agreed to be sold, & the vendor files a bill for specific performance of the agreement as to part, & the vendee offers to complete the contract as to that part; but the vendor adds, as a condition, that the vendee shall pay the costs of the bill: the ct. will refuse a decree for specific performance.—*SPENCE v. MAWSON* (1830), 9 L. J. O. S. Ch. 10.

879. — Variation not under seal — Contract by corporation.—It is no objection to relief that it depends on a variation of or departure from the contract made by the directors & officers of an incorporated co., such variation or departure not being made under the authority of their common seal.—*WARING v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1849), 7 Hare, 482; 18 L. J. Ch. 450; 68 E. R. 199; *on appeal* (1850), 2 H. & Tw. 239, L. C.

Annotations:—*Refd.* *Garrett v. Banstead & Epsom Downs Ry.* (1865), 4 De G. J. & Sm. 462; *Foster & Dicksee v. Hastings Corpn.* (1903), 87 L. T. 736. *Mentd.* *Bliss v. Smith* (1865), 34 Beav. 508; *Re Brighton Club & Norfolk Hotel Co.* (1865), 35 Beav. 204; *Garrett v. Salisbury & Dorset Junction Ry.* (1866), L. R. 2 Eq. 358; *Smith v. Howden Union & Fowler* (1890), *Hudson's B. C.*, 4th ed., Vol. 2, p. 156; *Kellett v. New Mills U. D. C.* (1900), *Hudson's B. C.*, 4th ed., Vol. 2, p. 298.

880. — Variation by agent without authority.—A landowner who had agreed to take shares in a railway co. contracted with the co. for the sale to them of certain land for a sum in cash. Subsequently, the landowner at the request of a person professing to act as the co.'s agent, agreed to vary the contract by accepting an annual rentcharge in lieu of the sum in cash, upon condition of being released from all liability in respect of certain of his shares. The conveyance purported to be made in consideration of the rentcharge. The co. took possession & paid the rentcharge for seven years. They afterwards made calls against their vendor on all the shares he had originally agreed to take, & brought an action against him for payment. The landowner thereupon filed his bill to restrain the action, or for specific performance of the original contract. The co. repudiated the authority of their agent to vary the contract:—*Held*: under these circumstances the vendor was entitled to specific performance of the original contract & to have the amount of calls set off as against the purchase-money due to him.—*PRICE v. DENBIGH, RUTHIN & CORWEN RY. CO.* (1869), 38 L. J. Ch. 461; 17 W. R. 572.

881. — Variation providing for conditional cancellation.—*Re HUTCHINSON'S PATENT, HASLETT v. HUTCHINSON* (1891), 8 R. P. C. 457.

Annotation:—*Mentd.* *Re Fletcher's Patent* (1893), 62 L. J. Ch. 938.

PART III. SECT. 17, SUB-SECT. 1.

885 i. General rule—Plaintiff must come promptly.—Pltf. must be prompt in seeking specific performance of a

contract, but the amount of delay that will prove fatal varies with each case.—*BROWN v. TUCK* (1895), 16 N. S. W. L. R. (Eq.) 182.—*AUS.*

882. — Variation by conduct of parties.—Although the subsequent acts of the parties to a contract are not admissible as evidence to vary its terms, they may prevent one of the parties from insisting upon a strict performance of the original agreement.—*BRUNER v. MOORE*, [1904] 1 Ch. 305; 73 L. J. Ch. 377; 89 L. T. 738; 52 W. R. 295; 20 T. L. R. 125; 48 Sol. Jo. 131.

Annotations:—*Consd.* *Morrell v. Studd & Millington*, [1913] 2 Ch. 648. *Refd.* *Hartley v. Hymans*, [1920] 3 K. B. 475. *Mentd.* *Erith Engineering Co. v. Sanford Riley Stoker Co. & Babcock & Wilcox* (1920), 37 R. P. C. 217; *Schiller v. Petersen*, [1921] 1 Ch. 394; *Phipps v. Rogers*, [1925] 1 K. B. 11.

883. — Performance involving variation.—Defts. agreed to construct a road over land of pltf., who was to grant defts. a right of way over the road when completed, & to permit it to be declared a public highway by the local board. Defts. were to make the road according to a plan & specification already approved by the local board, & to do all things necessary to carry out a resolution passed by the board that the road should, six months after completion to their satisfaction, be declared by the board a public highway. The specification provided that the pathways should be gravelled, & did not provide for means of lighting. After completion of the road, the board were advised that the road did not comply with the requirements of Public Health Act, 1875 (c. 55), s. 152, inasmuch as it was not flagged nor provided with means of lighting, & they withheld their sanction to its being declared a public highway.

Pltf. brought an action claiming specific performance by defts. of the agreement, on the ground that they had not done all things necessary to enable the board to declare the road a public highway, & claiming damages:—*Held*: inasmuch as to compel defts. to construct the road so as to conform with the provisions of the Act would be to enforce performance of terms at variance with the agreement & entirely outside the contemplation of the parties, specific performance could not be ordered.—*SAUNDERS v. BRADING HARBOUR IMPROVEMENT RAILWAY & WORKS CO.* (1885), 52 L. T. 426.

884. Evidence affording presumption of existence of parol variation—Inquiry directed.—Where a parol agreement varying the terms of the written agreement is set up by defts. in a suit for specific performance & supported by evidence affording a presumption or suspicion of its existence an inquiry will be directed.—*VAN v. CORPE* (1837), as reported in 3 My. & K. 269; 40 E. R. 102.

Annotations:—*Refd.* *Porter v. Drew* (1880), 5 C. P. D. 143. *Mentd.* *Paris v. Hughes* (1836), Keen, 1; *Steed v. Oliver* (1847), 5 Hare, 192.

Agreements for leases.—*See* LANDLORD & TENANT, Vol. XXX., pp. 419, 420, Nos. 814–818.

Variation of partnership articles.—*See* PARTNERSHIP, Vol. XXXVI., pp. 348, 349, Nos. 248–259.

Specific performance with parol variation.—*See* Part V., Sect. 6, sub-sect. 10, *post*.

SECT. 17.—LAPSE OF TIME IN BRINGING ACTION.

SUB-SECT. 1.—IN GENERAL.

885. General rule — Plaintiff must come promptly.—*MILWARD v. THANET (EARL)* (1801), 5 Ves. 720, n.; 31 E. R. 824.

Annotations:—*Apld.* *Firth v. Greenwood* (1855), 25 L. T. O. S. 51. *Consd.* *Barclay v. Messenger* (1874), 43 L. J. Ch. 419. *Apld.* *Mills v. Hayward* (1877), 6 Ch. D. 196.

885 ii. — — — — —.—Mere delay of a party to enforce his claim at law, furnishes no ground for the ct. of chancery interfering with his legal

886. —. —. —.] —HAMILTON v. GRANT, No. 92, *ante*.

887. —. —. —.] —SOUTHCOMB v. EXETER (B.P.), No. 920, *post*.

888. —. —. —.] —EADS v. WILLIAMS, No. 902, *post*.

889. —. —. —.] —SHARP v. MILLIGAN, No. 923, *post*.

—.] —It is a strict rule of this ct., that whoever brings forward a contract, as constituted of a proposal on one side & an acceptance on the other, should show that the acceptance was prompt, unqualified, simple, & unconditional.

The party applying for specific performance has an option whether he will bring an action at law, & repudiate the contract, or whether he will come to this ct. for a specific performance of the contract; & it is a very reasonable thing that he should be put to exercise that option promptly & without delay (LORD CAMPBELL, C.).—ORIENTAL INLAND STEAM CO. v. BRIGGS (1861), 4 De G. F. & J. 191; 31 L. J. Ch. 241; 5 L. T. 477; 8 Jur. N. S. 201; 10 W. R. 125; 45 E. R. 1157, L. C.

Annotations — **Refd.** *Re* General Provident Assce., Bridger's Case (1869), L. R. 9 Eq. 71; Harris' Case (1872), 7 Ch. App. 589, n.

891. —. —. —.] —BARCLAY v. MESSENGER, No. 776, *ante*.

892. —. —. —.] —KNIGHT v. SIMMONDS, No. 829, *ante*.

893. **Application of Statute of Limitations.**] —HAMILTON v. GRANT, No. 92, *ante*.

894. —. —. —.] —Stat. Limitations cannot be pleaded to a suit for specific performance.

If there has been such a lapse of time, that the ct., proceeding upon a rule adopted by analogy to Stat. Limitations, would refuse to enforce specific performance; these circumstances, if not disclosed in the bill so as to enable deft. to demur, ought to be stated in the plea; & the ct., for the purpose of applying its own rule, will advert to the statute, though not pleaded. —TALMASH v. MUGLESTON (1826), 4 L. J. O. S. Ch. 200.

895. —. —. —.] —It seems to me quite contrary to the principles on which a ct. of equity acts, or to the way in which it obeys or follows Stat. Limitations, that, the remedy at law being barred, the ct. should decree specific performance or give effect to these stipulations (STIRLING, J.). —FIRTH v. SLINGSBY (1888), 58 L. T. 481.

Annotations — **Mentd.** *Re* Buskin, *Ex p.* Farlow (1891), 15 R. 117; Barnes v. Glenton, [1899] 1 Q. B. 885.

896. **Delay between members of family — Distinguished from delay between strangers.**] —Delay in instituting proceedings between members of a family not so important as similar delay in the case

of strangers. —LAVER v. FIELDER (1862), 32 Beav. 1; 1 New Rep. 188; 32 L. J. Ch. 365; 7 L. T. 602; 9 Jur. N. S. 190; 11 W. R. 215; 55 E. R. 1.

885 iii. —. —. —.] —WALKER v. BROWN (1868), 14 Gr. 237.—CAN.

885 iv. —. —. —.] —It is a well established doctrine that the ct. will not grant a specific performance unless the party asking relief comes promptly. —OSMENT v. BLOUNT (W. T.) (1905), 1 W. L. R. 497.—

885 v. —. —. —.] —KREINHOLZ v. HANSFORD (1909), 10 W. L. R. 534; 2 Sask. L. R. 86.—CAN.

885 vi. —. —. —.] —FREDERIKSEN v. STANTON & RICHARDS (1913), 24 W. L. R. 891; 4 W. W. R. 1221; 12 D. L. R. 565; 6 Sask. L. R. 105.—CAN.

885 vii. —. —. —.] —Great delay on the part of pltf. in applying to the ct. for specific performance of a contract, of which he claims the benefit, is of

itself a sufficient reason for the ct. in the exercise of its discretion to refuse relief. Milward v. The Earl of Thanet, 5 Ves. 720n., referred to. —NEWAR BEGAM v. CREET (1905), 1 L. R. 27 All. 678.—IND.

885 viii. —. —. —.] —MURPHY v. HARRINGTON, [1927] L. R. 339.—IR.

885 ix. —. —. —.] —DRYDEN v. MCCOY, [1921] N. Z. L. R. 882.—N.Z.

893 i. **Application of Statute of Limitations.**] —Delay, which is short of the period prescribed by Limitation Act & which is not of such a character as to give rise to an inference of abandonment of right is no bar to a suit for specific performance, unless it is shown to have prejudiced deft. —KISSEN GOPAL SADANEY v. KALLY PROSONNO SETT (1905), 1 L. R. 33 Calc. 633.—IND.

d. **Delay in prosecution of bill.**] —A compromise of a suit having been entered into before answer, deft. may

set up the compromise in his answer, & pray, by way of cross-relief, that it be specifically performed; & if pltf. does not diligently proceed with the suit, deft. is entitled to move to dismiss for want of prosecution. —SMALL v. UNION PERMANENT BUILDING SOCIETY (1871), 6 P. R. 206.—CAN.

897. **Delay by vendors & purchasers — Not distinguished.**] —A vendor, under a power reserved to him by the contract, gave notice to the purchaser on Apr. 7, 1869, that, as he could not comply with certain requisitions made by the purchaser, he rescinded the sale. The purchaser filed his bill for specific performance on Aug. 30, 1870:—*Held*: the delay was fatal to pltf.'s claim for relief.

There is no distinction between laches on the part of a vendor, & laches on the part of a purchaser as a bar to a suit for specific performance. —RICH v. GALE (1871), 24 L. T. 745.

Agreements for lease.] —See LANDLORD & TENANT, Vol. XXX., pp. 409-411, Nos. 718-731.

— **Of mines.**] —See MINES, Vol. XXIV., p. 694, Nos. 848-852.

Contract for sale of shares.] —See COMPANIES, Vol. IX., pp. 356, 357, Nos. 2249, 2266.

Option to purchase in lease.] —See LANDLORD & TENANT, Vol. XXX., p. 477, No. 1391.

Delay in performance of contract.] —See Sect. 10, *ante*.

SUB-SECT. 2 —PERIOD OF DELAY BARRING RELIEF.

A. *In General.*

898. **Three months & thirteen days — After parties at arm's length.**] —Delay after the parties were at arm's length of three calendar months & thirteen days in filing a bill for specific performance of a contract for the sale & purchase of a colliery:—*Held*: a bar to relief. —GLASBROOK v. RICHARDSON (1874), 23 W. R. 51.

899. **Eleven months — After default by vendor.**] —An iron co. accepted an offer from a coal owner to take coals of a particular pit at a stated price & in certain quantities at specified intervals. The coal owner made default, & the iron co. did not file their bill for specific performance of the contract until eleven months after default. Defts. put in a demurrer:—*Held*: such delay in seeking to enforce a continuous contract was fatal to the bill, & the demurrer was allowed. —POLIARD v. CLAYTON (1855), 1 K. & J. 462; 25 L. T. O. S. 50; 1 Jur. N. S. 342; 3 W. R. 349; 69 E. R. 540. *Annotation*: —**Refd.** Abinger v. Ashton (1873), L. R. 17 Eq. 358.

900. **Fourteen months.**] —A vendor cannot come at any distance of time for a performance: but upon a bill, filed fourteen months after the

set up the compromise in his answer, & pray, by way of cross-relief, that it be specifically performed; & if pltf. does not diligently proceed with the suit, deft. is entitled to move to dismiss for want of prosecution. —SMALL v. UNION PERMANENT BUILDING SOCIETY (1871), 6 P. R. 206.—CAN.

e. —.] —In cases seeking a specific execution, laches is equally as strong against a pltf. in not prosecuting, as in not commencing a suit. —MOORE v. BLAKE (1808), 1 Ball. & B. 62.—IR.

PART III. SECT. 17, SUB-SECT. 2.—A.

f. **General rule.**] —In this country a much less delay will, in many cases, be sufficient to bar specific performance than would be sufficient in England. —HOOK v. McQUEEN (1854), 4 Gr. 231.—CAN.

g. **One month.**] —There is no precedent for a delay of one month in the institution of a suit being sufficient

Sect. 17.—Lapse of time in bringing action: Subsect. 2, A. & B.]

correspondence upon the objections to the title leased by deft.'s returning no answer to the last letter, calling for a distinct answer, & threatening a bill, & the auctioneer not having been called on to return the deposit, it was referred to the master.—*HERTFORD (MARQUIS) v. BOORE, ASTON v. BOORE* (1801), 5 Ves. 719; 31 E. R. 823, L. C.

Annotation:—Apld. Southcomb v. Exeter (Bp.) (1847), 16 L. J. Ch. 378.

901. Three years.]—A delay of three years by a purchaser in enforcing his contract is sufficient to preclude him from relief on a bill for specific performance.—*FIRTH v. GREENWOOD* (1855), 25 L. T. O. S. 51; 1 Jur. N. S. 866; 3 W. R. 358.

902. Three & a half years.]—A bill for specific performance, after a delay of three years & a half after the abandonment of possession, dismissed.

Specific performance is relief which this ct. will not give, unless in cases where the parties seeking it come promptly, & as soon as the nature of the case will permit (*LORD CRANWORTH, C.*).—*EADS v. WILLIAMS* (1854), 4 De G. M. & G. 674; 3 Eq. Rep. 244; 24 L. J. Ch. 531; 24 L. T. O. S. 162; 1 Jur. N. S. 193; 3 W. R. 98; 43 E. R. 671, L. C.

Annotations:—Apld. Barclay v. Messenger (1874), 43 L. J. Ch. 449; *Levy v. Stogdon*, [1898] 1 Ch. 478. *Mentd. Whitmore v. Smith* (1860), 5 H. & N. 824; *Bottomley v. Ambler* (1877), 38 L. T. 545.

903. Nine years.]—*COWARD v. ODINGSALE* (1709), 2 Eq. Cas. Abr. 688; 22 E. R. 578.

904. Ten years.]—A specific performance will not be decreed after a delay of ten years, when nothing has been done in the meantime.—*ALLO-WAY v. BRAINE* (1859), 26 Beav. 575; 33 L. T. O. S. 100; 53 E. R. 1020.

905. —.]—Where a person agrees by a contract, which does not amount to an equitable assignment, to purchase a contingent equitable reversionary interest, & is unable to obtain completion of the purchase at the time, & does nothing until, ten years afterwards, the reversion has fallen into possession, his delay will be a bar to a claim by him for specific performance of his contract.—*LEVY v. STODDON*, [1899] 1 Ch. 5; 68 L. J. Ch. 19; 79 L. T. 364, C. A.

Annotations:—Refd. Cornwall v. Henson, [1899] 2 Ch. 710. *Mentd. Davies v. Thomas*, [1900] 2 Ch. 462.

906. Fourteen years.]—*WRIGHT v. HOWARD, HOWARD v. WRIGHT* (1823), 1 Sim. & St. 190; 1 L. J. O. S. Ch. 94; 57 E. R. 76.

Annotations:—Apld. Macbryde v. Weekes (1856), 22 Beav. 533. *Refd. Walker v. Jeffreys* (1842), 1 Hare. 341; *Bower v. Cooper* (1843), 2 Hare. 408. *Mentd. Mason v. Hill* (1833), 5 B. & Ad. 1; *Acton v. Blundell* (1843), 12 M. & W. 324; *Embrey v. Owen* (1851), 6 Exch. 353; *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 590; *Chesmore v. Richards* (1859), 7 H. L. Cas. 349; *Ennor v. Barwell* (1860), 2 Giff. 410; *Wilts & Berks Canal Navigation Co. v. Swindon Water Works Co.* (1873), 29 L. T. 722.

907. Twenty-one years.]—*BAGG v. FOSTER* (1870), 1 Cas. in Ch. 188; 22 E. R. 755.

to justify a refusal of a relief by way of specific performance.—*HARADHAN DEBNATHI v. BHAGABATI DAS* (1911), 1 L. R. 41 Cal. 852.—*IND.*

h. One month & nineteen days.]—*MOSSOP v. MAFON* (1870), 17 Gr. 360; *varud* (1871), 18 Gr. 453.—*CAN.*

k. Seven months.]—*MCDONALD v. LEADLAY* (Alta.) (1914), 27 W. L. R. 721.—*CAN.*

l. One year.]—*SHANKAR SUKHARAM JARDALE v. RATANGI PREMJI SHET* (1922), 1 L. R. 47 Bom. 607.—*IND.*

m. Four years.]—*PORTER v. HALE* (N. B.) (1894), 23 S. C. R. 265.—*CAN.*

904 i. Ten years.]—*EVANS v. EVANS* (1862), 1 E. & A. 156.—*CAN.*

n. Thirteen years.]—Where an agree-

ment for sale of lands was entered into in 1903, & an action for specific performance was brought in 1914:—*Held*: the equitable remedy of specific performance is not given unless sought with great promptitude, & in this case the claim was altogether too belated, no attempt having been made to excuse the great delay; however, the purchaser was allowed a return of the money paid on account of the purchase price.—*CLERGUE v. PLUMMER* (1916), 27 O. W. R. 259; 38 O. L. R. 54.—*CAN.*

o. —.]—*GILL v. FLEMING* (1787), 1 Ridg. Parl. Rep. 420.—*IR.*

p. Eighteen years.]—The vendor let the purchasers into possession, but some years afterwards, on default in

908. Twenty-five years.]—Devise of lands to trustees in fee in trust to pay debts & legacies, & after these paid then to sell; & if any of testator's name would buy it, such person to have it for £200 less than the value. One of testator's name brings a bill for this pre-emption; but delays bringing it until twenty-five years after testator's death. Bill dismissed.—*HUCKSTEP v. MATHEWS* (1685), 1 Vern. 362; 23 E. R. 523, L. C.

Annotations:—Refd. Chalmer v. Bradley (1819), 1 Jac. & W. 51. *Mentd. Pyot v. Pyot* (1749), 1 Ves. Sen. 335.

909. Sixty years.]—Bill for a specific performance of a covenant whereby pltf. was to have a pit in deft.'s ground, for digging black stones. Proved that deft. had for above sixty years been in quiet possession of this pit, for digging black stones. Bill dismissed.—*SCOLEFIELD v. WHITEHEAD* (1690), 2 Vern. 127; 23 E. R. 690.

910. Hundred years.]—The ancestors of pltf., Sir John Banks, being seised of the manor of Canford Priors, & the ancestors of deft., Sir John Webb, being seised of the manor of Great Canford, in 1639 entered into an agreement, whereby after reciting that there were wastes lying intermixed, which belong to both manors, & that one fourth part belonged to Canford Priors, & that J. Webb & his ancestors had made inclosures thereof, it was agreed that Sir J. Banks might inclose 50 acres of the heath, & that J. Webb might enjoy the lands formerly inclosed, & that the residue should be divided into four equal parts; one fourth to be enjoyed by Sir J. Banks, & the remaining three-fourths by J. Webb; & the same division should be made in the event of an inclosure; upon a bill brought by pltf. for a specific performance of the agreement, or in case the ct. should not think fit to execute the agreement, that the limits & boundaries of the waste belonging to each manor might be ascertained; upon the ground that the agreement was made by a tenant for life, who could not bind the remainder man; that it had not been carried into execution within a hundred years; that the acts of ownership on the part of deft.'s ancestors, inconsistent with the agreement, far outweighed the acts of ownership on the other side, a specific performance of the agreement refused; & pltf. not having shown a title to or possession of the soil, or any impediment why he could not establish his title at law; the ct. would not direct a commission or an issue to ascertain the boundaries of the waste; & a cross bill by deft., that he might be quieted in possession of the waste, dismissed, being founded upon a mere legal title, & no trials at law having been had to try the right.—*BANKS v. WEBB* (1739), West temp. Hard. 653; 25 E. R. 1132, L. C.

911. Long delay.]—Where a mother who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate

payment of the purchase money, the vendor obtained possession by ejectment. Subsequently the purchase money was tendered & refused, & the purchasers took no steps for eighteen years to enforce their claim, during all which time the vendor remained in possession as owner; the property, during the interval, having increased very much in value. A bill filed by the purchasers, & subsequently revived by their representatives, was dismissed with costs.—*CRAWFORD v. BIRDSALL* (1860), 8 Gr. 415.—*CAN.*

911 i. Long delay.]—Where a contract has lain dormant for many years, & nothing done by either party in pursuance of it, a ct. of equity ought not to decree a specific performance.—

on the heirs male of the marriage; bill, for a specific performance by decreeing a strict settlement, dismissed; & even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, & none of the parties having asserted their rights, the ct. would not have interfered.—*HOWORTH v. DEEM* (1758), 1 Eden, 351; 28 E. R. 720.

912. —.]—*RIDGWAY v. WHARTON*, No. 279, ante.

913. —.]—In 1838 land was sold by pltf.'s predecessor in title to the railway co., & in the conveyance the co. covenanted that after the completion of the railway a part of the land should at all times be used as a depot for coals & other merchandise, to be erected & built upon the west side, & should be for ever thereafter used & employed as for a first class station or place for the purposes of taking up & setting down passengers. The line was completed in 1842 & buildings for a station called C. were erected & used without complaint for many years. In 1863 pltf. became possessed of the property of which the land sold formed part, & in 1869 he filed his bill complaining that the station in question was not treated as first class, & praying for a decree of specific performance of the covenant, & for an injunction to restrain the use of the land except as a first class station:—*Held*: pltf. was entitled to have the station used as a first class station for passenger traffic, & therefore that as many trains, excepting express, special, & mail trains, as stopped at any station between the two termini of the line, must in each twenty-four hours stop at C.; but so much of the judge's decree as directed a reference to inquire what additional conveniences ought to be supplied was discharged, their Lordships being of opinion that any objection which might have existed on the score of deficient accommodation at the station, had been waived by the lapse of time since the railway was opened.—*HOOD v. NORTH EASTERN RY. CO.* (1870), 5 Ch. App. 525; 23 L. T. 206; 18 W. R. 473, L. C. & L. J.

Annotation:—*Refd.* *Kennard v. Cory*, [1922] 2 Ch. 1.

Delay after rescission of contract by defendant.—*See* Sub-sect. 2, B., post.

B. After Rescission of Contract by Defendant.

914. Plaintiff must come within reasonable time.—If one of two parties to a contract for the sale of land, give to the other notice that he will not perform the contract, & the person receiving the notice does not, within a reasonable time after the receipt of such notice, take steps to enforce the contract, equity will consider him to have acquiesced in the abandonment of the contract, & will leave the parties to it to their remedies at law; & the tendency of modern decisions has been to diminish the time allowed to either party for enforcing his right under the contract (*ROMILLY, M.R.*).—*PARKIN v. THOROLD* (1852), 16 Beav. 59; 22 L. J. Ch. 170; 16 Jur. 959; 51 E. R. 698; *previous proceedings* (1851), 2 Sim. N. S. 1.

Annotations:—*Consd.* *McMurray v. Spicer* (1868), L. R. 5 Eq. 527. *Refd.* *Nott v. Riccard* (1856), 22 Beav. 307; *Wells v. Maxwell* (1863), 32 Beav. 408; *Barclay v. Messenger* (1874), 43 L. J. Ch. 449; *Patrick v. Milner* (1877), 2 C. P. D. 342; *Bernard v. Williams* (1928), 139 L. T. 22.

915. Five months.—Where pltf. to a bill for specific performance has allowed five months

to elapse after deft. had rescinded the contract before filing his bill, it is not a sufficient explanation of the delay to state that deft.'s solr. was suffering from mental alienation.—*HUXHAM v. LLEWELLYN* (1873), 21 W. R. 766; *previous proceedings*, 28 L. T. 577.

916. Six months.—In the month of May, 1843, a parol agreement was entered into between A. & B. for a partnership between them, as to certain land intended to be used for building purposes, & a lease of it was afterwards executed by the lessor to B. only, the lessor declining to grant a lease to two persons. Certain acts of ownership were exercised by A. shortly after the agreement was entered into; but, afterwards, A. permitted B. to lay out his money in the erection of buildings on the land, without interfering therewith. After a lapse of eighteen months, A.'s solr. applied to B. to perform the agreement, which B. repudiated; six months afterwards, A. filed his bill against B., seeking specific performance of the agreement:—*Held*: the circumstances were such as to exclude A. from insisting on the specific performance of the agreement by B.—*COWELL v. WATTS* (1850), 2 H. & Tw. 224; 47 E. R. 1665; *sub. nom.* *COWELL v. WATTS, WATTS v. COWELL*, 19 L. J. Ch. 455, L. C.

917. One year.—Pltf., the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance, till about a year afterwards: the bill was dismissed on the ground of unreasonable delay.—*WATSON v. REID* (1830), 1 Russ. & M. 236; Tam. 381; 39 E. R. 91.

Annotations:—*Apld.* *Walker v. Jeffreys* (1842), 1 Haro, 341. *Consd.* *Southcomb v. Exeter (Bp.)* (1847), 6 Haro, 213. *Apld.* *Parkin v. Thorold* (1852), 16 Beav. 59. *Refd.* *Eads v. Williams* (1854), 4 De G. M. & G. 674; *Stretton v. Great Western & Brontford Ry.* (1870), 5 Ch. App. 754, n.

918. Fifteen months.—A lease from A. to B. contained a provision that B. should not assign without the previous consent in writing of A. but that the consent should not be withheld unreasonably or vexatiously. B. subsequently agreed for the assignment, "subject to the landlord's approval," of the remainder of his term to C.; but A. having refused his consent, B. in Nov. 1864, gave notice to C. that the treaty for assignment must be considered at an end; & he shortly afterwards accepted an offer from A. for the surrender of the lease to him on similar terms to those agreed on between B. & C. C., being in possession, delayed filing his bill until Feb. 1856:—*Held*: the delay was fatal.—*LEHMANN v. MCARTHUR* (1868), 3 Ch. App. 496; 37 L. J. Ch. 625; 32 J. P. 660; 16 W. R. 877; *sub-nom.* *LECHMANN v. MCARTHUR*, 18 L. T. 806, L. J.J.

Annotations:—*Mentd.* *Evans v. Davis* (1878), 10 Ch. D. 747; *Dav v. Singleton*, [1899] 2 Ch. 320.

919. Sixteen months.—*RICH v. GALE*, No. 897, ante.

920. Nineteen months.—A contract for the sale of the vendor's interest in a manor under a lease for lives was made on Oct. 16, 1840. Objections were taken to the title, & a correspondence between the solrs. of the vendors & purchaser took place, & continued until Aug. 20, 1841, when the purchaser gave notice to the vendors that the title being defective, he rescinded the contract. The correspondence with reference to the title still proceeded, the purchaser's solr. claiming his right to insist upon the notice, but giving the vendors

WINGFIELD v. WHALEY (1722), 1 Bro. Parl. Cas. 200.—*IR.*

q. — *Doubtful contract.*—A contract in writing for the sale of land had not been acted on during the

vendor's life. Possession was afterwards taken by the vendee, but no improvement made. In a suit for specific performance brought by the vendor's heirs against the vendee's heirs after the latter had come of age,

the evidence given threw considerable doubt on the contract:—*Held*: the doubt, coupled with the delay, was sufficient to prevent the contract being enforced.—*KELLY v. SWEETEN* (1870), 17 Gr. 372.—*CAN.*

Sect. 17.—Lapse of time in bringing action: Sub-sect. 2, B.; sub-sect. 3. Part IV. Sects. 1, 2, 3, 4, 5, 6 & 7.]

two months more to complete the title, until Jan. 17, 1842, when the purchaser intimated that he should fall back to his position under the rescinded contract. The bill was filed on Aug. 30, 1843:—*Held*: the interval between Aug. 20, 1841 & Jan. 17, 1842 ought not to be regarded in the question of laches, but the delay after Jan. 17, 1842, before the bill was filed, precluded the vendors from sustaining their suit for specific performance.

The tendency of the ct. in modern cases has been to restrict the exercise of its jurisdiction in enforcing specific performance of contracts to those cases in which pltf. has been prompt in seeking his equitable remedy.—*SOUTHCOMB v. EXETER* (Br.) (1847), 6 Hare, 213; 16 L. J. Ch. 378; 9 L. T. O. S. 293; 11 Jur. 725; 67 E. R. 1145.

Annotations:—Distd. *Monro v. Taylor* (1850), 8 Hare, 51. *Consd.* *Parkin v. Thorold* (1852), 16 Beav. 59. *Distd.* *Sharp v. Milligan* (1856), 22 Beav. 606. *Appld.* *Sharp v. Wright* (1859), 28 Beav. 150. *Consd.* *McMurray v. Spicer* (1868), L. R. 5 Eq. 527; *Vonn v. Cattell* (1872), 27 L. T. 469. *Refd.* *Eads v. Williams* (1854), 4 De G. M. & G. 674; *Hedges v. Met. Ry.* (1860), 28 Beav. 109.

921. Five years.]—Unless a valid acceptance be given, within a reasonable time, to a written offer to sell an estate, it will be treated as abandoned.

In 1827 A. wrote to B., that he had credited B.'s account with £220, in consideration of an agreement by B. to convey two houses. The abstract was delivered, but there was no acceptance in writing on the part of B. Five years afterwards B. filed a bill against A. for specific performance. A. swore, & it was not denied, that in 1827, he abandoned the contract, & that in 1829 it was considered broken off by both parties. It appeared, however, that B. had, in the meantime, the benefit of the credit for £220. The ct. dismissed the bill on the ground of the delay.—*WILLIAMS v. WILLIAMS* (1853), 17 Beav. 213; 51 E. R. 1015.

SUB-SECT. 3.—WHEN DELAY NO BAR TO RELIEF.

922. Contract continued to be acted on.]—Specific performance of an agreement to purchase may be decreed after considerable delay; if the vendee has not demanded his deposit, or shown a determination not to proceed in the purchase.—*PINCKE v. CURTEIS* (1793), 4 Bro. C. C. 329; 29 E. R. 918.

923. —.]—Delay & laches, on the part of pltf., are a good defence to a suit for specific performance, but they are inapplicable where the contract, though incomplete, has continued to be acted on; as where, under a contract for a lease, possession is taken & rent paid for a series of years.—*SHARP v. MILLIGAN* (1856), 22 Beav. 606; 52 E. R. 1212.

PART III. SECT. 17, SUB-SECT. 3.

922 i. Contract continued to be acted on.]—*PAUL J. BLACKWOOD* (1852), 3 Gr. 394.—**CAN.**

924 ii. Delay due to negotiations between parties.]—A purchaser served notice on the vendor that, unless a good title was made within one week, he would consider the contract at an end, yet continued negotiations, &

did not appear to finally abandon the contract until about a month before the vendor filed his bill for specific performance.—*Held*: the purchaser's acquiescence in the proceedings taken after the service of the first notice, prevented his relying on unreasonable delay, so as to disentitle the vendor to maintain his bill.—*IRVINE v. DEANE* (1850), 2 Ir. Jur. 205.—**IR.**

r. Reasonable explanation of delay

924. Delay due to negotiations between parties.]

—Under two agreements for sale, one of which was to be completed on June 1, & the other on Sept. 29, both in 1846, disputes arose upon the title, and upon certain valuations incident to the purchase. The conveyances were engrossed on Jan. 4, 1847, & the vendor made two requisitions to the purchaser to complete the first on Jan. 11, & the second on Jan. 25, 1847, & intimated that non-compliance with the requisitions would be treated by the vendor as a breach of the agreements. The purchaser did not comply; but his solrs. reiterated claims to certain deductions & abatements. The disputes continued until after Feb. 13, 1847, when the purchaser filed a bill seeking specific performance:—*Held*: the circumstances & delay did not constitute a case of such default by pltf. as to preclude him from a title to specific performance; but, it appearing on the correspondence that the claims of deduction & abatements had not been the cause which delayed the completion of the purchase, but that want of means on the part of the purchaser to pay even so much purchase-money as, according to his view, he had to pay, was the cause of the delay up to & until after the date of the filing of the bill, the ct. held that the purchaser had so acted as to have lost the right to enforce a specific performance, & dismissed his bill.—*GEE v. PEARSE* (1848), 2 De G. & Sm. 325; 64 E. R. 146.

Annotations:—Appld. *Macbryde v. Weekes* (1856), 22 Beav. 533. *Refd.* *Aberaman Ironworks v. Wickens* (1868), L. R. 5 Eq. 485.

925. —.]—*McMURRAY v. SPICER*, No. 1178,

926. Position of parties not altered.]—Demurrer to a bill for specific performance of contract with the Crown, alleging that regulations were in 1828 issued by the Colonial Office, offering grants of land to settlers in Western Australia, in fixed proportions to the money expended by them in the colony, or in sending out labourers, & that pltf. had expended large sums of money under the regulations, & that there had been a waiver of some of them overruled, notwithstanding pltf.'s rights, if any, accrued as far back as 1830.

It seems to me that the situation of the parties has not been altered by the delay (*STUART, V.-C.*).—*LATOUR v. A.-G.* (1861), 5 New Rep. 102; 11 L. T. 563; *sub nom.* *LATOUR v. A.-G.*, 11 Jur. N. S. 7; *on appeal* (1865), 5 New Rep. 231, L. J.J.

927. Reasonable explanation of delay—Unless time made essence of contract.]—Delay in bringing an action for specific performance is not fatal, where it can be explained, unless time has been made the essence of the contract, & that position has not been waived.—*NEW IXION TYRE & CYCLE CO., LTD. v. SPILSBURY* (1898), as reported in 78 L. T. 543; *affd.* on other grounds, [1898] 2 Ch. 181, C. A.

—*Negotiation between plaintiff & third party.]*—*PEARCE v. STEVENS* (1904), 21 N. Z. L. R. 357.—**N.Z.**

t. Delay by infant.]—*CHEVALLIER v. STRONG* (1860), 8 Gr. 320.—**CAN.**

a. Whether plea of poverty sufficient.]—*McMAHON v. O'NEIL* (1869), 16 Gr. 579.—**CAN.**

l. Misrepresentation by defendant.]—*LARKIN v. GOOD* (1870), 17 Gr. 585.—**CAN.**

Part IV.—Particular Contracts.

SECT. 1.—ARBITRATION.

Enforcement of submission.]—*See* ARBITRATION, Vol. II., pp. 382, 411, Nos. 437-440, 644, & generally, pp. 381-386, Nos. 428-471.

Enforcement of award.]—*See* ARBITRATION, Vol. II., pp. 583, 584, Nos. 2160-2184.

Proceedings for compulsory purchase.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 197, 198, Nos. 762-771.

Effect of award on suit for specific performance.]—*See* ARBITRATION, Vol. II., p. 535, No. 1712.

SECT. 2.—BONDS.

See BONDS, Vol. VII., pp. 164, 165, 208, 252, 253, Nos. 10, 22, 494, 947-950.

SECT. 3.—BUILDING CONTRACTS.

See BUILDING CONTRACTS, Vol. VII., pp. 400, 401, Nos. 265-273.

SECT. 4.—CHATELS AND CHOSSES IN ACTION, CONTRACTS IN RESPECT OF.

See Part II., Sect. 8, sub-sect. 2, *ante*.

SECT. 5.—COMPANIES.

Transfer of shares.]—*See* COMPANIES, Vol. IX., pp. 356-358, Nos. 2255-2267, & generally, pp. 317-104, Nos. 2192-2585.

Option to take shares.]—*See* COMPANIES, Vol. IX., pp. 230, 231, Nos. 1472-1476.

Contract to take shares.]—*See* COMPANIES, Vol. IX., p. 247, Nos. 1518-1550.

Contract to take debentures.]—*See* COMPANIES, Vol. X., p. 763, Nos. 4772-4774.

Contract in which directors interested.]—*See* COMPANIES, Vol. IX., p. 633, No. 4187.

SECT. 6.—COMPULSORY PURCHASE.

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 175, 226-230, Nos. 524, 1120-1176.

Enforcement of arbitration award.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 197, 198, Nos. 762-771.

Acquisition of commons under compulsory powers.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 38, 39, No. 541, 545.

Agreement for apportionment of rents.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 278, No. 2054.

SECT. 7.—CONTINGENT AND EXPECTANT INTERESTS.

928. Whether specific performance decreed.]—*MORSE v. FAULKNER* (1792), 3 Swan. 429, n.; *Anst.* 11; 36 E. R. 936.

*Annotations:—***Expld.** *Lyde v. Mynn* (1833), 1 My. & K. 683. **Refd.** *West v. Berney* (1819), 1 Russ. & M. 431.

PART IV. SECT. 7

928. Whether specific performance decreed.]—Contracts for the sale of J.—VOL. XLII.

expectancies are void in India, & a suit for specific performance of such a contract, instituted after the expectancy falls into possession, is not

Mentd. *Right d. Taylor v. Banks* (1832), 3 B. & Ad. 664; *Doc d. Perry v. Wilson* (1836), 5 Ad. & El. 321; *R. v. Dullingham* (1838), 8 Ad. & El. 858.

929. — Inequitable to enforce agreement—Charges in favour of survivor.]—Two young officers in the army sign & hand over to each other certain documents, by which each charges his real & personal estate with £1,000 in favour of the other, in case the other should survive him: the inducement for this undertaking, as expressed on each instrument, being that the other had, by an instrument of even date, left the writer the same sum in case the writer should survive him. The officers soon afterwards separate, & after the lapse of many years, agree to cancel the engagement, but die before the mode of cancelment is definitively settled:—**Held:** taking into consideration the circumstances under which the instruments were made, & the situation in life of the parties, the survivor had no purely equitable claim which he could enforce against the estate of the other.—*RYAN v. DANIEL* (1841), 1 Y. & C. Ch. Cas. 60; 62 E. R. 790.

930. — Covenant to settle after acquired property—Marriage.]—Bill for specific performance T. in consideration of H.'s marrying his daughter, enters into a bond to H. to settle, etc., one-third of whatever estate should come to him upon the death of his father. Decreed that the condition of this bond should be specially performed; for the design of the agreement of which this bond was an evidence, being to make lasting provision for wife & children, could never be satisfied by the forfeiture of the penalty, which would be all the husband's.—*HOBSON v. TREVOR* (1722), 10 Mod. Rep. 507; 2 P. Wms. 191; 88 E. R. 829; *sub nom.* *HOPSON v. TREVOR*, 1 Stra. 533, L. C.

*Annotations:—***Apld.** *Roper v. Bartholomew, Butler v. Bartholomew* (1823), 12 Price, 797. **Consd.** *Lyde v. Mynn* (1833), 1 My. & K. 683. **Refd.** *Wright v. Wright* (1750), 1 Ves. Sen. 409; *Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125; *Carleton v. Leighton* (1805), 3 Mer. 667; *Hill v. Gomme* (1839), 5 My. & Cr. 250. **Mentd.** *Stone v. Lidderdale* (1795), 2 Anst. 533.

931. — — — — —.]—Execution of a contract on marriage by bond, with condition to settle all the personal estate, that the husband should at any time during the coverture be possessed of.—*LEWIS v. MADOCKS* (1803), 8 Ves. 150; 32 E. R. 310, L. C.; *subsequent proceedings* (1810), 17 Ves. 48, L. C.

*Annotations:—***Consd.** *Re Clarke, Coombe v. Carter* (1887), 35 Ch. D. 109; *Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109; *Churston v. Buller* (1897), 77 L. T. 45; *Finlay v. Darling*, [1897] 1 Ch. 719; *Re Dowdings' Settlement, Trusts, Gregory v. Dowding*, [1904] 1 Ch. 441. **Apld.** *Re Reis, Ex p. Clough*, [1901] 2 K. B. 769. **Refd.** *Fortescue v. Hennah* (1812), 19 Ves. 67; *Logan v. Wlenholt*, (1833), 7 Bl. N. S. 1; *Wellesley v. Wellesley* (1839) 4 My. & Cr. 561; *St. Aubyn v. Humphreys* (1856), 22 Beav. 175; *Fyfe v. Arbuthnot* (1857), 3 Sm. & G. 547; *Ford v. Tynte* (1865), 31 L. J. Ch. 452; *Re Clint, Ex p. Bolland* (1873), L. R. 17 Eq. 115; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Re Clutterbuck's Settlement, Bloxam v. Clutterbuck*, [1905] 1 Ch. 200; *Mackenzie v. Allardes*, [1905] A. C. 285. **Mentd.** *Imperial Paper Mills of Canada v. Quebec Bank* (1913), 83 L. J. P. C. 67.

932. — — — — —.]—A marriage settlement contained a covenant by the settlor to settle his estate & interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase,

maintainable.—*SRI K. L. JAGANNADA RAJU GARU v. SRI RAJAH PRASAD RAO GARU*, [1916] I. L. R. 39 Mad. 554.—IND.

Sect. 7.—Contingent and expectant interests. Sects. 8, 9, 10 & 11.]

or otherwise. He afterwards effected some policies of insurance on his life, one of which was subject to a condition that "it should not be assignable in any case whatever":—*Held*: the policies were property to which the settlor had during the marriage become entitled by purchase within the specific words of the covenant, & the covenant was divisible, & could be enforced as to that property by a ct. of equity.

Qu.: whether, if the policies had not come under any of the particulars specifically mentioned in the covenant, the covenant comprising the settlor's whole future property could have been enforced by a ct. of equity.—*Re TURCAN* (1888), 40 Ch. D. 5; 58 L. J. Ch. 101; 59 L. T. 712; 37 W. R. 70, C. A.

Annotations:—*Consd.* *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769. *Refd.* *Re Bondy, Wallis v. Bondy*, [1895] 1 Ch. 109; *Churston v. Buller* (1897), 77 L. T. 45; *Laurie v. West Hartlepool Steamship Thirlds Indemnity Assocn. & David* (1899), 15 T. L. R. 486.

933. —.]—In 1879, R. by his marriage settlement covenanted to transfer all his after-acquired property, except business assets, to the trustees of the settlement upon trusts for the benefit of his wife & children. In 1880 he was adjudicated a bkpt., & he obtained his discharge in 1882. In 1901, out of the profits of his business of outside broker, he purchased & furnished a house where he resided with his wife & children. On May 26, 1903, he intimated to his Stock Exchange creditors, who were substantially his only unsecured creditors, that he would be unable to pay in full his Stock Exchange liabilities which would fall due at the ensuing settlement, & gave leave to each of them individually to close his account immediately. On June 10, in pursuance of a notice served on him by the trustees of his marriage settlement, he transferred to them by two deeds his house & furniture. On July 15 he was adjudicated a bkpt. upon an act of bkpey. committed on June 25:—*Held*: the covenant to settle after-acquired property was not too vague or general to be enforced by the ct.—*Re REIS, Ex p. CLOUGH*, [1904] 2 K. B. 769; 73 L. J. K. B. 929; 91 L. T. 592; 53 W. R. 122; 11 Mans. 229; *sub nom.* *Re REIS, Ex p. SAMUEL*, 20 T. L. R. 547; *sub nom.* *Re REIS, Ex p. TRUSTEE*, 48 Sol. Jo. 506, C. A.; *affd.* on other grounds *sub nom.* *CLOUGH v. SAMUEL*, [1905] A. C. 442, H. L.

Annotations:—*Refd.* *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345. *Mentd.* *Re Magnus, Ex p. Salaman*, [1910] 1 K. B. 1049; *Re Hart, Ex p. Green*, [1912] 3 K. B. 6; *Re Midgley* (1913), 108 L. T. 45; *Re Debtor* (1928), 72 Sol. Jo. 860.

934. —.]—**Enforcement of covenant by trustees.**—In Nov. 1879, a sum of money was given to a wife, which was bound by a covenant of herself & her husband in their marriage settlement to settle her after-acquired property. The money was paid into the husband's banking account, upon which the wife had power to draw, & a month later part of it was invested in two Cape of Good Hope Bonds, which remained at the bank, the interest on them being credited to the account. The husband died in 1908 & the bonds came into possession of his exors. It was admitted that part of the money was represented by the two bonds, that they were bought for & belonged to the wife, & that they were in the husband's possession at his death. The trusts of the settlement were still subsisting for the wife & children of the marriage. Upon action by the trustees of the settlement to recover the bonds against the exors. who pleaded

Stat. of Limitations:—*Held*: trustees of a marriage settlement were entitled to specific performance of a covenant to create a trust which is for the benefit of persons within the marriage consideration.—*PULLAN v. KOE*, [1913] 1 Ch. 9; 82 L. J. Ch. 37; 107 L. T. 811; 57 Sol. Jo. 97.

Annotations:—*Refd.* *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 231.

935. —.]—A mtgor. by deed assigned to the mtgee. all his household goods & farming stock, & "also all moneys of or to which he then was or might during the security become entitled, under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of any person"; & also all real & personal property "of, in, or to which he was or during that security should become beneficially seised, possessed, entitled, or interested, for any vested, contingent, or possible estate or interest." The mtgor. afterwards became entitled under a will to a share of the personal estate of testator:—*Held*: the assignment of after acquired property was divisible; & although the general assignment of all property to which the mtgor. might become entitled might be too wide, as to which the ct. gave no decision, the assignment for valuable consideration of all moneys to which he should become entitled under a will operated as a contract which the ct. would enforce, & the share of the personal estate of testator was accordingly included in the mtgor.'s security.

That the property cannot be identified at the time when the contract is made does not signify if it can be identified at the time when the ct. is asked to carry the contract into effect (*COTTON, L.J.*).

No distinction can be drawn on the question of "vagueness" between contracts in marriage settlements & contracts in other instruments relating to future property.—*Re CLARKE, COOMBE v. CARTER* (1887), 36 Ch. D. 348; 56 L. J. Ch. 981; 57 L. T. 823; 36 W. R. 293; 3 T. L. R. 818; 31 Sol. Jo. 676, C. A.

Annotations:—*Apprvd.* *Tailby v. Official Receiver* (1888), 13 App. Cas. 523. *Apld.* *Re Turcan* (1888), 40 Ch. D. 5. *Consd.* *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769; *Re Walt*, [1927] 1 Ch. 606. *Refd.* *Churston v. Bullen* (1897), 77 L. T. 45; *Re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530; *Re Dallas*, [1904] 2 Ch. 385; *Glegg v. Bromley* (1911), 81 L. J. K. B. 331; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1. *Mentd.* *Re Allix, Ex p. Official Receiver* (1914), 58 Sol. Jo. 250; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44.

—.]—*See, further*, SETTLEMENTS, Vol. XL., pp. 493–524, Nos. 422–687.

936. —.]—**Covenant to settle expectancy.**—*WISEMAN v. ROPER* (1646), 1 Rep. Ch. 158; 1 Eq. Cas. Abr. 16; 21 E. R. 537.

Annotations:—*Refd.* *Skirme v. Meyrick* (1739), 2 Com. 700. *Mentd.* *Frankland v. Frankland* (1753), 1 Dick. 231.

937. —.]—A. devised the residue of his property to his wife, in trust, to divide it among their children in such manner as they should deserve. One of the seven children sold her share & covenanted to make it up a full seventh. This is good, & on a bill for a specific performance, she can make a good conveyance without the mother joining.—*MUSPRAT v. GORDON* (1792), 1 Anst. 34; 145 E. R. 791.

938. —.]—**Estate of lunatic.**—A. being heir-at-law of a person of unsound mind, in consideration of his son B. being at the risk & expense of suing out a commission of lunacy against the estate & person of the lunatic, & also in consideration of natural love & affection, covenants to

assure the estates of the lunatic, in the event of their descending upon him, to himself, A., for life, with remainder in fee to B.; subsequently he conveys upon the death of the lunatic the reversion of the estates, which had descended upon him as heir-at-law, to his second son, C., in consideration of £16,000 to take effect in possession upon his own death. B. then filed his bill against A. & C. for a specific performance of the contract, & for a conveyance of the Estates; which was dismissed by the Lord Chancellor of Ireland, whose Decree was reversed upon appeal.—*PERSSE v. PERSSE* (1840), 7 Cl. & Fin. 279; West, 110; 4 Jur. 358; 7 E. R. 1073, II. L.

Annotations:—*Mentd.* *Persse v. Persse* (1856), 11 Jur. N. S. 551; *Williams v. Williams* (1865), 11 Drew. & Sm. 378.

939. — Covenant to charge annuity on expectancy.]—A. granted an annuity to B., & covenanted to charge it upon all such property as, in the event of C. dying before him, he might become possessed of at C.'s death, either by will or otherwise. A. afterwards became bkpt., & obtained his certificate; & then C. died, having bequeathed an annuity in trust for A.:—*Held*: B. was entitled to a decree specifically charging his annuity upon the annuity bequeathed in trust for A.

An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity.—*LYDE v. MYNN* (1833), 1 My. & K. 683; *Coop. temp. Brough*, 123; 39 E. R. 839, I. C.

Annotations:—*Consd.* *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561. *Refd.* *Mornington v. Keane* (1858), 2 De G. & J. 292; *Montagu v. Sandwich* (1886), 32 Ch. D. 525; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 315. *Mentd.* *Parker v. Downing* (1833), *Coop. temp. Brough*, 148; *Re North, Ex p. McTurk* (1836), 2 Deac. 58; *Thompson v. Cohen* (1872), L. R. 7 Q. B. 527; *Collver v. Isaacs* (1881), 19 Ch. D. 312; *Robinson v. Ommaney* (1882), 21 Ch. D. 780.

940. — Assignment of share in tontine.]—*ALEXANDER v. CANA* (1850), 14 L. T. O. S. 504; 15 Jur. 51.

941. — Future patent rights.]—It is not against public policy for the vendor of a patent to agree to assign to the purchaser all future patent rights which he might afterwards acquire with respect to the inventions sold or any of a like nature. Specific performance of an agreement to that effect decreed.—*PRINTING & NUMERICAL REGISTERING CO. v. SAMPSON* (1875), L. R. 19 Eq. 462; 44 L. J. Ch. 705; 32 L. T. 354; 23 W. R. 463.

Annotations:—*Appld.* *Macdonald v. Eyles*, [1921] 1 Ch. 631. *Refd.* *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Radische Anilin und Soda Fabrik v. Schott, Segnor*, [1892] 3 Ch. 447; *Tullis v. Jackson*, [1892] 3 Ch. 441; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L. T. 363; *Millers v. Steedman* (1915), 84 L. J. K. B. 2057; *Morris v. Saxelby*, [1915] 2 Ch. 57; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Attwood v. Lamont*, [1920] 2 K. B. 146; *British Reinforced Concrete Engineering Co. v. Schelff*, [1921] 2 Ch. 563; *English Hop Growers v. Dering*, [1928] 2 K. B. 174. *Mentd.* *Spiers v. Hunt*, [1908] 1 K. B. 720; *Wilson v. Carnley*, [1908] 1 K. B. 729; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520.

SECT. 8.—COPYHOLDS.

Sale of copyholds.]—See COPYHOLDS, Vol. XIII., pp. 110, 111, Nos. 1402–1410.

SECT. 9.—FAMILY ARRANGEMENTS.

See FAMILY ARRANGEMENTS, Vol. XXIV., p. 947, 948, Nos. 19–30.

SECT. 10.—INDEMNITY, CONTRACTS OF.

Indemnity, generally.]—See GUARANTEE, Vol. XXVI., pp. 221 *et seq.*

942. Whether specifically enforced.]—Where a bill is filed to enforce a covenant for a simple indemnity the ct. will not decree specific performance; but where the indemnifying party also covenants to do an act, the doing of which will constitute a complete indemnity, specific performance will be decreed in such a case.—*LONDON & SOUTH WESTERN RY. CO. v. HUMPHREY* (1858), 32 L. T. O. S. 70; 6 W. R. 784.

943. ——Pltf., on May 6, 1864, sold some shares in a co. to deft., but they were not registered in his name, or that of a nominee for him. The co. was ordered to be wound up. Pltf. then filed a bill against deft. praying a decree for the specific performance of the agreement for the sale of the shares; the due registration of them in the name of deft. or his nominee; the rectification, if necessary, of the register of members of the co.; the execution by deft. of a proper indemnity to pltf. in respect of the shares; & that deft. might be ordered to pay the costs of the suit. Pltf. did not, at the hearing, succeed in proving the identity of the shares sold by him to deft. in respect of which he sought relief by his bill:—*Held*: the case was not one of specific performance at all, & under all the circumstances of it, the bill must be dismissed with costs.

The agreement, if there ever was one, has been performed. If not, the bill resolves itself into one for an indemnity merely (*LORD ROMILLY*).—*MORRISH v. EDWARDS* (1867), 16 L. T. 339.

944. — Covenant to perform act constituting indemnity.]—*LONDON & SOUTH-WESTERN RY. CO. v. HUMPHREY*, No. 942, *ante*.

945. — Contract to indemnify shareholders—Amalgamation of insurance companies.]—An agreement for the amalgamation of two insurance cos. provided that the business, property, liabilities & engagements of one should be transferred to & undertaken by the other, & that the shareholders of the former should execute the deed of settlement of the latter, & thereupon should be indemnified out of the latter's funds & property:—*Held*: shareholders of the former co., who did not execute the deed of settlement of the latter, were not entitled to be personally indemnified by it.—*ANGLO AUSTRALIAN INSURANCE CO. v. BRITISH PROVIDENT INSURANCE SOCIETY (OFFICIAL MANAGER)* (1862), 4 De G. F. & J. 341; 6 L. T. 517; 8 Jur. N. S. 628; 10 W. R. 588; 45 E. R. 1215, L. C.; *varying S. C. sub nom. ANGLO-AUSTRALIAN, ETC., CO. v. BRITISH PROVIDENT, ETC., SOCIETY, BRITISH PROVIDENT, ETC., SOCIETY v. ANGLO-AUSTRALIAN, ETC., CO.*, 3 Giff. 521.

Annotations:—*Refd.* *Re British Provident Life & Fire Assce. Soc., Ex p. Anglo-Australian Asscn., Ex p. Teete, Ex p. Rumney, Ex p. Webster* (1864), 10 L. T. 326; *Woodhams v. Anglo-Australian & Universal Family Life Assce.* (1864), 10 L. T. 178.

SECT. 11.—LEASES.

Agreements for lease.]—See LANDLORD & TENANT, Vol. XXX., pp. 398–420, Nos. 610–822.

—**Lease assigned without licence.]**—See LANDLORD & TENANT, Vol. XXXI., p. 371, No. 5181.

—**Effect of proceedings for specific performance—On action for damages.]**—See LANDLORD & TENANT, Vol. XXX., p. 421, Nos. 823, 824.

Covenants & options for renewal.]—See LANDLORD & TENANT, Vol. XXXI., p. 82, Nos. 2262–2267.

Sect. 11.—Leases. Sects. 12, 13, 14, 15 & 16.]

Option to purchase lease.]—See LANDLORD & TENANT, Vol. XXX., p. 477, Nos. 1388–1393.

Covenant to repair.]—See LANDLORD & TENANT, Vol. XXXI., p. 337, Nos. 4803–4907.

Mining leases.]—See Sect. 12, *post*.

SECT. 12.—MINES AND MINERALS.

Contract for sale of mines & mining rights.]—See MINES, Vol. XXXIV., p. 664, Nos. 618–620.

Mining leases.]—See MINES, Vol. XXXIV., pp. 692–694, Nos. 834–856.

SECT. 13.—MONEY, CONTRACTS RELATING TO

946. Specific performance refused—Contract to pay money.]—CRAMPTON v. VARNA RY. CO., No. 142, *ante*.

947. ——— Contract to lend or borrow money.]—

(1) A contract to lend is of the same nature as a contract to borrow money, & a demurrer will lie to a bill for the specific performance of such a contract.

(2) Deft. agreed to enter into partnership with plffs. on a future day, & on his failing to do so, to lend them £10,000 for two years. He failed to do so. To a bill for specific performance of this agreement a general demurrer was allowed.—*SICHEL v. MOSENTHAL* (1862), 30 Beav. 371; 31 L. J. Ch. 386; 5 L. T. 784; 8 Jur. N. S. 275; 10 W. R. 283; 54 E. R. 932.

Annotations:—As to (1) Apld. Larios v. Bonany y Gurety (1873), L. R. 5 P. C. 346. *Refd. Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271.

948. ——— ———.]—A Gibraltar firm entered into a contract with A.B., of Algeciras, in Spain, in consideration of certain property having been transferred to them, to open a credit in his favour to the extent of \$9,400, & to honour his drafts to that amount. After advancing him some sums of money, they refused to accept a bill for £1,000 drawn upon them by him, & subsequently refused to make any further advances. Proceedings in equity were thereupon commenced by him in the Supreme Ct. of Gibraltar to enforce a specific performance of the contract, & to obtain an award of damages under Chancery Amendment Act, 1858 (c. 27), for the non-performance of the contract:—*Held*: a ct. of equity will not decree the specific performance of a mere agreement to

advance money.—LARIOS v. BONANY Y GURETY (1873), L. R. 5 P. C. 346, P. C.

Annotations:—Refd. Western Wagon & Property Co. v. West, [1892] 1 Ch. 271, *South African Territories v. Wallington* (1897), 76 L. T. 520. *Mentd. Re General South American Co.* (1877), 47 L. J. Ch. 67.

Agreement for mortgage.]—See Sect. 14, *post*.

SECT. 14.—MORTGAGE.

See MORTGAGE, Vol. XXXV., p. 252, Nos. 109–115.

949. Exercise of power of sale by mortgagee—Agreement by purchaser to allow mortgagor to redeem.]—Specific performance decreed of an agreement by a purchaser to allow the mtgor. to redeem an estate sold under a power of sale by the mtgee.—ORME v. WRIGHT (1839), 3 Jur. 19; *affd.* on other grounds, 3 Jur. 972, L. C.

Annotation:—Mentd. Farrar v. Farrars (1888), 40 Ch. D.

SECT. 15.—PARTITION.

See PARTITION, Vol. XXXVI., pp. 307, 308, Nos. 59–61.

SECT. 16.—PARTNERSHIP.

See generally, PARTNERSHIP, Vol. XXXVI., pp. 310 *et seq.*

950. Whether specific performance decreed — Contract to enter into partnership.]—As a general rule, the ct. will not decree specific performance of a contract for partnership. Where plff.'s appropriate remedy is an action at law, where there are no legal difficulties in his way which the ct. can remove, & where there has been no part performance, the ct. will not decree specific performance of a contract for partnership.—SCOTT v. RAYMENT (1868), L. R. 7 Eq. 112; 38 L. J. Ch. 48; 19 L. T. 481.

951. ——— ———.]—Under partnership articles a partner was entitled to nominate & introduce into the firm, for the whole or any part of his share, a son or any other male person. The partner having nominated his son by writing addressed to the other partners, they refused to accept the son as a partner, & the father accordingly brought an action claiming a declaration that the son was duly nominated & introduced into the firm:—*Held*: the son was validly nominated & intro-

PART IV. SECT. 13.

947. Specific performance refused—Contract to lend or borrow money.]—Where money promised as a loan by a mtgee. is not advanced in full, the mtgor. is only entitled to recover, if anything, damages for non-payment of the balance: he cannot sue for specific performance of the agreement to lend the full sum promised.—PHUL CHAND v. CHAND MAL (1908), 1 L. R. 30 All. 252.—IND.

947 ii. ——— ———.]—A ct. will not specifically enforce an agreement to lend or borrow money whether on security or not, but where money has been advanced, either wholly or in part, the ct. would decree specific performance unless the debtor is prepared to pay off the advance at once.—MEENAKSHISUNDARA MUDALIAR v. RATHNASAMI PILLAI (1918), 1 L. R. 41 Mad. 959.—IND.

947 iii. ——— ———.]—The ct. has no power to decree specific performance of a contract an essential part of which is an agreement to lend or borrow money.—SAMSON v. COLLINS (1910), 29 N. Z. L. R. 1163.—N.Z.

PART IV. SECT. 14.

c. Agreement to assign mortgage.]—An agreement to assign a mtge. on land by way of absolute transfer or sale, or, as in the present case, to assign a mtge. on land in payment or part payment of other land sold by the proposed transferee to the proposed transferor, is a contract of which a ct. of equity would decree specific performance.—LUNCH v. WOOD, Cass. Dig. 2nd ed. 783.—CAN.

d. Parol agreement to increase rate of interest.]—A parol agreement to increase the rate of interest reserved by a mtge. upon land will not be enforced as against the land.—MURCHIE v. THURIAULT (1898), 1 N. B. Eq. Rep. —CAN.

SECT. IV. SECT. 16.

950 i. Whether specific performance decreed—Contract to enter into partnership.]—A ct. of equity will not decree specific performance of an agreement for a partnership unless the parties have engaged to execute some instrument of which execution can be ordered.—OGIER v. BOOTH (1883), 9

V. L. R. (Eq.) 160. —AUS.

950 ii. ——— ———.]—COLLINS v. SWINDLE (1857), 6 Gr. 282.—CAN.

950 iii. ——— ———.]—A parol agreement to form a partnership in the leasehold of a mine is enforceable against the owner of the leasehold who is one of the proposed partners.—WARREN & MACDONALD v. GALLAGHER, [1921] 2 W. W. R. 346.—CAN.

950 iv. ——— ———.]—The application of the doctrine of specific performance to partnerships is governed by the same rules as those which govern it in other cases. There are only two classes of cases in which specific performance of an agreement to enter into a partnership has been decreed; first, where the parties have agreed to execute some formal instrument which would confer rights that would not exist unless it was executed; secondly, where there has been an agreement which has come to an end to carry on a joint adventure, & the decree that the agreement is valid, prefaced by the declaration that the contract ought to be specifically performed, is made merely as the foundation of a decree for an account.—

duced, & under these circumstances the remedy did not lie in damages only, but that the son, though not entitled to specific performance, was entitled to other equitable relief as having become a partner in equity.—*BYRNE v. REID*, [1902] 2 Ch. 735; 71 L. J. Ch. 830; 87 L. T. 507; 51 W. R. 52, C. A.

952. ———.] — *TURNER v. MELLADEW* (1903), 19 T. L. R. 273.

953. ——— **Duration of partnership un-**
fixed.]—No specific execution of an agreement for a partnership; as it might be dissolved immediately afterwards.—*HERCY v. BIRCH* (1804), 9 Ves. 357; 32 E. R. 640, L. C.

*Annotations:—***Refd.** *McNeill v. Reid* (1832), 9 Bing. 68; *New Brunswick, etc., Co. v. Muggeridge* (1859), 4 Drew. 686; *Oriental Inland Steam Co. v. Briggs* (1861), 31 L. J. Ch. 241; *Allhusen v. Borries* (1867), 15 W. R. 739.

954. ———.] — Deft. agreed, in writing, to take shares in a joint stock co., which were transferable, “& to execute the deed of settlement when required.”

Specific performance was refused.

I am, however, satisfied that this is not such a contract as a ct. of equity can enforce. It is a contract to become a partner in a partnership of which, according to the terms of the deed, deft. could cease to be a partner within fourteen days. I entertain no doubt that this ct. will not enforce the specific performance of a contract to enter into a partnership, which, so far as deft. is concerned, he may dissolve immediately afterwards (*ROMILLY, M.R.*).—*SHEFFIELD GAS CONSUMERS' CO. v. HARRISON* (1853), 17 Beav. 291; 51 E. R. 1047.

*Annotations:—***Dbtd.** & **N.F.** *New Brunswick, etc. Co. v. Muggeridge* (1859), 4 Drew. 686. **Consd.** *Oriental Inland Steam Co. v. Briggs* (1861), 2 John. & H. 625.

955. ———.] — There are, however, many cases in which specific performance of a contract for a partnership has been refused. But the ground upon which those cases have been decided is not that a contract for a partnership is in itself such a contract as a ct. of equity will not specifically enforce, but that the contract being for a partnership, without any time fixed for its duration, if the partnership were completely formed, deft. could at his pleasure dissolve it the next moment, so as to leave pltf. in no better condition than if the partnership had never existed, & therefore, it would be idle & nugatory to compel the formation of such a partnership (*KINDERSLEY, V.-C.*).—*NEW BRUNSWICK & CANADA RAILWAY & LAND CO., LTD. v. MUGGERIDGE* (1859), 4 Drew. 686; 7 W. R. 369; 62 E. R. 263; *subsequent proceedings* (1860), 1 Drew. & Sm. 363.

*Annotation:—***Consd.** *Oriental Inland Steam Co. v. Briggs* (1861) 2 John. & H. 625.

956. ——— **Enforcement of terms of partnership agreement—After commencement of partnership.]**—*HIBBERT v. HIBBERT* (1807), cited in *Collyer on Partnership*, 2nd ed. at p. 133.

*Annotation:—***Refd.** *Scott v. Rayment* (1868), L. R. 7 Eq. 112.

957. ———.] — Agreement for a partnership decreed to be specifically performed by the execution of a proper partnership deed.—*ENGLAND v. CURLING* (1844), 8 Beav. 129; 50 E. R. 51.

*Annotations:—***Refd.** *Sichel v. Mosenthal* (1862), 30 Beav. 371; *Scott v. Rayment* (1868), L. R. 7 Eq. 112; *Byrne v. Reid*, [1902] 2 Ch. 735.

958. ———.] — *TURNER v. MELLADEW* (1903), 19 T. L. R. 273.

959. ——— **Option to enter into partnership—Parties mortgagor & mortgagee—Option alleged clog on equity of redemption.]**—On Apr. 23, 1896, an agreement was entered into between pltf. & deft., by which pltf. agreed to lend deft. £5,000 which was to be secured by a first mtge. of a ship belonging to deft., & was to be made payable six months from the date of the mtge. If interest was regularly paid pltf. were not to call in, & deft. was not to compel them to receive, the principal before the expiration of two years from the date of the mtge. If at any time within two years from Apr. 23, 1896, pltf. should elect to enter into partnership with deft., they were to be at liberty to do so, in which case they were to relieve deft. from payment of the mtge. money, & transfer the ship free from the mtge. for the purposes of the partnership. The capital, of which the ship was to form part, was to belong to pltf. & deft. in equal shares. On July 4, 1896, deft. executed a statutory mtge. of the ship to pltf. Pltf., did not within the two years elect to enter into partnership with deft., & no part of the £5,000 was paid. On June 27, 1898, deft. executed a mtge. to pltf. of some wharves as a further security for £2,000, part of the £5,000. By this deed deft. covenanted for the repayment of the £2,000 on Dec. 27, 1898, & there was a proviso for redemption upon payment on that day.

On July 9, 1898, another agreement was entered into between pltf. & deft. It contained a recital of the agreement of Apr. 23, 1896, & of the mtges. of July 4, 1896, & June 27, 1898; a recital that pltf. had applied to deft. for repayment of the £5,000, & that he was unable to repay it; & that he had requested them to extend the term of two years for a further period of five years, which they had agreed to do upon the terms thereafter appearing. It was then agreed & declared that, if at any time within the further period of five years pltf. should elect to enter into partnership with deft., they should be at liberty to do so, in which case pltf. were to release deft. from payment of the £5,000, & to transfer the ship free from the mtge. for the purposes of the partnership. The capital of the partnership, of which the ship was to form part, was to belong to pltf. & deft. in equal shares. On Feb. 24, 1900, pltf. gave notice in writing to deft. that they elected to enter into partnership with him. He refused to allow them to do so; & they thereupon brought an action to compel specific performance of the contract constituted by the agreement of July 9, 1898, & the notice of Feb. 24, 1900, or, in the alternative, payment of damages for breach of contract, in which case pltf. claimed the right to enforce their securities for the £5,000 & interest. Deft. alleged that the agreement of July 9, 1898, was invalid because it clogged the equity of redemption; & by a counterclaim he asked that that agreement might be delivered up to be cancelled, & a declaration that he was entitled to redeem the securities:—**Held:** the mtge. of June 27 & the agreement of July 9, 1898, were separate & independent transactions, & the fairness of the agreement of July 9 not being impeached, there was no reason why the mtgor. &

— JALA NATAN v. RAMASAVAMI NAYAN (1863), 1 Mad. 341.—**IND.**

960. ——— **Enforcement of terms of partnership agreement.]**—An agreement for mutually sharing in certain proportions the profits of all patent industries & copyrights possessed or to be pos-

sed by either party, indefinite as to duration, is not so uncertain or against public policy as to be incapable of being dealt with by the ct.—*LE ROY v. HERRENSCHMIDT* (1876), 2 V. L. R. (Eq.) 189.—**AUS.**

1. ——— **Sole relief sought payment of**

sum of money.]—A bill does not lie for specific performance of a partnership agreement, where the sole relief sought is the payment of a sum of money, for which there is a remedy by action at law.—*BAGNELL v. EDWARDS* (1876), 10 L. R. Eq. 215.—**IR.**

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the mtgees. should not subsequently to the date of the mtge. enter into an arrangement which might have the effect of depriving the mtgor. of his equity of redemption.—*LISLE v. REEVE*, [1902] 1 Ch. 53; 71 L. J. Ch. 42; 85 L. T. 464; 50 W. R. 231; 18 T. L. R. 61; 46 Sol. Jo. 67, C. A.; *affd.* on other grounds, *sub nom.* *REEVE v. LISLE*, [1902] A. C. 461, H. L.

Annotation:—Reid. Samuel v. Jarrah Timber & Wood Paving Corp., [1904] A. C. 323.

960. — Contract to buy share in partnership.]

—(1) A., C. & E. were partners in trade, without any written agreement. A. died, & his exors. continued the business with C. & E. C. then died, & his exors. & the exors. of A. still continued the business with E. An agreement was entered into between the exors. of A., of the one part, the exors. of C., of the second part, & E., of the third part, by which the exors. of A. had the option of buying the shares of E. & of the exors. of C., or to sell the shares of A. under certain terms. The exors. of A. elected to purchase. On a bill for specific performance, filed against them by E. & the exors. of C.:—*Held*: the contract must be specifically performed; the decree to be without prejudice to the claims of the persons beneficially interested under the will of A., either against plffs. or defts.

(2) A partner, who purchases his partner's share in the partnership leasehold premises, is not entitled to have a reference for title.—*LAW v. LAW* (1845), 9 Jur. 745.

961. — —.]—Pltf. & deft. carried on business in partnership. Deft. agreed to buy pltf.'s interest in consideration of a certain annuity which was based upon the estimated profits of the business, & was to commence from the date of the last settlement of accounts, & to be in lieu of profits from that date. Pltf. afterwards agreed to purchase deft.'s interest, upon the same terms in all respects as he was to sell. Before the sale was carried out, the partnership accounts were taken, & it was found to be more advantageous to deft. to take the profits of the business from the last settlement of accounts up to the date of the agreement than to take the stipulated annuity from the same period. Pltf. filed his bill for specific performance, upon the footing of the annuity being payable from the date of the last settlement of accounts, in lieu of profits:—*Held*: when the position of the contracting parties was reversed, the stipulation as to the date of the commencement of the annuity formed no part of the contract, & it being for the advantage of deft., she was entitled to take the profits instead of the annuity up to the date of the agreement.—*BONVILLE v. BONVILLE* (1860), 3 L. T. 164; 6 Jur. N. S. 414.

962. — —.]—In an action for specific performance by deft. of a contract for the purchase of pltf.'s share as a partner in a firm constituted under articles of partnership, dated May 19, 1899, it appeared that, the business proving unsuccessful, pltf. in June, 1900, desired to withdraw, & this was agreed to by the other partners on the understanding that he left his capital in the business for two or three years. Deft. then offered to purchase pltf.'s share, & a correspondence ensued which, it was alleged by pltf., disclosed a binding contract to purchase for £175. This deft. denied, & alleged that all he offered to purchase was the share of the assets & profits free from liabilities:—*Held*: on the evidence that there was a binding contract to purchase the share for £175.

Specific performance decreed accordingly, with

an express covenant to indemnify.—*DODSON v. DOWNEY*, [1901] 2 Ch. 620; 70 L. J. Ch. 854; 85 L. T. 273; 50 W. R. 57; 45 Sol. Jo. 739.

Annotation:—Reid. Mills v. United Counties Bank, [1912] 1 Ch. 231.

963. — Right of pre-emption of share in partnership.]—Partnership articles provided that no partner should sell his shares except as follows: That the partner desirous of selling should offer the shares to his co-partners collectively; if they should decline, then to the partners desirous of collectively purchasing; & if none such, then to the partners individually; after which he might sell to a stranger. One of four partners offered his shares to the other three collectively, one of whom to his knowledge would not purchase. The remaining two declared their willingness to accept, & were told that no offer was made to them:—*Held*: the offer to the three enured for the benefit of the two, & specific performance decreed accordingly.—*HOMFRAY v. FOTHERGILL* (1866), L. R. 1 Eq. 567; 14 L. T. 49.

Enforcement of rights of partners inter se.]—*See PARTNERSHIP*, Vol. XXXVI., pp. 481, 482, Nos. 1450-1452.

SECT. 17.—PENALTY OR DAMAGES, PROVISION FOR.

See Part II., Sect. 8, sub-sect. 7, ante.

SECT. 18.—RAILWAYS.

Construction of accommodation works.]—*See RAILWAYS*, Vol. XXXVIII., pp. 282, 283, Nos. 195-202.

SECT. 19.—RENTCHARGES AND ANNUITIES.

See Part II., Sect. 8, sub-sect. 6, ante.

SECT. 20.—SALE OF LAND.

See Parts & Sections passim.

SECT. 21.—SEPARATION DEEDS.

See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 219-238, Nos. 1900-2089.

When specific performance decreed.]—*See HUSBAND & WIFE*, Vol. XXVII., pp. 241, 242, Nos. 2112-2134.

SECT. 22.—SERVICE, CONTRACTS OF.

See Part II., Sect. 5, ante.

SECT. 23.—SETTLEMENTS.

Contract for settlement.]—*See, SETTLEMENTS*, Vol. XL., pp. 472, 473, 478, Nos. 212-221, 258-266.

Articles.]—*See SETTLEMENTS*, Vol. XL., pp. 491, 492, Nos. 386-409.

Voluntary settlements.]—*See SETTLEMENTS*, Vol. XL., pp. 537, 538, Nos. 801-803.

SECT. 24.—TREES AND TIMBER.

See AGRICULTURE, Vol. II., pp. 93, 94, Nos. 737-741.

SECT. 25.—WILL, CONTRACT TO LEAVE
PROPERTY BY.

See, generally, EXECUTORS, Vol. XXIV., pp. 621-623, Nos. 6510-6526; SETTLEMENTS, Vol. XL., pp. 486-489, Nos. 341-371; WILLS.

964. Whether specifically enforced.]—HILL v. GOMME, No. 855, ante.

965. —.]—Deft. before, & as an inducement to, his marriage with pltf. promised in writing, as part of the terms of the marriage, to leave a house & land to her for her life. Pltf. consented to the terms proposed, & the marriage took place; but deft. subsequently conveyed the property by deed to a third person. In an action to recover damages for breach of contract:—*Held*: where a proposal in writing to leave property by will, made to induce a marriage, was accepted, & the marriage took place on the faith of it, if the proposal related to a defined piece of real property the ct. had power to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.—SYNGE v. SYNGE, [1894] 1 Q. B. 466; 63 L. J. Q. B. 202; 70 L. T. 221; 58 J. P. 396; 42 W. R. 309; 10 T. L. R. 194; 0 R. 265, C. A.

Annotations:—*Reid*. *Re Cavendish Browne's Settlement*. Trusts, Horner v. Rawle (1916), 61 Sol. Jo. 27; Central Trust & Safe Deposit Co. v. Snider, [1916] 1 A. C. 266.

966. —.]—An agreement to make ample provision by will for a person is too vague to be enforced.—MACPHAIL v. TORRANCE (1909), 25 T. L. R. 810.

Annotation:—*Reid*. *Dennistoun v. Dennistoun* (1925), 69 Sol. Jo. 476.

967. — Contract by donee of testamentary power of appointment.]—The ct. will not decree specific performance of a contract to leave property by will entered into by a mere donee of a testamentary power of appointment.—*Re PARKIN*, HILL v. SCHWARZ, [1892] 3 Ch. 510; 62 L. J. Ch. 55; 67 L. T. 77; 41 W. R. 120; 36 Sol. Jo. 647; 3 R. 9.

Annotations:—*Reid*. *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799; *Re Evered*, Molineux v. Evered (1910), 79 L. J. Ch. 465; *Re Cavendish Browne's Settlement*. Trusts, Horner v. Rawle (1916), 61 Sol. Jo. 27. *Mentd*. *In the Estate of Heys*, Walker v. Gaskill, [1914] P. 192.

968. —.]—The donee of a general testamentary power of appointment over a fund borrowed a sum of money &, as security for the loan, covenanted with the lender that he would

make a will appointing that the loan should be a first charge on the fund, & that he would not revoke the will. He made a will accordingly, & died:—*Held*: the covenant was ineffectual to bind the fund, &, notwithstanding that the will was made in pursuance of the covenant, the lender was a volunteer as against testator's general creditors, & therefore took subject to the rule that the exercise by will of a general power of appointment made the property which was the subject of the power assets for the payment of the debts of the appointor; consequently, he was not entitled to priority as regards the fund over the other creditors.

A contract to leave by will on the part of one who is merely donee of a testamentary power of appointment cannot be enforced by a judgment or decree for specific performance (VAUGHAN WILLIAMS, L.J.).—*Re LAWLEY*, ZAISER v. LAWLEY, [1902] 2 Ch. 799; 71 L. J. Ch. 895; 19 T. L. R. 8; 51 W. R. 150; *sub nom. Re LAWLEY*, ZAISER v. PERKINS, 87 L. T. 536; 47 Sol. Jo. 29, C. A.; *affd. sub nom. BEYFUS v. LAWLEY*, [1903] A. C. 411, H. L.

Annotations:—*Mentd*. *Re Purdie's Settlement*, Rose v. Hill (1904), 48 Sol. Jo. 524; Stamp Duties Comr. v. Stephen, [1904] A. C. 137; *Re Hadley*, Johnson v. Hadley, [1909] 1 Ch. 20; *Re Whitehead*, Whitehead v. Street (1913), 108 L. T. 368; O'Grady v. Wilmot, [1916] 2 A. C. 231; *Re Wernher*, Wernher v. Beit, [1918] 2 Ch. 82.

SECT. 26.—OTHER CASES.

969. Agreement to purchase beer from particular brewer.]—An agreement between a brewer & a publican, that the publican shall take all his beer of the brewer, cannot be enforced unless the brewer supply the publican with good beer, such as ought to give satisfaction to his customers. In an action on this agreement the quality of the beer cannot be proved by showing what sort of a commodity the brewer furnished to other publicans during the same period.—HOLCOMBE v. HEWSON (1810), 2 Camp. 391; 170 E. R. 1194, N. P.

Annotation:—*Consd*. *Manchester Brewery Co. v. Coombs* (1900), 82 L. T. 347.

970. Sale of solicitor's business.]—Specific performance of an agreement for selling the business of an attorney, refused, upon the bill of the vendor, there being no express stipulations by

PART IV. SECT. 25.

964i. Whether specifically enforced.]—ORR v. ORR (1874), 21 Gr. 397.—CAN.

964 ii. —.]—JIBB v. JIBB (1877), 24 Gr. 487.—CAN.

964 iii. —.]—HALLERAN v. MOON (1881), 28 Gr. 319.—CAN.

964 iv. —.]—An agreement to make a will in favour of an adopted child may be enforced against the personal representatives of obligor.—ROBERTS v. HALL (1882), 1 O. R. 388.—CAN.

964 v. —.]—C., pltf., alleged that A., his father, being the owner of certain land, induced him to abstain from enforcing a certain claim, & also to work on the land, by representing that he would devise the land to him, which he afterwards represented that he had done; & A. being dead, C. now claimed the land as against one to whom A. had devised it by a later will, revoking the former one. The execution of the former will was proved as alleged:—*Held*: this was not such part performance as to take the case out of Stat. Frauds, for the execution of the former will was the act of the person whose estate it was sought to charge, & not of the person seeking to enforce the contract, &, moreover, did

not import a contract, but only indicated a benevolent intention displayed by testator in the execution of an instrument essentially of a revocable nature.—CAMPBELL v. McKERRICKER (1883), 6 O. R. 85.—CAN.

964 vi. —.]—WALKER v. BOUGHNER (1889), 18 O. R. 448.—CAN.

964 vii. —.]—MCGUGAN v. SMITH (Ont.) (1892), 21 S. C. R. 263.—CAN.

964 viii. —.]—KINSEY v. NATIONAL TRUST (1904), 15 Man. L. R. 32.—CAN.

964 ix. —.]—MURDOCH v. WEST (N.S.) (1895), 24 S. C. R. 305.—CAN.

964 x. —.]—CROSS v. CLEARY (1898), 29 O. R. 542.—CAN.

964 xi. —.]—SMITH v. SMITH (1898), 29 O. R. 309; *affd.* (1899), 26 A. R. 397.—CAN.

964 xii. —.]—An agreement by a grantor of property, in consideration of the conveyance, to devise the property to a certain person, is enforceable against another person to whom said grantor has devised the property as a gift.—STODDARD v. WILLIAMS, [1923] 1 D. L. R. 1113; 32 B. C. R. 43; [1923] 1 W. W. R. 688.—CAN.

964 xiii. —.]—BENN v. HAWTHORNE (1924), 55 O. L. R. 393.—CAN.

964 xiv. —.]—Deft. was induced to stay with A. under a promise that if he did so he would have all of A.'s property. After A.'s death he continued to reside with the widow until her death, to work the land & set crops thereon. An action was taken by the administrator for the possession of the land & other property of A., then in deft.'s possession. Deft. set up a counterclaim seeking specific performance of the agreement:—*Held*: there was not such a part performance as to take the case out of the operation of Stat. Frauds, s. 4.—GOSSE v. HUTCHINGS (1908), 9 Nfld. L. R. 375.—NFLD.

964 xv. —.]—CAMERON v. CAMERON (1892), 11 N. Z. L. R. 642.—N.Z.

PART IV. SECT. 26.

g. Purchase at sheriff's sale.]—The equitable interest of an assignee from the purchaser of a contract for the sale of lands, is exigible under a writ of *fiat facias* against the lands of such assignee, & the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract.—WARD v. ARCHER (1891), 21 O. R. 650.—CAN.

h. Contract for manufacture & sale of saw logs.]—The ct. will decree specific

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which the ct. might be enabled to carry it into effect on his part, in return for deflt.'s purchase-money; & there being no conditions generally applicable to transactions of this nature so as to come within the description of "usual clauses" to be inserted in an instrument to be drawn up in pursuance of the agreement.—**BOZON v. FARLOW** (1816), 1 Mer. 459; 35 E. R. 742.

*Annotations:—***Refd.** *Thornbury v. Bevil* (1842), 6 Jur. 407; *Stocker v. Brockelbank* (1851), 3 Mac. & G. 250.

971. Licence to dig stone.]—**NELSON v. BRIDGES** (1837), 1 Jur. 753; *subsequent proceedings* (1839), 2 Beav. 239.

972. Copyright.]—**THOMBLESON v. BLACK** (1837), 1 Jur. 198.

973. Agreement to pay fixed sum for costs—Solicitor & client.]—**STEDMAN v. COLLETT**, No. 1298, *post*.

974. Agreement admitting amount due on investment—Party entrusted with funds for investment for another's benefit.]—Where one person entrusted with sums of money to invest for the benefit of another, has signed an agreement admitting an amount due on investments made, equity will compel their transfer.—**STANTON v. PERCIVAL** (1855), 5 H. L. Cas. 257; 24 L. J. Ch. 369, 26 L. T. O. S. 49; 3 W. R. 391; 10 E. R. 898, H. L.; *affq.* *S. C. sub nom. PERCIVAL v. CANEY* (1852), 4 De G. & Sm. 610, L. C.

975. Contract for sale of land held under Inclosure Act.]—Specific performance of a contract for sale of lands held under an Inclosure Act refused, it appearing upon the context that the right of the lord to the minerals in the allotted lands had not been affected by the Act.—**PRETTY v. SOLLY** (1859), 26 Beav. 606; 33 L. T. O. S. 72; 53 E. R. 1032.

*Annotations:—***Refd.** *De Winton v. Brecon Corpn.* (1859), 33 L. T. O. S. 296. **Mentd.** *Wakefield v. Buccleuch*, *Buccleuch v. Wakefield* (1870), 39 L. J. Ch. 441.

976. Agreement contained in proper order.]—A judge's order giving liberty to sign judgment, with a stay of execution in the event of certain conditions being performed, is not an agreement to perform those conditions; & even if the terms are ordered substantively to be performed, the remedy for default is in the ct. where the order was made, & not by a bill for specific performance.

Therefore, where shipbuilders had built a ship according to contract, & retained her by virtue of their lien for the balance of price unpaid, & had, in an action, obtained by consent a judge's order for the amount, with a stay of execution in case defts. should pay half & give a mtge. on the ship for the remainder, to a bill alleging these facts, & that the retainer of the ship involved great

expense, & praying a sale, or specific performance of the conditions of the judge's order, a demurrer was allowed.—**THAMES IRON WORKS Co. v. PATENT DERRICK Co.** (1860), 1 John. & H. 93; 29 L. J. Ch. 714; 2 L. T. 208; 6 Jur. N. S. 1013; 8 W. R. 408; 70 E. R. 676.

*Annotations:—***Consd.** *Lievesley v. Gilmore* (1866), L. R. 1 C. P. 570. **Refd.** *Aitken v. Bachelor* (1893), 62 L. J. Q. B. 193.

977. Agreement relating to lands abroad.]—The ct. has jurisdiction to carry out an agreement entered into by persons in England, & relating to lands abroad, though such agreement is not made in a form which, by the foreign law, would affect the land.—**SICHEL v. RAPHAEL** (1864), 3 New Rep. 662, *on appeal*, 5 New Rep. 149, L. C.

978. Contract to pay salary of colonial bishop.]—Specific performance of a contract to pay a salary to a "bishop" in the colonies, enforced, though the contributors to the salary may have intended to support a bishop with coercive jurisdiction over his clergy, & subject to coercive jurisdiction of his metropolitan.—**NATAL (BP.) v. GLADSTONE** (1866), L. R. 3 Eq. 1 15 L. T. 465; *sub nom. COLENZO v. GLADSTONE*, 36 L. J. Ch. 2 12 Jur. N. S. 971; 15 W. R. 29.

*Annotations:—***Mentd.** *Er v. Jenkins* (1868), L. R. 2 P. C. 258; *Cape Town (BP.) v. Natal (BP.)* (1869), L. R. 3 P. C. 1; *Brown v. Montreal Curé* (1874), L. R. 6 P. C. 157.

979. Agreement to arrest litigation.]—**SMEATON v. ST. ANDREWS MAGISTRATES**, No. 401, *ante*.

980. Agreement to disentail.]—A tenant in tail in remainder barred his estate tail without the consent of the protector, & afterwards conveyed all his estate & interest to a purchaser, & covenanted that he would, at the request of the purchaser, his heirs or assigns, execute every such disentailing or other assurance as might be necessary to vest the premises in the purchaser, his heirs & assigns. The protector having died, the purchaser applied to the vendor to execute a disentailing deed to enlarge the base fee into a fee simple.—**Held:** *Fines & Recoveries Act*, 1833 (c. 74), s. 47, does not interfere with the jurisdiction of the ct. to decree against a tenant in tail specific performance of a contract for disentailment entered into by him, but only prevents the ct. from treating the contract as being in equity a disposition taking effect under the Act so as to bind the issue in tail & remainderman.—**BANKES v. SMALL** (1887), 36 Ch. D. 716; 56 L. J. Ch. 832; 57 L. T. 292; 35 W. R. 765; 3 T. L. R. 740, C. A.

*Annotations:—***Consd.** *Meeking v. Meeking*, [1917] 1 Ch. 77. **Refd.** *Mills v. Fox* (1887), 37 Ch. D. 153; *Case v. Case* (1889), 61 L. T. 789; *Re Montagu, Faber v. Montagu*, [1896] 1 Ch. 549; *Re Gaskell & Walters' Contract*, [1906] 2 Ch. 1. **Mentd.** *Re E. D. S.*, [1914] 1 Ch. 618.

performance of a contract for the manufacture & sale of saw logs, where they are capable of being identified & possess a peculiar value for the purchaser.—**STEVENSON v. CLARKE** (1854), 4 Gr. 540. — **CAN.**

k. Covenant by executors to indemnify legatee.]—**CROOK v. TORRANCE** (1860), 8 Gr. 220.—**CAN.**

l. Agreement to run back stream.]—**NICOL v. TACKABERRY** (1863), 10 Gr. 109.—**CAN.**

m. Contract to erect house.]—Equity does not, as a general rule, enforce specifically a contract between a landholder and a builder for the erection of a house or the like.—**COLTON v. ROOKLEDGE** (1872), 19 Gr. 121.—**CAN.**

n. —.] *Re MURRAY* (1902), 22 C. L. T. 373; 4 O. L. R. 418; 1 O. W. R. 576.—**CAN.**

o. Agreement to give farm in consideration of maintenance.]—**PUNCH v.**

CHISHOLM (1874), 9 N. S. R. (3 G. & O.) 469.—**CAN.**

p. After acquired property.]—At law, a bill of sale or conveyance cannot pass property in goods which are not in existence or which do not belong to the grantor at the time the deed is given, though in equity such a contract would operate to transfer to the vendee the beneficial interest in the property as soon as it was acquired by the grantor, & the grantee might enforce specific performance of the contract.—**LLOYD v. EUROPEAN & NORTH AMERICAN RY. Co.** (1878), 18 N. B. R. (2 P. & B.) 194.—**CAN.**

q. Easement.]—Specific performance of an agreement to grant an easement may be enforced in equity.—**CRAIG v. CRAIG** (1878), 2 A. R. 583.—**CAN.**

r. Agreement to sell rights under timber licence.]—**LAUGHLAN v. PRES-**

COTT (1897), 1 N. B. Eq. Rep. 406.—**CAN.**

t. Agreement to give bill of sale.]—Specific performance will be decreed of an agreement to give a bill of sale upon ascertained furniture sold & delivered upon credit in reliance upon such agreement.—**JONES v. BREWER** (1899), 1 N. B. Eq. Rep. 630.—**CAN.**

a. Contract in consideration of marriage.]—**BOYD v. SHOULDICE** (1875), 22 Gr. 1.—**CAN.**

b. —.]—A contract by a woman, in consideration of marriage, to make her husband sole heir, will be specifically enforced, notwithstanding that she has subsequently disposed of her estate by will to the exclusion of her husband.—**RASER v. MCQUADE** (1894), 11 B. C. R. 161.—**CAN.**

c. —.]—Deflt., on the occasion of the arrangement of a marriage by his son, which marriage later took

981. Agreement by married woman subject to restraint on anticipation.]—The ct. has no power under Conveyancing & Law of Property Act, 1881 (c. 41), s. 39, to order specific performance of an agreement entered into by a married woman notwithstanding that she is restrained from anticipation, in a case where, at the time when the application for specific performance is made, she has been divorced & her husband is dead.—*THOMSON v. THOMSON*, [1896] P. 263; 65 L. J. P. 80; 74 L. T. 801; 45 W. R. 134; 12 T. L. R. 464; 40 Sol. Jo. 583, C. A.

Annotation:—*Mentd. Bosworthick v. Bosworthick* (1926), 136 L. T. 211.

982. Agreement to demolish buildings—Alleged public nuisance.]—About 40 bungalows of 2 or 3 rooms apiece constructed on footings above the level of the ground had been erected for occupation in the spring & summer months on some 11 acres of low lying land between a seawall & the sea without notice to the rural district council. They were erected on separate sites or plots, let at weekly rents. There were also a considerable number of tents on these sites. The land lay below the level of high tides, & no system of drainage was practicable. Sets of closets at different parts of the land were erected for men & women respectively & their contents were removed & emptied on land at a distance from the residences. The water supply was from standpipes. In an action by the A.-G. at the relation of the rural district council for an injunction to restrain defts. from continuing an alleged public nuisance, & from continuing to maintain the bungalows in contravention of bye-laws & from erecting more, & by the rural district council for specific performance of an agreement to take

down existing bungalows:—*Held*: whilst it was a proper matter for investigation, plths. had on the evidence adduced failed to establish that the encampment was a nuisance to the public health. Overcrowding had not been proved. The sanitary arrangements were not so insufficient as to make the conditions insanitary. The bungalows showed no signs of damp, & there was a substantial surface of dry soil all over the camp. Smells from ditches were much exaggerated and were not a substantial danger to health. The nuisance suggested as arising from the mode of emptying the contents of the closets into the ground even taken in conjunction with the rest of the evidence was not made out. No injunctions would be granted and no specific performance ordered of the agreement to take down existing bungalows.—*A.-G. & WIRRAL RURAL DISTRICT COUNCIL v. KERR & BALL* (1914), 12 L. G. R. 1277.

Compromise of action.]—*See BARRISTERS*, Vol. III., pp. 340, 343, Nos. 301, 328.

Agreement to delimit boundaries.]—*See BOUNDARIES*, Vol. VII., p. 264, No. 10.

Composition agreements.]—*See BANKRUPTCY*, Vol. V., pp. 1174, 1175, Nos. 9499-9502.

Sale of allotment under Inclosure Act.]—*See COMMONS*, Vol. XI., p. 71, No. 959.

Agreement to supply electricity by transferee of statutory power.]—*See ELECTRIC LIGHTING*, Vol. XX., p. 215, No. 99.

Proviso for reduction of life assurance premium.]—*See INSURANCE*, Vol. XXIX., p. 363, No. 2933.

Sale of goodwill.]—*See TRADE & TRADE UNIONS*.

Sale of trade secret.]—*See TRADE & TRADE UNIONS*.

Covenants for further assurance.]—*See SALE OF LAND*, Vol. XL., p. 312, Nos. 2908-2913.

Part V.—Proceedings for Specific Performance.

SECT. 1.—IN GENERAL.

983. Interlocutory application.]—*LONGMAN & BRODERICK v. CALLIFORD* (1795), 3 Anst. 645; 145 E. R. 994.

984. . . .]—G. took out two patents for improvements in the manufacture of stockings to the benefit of which the H. co. became entitled. G. & the H. co. by deed assigned the patents to the L. co. The deed contained a covenant by G. & the H. co. to communicate to the L. co. & render available for their benefit all further improve-

ments of the patented inventions invented by them or either of them. The L. co. brought an action against G. claiming an injunction to restrain from selling, disposing, & communicating to any person other than plths. any invention for or relating to improvements in the manufacture of stockings, & from assisting as a scientific witness or otherwise defts. in two actions which the L. co. had commenced. On a motion for an interlocutory injunction until trial or further order:—*Held*: specific performance of the cove-

place, promised to "buy a farm" for his son. Deft. purchased a certain half section of land & had an assignment thereof to his son prepared & executed by himself but not delivered.—*Held*: the administrator of the son's estate was entitled to specific performance & possession of the land, anything uncertain in the original contract having been made certain by deft.'s execution of the assignment.—*NATYSZAK v. PANCHYSZYN*, [1920] 2 W. W. R. 346; 52 D. L. R. 708; 13 Sask. L. R. 259.—*CAN.*

d. —.—.]—Where a representation was made by a father on the occasion of his son's marriage of the amount of property he intended to leave his son, & on the faith of his representation his son contracted the marriage.—*Held*: the father had by this representation entered into a contract with his son which he was bound to perform specifically.—*KEATS v. GILMORE* (1871), 22 W. R. 465.—*IR.*

e. Specific performance not granted—*Executor's contract to exchange lands*—*Executor acting without consent.]*—*TENUTE v. WALSH* (1893), 24 O. R. 309.—*CAN.*

f. Agreement to sell land devised in fee with restriction against selling.]—*NORTHCOTE v. VIGON* (Ont.) (1891), 22 S. C. R. 710.—*CAN.*

g. Lease of hotel & sale of stock-in-trade—Condition precedent that license should remain.]—*BROWN v. BROWN* (1912), 20 O. W. R. 986; 3 O. W. N. 543; 1 D. L. R. 228.—*CAN.*

h. Privilege of free admission to theatre.]—The owners of a theatre by deed covenanted to confirm to certain debenture holders, of whom petitioner was one, the privilege of free admission to the theatre. Petitioner lost his debenture. Afterwards resp. became lessee of the theatre with notice of the deed:—*Held*: petitioner was not entitled to enforce specifically against

resp that privilege of free admission.—*MALONE v. HARRIS* (1859), 11 L. Ch. R. 33.—*IR.*

k. Agreement to vote at meeting.]—An agreement to vote at a meeting cannot be specifically enforced, but may, on breach, be the subject of an action for damages.—*Re CORONATION SYNDICATE, LTD.*, [1903] 1 T. H. 254.—*S. AF.*

PART V. SECT. 1.

1. Sale of infant's estate—Approval of court.]—Where a contract for the sale of an infant's estate had been approved of by the ct.:—*Held*: it was unnecessary for the purpose of obtaining a decree for specific performance, either to allege or prove that the sale was a proper one under 12 Vict. c. 62.—*McDONALD v. GARRETT* (1860), 8 Gr. 290.—*CAN.*

m. Motion for compensation for want of possession—Where made—In court.]

Sect. 1.—In general. Sects. 2 & 3.]

nant could not be ordered on an interlocutory application.—*LONDON & LEICESTER HOSIERY CO., LTD. v. GRISWOLD* (1886), 2 T. L. R. 676; 3 R. P. C. 251; *Griffin's Patent Cases* (1884–1886), 154.

985. Proceedings on special case.]—The Act which authorises the special case authorises the ct. to deal with the costs of the special case; but it does not authorise the ct. to go on to make a decree for specific performance (*KINDERSLEY, V.-C.*).—*EVANS v. SAUNDERS, EVANS v. EVANS, EVANS v. SAUNDERS* (1853), as reported in 22 L. T. O. S. 43; *on appeal* (1855), 6 De G. M. & G. 654, L. JJ.; *sub nom. SAUNDERS v. EVANS* (1861), 8 H. L. Cas. 721, H. L.

Annotations:—Mentd. Saunders v. Richardson (1854), 2 Eq. Rep. 510; *Walker v. Armstrong* (1856), 21 Beav. 281; *Gregg v. Richards*, [1926] Ch. 521.

986. Motion for decree.]—*WARDE v. DIXON*, No. 346, *ante*.

987. Proceedings on vendor & purchaser summons—To dispense with action for specific performance.]—The purchaser of a farm, consisting in part of 400 acres of heath land, took the objection that a title was not shown to the soil of the heath land, but only to rights of pasturage over it. The vendors took out a summons under Vendor & Purchaser Act, 1874 (c. 78), asking that it might be declared that the purchaser's objections & requisitions were sufficiently answered. Affidavits were filed on both sides, & the deponents were cross-examined. The Master of the Rolls rejected the affidavits & cross-examination, on the ground that evidence by affidavit upon requisitions as to title under the Act ought not to be given unless required by the judge:—*Held*: the evidence ought to have been admitted, for, on a proceeding under Vendor & Purchaser Act, 1874 (c. 78) the parties are in the same position as they would have been under a reference as to title in a suit for specific performance.

I have always considered that the Act was intended to enable the ct. to decide in a summary way, without a specific performance suit, such questions as whether a requisition has been sufficiently answered according to the practice of conveyancers, whether a requisition is precluded by the conditions, & the like, but not to enable the ct. to try in this way disputed questions of fact (*JAMES, L.J.*).—*Re BURROUGHS, LYNN & SEXTON* (1877), 5 Ch. D. 601; 46 L. J. Ch. 528; 36 L. T. 778; 25 W. R. 520, C. A.

Annotation:—Refd. Re Blyth & Young (1880), 41 L. T. 746.

988. — Whether bar to action for specific performance.]—A purchaser who has availed himself of the provisions of Vendor & Purchaser Act, 1874 (c. 75), & has thereby obtained an order on summons which has disposed of every objection which he thought fit to raise, & under which the vendor has been ordered to make compensation, is not entitled to bring an action, for specific performance of the contract for sale & damages. If a vendor does not comply with the order made on the vendor & purchaser summons, the purchaser should apply in chambers to get it enforced.—*THOMPSON v. RINGER* (1880), 44 L. T. 507; 29 W. R. 520.

—*O'DEA v. SINNOTT* (1869), 2 Ch. Ch. 146.—*CAN.*

n. Necessity for tendering deed.]—In an action for specific performance, it is not necessary to tender a deed where there is notice by clear implication that the tendering of a deed would be of no avail.—*CHISHOLM v. CHISHOLM* (1915), 49 N. S. R. 174.—*CAN.*

o. When action lies.]—An action for specific performance lies only where there has been a refusal to perform.—*WILLIAMS v. SHIELDS* (1919), 25 B. C. R. 198.—*CAN.*

p. Judge may try action.]—A suit for specific performance of an agreement for a lease can be more conveniently tried by a judge alone, not-

withstanding that the main question is whether the contract was in fact entered into.—*QUINLAN v. NORTHERN BREWERY CO.* (1904), 24 N. Z. L. R. 226.—*N.Z.*

989. Action for rescission—Motion for specific performance of part.]—A contract for sale of leasehold land provided that the purchaser should be let into possession on payment of part of the purchase-money, & should then pay rent & other outgoings, & perform the covenants & pay the costs of a certain fence. The purchaser was let into possession pursuant to the contract, but failed to pay the rent & other outgoings which the vendor was compelled to pay to prevent forfeiture of the land. The vendor commenced an action for rescission of the contract on the ground of misrepresentation, & moved in that action for an order that the purchaser should deliver up possession in default of his paying the moneys he had agreed to pay:—*Held*: the motion in effect asked for specific performance of part of the contract, & could not be allowed in an action for rescission.—*COOK v. ANDREWS*, [1897] 1 Ch. 266; 66 L. J. Ch. 137; 76 L. T. 16.

Proceedings for rectification of company register.]—*See, generally, COMPANIES*, Vol. IX., pp. 209–224.

Mandamus.]—*See CROWN PRACTICE*, XVI., pp. 320, 321, Nos. 1326, 1327.

Counterclaim.]—*See SET-OFF*, Vol. XL., p. 414, No. 364.

Specially indorsed writ.]—*See R. S. C.*, Ord. 14A.

990. Whether action tried by jury.]—Where there were cross-actions in the Ch. Div., one for specific performance of an agreement & the other to set it aside for fraud & misrepresentation, a judge of that Division refused to order the actions to be tried before a judge & jury on the ground that the subject-matter of the actions were suitable for trial by a judge without a jury, in the Ch. Div., & that there were other issues involved independently of the issues of fact, which might dispose of the whole matter.—*SWINDELL v. BIRMINGHAM SYNDICATE, BIRMINGHAM SYNDICATE v. SWINDELL* (1876), 3 Ch. D. 127; 45 L. J. Ch. 756; 35 L. T. 111; 24 W. R. 911; 3 Char. Pr. Cas. 304, 310, C. A.

Annotations:—Refd. Ruston v. Tobin (1879), 10 Ch. D. 558. *Mentd. Back v. Hay* (1877), 5 Ch. D. 235; *Cummins v. Heron* (1877), 36 L. T. 41; *West v. White* (1877), 4 Ch. D. 631; *Ormerod v. Todmorden Joint Stock Mill Co.* (1882), 8 Q. B. D. 664; *Jones v. Andrews* (1888), 58 L. T. 601.

991. —.]—In a suit for specific performance, which was commenced before Jud. Act, 1873 (c. 66), came into force, & in which pltf. claimed damages against one of defts., pltf. acting on a notice lately issued by the senior registrar, entered the action with the associates of the Exch. Div. for trial before a judge & special jury. On a motion by defts. that the action might be heard before the Vice-Chancellor:—*Held*: under Ord. 36, rr. 3, 26, pltf. has no absolute right to have his action tried before a judge & jury, but the ct. or a judge has a discretion in the matter, & the action, being one for specific performance, was a proper one to be tried by a judge of the Ch. Div.—*PILLEY v. BAYLIS* (1877), 5 Ch. D. 241; 46 L. J. Ch. 847; 36 L. T. 206.

Annotations:—Refd. Ruston v. Tobin (1879), 10 Ch. D. 558. *Mentd. Brooke v. Wigg* (1878), 8 Ch. D. 510.

q. Joinder of actions.]—Where a person sues for specific performance in respect of one contract as exor. & in respect of another on his own behalf, &

992. ———.]—An action for specific performance was directed, against the desire of deft., to be tried without a jury.—*USIL v. WHELPTON* (1881), 50 L. J. Ch. 511; 45 L. T. 39; 29 W. R. 799.

———.]—See R. S. C., Ord. 36, r. 3.

993. Discovery—Production of bill in previous compromised proceedings for specific performance.]

—Where, in a suit for specific performance of a contract to sell, it was discovered that some other specific performance suit had been commenced against defts., but compromised:—*Held*: pl'tfs. were entitled to a copy of the bill in the compromised suit, notwithstanding the opposition of pl'tfs. in that suit to any copy being furnished.—*COATES v. BROWN* (1873), 42 L. J. Ch. 378.

994. ——— Production of indorsements on counsel's brief.]—A lunatic was tenant in tail in possession of an estate with remainder to his committee in tail. An agreement for making a road for the common benefit of the lunatics of two adjoining estates was entered into & approved by the Lords Justices on behalf of the lunatic, & as it was alleged, by the committee on her own behalf. The lunatic died without issue, & the agreement was not executed in his lifetime. After his death the committee refused to execute or perform the agreement. In a writ for specific performance she declined to produce the indorsements upon counsel's briefs, shorthand notes, & other documents relating to the proceedings in lunacy:—*Held*: she must produce them as showing whether she was bound by the agreement in respect of her own interest.—*Re BROWN, TYAS v. BROWN* (1880), 42 L. T. 501; 28 W. R. 575.

995. Evidence—Necessity for production of contract.]—At the hearing of a claim for specific performance, the original Contract must be proved & produced.—*MARSHALL v. DAVIES* (1850), 16 L. T. O. S. 209; 14 Jur. 997.

2.—COURTS HAVING JURISDICTION.

See, generally, COURTS, Vol. XVI., pp. 172–175, Nos. 780–809.

996. Chancery Division—Irrespective of sum involved.]—B. bid for a lot at an auction, & signed the contract, but refused to complete, although he had signed an order for payment of the money. A. filed a claim for specific performance, & B. was examined. His answer & his deposition were wholly contradictory, & the ct. decreed specific performance, with costs. The discretion of the ct. to entertain a claim is judicially discretionary, & a claim for £50 is not too small for the jurisdiction of the ct.—*BENNETT v. SMITH* (1852), 20 L. T. O. S. 28; 16 Jur. 421.

———.]—See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 56 (1) (b).

997. Bankruptcy Court—Sale under order of

objection is not made to the joinder of the actions in manner prescribed by the rules, & defts. are not prejudicially affected by the joinder, such joinder is no obstacle to a decree of specific performance.—*BECK v. ERICKSON* (1908), 28 N. Z. L. R. 43.—N.Z.

PART V. SECT. 2.

r. Whether county court.]—*McMILLAN v. WILLIAMS* (1894), 9 Man. L. R. 627.—CAN.

t. ———.]—Man. County Ct. has no jurisdiction to entertain an action for specific performance of a contract for the sale of land.—*Miquez v. HARRISON* (1914), 30 W. L. R. 39; 25 Man. L. R. 40; 7 W. W. R. 650; 20 D. L. R. 233.—CAN.

a. District court.]—*BYERS v. SINGLETON* (Sask.) (1922), 65 D. L. R. 736; 14 Sask. L. R. 195; [1921] 2 W. W. R. 71.—CAN.

b. Saskatchewan court.]—Pl'tf. brought this action to compel specific performance of an agreement entered into by deft. by which deft. agreed to exchange lands in Sask. owned by him for lands in Iowa owned by pl'tf.:—*Held*: the conveyance of the land in Iowa was in effect the purchase-price of the land in Sask.; the Sask. ct. did not make a decree against the Iowa property, but decreed that upon the conveyance of the Iowa property there should be a conveyance of the Sask. property, & so had jurisdiction to order specific performance.—*TUCKER v. JONES* (1915), 33 W. L. R. 1; 11

court.]—When a sale takes place under an order of the [Bkpcy.] Ct., the ct. has jurisdiction to decree specific performance.—*Re BARRINGTON, Ex p. SIDEBOTHAM* (1834), 3 Deac. & Ch. 818; 1 Mont. & A. 655; 3 L. J. Bcy. 122, Ct. of R.; *affd. sub nom. Re BARRINGTON, Ex p. BARRINGTON* (1835), 4 Deac. & Ch. 461; 2 Mont. & A. 245.

Annotation:—N.F. *Re Goren, Ex p. CUTTS* (1838), 3 Deac.

998. S. P. Re BARRINGTON, Ex p. SIDEBOTHAM (1835), 4 Deac. & Ch. 693; 2 Mont. & A. 146; 4 L. J. Bcy. 27, Ct. of R.

999. ———.]—The Ct. of Review has not jurisdiction to order the specific performance of a contract against a purchaser at a sale which took place under the common order made by that Ct. or in petition of an equitable mtgee.—*Re GOREN, Ex p. CUTTS* (1838), 3 Deac. 242; 3 Mont. & A. 549; 2 Jur. 391; *sub nom. Re BRETTELL, Ex p. GOREN*, 7 L. J. Ch. 187, L. C.; *reversg. S. C. sub nom. Re GOREN, Ex p. BRETTELL*, 3 Deac. 111, Ct. of R.

1000. Court of King's Bench.]—*WILLIAMS v. SNOWDEN*, [1880] W. N. 124.

County court.]—See COUNTY COURTS, Vol. XIII., pp. 471, 474, 485, 486, Nos. 207, 232–235, 353–358.

Mayor's & City of London Court.]—See MAYOR'S COURT, Vol. XXXIV., p. 528, Nos. 18–21.

SECT. 3.—BY AND AGAINST WHOM AVAILABLE.

Enforcement of particular contracts generally, see Part IV., ante.

1001. By whom—Assignee—If assignee of whole agreement.]—*DYER v. PULTENEY* (1740), Barn. Ch. 160; 27 E. R. 596, L. C.

Annotation:—*Apld. Fenwick v. Bulman* (1869), L. R. 9 Eq. 165.

1002. ———.]—In a conveyance of a plot of land, reserving the mines under it to the vendor, there was a covenant by the vendor with the purchaser, that, in case the vendor, his heirs or assigns, should at any time thereafter sell, or agree to sell, to any person the mines under some adjoining lands belonging to him, he, his heirs or assigns, would at the same time offer to the purchaser of the plot of land, his heirs or assigns, the mines under that plot, & give him & them the refusal of the same for one month from the time such offer should be made at the same price per acre as the vendor, his heirs or assigns, should have agreed to sell the adjoining mines. If the purchaser, his heirs or assigns, should accept such offer, & within such month agree to purchase the mines so offered at the price at which they should be offered, the vendor, his heirs or assigns, should convey the same to the purchaser, his heirs or assigns:—*Held*: the performance of the covenant could be enforced by assigns of the purchaser against devisees of the vendor.—*BIRMINGHAM*

W. W. R. 620; 25 D. L. R. 278; 8 Sask. L. R. 387.—CAN.

c. High Court.]—In a suit for specific performance of an agreement made in Bombay, but relating to land situate outside the original jurisdiction of the High Ct., & to realise a mtge. debt by sale of the said land:—*Held*: the ct. had jurisdiction to try the suit & to order a sale of the mtged. land.—*SHRIMANT MAHARAJ YASHVANTRAY HOLKAR v. DADABHAI CURSETJI ASH-BURNER* (1890), 1 L. R. 14 Bom. 353.—IND.

PART V. SECT. 3.

d. By whom—Whether personal representative of party to contract.]—Where the personal quality of the party, with whom a contract is made,

Sect. 3.—By and against whom available. Sect. 4: Sub-sect. 1.]

CANAL CO. v. CARTWRIGHT (1879), 11 Ch. D. 421; 48 L. J. Ch. 552; 40 L. T. 784; 27 W. R. 597.

Annotations:—Mentd. Re Blight, Blight v. Hartnall (1881), 45 L. T. 524; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D.

1003. ——— Of mortgagee.] Certain moneys & benefits were secured to A. under an agreement with the provisional trustee of a projected co. A. mortgaged his interest in the moneys secured by this agreement:—*Held*: the assignees of A.'s mtgee. could sustain a bill for specific performance of the agreement against the co. for the purpose of enforcing their charge.—BROWNE v. LONDON NECROPOLIS & NATIONAL MAUSOLEUM CO. (1857), 6 W. R. 188.

———.]—*See, also, SALE OF LAND, Vol. XL., pp. 206, 207, Nos. 1725, 1726.*

1004. ——— Person not party to contract—Entitled to benefit of contract.]—Specific performance decreed at the instance of a person entitled to the benefit of an agreement, though not a party to it.

Pltf. is the proper person to bring this bill. . . . It is certain that if one person enters into an agreement with another for the benefit of a third person such third person may come into a ct. of equity & compel specific performance (LORD ELDON, C.).—HOOK v. KINNEAR (1743), 3 Swan. 417, n.; 36 E. R. 931, L. C.

1005. ——— Alteration of condition on faith of contract.]—HILL v. GOMME, No. 855, *ante*.

——— Whether proper party to action.]—*See Sect. 4, sub-sect. 2, post.*

——— Trustee in bankruptcy.]—*See BANKRUPTCY, Vol. V., pp. 983, 984, Nos. 8045–8050.*

——— Agreements between landlord & tenant.]—*See LANDLORD & TENANT, Vol. XXX., pp. 400, 401, Nos. 635–643; Vol. XXXI., pp. 93–94, Nos. 2341–2344.*

——— Marriage settlements.]—*See SETTLEMENTS, Vol. XL., p. 490, Nos. 379, 380.*

——— Commissioner of Woods & Forests.] *See CONSTITUTIONAL LAW, Vol. XL., p. 585, No. 864.*

——— Infants.]—*See INFANTS, Vol. XXVIII., p. 163, Nos. 200, 201.*

1006. Against whom—Parties to contract.]—The bill was good, but good only as an ordinary bill for specific performance, & therefore to be enforced only against those persons who were parties to the contract (LORD COTTENHAM, C.).—ATTWOOD v. SMALL (1840), 6 Cl. & Fin. 523, n.; 4 Jur. 239; 7 E. R. 793, L. C.; *varying S. C. sub nom. ATTWOOD v. BURTON, ATTWOOD v. BAILEY, ATTWOOD v. SMALL (1839), 8 L. J. Ch. 145.*

Annotations:—Refd. Holland v. Baker (1843), 3 Hare, 68. Mentd. Benson v. Heathorn (1812), 1 Y. & C. Ch. Cas. 326.

1007. ——— Assignee—Plaintiff's acquiescence in assignment.]—Bill for specific performance of an agreement to purchase, against the original vendee & an assignee of his contract, dismissed as against the former, pltf. being held, by delivery of abstract & offer to execute a conveyance, to have accepted the latter as purchaser.—HOLDEN v. HAYN & BACON (1815), 1 Mer. 47; 35 E. R. 594.

1008. ——— Married woman—With separate estate.]—A married woman entitled to separate estate, & living apart from her husband, entered into a contract for the purchase of some leasehold property. She entered into this contract as if she were a *feme sole*. A bill for specific performance was filed against her by the vendor. On his dis-

covering from her answer that she was a married woman the bill was amended by making her husband a party. An allegation was introduced that she had separate property sufficient to answer the suit, & her trustee was also made a party:—*Held*: (1) the contract could be enforced against the separate estate; (2) the proper form of decree in such a case is to declare that the purchase-money, interest, & costs are chargeable on the married woman's separate estate, & the ct. does charge the same accordingly, & then to direct an inquiry of what the separate estate consists, & in whom the same is vested.—PICARD v. HINE (1869), 5 Ch. App. 274; 18 W. R. 178, L. C. & L. J.

Annotations:—As to (2) Apld. Davies v. Jenkins (1877), 6 Ch. D. 728. Expld. Pike v. Fitzgibbon, Martin v. Fitzgibbon (1881), 17 Ch. D. 454. Generally, Mentd. Penley v. Anstruther (1883), 52 L. J. Ch. 367.

1009. ——— Person adopting contract by conduct—Provision in contract excluding demand against him.]—If a person, not originally a party to an agreement, acts under it, & professes to render accounts & make payments according to its provisions, a bill for the performance of it may be maintained against him, even though the original agreement stipulated that it was not to extend to create any demand against him.—COCKELL v. WHITING (1824), 3 L. J. O. S. Ch. 6.

1010. ——— Owner of ship—Contract between master & crew.]—Articles of agreement are executed between the crew of a vessel, of the one part, & the captain of the other part, containing a stipulation, that the seamen are not to have any demand against the owner of the ship: the owner subsequently acts under the agreement, & in pursuance of it, makes payment to the seamen out of the proceeds of the cargo:—*Held*: the owner, by such conduct, becomes a party to the agreement, & a bill for the performance of the agreement may be maintained against him.—GOSTLING v. SMITH (1824), 3 L. J. O. S. Ch. 5.

1011. ——— Person not party to contract.]—An agreement by *feme*, when *sole*, that if she die without issue, she would leave S. £500, or the land. Decreed the agreement to be performed against the husband, who was devisee of the wife.—GOILMERE v. BATTISON (1682), 1 Vern. 48; 23 E. R. 301; *sub nom. GOYLMER v. PADDISTON*, 2 Vent. 353, L. C.

Annotations:—Distd. Re Parkin, Hill v. Schwarz, [1892] 3 Ch. 510. Refd. Price v. Powel (1729), 1 Barn. K. B. 201; Syngc v. Syngc (1894), 70 L. T. 221.

1012. ——— Person interested under informal agreement.]—The extrix. of a lessee agreed to sell to A. the residue of her term, except a day, & the fixtures on the premises for £400. This agreement was entered into by the extrix. without advice & there was no written memorandum of it except a letter written by the extrix. to her own solr. a few hours afterwards. Subsequently the landlord knowing that there had been a negotiation, if not an agreement, between the extrix. & A. agreed with her for the purchase of the residue of the term for £550. A. on hearing of this offered the extrix. if she would complete her contract with him £1,000 as purchase-money & indemnity against any proceedings on the part of the landlord. She accepted the offer, & demised the premises to A., for the whole term wanting a day:—*Held*: (1) the original agreement, if any, with A. was such in its nature & circumstances as not to be of any validity in equity unless the price was shown to be equal or more than equal to the value of the property; (2) as this was not shown the landlord was entitled

is a material ingredient in the contract the right to enforce specific performance ceases upon the death of the per-

son with whom the contract is made, & cannot be claimed by his legal representative.—MOHENDRA NATH MOOKER-

JEE v. KALI PRASAD JOHURI (1902), 1 L. R. 30 Cal. 265; 7 C. W. N. 229.—IND.

to a specific performance of his agreement not only against the extrix. but against A.—*GOODWIN v. FIELDING* (1853), 4 De G. M. & G. 90; 1 W. R. 343; 43 E. R. 441, L. JJ.

1013. ———.]—The registered owner under a Colonial Land Registry Act of an "absolute fee" in certain land in the province entered into an agreement to sell it to first resp., who thereupon registered himself under that Act as owner of a "charge" upon the land. Applt. claimed to be, & unless precluded by the Act, was entitled to the land under an unregistered conveyance made by the vendor before registration of the "absolute fee." Resps., second resp. being a sub-purchaser, claimed specific performance of the agreement of sale against the vendor & applt., & the latter counterclaimed for a declaration of her title & for rectification of the register. At the trial the unregistered conveyance was put in & evidence was given that the vendor in an affidavit, & by verbal testimony in previous proceedings, had admitted the title of applt.; the vendor did not defend the counterclaim:—*Held*: resps. were not entitled to a decree for specific performance against applt. as she was not a party to the agreement of sale.—*HOWARD v. MILLER*, [1915] A. C. 318; 84 L. J. P. C. 49; 112 L. T. 403, P. C.

Annotation.—*Refd.* Central Trust & Safe Deposit Co. v. Snider, [1916] 1 A. C. 266.

1014. ——— **Party with notice of contract.**]—*HOLLOWELL, KIRK & MERRY v. ABNEY, ABNEY & KENDALL* (1863), Nels. 59; 21 E. R. 789; *sub nom.* *MERRY v. ABNEY, ABNEY & KENDALL*, 1 Cas. in Ch. 38; Freem. Ch. 151.

Annotations.—*Refd.* Penn v. Browne (1697), Freem. Ch. 214, *Le Neve v. Le Neve* (1747), 1 Ves. Sen 61.

1015. ———.]—*DANIELS v. DAVISON*, No. 1370, *post*.

1016. ———.]—A. made an equitable mtg. of certain premises to B., & he afterwards entered into an agreement to grant a lease of the premises to C., who had notice of the prior charge. A. became bkpt. before the lease was executed, & on the petition of B., an order in bkpcy. was made, under which the premises were sold, & B. became the purchaser, & retained the amount of his equitable mtg. out of the purchase-money:—*Held*: on a bill filed by C. for specific performance of the agreement B. having become the purchaser, & thereby united his equitable mtg. with the equity of redemption, was bound to perform the agreement.—*SMITH v. PHILLIPS* (1837), 1 Keen, 694; 6 L. J. Ch 253; 48 E. R. 474.

1017. ———.]—If a vendor contract with two different persons for the sale to each of them of the same estate, the ct. will, *prima facie*, enforce the contract which was first made; & if the party with whom the second contract was made should, after notice of the first contract, procure a conveyance of the legal estate in pursuance of the second contract, the ct. will, in a suit for specific performance by the first purchaser against the vendor & the second purchaser, decree the latter to convey

the estate to pltf.—*POTTER v. SANDERS* (1846), 6 Hare, 1; 67 E. R. 1057.

Annotations.—*Mentd.* British & American Telegraph Co. v. Colson (1871), L. R. 6 Exch. 108; *Re Imperial Land Co. of Marseilles, Harris' Case* (1872), 7 Ch. App. 587; *Household Fire Insce. v. Grant* (1879), 4 Ex. D. 216.

1018. ———.]—When a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, & persons so dealing cannot be heard to deny notice of the title under which the possession is held. Nor is it necessary that such possession should be continually visible or actively asserted. Where therefore the purchasers of mines took possession under the agreement for purchase without any conveyance:—*Held*: a subsequent purchaser of the land without any exception of mines took with notice of the agreement, & was bound specifically to perform it.—*HOLMES v. POWELL* (1856), 8 De G. M. & G. 572; 44 E. R. 510, L. JJ.

Annotation.—*Mentd.* Cavander v. Bulteel (1873), 29 L. T. 710.

1019. ———.]—In the case of contracts relating to land, as in all other contracts, equity enforced them, not only as against the man who entered into them, but . . . as against persons who took his estate with notice of the contract, or trust, or obligation, with which he had bound his estate (*JAMES, L.J.*).—*GREAVES v. TOFIELD* (1880), 14 Ch. D. 563; 50 L. J. Ch. 118; 43 L. T. 100; 28 W. R. 840, C. A.

Annotations.—*Refd.* *Re Monolithic Building Co., Tacon v. The Co.*, [1915] 1 Ch. 613. *Mentd.* *Jay v. Johnstone*, [1893] 1 Q. B. 25; *Foster v. G. E. Ry.*, [1920] 2 K. B.

1020. **Devisees of party.**]—*BIRMINGHAM CANAL CO. v. CARTWRIGHT*, No. 1002, *ante*.

— **Commissioner of Woods & Forests.**]—*See* CONSTITUTIONAL LAW, Vol. XL., p. 585, No. 861.

— **Infants.**]—*See* INFANTS, Vol. XXVIII., p. 162, No. 199.

— **Trustee in bankruptcy.**]—*See* BANKRUPTCY, Vol. V., p. 993, Nos. 8111–8114.

— **Personal representatives.**]—*See* EXECUTORS, Vol. XXIV., p. 623, Nos. 6529–6530.

— **Agreements between landlord & tenant.**]—*See* LANDLORD & TENANT, Vol. XXX., pp. 381, 401–404, Nos. 450, 451, 644–674; Vol. XXXI., p. 70, Nos. 2170–2178.

— **Marriage settlements.**]—*See* SETTLEMENTS, Vol. XL., pp. 481, 482, 490, 491, Nos. 302, 303, 381–385.

SECT. 4.—PARTIES.

SUB-SECT. 1.—PARTIES TO THE CONTRACT.

1021. General rule.]—To a bill founded on a contract, the parties to the contract are, in general, the only necessary parties.—*HUMPHREYS v. HOLLIS, DOWN v. HOLLIS* (1821), Jac. 73; 37 E. R. 777.

1022. ———.]—*TASKER v. SMALL*, No. 1042, *post*.

1023. ———.]—To a common bill for the specific performance of a contract of sale, the parties to

1014 i. *Against whom—Party with notice of contract.*]—*BAXTER v. ROLLO* (1912), 21 W. L. R. 892; 5 D. L. R. 764; 2 W. W. R. 786.—CAN.

a. ——— *Sheriff.*]—*Seemle*: the ct. will entertain a bill to compel a sheriff to convey property sold under an execution; but the execution debtor must be made a party.—*WITHAM v. SMITH* (1855), 5 Gr. 203—CAN.

f. *Tenant in tail.*]—A decree for specific performance will be made against a tenant in tail.—*GRAHAM v. GRAHAM* (1858), 8 Gr. 372.—CAN.

g. ——— *Purchasers with notice of*

covenant for maintenance.]—*Mc v. McCASKILL* (1886), 12 O. R. 783.—CAN.

h. ——— *Managing director of company signing contract without per procurator signature.*]—*LITCHFIELD v. SASKATCHEWAN & BATTLE RIVER LAND & DEVELOPMENT CO. (Sask.)* (1908), 7 W. L. R. 475.—CAN.

PART V. SECT. 4, SUB-SECT. 1.

k. *Person not in possession of miner's right.*]—As between vendor & purchaser of a mining claim it is not necessary that the purchaser should be the holder of a miner's right to

enable him to sue in equity for specific performance, it being sufficient if the vendor have one, & in the absence of evidence either way, the ct. will not presume that the vendor had not a miner's right.—*LEARMOUTH v. MORRIS* (1869), 6 W. W. & A'B. (Eq.) 74.—AUS.

l. *Personal representative of purchaser.*]—In proceeding against the heir-at-law of a purchaser for specific performance or rescission of the contract, the personal representative of deceased is a necessary party, even though an *error de son tort* is a debt, & though letters of administration had

Sect. 4.—Parties: Sub-sects. 1 & 2, A.]

the contract are the only proper parties.—*WOOD v. WHITE* (1839), 4 My. & Cr. 460; 8 L. J. Ch. 209; 3 Jur. 117; 41 E. R. 178, L. C.

Annotation:—Mentd. *Ferrand v. Wilson* (1845), 15 L. J. Ch. 41.

1024. —.].—*PEACOCK v. PENSON*, No. 370, ante.

1025. —.].—Although, in ordinary cases of specific performance, the parties to the contract are the only proper parties to the suit, yet, if the settlement had been purely voluntary, the persons interested under it would have been properly made defts.; for in their absence the question whether it was voluntary or for value could not have been tried.—*TOWNEND v. TOKER* (1866), 1 Ch. App. 446; 35 L. J. Ch. 608; 14 L. T. 531; 12 Jur. N. S. 477; 14 W. R. 806, L. J.

Annotations:—Mentd. *Rosher v. Williams* (1875), L. R. 20 Eq. 210; *Crossman v. R.* (1886), 18 Q. B. D. 256; *Bird v. I. R. Comrs.* (1924), 12 Tax Cas. 785.

1026. —.].—Bill by unpaid vendors against two railway cos., the purchasers & their lessees, in possession of the land, for specific performance of the contract:—*Held*: the lessees were properly made parties.

Ordinarily, a person not being a party to the contract ought not to be brought before the ct. But it is otherwise where possession is sought by the bill, & the person in possession will be affected by the decree (*STUART, V.-C.*).—*WINCHESTER (BP.) v. MID-HANTS RY. CO.* (1867), L. R. 5 Eq. 17; 37 L. J. Ch. 64; 17 L. T. 161; 32 J. P. 116; 16 W. R. 72.

Annotations:—Folld. *Goodford v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307; *Marling v. Stonehouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 306. *Refd.* *Drax v. Somerset & Dorset Ry.* (1868), 38 L. J. Ch. 232.

1027. —.].—Specific performance can only be decreed between the parties to the original contract or those claiming under them. A lessee of premises covenanted with his underlessees of part, that in case he obtained an extension of the term or a renewal of his lease, he would give to the underlessees a like renewal or extension of his under term. A lease was subsequently taken from the ground landlord for an extended term in the

name of a trustee for the separate use of the lessee's wife. The underlessees filed this bill against the lessee, his wife, & her trustee, charging that the extended lease had been taken in a trustee's name, in order to defeat their rights under the lessee's covenant, & praying that the wife & her trustee might be decreed to grant an underlease to the pl'ts. for the extended term:—*Held*: the relief sought could not be given, as the suit was virtually one for specific performance against persons who were not parties to the original covenant or contract to renew the underlease.—*LUMLEY v. TIMMS* (1873), 28 L. T. 157; 21 W. R. 319; *affd.*, 28 L. T. 608; 21 W. R. 494, L. C.

1028. —.].—The old practice under which, in suits for specific performance, the parties to the agreement were the only necessary parties to the suit still holds good.

Where, therefore, in an action for specific performance of an agreement to purchase lands deft. applied, under R.S.C., Ord. 16, r. 13, that certain persons, who had claimed the property, might be added as defts. in order that all questions of title between pl'ts. & such persons might be determined, the ct. refused to grant the application, on the ground that the presence of such persons was unnecessary to decide the question whether pl'tf. could or could not make a good title to the property.—*HARRY v. DAVEY* (1876), 2 Ch. D. 721; 45 L. J. Ch. 697; 34 L. T. 842; *sub nom.* *HARVEY v. DAVEY*, 24 W. R. 576.

1029. Covenant with trustee—Trustee necessary party—Action on covenant by persons interested.—Upon a bill for a specific performance of a covenant under hand & seal with A. for the benefit of B., A. must be a party to the suit. But if it had been only a promise, either A. or B. might have brought the action.—*COOKE v. COOKE* (1687), 2 Vern. 36; 1 Eq. Cas. Abr. 73; 23 E. R. 634, L. C.

Annotation:—Mentd. *Oates v. Jackson* (1741), 7 Mod. Rep. 439.

1030. —.].—In a bill to compel the performance of a covenant to surrender a copyhold estate to A., in trust for others, A. must be a party.—*COPE v. PARRY* (1821), 2 Jac. & W. 538; 37 E. R. 733.

not been issued before the filing of the bill.—*O'NEAL v. McMAHON* (1851), 2 Gr. 145.—CAN.

m. Heir-at-law of purchaser missing—Whether administration of heir's estate dispensed with.—*BURNS v. CANADA CO.* (1859), 7 Gr. 587.—CAN.

n. Infant heir.—Where, in a suit by personal representatives of a vendor for the specific performance of the contract of sale, an infant heir was joined as a co-pl'tf., the ct. refused to make a decree, although the bill had been taken *pro confesso* against deft., the purchaser, & ordered the case to stand over, with a view to the pl'ts. amending their bill, by making the infant a party deft., in order that the contract might be established against him.—*HAMILTON v. WALKER* (1865), 12 Gr. 172.—CAN.

o. Personal representatives of vendor.—*ADDAMAN v. STOUT* (1867), 13 Gr. 692.—CAN.

p. Husband & wife.—A husband & wife may jointly maintain one bill for specific performance of a covenant made by them for the sale of the land of the wife; but the wife must sue by her next friend.—*JESSOP v. McLEAN* (1868), 15 Gr. 489.—CAN.

q. —.].—*LOUGHEAD v. STUBBS* (1880), 27 Gr. 387.—CAN.

r. —.].—*MUTZ v. MURR* (Alta.) (1914), 26 W. L. R. 711.—CAN.

t. —.].—Husband & wife may

maintain a suit for specific performance of an agreement by them with a third party, to sell him lands of which the husband is seized in his wife's right.—*FENNELLY v. ANDERSON* (1851), 1 L. Ch. R. 706; 4 Ir. Jur. 33.—IR.

a. Vendor ejecting heirs of purchaser.—Where a vendor brought ejectment & turned the heirs of the purchaser out of possession:—*Held*: he had disabled himself from coming to the ct. for specific performance, & could only do so, in order to bind their interest in such a manner as to render the property saleable.—*HAWN v. CASHION* (1873), 20 Gr. 518.—CAN.

b. Next friends of married women.—Where the vendors, pl'ts., in an action for the specific performance of a contract for sale of land, were married women, & their husbands were joined as co-pl'ts., & deft. demurred *ore tenus*, on ground of misjoinder of parties, leave was given to amend by making the husbands defts., or by adding next friends for the married women as co-pl'ts.—*YOUNG v. ROBERTSON* (1880), 2 O. R. 434.—CAN.

c. Agent.—Where an agent makes a contract for the purchase of land in his own name, the vendor knowing that the agent is acting for another person, whose name is not disclosed, the agent cannot maintain an action in his own name against the vendor for specific performance of the contract.—*SMITH v. HUGHES* (1903), 23

C. L. T. 108, 5 O. L. R. 238, 1 O. W. R. 19.—CAN.

d. Person having legal & person having equitable interest in the property.—*MUTCH v. MOFFATT* (1908), 5 E. L. R. 491.—CAN.

e. Purchaser from original vendor—Land out of the jurisdiction.—Specific performance of an agreement for the sale of land situate out of the jurisdiction may be decreed where the parties are within the jurisdiction, even against a purchaser from the original vendor, if he has notice of the agreement.—*SMITH v. ERNST* (No. 2) (1912), 22 Man. L. R. 363; 20 W. L. R. 772; 21 W. L. R. 483; 1 W. W. R. 1250; 2 W. W. R. 498; 3 D. L. R. 736.—CAN.

f. Vendor.—A vendor of land may in his own name sue the vendee for specific performance of the contract of sale, notwithstanding the fact that he has assigned all moneys due & accruing in respect of such contract, & that whether the assignment amounts to an absolute assignment within the meaning of Judicature Ordinance, s. 10 (14), or not.—*MAGRATH v. COLLINS* (No. 2) (Alta.), [1917] 1 W. W. R. 487. CAN.

g. Right of one party to contract—To compel other parties to pay money to third party.—One party to an agreement cannot by an action for specific performance compel his co-parties thereto to pay money to a third party

1031. — Acting on behalf of company—Members of company necessary parties.]—Demurrer allowed to a bill for the specific performance of an agreement for a lease entered into by the trustees of a numerous co. for the use of the co., because none of the members of the co. were parties to the bill.—*DOUGLAS v. HORSEFALL* (1825), 2 Sim. & St. 184; 57 E. R. 315.

1032. Covenant with co-trustees—One co-trustee not duly appointed—Joinder with co-trustees—As co-plaintiff.]—Testator devised his real estates to A., B., C. & D. & their heirs, on certain trusts which required the legal estate to be vested in them, & gave a power of sale to them or the survivors or survivor of them, or the heirs of the survivor, & declared that their or his receipts or receipt should be a good discharge to the purchaser, & if any of them should die or decline to act, that it should be lawful & he thereby willed & directed that the survivors of them should, immediately or within two months afterwards, by any deed, nominate some fit person to be a trustee in his place. D. died; & A. & B. by one deed, & C. by another, both of which were executed more than two lunar months, but less than two calendar months after D.'s death, nominated a new trustee, but did not convey the legal estate to him. A., B., C., & the new trustee agreed to sell the estates to M., who objected to complete his purchase, first, because the appointment of the new trustee had not been made within two lunar months, secondly, because it had not been made by one single deed, & lastly, because the power of sale was suspended during the vacancy in the trust:—*Held*: the new trustee, though not duly appointed, might join with A., B. & C. in a suit for a specific performance.—*WARBURTON v. SANDYS* (1845), 14 Sim. 622; 14 L. J. Ch. 431; 5 L. T. O. S. 262; 9 Jur. 503; 60 E. R. 499.

Annotations:—*Refd.* *Welstead v. Colville* (1860), 28 Beav. 537. *Mentd.* *Re Bacon*, *Toovey v. Turner*, [1907] 1 Ch. 475; *Re Bayley-Worthington & Cohen's Contract*, [1908] 1 Ch. 26.

1033. Agreement with company—Enforcement through representative—Treasurer & directors.]—A joint-stock co. established by Act of Parliament, vesting in them all property then belonging to them, & authorising them to bring actions in the name of their treasurer for the time being, having purchased an estate pending a suit against the vendors, to compel the specific performance of an agreement to grant a lease of part; on a bill by the vendee against the treasurer & directors, pltf's. were declared entitled to a lease, & the treasurer was enjoined from disturbing their possession, though the rest of the proprietors, being very numerous, were not parties; but no decree could

be made for the execution of a lease.—*MEUX v. MALTBY* (1818), 2 Swan, 277; 36 E. R. 621.

Annotations:—*Consd.* *Small v. Attwood* (1832), You. 407. *Apprvd.* *Attwood v. Small* (1840), 6 Cl. & Fin. 523, n. *Consd.* *Taff Vale Ry. v. Amalgamated Soc. of Railway Servants*, [1901] A. C. 426. *Refd.* *Markt v. Knight S.S. Co.*, *Sale Frazar v. Knight S.S. Co.*, [1910] 2 K. B. 1021; *Hardie & Lane v. Chiltern*, [1928] 1 K. B. 663.

1034. — Directors—Agreement made by agent.]—To a suit by the directors of a joint-stock co., on behalf of themselves & all other shareholders, seeking to have the benefit of an agreement entered into by an agent of the co., it is not necessary that all the shareholders should be made parties.—*TAYLOR v. SALMON* (1838), 4 My. & Cr. 134; 8 Sim. 449; 41 E. R. 53, L. C.

Annotations:—*Consd.* *Nelthorpe v. Holgate* (1844), 8 Jur. 551; *Mozley v. Alston* (1847), 1 Ph. 790. *Refd.* *Wallworth v. Holt* (1841), 4 My. & Cr. 619; *Carter v. Palmer* (1842), 8 Cl. & Fin. 657; *Carlisle v. S. E. Ry.* (1850), 1 Mac. & G. 689; *Fawcett v. Laurie* (1860), 1 Drow. & Sm. 192. *Mentd.* *Dale v. Hamilton* (1846), 5 Hare, 369; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500.

Liability of personal representative on death of party.]—*See* EXECUTORS, Vol. XXIV., p. 644, Nos. 6704-6706.

SUB-SECT. 2.—STRANGERS TO THE CONTRACT.

A. In General.

1035. Sale of settled estate—Wife & children interested under marriage settlement.]—A husband reserves to himself a power by his marriage settlement, to sell the estate, which is settled, provided he settles other lands of a certain value to the same uses. He does settle other lands of that value accordingly, & then sells the lands which were originally purchased. The husband brings a bill against the purchaser in order to compel him to complete his purchase. The wife & children must be made defts. to this bill.—*LAMPLUGH v. HEBDEN* (1740), Barn. Ch. 371; 27 E. R. 683, L. C.; *subsequent proceedings* (1741), Dick 78, L. C.

1036. Sale of land—Stewards & receivers.]—To a bill against a vendor for a specific performance his stewards & receivers ought not to be made parties.—*M'NAMARA v. WILLIAMS* (1801), 6 Ves. 143; 31 E. R. 982, L. C.

Annotations:—*Distd.* *Wilson v. Clapham* (1819), 1 Jac. & W. 36. *Mentd.* *A.-G. v. Chesterfield* (1854), 18 Beav. 596.

1037. — Tenants of land.]—*ROBERTSON v. GREAT WESTERN RY. CO.*, No. 1066, *post*.

1038. — Purchasers of separate lots.]—Two houses, held under one lease, were sold in separate lots, & it was stipulated that the purchasers should be parties to each other's assignment:—*Held*: the purchaser of Lot 2 was not a necessary party to a suit for specific performance against the pur-

pursuant to mutual covenants to do so.—*BELGO-CANADIAN REAL ESTATE CO., LTD. v. ALLAN (Man.)*, [1925] 1 D. L. R. 41; [1924] 3 W. W. R. 833.—CAN.

h. One of two owners of undivided half interests in land.]—Where the two owners of undivided half interests in land join in giving a stranger an option to purchase the whole interest & the option is accepted, one of them may compel specific performance, if the other, on refusing to join in the bringing of the action, is made a deft. thereto.—*VITALY v. BRYAN (Alta.)*, [1926] 3 W. W. R. 785.—CAN.

k. Receiver.]—Where the receiver in a suit had, by order of ct., sold certain property in the suit, & had executed the contract of sale in his own name, a pliant praying for specific performance against the purchaser for refusing to complete the contract was admitted with the receiver as co-pltf., he having obtained leave to sue.—

WILKINSON v. GANGADHAR SIKKAR (1871), 6 B. L. R. 486.—IND.

l. Some of joint-contractors against wish of others.]—Under a single contract to convey land to several persons, it is not open to some of the joint contractees to enforce specific performance of the contract if the other contractees refuse to have specific performances.—*SAFIUR RAHMAN v. MAHARAMUNNESSA BIRI* (1897), I. L. R. 21 Cal. 832.—IND.

PART V. SECT. 4, SUB-SECT. 2.—A.

m. Sale of land—Sub-purchaser on default of purchaser.]—A purchaser of land from A., whose only title to the land is under an agreement of purchase from B. the owner, may, after default of A. in carrying out his contract with B., on notifying B. of his interest & tendering the full amount owing to him by A. if it be refused, maintain an action against both A. & B. for specific

performance & for an order that B. convey to him on payment of the amount due under his agreement with A.—*SVEINSSON v. JENKINS* (1911), 21 Man. L. R. 716.—CAN.

n. — Owner standing by when third person enters into contract.]—Where the owner of an estate stands by & allows a third person to appear as owner, & to enter into a contract as such, the owner will be decreed specifically to perform such contract.—*DAVIS v. SNYDER* (1850), 1 Gr. 134.—CAN.

o. — Executors & trustees.]—A vendor devised his estate to trustees, & on a division among the *cestuis que trust*, the trustees conveyed to one of them the sold property. These facts appeared on a bill by the purchaser against the grantee for specific performance. Defts. set up by answer that the exors. & trustees were necessary parties. The objection was

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chaser of Lot 1.—*PATERSON v. LONG* (1842), 5 Beav. 186; 49 E. R. 548; *subsequent proceedings* (1843), 6 Beav. 590.

1039. — Person interested in subject-matter by contemporaneous contract.]—A bill brought by a purchaser for the specific performance of an agreement to sell Lot A., as described in the particulars of sale, was resisted by the vendors on the ground stated, in their answer, that by an arrangement, to which pltf. was a party, part of Lot A., as described, was deducted from that lot and added to Lot B.:—*Held*: pltf. on amending his bill & putting in issue this averment, was bound to make the purchasers of Lot B. defts. to the suit.—*MASON v. FRANKLIN* (1842), 1 Y. & C. Ch. Cas. 239; 62 E. R. 871.

1040. — Person in possession.]—*WINCHESTER (BP.) v. MID-HANTS RY. CO.*, No. 1026, *ante*.

1041. — Sub-sales & purchases—Joinder of sub-vendor or sub-purchaser.]—Vendors, to their bill against their purchaser for specific performance of, or for rescinding the agreement, made a sub-purchaser a deft.; & the sub-purchaser afterwards filed a bill against his vendor for specific performance of his agreement, & made the original vendors defts.

A demurrer by the original vendors to the sub-purchaser's bill, was overruled on the ground that they had made him a deft. to their bill.—*FENWICK v. BULMAN* (1869), L. R. 9 Eq. 165; 21 L. T. 628; 18 W. R. 179.

1042. Sale by mortgagor — Mortgagee.]—No persons ought to be made parties to a suit for specific performance of a contract for the sale of an estate except the parties to the contract.

When a bill for specific performance is filed by a person who has contracted to purchase the absolute legal & equitable interest in a mtged. estate from the supposed owner of the equity of redemption, neither the mtgee. nor a person who claims an interest in the equity of redemption, but has not joined in the contract, can be made deft.; & the circumstance that the mtgee. does not object to being made a party, but requires the sanction of the person so claiming an interest in the equity of redemption before joining in the conveyance, does not make that person a proper party.—*TASKER v. SMALL* (1837), 3 My. & Cr. 63; Coop. Pr. Cas. 255; 7 L. J. Ch. 19; 1 Jur. 936; 40 E. R. 848.

Annotations.—**Consd.** *Cutts v Thodey* (1844), 2 L. T. O. S. 474. **Distd.** *West Midland Ry. v. Nixon* (1863), 1 Hem. & M. 176. **Appld.** *De Houghton v. Money* (1866), 2 Ch. App. 164. *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165. *Lumley v. Timms* (1873), 28 L. T. 157. **Refd.** *Roberts v. Marchant* (1843), 13 L. J. Ch. 56; *Nelthorpe v. Holgate* (1844), 1 Coll. 203; *Bird v. G. E. Ry.* (1865), 19 C. B. N. S. 268. *Aberaman Ironworks v. Wickens* (1868), 4 Ch. App. 101. *I. R. Comrs. v. Angus, The Same v. Lewis* (1889), 23 Q. B. D. 579; *Richards v. Pryse*, [1927] 2 K. B. 76.

1043. — Person interested in equity of redemption.]—*TASKER v. SMALL*, No. 1042, *ante*.

1044. Sale under power in mortgage—Administratrix of equitable mortgagor.]—An equitable mtgee. having taken from the administratrix of the mtgor. a legal mtge. containing a power of sale & having filed his bill to enforce specific

performance of a contract for sale under the power, the ct. declined to entertain in the suit in the absence of the administratrix & the parties beneficially interested under the mtgor.—*SANDERS v. RICHARDS* (1846), 2 Coll. 568; 63 E. R. 864.

Annotation:—**Refd.** *Cruikshank v. Duffin* (1872), L. R. 13 Eq. 555.

1045. — Persons beneficially interested under mortgagor.]—*SANDERS v. RICHARDS*, No. 1044, *ante*.

1046. Covenant to disentail—Judgment creditors of tenant in tail.]—To a bill by the covenantee for specific performance of a covenant entered into by a tenant in tail in remainder, to disentail the estate after the decease of the tenant for life, judgment creditors of the tenant in tail, whose debts have been made charges on his estate, under Judgments Act, 1837 (c. 110), are not necessary parties.—*PETRE v. DUNCOMBE* (1848), 7 Hare, 24; 17 L. J. Ch. 370; 12 L. T. O. S. 41; 12 Jur. 261; 68 E. R. 10.

1047. Sale by tenant for life—Action against tenant for life in remainder.]—The ct. will not decree specific performance of a contract entered into with a tenant for life for sale of parts of a settled estate in a suit against a tenant for life in remainder alone.—*NORTH STAFFORDSHIRE RY. CO. v. LAWTON* (1863), 3 New Rep. 31.

1048. Sale to railway company—Amalgamated company.]—Bill by a vendor for specific performance of a contract to sell land to the M. K. Ry. co. alleged that, since the date of the contract, which had not been completed, the M. K. Ry. co. had become amalgamated with the S. E. co., & prayed relief against the two cos., or one of them. Demurrer by the S. E. co. to the bill, on the ground that they had not purchased the liabilities of the M. K. Ry. co. overruled.—*HACKER v. MID KENT RY. CO. & SOUTH EASTERN RY. CO.* (1865), 12 L. T. 699; 11 Jur. N. S. 634.

1049. — — —.]—In a suit for the specific performance of a contract against a co., who stated in their answer that since the filing of the bill they had become amalgamated with another co. under a different title, the ct. refused to decree specific performance until the amalgamated co. had been made a party to the suit by amendment.—*POWYS v. SHREWSBURY & POTTERIES JUNCTION RY. CO.* (1867), 15 L. T. 602.

1050. — Lessees of company.]—*WINCHESTER (BP.) v. MID-HANTS RY. CO.*, No. 1026, *ante*.

1051. — Other company working line.]—A railway co. working the line of another co., under parliamentary powers, is a proper & necessary party to a bill for specific performance, filed by an unpaid vendor against that other co., & must bear its own costs of the suit.—*GOODFORD v. STONEHOUSE & NAILSWORTH RY. CO.* (1869), 38 L. J. Ch. 307; 20 L. T. 137; 17 W. R. 515.

1052. — — —.]—The S. Ry. co. purchased lands from C., & agreed to erect a station at A., & that the trains should stop there for passengers & luggage. They entered into possession of the lands before the conveyance was executed, but did not erect a station, & C. served a writ of ejectment upon them. The S. co. then filed their bill against C. praying for the specific performance

overruled.—*BUTLER v. CHURCH* (1871), 18 Gr. 190.—**CAN.**

p. — — —.]—*RUSSELL v. ROMANES* (1879), 3 A. R. 635.—**CAN.**

q. — — — Wife of vendor.]—*SAMPSON v. THOMAS* (Alta.), [1925] 1 W. W. R. 1018.—**CAN.**

r. Proposed acceptor of bill.]—A claim was compromised, the creditors agreeing to receive in satisfaction part

of the debt secured by acceptances of B. indorsed by C., who were not parties to the contract. Before the acceptances were given a bill was filed by the debtor & proposed acceptor for the specific performance of the agreement.—*Held*: the latter was improperly joined as co-pltf.—*HARTSHORE v. GORE BANK* (1867), 13 Gr. 187.—**CAN.**

t. Vendor's heir.]—The principle of

the *Droit de Retrait* (as formerly existing in Jersey) is to place the person exercising the right in the same situation as the vendee; but by the law of Jersey the heir is not bound to perform the stipulations of an original contract where it is personal, where, therefore, a contract was of a mixed nature, the price of the purchase being to be paid partly in money & partly in services.—*Held*: such contract

of the contract. A decree was made ordering specific performance, & that C. should execute a proper conveyance of the lands, & that such conveyance should contain a covenant by the S. co. to erect the station, & that trains should stop there for passengers & luggage. This conveyance was duly executed. Under Acts of Parliament of 1867 and 1873, confirming agreements between the S. co. & the L. S. W. co., the latter co. were empowered to take a lease for 1,000 years of the S. railway, & to work it, & were, during such lease, to be liable to all duties & obligations to which the S. co., if the Acts had not been passed, would be subject & liable. No station was erected. On bill filed by C. against both cos.:—*Held*: though the L. S. W. co. were necessary parties to the suit, no case whatever had been made out against them inasmuch as they were not bound either in law or in equity by the covenant entered into by the S. co. with C. to erect a station, but that they would be bound, when the station was made, to stop their trains there.—*CHURCHILL v. SALISBURY & DORSET RY. CO.* (1875), 23 W. R. 894, L. JJ.

1053. — Debenture-holders.]—In a suit by an unpaid vendor against a railway co., debenture-holders of the co., who in another suit have obtained a receiver are properly made co-defts.—*DRAX v. SOMERSET & DORSET RY. CO.* (1869), 38 L. J. Ch. 232; 19 L. T. 626.

Annotation:—*Apld.* Marling v. Stonehouse & Nallsworth Ry. & Mid. Ry. (1869), 17 W. R. 481.

1054. Charge on expectancy under will—Trustees of will.]—A married woman can give a valid charge on her expectancy under the will or as one of the next of kin of a living person, & such a charge will be enforced after that person's death against separate estate bequeathed by his will to the married woman.

To an action to enforce such a charge the trustees of the will are not necessary parties.—*FLOWER v. BULLER* (1880), 15 Ch. D. 665; 49 L. J. Ch. 784; 43 L. T. 311; 28 W. R. 948.

Annotation:—*Refd.* Pike v. Fitzgibbon, Martin v. Fitzgibbon (1881), 17 Ch. D. 451.

Contracts on behalf of company.]—*See, generally,* COMPANIES, Vol. X., pp. 1171–1176, Nos. 8317–8338.

Compulsory purchase of land.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 227, Nos. 1129, 1134–1138.

B. Persons entitled to Benefit of Contract.

1055. Right to sue—Cestuis que trust—Action by trustee.]—*KIRK v. CLARK* (1708), 2 Eq. Cas. Abr. 165; Prec. Ch. 275; 22 E. R. 141.

Annotation:—*Mentd.* Brown v. Carter (1801), 5 Ves. 862.

1056. — Procedure where cestuis que trust numerous.]—A person who makes a contract as trustee for others, cannot sustain a suit for specific performance, without joining them along with him. If his *cestuis que trust* are the members of a numerous co.; some of them, suing on behalf of themselves & all the other members, ought to join with him as co-pltfs.—*ANON.* (1825), 3 L. J. O. S. Ch. 99.

could not be enforced against the vendor's heir, so as to give him a right to the redemption of the estate.—*TOUZEL v. FILLEUL* (1812), 3 Moo. P. C. C. 484; 13 E. R. 196.—*CHANNEL ISLANDS.*

PART V. SECT. 4, SUB-SECT. 2.—B.

1058 i. Liability to be sued.]—Where the owner of land authorises two agents to make a sale for him & each enters into a contract to sell, in an action for specific performance by one

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purchaser, the other purchaser is entitled on his own application to be added as a deft.—*BRYCE v. JENKINS, Ex p. LEVY* (1901), 8 B. C. R. 32.—*CAN.*

a. Sub-purchaser.]—In an action for specific performance of an agreement for sale of land or, on default, for other relief including possession, a sub-purchaser, whose interest is known to pltf., is a necessary party deft.—*HOBART v. ZALONDEK & SHULTZ (Man.)*, [1923] 3 W. W. R. 246.—*CAN.*

b. Right to sue—Cestuis que trust.]

1057. — — — — —.]—Claim for specific performance of agreement of a railway co. to purchase land from trustees:—*Held*: persons beneficially interested in the land were not necessary parties to the suit.—*POTTS v. THAMES HAVEN DOCK & RY. CO.* (1851), 15 Jur. 1004.

1058. Liability to be sued.]—A party having purchased land, & signified at the time, that he made the purchase on behalf of the trustee in his marriage settlement, who had money vested in him to be laid out in land, & a bill being filed against him for specific performance, the ct. would not allow the cause to proceed until the trustee were made a party; & the cause stood over for that purpose.—*WYNNIAT v. LINDO* (1830), Tam. 512; 48 E. R. 204.

1059. — — — — —.]—A party claiming an interest in a purchase by virtue of a contract, as having been entered into on his behalf, is a proper party to a suit by the vendor for the specific performance of the contract.—*CHADWICK v. MADEN* (1851), 9 Hare, 188; 21 L. J. Ch. 876; 68 E. R. 469.

Annotations:—*Distd.* Wollaston v. Osborn (1853), 20 L. T. O. S. 274. *Consd.* West Midland Ry. v. Nixon (1863), 1 Hem. & M. 176. *Refd.* Hacker v. Mid Kent Ry. & S. E. Ry. (1865), 12 L. T. 699.

1060. — — — — — Denial of agency.]—In an action brought by a co. against L. & T., the claim stated that L., through T., who professed to be, & in fact was, the agent of L., contracted to take a certain number of debentures in pltf. co., which contract L. had failed to perform: & that L. denied that T. was authorised by him to make the contract. Pltfs. prayed for specific performance of the contract or for damages against L.; or in the alternative, if it should appear that T. had no authority to act as L.'s agent, then for specific performance & damages against T. T. having applied to have judgment entered up in his favour, or to have his name struck out as deft.:—*Held*: under the circumstances stated in the claim, pltfs. were entitled to join L. & T. as defts., & to claim alternative relief against them under R. S. C., Ord. 16, rr. 3, 6.—*HONDURAS INTER-OCEANIC RY. CO. v. LEFEVRE & TUCKER* (1877), 2 Ex. D. 301; 46 L. J. Q. B. 391; 36 L. T. 46; 25 W. R. 310, C. A.

Annotations:—*Apld.* Child v. Stenning (1877), 5 Ch. D. 695; *Bennetts v. McIlwraith*, [1896] 2 Q. B. 464. *Mentd.* Thompson v. L. C. C., [1899] 1 Q. B. 840; *Sanderson v. Blyth Theatre Co.*, [1903] 2 K. B. 533; *Bullock v. London General Omnibus Co. & Trollope & Colls* (1906), 22 T. L. R. 244; *Smith v. Buskell, Buskell v. Smith & G. W. Ry.*, [1919] 2 K. B. 362.

C. Assignor and Assignee.

1061. Whether necessary parties—Assignor—Action against assignee.]—*HALL v. LAVER*, No. 741, *ante*.

1062. — — — — — Assignee — Purchaser's interest assigned as security for loan.]—Where a purchaser deals with the property contracted to be purchased, he waives his right to object to the title. If a third party gives his promissory note to the vendor, as a security for the purchase-money, & afterwards takes an assignment of the purchaser's interest under the contract, as a security against his own liability, & also joins with the purchaser

—A person not named as a party is nevertheless entitled to maintain an action upon it if he takes a beneficial right under it in the character of *cestui que trust*, the covenantee standing to him in the relation of trustee.—*KELLY v. LARKIN*, [1910] 1 L. R. 550.—*IR.*

PART V. SECT. 4, SUB-SECT. 2.—C.

c. Whether necessary parties—Assignee.]—*BROWN v. HOARE* (1905), 16 Man. L. R. 314.—*CAN.*

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in raising money upon it for his own benefit, he does not thereby become a party to the original contract; but he is a necessary party to a suit for specific performance, instituted by the vendor.—*HAYDON v. BELL* (1838), 1 Beav. 337; 2 Jur. 1008; 48 E. R. 970.

1063. — Assignment in bankruptcy.] — *COLLET v. WOLLASTON*, No. 407, *ante*.

1064. — —.]—Deft. having in 1857 made a mtge. of freeholds to pltf. to secure repayment of a sum of money & interest, in June, 1861, signed a memorandum whereby he charged certain copyholds with the same debt, & undertook, when required, at his own expense, to execute to pltf. such mtge. of the same as he should require. Deft. afterwards became bkpt. After the adjudication, & before the ct. had made any vesting order as to the copyholds, pltf. filed a bill alleging that deft. had been applied to & refused to perform his undertaking to execute a conveyance or to sign any mtge. of the copyholds, & praying for specific performance of the agreement. The assignees in bkpcy. were not made parties to the suit, bkpt. being sole deft. :—*Held*: the assignees in bkpcy. were necessary parties to the suit.—*POOLE v. BURSSELL* (1862), 6 L. T. 777; 8 Jur. N. S. 1224; 10 W. R. 861.

1065. — —.]—An assignment for the benefit of creditors under Bankruptcy Act, 1861 (c. 134), vests the property of the assignor in the trustees of the deed, as completely as his actual bkpcy. would have vested it in his assignees. Therefore such assignor is an unnecessary party to a suit for the specific performance of a contract entered into by him before the assignment.—*FENTON v. QUEEN'S FERRY WIRE ROPE CO.*, (1868), L. R. 7 Eq. 267; 38 L. J. Ch. 136; 20 L. T. 297; 17 W. R. 155.

D. Person claiming Interest in Subject-Matter of Contract.

1066. Whether proper parties.]—A bill was filed by a vendor against a purchaser; averring, that before completing the contract the purchaser had entered on the land, & praying a specific performance, & in the meantime an injunction to restrain deft. from entering on, or continuing to hold the premises :—*Held*: a tenant of the land contracted to be sold, is not a necessary party.

It is a new doctrine, that to a bill for a specific performance & injunction, you cannot get intermediate relief, without having before the ct. every person who may be affected by an injury committed on the subject-matter of the contract. The owner of an estate has agreed to sell it, whether to a railway co. or not is immaterial, & he seeks an equitable performance of that agreement; the co. have not paid the money, but have entered & are dealing with the property in a manner that may or may not affect the tenant; to say that pltf. cannot restrain this without bringing the tenant before the ct., is to exclude the jurisdiction of the ct. (*LORD COTTENHAM, C.*).—*ROBERTSON v. GREAT WESTERN RY. CO.* (1839), 1 Ry. & Can. Cas. 459; 10 Sim. 314; 9 L. J. Ch. 17; 59 E. R. 635, L. C.

PART V. SECT. 4, SUB-SECT. 2.—D.

1066 i. Whether proper parties.]—In an action for specific performance by a vendor against a purchaser, the question raised by the defence whether a third person has a title to the whole or part of the land, is not one which under con. rule 328 should be determined between the parties to the action, or either of them, & the third person; & an order cannot properly be made

under that rule & con. rule 330 adding such third person as a deft. Neither do con. rules 329, 331, or 332, apply in such a case.—*BEGG v. ELLISON* (No. 2) (1892), 14 P. R. 384.—**CAN.**

1066 ii. —.]—*AIKINS v. MCGUIRE* (1912), 23 O. W. R. 98; 4 O. W. N. 132; 6 D. L. R. 864.—**CAN.**

1066 iii. —.]—*MCDUGALL v. ALLEN* (N. S.) (1922), 65 D. L. R. 320.—**CAN.**

1067. —.]—A. entered into a written agreement with B. for the purchase of certain freehold premises. The agreement stipulated, "that, if any dispute should arise as to the title, the same should be submitted to a conveyancer, to be agreed upon by both parties; the objections to be stated in writing, within six months of the date of the agreement, to the solr. of the vendor; & in case he should be of opinion that a good title could not be made out, then either party should be at liberty to rescind the contract on two calendar months' notice after the opinion of counsel had been obtained." This agreement was entered into by A., at the request of C., which circumstance, however, was not known to B. By a subsequent agreement, A. agreed to sell the premises to C., upon the same terms etc. under which he had contracted to purchase of B. D., the mother of B., had a life estate in the premises, which circumstance, though known to B., & his solr., was not known to either A. or C. D. did not, in respect of her life estate, sanction the agreement. A. & C., as co-pltfs., filed their bill against B. & D. for specific performance of the original agreement. After that bill had been answered, but before either party had gone into evidence, A. died intestate, & C. then filed a bill of revivor & supplement against the original defts. & the heir-at-law & personal representatives of A. Upon those two bills, no answer to the latter having been filed, the parties joined issue :—*Held*: (1) A. & C. were not improperly co-pltfs. in the original bill, & after the former's death, the suit was properly revived by the latter; (2) C. was entitled to have specific performance of the agreement, with compensation in respect of D.'s life estate.—*NELTHORPE v. HOLGATE* (1844), 1 Coll 203; 8 Jur. 551; 63 E. R. 384.

Annotations:—As to (2) Consd. Wilson v. Williams (1857), 3 Jur. N. S. 810. *Apld. Barnes v. Wood* (1869), L. R. 8 Eq. 424. *Distd. Procter v. Pugh*, [1921] 1 Ch. 256. *Refd. Price v. Griffith* (1851), 18 L. T. O. S. 190. *Generally, Consd. Beeston v. Stutely* (1858), 27 L. J. Ch. 156; *Re Jackson & Haden's Contract*, [1906] 1 Ch. 412. *Refd. Edwards-Wood v. Marjoribanks* (1858), 3 De G. & J. 329; *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212; *Carroll v. Keays, Keays v. Carroll* (1873), 22 W. R. 243; *Davenport v. Charsley* (1886), 54 L. T. 372; *Vowles v. Bristol, etc., Bldg. Soc.* (1900), 44 Sol. Jo. 592, *Merrett v. Schuster*, [1920] 2 Ch. 240; *Re Des Reaux & Setchfield's Contract*, [1926] Ch. 178. *Mentd. Re Robinson, Ex p. Burrell* (1876), 1 Ch. D. 542, n.; *Said v. Butt*, [1920] 3 K. B. 497.

1068. —.]—Bill against a husband & his wife for the specific performance of an agreement made by the husband for the sale of an estate to pltf. The bill alleged, as the grounds for making the wife a co-deft., that she claimed an interest in the purchase-money, & had taken forcible possession of the title deeds, & refused to part with them unless her claim was satisfied. The ct. held that she was improperly made deft., & allowed a demurrer by her for want of equity.—*MUSTON v. BRADSHAW* (1846), 15 Sim. 192; 7 L. T. O. S. 298; 10 Jur. 402; 60 E. R. 591.

1069. —.]—Although a person claiming land by title paramount is not a proper party to a suit for specific performance, a person who, by virtue of an antecedent agreement with the vendor, claims to be interested in the purchase-money, is a proper

d. Joinder of actions.]—Pltf.'s claim as against her husband, one of defts., was for specific performance of an ante-nuptial contract to transfer to her certain property of various kinds, & as against the several other defts., to whom the husband had made transfers of such property, or in whose hands it was, for relief by way of declaration, cancellation, & order for payment :—*Held*: although pltf.'s

party to a suit by the purchaser to have the right to the purchase-money ascertained, & for specific performance against the vendor.—*WEST MIDLAND RY. CO. v. NIXON* (1863), 1 Hem. & M. 176; 71 E. R. 77.

1070. —.]—A. agreed to grant B. a lease, but before he had done so, he mortgaged the property to C. with notice, who in no way contested A.'s right to the lease:—*Held*: C. was not a proper party to a suit for specific performance.—*LONG v. BOWRING* (1864), 33 Beav. 585; 10 L. T. 683; 10 Jur. N. S. 668; 12 W. R. 972; 55 E. R. 496.

1071. —.]—In 1861 pltf. was colonel, & deft. M. lieutenant-colonel of a volunteer rifle corps. Adjoining the premises occupied by deft. C. was a leasehold piece of land convenient for the regiment, which M. requested C. to purchase on its behalf, & C. bought it in 1861 for £500. In Mar. 1862, C. wrote to M., stating that he was willing to give the land to the regiment for the whole of the term held by him; the regiment was to observe all the covenants of the lease, to pay a merely nominal rent, & to level & prepare the ground suitably for drill. M. signed this letter, & had it stamped as if it were a mutual agreement, & paid the nominal rent for one year in advance. In June, 1864, he also executed a deed purporting to assign the land to himself, & deft. H. as trustees for the regiment. Shortly before this date pltf. & C. had entered into another agreement, by which the former was to purchase of the latter the said lands without reservation, except as to the disputed right claimed by M. in respect of the letter of Mar. 1862, & was to be at liberty to use C.'s name in all proceedings necessary for setting aside that letter, & any rights that might be claimed under it. In order to clear the title & carry out this agreement this bill was filed, alleging that the letter of Mar. 1862 had been obtained by M. from C. by concealment, surprise, & undue influence, & that C. had had no professional advice in the transaction, praying a declaration of the rights of the parties, that the letter, Mar. 1862, conveyed no estate or interest to M., & was merely a licence revocable at pleasure, & that it ought to be cancelled and that a specific performance of the last agreement might be decreed. Deft. C. did not resist, & at the hearing the judge decreed specific performance against him, but dismissed the bill with costs against M. & H.:—*Held*: the agreement, which in effect was the purchase of a right by pltf. to complain of the alleged fraud committed against C., savoured too much of maintenance for the ct. to enforce it; & further, that M. & H., as entire strangers to the agreement, & claiming under an adverse title to it, could not be parties to a suit for its specific performance.—*DE HOGHTON v. MONEY* (1866), 2 Ch. App. 164; 15 L. T. 403; 15 W. R. 214, L. JJ.

1072. — *Railway company working line of other company.*—A railway co., working the line of another co. under a traffic arrangement, is properly made a party to a suit for enforcing a lien upon, or otherwise with reference to, any portion of the line so worked.—*MARLING v. STONEHOUSE & NAILSWORTH RY. CO.* (1869), 38 L. J. Ch. 306; 17 W. R. 484.

Annotation:—*Folld. Goodford v. Stonchouse & Nailsworth Ry.* (1869), 38 L. J. Ch. 307.

right to each cause of action was historically connected with each of the others, that connection related only to her rights; the rights of each set of debts, were as distinct as they were before the events which conferred upon pltf. the rights which she asserted; & such causes of action could not properly be joined in one action.—

FAULDS v. FAULDS (1897), 17 P. R. 480.—CAN.

PART V. SECT. 6, SUB-SECT. 1.

e. Refusal of third party to assign security.—By the contract the property was agreed to be paid for, in part, by an assignment of a mtge., to be obtained from a third party. After-

1073. — *Claim abandoned.*—Where, in a suit against a vendor for specific performance of a contract, the refusal to complete arose from a claim made by deft. T. under a prior contract, but which claim T. was held to have abandoned in favour of pltf., a decree was made with costs against both debts., but with a declaration, that as between debts. the costs should be borne by T.—*WILSON v. THOMSON* (1875), L. R. 20 Eq. 459; 44 L. J. Ch. 527; 23 W. R. 744.

SECT. 5.—PLEADING.

Sec, generally, PLEADING.

Claim for alternative relief.—See Sect. 6, sub-sect 12, *post*.

Necessity for pleading Statute of Frauds.—See *CONTRACT*, Vol. XII., pp. 171, 172, Nos. 1256–1269.

SECT. 6.—RELIEF.

SUB-SECT. 1.—IN GENERAL.

1074. *Decree for sale of trust estate—Agreement for sale out of court—Whether agreement enforced by new decree.*—A trust estate was decreed to be sold for the payment of debts & legacies, & to be sold to the best purchaser. A. articles to buy the estate of the trustees, & brings a bill to compel them to perform the contract; the trustees by their answer disclose this matter; the ct. will make no new decree, but will leave the former decree to be pursued.—*ANNESLEY v. ASHURST* (1734), 3 P. Wms. 282; 24 E. R. 1066, L. C.

Annotation:—*Consd. Re Brettell, Ex p. Goren* (1838), 7 L. J. Ch. 187.

1075. *Inquiry into propriety of contract—Contract for sale by tenant for life.*—Trustees, whose consent was required to the exercise of a power of sale by tenants for life, submitting to act under the direction of the Court, on a bill for specific performance of a contract to sell, an inquiry into the property of the contract was ordered.—*DORAN v. WILTSHIRE* (1792), 3 Swan. 699; 36 E. R. 1027, L. C.

Annotation:—*Mentd. Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317.

1076. — *Contract for purchase by lunatic.*—*Re WALKER (A LUNATIC)* (1845), 5 L. T. O. S. 262, L. C.

1077. *Vendor's claim for specific performance not substantiated—Purchaser in possession—Claim for account whilst in possession.*—The vendor of a share in a co-partnership business filed a bill against the purchaser who had taken possession, charging that he had grossly mismanaged the property & destroyed its value, & praying that he might be declared to have accepted the title, & might be decreed to perform the contract specifically; the ct. was of opinion that the title had not been accepted, & as a good title was not shown, a specific performance could not be decreed:—*Held*: upon a record so framed, no accounts or inquiries could be directed as to deft.'s possession & management of the property, with a view to ascertain whether any & what sum ought to be paid, or compensation made, by him to pltf.

wards the purchaser alleged the refusal of the mtgee. to assign:—*Held*: specific performance at the instance of the vendor would be refused, but an inquiry was directed as to whether or not the mtgee. was still willing & able to assign the mtge.—*ARNOLD v. HULL* (1858), 7 Gr. 47.—CAN.

1. What must be shown on abortive

Sect. 6.—Relief: Sub-sects. 1, 2 & 3, A.]

—*STEVENS v. GUPPY* (1828), 3 Russ. 171; 6 L. J. O. S. Ch. 164; 38 E. R. 540, L. C.

1078. Reference to master as to rights of parties—Agreement to exercise power of appointment.]—C. being indebted to J., C.'s wife, who by a settlement was empowered to appoint certain estates, entered into a verbal agreement with J. that she should make her will, & exercise her power of appointment, by giving the property to J. to hold upon trust, in the first place, for the payment of the moneys due to him from his brother C. & subject thereto in trust for C. in fee. The appointment was stated to have been prepared upon that understanding, & was made with the concurrence of J. who agreed to take the property about to be settled upon those trusts. Upon the death of C.'s wife, the heir of J. having claimed the property, C. filed his bill for specific performance:—*Held*: there was sufficient evidence of an agreement to direct a reference to the master to ascertain the several parties' rights.—*ROBINSON v. ROBINSON* (1848), 10 L. T. O. S. 479.

1079. Rights of parties not co-extensive—Dependent upon conduct.]—(1) A railway co., having contracted with a party who, under a contract made some years previously, was a purchaser of land which the co. required for the railway, but who had not paid his purchase-money, & appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor & purchaser:—*Held*: as the purchaser was not, after the lapse of time & under the circumstances, entitled in equity to a decree for specific performance of the contract against the vendor, the bill must be dismissed as against him, with costs; & as against the purchaser, without costs.

(2) The rights of parties to agreements to enforce a specific performance in equity are not co-extensive; for their respective rights depend upon their conduct, & the conduct of one may give him the right to apply to the ct., while the conduct of the other may debar him from that right.—*SOUTH EASTERN RY. CO. v. KNOTT* (1852), 10 Hare, 122; 68 E. R. 865.

Annotations:—*Generally*, *Reid*. *Bannerman v. Clarke* (1856), 26 L. J. Ch. 77; *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

1080. Execution of works to be determined by award—Claim based on validity of award—Right of plaintiff at hearing to abandon award as invalid.]—Where a bill is filed for the specific performance of an agreement to execute certain works to be determined by the award of a third party, & the case made by the bill is substantially based on the supposition that such award is valid & binding, pltf. cannot at the hearing abandon the award as invalid, & fall back upon the general scope of the agreement.—*DARNLEY (LORD) v. LONDON, CHAT-*

sale after decree—Purchase-money not

1.—Where in a suit by a vendor for specific performance, a decree for a sale has been made, with a proviso that if the sale prove abortive the contract is to be rescinded, & the sale proves abortive, & an application is made to rescind the contract, it must be shown that the purchase-money has not been paid.—*GRANGE v. CONROY* (1864), 1 Ch. Ch. 198.—*CAN.*

g. Necessity for action for specific performance—Purchaser directed by court to carry out contract.]—If under R. S. O. 1877, c. 109, the ct. adjudicates upon a question of title between vendor & purchaser, & directs the purchaser to carry out the contract, & the purchaser then fails to carry out the contract, it is unnecessary to bring

an action for specific performance of the contract, & the requisite relief may be had on notice of motion for payment of the purchase-money or in default a resale.—*Re CRAIG* (1883), 10 P. R. 33.—*CAN.*

h. What may be claimed in action.]—In an action by a vendor against a purchaser on an executory contract for the purchase of land, where pltf. is not merely seeking a declaration that he has effectively exercised a legally binding express provision for rescission, or a legally binding express provision or the implied provision for resale, he may claim, (1) damages, (2) specific performance, (3) rescission, (4) sale to realise vendor's lien.—*MERRIAM v. PAISCH* (1908), 8 W. L. R. 340; 1 Alta. L. R. 262.—*CAN.*

HAM & DOVER RY. CO. (1863), 1 De G. J. & Sm. 204; 1 New Rep. 409; 33 L. J. Ch. 9; 8 L. T. 94; 9 Jur. N. S. 452; 11 W. R. 388; 46 E. R. 80, L. JJ.; *on appeal* (1867), L. R. 2 H. L. 43, H. L.

Annotations:—*Consd.* *A.-G. v. Cambridge Consumers Gas Co.* (1868), L. R. 6 Eq. 282. *Expld.* *Breckon v. Russell* (1868), 19 L. T. 468. *Reid.* *Gossip v. Wright* (1863), 2 New Rep. 152; *Budding v. Murdoch* (1875), 1 Ch. D. 42. *Mentd.* *Samuel v. Dumas*, [1924] A. C. 431.

1081. Contract to sell bonds of certain kind—Right to relief by delivery of other bonds.]—In a suit for the specific performance of a contract for the sale to pltf. of certain bonds, pltf. cannot at the bar abandon his case as to the particular bonds in question, & ask specific relief by the delivery of other bonds of the same kind, admitted by deft. to be in his hands.—*SIMPSON v. MALHERBE* (1865), 4 Giff. 707; 6 New Rep. 245; 13 L. T. 112; 13 W. R. 887; 66 E. R. 891.

1082. Claim for alternative relief—Against one defendant—In case relief not obtainable against other.]—A contract having been entered into by a firm of solrs. acting on behalf of their client, to pay pltf. certain sums of money, pltf. filed his bill against the client & the solrs., alleging that the client was bound by the contract, but that the client denied that he was so bound on the ground that the solrs. had no authority to enter into such contract; & the bill prayed specific performance by the client; or otherwise if it should appear that the solrs. were not authorised, then that the solrs. themselves might be declared personally liable to perform the same. A demurrer to the bill by the solrs. was allowed on the ground that pltf. did not himself allege that the client was not bound, & also, that alternative relief could not be prayed against one deft. in case relief could not be obtained against another deft.—*CLARK v. RIVERS (LORD)* (1867), L. R. 5 Eq. 91; 37 L. J. Ch. 70; 17 L. T. 166; 32 J. P. 71; 16 W. R. 123.

1083. Right of purchaser as against equitable incumbrancer—Incumbrance created by vendor subsequently to contract.]—A person who has contracted to purchase real estate is entitled to specific performance of the contract as against a person claiming under an equitable incumbrance created by the vendor subsequently to the contract, whether the incumbrancer had or had not notice of the contract when the incumbrance was created.—*FLINN v. POUNTAIN* (1889), 58 L. J. Ch. 389; 60 L. T. 484; 37 W. R. 443.

Writ ne exeat regno.]—See EQUITY, Vol. XX., p. 515, No. 2657.

SUB-SECT. 2.—MOTION FOR JUDGMENT.

1084. After defence—Upon admission of fact—Whether in time.]—In an action for specific performance of an agreement for purchase of lands, pltf., after reply, moved for judgment upon

k. —.]—Where lands are to be paid for by crop payments, in an action for specific performance the vendor cannot obtain an order for delivery of part of the last crop & rescission of the agreement at the same time.—*BATEMAN v. ROMPHF* (1916), 31 W. L. R. 62; 10 W. W. R. 169.—*CAN.*

l. When decree made.]—The ct. will not decree a specific performance of an agreement unless the party asking the assistance satisfies the ct. he is entitled to that which he seeks.—*HARNEY v. BERNEY* (1878), 6 Nfld. L. R. 152.—*NFLD.*

PART V. SECT. 6, SUB-SECT. 2.

m. In default of defence—Delivery of conveyance should be provided for in minutes.]—Where a motion for judg-

admissions of fact in the statement of defence :—*Held* : he was not too late, & he was entitled to his order.—*BROWN v. PEARSON* (1882), 21 Ch. D. 716 ; 46 L. T. 411 ; 30 W. R. 436.

1085. In default of defence—Necessity for affidavits to support statement of claim.—An action was brought by a vendor for specific performance of an agreement against a purchaser who was in possession. The statement of claim set out the agreement. Deft. had not put in any defence. A motion was made on behalf of pltf. for judgment in default of defence, the action being set down as a short cause. The agreement had not been proved ; but it was contended that deft., by making default in defence, had admitted the agreement as alleged, & that evidence of it was consequently unnecessary :—*Held* : the agreement must be duly verified by affidavit & the action was ordered to stand over for the purpose.—*HOLMES v. SHAW* (1885), 52 L. T. 797.

Annotation —*Dbtd. but Follid.* *De Jongh v. Newman* (1887), 56 L. T. 180.

1086. — — — .]—Upon a motion for judgment in default of pleading in a specific performance action, pltf. asked for an order in the usual form, but no minutes of the proposed judgment had been left with the judge's clerk before the cause was put into the paper :—*Held* : in such a case, where a copy of the minutes has not been delivered, pltf. should state in his notice of motion the precise words of the judgment for which he asks.

Qu. : whether, upon a motion for judgment in default of pleading in a specific performance action, it is necessary to file affidavits in support of the statement of claim.—*DE JONGH v. NEWMAN* (1887), 56 L. T. 180 ; 35 W. R. 403.

Annotations . *N.F.* *Bagley v. Searle* (1887), 56 L. T. 306. *Refd.* *Chapman v. Brooke* (1902), 46 Sol. Jo. 215.

1087. — — — .] —*BAGLEY v. SEARLE*, No. 1089, *post*.

1088. — — — *No statement of terms of proposed judgment in notice of motion—Necessity for statement—Where no copies of minutes delivered.* — *DE JONGH v. NEWMAN*, No. 1086, *ante*.

1089. — — — *Preparation of minutes—Delivery of copy to defendant.*—In a vendor's action for specific performance pltf. moved for a common form judgment against deft., he having made default in pleading. The notice of motion did not state the terms of the proposed judgment :—*Held* : (1) having regard to the form of the notice of motion, that minutes must be prepared & a copy delivered to deft.

(2) It is unnecessary upon motion for judgment in default of pleading in actions for specific performance to have affidavits in support of the statement of claim.—*BAGLEY v. SEARLE* (1887), 56 L. T. 306 ; 35 W. R. 401.

1090. — — — *Delivery of conveyance to be provided for.*—Where a motion for judgment in default of defence is made in a vendor's action for specific performance of an agreement for the sale of real estate, the title to which has been accepted by the purchaser, the minutes should provide for the delivery of a conveyance of the property to the purchaser, on payment by him of the purchase-money, interest, costs, & damages, if any.—

ment in default of defence is made in a vendor's action for specific performance of an agreement for sale of real estate the title to which has been accepted by purchaser, the minutes should provide for the delivery of a conveyance of the property to purchaser on payment by him of the purchase-money, interest, costs &

damages (if any).—*REGINA BROKERAGE & INVESTMENT CO. v. WADDELL* (1916), 34 W. L. R. 229 ; 10 W. W. R. 364.—*CAN.*

n. — — — *When default judgment set aside.*—In an action for specific performance of an agreement to sell lands pltf. joined F. as a deft., alleging merely that F. purchased the said

COOPER v. MORGAN, [1909] 1 Ch. 261 ; 78 L. J. Ch. 195 ; 99 L. T. 911.

1091. Order referring to due execution of conveyance—Necessity for reference to due stamping.—The minutes of judgment in a vendor's action for specific performance should contain a reference to the fact that the conveyance has been duly stamped with the increment value duty stamp in accordance with Finance (1909–1910) Act, 1910 (c. 8), s. 4 (3). The form at p. 2171, of the 7th edition of *Seton on Judgments & Orders*, should be amplified by adding after the words "duly executed by him" the words, "and duly stamped so as to comply with Finance (1909–1910) Act, 1910 (c. 8), s. 4 (3).—*DAWNAY v. CHESSUM* (1915), 60 Sol. Jo. 59.

1092. — — — .]—*MOSELEY v. DOWSE*, [1916] W. N. 25.

SUB-SECT. 3.—THE DECREE.

A. In General.

1093. How far decree conclusive—Decree by consent—Whether rehearing granted—On ground of mistake.—*KING v. WIGHTMAN* (1794), 1 Anst. 80 ; 145 E. R. 806.

1094. Suspension of execution of decree—Pending appeal.—An appeal does not stay proceedings without a special ground. The decree, being for the specific performance of a contract for purchase, according to the answer, the execution only was suspended.—*GWYNN v. LETHBRIDGE* (1808), 14 Ves. 585 ; 33 E. R. 645, L. C.

Annotations —*Consd.* *Suisse v. Lowther* (1843), 7 Jur. 808. *Refd.* *Gloucester Corp'n v. Wood* (1843), 3 Hare, 131. *Berners v. Fleming*, [1925] Ch. 264.

1095. Decree in default of appearance—Direction for future hearing.—To show cause against a decree on default by deft. at the hearing the order must be to set down the cause on some day immediately, not after the causes already set down.—*ANSPACH (MARGRAVINE) v. NOEL* (1816), 19 Ves. 573 ; 1 Madd. at p. 313 ; 31 E. R. 628, L. C. ; *subsequent proceedings*, 1 Madd. 310.

1096. — — — *Conveyance executed before action brought.*—The ct. will order specific performance of a contract at the instance of the vendor in an action where there has been default of appearance by the purchaser, even though the conveyance has already been executed by both parties before action brought.—*CHATT v. CHATT* (1926), 70 Sol. Jo. 465.

1097. Rectification of defective decree—Defect arising through plaintiff's omission—Costs.—In a suit for specific performance a defective decree was on petition rectified in accordance with the prayer of the bill. The defect having arisen through pltf.'s omission he was ordered to pay the costs of the petition.—*WILLIAMS v. CARMARTHEN & CARDIGAN RY. CO.* (1869), 19 L. T. 762 ; 17 W. R. 346.

1098. Meaning of "completion."—*NEATH NEW GAS CO. v. GWYN*, [1873] W. N. 200.

Effect of decree on rescission by vendor.—*See SALE OF LAND*, Vol. XL., pp. 224, 225 ; Nos. 1925–1948.

lands with notice of pltf.'s rights :—*Held* : upon a consideration of Land Titles Act (Sask.), ss. 162 & 169, that a default judgment signed against F. should be set aside *ex debito justitiae*, pltf. not being entitled to judgment upon such an allegation of facts.—*KRONAU v. EUTENEIER* (1916), 34 W. L. R. 168 ; 10 W. W. R. 351.—*CAN.*

Sect. 6.—Relief: Sub-sect. 3, B.; sub-sect. 4, A. & B. (a).]

B. Form and Contents.

1099. Forms of decree not to be departed from—Except in cases of special necessity.]—The forms of decrees of the ct. which are the best exponents of the law, have long existed, & have worked through all difficulties, & proved effectual for the purposes of justice, ought not to be departed from, or added to, or altered, unless in cases of special necessity.—**SHERWIN v. SHAKESPEAR** (1854), 5 De G. M. & G. 517; 2 Eq. Rep. 957; 23 L. J. Ch. 898; 24 L. T. O. S. 45; 18 Jur. 843; 2 W. R. 668; 43 E. R. 970, L. JJ.

Annotations:—*Reid*. **Regent's Canal Co. v. Ware** (1857), 23 Beav. 575; **Vickers v. Hand** (1859), 26 Beav. 630; **Herbert v. Salisbury & Yeovil Ry.** (1866), L. R. 2 Eq. 221; **Williams v. Glenton** (1866), 1 Ch. App. 200; *Re* **Riley to Streetfield** (1886), 56 L. T. 48; **Bennett v. Stone**, [1903] 1 Ch. 509. **Mentd.** **Palmerston v. Turner** (1864), 33 Beav. 524; *Re* **Phillips, Ex p. Kiveton Coal Co.** (1872), 7 Ch. App. 730; **Met. Ry. v. Defries** (1877), 2 Q. B. D. 189; *Re* **London Corp'n. & Tubbs' Contract**, [1894] 2 Ch. 524.

1100. Usual decree—Contract to be specifically performed.]—**COLLETT v. HOVER** (1844), 1 Coll. 227; 63 E. R. 395, L. C.

1101. ———.]—**BRINSLEY v. LYNTON & LYNMOUTH HOTEL & PROPERTY CO.** (1895), 2 Mans. 244; 13 R. 369.

1102. ———.]—**CHATT v. CHATT** (1926), 70 Sol. Jo 465.

1103. ——— Where title can be made.]—(1) It is not sufficient for a party, who intends to rely upon a waiver of title to allege upon his pleading the facts constituting the waiver; he must show how he means to use the facts by alleging that the title has been waived thereby.

Semble, (2) a decree for specific performance should not declare that the agreement ought to be performed if a good title can be made.—**CLIVE v. BEAUMONT** (1848), 1 De G. & Sm. 397; 12 L. T. O. S. 530; 13 Jur. 226; 63 E. R. 1121.

Annotations:—*As to* (1) **Apld.** **Gaston v. Frankum** (1848), 2 De G. & Sm. 561. (*See* (1852), 16 Jur. 507). *Reid*. **Simpson v. Sadd** (1845), 4 De G. M. & G. 665; *Corless v. Sparling* (1873), 21 W. R. 876. *As to* (2) *Reid*. **Scargill v. Hurry** (1850), 14 Jur. 847.

1104. Decree against infant heir—Heir to convey when of full age.]—**SKIES v. LISTER** (1726), 2 Eq. Cas. Abr. 25; 22 E. R. 22.

1105. Where draft conveyance approved by both parties.]—Where after a [draft] conveyance has been approved by vendor & purchaser, & the purchaser refuses to proceed, & the vendor files a claim for specific performance, deft. will be ordered to pay the costs of the suit.—**HIRST v. STOKES** (1853), 21 L. T. O. S. 255; 1 W. R. 479.

1106. Bankruptcy of defendant—Action revived against assignees of bankrupt—Certificate of good title.]—Form of decree in a vendor's suit for specific performance of a contract, where, deft. having become bkpt., the suit had been revived against his assignees, who disclaimed, & the chief clerk had certified that a good title had been shown.—**KELL v. NOKES** (1866), 35 L. J. Ch. 729; 14 L. T. 697; 12 Jur. N. S. 780; 14 W. R. 908; *previous proceedings* (1863), 32 L. J. Ch. 785.

PART V. SECT. 6, SUB-SECT. 3.—B.

o. Purchase-money—Time for payment.]—In decrees for specific performance of a contract for purchase, a time for payment of the purchase-money should be limited, or, in default, the bill dismissed.—**MCDONALD v. ELDER** (1852), 3 Gr. 244.—**CAN.**

p. ——— Order for payment.]—The vendor's strict legal right under his agreement in a specific performance action is an order for the payment of his purchase-money, but in practice

that right is never given effect to.—**JENSEN v. ZILM** (Alta.), [1925] 2 D. L. R. 901; [1925] 1 W. W. R. 1128.—**CAN.**

q. Settlement of mortgage.]—In a suit by a vendor for specific performance, where the vendor is ordered to execute a deed, & the vendee to execute a mtge.:—*Semble*: it would be improper to insert a power of sale in such mtge.—**McKAY v. REED** (1864), 1 Ch. Ch. 208.—**CAN.**

r. Undertaking to procure release of mortgage.]—**ROBSON v. WRIKE**

1107. Direction that vendor shall convey—Includes conveyance by all necessary parties.]—In a decree for specific performance, a direction that the vendor shall convey has the same effect as a direction that the vendor & all other necessary parties shall convey.—**MINTON v. KIRWOOD** (1868), 3 Ch. App. 614; 37 L. J. Ch. 606; 18 L. T. 781; 16 W. R. 991, L. JJ.

Annotation:—*Mentd.* **Heasman v. Pearse** (1871), L. R. 11 Eq. 522.

1108. Direction for settlement of conveyance—By judge "in case the parties differ"—When clause inserted.]—**BAXENDALE v. LUCAS**, [1895] W. N. 30.

1109. ——— Effect of insertion.]—**BAXENDALE v. LUCAS**, [1895] W. N. 30.

SUB-SECT. 4.—REFERENCE AS TO TITLE.

A. In General.

1110. Necessity for reference—General rule.]—**JENKINS v. HILES**, No. 1123, *post*.

1111. ———.]—Questions of title ought not, as a rule, to be discussed at the hearing of a suit for specific performance. They should be referred to chambers; but everything which affects the validity of the contract, or bears upon its enforcement, ought to be then disposed of. If, however, deft. at the hearing alleges that, through some mistake, the contract ought not to be enforced against him, that question must be then disposed of, although it may involve one of title.

Where a purchaser instituted a suit for the specific performance of a contract for the sale of an estate, & the question was whether the vendor was owner in fee, or had only a power of exchanging the estate:—*Held*: the question might be decided at the hearing without a reference as to the title.—**HOOD v. OGLANDER** (1865), 34 Beav. 513; 6 New Rep. 57; 34 L. J. Ch. 528; 12 L. T. 626; 11 Jur. N. S. 498; 13 W. R. 705; 55 E. R. 733.

1112. ———.]—**PHILLIPSON v. GIBBON**, No. 674, *ante*.

1113. ——— Defect appearing clearly on pleadings.]—Bill for specific performance of a contract for sale of an estate upon various objections to the title dismissed in the first instance without a reference.

If it should clearly appear to the ct. upon the pleadings & the evidence, that there are objections not to be removed, it would be an idle & unnecessary expense to the parties, to answer no purpose, to make such a reference (**CHAMBER, J.**).—**OMEROD v. HARDMAN** (1801), 5 Ves. 722; 31 E. R. 825.

Annotation:—*Mentd.* **Wilbraham v. Scarisbrick** (1874), 1 H. L. Cas. 173, n.

1114. ———.]—**LUCAS v. JAMES**, No. 553, *ante*.

1115. ——— Objection taken not substantial.]—**BOEHM v. WOOD**, No. 1150, *post*.

1116. ——— Title accepted—Dispute as to right of way.]—**HENNING v. MAYO** (1850), 15 L. T. O. S. 273; *sub nom.* **HEMMING v. MAYO**, 14 Jur. 847.

(1867), 13 Gr. 419.—**CAN.**

t. Issue of execution prohibited.]—**MORGAN v. DE GREER**, [1917] 3 W. W. R. 177; 36 D. L. R. 161; 10 Sask. L. R. 312.—**CAN.**

u. Restraining parties from denying date of lease.]—A judgment for the specific performance of an agreement for a lease directed the lease to be ante-dated:—*Held*: the judgment should also restrain the parties, in any action on the lease, from averring that same was of any other date.—**M'ILROY v.**, [1898] 1 I. R. 459.—**IR.**

1117. — Court asked to decide question of title — Title alone in dispute.]—(1) In a purchaser's suit for specific performance the ct. at the request of both parties, & on an assurance that the only question in dispute was one of title, which the ct. was asked to decide, made a declaration that deft. could show a good title without directing a reference as to title or the settlement of the conveyance at chambers.

(2) A devisee of real estate in trust for sale & who was also exor. of testator, disclaimed the trusts & renounced probate of his will. The devisee was also a mtgee. of part of testator's real estate. As such mtgee. he joined with testator's heir-at-law & legal personal representative in conveying the mtged. property to deft. in fee. Deft. afterwards contracted for the sale of it in fee absolutely to pltf. On a bill for specific performance of the contract:—*Held*: deft. could make a good title to the property, without having new trustees of the will appointed, & as pltf. had taken an untenable objection he was ordered to pay costs until the hearing.—*AUSTIN v. MARTIN* (1861), 29 Beav. 523; 4 L. T. 817; 7 Jur. N. S. 871; 9 W. R. 674; 54 E. R. 730.

1118. — Contract alleged to be unenforceable owing to mistake — Question involving title.] — *HOOD v. OGLANDER*, No. 1111, *ante*.

1119. Place of inquiry.]—*HOOD v. OGLANDER*, No. 1111, *ante*.

1120. Failure to prosecute action—Whether action dismissable pending reference.]—*DORIN v. HARVEY* (1845), 15 Sim. 49; 6 L. T. O. S. 42; 9 Jur. 648; 60 E. R. 534.

1121. — Pending a reference of title ordered upon motion, in a suit for specific performance, deft. cannot, under Ord. 114 of May, 1845, dismiss the bill for want of prosecution.—*COLLINS v. GREAVES* (1817), 5 Hare, 596; 67 E. R. 1048.

1122. — A reference as to title was made before hearing. A motion to dismiss for want of prosecution pending the reference was refused.—*GREGORY v. SPENCER* (1848), 11 Beav. 143; 50 E. R. 771.

B. When Ordered.

(a) In General.

1123. In vendor's action.]—General rule that the ct. will not decide upon a title without a reference to the master, unless unequivocally, & without fraud or surprise, waived; pltf. seeking a specific performance of a contract being entitled to the opportunity of making out a better title before the master; & deft. having a right to farther inquiry, beyond the objections arising on the abstract, upon the principle, that the bill seeks relief beyond the law.—*JENKINS v. HILES* (1802), 6 Ves. 646; 31 E. R. 1238, L. C.

Annotations:—*Refd.* *Shaw v. Borrer* (1836), 1 Keen. 559; *Page v. Adam* (1841), 4 Beav. 269; *Bousfield v. Hodges* (1863), 33 Beav. 90; *Re Haedlicke & Lipski's Contract*, [1901] 2 Ch. 666; *Halkett v. Dudley*, [1907] 1 Ch. 590.

1124. — Under the usual power of sale contained in an indenture of mtge. a contract was entered into by defts. to purchase the property of the mtgees. before the three months notice required by the mtge. deed to be given to the mtgor. had elapsed. Defts. refused to complete the purchase in consequence of the non-concurrence of the mtgor.; & on bill filed for the specific performance of the contract the ct. declined to decide

as to the necessity of such concurrence as the time for making a valid contract had not when it was entered into arrived; & the only order made was, that the title should be investigated.—*FORD v. HEELY* (1857), 3 Jur. N. S. 1116; 5 W. R. 516.

1125. — *UPPERTON v. NICKOLSON*, No. 1609, *post*.

1126. — On motion by purchaser.]—*REED v. DON PEDRO NORTH DEL REY GOLD MINING CO., LTD.*, No. 1149, *post*.

1127. — Necessity for proving original abstract incomplete.]—If, in a suit by the vendor for specific performance of a contract of this description, the purchaser desires to have an inquiry inserted in the decree as to whether a complete abstract was delivered & good title shown, the burden of proof lies upon him to show that the original abstract delivered was incomplete.—*WARD v. GRIMES* (1863), 8 L. T. 782; 9 Jur. N. S. 1097; 11 W. R. 794.

1128. Freedom of property from tithe charges.]—No reference of title upon a question whether the estate was tithe free, having been sold as such.—*WALLINGER v. HILBERT* (1815), 1 Mer. 104; 35 E. R. 615, L. C.

1129. Vendor guilty of laches in prosecuting action.]—*WRIGHT v. HOWARD*, *HOWARD v. WRIGHT* (1823), 1 Sim. & St. 190; 1 L. J. O. S. Ch. 94; 57 E. R. 76.

Annotations:—*Mentd.* *Mason v. Hill* (1833), 5 B. & Ad. 1; *Walker v. Joffreys* (1842), 1 Hare, 341; *Acton v. Blundell* (1843), 12 M. & W. 324; *Bower v. Cooper* (1843), 2 Hare, 408; *Macbryde v. Weekes* (1856), 22 Beav. 533; *Embrey v. Owen* (1857), 6 Exch. 353; *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 590; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Ennor v. Barwell* (1860), 2 Giff. 410; *Wilts & Berks Canal Navigation Co. v. Swindon Waterworks Co.* (1873), 9 Ch. App. 453, n.

1130. — *DORIN v. HARVEY* (1845), 15 Sim. 49; 6 L. T. O. S. 42; 9 Jur. 648; 60 E. R. 534.

1131. Contract by vendor to make good title.]—In an agreement for the purchase of an estate, the purchaser stipulated to pay the residue of the purchase-money on a day specified, "upon the vendor's making a good title, or, otherwise, if such title should not be then completed, upon his executing a bond to complete such title, & to convey the estate as soon as the same could be completed:" the vendor is bound to show a good title; & till a good title is shown, the purchaser, though he had entered into possession, is not bound to pay the purchase-money. I think, therefore, the question as to the title was properly referred to the master (*LORD LYNDHURST, C.*).—*CLARKE v. FAUX* (1827), 3 Russ. 320; 38 E. R. 596; *sub nom.* *CLARKE v. VAUX*, 6 L. J. O. S. Ch. 17, L. C.

1132. Partner purchasing co-partner's share.]—*LAW v. LAW*, No. 960, *ante*.

1133. Sale of shares.]—A vendor by public auction of shares in a railway co., incorporated by Act of Parliament, at the request of the purchaser, who had paid his purchase-money, executed a transfer to a third party, who did not accept the transfer, or register himself as a shareholder. On a bill filed by the vendor against the purchaser for a specific performance, the ct. directed the usual reference as to title.—*SHAW v. FISHER* (1848), 2 De G. & Sm. 11; 5 Ry. & Can. Cas. 461; 10 L. T. O. S. 500; 12 Jur. 152; 64 E. R. 5; *subsequent proceedings* (1855), 5 De G. M. & G. 596, L. C.

Annotations:—*Refd.* *Oriental Inland Steam Co. v. Briggs* (1861), 2 John. & H. 625. *Mentd.* *Re Monmouthshire & Glamorganshire Joint-Stock Banking Co., Ex p. Cape's Exor.* (1852), 22 L. J. Ch. 601.

PART V. SECT. 6, SUB-SECT. 4.— B. (a).

1123 i. In vendor's action.]—*NIXON v. LOGIE* (1887), 4 Man. L. R. 366.—*CAN*

1135 i. As to lessor's title.]—*CORLESS v. SPARLING* (1873), 21 W. R. 876.—*IR.*

b. Purchaser going into possession — Whether right to reference waived.]—

A person went into possession under a contract for the purchase of a lot of forest land, in order to clear & cultivate it, & thereby raise the purchase-money, which was to be paid by

Sect. 6.—Relief: Sub-sect. 4, B. (a), (b), (c) & C. & D. (a).]

1134. Ability of vendor to obtain licence to assign lease.]—SMITH v. CAPRON, No. 708, ante.

1135. As to lessor's title.]—SCARGILL v. HURRY (1850), 15 L. T. O. S. 325; 14 Jur. 847.

1136. Terms of contract excluding reference.]—Deft. sold & conveyed to pltf. some undivided shares in various properties. Disputes afterwards arose as to what shares had been purchased. They agreed to settle all these disputes, & signed a written agreement that pltf. should pay deft. £9500, & that deft. should execute such deeds as pltf. should require for the conveyance of the estates. Upon a bill for specific performance:—*Held*: deft. was not bound to deduce any title to the property.—**GODSON v. TURNER (1851), 15 Beav. 46; 51 E. R. 453.**

1137. Compulsory purchase—Title not investigated.]—(1) The ct. will not, in a suit on the part of a landowner against a railway co. for specific performance of an agreement to take lands, make a decree where there has been no investigation of title, but will refer it to chambers to see whether a good title can be made

(2) Where there has been great delay on the part of the company, the ct. will reserve costs specially.—**GUNSTON v. EAST GLOUCESTERSHIRE RY. CO. (1868), 18 L. T. 8.**

1138. Common mistake.]—Deft. contracted to buy from pltf. freeholds & leaseholds under the condition that he should assume that E., who died in 1841, was seised in fee of the freeholds, & should not "require the production of or investigate or make any objection in respect of the prior title" thereto. He accepted the title, & before completion contracted to sell the lands, with a farm of his own adjoining the freeholds, to a sub-purchaser, who discovered, from an inclosure award prior in date to 1841, as to the effect of which both pltf. & deft. had been under a misapprehension, that the freeholds had never belonged to E. but at the date of the contract belonged to deft. himself in fee, subject to a leasehold interest in pltf. Deft. then refused to complete, & pltf. filed her bill for specific performance, stating that she too had discovered that part of the lands she had contracted to sell as leaseholds belonged to her in fee simple, & offering mutual waiver or compensation:—*Held*: deft. was not precluded by the condition or the acceptance of title from taking the objection, & the ct. could not decree specific performance; but, although there was no fraud yet, there being a common mistake, deft. was entitled to an inquiry as to the title to the freeholds at the date of the contract.—**JONES v. CLIFFORD (1876), 3 Ch. D. 779; 45 L. J. Ch. 809; 35 L. T. 937; 24 W. R. 979.**

Annotations:—**Consd.** *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190. **Refd.** *Allen v. Richardson (1879), 13 Ch. D. 524; Bettyes v. Mavnard (1882), 46 L. T. 766; Soper v. Arnold (1887), 37 Ch. D. 96; Huddersfield Banking Co. v. Lister, [1895] 1 Ch. 273; Scott v. Alvarez (1895), 64 L. J. Ch. 821; Re Tyrell, Tyrell v. Woodhouse (1900), 82 L. T. 675; Debenham v. Sawbridge, [1901] 2 Ch. 98.*

1139. To allow vendor to make defects good.]—**HYDE v. WARDEN, No. 709, ante.**

1140. To determine right of purchaser to compensation.]—Under an Electric Lighting Confirma-

tion Order Act, it was directed that a co. should sell, & a local authority might, & should, purchase that part of the undertaking & business of the co. which was situate in the area of the local authority. After a notice to treat had been given, the co. incurred a considerable amount of further capital expenditure in respect of the undertaking. The purchase price having been left to arbn. & the arbitrators referring it to an umpire, the umpire in fixing the purchase price considered that the adjustment of the rights of the parties in respect of such capital expenditure did not come within the award, & fixed the price without considering it. On an action brought by the co. for specific performance, it was submitted by the local authority that the co. could not show a good title to certain property comprised in the purchase. At the time of the hearing of the action the local authority were endeavouring to obtain leave to borrow the purchase-money on the security of their rates:—*Held*: (1) there must be an inquiry as to the title of the co. to the property sold, for the purpose of seeing if the local authority were entitled to any compensation. (2) A decree for specific performance would be made in favour of the co., & a date fixed for completion; with liberty to apply to extend the date.—**METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. MARYLEBONE CORPN. (1903), 67 J. P. 382; 1 L. G. R. 673.**

(b) Where Title Alone in Dispute.

1141. Whether reference ordered.]—Reference of title before decree only, where the title alone is disputed, refused therefore, where the purchaser on other grounds resisted performance.—**BLYTH v. ELMHIRST (1812), 1 Ves. & B. 1; 35 E. R. 1, L. C. Annotations**:—**Consd.** *Paton v. Rogers (1813), 1 Ves. & B. 351; Reed v. Dom Pedro North Del Rey Gold Co. (1863), 2 New Rep. 413. Refd.* *Withey v. Cottle (1823), 1 L. J. O. S. Ch. 117; Wood v. Machu (1846), 10 Jur. 1001.*

1142. —.]—Reference of title before decree refused, where the purchaser on other grounds resists a performance of the contract. Though it is generally, not universally, true, that a purchaser may take what he can get with compensation for what he cannot have. *Qu.*: whether that is ever done without an express undertaking on his part to do what the ct. shall order.—**PATON v. ROGERS (1813), 1 Ves. & B. 351; 35 E. R. 137, L. C.**

1143. —.]—There can be no reference of title except where the title only is in dispute.—**MORGAN v. SHAW (1817), 2 Mer. 138; 35 E. R. 892, L. C.**

1144. — Before defence.]—BALMANNO v. LUMLEY, No. 1270, post.

1145. — Duty of vendor to obtain reference as soon as possible.]—PHILLIPSON v. GIBBON, No. 674, ante.

(c) Performance Resisted on Grounds Other than Title.

1146. Whether reference ordered.]—BLYTH v. ELMHIRST, No. 1141, ante.

1147. —.]—PATON v. ROGERS, No. 1142, ante.

1148. —.]—*Semble*, the ct. will not, on motion, decide upon the validity of any other objection, besides defect of title, which may be raised by the answer to a bill for specific performance, the consideration of any other objection being matter to

instalments. On a bill filed by the purchaser for a specific performance of the contract—*Held*: he had not, by going into possession, waived his right to a reference as to title, & he was bound to pay his purchase-money into ct., pending the inquiry before the master.—**O'KEEFE v. TAYLOR (1851), 2 Gr. 305. —CAN.**

c. Contract to purchase mortgaged.]—A person, after contracting for the sale of land, mtged. it, & then filed a bill for specific performance. The mtge. not being due, the ct. on the hearing directed an inquiry whether pltf. could make a good title free from incumbrance, & reserved further directions & costs.—**MCDUGAL v. MILLER**

(1868), 15 Gr. 505.—**CAN.**

d. Parties unable to agree on title.]—**TIRSCHMANN v. SCHULTZ (Man.) (1908), 8 W. L. R. 210. —CAN.**

e. Title to property situate in another Province.]—FORT GEORGE & FRASER VALLEY LAND CO., LTD. v. WILSON (Alta.), [1917] 2 W. W. R. 351.—CAN.

be reserved till the hearing of the cause.—*GORDON v. BALL* (1823), 1 Sim. & St. 178; 57 E. R. 71.

1149. ———.]—In a suit for specific performance, the ct. will not, if any other defence is set up besides want of title, direct a reference as to title on motion before the hearing.

Semble: in a suit by a vendor the ct. will not in any case direct a reference upon the motion of deft.—*REED v. DON PEDRO NORTH DEL REY GOLD MINING CO., LTD.* (1863), 3 De G. J. & Sm. 593; 2 New Rep. 473; 32 L. J. Ch. 773; 9 L. T. 132; 11 W. R. 935; 46 E. R. 766, L. JJ.

1150. ——— **Other grounds to be substantial.**]—*Semble*: although the ct. will not order a reference of title on motion, where a purchaser resists the performance of the contract on another ground; yet it will take care that the latter is substantial.—*BOEHM v. WOOD* (1820), 1 Jac. & W. 419; 37 E. R. 435, L. C.

Annotations:—*Refd.* *Withy v. Cottle* (1823), Turn. & R. 78; *Reed v. Don Pedro North Del Rey Gold Co.* (1863), 2 New Rep. 413; *Tilley v. Thomas* (1867), 3 Ch. App. 61.

1151. ———.]—Upon a motion for a reference of title, where the performance of the contract is resisted upon other grounds, the ct. will look into the answer to see whether those other grounds are substantial or frivolous.—*WITHY v. COTTLE* (1823), Turn. & R. 78; 1 L. J. O. S. Ch. 117; 37 E. R. 1024, L. C.

Annotations:—*Refd.* *Wood v. Machu* (1846), 5 Hare, 158.

1152. ———.]—On a vendor's bill for specific performance the ct. will not, either under the old practice or under General Order 5 of May 9, 1839, grant a reference as to title before the hearing, if deft. resists the specific performance on other grounds than that of title, & the ct., on looking at the answer, is of opinion that such other grounds are not merely frivolous.—*BOYES v. LIDDELL* (1841), 1 Y. & C. Ch. Cas. 133; 6 Jur. 725; 62 E. R. 823.

Annotations:—*Refd.* *Wood v. Machu* (1846), 5 Hare, 158.

1153. ———.]—Where, on a bill for specific performance of a contract for the sale of an estate, a deft. by his answer takes objections upon other grounds than those of title, the ct. will look into the answer & examine the validity of the objections & unless good cause is shown for resistance, the ct. will treat them as frivolous, & without deciding upon them, direct a reference to the master as to the title.—*WOOD v. MACHU* (1846), 5 Hare, 158; 16 L. J. Ch. 21; 8 L. T. O. S. 210; 10 Jur. 1001 67 E. R. 868.

1154. ——— **Meaning of substantial.**]—*ANON.* (1823), 1 L. J. O. S. Ch. 177.

(d) *Effect of Waiver.*

1155. General rule.]—*JENKINS v. HILES*, No.

1156. What amounts to waiver—Delay in completion.]—On an agreement to purchase a leasehold interest, the purchasers, who had previously bought the reversion, subject to the vendor's lease, from the lessor, the freeholder, investigated & accepted the vendor's title, & prepared & engrossed the surrender. They subsequently delayed completion upon the discovery of an ancient lease which they alleged to be still outstanding, & to override the lessor's title. Specific performance decreed, & reference as to title refused.—*CORBETT v. WORKS & PUBLIC BUILDINGS COMRS.* (1868), 18 L. T. 548; 16 W. R. 889.

— **Failure to make objections to title.**]—*See, generally, SALE OF LAND*, Vol. XL, p. 89, Nos. 692–694.

— **Acceptance of title.**]—*See, generally, SALE OF LAND*, Vol. XL, pp. 172–176, Nos. 1417–1456.

1157. Necessity for pleading.]—*CLIVE v. BEAUMONT*, No. 1103, *ante*.

1158. ——— **Where waiver inferred from facts pleaded.**]—Deft., a married woman, having separate estate & living apart from her husband, entered into a contract to take a leasehold house for a term of seven or fourteen years. The agreement being reduced into writing by the lessor's agent, was, after alterations by deft.'s solrs., signed by the agent & left with deft., who retained but did not sign it. In letters which she & her solrs. wrote, it was treated as an agreement between the parties, & she entered into possession of the house:—*Held*: inasmuch as deft. had by occupying & continuing to occupy the house, & by other acts, adopted the agreement, a decree directing a reference as to the lessor's title could not be sustained, although it was not expressly alleged in the bill that deft. had waived the production of the lessor's title.—*GASTON v. FRANKUM* (1852), 18 L. T. O. S. 310; 16 Jur. 507, L. C.

Annotations:—*Refd.* *Scargill v. Hurry* (1850), 14 Jur. 847; *Laurie v. Lees* (1881), 7 App. Cas. 19. *Mentd.* *Hancocks v. Lablache* (1878), 3 C. P. D. 197.

C. *Time for Reference.*

1159. Interlocutory order — Before hearing — Necessity for consent.]—This ct. will not, on a bill for specific performance, make an interlocutory order to refer a title, the validity of which is denied by the answer, and depends on facts, to the Deputy Remembrancer, until the cause is brought to a hearing, without consent.—*BOWYER v. BRIGHT* (1816), 3 Price, 300; 146 E. R. 268.

1160. Motion at commencement of action.]—A motion may be made on a bill for a specific performance, for a reference as to the title, & whether a title was shown prior to the filing of the bill.—*ANON.* (1818), 3 Madd. 495; 56 E. R. 587.

1161. After decree.]—When, in consequence of the contract itself having been disputed, an action for specific performance is heard before there has been a reference as to the title, judgment will at once be given for specific performance, & an inquiry ordered whether a good title can be made.—*FLOOD v. PRITCHARD* (1879), 40 L. T. 873.

D. *Form and Scope of Reference.*

(a) *In General.*

1162. Reference in general terms.]—*JENKINS v. HILES*, No. 1123, *ante*.

1163. ———.]—Upon a bill filed by the vendor for the specific performance of a contract, it appeared that deft., in the course of correspondence between the solrs., & upon a case stated on his part for the opinion of counsel, expressed himself willing to accept the title if a particular objection then referred to were removed. That objection not being removed, the bill was filed, & the ct. ruled that the reference to the master as to the title must be in general terms, & not confined to the particular objection.—*LESTURGEON v. MARTIN* (1834), 3 My. & K. 255; 40 E. R. 97.

1164. ———.]—When money in ct. is subject to a trust for investment in land, & the tenant for life enters into a provisional contract for the purchase of an estate, subject to conditions of sale, the ct. makes a general reference as to the title, & not whether a good title can be made subject to the conditions of sale.—*MEYRICK v. LAWS* (1864), 34 Beav. 58; 55 E. R. 554.

Reference to particular matters.]—*See* Sub-sect. 4, D. (b), *post*.

1165. Extension of terms of reference—By subsequent motion—After order for reference made—Delivery of abstract.]—A reference having been

Sect. 6.—Relief: Sub-sect. 4, D. (a) & (b) i., ii. & iii. & E.]

made as to title on one motion, the party cannot afterwards, by another motion, have a reference as to the delivery of the abstract.—*HYDE v. WROUGHTON* (1818), 3 Madd. 280; 56 E. R. 512.

1166. ——— Time when title first shown.]—The ct. will not, on motion, after an order for a reference, direct the master to inquire, if he found that a good title can be made to premises, the subject of a suit for specific performance, when such good title could first be made. Such direction should be applied for at the hearing, when the ct. is in possession of the merits.—*LUBIN v. LIGHTBODY* (1820), 8 Price, 606; 146 E. R. 1310.

1167. ——— Matters set up in defence against execution of contract.]—In a suit by a vendor for specific performance, the decree at the original hearing having directed merely a reference of title, the ct. will not, at the hearing on further directions, enter into the consideration of any other objection which the answer had set up against the execution of the contract.—*LE GRAND v. WHITEHEAD* (1826), 1 Russ. 309; 38 E. R. 120.

(b) To What Matters Directed.

i. In General.

1168. All matters concerning title.]—On a reference of title on a bill for a specific performance, the reference may extend to all that concerns the title, but not to other matters; it may be extended, therefore, to inquire, whether it appeared by the abstract in the pleadings mentioned, that a good title could be made.—*JENNINGS v. HOPTON* (1816), 1 Madd. 211; 56 E. R. 79.

1169. ———.]—In suits for specific performance between vendor & purchaser, everything connected with the title may be the subject of the usual reference upon motion as to the vendor's title, & may be added by way of inquiry to that reference; but the ct. will not allow any inquiry to be added as to matters which have no reference to the title, & which are not admitted by the answer.

It was directed by Sir John Leach, that in every order by which it was referred to the Master to inquire whether a good title could be made, there should be inserted a direction that, if the Master should find a good title could be made, he should inquire when it was first shown: & so the order is now always made, unless for some reason stated at the time, & by the express direction of the ct., the inquiry as to the time when a good title was first shown, should be omitted (*LORD LONGDALE, M.R.*).—*BENNETT v. REES* (1836), 1 Keen, 405; 5 L. J. Ch. 360; 48 E. R. 362.

1170. Not matters outside title.]—*JENNINGS v. HOPTON*, No. 1168, *ante*.

1171. ———.]—*BENNETT v. REES*, No. 1169, *ante*.

1172. Acceptance of title.]—*HORNIBLOW v. SHIRLEY* (1804), 3 Seton's Judgments & Orders 7th ed. 2160; *previous proceedings* (1802), 13 Ves. 81.

Annotation:—Refd. Halsey v. Grant (1806), 13 Ves. 73.

1173. Matters not admitted by answer.]—*BENNETT v. REES*, No. 1169, *ante*.

1174. Increase in value of estate.]—*BROOKE v. CHAMPERNOWNE*, No. 1187, *post*.

1175. Delivery of abstract.]—*REMNANT v. HOLT* (1847), 3 Seton's Judgments & Orders 7th ed. 2160.

1176. Requisitions — Answers thereto.]—*REMNANT v. HOLT* (1847), 3 Seton's Judgments & Orders 7th ed. 2160.

1177. ———.]—*SAUL v. BOLTON* (1852), 3 Seton's Judgments & Orders 7th ed. 2159, L. JJ.

1178. ———.]—In Nov. 1861, S. agreed to purchase of pltf. "the mill property, including six

cottages in E. village." Pltf. being, at the date of the contract, only equitably entitled under an agreement for sale from the beneficial owners, stipulated by parol that he should only be bound to show such title as he was himself entitled to require from his vendors; it was also agreed that all the property, part of which was then copyhold, should be sold as freehold. The copyholds had as to a moiety been devised by testator to his daughter B. in fee, but were not surrendered to the uses of the will. After his death his two daughters, A. & B. were admitted as coparceners, & the subsequent enfranchisement was made to them, their heirs, & assigns. After the enfranchisement, A. being out of the jurisdiction, an order was obtained upon petition, under Trustee Act, 1850 (c. 60), s. 9, vesting her outstanding legal estate in trustees for B. Negotiations in respect of the title were carried on between the parties for three years, in the course of which the purchaser objected to the above order on the ground that it was ineffectual, & that a fresh order should be obtained under Trustee Act, 1850 (c. 60), s. 10. This was the principal requisition, & the only one with which pltf. refused to comply. In Dec. 1864, the purchaser gave notice that unless, within one week, pltf. would comply, or consent to comply, with the requisitions sent therewith, he should require a good & marketable title to the whole property, & in default of such title being shown within five weeks, he should treat the contract as rescinded. After some further negotiation pltf. in Aug. 1865, filed his bill for specific performance:—*Held*: the notice to rescind was a waiver of all delay up to that time, & an admission that the contract was then in force; the vesting order had been properly made under Trustee Act, 1850 (c. 60), s. 9, A. being "solely seised upon trust" for B. both under the admission & under the enfranchisement; consequently, the notice to rescind was bad, being also unreasonable in point of time. Decree made for specific performance, with a declaration that the deft. was bound to accept such title as pltf. could require from his vendors; the inquiry in chambers to be limited to such requisitions as were specified in an opinion of counsel which had been sent to pltf. in June, 1863, & subject to which the title had then been accepted, & the purchaser was ordered to pay the costs of the suit up to the hearing.

Laches will not be imputed to a vendor on account of delay, however long, in filing his bill for specific performance, where negotiations respecting the title have been going on the whole time.—*McMURRAY v. SPICER* (1868), L. R. 5 Eq. 527; 37 L. J. Ch. 505; 18 L. T. 116; 16 W. R. 332.

Annotations:—Appld. McGrory v. Alderdale Estate Co., [1918] A. C. 503. *Refd. Webb v. Hughes* (1870), L. R. 10 Eq. 281.

1179. Objection by vendor to own title.]—A vendor took an exception which contested the validity of his own title:—*Held*: it was irregular.—*BRADLEY v. MUNTON* (1852), 15 Beav. 460; 51 E. R. 616.

1180. Objections abandoned by purchaser before action.]—Possession by a purchaser given or permitted by a vendor without receipt of rents & profits by the purchaser, does not render the purchaser liable to pay the purchase-money into ct.; but he will be ordered to give up possession or to pay the purchase-money. If the common decree for specific performance & for an inquiry for title be made, the purchaser may raise objections which he abandoned before the suit, & the ct. will not add any inquiry on the subject to the decree, or direct the chief clerk to state special circumstances. On further consideration the ct. will not, on the

question of costs or interest, look at any evidence but that in the cause, & not at the proceedings & evidence in chambers or an interlocutory motion.—*CURLING v. AUSTIN* (1862), 2 Drew. & Sm. 129; 10 W. R. 682; 62 E. R. 570.

Annotations:—*Consd.* *Upperton v. Nickolson* (1871), 5 Ch. App. 436. *Appld.* *McGrory v. Alderdale Estate Co.*, [1918] A. C. 503. *Refd.* *Lawrie v. Lees* (1881), 7 App. Cas. 19.

ii. *Whether Abstract Shows Good Title.*

1181. Whether reference directed.]—*HORNIBLOW v. SHIRLEY* (1804), 3 Seton's Judgments & Orders 7th ed. 2160; *previous proceedings* (1802), 13 Ves. 81.

Annotation:—*Refd.* *Halsey v. Grant* (1806), 13 Ves. 73.

1182. —.]—After answer, submitting to perform the contract, if a good title can be made, reference directed on motion, whether a good title can be made; & whether it appears upon the abstract.—*WRIGHT v. BOND* (1805), 11 Ves. 39; 32 E. R. 1002, L. C.

1183. —.]—*JENNINGS v. HOPTON*, No. 1168, *ante*.

1184. —.]—*BENNETT v. REES*, No. 1169, *ante*.

iii. *When Good Title First Shown.*

1185. Whether reference directed.]—Decree for a reference upon the title. The cause coming on for further directions, after a report approving the title, *deft.* is entitled to have an inquiry at what time a title could have been made.—*DALY v. OSBORNE* (1816), 1 Mer. 382; 35 E. R. 714.

1186. —.]—*BENNETT v. REES*, No. 1169, *ante*.

1187. —.]—A., in Dec. 1812, agreed to become the purchaser of a reversionary estate; B., the vendor, agreed, on or before May 1 then next, to make out a good title. A. was to be entitled to the rents & profits of all & singular the messuages, etc., from May 1 then next, or from such time as the purchase should be completed. A. had at the time of making the agreement paid part of the purchase-money, & he promises, for the considerations aforesaid, that he would, on May 1, pay the remainder as & for the absolute purchase, etc. A. further agreed to pay all & every such sum & sums of money for the increased value of the messuages, etc., by or in consequence of the deaths of any persons for whose life or lives any of the messuages were theretofore granted. The purchase was not completed for a very considerable period. The vendor filed his bill for a specific performance. The *ct.* made a decree, referring it to the master to inquire when the vendor could make a good title, & how much the value of the estate had been increased by the deaths of the persons on whose lives any portions of it were holden:—*Held*: this decree was correct, & the contract did not give the vendor a right to demand payment for the increased value of the estate from the wearing as well as the dropping of lives.—*BROOKE v. CHAMPERNOWNE* (1837), 4 Cl. & Fin. 589; 7 E. R. 224, H. L.

Annotation:—*Consd.* *Richards v. Pryse*, [1927] 2 K. B. 76.

1188. —.]—On motion for the usual order of reference as to title, it being objected that the answer stated that a good title could not be made, & that a question of costs would arise on the point of notice of no title before filing the bill, the *ct.*

ordered the usual reference to the master, & directed, that if a good title could not be made, the master should state when it was first shown that a good title could not be made, with liberty to state special circumstances as to the time when it was first shown that a good title could or could not be made to the estate contracted to be sold.—*MARTIN v. JARDINE* (1838), 7 L. J. Ch. 250.

1189. —.]—*Deft.*, a purchaser of a public-house, insisted that time was of the essence of the contract, & that the abstract had not been delivered within the time agreed on. A reference without prejudice, was made, on motion, as to the title, & when it was first shown.—*FOXLOWE v. AMCOATS* (1840), 3 Beav. 496; 4 Jur. 1053; 49 E. R. 195.

Annotation:—*Expld.* *Reed v. Dom Pedro North Del Rey Gold Co.* (1863), 2 New Rep. 413.

1190. —.]—*REMNANT v. HOLT* (1847), 3 Seton's Judgments & Orders 7th ed. 2160.

1191. —.]—*SAUL v. BOLTON* (1852), 3 Seton's Judgments & Orders 7th ed. 2159, L. JJ.

1192. —.]—A. entered into a treaty with B.'s agent for the purchase of leasehold premises, fixtures & furniture, & in going over the premises, pointed out the articles of furniture which he would take at a valuation, of which the agent made a list. No agreement was executed or signed, but in the letter which passed between A. & the agent, A. consented to take the lease, & added, "the other articles which you included in your list, I will also take at a valuation":—*Held*: as *deft.* disputed the contract, the *ct.* would only allow the common reference as to title, without the inquiry when a good title could be shown.—*MORRIS v. WILSON* (1859), 33 L. T. O. S. 56; 5 Jur. N. S. 168.

Annotations:—*Mentd.* *Stanley v. Dowdeswell* (1874), L. R. 10 C. P. 102; *Commins v. Scott* (1875), L. R. 20 Eq. 11; *Wylson v. Dunn* (1887), 34 Ch. D. 569; *Pattie v. Anstruther* (1893), 69 L. T. 175; *Filby v. Hounsell*, [1896] 2 Ch. 737; *Lovesy v. Palmer*, [1916] 1 Ch. 233.

1193. — **Validity of contract disputed.]**—Here the contract itself has been disputed, & therefore, I must not direct an inquiry as to when the title was first shown (*LORD LANGDALE, M.R.*).—*GIBBINS v. NORTH EASTERN METROPOLITAN ASYLUM DISTRICT BOARD* (1847), 11 Beav. 1; 17 L. J. Ch. 5; 10 L. T. O. S. 301; 12 Jur. 22; 50 E. R. 716.

Annotations:—*Refd.* *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Jones v. Daniel*, [1894] 2 Ch. 332.

1194. — — —.]—*POTTER v. CROSSLEY*, No. 762, *ante*.

E. *Evidence.*

1195. What evidence admissible Matters not produced before the court.]—In this instance, a bill by a vendor for a specific performance, the report being against the title, the bill was dismissed with costs, upon the circumstances: the purchaser having taken possession at the instance of the vendor, representing the title to be perfect; though possession taken, generally, is of weight as to costs.

Upon a question of title, as to specific performance, farther evidence may be produced on both sides before the master.—*VANCOUVER v. BLISS* (1805), 11 Ves. 458; 32 E. R. 1164, L. C.

Annotations:—*Mentd.* *Smedley v. Philpot* (1838), 3 M. & W. 573; *Grove v. Bastard* (1851), 1 De G. M. & G. 69.

PART V. SECT. 6, SUB-SECT. 4.— D. (b) iii.

1185 f. Whether reference directed.]—In future the *ct.* will add to the reference, as to whether a good title can be made, a direction to the master, at the request of either party, to inquire & report at what time a good title

was shown.—*ENRAGHT v. FITZGERALD* (1842), 2 Dr. & War. 43.—*IR.*

PART V. SECT. 6, SUB-SECT. 4.—E.

f. Clear case must be shown.]—In suits for specific performance *pltf.* must show a fair, clear, & conscientious case, & not rely upon a contract

snatched from the other party.—*RAWLINGS v. HISLOP* (1883), 9 V. L. R. (Eq.) 25.—*AUS.*

g. Certainty of proof.]—The certainty of proof in a suit for specific performance must be greater than in an action for damages.—*TART v. CALLOWAY* (1885), 2 Man. L. R. 289.—*CAN.*

Sect. 6.—Relief: Sub-sect. 4, E. & F. (a), (b), (c), (d) & (e).]

1196. To show purchaser's knowledge of incurable defect.]—Upon an inquiry as to title under an ordinary vendor's decree for specific performance of an open contract to purchase land the vendor is not entitled to adduce evidence to show that the purchaser, when he entered into the contract, knew of the existence of incurable defects in title. Such evidence can be adduced only at the trial of the action.—*MCGRORY v. ALDERDALE ESTATE CO.*, [1918] A. C. 503; 87 L. J. Ch. 435; 119 L. T. 1; 62 Sol. Jo. 518, H. L.; *revsq.* S. C. *sub nom.* *ALDERDALE ESTATE CO. v. MCGRORY*, [1917] 1 Ch. 414, C. A.

Annotation:—Mentd. *Keen v. Mear*, [1920] 2 Ch. 574.

F. The Certificate.

(a) In General.

1197. Action against vendor for recovery of estate—Whether report suspended until decision.]—The master's report on a reference of title, will not be suspended, to wait the decision of a suit commenced against the vendor for the recovery of part of the estate, but the two suits may be heard together.—*OSBALDISTON v. ASKEW* (1821), 2 Jac. & W. 539; 37 E. R. 734, L. C.

1198. Re-opening of case after master's report—Discovery of misrepresentation.]—Matter discovered after a decree has been made, though not capable of being used as evidence of any thing which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a supplemental bill in the nature of a bill of review. A party may obtain leave to file, & may file a supplemental bill in the nature of a bill of review, though he has not performed the decree in the original cause, if the proceedings under the decree are not at the time in such a state as to enable the adverse party to bring him into default for not having done what the decree orders. A party will not be allowed, except under very special circumstances, to file a bill of review or a supplemental bill in the nature of a bill of review, or to prosecute it after he has obtained leave to file it, unless he performs at the proper time all that the decree commands him to do. A purchaser, who was deft. in a suit for specific performance, did not in his answer mention any warranty given, or representation made by the vendor, & insisted merely that a good title was not shown; a reference on the question of title was ordered; the master reported in favour of the title, & a decree for specific performance was pronounced. After the order of reference had been made, deft. discovered that the timber on the estate, which constituted its principal value, was much less in quantity than it had been represented to be in a statement, the accuracy of which was alleged to have been warranted at the sale; but the fact of such warranty having been given was strongly controverted; under these circumstances leave was given to file a supplemental bill in the nature of a bill of review, in order that deft. might have the same benefit of the alleged warranty, as if he had originally insisted upon it in his answer. After leave given, he has a right to file such a bill without having previously paid the purchase-money which the decree commands him to pay, if the time, at which the adverse party in the due execution of the decree, can compel payment, has not yet arrived:—*Semble*: as soon as that time arrives, he will not be allowed to proceed with his bill, until he pays the purchase-money to the vendor; & such payment will not be dispensed with, nor will payment of the money into ct. be allowed to be

substituted for it, though the sum be very large.—*PARTRIDGE v. USBORNE* (1828), 5 Russ. 195; 7 L. J. O. S. Ch. 49; 38 E. R. 1000, L. C.

Annotations:—Refd. *Hodson v. Ball* (1842), 1 Ph. 177; *Henderson v. Henderson* (1843), 3 Hare, 100; *Michael v. Fripp* (1870), 18 W. R. 423. *Mentd.* *Ingram v. Thorp* (1848), 7 Hare, 67; *Slim v. Croucher* (1860), 8 W. R. 347.

1199. Mode of appeal from certificate.]—Course of proceeding in order to take the opinion of the Ct. of Appeal on a certificate of a chief clerk.—*RHODES v. IBBETSON* (1853), 4 De G. M. & G. 787; 2 Eq. Rep. 76; 23 L. J. Ch. 459; 43 E. R. 715, L. JJ.

Annotations:—Refd. *Saunders v. Druce* (1855), 3 Drew. 139. *Mentd.* *Lawrie v. Lees* (1881), 7 App. Cas. 19.

(b) Report in favour of Title.

1200. Report conditionally in favour—Concurrence of third party necessary.]—Bill by purchaser for specific performance, ordered too be dismissed for defect of title, a necessary party not choosing to concur in conveying. Order to dismiss, without costs, it being against the principles of the ct. to order deft. to pay pltf. his costs.—*LEWIS v. LOXHAM* (1817), 3 Mer. 429; 36 E. R. 165.

Annotation:—Refd. *Merlin v. Blagrove* (1858), 25 Beav. 125.

1201. ———.]—When a necessary party to a title, is neither in law or equity under the control of the vendor, the master ought to report against the title, unless there is produced to him a legal or equitable obligation on the part of the stranger to join in the conveyance.

If the master should report against the title, & at the hearing, upon further directions, the vendor had cured the defect, the ct. would then compel the purchaser to take the title, although it would not suspend the contract with a view to a future proceeding to perfect the title (*LEACH, V.-C.*).—*ESDAILE v. STEPHENSON* (1822), 6 Madd. 366; 56 E. R. 1131.

Annotations:—Consd. *Dawes v. Betts* (1818), 17 L. J. Ch. 315; *Halkett v. Dudley*, [1907] 1 Ch. 590. *Distd.* *Brickles v. Snell*, [1916] 2 A. C. 599. *Refd.* *Douglass v. L. & N. W. Ry.* (1857), 3 K. & J. 173; *Ex p. Winder* (1877), 6 Ch. D. 696.

1202. Objections overruled—Whether further objections allowed.]—*BROOKE v. ———* (1819), 4 Madd. 212; 56 E. R. 684.

1203. ——— Finality of decree.]—(1) On a sale by a trustee, he stipulated that his receipt should be deemed an effectual & conclusive discharge, & that the purchaser should not require the concurrence of the heir or *cestui que trust*. A decree was made for specific performance & reference as to title. The master found in favour of the trustee; & upon exceptions, the purchaser contended that the rule as to the concurrence of the *cestuis que trust* being one for their protection, it was a breach of trust to stipulate that they should not concur; but the ct. held the point concluded by the decree.

(2) The rule that the costs of a suit for specific performance depend upon when the title was first shown, is to be strictly adhered to.—*WILKINSON v. HARTLEY* (1852), 15 Beav. 183; 51 E. R. 507.

Annotation:—As to (2) Refd. *Lyle v. Yarborough* (1859), John. 70.

1204. Objections allowed—Whether further objections allowed.]—*BROOKE v. ———* (1819), 4 Madd. 212; 56 E. R. 684.

1205. ——— Vendor allowed time to remove objection.]—Where the report is in favour of the title, the ct., on allowing exceptions to it, will give the vendor a reasonable time within which to remove the objection, although the exceptions & further directions were set down to come on together.—*PORTMAN v. MILL* (1831), 1 Russ. & M. 696; 9 L. J. O. S. Ch. 193; 39 E. R. 267, L. C.

Annotations:—Refd. *Beaufort v. Glynn* (1855), 3 W. R. 463. *Mentd.* *Dell v. Barlow* (1831), 2 Russ. & M. 686.

PART V.—PROCEEDINGS FOR SPECIFIC PERFORMANCE.

1206. Title held too doubtful to force on purchaser—Action dismissed—Without costs.]—WILLCOX v. BELLAERS, No. 587, ante.

1207. ——— Whether objections allowed or disallowed.]—WILLCOX v. BELLAERS, No. 587, ante.

1208. ——— .]—Where, on a reference as to title in a suit against a purchaser for specific performance, the master reports in favour of the title, but the ct. holds it to be so doubtful that the purchaser should not be compelled to take it, the bill may be dismissed without allowing the exceptions taken by deft. to the report.—ROBINSON v. MILNER (1842), 1 Hare, 578, n.; 66 E. R. 1161.

Annotation :—**Refd.** Hall v. Laver (1842), 1 Hare, 571.

1209. Objection only as to time when title shown—Title held to be accepted.]—On a bill for specific performance against the purchaser, where the master has reported in favour of the title, & deft. excepts to the report, as to the time when a good title was shown, but not generally, he was held to have accepted the title.—ARUNDALE v. BOWYER (1843), 2 L. T. O. S. 205, L. C.

Reference back for review.]—See Sub-sect. 4, F. (c), post.

(c) Report against Title.

1210. Action dismissed with costs.]—BENNET COLLEGE v. CAREY (1791), 3 Bro. C. C. 390; 29 E. R. 602, L. C.

Annotation :—**Refd.** Aberaman Ironworks v. Wickens (1868), L. R. 5 Eq. 485.

1211. ———.]—VANCOUVER v. BLISS, No. 1195, ante.

1212. ———.]—On the report against vendor's title his bill for specific performance dismissed with costs on motion.—WALTERS v. PYMAN (1815), 19 Ves. 351; 34 E. R. 548, L. C.

1213. ———.]—PRETTY v. SOLLY (1859), 26 Beav. 606; 33 L. T. O. S. 72; 53 E. R. 1032.

Annotations :—**Mentd.** De Winton v. Brecon Corp'n. (1859), 33 L. T. O. S. 296; Wakefield v. Buccleuch, Buccleuch v. Wakefield (1870), 39 L. J. Ch. 111.

1214. ———.]—TURNER v. MARRIOTT, No. 1542, post.

Discharge or Variation of Certificate.

See R. S. C., Ord. 55, rr. 70, 71.

1215. Whether granted after eight days from date of certificate—Necessity for special grounds.]—After eight days from the date of a chief clerk's certificate, it stands on the same footing as a master's report confirmed absolutely did under the old practice, & will not be discharged or varied except on special grounds.—HOWELL v. KIGHTLEY (1856), 8 De G. M. & G. 325; 25 L. J. Ch. 341; 27 L. T. O. S. 61; 2 Jur. N. S. 455; 4 W. R. 477; 41 E. R. 415, L. J.

Annotations :—**Refd.** Ashton v. Wood (1857), 26 L. J. Ch. 275; Briant v. Tebbut (1869), 20 L. T. 62, Lawrie v. Lees (1881), 7 App. Cas. 19; *Re* McMurdo, Penfield v. McMurdo, [1902] 2 Ch. 684.

1216. ——— Mistater of solicitor.]—Where, in a vendor's suit for specific performance of a contract to purchase land, the chief clerk had certified against the title of pltf., & pltf.'s solr., through misapprehension of the practice on the part of his clerk, had allowed the eight days after the filing of the certificate, within which, according to the practice prescribed by the General Orders of Oct. 16, 1852, Ord. 51, pltf. ought to have applied

to vary the certificate to expire; the ct. nevertheless gave leave to apply by motion to vary such certificate.—ASHTON v. WOOD (1857), 8 De G. M. & G. 698; 26 L. J. Ch. 275; 3 Jur. N. S. 146; 5 W. R. 271; 44 E. R. 559, L. J.

Annotation :—**Apld.** Briant v. Tebbut (1869), 20 L. T. 62.

Appeal from certificate.]—See Nos. 1198, 1199, ante.

(e) Reference back for Review.

1217. When ordered—Report against title in another proceeding.]—After a report, which was confirmed in favour of a title by one master, another master, in another proceeding, made a report, by which the title was affected. On motion to refer the title back to the master who had reported there was a good title, an order was made for that purpose.—JEUDWINE v. ALCOCK (1816), 1 Madd. 597; 56 E. R. 219.

1218. ——— To see whether title could have been made before action brought.]—On a reference of title, the master having reported that a good title could be made, order, referring it back to the master to see whether such title could have been made prior to the filing of the bill by the vendor for a specific performance.—BIRCH v. HAYNES (1817), 2 Mer. 444; 35 E. R. 1010, L. C.

1219. ——— Production of further evidence—Court holding evidence insufficient.]—If, upon a question of title, the master is satisfied with the evidence produced before him, but, upon the hearing of an exception to the report, the ct. thinks the evidence not sufficient, the ct., upon the application of the vendor, will refer it back to the master to review his report, in order to give the vendor an opportunity of producing further evidence.—ANDREW v. ANDREW (1830), 3 Sim. 390; 57 E. R. 1044.

Annotation :—**Consd.** Dawes v. Betts (1848), 17 L. J. Ch. 315.

1220. ——— To show objection is immaterial.]—An exception to a report in favour of the title having been on argument allowed, leave was given to pltf., sometime afterwards, to go again before the master, for the purpose of bringing evidence to show that the objection which the ct. had sustained, was in the circumstances, immaterial.—EGERTON v. JONES (1830), 1 Russ. & M. 694; 39 E. R. 266, L. C.

Annotations :—**Consd.** Dawes v. Betts (1848), 17 L. J. Ch. 315. **Refd.** Eno v. Eno (1847), 6 Hare, 171.

1221. ——— Erroneous report.]—Where, on a reference as to title, the master has reported in favour of the title, but, upon exceptions, the ct. thinks he has done so erroneously or on insufficient grounds, the course is to give resp. the option of a reference back to the master to review his report.—CURLING v. FLIGHT (1848), 2 Ch. 613; 17 L. J. Ch. 359; 12 L. T. O. S. 61; 12 Jur. 423; 41 E. R. 1080, L. C.

Annotation :—**Refd.** Dawes v. Betts (1848), 12 Jur. 709.

1222. ——— Report on insufficient grounds.]—CURLING v. FLIGHT, No. 1221, ante.

1223. Whether special application necessary—Where court disagrees with master's finding.]—CURLING v. FLIGHT, No. 1221, ante.

1224. ——— .]—Where the ct., on exceptions to the master's report, disagrees with his finding, it is not necessary to make a special application for a reference back to the master.—DAWES v. BETTS (1848), 13 L. T. O. S. 481; 12 Jur. 709, L. C.

PART V. SECT. 6, SUB-SECT. 4.—F. (c).

h. Court's attention should be drawn to precise disapproved point]—GREEN v. MONKS (1818), 2 Mol. 325.—IR.

PART V. SECT. 6, SUB-SECT. 4.—F. (e).

k. When ordered—Several objections to title.]—GRAY v. STRANGMAN (1853), 5 Ir. Jur. 113.—IR.

Sect. 6.—Relief: Sub-sects. 5, 6 & 7, A. & B. (a).]

SUB-SECT. 5.—INTEREST, RENTS AND DETERIORATION.

See, generally, SALE OF LAND, Vol. XL., pp. 178, et seq.

Where special conditions in contract.]—See SALE OF LAND, Vol. XL., pp. 118 et seq.

Agreement for compulsory purchase.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 231, 232, Nos. 1203-1215.

Agreement for purchase of mines.]—See MINES, Vol. XXXIV., p. 633, Nos. 307-309.

Agreement for lease.]—See LANDLORD & TENANT, Vol. XXXI., p. 273, No. 4171.

SUB-SECT. 6.—FORFEITURE OR RETURN OF DEPOSIT.

See, generally, SALE OF LAND, Vol. XL., pp. 131-134, 226-242.

1225. Return of deposit with interest—Unsuccessful action.]—ANSON (LORD) v. HODGES, No. 576, ante.

1226. ———.]—TURQUAND v. RHODES, No. 463, ante.

———.]—See SALE OF LAND, Vol. XL., pp. 241-242, Nos. 2092-2117.

1227. Replacement of deposit by vendor's solicitor—Deposit paid away without concurrence of purchaser—Mortgagee refusing to join in conveyance.]—On a contract for purchase, a part of the purchase-money was paid as a "deposit" to the vendor's solr., who paid it away at the desire of the vendor, without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mtgee. of the estate would not join in the conveyance without payment to him of the deposit. In a suit by the purchaser for specific performance, the solrs. were declared liable to make good the money.—WIGGINS v. LORD (1841), 4 Beav. 30; 49 E. R. 248.

Annotation:—Reid. Edgell v. Day (1865), L. R. 1 C. P. 80.

Declaration made in action for specific performance.]—See SALE OF LAND, Vol. XL., pp. 132, 133, Nos. 1045-1048.

PART V. SECT. 6, SUB-SECT. 6.

l. General rule.]—The circumstance that a purchaser is not entitled to specific performance is by no means conclusive against his right to a return of the deposit. If, having regard to the terms of the contract, he is justified in refusing to accept the title, which the vendor is able to give, he is entitled to a refund of the deposit.—*IBRAHIMBAI v. FLETCHER* (1896), 1 L. R. 21 Bom. 827.—**IND.**

m. Return of part of purchase-money—No good title shown.]—Where a bill by a purchaser for specific performance is dismissed because a good title cannot be shown, the ct. will order a sum paid on account of the purchase-money to be returned to the purchaser, & in default, give him a lien therefor on the estate agreed to be sold; but, unless the vendor has been guilty of fraud, the bill will be dismissed without costs.—*HURD v. ROBERTSON* (1859), 7 Gr. 142.—**CAN.**

n. Repayment of moneys paid on account—Default in payment of instalments.]—Pltf. agreed to purchase from defts. certain lands for the sum of \$500, payable as follows: \$60 cash & \$20 per month thereafter till the full amount should be paid. The agreement provided that time should be of the essence of the contract & contained the usual proviso for cancellation by notice in case of default fully set out

in the judgment. Pltf. having made default in payment of six monthly instalments, defts. gave notice of cancellation pursuant to the agreement & afterwards sold & conveyed the land to a third party. About two & a half years after the last payment by pltf., he brought this action for specific performance, or, in the alternative, for a return of the money he had paid:—*Held*: the effect of the default, the giving of the notice & the continued default was, at common law, to cancel the contract & unless equity would relieve, to enable the vendor to retain both the land & the money paid, & that pltf., having deliberately refrained from continuing his monthly payments for over two years & a half because the land diminished in value & he was in doubt whether it "would do him any good" to pay any more instalments, was not entitled to any equitable relief, either by way of specific performance or against the forfeiture provided for by the contract, & therefore could not recover the amount he had paid.—*DALZIEL v. HOMESEEKERS' LAND & COLONIZATION CO.* (1911), 20 Man. L. R. 736; 16 W. L. R. 406.—**CAN.**

o. Speculative purchase.]—*BRITISH COLUMBIA ORCHARD LANDS CO. v. KILMER (B.C.)* (1912), 20 W. L. R. 892; 2 W. W. R. 91; 2 D. L. R. 306.—**CAN.**

SUB-SECT. 7.—PAYMENT INTO COURT.

A. In General.

1228. Deposit—Order against auctioneer.]—Auctioneer, on motion of vendor, ordered to pay deposit into ct., minus his charges & expenses; & vendee restrained by injunction from proceeding in his action against the auctioneer for the deposit; in which action he had obtained a judgment for the whole amount of the deposit.—*ANNESLEY v. MUGGRIDGE* (1816), 1 Madd. 593; 56 E. R. 218.

1229. ———.]—Bill against vendee & auctioneer, praying a specific performance, & that deposit may be paid into ct. Auctioneer admits the deposit to be in his hands, & states his claims upon it. On motion, he was ordered to pay in the deposit, after retaining the amount of his claims, & without prejudice to any question as to the money retained.—*YATES v. FAREBROTHER* (1819), 4 Madd. 239; 56 E. R. 694.

1230. Rent—Possession taken by lessee.]—Pltf. & deft. entered into an agreement, that when a certain house belonging to pltf. should be completed & finished fit for habitation, pltf. would grant to deft. a lease of such house for twenty-one years. Deft. took possession before the house was completed, & occupied it for a year; but refused to pay rent or execute the lease. Pltf. filed a bill for specific performance, & moved that deft. might be ordered to pay the year's rent into ct. Motion refused, with costs.—*FAULKNER v. LLEWELLIN* (1862), 31 L. J. Ch. 549; 26 J. P. 515; 10 W. R. 378; *subsequent proceedings* (1863), 9 L. T. 557, L. JJ.

1231. Royalties—Lessee of mine in possession.]—Pltfs. commenced an action against deft. for specific performance of an agreement for a lease of a coal mine by pltfs. to deft. at a royalty, as pltfs. alleged, of 10d. per ton. Deft. counter-claimed to have specific performance with a royalty of less amount. Deft. was in possession & raising & selling large quantities of coal, but he alleged that he had expended on the mine more than the value of the coal raised. He also brought an action against pltfs. in the Q. B. Div. to obtain damages for misrepresentations alleged to have been made to him for the purpose of inducing him to enter into the agreement, which action was still

p. Right to retain money—Contract not open one.]—Where a vendor sues for specific performance & prays that in default thereof he may have the purchaser's interest cancelled & determined, he is entitled, if the purchaser does not pay the amount due within the time fixed by the ct., to have the agreement determined & to retain the moneys paid thereunder, even if the agreement is an open one in that it contains no clause permitting the vendor to cancel it & retain the moneys paid to him.—*EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT CORPN. v. MAHON*, [1926] 1 D. L. R. 411; [1926] 1 W. W. R. 186; 20 Sask. L. R. 318.—**CAN.**

PART V. SECT. 6, SUB-SECT. 7.—A.

q. Whether security for performance of decree of court ordered.]—*MERRITT v. TOBIN* (1845), U. C. Jur. 609; 1 O. S. 257.—**CAN.**

r. When refused—Reference for title necessary.]—In a suit against the purchasers for specific performance the ct. refused to order the purchase-money into ct., pending a reference as to title.—*TISDALE v. SHORTIS* (1863), 10 Gr. 271.—**CAN.**

t. ———.]—*DARBY v. GREENLEES* (1865), 11 Gr. 351.—**CAN.**

u. Purchase-money.]—*JESSOP v. SMYTH*, [1895] 1 I. R. 508.—**IR.**

pending. Pltfs. moved for an interlocutory order that deft. might be ordered to pay into ct. the amount of royalties at 10d. per ton on the coal he had raised:—*Held*: although it would not be right, while the rate of royalty was in dispute, to order deft. to pay into ct. the amount of royalties at the rate claimed by pltfs., he ought to be ordered to pay in the amount of royalties at the rate which he himself alleged to be the one agreed upon, & as his carrying away coal diminished the value of the property he would not have the usual option of giving up possession instead of paying money into ct.—*LEWIS v. JAMES* (1886), 32 Ch. D. 326; 56 L. J. Ch. 163; 54 L. T. 260; 50 J. P. 423; 34 W. R. 619, C. A.

Annotations:—*Consd.* *Greenwood v. Turner*, [1891] 2 Ch. 144. *Refd.* *Cook v. Andrews* (1896), 66 L. J. Ch. 137.

Purchaser in possession.—*Sec* Sub-sect. 7, B., *post*.

— **Compulsory purchase.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 229, 230, 233, 234, Nos. 1170–1176, 1216–1235.

1232. Retention of amount paid in—Death of plaintiff—Benefit of infant heir.—The vendor dying intestate & leaving an infant heir the purchase-money being paid into ct., in a suit for a specific performance instituted after his death, will be retained till the heir attains twenty-one & conveys.—*BULLOCK v. BULLOCK* (1820), 1 Jac. & W. 603; 37 E. R. 498.

1233. Payment out—Defective title—Form of order.—*JAMES v. WILLIAMS* (1848), 10 L. T. O. S. 481.

1234. — Agreement for compulsory purchase.—A public body acting under the powers of their Act & of Lands Clauses (Consolidation) Act, 1845 (c. 18), gave notice to pltf. who was a tailor to take his house which was leasehold. After some negotiation they offered him £400 of which £150 was to be apportioned to his leasehold interest & £250 to his trade damage & personal expenses to which pltf. agreed. Pltf. had mortgaged his leasehold interest & could not make a good title. Pltf. then brought an action for specific performance of the agreement & defts. afterwards paid the £400 into ct. under Lands Clauses Act (c. 18), s. 76, executed a deed poll & took possession:—*Held*: pltf. was entitled to judgment in the action & to have the £250 paid at once to him with interest from the time when defts. took possession. Although in some cases the goodwill of trade premises passes to a mtgee. that does not apply to a case where the goodwill depends on the personal skill of the owner.—*COOPER v. METROPOLITAN BOARD OF WORKS* (1883), 25 Ch. D. 472; 53 L. J. Ch. 109; 50 L. T. 602; 32 W. R. 709, C. A.

Annotation:—*Mentd.* *West London Syndicate v. I. R. Conors.*, [1898] 2 Q. B. 507.

B. Purchaser in Possession.

(a) In General.

1235. Whether payment in ordered.—Order on a purchaser, before conveyance, to pay into ct. instalments due, & interest according to the contract, the subject being a coal mine, & the purchaser in possession, & working it.—*BUCK v. LODGE* (1812), 18 Ves. 450; 34 E. R. 387.

1236. ——The ct., on motion in a bill for specific performance, ordered the purchaser, who had been let into possession previously to signing the contract, to pay the purchase-money, with interest from the day fixed by the contract for such payment, into ct.—*LILLEY v. ALLEN* (1866), 14 L. T. 52; 12 Jur. N. S. 181.

1237. — Option to give up possession.—The

co. have taken possession as purchasers & the whole question is whether they have or not accepted the title. The ordinary course is to direct either that the purchase-money be paid into ct. or that the possession be given up. The vendor by filing this bill has elected his ct.; & in case of specific performance he can require nothing more than that the purchase-money should be secured (*LORD COTTENHAM, C.*).—*HYDE v. GREAT WESTERN RY. CO.* (1839), 1 Ry. & Can. Cas. 277.

1238. — — ——*TOMLINSON v. MANCHESTER & BIRMINGHAM RY. CO.*, No. 390, *ante*.

1239. — — ——Where a purchaser of real estate fails to complete his contract by payment of the balance of his purchase-money by the stipulated day, but, being in possession on that day, retains possession thereafter without paying interest or rent, the ct. will not, on a motion by the vendor in an action for specific performance, order him to pay the balance of purchase-money into ct. without giving him the option either of retiring from possession on a certain day or of paying the balance into ct. on that day, with interest from the day fixed by the contract for completion, even though the purchaser is in possession under the contract & has made no objection to the vendor's title; but that option will not be given if the purchaser has done anything to prejudice the value of the property as a security for the balance.—*GREENWOOD v. TURNER*, [1891] 2 Ch. 144; 60 L. J. Ch. 351; 64 L. T. 261; 39 W. R. 315.

Annotations:—*Apld.* *Re Cassano & Mackay's Contract* (1919), 64 Sol. Jo. 259. *Refd.* *Cook v. Andrews* (1896), 66 L. J. Ch. 137.

1240. — — ——Where title has been accepted & the purchaser has gone into possession before completion, & has failed to complete, & the vendor has commenced proceedings for specific performance, the vendor can obtain on motion an order directing the purchaser to lodge the balance of the purchase-money in ct., together with the interest under the contract from the date fixed for completion within four days, or in default to deliver up possession to the vendor, & in that event to lodge in ct. the interest due under the contract.—*Re CASSANO & MACKAY'S CONTRACT* (1919), 64 Sol. Jo. 259.

1241. — Unreasonable delay.—*BONNER v. JOHNSTON*, No. 1261, *post*.

1242. — Possession taken without consent of vendor.—Purchaser taking possession without the consent or privity of the vendor, ordered on motion, before answer, to pay the purchase-money into ct.—*BLACKBURN v. STACE* (1821), 6 Madd. 69; 56 E. R. 1016.

1243. — Possession given without prejudice to objections to title.—A purchaser under the ct. will not be allowed to take possession "without prejudice to objections to the title" even upon payment of his purchase-money into ct.—*HUTTON v. MANSELL* (1840), 2 Beav. 260; 48 E. R. 1180.

1244. — — ——A purchaser who takes possession although for the benefit of the vendor & expressly without prejudice to any objection he may afterwards make to the title will be ordered to pay the money into ct. if he admits the contract.—*FOWLER v. WARD* (1842), 6 Jur. 547.

1245. — Long possession without objection to title.—Where a purchaser who had been in possession for some years made no objection to the title, a specific performance was decreed, & the money ordered to be brought into ct.; & an inquiry was directed whether a trustee was authorised to make an agreement touching an adjoining field,

Sect. 6.—Relief: Sub-sect. 7, B. (a), (b), (c), (d) & (e); sub-sects. 8 & 9, A.]

& the erection or continuance of a brick field therein, & to state the circumstances of such agreement; & whether the same had or had not been performed, or in what respect broken, & if it had been broken the master was to state the circumstances. Upon appeal against that part of the decree which directed an inquiry, the order was varied by striking out all that related to the adjoining land.—*EVERSFIELD v. TROUP* (1847), 9 L. T. O. S. 349, L. C.

1246. — Possession permitted without rents & profits.]—*CURLING v. AUSTIN*, No. 1180, *ante*.

1247. — Objection to conveyance—No objection to title.]—*MATSON v. DENNIS* (1864), 4 De G. J. & Sm. 345; 10 Jur. N. S. 461; 12 W. R. 926; 46 E. R. 952; *sub nom.* *MATSON v. DENNIS*, *MATSON v. WOODTHORPE*, 10 L. T. 391, L. J.

Annotations:—Consd. *Powell v. Brodhurst*, [1901] 2 Ch. 160. *Mentd.* *Steeds v. Steeds* (1889), 22 Q. B. D. 537.

(b) Purchaser Objecting to Title.

1248. Whether payment in ordered.]—*WOOD v. EDWARDS*, [1876] W. N. 15.

1249. — Option to deliver up possession.]—Purchaser, having taken possession, but objecting to the title, required either to pay in the purchase-money, or deliver up possession.—*CLARKE v. WILSON* (1808), 15 Ves. 317; 33 E. R. 774, L. C.

Annotations:—Refd. *Clarke v. Elliott* (1816), 1 Madd. 606; *Pope v. G. E. Ry* (1866), L. R. 3 Eq. 171, *Greenwood v. Turner*, [1891] 2 Ch. 144.

1250. — — —.]—Vendee in possession, objecting to title, must pay in purchase-money, or give up possession.—*SMITH v. LLOYD* (1815), 1 Madd. 83; 56 E. R. 33.

1251. — — —.]—A purchaser, who had been three years in possession, & who had not paid the purchase-money, on the ground that a good title had not been made out, was ordered either to pay the purchase-money within two months, or to give up possession.—*TINDAL v. COBHAM* (1835), 2 My. & K. 385; 4 L. J. Ch. 98; 39 E. R. 991.

Annotation:—Apld. *Greenwood v. Turner*, [1891] 2 Ch. 144.

1252. — Where possession proved by affidavit only.]—Vendee in possession, objecting to title, ordered to pay purchase-money into ct., though possession not admitted by the answer, & only shown by affidavit.—*BOOTHBY v. WALKER* (1815), 1 Madd. 197; 56 E. R. 73.

1253. — — —.]—*BURROUGHS v. OAKLEY* (1815), 1 Mer. 52; 35 E. R. 596, L. C.; *subsequent proceedings* (1819), 3 Swan. 159.

Annotations:—Distd. *Boothby v. Walker* (1815), 1 Madd. 197. *Expld.* *Bonner v. Johnston* (1816), 1 Mer. 366. *Consd.* *Blackburn v. Stace* (1821), 6 Madd. 69.

1254. — Where acts of ownership.]—Possession by a purchaser according to the contract not a ground for payment of money into ct. on objections to the title. Acts of alteration or destruction, against the nature of the contract, are & slighter acts, after the objections discovered, effectual for that purpose, than if done with an understanding on one side, that there is a title, on the other, that there is not.—*DIXON v. ASTLEY* (1816), 19 Ves. 564; 1 Mer. 133; 34 E. R. 625, L. C.

Annotations:—Consd. *Bonner v. Johnston* (1816), 1 Mer. 366. *Apld.* *Pope v. G. E. Ry*, (1866), L. R. 3 Eq. 171. *Refd.* *Blackburn v. Stace* (1821), 6 Madd. 69.

1255. — — —.]—A purchaser in possession making improvements, etc., but objecting to the title, not obliged to pay purchase-money into ct.—*GILL v. WATSON* (1818), 3 Madd. 225; 56 E. R. 492.

1256. — — —.]—*WICKHAM v. EVERED* (1819), 4 Madd. 53; 56 E. R. 628.

Annotation:—Apld. *Younge v. Duncombe* (1831), You. 275.

1257. — — —.]—A purchaser under an agreement entered into possession & into receipt of the rents & profits of certain messuages & premises in the year 1827, without prejudice as to any question of title. After the delivery of the abstract, the purchaser took objections to the title, & by reason of a party necessary to the conveyance being a minor, the conveyance was postponed. The purchaser remained in possession down to the time of filing the bill, performing certain acts of ownership, & still offering objections to the title. Upon motion of the vendor in a suit for specific performance:—*Held*: deft. ought to pay the purchase-money into ct. with interest, after the usual rate of £4 per cent.—*ADAMS v. HEATHCOTE* (1846), 7 L. T. O. S. 317; 10 Jur. 301.

1258. — Objection waived by delay.]—By an agreement for the sale of an estate, the purchaser was to pay part of his purchase-money on Dec. 24 then next, when the conveyance was to be executed, & the residue was to be secured by a mtge. of the estate, payable at not less than twelve months from the date of the conveyance. The purchaser entered into possession immediately after the execution of the agreement, but, on some objections to the title, refused to pay his purchase-money. A bill was filed by the vendor, for the specific performance of the contract, & more than twelve months having elapsed from the time when the conveyance ought to have been executed, deft. was on motion ordered to pay the purchase-money into ct.—*YOUNGE v. DUNCOMBE* (1831), You. 275; 159 E. R. 995.

(c) Possession Obtained Independently of Contract.

1259. Payment in not ordered.]—Motion, for a purchaser in possession to pay money into ct. refused, under the circumstances of possession given independently of the agreement to purchase, & laches on the part of the vendor in completing his title.—*FOX v. BIRCH* (1815), 1 Mer. 105; 35 E. R. 615, L. C.

1260. — Possession as tenant in common.]—Motion by one tenant in common who had agreed to sell to the other, that the latter should pay his purchase-money into ct., refused; where such purchaser had been before & at the time of the purchase in possession of the whole, with the approbation of the other tenant in common.—*FREEBODY v. PERRY* (1815), Coop. G. 91; 35 E. R. 489, L. C.

1261. — Possession as tenant of vendor.]—On bill by vendor for a specific performance, the ct. will not, before answer, make an order for payment of the purchase-money, by deft. in possession, unless under special circumstances, such as unreasonable delay, committing acts of ownership in alteration of the property, etc. In this case, deft. being in possession, not under the agreement to purchase, but as tenant to pltf. at the time of the purchase, no order was made.—*BONNER v. JOHNSTON* (1816), 1 Mer. 366; 35 E. R. 709, L. C.

Annotations:—Distd. *Blackburn v. Stace* (1821), 6 Madd. 69. *Refd.* *Osborne v. Harvey* (1811), 1 Y. & C. Ch. Cas.

1262. — — —.]—The purchasers of a mining property, subject to leases, were in possession of part as lessees, & of part under an agreement with the lessees, & were working & disposing of the minerals, but they had paid no rent since the time when, according to the agreement, possession was to be given. Upon motion, after answer,

in a suit for specific performance by the vendors, for payment into ct. of the balance of the purchase-money:—*Held*: defts. could only be required to pay into ct. the rent in arrear.—*ROBERTSHAW v. BRAY* (1866), 35 L. J. Ch. 844; 14 L. T. 101; 12 Jur. N. S. 224.

(d) *Vendor in Default.*

1263. Whether payment in ordered—Laches in completing title—Mutual surprise.—Though generally a purchaser cannot be called on for his money until he has a title yet where he is let into possession upon a mutual confidence of a speedy title & the difficulty is a mutual surprise he cannot without express contract retain the possession withholding the money.—*GIBSON v. CLARKE* (1813), 1 Ves. & B. 500; 35 E. R. 195, L. C.; *subsequent proceedings*, 2 Ves. & B. 103, L. C.

Annotations:—*Consd.* *Greenwood v. Turner*, [1891] 2 Ch. 144. *Refd.* *Jennings v. Hopton* (1816), 1 Madd. 211; *Mole v. Smith* (1820), 1 Jac. & W. 665.

1264. — — — — —.] —*FOX v. BIRCH*, No. 1259, *ante*.

1265. — — — — —.] —*Failure to make good title.*—*CLARKE v. FAUX*, No. 1131, *ante*.

(e) *Purchaser Doing Acts of Ownership.*

1266. Whether payment in ordered.—Acts of ownership, amounting to waste, by alteration & conversion of property, sufficient to induce the ct. to order payment of purchase-money into ct., upon the ground that a vendor has a lien on the estate for the amount, & might have filed his bill to restrain the purchaser in possession from committing such acts of ownership.—*CUTLER v. SIMONS* (1816), 2 Mer. 103; 35 E. R. 880, L. C.

Annotations:—*Apld.* *Bramley v. Teal* (1818), 3 Madd. 219. *Consd.* *Lewis v. James* (1886), 32 Ch. D. 326. *Refd.* *Osborne v. Harvey* (1841), 1 Y. & C. Ch. Cas. 116; *Greenwood v. Turner*, [1891] 2 Ch. 144.

1267. — — — — —.] —*BONNER v. JOHNSTON*, No. 1261, *ante*.

1268. — — — — —.] —*Purchaser, a trustee, acting on behalf of himself & others his co-trustees, & of the cestuis que trust, ordered to pay purchase-money into ct.; the agreement having been entered into in the name of himself alone; upon affidavits, that plffs., the vendors, had no notice of his acting for others, & of acts of ownership committed since possession given to him under the agreement; in opposition to the answer, alleging notice, & denying any acts of ownership by himself, or by any other person, to his knowledge.*—*CRUTCHLEY v. JERNINGHAM* (1817), 2 Mer. 502; 35 E. R. 1032, L. C.

Annotation:—*Refd.* *Greenwood v. Turner* (1891), 39 W. R. 315.

1269. — — — — —.] —*Purchaser in possession, who has made alterations & improvements on the estate, ordered to pay the purchase-money into ct.*—*BRAMLEY v. TEAL* (1818), 3 Madd. 219; 56 E. R. 490.

— — — — —.] —*Purchaser objecting to title.*—*See* Subsect. 7, B. (b), *ante*.

SUB-SECT. 8.—SPECIFIC PERFORMANCE WITH COMPENSATION.

See Sect. 7, *post*.

PART V. SECT. 6, SUB-SECT. 7.—B. (d).

b. *Whether payment in ordered—Sale of lumber [mill & timber].*—*CROWSTON v. TATE* (1907), 6 W. L. R. 70.—CAN.

PART V. SECT. 6, SUB-SECT. 9.—A.

c. *Whether court will compel vendor to give indemnity—Against mortgage.*—*ARNOLD v. MCLEAN* (1854), 4 Gr. 337. *reversd.* (1857), 11 Gr. 242.—CAN.

d. — — — — —.] —*Against future liabilities on shares.*—*SHEPPARD v. MURPHY* (1868), 2 I. R. Eq. 544.—IR.

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SUB-SECT. 9.—

PERFORMANCE WITH INDEMNITY.

A. *Vendor Compelled to Give Indemnity.*

1270. Whether court will compel vendor to give indemnity.—(1) Reference of title before answer; plff., vendor, undertaking to do all such acts for the purpose of executing what the ct. thinks right, as if the answer was in, & the cause brought to hearing. Direction, if the report shall be against the title, for compensation.

The Lord Chancellor said he did not apprehend the ct. could compel (2) the purchaser to take an indemnity, or (3) the vendor to give it.—*BALMANNO v. LUMLEY* (1813), 1 Ves. & B. 224; 35 E. R. 88, L. C.

Annotations:—*As to* (1) *Expld.* *Bonner v. Johnston* (1816), 1 Mer. 366. *Consd.* *Wilson v. Williams* (1857), 3 Jur. N. S. 810. *As to* (3) *Apld.* *Aylett v. Ashton* (1835), 1 My. & Cr. 105.

1271. — — — — —.] —*If deft. cannot make a title to that which he has agreed to convey the ct. will not compel him to convey something less with indemnity against the risk of eviction* (LORD ELDON, C.).—*PATON v. BREBNER* (1819), 1 Bli. 42; 4 E. R. 16, H. L.

Annotation:—*Refd.* *Aylett v. Ashton* (1835), 1 My. & Cr. 105.

1272. — — — — —.] —*Special directions, in a decree for specific performance against a co., providing for an indemnity to the co., & for works to be performed by the co.*

A co. having taken a small portion of an estate, the whole of which was subject to a rentcharge, & a reference having been directed to ascertain what would be a proper amount to be deducted from the purchase-money by way of compensation, but no reference as to indemnity:—*Held*: regard being had to the provisions for indemnity thereafter directed, a proper sum to deduct was a sum which bore such a proportion to the whole present worth of the rentcharge as the quantity of lands taken by the co. bore to the whole lands out of which the rentcharge issued. The provision for indemnity then directed by the order was a covenant by the vendor to pay the annuity; & that all the other lands should, as between the vendor & purchaser, be solely chargeable therewith, in exoneration of the small parcel now sold.—*POWELL v. SOUTH WALES RY. CO.* (1855), 1 Jur. N. S. 773.

1273. — — — — —.] —*Against liability for rent & on covenants.*—*Exors. sell by auction, in nine lots, sundry houses which testator, during his life, held by lease under the Crown, & of which they, after his death, obtained a new lease, subject to one entire rent of £243; the printed particulars mention that the sale is by exors. & that the nine lots are held under one lease, & at one entire reserved rent; decreed, upon a bill filed by the vendors, & an answer, submitting to perform the contract upon an indemnity being given, that the purchaser of one lot, with respect to which the particulars stated that the apportioned rent for it was £52, was entitled to have an indemnity from the exors. against his liability for the whole reserved rent, & the breach of any of the covenants in the original lease.*—*WEST v. WILD* (1824), 3 L. J. O. S. Ch. 15.

1274. — — — — —.] —*In absence of special agreement.*—*The ct. will not compel a vendor to give an*

Sect. 6. - Relief: Sub-sect. 9, A. & B.; sub-sect. 10.] indemnity, unless vendor & purchaser have contracted for it.—*AYLETT v. ASHTON* (1835), 1 My. & Cr. 105; 5 L. J. Ch. 71; 40 E. R. 316.

Annotations: Mentd. Johnson v. Gallagher (1861), 3 De G. F. & J. 494; *London Chartered Bank of Australia v. Lemprière* (1873), L. R. 4 P. C. 572; *Atwood v. Chichester* (1878), 26 W. R. 320.

1275. — Refusal of incumbrancer to join in conveyance—After agreement to join.]—*WILSON v. WILLIAMS*, No. 1432, *post*.

1276. — Waiver of objection by purchaser.]—The tenant for life of a real estate, the trustees of which were empowered to sell it at his request & by his direction, entered into a contract to sell it. The estate was subject, with others, to a charge for younger children. The tenant for life died without issue, & the fee of the estate passed under his will:—*Held*: the purchaser, on waiving the objection as to the charge, was entitled to a specific performance against the representatives of the vendor, but he was not entitled either to an indemnity against the charge or to compensation.—*BAINBRIDGE v. KINNAIRD* (1863), 32 Beav. 346; 2 New Rep. 5; 8 L. T. 447; 9 Jur. N. S. 802; 11 W. R. 608; 55 E. R. 135.

1277. Computation of indemnity.]—*POWELL v. SOUTH WALES RY. CO.*, No. 1272, *ante*.

1278. —.]—*WILSON v. WILLIAMS*, No. 1432, *post*.

B. Purchaser Compelled to Take or Give Indemnity.

1279. Whether court will compel purchaser to take indemnity.]—*BALMANNO v. LUMLEY*, No. 1270, *ante*.

1280. —.]—Purchaser not entitled to compensation, where the misdescription consisted in stating, that the premises sold were in the joint occupation of A. & B. as lessees, the fact being that the premises had been demised to C., & by C. assigned to A., who was, together with B., in the occupation of them at the time of sale. The purchaser could not, in this case, be compelled to accept an indemnity.—*RIDGWAY v. GRAY* (1849), 1 Mac. & G. 109; 1 H. & Tw. 195; 41 E. R. 1204, L. C.

1281. — Against judgment amounting to half purchase-money.]—Purchaser not to be compelled to take an indemnity against a judgment amounting to half of the purchase-money.—*WOOD v. BERNAL* (1812), 19 Ves. 220; 34 E. R. 500, L. C.

1282. — Liability not fit subject for indemnity.]—A lessee covenanted to build thirty four additional houses on the demised property within five years, to keep in repair the houses built & to be built, & at the end of the term to deliver them up to the lessor; & there was a proviso for re-entry on non-performance of the covenants. The additional houses were not built, but for forty six years the lessor received the rent, & thus waived the obligation to build. The leasehold interest being sold:—*Held*: the purchaser was not bound to accept either a compensation or indemnity.

An indemnity the purchaser would not be bound to take, if in such a case it could be given, & I am of opinion that such a liability as this is not a fit subject for either compensation or

indemnity. It is . . . impossible to ascertain with any reasonable accuracy the amount or value of any such liability (*LORD LANDALE, M.R.*).—*NOUAILLE v. FLIGHT* (1844), 7 Beav. 521; 13 L. J. Ch. 414; 8 Jur. 838; 49 E. R. 1168.

*Annotation:—**Reid. Hume v. Bentley* (1852), 5 De G. & Sm. 520.

1283. — Contingent Incumbrance—However small or remote.]—A purchaser is not bound to accept an indemnity for a contingent incumbrance, however small the amount or remote the contingency, but is entitled to have it discharged.—*Re WESTON & THOMAS'S CONTRACT*, [1907] 1 Ch. 244; 76 L. J. Ch. 179; 96 L. T. 324.

1284. Purchaser ordered to give indemnity—Sale of business—Delay of purchaser—Indemnity against loss in carrying on business.]—Where completion of a contract for sale of a business as a going concern is delayed through the fault of the purchaser, & the vendor notifies the purchaser that the business is being carried on at a loss & that he will hold the purchaser accountable therefor, the vendor is entitled to specific performance & also to an indemnity in respect of expenses properly incurred in carrying on & preserving the business as a going concern.—*GOLDEN BREAD CO. v. HEMMINGS*, [1922] 1 Ch. 162; 91 L. J. Ch. 228; 126 L. T. 594; 66 Sol. Jo. 124.

SUB-SECT. 10. - SPECIFIC PERFORMANCE WITH PAROL VARIATION.

1285. Variation set up by plaintiff.] —Though a debt., resisting a specific performance, may go into parol evidence, that by fraud the written agreement does not express the real terms, pltf. cannot for the purpose of obtaining a specific performance with a variation.—*WOOLLAM v. HEARN* (1802), 7 Ves. 211; 32 E. R. 86.

*Annotations:—**Folld. Garrard v. Grinling* (1818), 2 Swan. 214. *Apld. May v. Platt*, [1900] 1 Ch. 616. *Consd. Craddock v. Hunt*, [1923] 2 Ch. 136. *Reid. Squire v. Campbell* (1836), 1 My. & Cr. 459; *Flight v. Gray* (1857), 3 C. B. N. S. 320; *Olley v. Fisher* (1886), 34 Ch. D. 367; *Henry v. Smith* (1895), 39 Sol. Jo. 559; *Thompson v. Hickman*, [1907] 1 Ch. 550; *Fowler v. Sugden* (1916), 85 L. J. K. B. 1690; *Forgione v. Lewis*, [1920] 2 Ch. 326.

1286. —.]—An Act of Parliament empowered the Comrs. of Woods & Forests to make certain new streets according to a particular plan therein referred to, & to lease, & to enter into agreements for leasing, the ground in the lines of the new streets. Under this power leases were granted of two plots of ground, upon which the lessees erected two particular houses in the line of one of the new streets. Each of the leases described the plot of ground which it demised as being "on the north side of a new street then forming there, called," etc., & as "fronting towards the south on the new street." The plan referred to in the Act of Parliament exhibited an open space in front of the sites of these houses; but that plan was not mentioned in either of the leases.

The intended streets were completed, & the space in front of the houses was left open. The Comrs. of Woods & Forests, & the paving committee of the parish, afterwards gave permission

PART V. SECT. 6, SUB-SECT. 10.

1285 i. Variation set up by plaintiff.]—Where pltf. claims specific performance of a written contract, at the same time stating & offering to submit to subsequent parol variations, the ct. will decree specific performance with the

variations, if debt. is willing to accept the same, & if not, according to the original contract.—*MAJOUGHNEY v. CROWE* (1912), 22 O. W. R. 635; 3 O. W. N. 1488; 26 O. L. R. 579; 6 D. L. R. 471.—*CAN.*

1285 ii. —.]—*WARREN v. THUNDER* (1846), 9 I. Eq. R. 371.—*IR.*

1285 iii. —.]—*LAW v. WARREN* (1843), 1 I. Eq. R. 299.—*IR.*

1285 iv. —.]—*DONALD v. SCOTT* (1860), 10 I. Ch. R. 496; 12 Ir. Jur. 374.—*IR.*

1285 v. Variation set up by defendant.]—*JONES v. DALE* (1888), 16 O. R. 717.—*CAN.*

to certain persons to erect an equestrian statue in the open space, & those persons proceeded to place it upon a part of that open space, but without interfering with the line of the carriage way of the new street in which the houses stood. The lessees of the houses thereupon filed a bill to restrain the erection of the statue, alleging that, upon the treaty for the leases, the lessees were shown the plan of the intended new street & parts adjacent, by which it appeared that the space in question was to be quite open & free from all obstructions, & that it was upon the treaty represented & stated, that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue; they also alleged, that the proposed erection would diminish the value of their property, & be a public & a private nuisance.

Although to resist in specific performance a deft. may show, by parol, that the written document does not represent the contract between the parties yet a pltf. cannot have a decree for a specific performance of a written contract with a variation upon parol evidence (*LORD COTTENHAM, C.*).—*SQUIRE v. CAMPBELL* (1836), 1 My. & Cr. 459; 6 L. J. Ch. 41; 40 E. R. 451, L. C.

Annotations:—*Refd.* *Fewster v. Turner* (1842), 11 L. J. Ch. 161; *N. B. Ry. v. Tod* (1846), 12 Cl. & Fin. 722; *Lett v. Randall* (1883), 49 L. T. 71. *Mentd.* *Williams v. Jersey* (1841), Cr. & Ph. 91; *Dietrichsen v. Cabburn* (1846), 1 Coop. temp. Cott. 72; *Soltau v. De Held* (1851), 2 Sm. N. S. 133; *Allen v. Maddock* (1858), 11 Moo. P. C. C. 427; *Eastwood v. Lever* (1863), 4 De G. J. & Sm. 111.

1287. ——.]—By a conveyance expressed to be supplemented to a “principal agreement,” under which the vendor was entitled to a lease of certain land coloured red in the plan annexed to that agreement, the vendor, in pursuance of a written contract in that behalf, as beneficial owner conveyed to the purchasers “all his estate, term & interest under & by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement.

The parcels being deficient, the purchasers sued on the covenant. The vendor alleged mutual mistake, & alternatively unilateral mistake on his own part, & counterclaimed for rectification of the conveyance:—*Held*: the written contract & conveyance being unambiguous, parol evidence of mistake was inadmissible after completion either as a defence to the action, to which it afforded no answer; or to support the counterclaim, which amounted to claiming specific performance of a written contract with a parol variation.—*MAY v. PLATT*, [1900] 1 Ch. 616; 69 L. J. Ch. 357; 83 L. T. 123; 48 W. R. 617.

Annotations:—*Consd.* *Fowler v. Sugden* (1916), 85 L. J. K. B. 1090; *Craddock v. Hunt*, [1923] 3 Ch. 136. *Refd.* *Thompson v. Hickman*, [1907] 1 Ch. 550; *Forgione v. Lewis*, [1920] 2 Ch. 326.

1288. Variation set up by defendant.—*WOOLLAM v. HEARN*, No. 1285, *ante*.

1289. ——.]—Deft. to a bill for specific performance, proving an agreement different from that insisted on by pltf., may have a decree upon his answer, submitting to perform.—*FIFE v. CLAYTON* (1807), 1 Coop. temp. Cott 351; 13 Ves. 546; 33 E. R. 398, L. C.

Annotations:—*Refd.* *Berners v. Fleming*, [1925] Ch. 264. *Mentd.* *Williams v. Phillips* (1881), 8 Q. B. D. 437.

1290. ——.]—*SQUIRE v. CAMPBELL*, No. 1286, *ante*.

1291. ——.]—*RICKETTS v. BELL*, No. 111, *ante*.

1292. ——.]—Deft., a brewer, agreed to grant a lease to pltf., & after the terms had been discussed a written agreement was prepared by

deft. & executed. The agreement did not expressly state that the lease was to be a usual brewer's lease, nor did it contain any stipulation that pltf. should take his beer of deft., although that had been the understanding in the previous parol treaty:—*Held*: pltf. was not entitled to specific performance of the agreement unless he would consent to admit this stipulation.—*BARNARD v. CAVE* (1858), 26 Beav. 253; 7 W. R. 158; 53 E. R. 895.

1293. ——.]—*SMITH v. WHEATCROFT*, No. 877, *ante*.

—[*Sec. also*, *MISTAKE*, Vol. XXXV., pp. 140, 141, Nos. 379–386.

1294. Variation coming out in cross-examination.—*Semble*: in a suit for specific performance of a written agreement, a parol variation not set up by the answer, but coming out on the cross-examination of deft.'s agent, who was one of pltf.'s witnesses, is a proper subject for inquiry before the ct. finally disposes of the case.

But pltf. consenting to adopt it as part of the contract, a specific performance of the contract with the parol variation was decreed immediately, with costs.—*LONDON & BIRMINGHAM RY. CO. v. WINTER* (1840), Cr. & Ph. 57; 41 E. R. 410, L. C.

Annotations:—*Consd.* *Smith v. Wheatcroft* (1878), 9 Ch. D. 223. *Refd.* *Wilson v. West Hartlepool Harbour & Ry. Co.* (1864), 34 Beav. 187; *Berners v. Fleming*, [1925] Ch. 264. *Mentd.* *Lindsey v. G. N. Ry.* (1853), 10 Hare, 664; *Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281.

1295. Clerical error.—*GARNAN v. FOX* (1674), *Cas. temp.* Finch 172; 23 E. R. 95.

1296. Mutual mistake.—In a written agreement for the sale & purchase of a leasehold house the number of the house was inaccurately described as No. 232 instead of 233. There was no dispute as to the identity of the house, which was admitted by the vendor to be No. 233. In an action by the purchaser against the vendor for the specific performance of the agreement to sell No. 233, the defence was raised that in such an action no parol variation of the written agreement could be made, according to the rule in *Woollam v. Hearn*, No. 1285, *ante*. applied in *May v. Platt*, No. 1287, *ante*. Stat. Frauds was not pleaded by deft., & pltf. did not ask for rectification of the written agreement, or seek to introduce any parol evidence:—*Held*: as there was a common mistake of both parties to the agreement the rule in *Woollam v. Hearn*, No. 1285, *ante*. had no application, & pltf. was entitled to specific performance of the contract alleged.—*FORGIONE v. LEWIS*, [1920] 2 Ch. 326; 89 L. J. Ch. 510; 123 L. T. 562; 64 Sol. Jo. 549.

1297. Sufficiency of evidence.—An agreement to grant a lease of a house was contained in three letters, which specified the term & the amount of rent, & stipulated that the intended lessee, pltf., was to do all repairs, painting, decorating, etc. The intended lessor, deft., refused to grant a lease on the footing of the agreement, on the ground that pltf. had at the time of entering into the agreement also verbally undertaken to expend £1,000 on the premises in a particular manner, & to allow covenants to compel him to do so to be inserted in the lease; that pltf. had not performed that part of his agreement, & had objected to such covenants; & further, that the agreement as contained in the letters was too uncertain for the ct. to enforce. On a bill filed for specific performance of the agreement as contained in the letters:—*Held*: the alleged parol collateral agreement was not substantiated by the evidence, & there was no ground for saying that the terms of the letters were uncertain, & therefore pltf. was entitled to a decree.—*DEAR v. VERITY* (1869),

Sect. 6.—Relief: Sub-sects. 10 & 11, A.]

38 L. J. Ch. 486; 21 L. T. 185; 17 W. R. 716, L. JJ.

Agreement for lease.—See LANDLORD & TENANT, Vol. XXX., pp. 387–389, Nos. 514–529.

1298. Power of court to rectify & decree specific performance.—The settlement of a solr.'s bill by the client for a fixed sum is valid, & will not be disturbed by the ct., when it has been entered into fairly, & with proper knowledge on both sides.

Several years after a solr. had ceased to act for his client, an agreement was entered into between them, for the delivery up of the client's papers, in consideration of a fixed sum to be paid to the solr. when the Ct. of Ch. should declare that he was one of the next of kin of E. & entitled to a fund in ct. No bill was delivered, & five years afterwards the right of the client was established:—*Held*: the agreement was valid, there having been no fraud or undue pressure, the client having had the full benefit of the agreement, & it being impossible to replace the parties in their original position.

(2) A husband agreed to pay a sum of money, on "his" being held next of kin of A. & entitled to his property. The wife was & claimed to be such next of kin. The husband having succeeded in right of his wife, the ct. held, that there was an error & mistake in the agreement, which ought to be rectified, & decreed the husband to make the payment.—*STEDMAN v. COLLETT* (1854), Beav. 608; 24 L. J. Ch. 113; 18 Jur. 457; 51 E. R. 1171; *sub nom.* *STEADMAN v. COLLETT*, 23 L. T. O. S. 45.

Annotations:—As to (1) *Refd.* Morgan v. Higgins (1859) 1 Giff. 270. As to (2) *Refd.* Olley v. Fisher (1886), 55 L. T. 807. *Generally, Mentd.* *Re West, King & Adams, Ex p. Clough*, [1892] 2 Q. B. 102.

1299. —.—.]—In 1866, A. purchased a house of residence & grounds from B. The conveyance was prepared by the purchaser's solr., but by a mistake, the minerals under the house were excepted from it. The purchaser entered into possession & expended money in repairs & improvements; the vendor afterwards discovered the mistake, & attempted to deal with the minerals; there upon five years after the purchase, the purchaser filed a bill against him, praying for specific performance of the original agreement, & to have the conveyance rectified; the vendor had died & the suit had been renewed against his legal personal representative:—*Held*: she must have the option either of having the conveyance rectified or having the whole purchase set aside, she repaying the purchase-money with interest at 4 per cent. *per annum*, & all sums expended by pltf. in repairs & permanent improvements & pltf. being charged with an occupation rent.—*BLOOMER v. SPITTLE*

1298 i. Power of court to rectify & decree specific performance.—*GUEST v. WATSON* (1891), 17 V. L. R. 497.—AUS.

1298 ii. —.—.]—*NEEDLER v. CAMPBELL* (1870), 17 Gr. 592.—CAN.

1298 iii. —.—.]—The ct. has jurisdiction (in any case in which Stat. Frauds is not a bar) in one & the same action to rectify a written instrument upon parol evidence of a mistake & to order the agreement to be specifically performed.—*HOWARD v. STEWART* (Alta.) (1915), 31 W. L. R. 204; 8 W. W. R. 616.—CAN.

1298 iv. —.—.]—It is very doubtful if the ct. will grant specific performance of a written contract with rectification on the ground of mistake where Stat. Frauds is a bar.—*MANDZIUK v. CZANLEY* (Alta.), [1920] 3 W. W. R. 758; Alta. L. R. 68; 55 D. L. R. 299.—CAN.

1298 v. —.—.]—A decree for rectification of a written agreement & that the agreement as rectified be specifically performed may be made in one & the same action.—*FREY v. FLOYD* (1921), 63 D. L. R. 614; 30 B. C. R. 488; [1922] 1 W. W. R. 651.—CAN.

1298 vi. —.—.]—*U. S. A. v. MOTOR TRUCKS, LTD.*, [1923] 3 D. L. R. 674, P. C.—CAN.

c. Immaterial collateral agreements.—When two parties enter into a formal written agreement for the sale & purchase of land containing all the particulars necessary to make it binding under Stat. Frauds & all the terms they intended to embody in it, & there is no suggestion of accident, fraud, or mistake in the preparation or execution of it, specific performance of it may be decreed, notwithstanding that the parties at the same time ver-

(1872), L. R. 13 Eq. 427; 41 L. J. Ch. 369; 26 L. T. 272; 20 W. R. 435.

Annotations:—*Dbtd.* Beale v. Kyte, [1907] 1 Ch. 564. *Refd.* *McKenzie v. Hesketh* (1877), 7 Ch. D. 675. *Mentd.* *Huddersfield Banking Co. v. Lister* (1895), 72 L. T. 703.

1300. —.—.]—Since Jud. Act, 1873 (c. 66), the ct. has jurisdiction, in any case in which Stat. Frauds is not a bar, in one & the same action, to rectify a written agreement, upon parol evidence of mistake, & to order the agreement as rectified to be specifically performed.—*OLLEY v. FISHER* (1886), 34 Ch. D. 367; 56 L. J. Ch. 208; 55 L. T. 807; 35 W. R. 301.

Annotations:—*Folld.* *Craddock v. Hunt*, [1923] 2 Ch. 136. *Refd.* *Conway Bridge Comrs. v. Jones* (1910), 102 L. T. 92; *Forgione v. Lewis*, [1920] 1 Ch. 326.

1301. —.—.]—*SHREWSBURY & TALBOT CAB & NOISELESS TYRE CO., LTD. v. SHAW* (1890), 89 L. T. Jo. 274.

Annotations:—*Folld.* *Craddock v. Hunt*, [1923] 2 Ch. 136.

1302. —.—.]—Where, owing to a common mistake in reducing a verbal agreement for the sale of land into writing, the written agreement failed to express the real bargain between the parties, & the mistake was embodied in the deed of conveyance, the ct., since Jud. Act, 1873 (c. 66) has jurisdiction to rectify the mistake contained in the deed of conveyance, although the deed conformed strictly with antecedent written agreement & although the effort of ordering rectification is to grant specific performance of a written agreement with a parol variation.—*CRADDOCK BROTHERS, LTD. v. HUNT*, [1922] 2 Ch. 809; 91 L. J. Ch. 647; 128 L. T. 13; 66 Sol. Jo. 694; *affd.*, [1923] 2 Ch. 136, C. A.

Annotations:—*Apprvd.* *U.S.A. v. Motor Trucks*, [1924] A. C. 196.

1303. —.—.]—Where owing to a mistake common to both parties to a contract in writing it does not express the true bargain between the parties, the ct. in England has jurisdiction, since Jud. Act, 1873 (c. 66), to rectify the contract & to order specific performance of it as rectified, although apart from the rectified contract there is no memorandum to satisfy Stat. Frauds.—*U.S.A. v. MOTOR TRUCKS, LTD.*, [1924] A. C. 196; 93 L. J. P. C. 46; 130 L. T. 129; 39 T. L. R. 723, P. C.

SUB-SECT. 11.—DAMAGES IN LIEU OF OR IN ADDITION TO SPECIFIC PERFORMANCE.

A. Jurisdiction to Award.

See Chancery Amendment Act, 1858 (c. 27); Statute Law Revision & Civil Procedure Act, 1883 (c. 49), ss. 3, 5; Statute Law Revision Act, 1898 (c. 22), s. 1; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 18 (3); SALE OF LAND, Vol. XL, pp. 259, 260, Nos. 2257–2264.

bally agreed upon a number of collateral agreements or subsidiary conditions for conveniently carrying out the written agreement, & notwithstanding Stat. Frauds.—*ANDERSON v. DOUGLAS* (1908), 18 Man. L. R. 254; 9 W. L. R. 378.—CAN.

f. Dispute as to term of mortgage.—*GRAYDON v. GORRIE* (1913), 24 O. W. R. 23; 4 O. W. N. 704; 10 D. L. R. 820.—CAN.

PART V. SECT. 6, SUB-SECT. 11.—A.

g. Discretion of court.—The right to ask that damages shall be awarded a purchaser in lieu of specific performance is largely personal to the vendor, & the ct. will not substitute the one remedy for the other where it will not benefit the vendor but only a subsequent purchaser from him.—*CRAMPTON*

1304. Under Chancery Amendment Act, 1858 (c. 27)—Only where claim for specific performance entertainable.]—(1) A ct. of equity will not decree the specific performance of a contract to borrow a sum of money on mtge.

(2) In a case where the ct. has no jurisdiction to grant a specific performance of a contract, it has no jurisdiction, under above Act, to award & assess damages for its non-performance.

The ct. has said that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective (ROMILLY, M.R.).—*ROGERS v. CHALLIS* (1859), 27 Beav. 175; 29 L. J. Ch. 240; 6 Jur. N. S. 334; 7 W. R. 710; 54 E. R. 68.

Annotations:—As to (1) Consd. Larios v. Bonany y Gurety (1873), L. R. 5 P. C. 346; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271. *Refd. Siebel v. Mosenthal* (1862), 30 Beav. 371. *Generally, Refd. Middleton v. Magnay* (1864), 2 Hem. & M. 233. *Mentd. Mounsey v. Rankin* (1885), Cab. & El. 496.

1305. ———.]—A ct. of equity can give damages only in a case where it can decree specific performance.—*DE BRASSAC v. MARTYN* (1863), 2 New Rep. 512; 9 L. T. 287; 27 J. P. 742; 11 W. R. 1020.

Annotation:—Refd. Lever v. Koffler, [1901] 1 Ch. 543.

1306. ———.]—Pltf. by his bill prayed the specific performance of a resolution passed by the board of directors of a railway co., under which he alleged that he was entitled to have a certain number of shares allotted to him; & he also prayed that if it should appear that all the shares had been allotted to other shareholders, the directors might indemnify him out of their own shares or might be charged with damages. All the shares had been allotted before the filing of the bill:—*Held*: as no relief by way of specific performance was possible, pltf.'s claim for damages under above Act failed also.—*FERGUSON v. WILSON* (1866), 2 Ch. App. 77; 36 L. J. Ch. 67; 15 L. T. 230; 30 J. P. 788; 12 Jur. N. S. 912; 15 W. R. 27, 80, L. JJ.

Annotations:—Consd. Elmore v. Pirrie (1887), 57 L. T. 333. *Refd. Lewers v. Shaftesbury* (1867), 16 L. T. 135; *Hilton v. Tipper* (1868), 16 W. R. 888; *Turner v. Moy* (1875), 32 L. T. 56; *Damler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851. *Mentd. Wilson v. Bury* (1880), 5 Q. B. D. 518.

1307. ———.]—Where an agreement is entered into between two parties, & performance by the first party of his part goes to the root of the whole agreement, & the first party fails to perform his part, & the second party also fails to perform his part, the Ct. of Ch. will restrain the first party from bringing an action against the second party for non-performance of his part, until he, the first party, shall have performed his part; & that, although the Ct. of Ch. has no jurisdiction to compel the first party to specifically perform his part, & no jurisdiction to award damages for its non-performance.

A lease of a colliery contained an implied covenant on the part of the lessor to procure land by certain compulsory powers, for the lessees to make a railway to a neighbouring canal, without which they had no access to any available market. The

lessor did not procure the land, but brought an action against the lessees for rent. The lessees applied to the Ct. of Ch. for an injunction, &, the powers having expired, they asked at the hearing for an inquiry as to damages:—*Held*: the ct. would restrain the action at law until the land was provided, but, as it could not have compelled deft. to provide the land, it had no jurisdiction to award damages.—*ACRAMAN v. PRICE, DAVIES v. PRICE* (1870), 18 W. R. 540; *varied* (1871), 24 L. T. 487; 19 W. R. 364, L. C.

1308. ———.]—*CRAMPTON v. VARNA RY. Co.*, No. 142, *ante*.

1309. ———.]—(1) Specific performance cannot be enforced of an agreement, the essence of which is that it is one for personal service.

(2) Pltf. will not obtain damages instead of specific performance, unless he can show that he had an equity at the time of issuing the writ.—*WHITE v. BOBY* (1877), 37 L. T. 652; 26 W. R. 133, C. A.

1310. ———.]—A contract for the sale of "the building materials" of a house, with a condition that all materials were to be taken down & cleared off the ground within two months, "after which date any materials then not cleared will be deemed a trespass & become forfeited, & the purchaser's right of access to the ground shall absolutely cease"—is a contract for the sale of an interest in or concerning land within Stat. Frauds, s. 4, & accordingly, from the absence of any sufficient description in the contract of the vendor avoided:—*Held*: the jurisdiction to give damages in substitution for, or in addition to, specific performance, has not been extended to cases where specific performance could not possibly have been directed; &, accordingly, the contract having, from lapse of time, become at the hearing incapable of specific performance, the equitable doctrine of part performance, as avoiding the operation of Stat. Frauds, did not enable pltf. to obtain relief in damages.—*LAVERY v. PURSELL* (1888), 39 Ch. D. 508; 57 L. J. Ch. 570; 58 L. T. 846; 37 W. R. 163; 4 T. L. R. 353.

Annotation:—Mentd. Jarvis v. Jarvis (1893), 63 L. J. Ch. 10.

1311. ———.]—Where order for specific performance disobeyed.]—The ct. has no power under above Act upon motion in a cause, after a decree for specific performance of a covenant, to add an order for assessing damages for the breach of the covenant. Such an order would be a supplemental decree upon facts which had subsequently occurred.—*HYTHE CORPN. v. EAST* (1866), L. R. 1 Eq. 620; 35 L. J. Ch. 257; 13 L. T. 788; 14 W. R. 273.

1312. ———.]—Where damages previously recoverable at law.]—In a purchaser's action for specific performance pltf. cannot recover damages for breach of contract unless he establishes misrepresentation on the part of deft. The object & intention of above Act which gives the ct. jurisdiction to award damages in substitution for specific performance in all cases in which the ct. has jurisdiction to entertain an application for specific performance, was not to give any new right to damages, but to prevent the mischief arising from two distinct methods of procedure which pre-

v. FOSTER (1897), 18 N. S. W. Eq. 136.—*AUS.*

h. ———.]—NORTON v. ANGUS (1926), 38 C. L. R. 523.—*AUS.*

k. ———.]—Semble: this ct. in a proper case has jurisdiction to decree compensation for improvements where the vendor is unable to complete the title to the purchaser, but the ct. will not make such a decree where specific

performance of the contract can be compelled.—*DAVIS v. SNYDER* (1850), 1 Gr. 134.—*CAN.*

*l. ———.]—*On failure of one party to an agreement for exchange of properties to perform his part, the ct. may order specific performance or award damages, & is not bound, on the demand of the other party who has performed his part, to order a restora-

tion of the thing delivered by him.—*WORCESTER MUNICIPALITY v. COLONIAL GOVERNMENT* (1909), 3 Buch. A. C. 538.—*S. AF.*

m. Only where claim for specific performance entertainable.]—ST. THOMAS CITY CORPN. v. CREDIT VALLEY RY. Co. (1885), 12 A. R. 273.—*CAN.*

*n. ———.]—*There is no jurisdiction to grant damages in substitution for

Sect. 6.—Relief: Sub-sect. 11, A., B. & C.]

viously to the time of its passing were in existence. In no case where damages could not previously have been recovered at law can they now be obtained under above Act.—**ROCK PORTLAND CEMENT CO., LTD. v. WILSON** (1882), 52 L. J. Ch. 214; 48 L. T. 386; 31 W. R. 193.

Annotation:—**Mentd.** *Edwards v. Jones* (1921), 124 L. T. 740.

1313. ———.]—**SHEPHERD v. BLANK** (1894), 38 Sol. Jo. 631.

1314. ——— **Effect of Judicature Acts.**]—In the absence of a new contract made by a co. after its incorporation, a contract made before its incorporation by a person purporting to contract as trustee for the co. is not binding on the co. Jud. Act, 1873 (c. 66), s. 25 (11), does not extend the equity jurisdiction so as to enable the ct. to grant damages in a case wherein before the Act damages were not recoverable, *e.g.*, in the case of an oral agreement not capable of specific performance in equity, & in respect of which, in an action at law for damages, deft. could have successfully pleaded Stat. Frauds.—**Re NORTHUMBERLAND AVENUE HOTEL CO.** (1885), 33 Ch. D. 16; 2 T. L. R. 210; 30 Sol. Jo. 156; *sub nom.* **Re NORTHUMBERLAND AVENUE HOTEL CO., SULLY'S CASE**, 54 L. T. 76; *affd.* (1886), 33 Ch. D. p. 18, C. A.

Annotations:—**Apld.** *Lavery v. Pursell* (1888), 39 Ch. D. 508.

Mentd. *Re Patent Ivory Manufacturing Co.*, *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156; *Re Johannesburg Hotel Co.* (1890), 6 T. L. R. 360; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146; *Steel Manufacturers' Nickel Syndicate v. Soc. Generale D'Explorations Coloniales & Consolidated Nickel Mines (No. 2)* (1903), 48 Sol. Jo. 178; *Barker v. Stickney*, [1918] 2 K. B. 356.

1315. ———.]—Vendors entered into an alleged agreement, consisting of letters, for the sale to purchasers of certain patent rights by which the vendors were to receive £15,000, payable by Mar. 1, 1886, for the patent rights, works, plant, & book debts, & 25 per cent. of the profits made in dealing with the patents, the purchasers to form a co. to work the patents. No co. having been formed & the purchasers refusing to carry out the agreement, the vendors brought an action claiming specific performance of the agreement, payment of the £15,000 & damages in addition to specific performance of the whole or any part of the agreement, & in substitution for specific performance of any part of the agreement of which the ct. might decline to enforce specific performance.

The defence denied the agreement, & pleaded that the formation of a co. to work the patents was a condition precedent to the payment of the money. An order was made under R. S. C., 1883, Ord. 34, r 2, directing the following questions of law to be set down for argument: (a) what was the construction of the letters constituting the alleged agreement; (b) whether plffs. were entitled to any & what relief by way of specific performance, or damages, or both, in respect of such agreement.

Held: (1) under Jud. Act, 1873 (c. 66), the ct. had complete jurisdiction both in law & in equity; so whether the ct. could in a particular case grant specific performance or not, it could give damages for breach of the agreement.

(2) Under Chancery Amendment Act, 1858 (c. 27), plff. had first to make out that he was entitled to specific performance before he could get damages at all; now, he may come to the ct. & say, "If you think I am not entitled to specific performance of the whole or any part of the agree-

ment, then give me damages:—**Held**: on the pleadings plffs. were entitled to some relief, & defts. must pay the costs of the present hearing.—**ELMORE v. PIRRIE** (1887), 57 L. T. 333.

Annotation:—*As to* (2) **Consd.** *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851.

B. Damages in lieu of Specific Performance.

1316. Whether damages awarded—Plaintiff disentitling himself to specific performance.]—Plff. will not be entitled to damages in equity for the non-performance of an act for which *prima facie* he might have obtained specific performance, after he himself has done some act which disentitles him to specific performance.—**COLLINS v. STUTELEY** (1859), 7 W. R. 710.

1317. ———.]—Plff. by his statement of claim claimed specific performance of a contract by which he agreed to sell & deft. agreed to purchase the lease, goodwill, fixtures & stock-in-trade of a business; plff. alleging that he was & always had been able & willing to perform the contract but that deft. refused to perform the same. The statement of claim in the alternative claimed £100 as liquidated damages fixed by the contract for the refusal to perform the contract. The statement of defence alleged false representations by plff. as to the character of the business, & denied that plff. was able & willing to perform the contract. Plff., after the close of the pleadings, gave notice to deft. that, unless deft. completed the purchase within a week, he should resell the business, which he accordingly did. No amendment of the pleadings was then asked for by plff. & the action went on to trial. At the trial plff.'s counsel, admitting that the claim for specific performance must be abandoned, sought to recover the £100 as liquidated damages. He did not apply for any amendment of the pleadings. The judge dismissed the action on the ground that the claim for specific performance failing through plff.'s own act the alternative claim for damages must fail also:—**Held**: in the absence of any amendment of the pleadings, which ought not at that stage of the action to be allowed, the action must be treated as one for specific performance with a claim for damages in the alternative as a substitute for specific performance, according to the practice existing before Jud. Act, 1873 (c. 66), in the Ct. of Ch. & plff., having by his own act rendered specific performance impossible, was not in such action entitled to damages.—**HIPGRAVE v. CASE** (1885), 28 Ch. D. 356; 54 L. J. Ch. 399; 52 L. T. 242, C. A.

Annotations:—**Refd.** *Gas Light & Coke Co. v. Towse* (1887), 35 Ch. D. 519; *Nicholson v. Brown* (1897), 41 Sol. Jo. 490; *Berners v. Fleming*, [1925] 1 Ch. 264.

1318. ———.]—**NICHOLSON v. BROWN** (1897), 41 Sol. Jo. 490.

1319. ——— **Subject-matter expired.**]—Where a bill is filed for specific performance of a contract, & circumstances prevent the ct. from giving a decree for specific performance, the ct. may at the hearing award damages, although the subject-matter of the contract has then expired.—**OAKLEY v. RAMSAY** (1872), 27 L. T. 745.

1320. ——— **Contract too vague to be specifically enforced.**]—**WILSON v. NORTHAMPTON & BANBURY JUNCTION RY. CO.**, No. 137, *ante*.

1321. ———.]—Plff. was tenant to A. of certain premises for the residue of a term determinable in 1889, created by a lease dated in Oct. 1875. On Apr. 9, 1886, an agreement was entered into

or addition to specific performance, where specific performance could not properly be granted.—**TREADGOLD v. ROST (Y.T.)** (1912), 22 W. L. R. 300; 7 D. L. R. 741.—**CAN.**

PART V. SECT. 6, SUB-SECT. 11.—B.

1321 i. Whether damages awarded.]—**BOULTBEE v. SHORE** (1882), *Temp. Wood*. 376.—**CAN.**

1321 ii. ———.]—When specific performance for any reason cannot be granted, a plff. may now be awarded damages in lieu thereof as at common law, & no delay in seeking his remedy,

between pltf. & deft. which was in part that within seven days deft. should enter into a binding agreement with A. for a lease from A. of the said premises at the rental of £140 for such a term, to commence from June 24, 1886, & subject to such covenants as A. should approve, & that deft. should accept & take up such lease when ready, & if so required, execute a counterpart thereof, & that upon the lease being granted, or immediately preceding the same, pltf. should, at the request of A. or deft., execute a surrender to A. of his present lease of the premises. Pltf. brought an action against deft. for specific performance of the agreement, or in the alternative for damages for breach thereof:—*Held*: though as an agreement to enter into a contract it could not be decreed to be specifically performed, the agreement was one for breach of which deft. was liable in damages; & *semble*, not merely in nominal damages.—*FOSTER v. WHEELER* (1888), 38 Ch. D. 130; 57 L. J. Ch. 871; 59 L. T. 15; 37 W. R. 40; 4 T. L. R. 399, C. A.

Annotations:—*Reid*, *Waring & Gillow v. Thompson* (1912), 29 T. L. R. 154; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

1322. —.—.]—*PEARL LIFE ASSURANCE CO. v. BUTTENSHAW*, [1893] W. N. 123.

1323. —.—.]—Deft. in Aug. 1892, agreed to sell some land to pltf. for £150, of which £40 was paid at the time, & the balance was to be paid by twelve equal quarterly instalments of £9 3s. 4d. each. In case of default for thirty days in the payment of any instalment, the whole of the unpaid instalments were to become immediately due & payable, & in the event of default for thirty days in payment, the vendor was to be at liberty to resell the land, & to retain out of the proceeds of sale the unpaid instalments with interest, & was to pay the balance to the purchaser. The purchaser went into possession under the contract, & retained possession for a considerable time, & though generally in arrear with the instalments, he had by Aug., 1895, paid them all except the last. The last instalment became due on Sept. 29, 1895, but it was never paid. Correspondence took place, in which the vendor called on the purchaser to pay, but he never gave him notice that, if payment was not made within a specified time, he should treat the contract as abandoned. In Oct., 1896, the purchaser went away, & the vendor was unable to find him. The vendor resumed possession of the land & endeavoured to sell it, but without success, and in Mar. 1898, he agreed to let it for three years to a tenant, who took possession.

short of that imposed by Stat. Limitations, would afford a sufficient defence.—*BARLOW v. WILLIAMS* (1906), 4 W. L. R. 233; 16 Man. L. R. 164.—*CAN.*

1321 iii. —.—.]—The fact that the statement of claim asks for specific performance of a contract of sale, when specified performance cannot be granted, does not bar pltf. from recovering damages for breach of the contract, when these are also claimed in the alternative.—*JOHANNSON v. GUDMUNDSON* (1909), 19 Man. L. R. 83.—*CAN.*

1321 iv. —.—.]—If a contract has been entered into by a competent party, & is unobjectionable in its nature & circumstances, specific performance is as much a matter of course & therefore of right as are damages.—*RAM SUNDAR SAHA v. RAJ KUMAR SEN CHOWDHURY* (1927), 1 L. T. 55 Cal. 285.—*IND.*

1321 v. —.—.]—In an action on a contract of sale for specific performance it is competent for pltf. to claim in the alternative cancellation & damages for breach.—*RAS v. SIMPSON*, [1904] T. S. 254.—*S. AF.*

1321 vi. —.—.]—*DENNILL v. ATKINS & Co.*, [1905] T. S. 282.—*S. AF.*

1321 vii. —.—.]—In an action for specific performance of a contract, the ct. has power to grant damages as an alternative, even when there is no alternative prayer for damages.—*NATIONAL BUTCHERY CO. v. AFRICAN MERCHANTS, LTD.*, [1907] E. D. C. 57.—*S. AF.*

1321 viii. —.—.]—*DILLON v. MACDONALD* (1902), 21 N. Z. L. R. 375.—*N.Z.*

o. —.—.]—*Plaintiff willing to accept damages*.—*DEVENNE v. WARREN* (1910), 8 E. L. R. 453; 45 N. S. R. 8.—*CAN.*

p. —.—.]—*M'KELLAR v. DALLAS'S, LTD.*, [1928] S. C. 503.—*SCOT.*

q. —.—.]—*Defendant rendering specific performance impossible*.—*BLUMQUIST v. TYMCHORAK* (Man.) (1912), 22 W. L. R. 205; 6 D. L. R. 337; *affd.* (1913), 23 W. L. R. 662.—*CAN.*

r. —.—.]—Damages may be awarded where deft. by his own act disables himself from giving performance.—*LEFTLEY v. MOFFAT*, [1925] 3

In June, 1898, the purchaser reappeared, & wrote to the vendor that he was prepared to pay the final instalment. In July, 1898, the purchaser commenced an action against the vendor, claiming specific performance of the agreement of Aug., 1892, and damages in lieu of or in addition to specific performance:—*Held*: pltf.'s conduct did not amount to a repudiation of his contract, & the vendor was not justified in treating the contract as abandoned, & though the purchaser was not entitled to specific performance of his contract, he was entitled to damages, which the ct. assessed at £125.—*CORNWALL v. HENSON*, [1900] 2 Ch. 298; 69 L. J. Ch. 581; 82 L. T. 735; 49 W. R. 42; 16 T. L. R. 422; 44 Sol. Jo. 514, C. A.

Annotation:—*Mentd.* *Von Freedon v. Hull* (1906), 75 L. J. K. B. 359.

1324. —.—.]—*Plaintiff willing to accept damages*.—*OKINS v. MORRISON* (1912), 133 L. T. Jo. 9.

Agreement for leases.—*See LANDLORD & TENANT*, Vol XXX., pp. 425–426, Nos. 856–863.

C. Damages in addition to Specific Performance.

1325. *Whether damages awarded—Contract performed before hearing*.—Pltf. who has filed his bill for specific performance of a contract, & compensation in damages, & has obtained performance from defts. before the suit is brought to a hearing, does not thereby lose his right to consequential relief in damages in respect of the injury occasioned to him by the delay of defts. in performing the contract.—*CORY v. THAMES IRON-WORKS & SHIP BUILDING CO., LTD.* (1863), 2 New Rep. 16; 8 L. T. 237; 11 W. R. 589.

1326. —.—.]—*Special damage*.—Where the ct. has decreed specific performance of an agreement, it will not also grant a reference to assess damages, unless there has been some special damage arising from the delay of deft.—*CHINNOCK v. ELY (MARCHIONESS)* (1864), 2 Hem. & M. 220; 5 New Rep. 185; 34 L. J. Ch. 399; 11 L. T. 536; 29 J. P. 36; 11 Jur. N. S. 32; 13 W. R. 178; 71 E. R. 447; *reversd.* on other grounds (1865), 4 De G. J. & Sm. 638, L. C.

Annotations:—*Mentd.* *Winn v. Bull* (1877), 7 Ch. D. 29; *Bertel v. Neveux* (1878), 39 L. T. 257; *Rossiter v. Miller*, (1878), 3 App. Cas. 1124; *Preston v. Luck* (1884), 27 Ch. D. 497; *Hawkesworth v. Chaffey* (1886), 55 L. J. Ch. 335; *Rossdale v. Denny*, [1921] 1 Ch. 57; *Chillingworth v. Esche* (1923), 92 L. J. Ch. 461.

1327. —.—.]—Pltf. agreed with deft. to take a lease of premises belonging to deft. for the purpose as deft. knew of carrying on a trade which pltf. was about to commence. In consequence of

D. L. R. 825; 57 O. L. R. 260.—*CAN.*

t. —.—.]—*PEARISUNDARI DASSEE v. HARI CHARAN MOZUMDAR CHOWDHEY* (1887), 1 L. R. 15 Cal. 211.—*IND.*

a. —.—.]—*NORDEN v. RENNIE* (1879), Buch. 155.—*S. AF.*

b. —.—.]—*Sale of land outside province*.—*CAMPBELL v. BARRETT & MCCORMACK* (1914), 26 O. W. R. 344; 32 O. L. R. 157; 7 O. W. N. 205.—*CAN.*

c. —.—.]—*Voluntary agreement*.—Although equity may not enforce specific performance of a voluntary agreement made by deed, yet damages may be recovered for its breach.—*KIRK v. GREAVES*, [1924] N. Z. L. R. 260.—*N.Z.*

PART V. SECT. 6, SUB-SECT. 11.—C.

1327 i. *Whether damages awarded*.—As a general rule, subject to exceptions, a pltf. suing for specific performance of a contract of sale is not entitled, in addition thereto, to damages in respect of the profit which he would have made had delivery been effected in due time.

Sect. 6.—Relief: Sub-sect. 11, C., D. & E.; sub-sect. 12, A.]

deft.'s wilful refusal to fulfil his agreement pltf. was unable for fifteen weeks to commence his trade :—*Held* : in addition to judgment for specific performance of the agreement, damages must be awarded in respect of pltf.'s loss of profits from his trade during the fifteen weeks, & £250 damages were awarded.—*JAKES v. MILLAR* (1877), 6 Ch. D. 153; 37 L. T. 151; 25 W. R. 846; *sub nom* *JAKES v. MILLAR*, 42 J. P. 20.

Annotations:—Apld. *Jones v. Gardiner*, [1902] 1 Ch. 191. *Refd.* *Royal Bristol Permanent Bldg. Soc. v. Bomash* (1887), 35 Ch. D. 390. *Mentd.* *Wesley v. Walker* (1878), 38 L. T. 284; *Marshall v. Berridge* (1881), 19 Ch. D. 233; *Wood v. Aylward* (1887), 57 L. T. 54; *Re Lander & Bagley's Contract*, [1892] 3 Ch. 41.

1328. ———.]—The purchaser of a piece of land agreed, as part of the consideration, to grant within a given time to the vendor a right of way, & to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way or to make the road & sewers until long after the time fixed, & the vendor brought an action for specific performance & for damages, as the other land had remained unproductive until the road was made :—*Held* : judgment for specific performance with costs must be given, but no damages, as the contract was for a sale of real estate; there being no distinction between a contract to grant a right of way & make a road & sewers, & a contract to sell real estate.—*ROWE v. LONDON SCHOOL BOARD* (1887), 36 Ch. D. 619; 57 L. J. Ch. 179; 57 L. T. 182; 3 T. L. R. 672.

Annotation.—Refd. *Morgan v. Russell*, [1909] 1 K. B. 357.

1329. ———.]—Two houses, stated in the particulars to have been "recently in the possession of F.," were put up by pltf's, mtgees. from F., for sale by auction, & were bought by deft. A day was fixed for completion of the purchase, when rents or possession were to belong to the purchaser. At that day F. was still in possession, & remained so until he was turned out by the sheriff, more than a month after. The purchaser had agreed to let the houses to a tenant as from a day five days later than the day fixed for completion, but the tenant, finding that he could not have immediate possession, had refused to take the houses which had remained unoccupied, & had also been damaged by the removal of some fixtures & otherwise. The vendors brought an action for specific performance simply. Deft. counterclaimed for specific performance with compensation :—*Held* : the purchaser was entitled to damages in the nature of compensation for loss of a tenant, & damages for the deterioration of the property.—*ROYAL BRISTOL PERMANENT BUILDING SOCIETY v. BOMASH* (1887), 35 Ch. D. 390; 56 L. J. Ch. 840; 57 L. T. 179.

Annotations:—Refd. *Clarke v. Ramuz*, [1891] 2 Q. B. 456; *Re Wilsons' Contract* [1894], 3 Ch. 516; *Jones v. Gardiner*, [1902] 1 Ch. 191.

—*PHILIP v. METROPOLITAN & SUBURBAN RY. CO.* (1893), 10 S. C. 52.—S. AF.

1327 ii. ———.]—*RHODESIA COLD STORAGE & TRADING CO. v. BEIRA COLD STORAGE LTD. (IN LIQUIDATION)* (1905), 2 Buch. A. C. 253.—S. AF.

1327 iii. ———.]—*SILVERTON ESTATES CO. v. BELLEVUE SYNDICATE*, [1904] T. S. 462.—S. AF.

1327 iv. ———.]—*EISELE v. AURET*, [1904] 2 T. H. 156.—S. AF.

*d. Right to specific performance where damages already obtained.]—*Where, in an action for specific performance of a contract, pltf. claimed &

obtained damages for the non-fulfilment thereof, the ct. refused to decree specific performance.—*McAGY v. GRAY* (1859), 4 N. S. R. (Coch.) 52.—CAN.

PART V. SECT. 6, SUB-SECT. 11.—E.

1332 i. *Assessment by court.]—*Under Administration of Justice Act, 1873, s. 32, the ct. of chancery has cognizance of all the rights of all the parties arising out of an agreement; & if either is entitled to damages, the ct. ought to ascertain them. In this view, in a suit for specific performance, to which pltf. was found not entitled, a reference was directed to inquire as to damages sustained by a purchaser by reason of

1330. ———.]—*GRAHAM v. O'CONNOR* (1896), 12 T. L. R. 297, C. A.

1331. ———.]—Damages can be recovered by a purchaser from his vendor for delay in completing the purchase, where the delay has been occasioned by default of the vendor, not in consequence of want of, or defect in, title, or in consequence of conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract.—*JONES v. GARDINER*, [1902] 1 Ch. 191; 71 L. J. Ch. 93; 86 L. T. 74; 50 W. R. 265.

Agreements for leases.]—See LANDLORD & TENANT, Vol. XXX., pp. 426-427, Nos. 864-871.

D. Nature of Damages awarded.

Where vendor unable to make good title.]—See SALE OF LAND, Vol. XL., pp. 262 *et seq.*

E. Assessment of Damages.

1332. *Assessment by court.]—JAKES v. MILLAR*, No. 1327, *ante*.

1333. ———.]—*CORNWALL v. HENSON*, No. 1323, *ante*.

1334. *Reference to Official Referee—Examination of witnesses.]—*In an action for specific performance, where, on an inquiry as to damages, it was necessary to examine witnesses, the inquiry was referred to an Official Referee.—*STAFFORD v. COXON* (1877), 25 W. R. 788.

SUB-SECT. 12.—ANCILLARY RELIEF.

A. In General.

1335. *Delivery of deeds—Deposited with master By defendant.]—*Bill filed for a specific performance of an agreement to purchase, & demurred to. Order made, that on a conveyance of the estate from pltf. to deft. being deposited with the master, the vendee should pay into ct. his purchase-money; which order was complied with. Motion, that master should deliver the conveyance to the vendee, refused.—*CUTLER v. BROUGHTON* (1818), 3 Madd. 95; 56 E. R. 445.

1336. ———.]—*By plaintiff.]—*In a case where deeds had been brought into the master's office, under an order of reference made in a suit for specific performance of two contracts relating to different parts of lands of the parties, one for an exchange, & the other for a purchase, referring it to the master to settle a conveyance from deft. to a purchaser, a third person, of the exchanged lands, upon whose report so much of the bill as related to that contract, was ordered to be dismissed with costs, an application was made to the ct. that the documents belonging to pltf., which had been brought into the master's office, according to the terms of the order, might be delivered back to him; but it was refused, on deft. showing that they would yet be of service,

breach of the contract, & also as to damages sustained by the vendor by reason of breach of covenants in the instrument constituting the agreement.—*CASEY v. HANLON* (1875), 22 Gr. 445.—CAN.

PART V. SECT. 6, SUB-SECT. 12.—A.

e. Order for account—With reference to ascertain true agreement.]—HUGHES v. MOORE (1885), 11 A. R. 569.—CAN.

*f. Appointment of receiver.]—*A vendor suing for specific performance of an agreement for the sale of land, under which the purchaser was in possession & which contained no pro-

& necessary to him in defending the same suit as to the other contract: upon the ground that the order, in such cases, was matter of regulation: & it was held that, under the circumstances, the ct. might still retain the papers, deft., having an interest in the order & the documents brought in under it, & having paid the purchase-money & interest into ct.—*BOWYER v. GREEN* (1824), 13 Price, 250; 147 E. R. 981.

1337. Order for account—Payment made by purchaser at different times—Whether account taken with rests.]—Where payments have been made by a vendee at different times on account of his purchase, all exceeding the interest due at the times of such payments, & the decree in a suit by the vendor for a specific performance directs an account to be taken of what is due to pltf. for the principal & interest in respect of the purchase, rests are always made in taking the account.—*GRIFFITH v. HEATON* (1823), 1 Sim. & St. 271; 1 L. J. O. S. Ch. 197; 57 E. R. 109.

1338. — Compulsory purchase of land.]—The vendor's title & the contract being admitted, decree will be made for sale, & satisfaction to the vendor out of the moneys, & for payment of the deficiency, if any, by the purchaser, notwithstanding an Act of Parliament has dealt with the lands in question since the date of the contract.

Mode of directing sales of lands held in trust. The order should direct the sale to be made by the trustee or by the judge at chambers, not by the trustee with the approbation of the judge.—*NASH v. WORCESTER IMPROVEMENT COMRS.* (1855), 1 Jur. N. S. 973.

*Annotation:—***Refd.** *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

1339. — Of rents & profits.]—I do not see how in a decree directing an account of rents & profits they can have an account of business carried on by them upon the premises which has resulted in a loss. Whether it was necessary or not I do not know; it is not in the decree (*BUCKLEY, J.*).—*BENNETT v. STONE*, [1902] 1 Ch. 226; 71 L. J. Ch. 60; 85 L. T. 753; 50 W. R. 118; 46 Sol. Jo. 151; *on appeal*, [1903] 1 Ch. 509, C. A.

*Annotation:—***Mentd.** *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 618.

1340. Directions as to settlement of conveyance—Subsequent motion.]—Where a contract was decreed to be specifically performed, nothing being said as to interest on the purchase-money, & the ct. afterwards, on motion, referred to the master to settle a conveyance; a subsequent motion to direct the master to calculate & charge interest on the purchase-money, & to give particular direction as to the mode of settling the conveyance, was refused.—*BYFIELD v. PROVIS* (1835), 4 L. J. Ch. 214.

1341. —.]—By the terms of a contract for the purchase of real estate, it was stipulated that "a copy of the pedigree on which the claim of the vendor as heir-at-law to the last owner was based should be furnished to the purchaser, who should admit the right of the vendor as such heir-at-law, & should not require any further evidence of marriages, births, failure of issue, descents, intestacies, survivorships, or other matters of pedigree than such as were in the possession of the vendor." The vendor furnished a pedigree which was defective:—**Held:** upon the construction of the contract, the purchaser had

thereby admitted the vendor's right as heir-at-law to the last owner, & he could not object to any defect in the vendor's pedigree purporting to show such heirship.

Decree for specific performance, with direction to settle conveyance "by all necessary parties" in case the parties should differ.—*NASH v. BROWNE* (1863), 32 L. J. Ch. 148; 7 L. T. 667; 9 Jur. N. S. 431.

1342. Directions as to settlement of lease—Insertion of particular clause.]—When the ct. directs a reference to chambers to settle the terms of a lease, it will, when convenient, at the same time make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings.—*STRELLEY v. PEARSON* (1880), 15 Ch. D. 113; 49 L. J. Ch. 406; 43 L. T. 155; 28 W. R. 752.

*Annotation:—***Mentd.** *New Orleans S.S. Co. v. London & Provincial Marine & General Insee.* (1909), 14 Com. Cas. 111.

1343. — — —.]—By an agreement in writing (contained in two letters) deft. agreed to grant to pltf., a brewer, a lease of a public-house for a certain term, at a certain rent "a proper lease to be drawn up with all proper clauses & approved of by" deft. & his solr. Afterwards deft. refused to grant a lease unless it contained a clause against underletting. In an action to enforce specific performance of the agreement:—**Held:** the clause was not a "proper clause"; deft. was bound to grant a lease without putting in any such clause, & specific performance decreed.

There will be a declaration as claimed that the restrictive covenant is not to be put in the lease (*PEARSON, J.*).—*EADIE v. ADDISON* (1882), 52 L. J. Ch. 80; 47 L. T. 543; 31 W. R. 320.

1344. Order to convey—Saving rights of absent party—Real estate subject of voluntary settlement.]—A decree made in the absence of a material party, but without prejudice to his rights & interests.

A. B. executed a voluntary settlement of real estate in favour of his wife & children, & afterwards contracted to sell it for valuable consideration. The purchaser filed a bill for specific performance against the vendor, his wife, children & the trustees in whom the legal estate was vested. One of the children was out of the jurisdiction & did not appear. The ct. decreed a specific performance, & ordered the trustees to convey to the purchaser, saving the rights of the absent party.—*WILLATS v. BUSBY* (1842), 5 Beav. 193; 12 L. J. Ch. 105; 49 E. R. 551.

*Annotations:—***Refd.** *Postgate v. Barnes* (1863), 1 New Rep. 389; *Townend v. Toker* (1866), 35 L. J. Ch. 608.

1345. Order for sale—Land compulsorily taken.]—*NASH v. WORCESTER IMPROVEMENT COMRS.* (1855), 1 Jur. N. S. 973.

*Annotation:—***Consd.** *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426.

1346. Indemnity—Actual specific performance not possible.]—Where actual specific performance cannot be directed, & indemnity is prayed, the ct. will decree indemnity as ancillary to the relief by specific performance.—*CRUSE v. PAINE* (1868), L. R. 6 Eq. 641; 37 L. J. Ch. 711; 19 L. T. 127; 17 W. R. 44; *affd.* (1869), 4 Ch. App. 441, L. C.

*Annotations:—***Refd.** *Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Co.'s Case*, [1914] 2 Ch. 617. **Mentd.** *Davis v. Haycock* (1869), L. R. 4 Exch. 373; *Bowring v. Shepherd* (1871), L. R.

vision for attornment or distress, held not entitled before judgment to a receiver order with respect to a crop which had been cut & was lying on the

ground at the time of the order. Even had judgment been obtained, pltf., in view of Land Titles Act, 1922, c. 133, s. 94, & the material used on the applica-

tion, was not entitled to the order.—*BUDNYK v. KUSHNEIYK* (Alta.). [1925] 1 D. L. R. 246; [1924] 3 W. W. R. 900.—**CAN.**

Sect. 6.—Relief: Sub-sect. 12, A., B. & C. Sect. 7: Sub-sect. 1, A. (a).]

Q. B. 309; *Maxted v. Paine* (1871), L. R. 6 Exch. 132; *Merry v. Nickalls* (1872), 7 Ch. App. 733; *Lacey v. Hill, Re Crowley's Claim* (1874), L. R. 18 Eq. 182; *Thacker v. Hardy, Same v. Hardy, Same v. Wheatley* (1879), 48 L. J. Q. B. 289; *Neillon v. James* (1882), 9 Q. B. D. 546; *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182; *British Union & National Insce. v. Lawson* No. 1 (1916), 60 Sol. Jo. 679.

— *In addition to specific performance.*—*See Sub-sect. 9, ante.*

1347. Vesting order—Non-appearance of defendant.—Where defts. to a bill for specific performance cannot be found, pltf., after entering an appearance & filing replication, may, by advertisement in the "London Gazette," give him notice of a *subpœna* to hear judgment, & if he fail to appear, the ct. at the hearing will, on proof of the case made by the bill, make a decree & an order vesting the estate in pltf.—*MURPHY v. VINCENT* (1871), 40 L. J. Ch. 378.

1348. — Lunacy of defendant.—Deft. agreed to grant to pltf. leases of houses built by pltf. on deft.'s land. Before the leases were granted deft. became of unsound mind, though he had not been so found by inquisition, nor had any committee of his estate been appointed. In an action for specific performance, deft. offered to submit to a decree, and to have himself declared a trustee for pltf. under Trustee Act, 1850 (c. 60), & to have a person appointed to execute the leases on his behalf, or to have the houses vested in pltf. on the terms of the agreement:—*Held*: the proposed order would vest a legal term in pltf. pursuant to the contract, but would not give him the benefit of the express covenant for quiet enjoyment.—*COWPER v. HARMER* (1887), 57 L. J. Ch. 460; 57 L. T. 714; 4 T. L. R. 16.

1349. Appointment of receiver—When appeal pending.—In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for deft., pltf. having appealed, the Ct. of Appeal, no previous application having been made to the Div. Ct. or a judge, appointed pltf. receiver & manager of the farm without security, on his undertaking to abide by any order which the ct. might make in the matter.—*HYDE v. WARDEN* (1876), 1 Ex. D. 309; 25 W. R. 65; 3 Char. Pr. Cas. 397, C. A.; *subsequent proceedings* (1877), 3 Ex. D. 72, C. A.

1350. Vacation of registration of action as *lis pendens*—Where claim unsuccessful.—The ct. may on giving judgment dismissing an action by a purchaser for specific performance include in the judgment on the vendor's application an order vacating the registration of the action as a *lis pendens* unless the purchaser sets down an appeal within a limited time.—*BAXTER v. MIDDLETON*, [1898] 1 Ch. 313; 67 L. J. Ch. 200; *sub nom. BAXTER v. MIDDLETON, Re MIDDLETON & BAXTER*, 46 W. R. 350; 42 Sol. Jo. 253; *affd.*, 42 Sol. Jo. 508, C. A.

Annotation:—*Distd. Reilly v. Richardson* (1899), 43 Sol. Jo. 457.

1351. — — — — ——*REILLY v. RICHARDSON* (1899), 43 Sol. Jo. 457.

Annotation:—*Refd. King & Wilkins v. Barber* (1902), 47 Sol. Jo. 110.

B. Injunction in aid of Specific Performance.

See INJUNCTION, Vol. XXVIII., pp. 456, 457, Nos. 729–738.

1352. Stay of action for ejectment—By judgment creditor of vendor.—A. entered into an agreement for the purchase of an estate, & paid a deposit, & entered into possession, but did not pay the remainder of the purchase-money. Afterwards a creditor of the vendor obtained a judgment against him, sued out an *elegit*, & brought an action of ejectment against A. A. filed a bill against the vendor & the judgment creditor praying to have the agreement specifically performed & for an injunction to restrain the judgment creditor from proceeding in any action against him:—*Held*: he was entitled to such injunction.—*BRUNTON v. NEALE* (1844), 14 L. J. Ch. 8; 9 Jur. 338, L. C.

1353. — Agreement for lease.—Pltfs. paying rent for premises under an agreement for a lease, being embarrassed by two claimants of the rent, refuse to pay without an indemnity, & an ejectment being brought, file their bill for specific performance of the agreement, & to stay the ejectment an injunction is granted on their paying the arrear into ct., or to deft., without prejudice.—*JONES v. HORRIDGE* (1844), 3 L. T. O. S. 199.

1354. Agreement for nomination of directors—Restraint of alteration of company's articles.—By an agreement binding on deft. co. it was provided that so long as pltf. syndicate should hold 5,000 shares in deft. co., pltf. syndicate should have the right of nominating two directors on the board of deft. co. A clause to the same effect was contained in art. 88 of deft. co.'s arts. of assocn. Another art. provided that the number of directors should not be less than three nor more than seven. Pltf. syndicate had recently nominated two persons as directors. Deft. co. objected to these persons as directors & refused to accept the nomination, & a meeting of the shareholders was called for the purpose of passing a special resolution under Companies (Consolidation) Act, 1908 (c. 69), s. 13, cancelling art. 88:—*Held*: deft. co. had no power to alter its arts. of assocn. for the purpose of committing a breach of contract & an injunction ought to be granted to restrain the holding of the meeting for that purpose; the contract was not incapable of being specifically enforced, & a declaration ought to be made that the two persons nominated by pltf. syndicate became & were directors of deft. co. with ancillary relief by way of injunction if it became necessary.—*BRITISH MURAC SYNDICATE, LTD. v. ALPERTON RUBBER CO., LTD.*, [1915] 2 Ch. 186; 84 L. J. Ch. 665; 113 L. T. 373; 31 T. L. R. 391; 59 Sol. Jo. 494.

Annotation:—*Distd. Plantations Trust v. Bila* (Sumatra), *Rubber Lands* (1916), 85 L. J. Ch. 801.

1355. — Restraint of preventing nominees acting as directors.—In consideration of pltf. co. guaranteeing an issue of debentures deft. co., the latter agreed to appoint two nominees of pltf. co. as directors. Two directors were nominated by pltf. co., but deft. co. refused to appoint them. On an application to restrain deft. co. from preventing the two nominees from acting as directors:—*Held*: the nomination had not the effect of appointing the nominees as directors, &

PART V. SECT. 6, SUB-SECT. 12.—B.

g. Stay of action for ejectment—By vendor.—*FREEMAN v. STEWART* (1902), 2 N. B. Eq. Rep. 365.—CAN.

h. To restrain alienation.—In a suit for the specific performance of an

agreement for sale of lands, or to set aside a conveyance for fraud, pltf. is not of right entitled to injunction to restrain alienation, unless it is alleged by the bill & proved that the holder of the land threatens & intends to convey it.—*KERR v. HILLMAN* (1860), 8 Gr.

285.—CAN.

k. Covenant to build wall to specifications—Injunction to restrain breach.—*GROSS v. WRIGHT*, (B.C.) [1923] 2 D. L. R. 171; [1923] S. C. R. 214; [1923] 1 W. W. R. 882.—CAN.

on the merits the injunction ought not to be granted.

Qu.: whether a contract to elect as directors the nominees of an outside body will be enforced by a decree for specific performance.—**PLANTATIONS TRUST, LTD. v. BILA (SUMATRA) RUBBER LANDS, LTD.** (1916), 85 L. J. Ch. 801; 114 L. T. 676.

C. Declaration of Lien.

See, generally, LIEN, Vol. XXXII., pp. 212 *et seq.*

1356. When declaration made—Condition for resale on default of purchaser—Liberty to apply if decree not obeyed.—Pltfs., vendors, contracted to sell property to defts., a railway co., & the conditions of sale provided that if default was made by the purchasers in the completion of their contract, the vendors should be at liberty to resell the property. The purchasers never completed their contract. Pltfs. filed a bill praying a decree for specific performance or, in the alternative, that the condition as to the resale of the property might be enforced. They also asked to have it declared that they had a lien on the property for the unpaid purchase-money:—*Held*: pltfs. were only entitled to a decree for the specific performance of the contract by defts., with the liberty to apply “in case that decree was not obeyed,” with respect to the lien.—**DICKENSON v. LONDON, CHATHAM & DOVER RY. CO.** (1866), 15 L. T. 262; 15 W. R. 141.

1357. ——— Declaration not claimed by plaintiff—Motion for judgment in default of defence.—Upon motion for judgment in default of defence in an action for specific performance in which pltf. does not claim any declaration of lien, the ct. will not give judgment declaring pltf. entitled to a lien.—**TACON v. NATIONAL STANDARD LAND MORTGAGE & INVESTMENT CO.** (1887), 56 L. J. Ch. 529; 56 L. T. 165.

———.]—*See* LIEN, Vol. XXXII., pp. 271-273, 276, 282, Nos. 514, 531, 532, 542, 557, 596.

Enforcement of lien.—*See, generally*, LIEN, Vol. XXXII., pp. 290-294, Nos. 669-698.

——— **Compulsory purchase of land.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 230, 231, Nos. 1177-1202.

SECT. 7.—SPECIFIC PERFORMANCE WITH COMPENSATION.

SUB-SECT. 1.—CONTRACT WITHOUT CONDITION FOR COMPENSATION.

A. Right of Vendor to Specific Performance Subject to Compensation.

(a) In General.

1358. How far principle carried by court.—Objects of parties defeated.—In enforcing contracts upon the principle of compensation for a variance from the description the ct. has gone so far, to the extent even of wholly defeating the object of the purchaser, that, where the principal subject of the contract was all the corn & hay tithes of a parish, & of the hay tithe half was allotted to the vicar, & the other half commuted for a customary payment, the nature of that payment, the extent of meadow, & the possible conversion from arable, not distinctly appearing,

the injunction against recovering the deposit was continued after answer.—**DREWE v. HANSON** (1802), 6 Ves. 675; 31 E. R. 1253, L. C.

Annotations:—**Consd.** Halsey v. Grant (1806), 13 Ves. 73. **Refd.** Dyer v. Hargrave, Hargrave v. Dyer (1805), 10 Ves. 505; Knatchbull v. Grueber (1817), 3 Mer. 124; Casamajor v. Strode (1834), 2 My. & K. 706; Holliday v. Lockwood (1917), 86 L. J. Ch. 556.

1359. ———.]—I think that the cases of specific performance with compensation ought not to be extended. In many of them a bargain substantially different from that which the parties entered into has been substituted for it & enforced, which is not right (JESSEL, M.R.).—**CATO v. THOMPSON** (1882), 9 Q. B. D. 616; 47 L. T. 491, C. A.

Annotations:—**Appld.** Rudd v. Lascelles, [1900] 1 Ch. 815. **Refd.** Ellis v. Rogers (1885), 29 Ch. D. 661; Ashburner v. Sewell, [1891] 3 Ch. 405; May v. Platt, [1900] 1 Ch. 616; Halkett v. Dudley, [1907] 1 Ch. 590; Alderdale Estate Co. v. McGrory, [1917] 1 Ch. 414; Simpson v. Gilley (1922), 92 L. J. Ch. 191.

1360. Defects discoverable on minute examination.—**DYER v. HARGRAVE, HARGRAVE v. DYER**, No. 545, *ante*.

1361. No substantial deviation from contract.—The objection by a purchaser applying only to a small part of the estate, a specific performance decreed with compensation.—**M'QUEEN v. FARQUHAR** (1805), 11 Ves. 467; 32 E. R. 1168, L. C.

Annotations:—**Consd.** Warde v. Dixon (1858), 28 L. J. Ch. 315. **Refd.** Wright v. Wakeford (1811), 17 Ves. 454; Green v. Pulsford (1839), 2 Beav. 70. **Mentd.** A.-G. v. Hamilton (1816), 1 Madd. 214; Moodie v. Reid (1816), 1 Madd. 516; Hougham v. Sandys (1827), 2 Sim. 95; Hall v. Montague (1830), 8 L. J. O. S. Ch. 167; Allen v. Bradshaw (1835), 1 Curt. 110; Campbell v. Home (1842), 1 Y. & C. Ch. Cas. 664; Burdett v. Spilsbury (1843), 10 Cl. & Fin. 340; Butcher v. Jackson (1845), 14 Sim. 441; Warren v. Postlethwaite (1845), 2 Coll. 108; Doe d. Knight v. Spencer (1848), 2 Exch. 752; Vincent v. Sodor & Man (Bp) (1849), 8 C. B. 905; Brassey v. Chalmers (1852), 16 Beav. 223; Donville v. Lamb (1853), 1 W. R. 216; Baker v. Bradley (1855), 2 Jur. N. S. 98; Wellesley v. Mornington (1855), 2 K. & J. 143; Bradshaw v. Fane (1856), 25 L. J. Ch. 413; Cockcroft v. Sutcliffe (1856), 25 L. J. Ch. 313; Re Rickett's Trust (1860), 2 L. T. 320; Re Huish's Charity (1870), 11 R. 10 Eq. 5; Re Frith & Osborne (1876), 3 Ch. D. 618; Henty v. Wrey (1882), 21 Ch. D. 332; Ross v. Tyser Line, The Celtic King (1894), 10 T. L. R. 222; Cloutte v. Storey, [1911] 1 Ch. 18.

1362. ———.]—Specific performance upon the principle of compensation & indemnity, the effect not being a substantial deviation from the contract.—**HORNIBLOW v. SHIRLEY** (1802), 13 Ves. 81; 33 E. R. 225.

Annotation:—**Consd.** Halsey v. Grant (1806), 13 Ves. 73.

1363. ———.]—Specific performance upon the principle of compensation & indemnity, not, if the effect is a substantial deviation from the contract.—**HALSEY v. GRANT** (1806), 13 Ves. 73; 33 E. R. 222, L. C.

Annotation:—**Consd.** Knatchbull v. Grueber (1815), 1 Madd. 153.

1364. ———.]—**CARVER v. RICHARDS**, No. 1569, *post*.

1365. ———.]—Property was put up for sale under the description of a “messuage situated in T. street, with the builder's yard, stables, & premises as lately in the occupation of F., & containing 1,372 square yards. There was a condition that errors of description should not annul the sale, but that if they were pointed out before completion compensation should be allowed for them. The property had originally contained 1,372 square yards, but F., the owner before building had sold off, in 1870, 339 square yards,

PART V. SECT. 6, SUB-SECT. 12.—C.

1. When declaration made—Agreement to sell in lots when called for—Right to lien on whole for sum unpaid on part.—**LAND CORPN. OF CANADA v. WILLIAM PEARSON LAND CO.** (Sask.) (1922), 68 D. L. R. 775.—CAN.

PART V. SECT. 7, SUB-SECT. 1.—A. (a).

1361 i. No substantial deviation from contract.—**MACKAY v. PROHAR** (Sask.), [1925] 3 D. L. R. 1199.—CAN.

*Sect. 7.—Specific performance with compensation:
Sub-sect. 1, A. (a), (b) & (c).]*

so that the property contained only 1,033 square yards, which were separated by a wall from the 339 yards, & were fenced round & well defined:—*Held*: the purchaser had got substantially what he had contracted to buy, the deficiency of quantity, though considerable, did not so affect the substance of what he had bargained for as to take the case out of the condition, & he must complete with compensation.—*Re FAWCETT & HOLMES' CONTRACT* (1889), 42 Ch. D. 150; 58 L. J. Ch. 763; 61 L. T. 105; 5 T. L. R. 515, C. A.

Annotation:—*Consd.* *Jacobs v. Revell*, [1900] 2 Ch. 858.

1366. ——. *]*—In exercising jurisdiction over specific performance, a ct. of equity will look at the substance & not merely the letter of the contract. Therefore if a vendor sues, & is in a position to convey substantially what the purchaser has contracted for, the ct. will decree specific performance, with compensation for any small & immaterial deficiency; & if a purchaser is suing he may elect to take all that he can get, & to have a proportionate abatement from the purchase-money in respect of a deficiency in the subject-matter described in the contract, but this right does not apply to a representation about the subject-matter made, not in the contract, but collaterally to it.—*RUTHERFORD v. ACTON-ADAMS*, [1915] A. C. 866; 84 L. J. P. C. 238; 113 L. T. 931, P. C.

1367. ——. *Latent but immaterial defect.* — *SHEPHERD v. CROFT*, No. 548, *ante*.

1368. *Vendor acting inconsistently with contracts—Turning defendant out of possession—Immediate possession taken under contract.* — *KNATCHBULL v. GRUEBER*, No. 1381, *post*.

1369. ——. *Failure to perform stipulation in agreement.* — *HEMBROW v. TALBOT* (1892), 36 Sol. Jo. 712.

1370. *Purchaser with notice of possible defect or incumbrance.* — Specific performance of a contract to purchase enforced against a subsequent purchaser, at an advanced price, with notice; who was decreed to convey on payment to him of the price, for which the pltf. contracted. The possession of a tenant is notice to a purchaser of the actual interest he may have, either as tenant; or farther, as in this instance, by an agreement to purchase the premises.—*DANIELS v. DAVISON* (1811), 17 Ves. 433; 34 E. R. 167, L. C.; *previous proceedings* (1809), 16 Ves. 249, L. C.

Annotations:—*Consd.* *Jones v. Smith* (1841), 1 Hare. 43. *Refd.* *Phillips v. Miller* (1875), L. R. 10 C. P. 420. *Mentd.* *Hunt v. Luck*, [1901] 1 Ch. 45; *Green v. Rheinberg* (1911), 104 L. T. 149.

1371. ——. *]*—An estate was stated to be subject to certain drainage taxes, & it afterwards appeared that there were other drainage taxes payable in respect of the same, imposed by a public Act of Parliament. Upon a bill filed by vendors for specific performance, a decree was pronounced for pltf. with costs, & without allowing compensation to deft. for the taxes, not mentioned in the particulars of sale.

Having in my opinion sufficient notice to put him [the purchaser] upon inquiry I think he is not entitled to the compensation he seeks (LORD BROUGHAM, C.).—*BARRAUD v. ARCHER* (1831), 9 L. J. O. S. Ch. 173, L. C.

1372. ——. *]*—*HUGHES v. JONES*, No. 1386, *post*.

1373. ——. *]*—Although according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease, cannot, if nothing further is said, make a good

title unless it is held under an original lease, yet in a case where the particulars & conditions of sale of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease:—*Held*: the purchaser could not on that account refuse to complete, or claim compensation on the ground of misdescription.—*CAMBERWELL & SOUTH LONDON BUILDING SOCIETY v. HOLLOWAY* (1879), 13 Ch. D. 754; 49 L. J. Ch. 361; 41 L. T. 752; 28 W. R. 222.

Annotations:—*Refd.* *Blenkhorn v. Penrose* (1880), 43 L. T. 668; *Re Beyfus & Masters's Contract* (1888), 39 Ch. D. 110; *Broom v. Phillips* (1896), 74 L. T. 459.

1374. ——. *Risk accepted—Vendor acting bonâ fide.* — In an agreement for the sale of seventeen undivided shares of a coal mine there was an article stating two conveyances by which six undivided shares of the land beneath which the coal lay had been conveyed to the vendors' predecessor in title, but stating that there was no express mention in the conveyances of the minerals under the land, & requiring that the purchasers should assume that six undivided shares of the minerals passed by the conveyances of the land, & thereby became absolutely vested in the vendors' predecessor in title. In the abstract of the vendors' title sent to the purchasers mention was made of a certain indenture, but nothing further was said about it. The purchasers' solr. inquired of the vendors' solr. what this deed was, & was told that it could not be found, and no abstract of it or information about it could be furnished, but that it was believed not to affect the property sold. The vendors' solr. also said, as he really believed to be the case, that though the title to the six undivided shares could not be strictly proved, yet the vendors had a good holding title to them. After these transactions the purchasers entered into the agreement, & paid the deposit money. Subsequently, the deed which was supposed to have been lost was found, when it was discovered that by virtue of it the six undivided shares of the mine belonged to some person quite different from the vendors, & that neither they, nor their predecessor in title, had ever had any title to those shares. The purchasers refused to proceed with the agreement, whereupon the vendors brought this action for specific performance of it. The purchasers contended that without these six shares the mine would be useless to them, & claimed to be entitled to be released from the agreement:—*Held*: as there had been no fraud in the matter, but the vendors had acted under a *bonâ fide* mistake, & the purchasers had had the fact that there was a doubt as to the title brought to their notice before entering into the agreement, & had thought fit to run the risk of taking the property without having the matter cleared up, specific performance of the agreement ought to be decreed, but a deduction must be made from the purchase-money as compensation to the purchasers for the loss of the six shares.—*ENGLISH v. MURRAY* (1883), 49 L. T. 35; 32 W. R. 84.

1375. *Restriction on acquisition of easement.* — Deft. agreed to purchase houses in F. street, on the other side of which was a recreation ground belonging to the mayor & corpn. of S. After signing the contract deft. discovered that the vendor had entered into a covenant with the corpn. to pay 1s. a year by way of acknowledgement that he had no right to the flow of light & air to his windows over the recreation ground.

The covenant was expressed to bind the "owner for the time being" of the houses, & on having notice of it, deft. declined to complete the purchase. The vendor having brought an action for specific

performance, the purchaser relied on the covenant as sufficient reason for declining to complete, & in the alternative claimed compensation:—*Held*: (1) in a purchase of property there was no right to the potentiality of the acquisition of an easement, & specific performance must be decreed; (2) it was not a case for compensation, but there would be no order as to costs, on the ground that the vendor ought to have informed the purchaser of the existence of the covenant.—*GREENHALGH v. BRINDLEY*, [1901] 2 Ch. 324; 70 L. J. Ch. 740; 84 L. T. 763; 49 W. R. 597; 17 T. L. R. 574; 45 Sol. Jo. 576.

Annotations:—As to (1) *Refd.* *Hyman v. Van den Bergh* (1907), 77 L. J. Ch. 154. *Generally, Refd.* *Smith v. Colbourn*, [1914] 2 Ch. 533.

(b) *Prejudicial Rights of Third Parties over Property.*

1376. Whether specific performance decreed—Property subject to covenants.—A lessee, subject to covenants, cannot compel a specific performance of an agreement to purchase the premises, though he offered to indemnify the purchaser against the performance of the covenants.—*FILDES v. HOOKER* (1818), 3 Madd. 193; 56 E. R. 481.

1377. — Sale of wharf with jetty—Right of third person to remove jetty.—A. contracted to sell a wharf on the banks of the Thames, with a jetty. The jetty turned out to be liable to be removed by the Corp'n. of London, if they thought fit:—*Held*: the jetty was essential to the beneficial occupation & enjoyment of the premises contracted to be sold, & a specific performance could not be decreed.—*PEERS v. LAMBERT* (1844), 7 Beav. 546; 3 L. T. O. S. 121; 49 E. R. 1178.

1378. — Easement in third party—Entry upon land.—*SHACKLETON v. SUTCLIFFE*, No. 638, *ante*.

1379. — Sale of shares in coal mine—One-third shares outstanding in third party—Doubt as to vendor's title known to purchaser.—*ENGLISH v. MURRAY*, No. 1374, *ante*.

(c) *Defect in Title.*

1380. Whether specific performance decreed.—*WESTERN v. RUSSELL*, No. 124, *ante*.

1381. — Material portion.—(1) On a bill by vendor for specific performance, with an allowance to deft. by way of compensation for a part of the estate to which pltf. is unable to make a good title, deft. having taken possession under the agreement one of the terms of which was "that immediate possession should be given"; & in the course of disputes which arose subsequently as to the title to this part of the estate, having been turned out of the possession so taken:—*Held*: vendor in so turning him out of possession, had abandoned his right to a specific performance, & bill dismissed accordingly without going into the question as to the materiality of the defective part.

(2) Considering that all the witnesses for deft. speak as to [the portion of the land] being material & that nothing is said with regard to the question on the part of pltf., & regard being had to the decided cases & to the circumstance that this ct. is from time to time approaching nearer to the doctrine that a purchaser shall have that which he

contracted for or not be compelled to take that which he did not mean to have. I should be going much too far in saying that the 12 acres are not material & that he shall be compelled to take the estate without them (*LORD ELDON, C.*).—*KNATCHBULL v. GRUEBER* (1817), 3 Mer. 124; 36 E. R. 48.

Annotations:—As to (2) *Consd.* *Casamajor v. Strode* (1834), 2 My. & K. 706; *Re Arnold*, *Arnold v. Arnold* (1880), 14 Ch. D. 270; *Jacobs v. Revell*, [1900] 2 Ch. 858; *Lee v. Rayson*, [1917] 1 Ch. 613. *Generally, Refd.* *Bowyer v. Bright* (1824), M'Cle. 479; *Croome v. Lediard* (1834), 2 My. & K. 251; *Colby v. Gadsden* (1865), 34 Beav. 416.

1382. — — — — ——A residence, with 4 acres, was sold. It turned out that there was no title to a slip of ground of about a quarter of an acre, between the house & the high road:—*Held*: it was not a proper subject for compensation, & a good title could not be made.—*PERKINS v. EDE* (1852), 16 Beav. 193; 1 W. R. 10; 51 E. R. 751.

1383. — — — — ——A farm was put up for sale under the direction of the ct. by particulars accompanied by a plan, & was described as "a compact small farm containing 41 acres 3 roods 35 poles, divided as follows." Among the parcels was "490a, Bottlesey Green, containing 7 acres 1 rood 27 poles," opposite to which, in the column showing the amounts which made up the 41 acres 3 roods 35 poles, was entered 4 acres 0 roods 38 poles. The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such, if any, as the judge in chambers should direct. G. bought the property in his own name, & was certified as purchaser. He in fact bought as agent for B., who was the owner of immediately adjoining property. On investigating the title it turned out that the vendors were only entitled to four undivided sevenths of 490a, which was a narrow close containing 7 acres 1 rood 27 poles, having a long frontage to a high road & at one end adjoined B.'s property. B. alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490a, & G., by his directions, refused to complete. The vendors then entered into an arrangement with the owner of the other three-sevenths to give them up, receiving an equivalent out of another part of the farm having a frontage to another road:—*Held*: G., having only purchased as agent for B., could take any objection which B., had he been the nominal as well as the real purchaser, could have taken; for the purpose of resisting completion, the purchaser was entitled to say that he bought the farm as shown on the plan; as the possession of 490a was important to the enjoyment of B.'s property, completion could not be compelled unless he could get the whole of it, & he was not bound to accept the arrangement by which he would obtain the whole of it by giving up another part of the purchased property; & he must therefore be discharged from his purchase.—*Re ARNOLD*, *ARNOLD v. ARNOLD* (1880), 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635, C. A.

Annotations.—*Consd.* *Re Fawcett & Holmes' Contract* (1889), 42 Ch. D. 150. *Apld.* *Jacobs v. Revell*, [1900] 2 Ch. 858. *Refd.* *Re London Corp'n. & Tubb's Contract* (1894), 63 L. J. Ch. 580.

1384. — — — — ——The defts. sold by auction to pltf. a freehold property described in the par-

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A. (c).

1381 i. Whether specific performance decreed—Material portion.—In an action brought by the vendor for specific performance of a contract for sale of land containing minerals:—*Held*: the purchaser should be discharged from the said contract unless the vendor made a good title to the

minerals, failure to make a good title thereto not being such a trifling defect of title to the land in which they were situated as to make it fair that the vendor should be permitted to hold his contract subject to compensation or abatement of the purchase-money.—*LEE v. SHEER* (1914), 8 Alta. L. R. 161; 30 W. L. R. 273; 7 W. W. R. 927; 19 D. L. R. 36.—*CAN.*

1381 ii. — — — — ——*LOVELOCK v. JEFFERIES* (1907), 26 N. Z. L. R. 1333.—*N.Z.*

m. — Purchaser with knowledge of slight defect.—A. being the owner of fifty acres, the title to one acre of which was defective, B., with knowledge of the defect agreed to purchase the whole for a certain sum. B., with others, had at the same time an independent

*Sect. 7.—Specific performance with compensation :
Sub-sect. 1, A. (c) & (d).]*

particulars of sale as containing 5 acres, 0 roods, 26 poles, & as bordering on a lake on S. common, the sale being subject to conditions of sale, one of which was as follows: "The property is believed & shall be taken to be correctly described in the particulars as to quantity & otherwise . . . & if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof." The only part of the property to which a good title was shown contained 4 acres, 3 roods. Another part of the property offered for sale bordered on the lake & as to this the only title offered was what purported to be a title by possession for less than forty years. Pltf. claimed rescission of the contract & a return of the deposit paid by him, & defts. counterclaimed for specific performance:—*Held*: even if defts. had established a possessory title to the border land for twelve years that would not have been sufficient, as the contract, as far as it related to that land, was an open one, in which case a forty years' title by possession was required; defts. were not entitled to specific performance in respect of the part of the property to which a good title had been shown; & pltf. was entitled to rescission of the contract & the return of his deposit.—*JACOBS v. REVELL*, [1900] 2 Ch. 858; 69 L. J. Ch. 879; 83 L. T. 629; 49 W. R. 109.

Annotations:—*Refd.* *Re Nisbet & Pott's Contract*, [1905] 1 Ch. 391; *Lee v. Rayson*, [1917] 1 Ch. 613.

1385. ——— Outstanding lease.—A person having contracted for the purchase of an estate in fee simple, in possession, free from incumbrances, died intestate before the completion of the contract: it subsequently appeared that a good title in possession could not be made in consequence of an outstanding lease, for the life of a person, at a low rent: a bill was filed by the heir-at-law of the purchaser for a specific performance of the contract, with an abatement from the purchase-money as a compensation for the lease for life, & seeking to have the purchase-money paid out of the personal assets of the purchaser:—*Held*: the purchaser could not have been compelled to perform the contract, & the heir was not entitled to have it completed for his benefit.—*COLLIER v. JENKINS* (1831), You. 295; 159 E. R. 1004.

1386. ——— Property subject to lease for lives.—An estate was put up for sale by a particular describing it as "now or late in the several occupations of H.R. & others," & by one of the conditions, it was provided that on completion, the purchaser should be "let into the receipt of the rents & profits." Some parts of the property were subject to leases for lives at a low rent:—*Held*: a purchaser, who entered into the contract without knowing of the existence of such leases, could not be compelled to take the title without compensation.

A claim for specific performance raising no question of notice or waiver having been filed by the vendor, & a reference as to title in the common form having been made, the order directing which was not appealed from:—*Held*: proof of notice to the purchaser of the existence of the leases for lives when he entered into his contract, & proof of

subsequent conduct from which a waiver of the objection might be inferred, would not take away his right to compensation.—*HUGHES v. JONES* (1861), 3 De G. F. & J. 307; 31 L. J. Ch. 83; 5 L. T. 408; 8 Jur. N. S. 399; 10 W. R. 139; 45 E. R. 897, L. JJ.

Annotations:—*Refd.* *Carroll v. Keays*, *Keays v. Carroll* (1873), 22 W. R. 243; *Royal Bristol Permanent Bldg. Soc. v. Bomash* (1887), 35 Ch. D. 390. *Mentd.* *Phillips v. Miller* (1875), L. R. 10 C. P. 420.

1387. ——— Portion not material to purchaser.—The particulars of sale described the property as a family residence, with a right to a pew in the middle aisle of the parish church. The title to the pew being defective:—*Held*: it was not essential to the enjoyment of the property.—*COOPER v. ———* (1838), 2 Jur. 29.

1388. ————*CARVER v. RICHARDS*, No. 1569, *post*.

1389. ——— Compulsory purchase — Purchaser able to acquire land subject to defective title.—*WELLS v. CHELMSFORD LOCAL BOARD OF HEALTH* (1880), 15 Ch. D. 108; 49 L. J. Ch. 827; 43 L. T. 378; 45 J. P. 6; 29 W. R. 381.

1390. ——— Sale of public undertaking.—*METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. MARYLEBONE CORPN.*, No. 1140, *ante*.

(d) Misdescription of Property.

1391. Whether specific performance decreed — Misdescription of tenure—Tenancy at will—Described as freehold.—Agreements for the sale of an estate, especially if by auction, depend on the *bond fides* of the transaction; therefore trifling errors in the description are not material. Advertisement of an estate for sale by auction described it all as freehold, though a small part was held at will: after execution of articles a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, purchaser took possession forcibly; but proceeded in the treaty afterwards till he finally refused to agree to the purchase; on bill of vendor purchase-money decreed to be paid with 4 per cent. from the time it ought; but inquiry directed as to what ought to have been the compensation at that time for the part not freehold; that, with the outgoings to be deducted.—*CALCRAFT v. ROEBUCK* (1790), 1 Ves. 221; 30 E. R. 311, L. C.

1392. ——— Freehold with leasehold adjoining—Mainly leasehold.—Injunction granted to stay action against the auctioneer for the deposit, although the estate sold was represented as freehold with leasehold adjoining, & turned out to be almost all leasehold, & although there had been great delay in making out pltf.'s title.

If the purchaser had made the objection as to its being represented as freehold with leasehold adjoining & hiring out leasehold, I should not have thought he ought to be bound (*LORD ALVANLEY, M.R.*).—*FORDYCE v. FORD* (1794), 4 Bro. C. C. 494; 29 E. R. 1007.

Annotations:—*Consd.* *Drewe v. Hanson* (1802), 1 Ves. 675; *Drewe v. Corp* (1804), 9 Ves. 368; *Halsey v. Grant* (1806), 13 Ves. 73; *Knatchbull v. Grueber* (1817), 3 Mer. 124. *Refd.* *Clive v. Beaumont* (1848), 1 De G. & Sm. 397.

1393. ——— Leasehold—Described as freehold.—A purchaser cannot be compelled upon the principle of compensation to take under a contract for a freehold estate, a leasehold, though a very

interest in the one acre, & obtained a decree ordering A. to convey it to him & the others. A. then filed a bill for specific performance of the contract with B.:—*Held*: B. must pay the whole of the purchase money upon receiving a clear title to the remaining

forty-nine acres.—*CURRAN v. LITTLE* (1860), 8 Gr. 250.—*CAN.*

n. ——— *Purchaser with notice of defect—Land subject to tenancies.*—*CARROLL v. KEAYES*, *KEAYES v. CARROLL* (1873); 8 I. R. Eq. 97.—*IR.*

PART V. SECT. 7, SUB-SECT. 1. — A. (d).

o. *Whether specific performance decreed—Misdescription of tenure—Leasehold.*—*ROLLO v. LEINEWEBER* (No. 2) (1909), 29 N. Z. L. R. 133.—*N.Z.*

long term.—*DREWE v. CORP* (1804), 9 Ves. 368; 32 E. R. 644.

Annotations :—*Consd.* *Halsey v. Grant* (1806), 13 Ves. 73; *Knatchbull v. Grueber* (1815), 1 Madd. 153.

1394. ——— **Property held on under-lease.]**—A purchaser entered into an open contract to purchase a "leasehold" house & paid a deposit. It appeared on the face of the abstract of title that the property agreed to be sold was held upon an underlease & formed part of larger premises comprised in two head leases. The purchaser objected to the title on the ground that the property being so held she would be liable to eviction by the original lessor for breaches of covenant in respect of property not comprised in the underlease :—*Held* : a good title had not been shown by the vendors to the property agreed to be sold, & the purchaser was entitled to a return of the deposit.—*Re LLOYDS BANK, LTD. & LILLINGTON'S CONTRACT*, [1912] 1 Ch. 601; 81 L. J. Ch. 386; 106 L. T. 561; 56 Sol. Jo. 380.

Annotation :—*Mentd.* *Hurd v. Whaley* (1918), 118 L. T. 593.

1395. ——— **Agreement to take vendor's "interest in lease."]**—By an agreement, dated Aug. 15, 1885, & made between eleven persons described as the committee of Verulam Church, & A. L. Waring, the committee agreed to purchase from the said A. L. Waring "his interest in the lease held by him of Verulam Church in Kennington Lane for the sum of £550." The committee having failed to complete the purchase A. L. Waring brought an action for specific performance. On Nov. 2, 1887, judgment was given in the said action directing the usual inquiry whether a good title could be made. The chief clerk's certificate, dated Mar. 22, 1888, found that a good title could be made, to a derivative term of ninety-three & a quarter years from Dec. 25, 1824, less three days :—*Held* : the words of the agreement took the case out of the authority of *Madeley v. Booth*, No. 1474, *post*, & *pltf.* was entitled to specific performance.—*WARING v. SCOTLAND* (1888), 57 L. J. Ch. 1016; 59 L. T. 132; 36 W. R. 756.

1396. ——— **Redemption of land tax.]**—Redeemed land tax, amounting to £41 *per annum*, was sold by auction in one lot. The particulars represented £3 14s., part of it, as charged on three houses, but stated that the title consisted of a contract for redemption of the land tax of Mar. 25, 1818. This contract, when produced after the sale, showed that the £3 14s. was not charged on three houses, but consisted of three small sums, each charged separately on one of the houses :—*Held* : (1) the misdescription was fatal; (2) the reference to the contract did not give the purchaser notice of the actual state of the title; (3) it was not a matter susceptible of compensation, & a bill by the vendor for specific performance was dismissed with costs.—*COX v. COVENTON* (1862), 31 Beav. 378; 7 L. T. 78; 8 Jur. N. S. 1142; 10 W. R. 829; 54 E. R. 1185.

Annotations :—*As to* (2) *Refd.* *Dougherty v. Oates* (1900), 45 Sol. Jo. 119. *Generally, Refd.* *Turquand v. Rhodes* (1868), 18 L. T. 844.

1397. ——— **Misdescription of condition—State of house & cultivation of land.]**—*DYER v. HARGRAVE, HARGRAVE v. DYER*, No. 545, *ante*.

1398. ——— **Water supply.]**—A property situate in a town, & comprising a warehouse with a small steam engine, was described in particulars of sale under a decree as "well supplied with

water." The property was well supplied with water, but only from the waterworks of the borough, & by payment of water rates, there being no natural supply. The manufactories in the town were generally supplied with water from wells upon the properties themselves, though small steam engines in warehouses frequently were not :—*Held* : there was a misdescription, & a purchaser who purchased on the faith of the description of the particulars, without knowing the real state of the case, could not be compelled to complete his purchase without compensation.—*LEYLAND v. ILLINGWORTH* (1860), 2 De G. F. & J. 248; 45 E. R. 617; *sub nom.* *LEYLAND v. ILLINGWORTH, Ex p. WALKER*, 29 L. J. Ch. 611; *sub nom.* *LEYLAND v. ILLINGWORTH, Ex p. WEBSTER*, 2 L. T. 587; 24 J. P. 595; 6 Jur. N. S. 811; 8 W. R. 695, L. J.

Annotations :—*Consd.* *Denny v. Hancock* (1870), 18 W. R. 566; *Cato v. Thompson* (1882), 9 Q. B. D. 616.

1399. ——— **Misdescription of location.]**—*SHIRLEY v. DAVIS* (prior to 1802), cited in 6 Ves. at p. 678; 31 E. R. 1254.

Annotations :—*Consd.* *Drewe v. Hanson* (1802), 6 Ves. 675; *Halsey v. Grant* (1806), 13 Ves. 73.

1400. ——— **]**—*DYER v. HARGRAVE, HARGRAVE v. DYER*, No. 545, *ante*.

1401. ——— **Misdescription of quantity.]**—A contract for the purchase of a farm described it as containing "349 acres or thereabouts, be the same more or less"; & stipulated that the premises should be taken at the quantity above stated, whether more or less : in fact, the farm consisted of only 349 customary acres, which were less than the same number of statute acres by about 100 acres or upwards. On a bill being filed for specific performance, the purchaser, admitting that he had been for several months in possession of the property, & had exercised acts of ownership over it, on the faith that a good title to 349 acres would be shown, insisted, that, in the contract, acres meant statute acres, & that he was not bound to perform the contract, unless 349 statute acres were conveyed to him :—*Held* : in such a case, a reference of title would not be directed on motion.

Semble : the stipulation that the premises should be taken at the quantity before stated, be the same more or less, would not cover so large a deficiency as existed here.—*PORTMAN v. MILL* (1826), 2 Russ. 570; 38 E. R. 449, L. C.

Annotations :—*Consd.* *Whittemore v. Whittemore* (1869), L. R. 8 Eq. 603; *Jacobs v. Revell*, [1900] 2 Ch. 858. *Refd.* *Nicoll v. Chambers* (1852), 11 C. B. 996; *Beaufort v. Glynn* (1855), 3 W. R. 463; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Re Terry & White's Contract* (1886), 32 Ch. D. 14.

1402. ——— **]**—A tenant in possession purchased the property, which was represented to be 46 feet in depth : it turned out to be 33 only :—*Held* : he was entitled to an abatement.—*KING v. WILSON* (1843), 6 Beav. 124; 49 E. R. 772.

Annotations :—*Distd.* *Parkin v. Thorold* (1851), 2 Sim. N. S. 1. *Refd.* *Southcomb v. Exeter (Bp.)* (1847), 6 Hare, 213; *Manson v. Thacker* (1878), 7 Ch. D. 620; *Green v. Sevin* (1879), 13 Ch. D. 589.

1403. ——— **]**—*Re FAWCETT & HOLMES' CONTRACT*, No. 1365, *ante*.

1404. ——— **Misdescription of value.]**—*CUTHBERT v. BAKER* (1790), Sugden's Vendors & Purchasers 14th ed., p. 313.

1405. ——— **]**—In suits as to the specific performance of a contract to purchase large colliery works the purchasers alleged as a defence

1397 i. ——— **Misdescription of condition—State of house & cultivation of land.]**—*CANADA PERMANENT BUILDING & SAVINGS SOCIETY v. YOUNG* (1871), 18 Gr. 566.—*CAN.*

1401 i. ——— **Misdescription of quan-**

]—*HEATH v. ALLEN* (1875), 1 V. L. R. (Eq.) 176.—*AUS.*

1401 ii. ——— **]**—*COX v. HOBAN* (1911), 12 C. L. R. 256.—*AUS.*

1401 iii. ——— **]**—*SPRINGER v.*

(*Alta.*) (1915), 33 W. L. R. 365; 9 W. W. R. 922.—*CAN.*

p. ——— **Representation collateral to contract.]**—*CORBETT v. JONES*, [1918] N. Z. L. R. 951.—*N.Z.*

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Sub-sect. 1, A. (d), (e) & (f), & B. (a).]*

misrepresentation by the vendors as to the value. As to several allegations the purchasers were held to have failed, & specific performance was decreed, but with compensation to the purchasers in respect of an alleged misrepresentation as to the amount of stores consumed in the collieries, & a consequent excess in the statement of income. An inquiry was directed as to such compensation, & it was found that there was a large excess in the statement of income beyond its true amount:—*Held*: (1) the purchasers were entitled to a deduction from their purchase-money bearing the same proportion to the whole purchase-money as the excess bore to the income stated; (2) as no direction as to costs was given by the original decrees in the suits, & as the purchasers were held to be entitled to a considerable abatement, the vendors must pay the costs of the suits, & could not on the hearing on further consideration be relieved from payment of any parts of the costs on account of the failure of the purchasers as to part of their case on the original hearing.—*POWELL v. ELLIOT* (1875), 10 Ch. App. 424; 33 L. T. 110; 23 W. R. 777. L. C. & L. J.

Annotations:—*As to* (1) *Consd.* *Rudd v. Lascelles*, [1900] 1 Ch. 815. *Refd.* *Re Fawcett's Trustees & Holmes* (1889), 61 L. T. 105. *Generally, Mentd.* *Ebbs v. Boulnois* (1875), 44 L. J. Ch. 691.

1406. ———.]—*Re DEPTFORD CREEK BRIDGE Co. & BEVAN* (1884), 28 Sol. Jo. 327, C. A.

(e) Property Subject to Incumbrances.

1407. Whether specific performance decreed—Tithes.—*KER v. CLOBBERRY* (1814), 1 Hov. Supp. 209; 34 E. R. 755.

1408. ———.]—*STANHOPE'S (LORD) CASE* (circa 1785), cited in 6 Ves. at p. 678; 31 E. R. 1254, L. C.

Annotation:—*Refd.* *Drewe v. Hanson* (1802), 6 Ves. 675.

1409. ———.]—*DREWE v. HANSON*, No. 1358, *ante*.

1410. ———.]—The purchaser of an estate, sold as tithe free, cannot be compelled to take it subject to tithe on terms of compensation; but an estate of 140 acres being sold under a decree, the particulars stating about 32 acres to be tithe free, & no evidence of exemption having been produced on the reference of the title, the master was directed to certify the proper amount of compensation.—*BINKS v. ROKEYBY (LORD)* (1818), 2 Swan. 222; 36 E. R. 600, L. C.

Annotations:—*Apld.* *Smith v. Tolcher* (1828), 4 Russ. 302. *Refd.* *Bowyer v. Bright* (1824), M'Cle. 479.

1411. ———.]—*Tithes not inducement to contract.*—As a general rule, where land is agreed to be sold tithe free, the right to the tithe is to be considered so material to the enjoyment of the land, that a purchaser is not compelled to complete his contract with a compensation, if a good title cannot be made to the tithe; but this rule admits of exception, where the circumstances manifest, that the right to the title did not form any inducement to the purchaser to enter into the contract.—*SMITH v. TOLCHER* (1828), 4 Russ. 302; 38 E. R. 819.

1412. ———.]—*Outgoings.*—A contract having been made for sale of an estate, it afterwards appeared that there were several outgoings from the estate, which were not disclosed at the time of the contract; yet there being matters which lie in compensation, the contract shall be carried into

execution, with an allowance only to the purchaser for these particulars which diminish the value.—*HOWLAND v. NORRIS* (1784), 1 Cox, Eq. Cas. 59; 29 E. R. 1062, L. C.

1413. ———.]—*Small Incumbrance.*—*GUEST v. HOMFRAY*, No. 751, *ante*.

1414. ———.]—*Sporting rights.*—If a purchaser after the delivery of the abstract, on the face of which, part of the estate appears to be subject to a right of sporting, not mentioned in the particulars of sale, enters into possession, he waives that objection.

The objection having been waived, an offer of compensation made by a clerk of the vendor's solr., without express authority, is of no effect.—*BURNELL v. BROWN* (1820), 1 Jac. & W. 168; 37 E. R. 339.

Annotations:—*Apld.* *Smithson v. Powell, Powell v. Smithson* (1852), 20 L. T. O. S. 105. *Distd.* *Edwards-Wood v. Marjoribanks* (1860), 7 H. L. Cas. 806. *Refd.* *Re Gloag & Miller's Contract* (1883), 48 L. T. 629.

1415. ———.]—*Quit rents.*—(1) Quit rents, being incidents of tenure, are proper subjects of compensation. (2) *Qu.*: as to rentcharges, which are not incidents of tenure; though the ct. has allowed them, when small, to be subjects of compensation.—*ESDAILE v. STEPHENSON* (1822), 1 Sim. & St. 122; 57 E. R. 49.

Annotations:—*As to* (1) *Refd.* *Catling v. G. N. Ry.* (1869), 21 L. T. 17. *Generally, Refd.* *Jones v. Mudd* (1827), 4 Russ. 118; *Portman v. Mill* (1839), 3 Jur. 356; *De Visme v. De Visme* (1849), 1 H. & Tw. 408.

1416. ———.]—*Rentcharges.*—*ESDAILE v. STEPHENSON*, No. 1415, *ante*.

1417. ———.]—*Tax.*—An estate sold, & at the auction, eau brink tax stated at a certain amount, & a corpn. tax at a certain amount. It was afterwards discovered that the eau brink tax was less than the amount stated, & the corpn. tax more, & on a bill filed by the vendors for a specific performance, deft. claimed compensation for the excess in amount of the corpn. tax, after deducting the difference in the amount of the eau brink tax, the ct. allowed the compensation.—*TOWNSHEND v. GRANGER* (1817), 9 L. J. O. S. Ch. 176.

Annotation:—*Consd.* *Barraud v. Archer* (1831), 9 L. J. O. S. Ch. 173.

1418. ———.]—*BARRAUD v. ARCHER*, No. 1371, *ante*.

1419. Waiver of objection to incumbrance—Effect on compensation.—*BURNELL v. BROWN*, No. 1414, *ante*.

(f) Compensation Incapable of Computation.

1420. Whether specific performance decreed.—Demurrer to a bill praying specific performance of a contract for an exchange of lands, which deft. had refused to perform on the ground of a want of title to a small proportion of the land agreed to be conveyed to him, pltf. tendering a full & adequate compensation, to be ascertained by reference to the master, allowed on the objections that the bill did not state such a case as was necessary to satisfy the ct. that the subject-matter of the suit was one which was palpably & obviously matter for compensation, & capable of being compensated.—*BOWYER v. BRIGHT* (1824), 13 Price, 698; M'Cle. 479; 147 E. R. 1126.

1421. ———.]—*NOUAILLE v. FLIGHT*, No. 1282, *ante*.

1422. ———.]—*RIDGWAY v. GRAY*, No. 1280, *ante*.

1423. ———.]—*Sale of timber—Misrepresentation as to size.*—Bill by the vendor for the specific

PART V. SECT. 7, SUB-SECT. 1.—A. (e).

performance decreed—Inchoate right of dower.—*SHUTER v. PATTEN* (1922), 67 D. L. R. 577; 51 O. L. R.

performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood "with upwards of 65 acres of fine oak timber trees, the average size of which approached 50 feet," & in the particulars of the lot described it only as 65 acres 2 roods & 12 perches of growing timber." It appeared, on the evidence for pltf., that the average size of the trees was about 35 feet, but on that for deft. that it was only about 22 feet; & deft., moreover, alleged that it was sold at a time when he had no means of seeing the wood, & that he relied on the particulars of sale:—*Held*: as the representation on the particulars of sale had proved to be incorrect, & as it was not shown that deft. knew it to be incorrect at the time of making the contract, the ct. would not, at all events, enforce the specific performance of the contract without compensation; & it was not a case in which the ct. could measure the extent of the deficiency, or ascertain the amount of compensation, & the bill must therefore be dismissed.—*BROOKE (LORD) v. ROUNTHWAITE* (1846), 5 Hare, 298; 15 L. J. Ch. 332; 10 Jur. 656; 67 E. R. 926.

Annotation:—*Refd.* *Denny v. Hancock* (1870), 18 W. R. 566.

B. Right of Purchaser to Specific Performance with Compensation.

(a) In General.

1424. Basis of jurisdiction to order specific performance—Estoppel.—*MORTLOCK v. BULLER*, No. 19, *ante*.

1425. ———.]—Where a husband & wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, & the wife afterwards refused to convey:—*Held*: the purchaser could not compel the husband to convey his interest & accept an abated price.

If a man professes to be owner of the fee simple & undertakes to sell the fee simple & it turns out that he had not the power so to do, the purchaser not being at the time aware of the difficulty, then the vendor must convey as much as he can & submit to an abatement. But the case is wholly different where the vendor does not profess to sell the fee but only that estate which he is able to dispose of (*LORD HATHERLEY, C.*)—*CASTLE v. WILKINSON* (1870), 5 Ch. App. 534; *sub nom.* *WILKINSON v. CASTLE*, *CASTLE v. WILKINSON*, 39 L. J. Ch. 843; 18 W. R. 586, L. C. & L. J.

Annotations:—*Appld.* *Hooper v. Smart*, *Bailey v. Piper* (1874), L. R. 18 Eq. 683. *Distd.* *Hopcraft v. Hopcraft* (1897), 76 L. T. 341; *Rudd v. Lascelles*, [1900] 1 Ch. 815. *Mentd.* *Cahill v. Cahill* (1883), 8 App. Cas. 420.

1426. ———.]—(1) The ct. will not, at the instance of the purchaser under an open contract containing no provision for compensation, decree specific performance of the contract with compensation in respect of covenants restricting the building on or user of the land sold. By granting the purchaser such relief, the ct. would not only be making a new contract never contemplated by the parties, but would also be extending the equitable doctrine of specific performance with compensation beyond its proper limits.

The extreme difficulty in assessing compensa-

tion in respect of covenants of that nature is another consideration which will influence the ct. in refusing such relief.

(2) Where the purchaser seeks specific performance with a proportionately large abatement of the purchase-money in respect of defects of which, as the purchaser knew, the vendor was unaware at the time of entering into the contract, the ct. will not grant him relief, because of the great hardship which would be thereby imposed upon the innocent vendor.

(3) The jurisdiction to enforce specific performance with compensation for defects on a vendor, in cases where the contract is silent as to compensation, rests on the equitable estoppel referred to in *Mortlock v. Buller*, No. 19, *ante*, & *Castle v. Wilkinson*, No. 1425, *ante*, namely, that where a vendor has represented & contracted to sell an estate as his own, & the purchaser has relied on the representation, the vendor cannot afterwards be heard to say he has not the entirety.—*RUDD v. LASCELLES*, [1900] 1 Ch. 815; 69 L. J. Ch. 396; 82 L. T. 256; 48 W. R. 586; 16 T. L. R. 278.

Annotations:—*Generally, Refd.* *Halkett v. Dudley*, [1907] 1 Ch. 590; *Rutherford v. Acton-Adams*, [1915] A. C. 866.

1427. Condition providing to rescission of contract.—One of the terms of an agreement was that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed with costs.—*WILLIAMS v. EDWARDS* (1827), 2 Sm. 78; 57 E. R. 719.

Annotations:—*Refd.* *Sainsbury v. Jones* (1839), 5 My. & Cr. 1; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Aberaman Ironworks v. Wickens* (1868), L. R. 5 Eq. 485; *Hudson v. Buck* (1877), 7 Ch. D. 683. *Mentd.* *Taylor v. Cook* (1830), You. 201; *Re Le Brasseur & Oakley, Ex p. Terrell* (1896), 74 L. T. 717.

1428. ———.]—*NELTHORPE v. HOLGATE*, No. 1067, *ante*.

1429. Specific performance or rescission—Election by purchaser—Property in possession of tenant.—Deft. contracted to sell an inn to pltf., & in the treaty represented to him that the agreement which the tenant in possession held it was a void agreement & that he would give pltf. possession at Michaelmas following. He had in fact given the tenant notice to quit at that time; the tenant did not quit. These representations were proved by witnesses:—*Held*: pltf. was entitled to be released from the agreement, or he might at his election perform it & have compensation. He elected to have performance, & it was decreed to him, with compensation & costs.—*BESANT v. RICHARDS* (1830), Tam. 509; 48 E. R. 203.

1430. Right of heir of purchaser.—*COLLIER v. JENKINS*, No. 1385, *ante*.

1431. Decree without order for compensation—Compensation unjust.—An estate was put up to sale in lots. In the particulars the lots were described respectively as "All that, etc., comprising Lot—in the sale plan." The sale plan, circulated at the auction, represented a well on Lot 4, with a drain & pipe conveying the water

given to a purchaser by English cts. of equity, is unknown to the law of Scotland. That law rejects the *actio quanti minoris*, & its principle, for the reason apparently that to assess compensation to the purchaser for part of the estate sold, which the vendor has it not in his power to convey, would virtually be to make a new bargain for the parties which they had not

PART V. SECT. 7, SUB-SECT. 1.—B. (a).

1427 I. Basis of jurisdiction to order specific performance—Estoppel.—*GANDER v. MURRAY*, *ZOBEL v. MURRAY* (1907), 5 C. L. R. 575.—*AUS.*

1427 II. ———.]—The right of a purchaser to obtain specific performance, with abatement, of a contract to

sell land is limited to the cases where there is a representation by the vendor of ability to convey.—*WILSON v. PATTERSON*, [1919] 1 W. W. R. 999; 39 D. L. R. 642; 14 Alta. L. R. 162.—*CAN.*

r. ——— *Equitable jurisdiction.*—The remedy of specific performance of part of the contract, with a compensation, which has in many cases been

Sect. 7.—Specific performance with compensation:
Sub-sect. 1, B. (a) & (b).]

from the well through Lot 2 to Lot 1. Pltf. the purchaser of Lot 1, filed his bill for specific performance, with compensation for the loss of the water, the vendor having conveyed away the other two lots without any reservation to pltf. of a right to the flow of water from the well:—**Held:** the sale plan, accurately describing the existing state of the property, would not carry the case higher than a view of the property by the purchaser, decree for specific performance without compensation.

Nothing could be more unjust after the vendor has put it out of his power, by conveyances, to grant it himself, to allow a purchaser to make this claim. . . . The ct. would not, after that, give pltf. the relief asked in respect of compensation (WIGRAM, V.-C.).—**FEWSTER v. TURNER** (1842), 11 L. J. Ch. 161; 6 Jur. 144.

Annotations:—**Mentd.** *Cash v. Belcher* (1812), 1 Hare, 310; *Tipping v. Power* (1842), 1 Hare, 405.

1432. — Whether claim for compensation precluded.]—(1) A. contracted to sell to B. the fee simple, clear of incumbrances. B. aware that on a former occasion an attempted sale had gone off in consequence of A.'s wife refusing to bar her dower, asked as to this, & was informed that she would now join. Afterwards she refused to join:—**Held:** B. was entitled to compel a specific performance, with a compensation & indemnity against the right to dower.

Seemle: a proper indemnity would be to retain in ct. a third part of the purchase-money, the dividends to be paid to A. & his assigns during the joint lives of himself and wife: & if she survived A. to B. during her life: & upon her decease, the capital so retained in ct. to be paid to the husband A.

(2) At the hearing, the decree, as drawn up by pltf., was simply for specific performance, although the ct. had directed it to be without prejudice to the question of compensation:—**Held:** pltf. was not thereby precluded, as having elected to take the decree in that form, from asking for compensation.

(3) The want of mutuality is not a sufficient argument against granting specific performance, with compensation, at the prayer of a purchaser, although a vendor could not compel a purchaser to accept such a compensation.—**WILSON v. WILLIAMS** (1857), 3 Jur. N. S. 810.

1433. Compensation for unmade road.]—**PEACOCK v. PENSON**, No. 370, *ante*.

1434. Sale by auction—Communication of altered conditions of sale—Not heard by bidder.]—**MANSER v. BACK**, No. 491, *ante*.

1435. — — —.]—A clear & distinct

statement by an auctioneer at the time of sale verbally correcting a material misdescription in the particulars disentitles the purchaser to specific performance with compensation for that misdescription even if he does not hear the statement.—**Re HARE & O'MORE'S CONTRACT**, [1901] 1 Ch. 93; 70 L. J. Ch. 45; 83 L. T. 672; 49 W. R. 202; 17 T. L. R. 46; 45 Sol. Jo. 79.

1436. Defect not in subject-matter of sale—Sale of advowson—Incumbrance on living.]—An advowson was sold. After the sale the purchaser found that there was a mtgc. on the living in respect of money advanced to build a new parsonage house:—**Held:** this did not form a ground for rescinding the contract for the advowson or for allowing to the purchaser a deduction from the amount of the purchase-money.—**EDWARDS-WOOD v. MARJORIBANKS** (1860), 7 H. L. Cas. 806; 30 L. J. Ch. 176; 3 L. T. 222; 6 Jur. N. S. 1167; 11 E. R. 321, H. L.

Annotations:—**Mentd.** *Gatayes v. Flather* (1865), 34 Beav. 387; *Torrance v. Bolton* (1872), 41 L. J. Ch. 643.

1437. Purchaser acting under mistaken information.]—**FAIRHEAD v. SOUTHEE**, No. 539, *ante*.

1438. Defect discovered after completion of sale.]—**ALLEN v. RICHARDSON**, No. 523, *ante*.

(b) Performance to Extent of Vendor's Interest.

1439. Whether specific performance decreed.]—**PATON v. ROGERS**, No. 662, *ante*.

1440. —.]—**WESTERN v. RUSSELL**, No. 124, *ante*.

1441. —.]—A party, acting as the absolute owner, contracted to sell property. He was the absolute owner of part, & as to the other part he was tenant for life, with a power of sale, at his request & by his direction, vested in trustees. Upon a bill by the purchaser for a specific performance, an inquiry was directed "whether deft. could make a good title, or could, by application to the trustees, procure a good title to be made."

Difficulty in decreeing a partial performance of a contract, where a vendor has not the power of fully performing it.

The general rule, subject to some qualification, undoubtedly is that where a party has entered into a contract for the sale of more than he has, the purchaser if he thinks fit to accept that which it is in the power of the vendor to give is entitled to a performance to that extent (**LORD LANGDALE, M.R.**).—**GRAHAM v. OLIVER** (1840), 3 Beav. 124; 49 E. R. 48.

Annotations:—**Refd.** *Wilson v. Williams* (1857), 3 Jur. N. S. 810. **Mentd.** *Malcolm v. Scott* (1843), 3 Hare, 39.

1442. — With reduction of purchase-money in respect of deficiency.]—**DALE v. LISTER** (*circa* 1800), cited in 16 Ves. at p. 7; 33 E. R. 886.

Annotations:—**Consd.** *Milligan v. Cooke* (1809), 16 Ves. 1; *Thomas v. Dering* (1837), 1 Keen, 729.

made for themselves.—**STEWART v. KENNEDY** (No. 1) (1890), 15 App. Cas. 75.—**SCOT.**

t. Specific performance or rescission—Rescission impossible.]—**LA FONCIERE FRANCO BELGE v. DUGGAN** (Alta.), [1919] 2 W. W. R. 880.—**CAN.**

a. Decree without order for compensation—Slight deficiency.]—**WILSON LUMBER CO. v. SIMPSON** (1910), 17 O. W. R. 820; 2 O. W. N. 410.—**CAN.**

1438 i. Defect discovered after completion of sale.]—**Re MURRAY & KERR** (1887), 13 O. R. 414.—**CAN.**

b. Specific performance with abatement of purchase-money or damages—Election by purchaser.]—A purchaser who elects to take what the vendor can convey, with an abatement of the purchase-money for a deficiency in title, quantity or quality of the estate,

is not entitled to anything beyond that; when he makes his election, he agrees to take part performance with the abatement, in lieu of the rights he might otherwise have arising out of the contract or the breach of it. So damages will not be awarded in addition to the abatement of the breach of the purchase-money.—**ONTARIO ASPHALT BLOCK CO. v. MONTREUIL** (1913), 5 O. W. N. 298; 29 O. L. R. 534.—**CAN.**

c. Deficiency in quality—Representations innocent & not included in contract.]—Compensation is not recoverable in a suit by a purchaser for specific performance, for deficiency in the quality of the land sold where the representation as to such quality was an innocent representation not included in the contract & not amounting to a warranty.—**SCHMIDT & BELLISHAW v. GREENWOOD** (1912), 32 N. Z. L. R. 241.—**N.Z.**

PART V. SECT. 7, SUB-SECT. 1.—
B. (b).

1439 i. Whether specific performance decreed.]—Where there is a deficiency in the property agreed to be sold the purchaser has a right to take what the vendor has.—**DIXON v. DUNMORE** (1913), 24 O. W. R. 774; 4 O. W. N. 1501; 12 D. L. R. 549.—**CAN.**

1442 i. — With reduction of purchase-money in respect of deficiency.]—**GAIL v. MITCHELL** (1924), 35 O. L. R. 222; 25 S. R. N. S. W. 317.—**AUS.**

1442 ii. —.]—**OSBORNE v. FARMERS' & MECHANICS' BUILDING SOCIETY** (1855), 5 Gr. 326.—**CAN.**

1442 iii. —.]—**MAC ECHEN v. MACDONALD** (1904), 37 N. S. R. 59.—**CAN.**

1442 iv. —.]—**DAVIS v. SHAW** (1910), 16 O. W. R. 273; 21 O. L. R. 474; 1 O. W. N. 991.—**CAN.**

l. — Contract to be void if vendor unwilling to remove valid objection to title.]—BOWLES v. VAUX (1919), 43 O. L. R. 521.—CAN.

m. — — —.]—HURLEY v. ROY (1921), 64 D. L. R. 375; 50 O. L. R. 281.—CAN.

Sect. 7.—Specific performance with compensation: Sub-sect. 1, B. (b), (c) & (d); sub-sect. 2, A.]

1453. ———.]—By a memorandum in writing, deft. agreed to let, & pltf. agreed to take, business premises for one year, with an option for pltf. at the end of the year to have a lease for seven, fourteen, or twenty-one years. Pltf., having gone into possession under the agreement, & having laid out money in alterations, at the end of the year gave notice of their intention to exercise the option; but when deft.'s title came to be investigated it was found that she was possessed of only a moiety of the premises, the other moiety being vested in her son, a minor. Deft. was decreed to perform specifically so much of the contract as she was able to perform, with an abatement of one moiety of the rent.—*BURROW v. SCAMMELL* (1881), 19 Ch. D. 175; 51 L. J. Ch. 296; 45 L. T. 606; 46 J. P. 135; 30 W. R. 310.

*Annotations:—*Refd. Clayton v. Leech (1889), 41 Ch. D. 103; Hexter v. Pearce, [1900] 1 Ch. 341.

1454. ———.]—**Lien of third party on estate for debt.**—A. being entitled to nine-sixteenths only of an estate, agrees, by mistake, to sell the entirety to B. *Semle:* specific performance will not be decreed as to the nine-sixteenths, with an abatement out of the purchase-money, especially where C. has a lien on the estate for a debt which would exhaust nearly the whole of the purchase-money.—*WHEATLEY v. SLADE* (1830), 4 Sim. 126; 58 E. R. 48.

*Annotation:—*Dbtd. Burrow v. Scammell (1881), 19 Ch. D. 175.

1455. ———.]—**Vendor only tenant for life.**—*THOMAS v. DERING*, No. 395, *ante*.

1456. ———.]—**Necessity for purchaser's ignorance of state of title.**—Pltf. & deft. had been partners in a brewery to which a number of tied houses were attached. In an action between them an order was made for dissolution & sale by tender. By the chief clerk's certificate deft. was declared the purchaser, as being the highest bidder, of the moiety of pltf.

The conditions, which were prepared by pltf.'s solr. & approved by deft.'s solr. & deft., provided that the title should be accepted as it stood, the properties being well known to both parties, & nothing was said about compensation. It subsequently transpired that certain of the properties which were to be conveyed as freeholds were copyholds. Negotiations thereupon took place between the parties & their legal advisers, & as it was feared that there would be delay, the properties being in mtge., a conveyance was executed by pltf. in the form settled by counsel. Deft., having had to pay a large sum in respect of enfranchisement of the copyholds, took out a summons in the action, in which he asked that pltf. might be ordered to pay him one-half of that sum in effect by way of compensation:—*Held:* the principle laid down in *Mortlock v. Buller*, No. 19, *ante*, which allowed the purchaser to insist on having all the vendor could convey, with a compensation for the difference, was confined to the class of cases where the vendor knew the title & the purchaser did not, & had no application to the present case, & therefore it was unnecessary to consider whether compensation could be enforced by a purchaser after the money was paid & the conveyance executed. The summons was accordingly dismissed.—*HOPCRAFT v. HOPCRAFT* (1897), 76 L. T. 341.

1457. ———.]—**Only in respect of deficiency in subject-matter described in contract.**—*RUTHERFORD v. ACTON-ADAMS*, No. 1366, *ante*.

1458. ———.]—**Representation collateral to contract.**—*RUTHERFORD v. ACTON-ADAMS*, No. 1366, *ante*.

1459. ———.]—**Purchaser waiving all objections.**—*BENNETT v. FOWLER*, No. 1564, *post*.

1460. ———.]—**One of two joint vendors having no interest—Decree against vendor with interest.**—*HORROCKS v. RIGBY*, No. 1452, *ante*.

—**Agreement for lease.**—See *LANDLORD & TENANT*, Vol. XXX., pp. 407, 408, Nos. 704–710.

(c) *Knowledge of Purchaser of True State of Vendor's Title.*

1461. **Whether specific performance decreed.**—When a vendor can make a title to three-fourths only of the property sold, the purchaser is not entitled to take the three-fourths with an abatement, but he may take the three-fourths at the price agreed on for the whole.

The ct. will not decree a specific performance which involves a breach of trust.

I think that pltf. when he filed this bill was aware of the circumstances in which this part of the matter rested & that he did so at his own risk, being aware or having good reason to believe that no good title could be made to the whole of these premises (*ROMILLY*, M.R.).—*MAW v. TOPHAM* (1854), 19 Beav. 576; 52 E. R. 474.

*Annotation:—*Refd. Bailey v. Piper (1874), 43 L. J. Ch. 704.

1462. ———.]—*HOPCRAFT v. HOPCRAFT*, No. 1456, *ante*.

1463. ———.]—The particulars of a contract for the sale of land contained a misdescription of the quantity of land in one parcel:—*Held:* the purchaser was not entitled to compensation under the contract, as he was well acquainted with the land he was buying.—*COBBETT v. LOCKE-KING* (1900), 10 T. L. R. 379.

1464. ———.]—**Sale of settled estates.**—*BAINBRIDGE v. KINNAIRD*, No. 1276, *ante*.

1465. ———.]—**Property subject to lease.**—Where a vendor contracted to sell certain property which the purchaser knew to be in occupation of a tenant, & it was afterwards discovered by the purchaser that the tenant had a lease:—*Held:* the purchaser was affected with notice of the lease, & was not entitled to specific performance with compensation.—*JAMES v. LICHFIELD* (1869), L. R. 9 Eq. 51; 39 L. J. Ch. 248; 21 L. T. 521; 18 W. R. 158.

*Annotations:—*Consd. Caballero v. Henty (1874), 9 Ch. App. 447. Refd. Carroll v. Keays, Keays v. Carroll (1873), 22 W. R. 243; Phillips v. Miller (1875), L. R. 10 C. P. 420. Mentd. Cavander v. Bulteel (1873), 9 Ch. App. 80, n.

1466. ———.]—**Sale of wife's estate by husband & wife.**—*CASTLE v. WILKINSON*, No. 1425, *ante*.

(d) *Compensation Incapable of Computation.*

1467. **Whether specific performance decreed.**—Deft. agreed to sell to pltf. certain lands in New South Wales free from incumbrances, & the greater part of the purchase-money was paid. On investigation of the title it appeared that these lands were held with other lands under a Crown grant, containing various reservations & conditions, with a proviso for re-entry on breach of condition. Pltf. filed his bill for specific performance, with compensation on account of these reservations, offering to complete without compensation, if the ct. was of opinion that he was not entitled to it.

PART V. SECT. 7, SUB-SECT. 1.—
B. (c).

1465 i. *Whether specific performance*

decreed—Property subject to lease.—*CLARK v. RAYNOR* (N. S.) (1922), 65 D. L. R. 425.—CAN.

n. *Vendor contracting in repre-*

sentative capacity—Sale by administrator.—*BOUDREAU v. RENEULT* (1910), 15 W. L. R. 414; 3 Alta. L. R. 333.—CAN.

An order was made on appeal, declaring him entitled to compensation, & directing a reference as to the amount. In answer to this inquiry it was found that the amount of compensation could not be ascertained. Pltf. then filed a supplemental bill, asking that if the compensation could not be ascertained deft. might be decreed to repay with interest the part of the purchase-money which he had paid, & that pltf. might be declared entitled to a lien on the land for it:—*Held*: as pltf. was not bound to take the property without compensation, & as the compensation could not be ascertained, he was entitled to the return of his purchase-money with interest at 4 per cent., & to a lien on the estate for the amount.—*WESTMACOTT v. ROBINS* (1862), 4 De G. F. & J. 390; 45 E. R. 1234, L. JJ.

1468. —.]—Pltf. agreed to purchase an estate which, on the written contract, was, by mistake, stated to contain 21,750 acres; it turned out that it contained only 11,814 acres:—*Held*: the purchaser was not entitled to specific performance with a proportionate abatement for the deficiency of acreage, but that he could only enforce the contract on payment of the full price, or rescind the contract.

This is not a case in which the ct. could, upon any principle, assess compensation so as to make everything fair between them (*ROMILLY, M.R.*).—*DURIAM (EARL) v. LEGARD (SIR FRANCIS)* (1865), 34 Beav. 611; 34 L. J. Ch. 589; 13 L. T. 82; 29 J. P. 708; 11 Jur. N. S. 706; 13 W. R. 959; 55 E. R. 771. . .

Annotations—*Apld.* *Rudd v. Lascelles*, [1900] 1 Ch. 815. *Refd.* *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212.

1469. — **Calculations founded on matters of chances—Proving fallacious.**—Pltf., at an auction became the purchaser & entered into a contract for the purchase of a manor of which deft. was seised in fee. The deposit money was paid & it was agreed that the remainder of the purchase-money should be paid & pltf. be let into possession on Feb. 4, then next. On Jan. 23 a tenant of the manor died, & the vendors thereupon admitted a new tenant on the ct. roll before Feb. 4 without communicating with the purchaser. By this admittance the property was for the first time brought within the operation of Copyhold Act, 1852 (c. 51), by which the lord may be compelled to enfranchise at the instance of the tenant. Pltf. insisted, first, that he was entitled to the fines paid on this admittance; & secondly, that having entered into the contract upon the faith of certain statements, he ought not now to be prejudiced by finding the enfranchisable value of the property impaired, & prayed for specific performance of the contract, with an abatement out of the purchase-money. Deft. demurred to the bill:—*Held*: the purchaser was not entitled to relief on account of calculations of value, founded on matters of chance, turning out to be fallacious.—*CUDDON v. TITE* (1858), 1 Giff. 395; 31 L. T. O. S. 310; 4 Jur. N. S. 579; 6 W. R. 606; 65 E. R. 971.

1470. — **Reservations & restrictions in favour of third party.**—*WESTMACOTT v. ROBINS*, No. 1467, *ante*.

1471. —.]—*RUDD v. LASCELLES*, No. 1426, *ante*.

SUB-SECT. 2.—CONTRACT WITH CONDITION FOR COMPENSATION.

A. Right of Vendor to Specific Performance Subject to Compensation.

1472. Error must not go to essence of contract.—The particulars of sale of certain property put up

for sale by auction by deft. described the property as “four freehold ground rents of £19 4s. each—viz., £15 ground rent, & £4 4s. garden rent, amounting to £76 16s. a year, arising from four capital residences of the annual value of £384, held by four leases granted to W. R. for a term of ninety-five years each, wanting ten days, from Sept. 29, 1844, with reversion to the property in about eighty years”; & stated that the gardens would remain in the hands of the freeholder, & would be kept up by him; & that the property sold was to be taken as that comprised in the leases mentioned in the particulars, the counterparts of which would be produced at the sale. The 8th of the conditions of sale stated that the conveyance to a purchaser should contain a grant on the part of the vendor of the perpetual right of user of the gardens then enjoyed by the tenants of each house, as appurtenant to each house; & that the purchaser should, in consideration of such grant, grant to the vendor a perpetual yearly rentcharge of £1 1s. out of each such house, with the usual powers of distress; & the 10th condition provided that errors of description in the particulars should not vitiate the sale, but should be matter for compensation, as provided. Pltf. became the purchaser, & paid a deposit. The vendors to make out their title produced four counterparts of leases granted by one Roy to W. R. By each of the leases Roy, in consideration of the yearly rents thereafter reserved, & of the covenants thereafter contained, demised to W. R. a piece of land, with a messuage thereon for a term of ninety-five years, wanting ten days, at the yearly rent of £15; &, for the consideration aforesaid, & also in consideration of the further rent thereafter reserved, covenanted with W. R. that it should be lawful for him, & the tenants & occupiers of the messuage, at all times during the term, to enter into & use the pleasure ground or garden described in the lease, & that he, Roy, would keep it in order. Then followed a covenant by W. R. that he would pay Roy the said yearly rent thereinbefore reserved; &, also, “the further yearly rent or sum of £4 4s.,” in respect of the right of user of the garden, “such last mentioned rent to be payable on the days, & in all respects in a similar manner, with the rent of £15. Proviso for re-entry if the said yearly rents should be in arrear:—*Held*: (1) upon the construction of the leases, the £4 4s. was not an additional rent arising from the residences, but a sum in gross payable under the covenant; &, therefore, as no freehold ground rents of £19 4s. each, arising from the residences, could be conveyed to the purchaser, that he was entitled to rescind the contract, & recover back the deposit; (2) the thing sold was a different thing, & of a different nature from that contracted for; &, therefore, the purchaser was not bound to take it, with compensation under the 10th condition.—*ROBINS v. EVANS* (1863), 2 H. & C. 410; 159 E. R. 169; *sub nom.* *EVANS v. ROBINS*, 33 L. J. Ex. 68; 11 L. T. 211; 10 Jur. N. S. 473; 12 W. R. 604, Ex Ch.

Annotation:—As to (1) *Refd.* *Camberwell & South London Bldg. Soc. v. Holloway* (1879), 13 Ch. D. 754.

1473. —.]—*Re FAWCETT & HOLMES' CONTRACT*, No. 1365, *ante*.

1474. Misdescription of property—Leasehold—Residue of term.—Messuages described in a particular of sale as held for the residue of a term of ninety-nine years from June 24, 1838, but not as being held by an original lease, were sold subject to conditions that the purchaser should not be entitled to call for the lessor's title, & that any error or misstatement of the term of years should not vitiate the sale, but should be the subject of

Sect. 7.—Specific performance with compensation: Sub-sect. 2, A. & B.; sub-sect. 3. Sect. 8: Sub-sect. 1.]

compensation, under a provision for arbn., authorising the arbitrator of either party to proceed in certain events *ex parte*. The title proved to be an underlease, for a term less by three days than the term of ninety-nine years granted by the original lease. The vendor filed a bill to enforce specific performance, with compensation to an amount which had been assessed, in conformity with the conditions, by one arbitrator, nominated by the vendor, the purchaser having taken no part in the arbn. The ct. dismissed the bill with costs.—*MADELEY v. BOOTH* (1848), 2 De G. & Sm. 718; 64 E. R. 321.

Annotations:—Consd. Darlington v. Hamilton (1854), Kay. 550. *Dbtd. Camberwell & South London Bldg. Soc. v. Holloway* (1879), 13 Ch. D. 754. *Apprvd. Re Boyfus & Masters's Contract* (1888), 39 Ch. D. 110. *Distd. Waring v. Scotland* (1888), 57 L. J. Ch. 1016.

1475. — Copyholds—In fact partly freehold.]—*AYLES v. COX*, No. 558, *ante*.

1476. — Freehold—In fact copyhold.]—PRICE v. MACAULAY, No. 450, *ante*.

1477. — Area.]—Re FAWCETT & HOLMES' CONTRACT, No. 1365, *ante*.

1478. Misrepresentation as to property—Character of house—Brick built.]—POWELL v. DOUBBLE (1832), cited in Sugden's Vendors & Purchasers 14th ed., p. 29.

1479. — Rights of third parties prejudicial to property.]—PRICE v. MACAULAY, No. 450, *ante*.

1480. Vendors bound by contract to make good title.]—ASHTON v. WOOD, No. 650, *ante*.

B. Right of Purchaser to Specific Performance with Compensation.

1481. Misdescription of property—Statement as to fines of copyhold.]—WHITE v. CUDDON, No. 318, *ante*.

1482. — Renewable leaseholds.]—A vendor described part of the property as leasehold, renewable every twenty-one years on certain terms. The fourth condition of sale provided that the purchaser should, within fourteen days after delivery of abstract, send in his objections to the title, & that the vendor should be at liberty, at any time afterwards, to vacate the sale. The fifth condition provided that the existing lease should be taken as sufficient title to the leasehold part; & the sixth provided that if the estate should be improperly described, the error should not vitiate the sale, but should be the subject of compensation. The purchaser required further evidence of the right of renewal, & it was then discovered that no such right existed:—*Held*: "title" referred to title to the thing described, & not to the description of it; the vendor could not claim to vacate the sale, but the purchaser had a right to have the contract performed, with compensation.—*PAINTER v. NEWBY* (1853), 11 Hare, 26; 1 Eq. Rep. 173; 1 W. R. 284; 68 E. R. 1172; *sub nom. NEWBY v. PAYNTER*, 22 L. J. Ch. 871; 21 L. T. O. S. 299; 17 Jur. 483.

Annotations:—Refd. Mawson v. Fletcher (1870), L. R. 10 Eq. 212, *Ashburner v. Sewell*, [1891] 3 Ch. 405.

1483. — Condition that measurements be taken as correct—Condition for compensation for error—Error of magnitude.]—On a sale one of the conditions provided that if the purchasers should make any objection to, or requisition as to the title, evidence, conveyance, or as to compensation or otherwise which the vendor should be unwilling

to remove or comply with, the vendor should be at liberty to vacate the sale. Another condition was that the admeasurements were presumed to be correct, but that if any error were discovered therein no allowance should be made or required either way. Another provided that if any error of any kind should be made in the description of the premises, such error should not invalidate the sale, but that compensation should be settled by a referee named in the condition. On a bill for specific performance by the purchaser with a deduction to be assessed by the referee for a deficiency in quantity of nearly one-half:—*Held*: although the ct. would not have enforced against the purchaser the condition as to erroneous admeasurements where the error was so great that condition was sufficient to exclude any right in the purchaser to a specific performance with a deduction, & the ct. in his suit for that relief decreed specific performance without deduction.—*CORDINGLEY v. CHEESEBOROUGH* (1862), 4 De G. F. & J. 379; 31 L. J. Ch. 617; 6 L. T. 342; 26 J. P. 644; 8 Jur. N. S. 755; 45 E. R. 1230, L. C.

Annotations:—Expld. Whittemore v. Whittemore (1869), L. R. 8 Eq. 603. *Consd. Re Terry & White's Contract* (1886), 32 Ch. D. 11; *Jacobs v. Revell*, [1900] 2 Ch. 858. *Refd. Lett v. Randall* (1883), 49 L. T. 71.

1484. Condition allowing vendor to rescind contract—Action for specific performance & notice to rescind.]—On the sale of a copyhold manor, it was stated, that the "fine was two years' improved value." The 8th condition enabled the vendor, in case of any objection to title, to rescind, & the 11th condition provided for compensation in case of mistake or error. The abstract was delivered, & no objection was taken to the title, within the time prescribed for that purpose. Subsequently some doubt arose as to whether the fine was of one or two years' improved value:—*Held*: (1) so far plff. was entitled to specific performance with a compensation.

The purchaser having afterwards raised a question as to title, & filed a bill for specific performance, the vendor on the same day, gave notice to rescind:—*Held*: although the objection as to title was waived at the bar, the vendor had a right to insist on the contract having been rescinded, & the bill was dismissed.

(3) By the 8th condition of sale, a vendor reserved a right to rescind, in case of objection to title, etc., & by the 11th misdescriptions were not to annul the sale, but be the subject of compensation. *Semble*: the 8th condition did not apply to cases of misdescription within the 11th condition.—*HOY v. SMYTHIES* (1856), 22 Beav. 510; 28 L. T. O. S. 183; 2 Jur. N. S. 1011; 52 E. R. 1205.

Annotations:—As to (2) *Appld. St. Leonard's Shoreditch Vestry v. Hughes* (1864), 17 C. B. N. S. 135. *Refd. Falkner v. Equitable Reversionary Soc.* (1858), 4 Drew. 352, *Mawson v. Fletcher* (1870), L. R. 10 Eq. 212; *Isaacs v. Towell*, [1898] 2 Ch. 285.

1485. — —.]—Upon a sale of land, one of the conditions provided that if any objection was persisted in, the vendors might rescind the contract; & another condition provided that if any mistake should appear to have been made in the description of the property, or of the vendors' interest therein, such mistake should not vitiate the sale, but compensation should be given. The purchaser objected that certain minerals under the land appeared to belong to the lord of the manor; the vendors answered that this would not be compensated for, being the result of an enfranchisement as to which there was a condition.

PART V. SECT. 7, SUB-SECT. 2.—B.

o. Misdescription of property—Property subject to tithe-rentcharge.]—HAMILTON v. BATES, [1894] 1 I. R. 1—IR.

The purchaser persisted in the objection, & the vendors gave notice that they should rescind the contract. The purchaser then filed his bill for specific performance with compensation, & the vendors by their answer alleged that they had in fact a title to these minerals, but had rescinded under the conditions :—*Held* : the objection taken by the purchaser was an objection to title to part of the property sold, the removal of which might involve a long & expensive inquiry ; the vendors had a right to rescind, & performance with compensation would not be compelled.—*MAWSON v. FLETCHER* (1870), 6 Ch. App. 91 ; 40 L. J. Ch. 131 ; 23 L. T. 545 ; 35 J. P. 391 ; 19 W. R. 141, L. J. J.

Annotations :—*Apld.* *Heppenstall v. Hose* (1881), 51 L. T. 589 ; *Ashburner v. Sewell*, [1891] 3 Ch. 405. *Refd.* *Re Dames & Wood* (1885), 29 Ch. D. 626 ; *Ite Terry & White's Contract for Sale of Real Estate* (1886), 11 T. L. R. 327 ; *Re Jackson & Haden's Contract* (1906), 75 L. J. Ch. 226.

1486. Defective title—To subjacent mines.]—

A condition giving the vendor the right to rescind in the event of his unwillingness to comply with an objection to the title, must not be considered as giving him an arbitrary power to annul the contract ; some reasonable ground for his unwillingness must be shown. Before a vendor will be allowed to rescind, he must satisfy the ct. that he entered into the contract in ignorance of some material fact or document, or under some mistaken notion that he was entitled to sell & could make a title ; there must be no failure of duty on his part, no element of shortcoming, & he must have omitted nothing which the ordinarily prudent man, having regard to his contractual relations with other persons, is bound to do.

J. & others contracted to sell to H. a villa residence by a description wide enough to include the mines & minerals under it. The contract provided, clause 13, that if the purchaser should "insist on any objection or requisition as to title" which the vendors should "be unable . . . or decline" to comply with, the vendors might rescind the contract ; & clause 14, that any error or misstatement should form the subject of compensation. The vendors believed that it was well known in the district that the minerals were reserved. The purchaser having insisted on a requisition that the vendors' title to the minerals should be furnished, the vendors gave a notice purporting to rescind the contract under clause 13 :—*Held* : though the purchaser's objection, was "an objection to the title" within the terms of clause 13, it was not an objection that the vendors could avail themselves of as a ground for rescinding the contract, having regard to the facts & their own conduct : & the purchaser was entitled, under clause 14, to a conveyance of the property with compensation in respect of the mines & minerals.—*Re JACKSON & HADEN'S CONTRACT*, [1906] 1 Ch. 412 ; 75 L. J. Ch. 226 ; 94 L. T. 418 ; 54 W. R. 434 ; 50 Sol. Jo. 256, C. A.

Annotations :—*Distd.* *Merrett v. Schuster*, [1920] 2 Ch. 240 ; *Re Milner & Organ's Contract* (1920), 89 L. J. Ch. 315 ; *Procter v. Pugh*, [1921] 2 Ch. 256. *Consd.* *Re Des Reaux & Setchfield's Contract*, [1926] Ch. 178.

SUB-SECT. 3.—CONTRACT WITH CONDITION EXCLUDING COMPENSATION.

1487. Right of vendor to specific performance—Dependent on materiality of error.]—*PORTMAN v. MILL*, No. 1401, *ante*.

1488. ———.]—*JACOBS v. REVELL*, No. 1384, *ante*.

1489. ———.]—*TOMPKINS v. TRATT* (1915), 139 L. T. Jo. 541.

1490. ———.]—Pltf. who had inspected the premises but not the leases, agreed to buy premises in the schedule to the contract for £1,400. The freehold property sold—viz. thirteen freehold houses—was stated in the schedule as Nos. 1 to 25, odd numbers, T-road ; Nos. 1 & 3 leased for ninety-nine years at £11 10s. *per annum* ; Nos. 5 & 7, 9, 11, 13, & 15, 17, & 19 respectively at £11 *per annum* ; & Nos. 21, 23, & 25 at £16 10s. *per annum*. In each lease there was reserved a separate rent for each house. There was evidence that the market value of adequately secured ground rents is unaffected by the number of amounts in which they are collected. The contract contained a clause (4) that no compensation should be allowed for any misstatement or error in the description of the premises, nor should it annul the sale, & in clause 6 there was a reference to the leases by which the "ground rents hereby sold are reserved." The purchaser claimed rescission, & the vendor counterclaimed for specific performance :—*Held* : the contract on its true construction referred to the houses in respective leases as being let at entire rents of £11 10s. £11, & £16 10s., & as there was a separate rent reserved for each house, this was an inaccurate statement by the vendor upon which the purchaser was entitled to rely. With reference to that misstatement the vendor was entitled to rely on clause 4 of the contract, & the misstatement or error would not annul the sale unless it was in a material & substantial point, but for which the purchaser would not have entered into the contract. The ct. ought not to regard the value alone, & pltf. being offered something substantially different from that which he contracted to buy was entitled to rescission & return of his deposit.—*LEE v. RAYSON*, [1917] 1 Ch. 613 ; 86 L. J. Ch. 405 ; 116 L. T. 536 ; 61 Sol. Jo. 368.

1491. Right of purchaser to specific performance with compensation.]—*Re TERRY & WHITE'S CONTRACT*, No. 17, *ante*.

SECT. 8.—ENFORCEMENT OF DECREE.

SUB-SECT. 1.—IN GENERAL.

See R. S. O., Ord. 42, r. 30.

1492. Appointment of time & place for payment of purchase-money.]—After a decree for specific performance & execution of the conveyance the purchaser neglected to pay the purchase-money. The ct., on the application of the vendor, fixed a day & place for that purpose.—*MORLEY v. CLAVERING* (1861), 30 Beav. 108 ; 7 Jur. N. S. 904 ; 9 W. R. 801 ; 54 E. R. 830.

1493. Sale—Land compulsorily taken.]—*ST. GERMAN'S (EARL) v. CRYSTAL PALACE RY. CO.*, No. 1509, *post*.

1494. Vesting order.]—*GRACE v. BAYNTON* (1877), 25 W. R. 506 ; 21 Sol. Jo. 631.

— **As ancillary relief.]—***See, also*, Nos. 1347, 1348, *ante*.

1495. Order for plaintiff to perform agreement at cost of defendant.]—At the trial of an action for specific performance of an agreement to make a road, deft. gave an undertaking that he would complete the road in question. An order was subsequently made fixing a date by which the road was to be completed. This not having been done, pltf. moved, under R. S. O., Ord. 42, r. 30,

PART V. SECT. 7, SUB-SECT. 3.

1491 I. Right to purchaser to specific performance with compensation.]—*MOLPHY v. COYNE* (1919), 53 I. L. T. 177.—*IR.*

Sect. 8.—Enforcement of decree: Sub-sects. 1, 2 & 3.
Sect. 9: Sub-sect. 1.]

for an order that he might be at liberty to complete the road himself at the cost of deft. :—*Held*: the case did not fall within the rule; but, nevertheless, the ct. would enforce the undertaking by permitting pltf. to do the works, with liberty to apply that deft. should pay the expenses so incurred in completing the road.—*MORTIMER v. WILSON* (1885), 33 W. R. 927.

1496. Order for payment—Within four days—On deposit of documents in court.]—*MORGAN v. BRISCO* (1886), 32 Ch. D. 192; 54 L. T. 230; 34 W. R. 360.

1497. ———.]—The decree in a vendor's action for specific performance directed that, on pltf. executing an assignment & delivering to deft. the deeds & writings relating to the property, deft. should pay to pltf. the amount certified to be due for purchase-money, interest, & costs. Pltf. executed the assignment, & tendered the deeds to deft. Deft. refused to receive the deeds, or to pay the money. Pltf. moved for leave to issue execution for the amount certified to be due, on the ground that he had performed the condition :—*Held*: pltf. must deposit the executed assignment & the deeds in ct., & on such deposit an order should be drawn up that pltf. should pay the amount certified & the costs of the motion within four days.—*BELL v. DENVER* (1886), 54 L. T. 729; 34 W. R. 638.

1498. ——— Within seven days—Defendant not attending at time & place fixed for completion.]—By the judgment in an action for specific performance by vendors against a purchaser it was ordered that an account should be taken of what was due to pltf.s.; that, it appearing that deft. had accepted the title, pltf.s. should be at liberty to prepare & execute a conveyance of the property to deft., as an escrow to be delivered to deft. on payment of the balance of purchase-money, interest, & costs within the time limited, such conveyance to be settled by the judge, & that deft. should pay to pltf.s., at a time & place to be appointed by the judge when the conveyance should have been approved, the sum which should be certified to be the balance of the purchase-money, interest, & costs, & thereupon it was ordered that pltf.s. should deliver to deft. the conveyance duly executed & the title deeds. This order was not served on deft. The chief clerk made his certificate & fixed a time & place for payment. Pltf.s. attended on the day at the time & place fixed with the conveyance & title deeds, but deft. did not attend. Pltf.s. then moved that deft. might be ordered within four days after service to pay into ct. to the credit of the action the amount certified to be due from him, & that thereupon pltf.s. might execute a proper conveyance to him & deliver to him the title deeds :—*Held*: an order for payment into ct. could not be made as the judgment became a final & absolute order upon the certificate being made finding the amount due, & fixing the time & place for payment, but pltf.s. were entitled to a new order for payment to themselves of the amount found due within seven days after service of such new order for the purpose of working out the former order.—*ROBINSON v. GALLAND* (1889), 60 L. T. 697; 37

W. R. 396; subsequent proceedings, 5 T. L. R. 504.

1499. Where defendant bankrupt.]—Where a vendor has got a judgment for specific performance against the purchaser, & the purchaser becomes bkpt., the vendor's proper course is to go on & enforce his rights under his judgment.—*Re JEWELL* (1897), 4 Mans. 28.

Attachment & committal.]—*See, generally, CONTEMPT OF COURT*, Vol. XVI., pp. 46 *et seq.*

Fieri facias.]—*See, generally, EXECUTION*, Vol. XXI., pp. 470 *et seq.*

Sequestration.]—*See, generally, EXECUTION*, Vol. XXI., pp. 591 *et seq.*

SUB-SECT. 2.—APPOINTMENT OF PERSON TO CONVEY.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 47.

1500. Jurisdiction of court—Defendant incapable of executing conveyance.]—*Re BOWYER, MINCHIN v. NANCE* (1844), 3 L. T. O. S. 237, L. C.

1501. ——— Execution of power of jointuring.]—A donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife, to execute the power by a deed to be approved of by the master, whereby £1,000 *per annum* was to be appointed as pltf.'s jointure. On his refusal to obey the decree :—*Held*: under Trustee Acts, he might be declared a trustee of all the rights, interests, estates & property acquired by him under the settlement, & the ct. appointed a person to execute the requisite deed in his place.—*WELLESLEY v. WELLESLEY, MORNINGTON v. MORNINGTON, Ex p. MORNINGTON (COUNTESS)* (1853), 4 De. G. M. & G. 537; 1 Eq. Rep. 369; 22 L. J. Ch. 966; 43 E. R. 617, L. J.J.

1502. ——— Execution of lease.]—*GRACE v. BAYNTON* (1877), 25 W. R. 506; 21 Sol. Jo. 631.

1503. ———.]—A decree was made for specific performance of an agreement to grant a new lease of certain premises, & deft. was ordered to execute such new lease to pltf.

Deft. having refused to obey the order, pltf. moved for leave to issue a writ of attachment against her. An order was made declaring deft. a trustee of the premises & a person was appointed in place of deft. to execute the lease to pltf.—*HALL v. HALE* (1884), 51 L. T. 226.

Death of vendor—Trusteeship of vendor & heir.]—*See SALE OF LAND*, Vol. XL., p. 209, Nos. 1751, 1759.

SUB-SECT. 3.—FAILURE TO OBEY DECREE.

See SALE OF LAND, Vol. XL., pp. 224, 225, Nos. 1925–1948.

1504. Default by purchaser—Rescission of contract—Whether order made on motion.]—A decree for specific performance was made against a purchaser. Not having paid the purchase-money, he was ordered, on motion, to pay it within a limited time, & in default, that the contract should be rescinded & all proceedings stayed.—*SIMPSON v. TERRY* (1865), 34 Beav. 423; 55 E. R. 698.

*Annotation:—**Refd. Hutchings v. Humphreys* (1885), 54 L. J. Ch. 650.

PART V. SECT. 8, SUB-SECT. 2.

p. Appointment of sheriff.]—Where a person is condemned in an action to give transfer of immovable property, & neglects & refuses to do so, the ct. will carry its judgment into execution by ordering the sheriff to

give & effect transfer.—*VAN DER BYL v. HANBURY*, (1882), 2 S. C. 80.—*S. AF.*

PART V. SECT. 8, SUB-SECT. 3.

q. Default by vendor—Rescission of contract.]—The principle that a vendor who has obtained a decree for

specific performance is entitled to a rescission of the contract if purchaser refuses to obey the decree is equally applicable to the case of a defaulting vendor.—*COOMBS & CONNOR v. EDWARDS* (1915), 34 N. Z. L. R. 984.—*N.Z.*

1505. —.] — **FORSTER v. GREAT EASTERN RY. CO.**, [1868] W. N. 122.

1506. —.] — Where deft. by a decree in a suit for specific performance was decreed to pay the purchase-money within a specific time, & failed to do so, the ct., on the application of the vendor, ordered the contract to be rescinded, & stayed all proceedings in the suit with costs, to be paid by deft., & refused to make an order for the return of the deposit to deft.—**DUNN v. VERE** (1870), 23 L. T. 432; 19 W. R. 151.

Annotation:—**Refd.** *Hutchings v. Humphreys* (1885), 51 L. J. Ch. 650.

1507. —.] — **Form of order.**—**WESTERMAN v. PANTLIN** (1900), 3 Seton's Judgments & Orders, 7th ed. 2218.

Annotation:—**Appld.** *Olde v. Olde*, [1904] 1 Ch. 35.

1508. —.] — **Form of order in a vendor's action where judgment for specific performance with costs has been obtained & the purchaser having subsequently failed to comply with the judgment, the vendor moves to rescind the contract & to stay further proceedings except for recovery of the costs of the action & motion.**—**OLDE v. OLDE**, [1904] 1 Ch. 35; 73 L. J. Ch. 81; 89 L. T. 604; 52 W. R. 260.

1509. —.] — **Petition for re-sale of land—Inquiry into damages for non-construction of works.**—On a bill by unpaid vendors of land, taken possession of by a railway co., specific performance of an agreement & of an award, determining the value of the land & binding the co. to construct a certain bridge, was decreed, payment of the unpaid purchase-money ordered, and the right of plffs. to a lien declared. The money was not paid, & the bridge not constructed, & plffs. accordingly presented a petition for sale of the land & for a reference to chambers to assess the damages in respect of the non-construction of the bridge:—**Held**: they were entitled to the order prayed for.—**ST. GERMAN'S (EARL) v. CRYSTAL PALACE RY. CO.** (1871), L. R. 11 Eq. 568; 21 L. T. 288; 19 W. R. 581.

SECT. 9.—COSTS

SUB-SECT. 1.—IN GENERAL.

See R. S. C., Ords. 14A, r. 6, 65, r. 1.

1510. **Discretion of court.**—**SCARBROUGH v. BURTON** (1740), Barn. Ch. 255; 27 E. R. 635; *sub nom.* **SCARBOROUGH v. BURTON**, 2 Atk. 111, L. C.

1511. **Costs follow event.**—**CARVER v. RICHARDS**, No. 1569, *post*.

1512. **Liability of party giving cause for action—Liability for whole costs.**—A bill for a specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance. The ct. being of opinion, that the trustee ought to pay all the costs of the suit, the decree was that plff. should pay the costs of all the other defts., although he had a decree against them, & recover over the whole costs from deft., the trustee.—**JONES v. LEWIS** (1786), 1 Cox Eq. Cas. 199; 29 E. R. 1127, L. C.

Annotation:—**Appld.** *Goodson v. Ellisson* (1827), 3 Russ. 583.

PART V. SECT. 9, SUB-SECT. 1.

1510 i. **Discretion of court.**—Whatever may be the rule in England, the ct. of chancery in this province has jurisdiction to make a deft. pay costs in a suit for specific performance, though the bill be dismissed, if the circumstances be such as to warrant doing this.—**CHURCH v. FULLER** (1883), 3 O. R. 417.—**CAN.**

1523 i. **Decree against two defendants—Suit necessitated through misconduct of one—Right of other to reimbursement.**—

In an action for specific performance by a purchaser against the vendor & a prior purchaser, costs may be allowed to the plff. as against both defts.: & if the prior purchaser is the main cause of litigation he should bear the costs ordered to be paid to plff. by the vendor, but not the vendor's own costs unless the circumstances which led up to the litigation were in no degree the result of the vendor's action, but the difficulty was created entirely by the action of the prior purchaser.—**DRIVER v. OTAGO & SOUTHLAND**

1513. **Discrepancy between right claimed & right proved—Decree to extent of right proved.**—A. agrees to lend B. £3,000 on mtge. of leasehold houses, & not to call for the title of the lessor, & advances £600 in part. He then calls for the lessor's title, & files a bill for specific performance, or sale of the property to repay him the £600 & interest:—**Held**: he was not entitled to the title, but only to a specific performance of the contract, as proved; & plff., not obtaining the decree he asked, shall pay the costs.—**BASS v. CLIVLEY** (1829), Tambl. 80; 48 E. R. 33.

1514. **Two sets of costs—Co-heiresses made defendants—Separate defences.**—The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles. They submitted to act as the ct. might direct, & defended separately:—**Held**: they were entitled to two sets of costs.—**ALDRIDGE v. WESTBROOK** (1841), 4 Beav. 212; 10 L. J. Ch. 363; 49 E. R. 320.

1515. **Terms of agreement uncertain.**—**TATHAM v. PLATT**, No. 237, *ante*.

1516. **Proceedings unnecessary—Vexatious.**—**BRADBY v. WHITCHURCH**, [1868] W. N. 81.

1517. —.] — **Untenable objections to renewal of lease.**—A lease contained a covenant by the lessor to grant a further lease, & a stipulation that the lease should be prepared by the lessor's solr. The lessor's solr. raised various untenable objections, & put the lessee to considerable expense. The lessee required the lessor to pay the costs occasioned thereby, & threatened to file a bill for specific performance of the covenant. The lessor then wrote, withdrawing all his objections, but refused to pay the costs occasioned by them. Plff. filed his bill the day after:—**Held**: deft.'s solr. was bound to prepare a proper lease, & deft. was ordered to pay the costs of the suit, & of the dispute occasioned by deft.—**MAPPIN v. SAVORY** (1869), 20 L. T. 777.

1518. **Suit by principal against agent—Costs of disproving charges of fraud.**—**FORESTER v. READ**, No. 201, *ante*.

1519. **Amendment of claim for specific performance—Costs up to amendment.**—**BLACKMORE v. EDWARDS**, [1879] W. N. 175.

Annotation:—**Refd.** *Bourne v. Coulter* (1881), 53 L. J. Ch. 699.

1520. **Costs charged on married woman's separate estate.**—**PICARD v. HINE**, No. 1008, *ante*.

1521. **County court scale—Value of property within statutory limit.**—Suit for specific performance of sale of leasehold property for £150 subject to rent of £92 10s. & covenant to keep insured:—**Held**: a proper case to allow full costs, notwithstanding County Courts Act, 1867 (c. 142).—**CARPMAEL v. CARVELL** (1870), 18 W. R. 513.

1522. —.] — **Action brought in place where property situate—Advantage to defendant.**—**GRANDIN v. HAINES**, [1873] W. N. 12.

1523. **Decree against two defendants—Suit necessitated through misconduct of one—Right of other to reimbursement.**—**WILSON v. THOMSON**, No. 1073, *ante*.

INVESTMENT CO. (1903), 23 N. Z. L. R. 111.—**N.Z.**

r. **Payment out of sum lodged to secure costs—Necessity for final termination of suit.**—When plffs., who were residents out of the jurisdiction, had paid a certain sum into ct. in lieu of security for costs, an application to have this money paid out to them was refused, although a decree for specific performance had been made in their favour, the suit not being finally terminated.—**LUTHER v. WARD** (1867), 2 Ch. Ch. 175.—**CAN.**

Sect. 9.—Costs : Sub-sect. 2, A. & B.]

SUB-SECT. 2.—ACTIONS BETWEEN VENDOR AND PURCHASER.

A. In General.

1524. How liability determined—Whether title perfected on reference.]—Where strips of land lie between the highway & the adjoining inclosure, the legal presumption is, that the soil belongs to the owner of the adjoining old inclosure.

The fact of a title having been perfected in the master's office, does not determine the question of the costs of a suit for specific performance, which depends upon whether the defects which have been removed there, were the occasion of the suit.—*SCOONES v. MORRELL* (1839), 1 Beav. 251; 48 E. R. 936.

*Annotations:—*Appld. *Grove v. Bastard* (1851), 1 De G. M. & G. 69. Foll'd. *Abbott v. Calton* (1853), 22 L. J. Ch. 936. *Mentd.* *Boyse v. Rossborough* (1853), Kay. 71.

1525. ——— Whether action caused by defects removed on reference.]—*SCOONES v. MORRELL*, No. 1524, *ante*.

1526. ——— When title first shown.]—*WILKINSON v. HARTLEY*, No. 1203, *ante*.

1527. ———.]—*FREER v. HESSE*, No. 1550, *post*.

1528. ———.]—The costs of a suit for specific performance do not depend upon when a good title was first shown, but upon the conduct of each party in causing the litigation.

When costs are occasioned by the conduct of either party, the general rule is, that the party who occasioned must bear them; & when by the misconduct of both parties, neither has his costs.—*PARR v. LOVEGROVE* (1858), 31 L. T. O. S. 364; 4 Jur. N. S. 600; 6 W. R. 709.

1529. ———.]—*HALKETT v. DUDLEY (EARL)*, No. 123, *ante*.

1530. ——— Requisition after action brought.]—The rule which makes the costs of a suit for specific performance depend upon when the title was first shown, relaxed: (a) where the requisition was not made until after bill filed; (b) where, although the requisition was made before bill filed, the non-compliance was attributable to the circumstance of the purchaser having claimed abatement or compensation, in respect of which his bill had been dismissed with costs.—*LYLE v. YARBOROUGH (EARL)* (1859), John. 70; 33 L. T. O. S. 343; 70 E. R. 343.

1531. ——— Requisition before action brought—Non-compliance due to purchaser's claim for compensation.]—*LYLE v. YARBOROUGH (EARL)*, No. 1530, *ante*.

1532. ——— Conduct of each party in causing litigation.]—*PARR v. LOVEGROVE*, No. 1528, *ante*.

1533. Action by first purchaser—Against vendor second purchaser & auctioneer—Action dismissed as against second purchaser & auctioneer.]—Conditions of sale stipulated that the sale should be completed on a certain day; & that objections to the title not made within twenty-one days from the delivery of the abstract should be considered as waived; & that, if the purchaser should not comply with the conditions, his deposit should be forfeited, & the vendor be at liberty to resell the property. The purchaser did not deliver his objections until several weeks after the expiration of the twenty-one days, & after the day appointed for completing the purchase: the vendor's solr., however, received them, and entered into a long correspondence with the purchaser on the subject of them, but without coming to a satisfactory con-

clusion. Finally, the vendor resold the property, but at a less price, notwithstanding the purchaser protested against the resale, & gave notice to the vendor of his intention to file a bill to enforce the contract. About six months afterwards he filed his bill, making the auctioneer & the purchaser at the resale, to whom he had some months before given notice of his prior contract, co-defts. to it. The court held that the benefit of the conditions had been waived by the vendor's solr., & decreed a specific performance, with a reference to the master as to title, & dismissed the bill, with costs as against the auctioneer, because he denied that he had ever intended to part with the deposit, & without costs as against the purchaser at the resale, who claimed the benefit of his contract if the ct. should think that pltf.'s ought not to be performed.—*CUTTS v. THODEY* (1842), 13 Sim. 206; 6 Jur. 1027; 60 E. R. 80; *affd.* (1844), 1 Coll. 223, L. C.

*Annotation:—*Refd. *Morley v. Cook* (1842), 2 Hare, 106.

1534. Action by sub-purchaser—Against vendor & purchaser—Purchaser not entitled to specific performance.]—*SOUTH EASTERN RY. CO. v. KNOTT*, No. 1079, *ante*.

1535. What evidence court will consider.]—*CURLING v. AUSTIN*, No. 1180, *ante*.

1536. Reservation of costs by court—Until reference of title settled.]—*GUNSTON v. EAST GLOUCESTERSHIRE RY. CO.*, No. 1137, *ante*.

1537. Plaintiff successful in one-third of suit—Liability to defendant in respect of balance.]—Where pltf. in a suit was successful in one-third, & failed in two-thirds of his claim, he was decreed to pay to defts. one-third of the costs of the litigation.—*BANKART v. TENNANT* (1870), L. R. 10 Eq. 141; 39 L. J. Ch. 809; 23 L. T. 137; 18 W. R. 639.

1538. Set-off of costs against purchase-money—When allowed—Rescission action by vendor—Counterclaim for specific performance by purchaser.]—A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counterclaim for the specific performance of the contract. Judgment was given for deft., with costs on both claim & counterclaim:—*Held*: deft. was entitled to deduct his costs from his purchase-money in priority to a mtgee. of pltf., whose mtge. had been created after the contract for sale, but before the commencement of the action.—*GREEN v. SEVIN* (1879), as reported in 13 Ch. D. 589; 41 L. T. 724;

*Annotations:—*Cons'd. *Phillips v. Howell*, [1901] 2 Ch. 773. *Mentd.* *Lee v. Soames* (1888), 59 L. T. 366; *Stickney v. Keeble*, [1915] A. C. 386.

1539. ——— Action against administrator.]—Pltf., as purchaser of leasehold property, obtained judgment for specific performance against deft., as administratrix of an intestate, with costs to be paid by her personally. Deft. had a beneficial interest, to the extent of one-fourth, in the intestate's estate, & it was alleged that except a mtge. there were no unpaid debts of the intestate, & that the purchase-money payable by pltf. represented the whole of the intestate's estate. The judgment not having been passed, & entered, pltf. moved for the addition of a direction enabling him to deduct the costs due to him from deft. from so much of the purchase-money as represented her beneficial interest in the intestate's estate:—*Held*: without some form of administration order, which the ct. had no power to make in this action, it was impossible to ascertain what the amount representing the beneficial interest of deft. was, so as to

PART V. SECT. 9, SUB-SECT. 2.—A.

t. No costs allowed—Both parties acting *bonâ fide*.]—*HUTCHISON v. RAPKLE* (1851), 2 Gr. 533.—CAN.

bind other persons interested in the intestate's estate; &, though a set-off of costs against purchase-money might be allowed in a case where the debt due to & the debt due from the vendor were so due in the same capacity, *pltf.* here could not be allowed to bring into account all or any part of an unascertained sum to which *deft.* might be beneficially entitled in the administration of her intestate's estate, as against the purchase-money which was due to her in her representative capacity.—*PHILLIPS v. HOWELL*, [1901] 2 Ch. 773; 71 L. J. Ch. 13; 85 L. T. 777; 50 W. R. 73; 46 Sol. Jo. 12.

Non-compliance with decree for specific performance—Proceedings for rescission.—See *SALE OF LAND*, Vol. XL., p. 224, Nos. 1927-1937.

Lien for costs—Action by vendor.—See *LIEN*, Vol. XXXII., p. 272, Nos. 531, 532.

B. Liability of Vendor.

1540. No title shown.—Vendor not making a good title ordered to pay costs, though he was only a trustee to sell.—*EDWARDS v. HARVEY* (1809), *Coop. G.* 40; 35 E. R. 470.

1541. ——A vendor who contracts to sell an estate, & files a bill for specific performance, must pay the costs, if it turns out he has no title.—*EAGLE v. TAYLOR* (1833), 3 L. J. Ch. 16.

1542. ——Where, in a suit by vendor for specific performance it was certified that a good title was not deduced, the *ct.* ordered a return to *deft.* of his deposit money, with interest at 4 per cent., & declared *deft.* entitled to a lien on the estate for same, & also for his costs, with liberty to apply, & subject thereto, dismissed the bill.—*TURNER v. MARRIOTT* (1867), L. R. 3 Eq. 711; 15 L. T. 607; 15 W. R. 420.

*Annotations:—*Consd. *Re New Land Development Assocn. & Fagence* (1892), 61 L. J. Ch. 323. *Apld. Kitton v. Hewett*, [1904] W. N. 21. Consd. *Re Furneaux & Aird's Contract*, [1906] W. N. 215.

1543. — Purchaser subsequently abandoning objections.—Where a vendor of land fails to make out a good title, the purchaser is entitled to the costs of an action for specific performance, though he afterwards abandons his objections to the vendor's title. But his right to costs may be lost if he brings the action to trial to obtain a decision on a separate point on which he eventually fails.—*BALLARD v. SHUTT* (1880), 15 Ch. D. 122; 49 L. J. Ch. 618; 43 L. T. 173; 29 W. R. 73.

1544. — Costs of investigating title.—*KITTON v. HEWETT*, [1904] W. N. 21.

1545. Title established before master—On different grounds from those in abstract.—Costs to a purchaser, the vendor having established his title before the master, after contest, upon a different ground from that in the abstract delivered.—*FIELDER v. HIGGINSON* (1814), 3 Ves. & B. 142; 35 E. R. 432, L. C.

1546. Title shown after action brought—Costs up to report of good title.—Vendor not making a title when bill filed, pays the costs up to the report of a good title.—*HARFORD v. PURRIER* (1816), 1 Madd. 532; 56 E. R. 195.

*Annotation:—*Mentd. *Raffety v. Schofield*, [1897] 1 Ch. 937.

1547. — Vendor able to make title before.—*TOWNSEND v. CHAMPERNOWNE*, No. 664, *ante*.

1548. Delivery of imperfect abstract—Costs until

defects supplied.—*WILSON v. ALLEN*, No. 619, *ante*.

1549. Vendor unable to convey—Without direction of court.—Where it appears on the face of a bill for specific performance, that *pltf.* could not convey, according to the agreement, without the direction of the *ct.*, he will not have the costs up to the hearing; but if *deft.* insists on inquiries into the title, & fails in them, *pltf.*'s costs incurred in these inquiries, & at the hearing on further directions, must be paid by *deft.*—*ALLEN v. CURRIE* (1823), 2 *Coop. temp. Cott.* 223; 1 L. J. O. S. Ch. 135; 47 E. R. 1139.

1550. — Without concurrence of third party.—Where the *ct.* has declared, in a suit for specific performance by a vendor, that the concurrence of judgment creditors where necessary, that being the substantial ground of the litigation, although a question of conveyance & not of title, vendor *pltf.* failing must pay the costs of the suit.

It is the duty of a vendor plaintiff who has a defective title, when the objection is removed, to offer to the purchaser the costs up to that time & to give him a conveyance.—*FREER v. HESSE* (1853), 4 De G. M. & G. 495; 2 Eq. Rep. 13; 23 L. J. Ch. 338; 17 Jur. 703; 43 E. R. 600, L. J.J.

*Annotations:—*Refd. *Beavan v. Oxford* (1855), 1 Jur. N. S. 1121; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599. Mentd. *Shaw v. Neale* (1858), 6 H. L. Cas.

1551. Vendor contracting to deduce title at own expense—No laches on either side—Costs out of vendor's estate.—Testatrix devised a freehold property in which she had an equitable estate in fee, to A. for life, with remainder to B. for life, with remainder to the family of B., who were infants, in strict settlement. She then contracted to sell part of the estate, & died before conveyance. After her decease the legal estate was got in, & the owners of it, together with the tenants for life, were willing to complete the purchase:—*Held: in* order to give the purchaser an immediate estate in fee, both legal & equitable, a decree for specific performance of the contract was necessary, & as this was a question of title, & the vendor had contracted to deduce a good title at her own expense, & there was no laches on either side, the costs of the suit must be paid out of the vendor's estate.—*FARRAR v. WINTERTON (EARL)* (1841), 4 Y. & C. Ex. 472; 160 E. R. 1092.

*Annotations:—*Consd. *Midland Counties Ry. v. Rice* (1851), 2 Eq. Rep. 1109. Mentd. *Re Clowes*, [1893] 1 Ch. 214.

1552. Vendor having good title before hearing—Vendor's conduct causing great expense on reference—Costs only up to hearing.—Where *pltf.*, vendor, has shown a good title according to the conditions of sale prior to the hearing but has been the means of great expense being incurred in prosecuting the inquiry at chambers, whither the cause was referred, instead of having the question decided at the hearing, the *ct.* will, in decreeing a specific performance, give him his costs up to the hearing only.—*GOULD v. WHITE* (1854), Kay 683; 2 Eq. Rep. 1100; 24 L. T. O. S. 43; 69 E. R. 291.

*Annotation:—*Mentd. *Poppleton v. Buchanan*, *Buchanan v. Poppleton* (1858), 4 C. B. N. S. 20.

1553. Vendor insisting on unusual mode of executing conveyance.—A vendor insisted on executing the purchase deed without the purchaser or by agent of the purchaser being present, & also

vendor will pay his costs up to that time; if he omit to do so, the *ct.* will fix all the subsequent costs on him.—*LILL v. ROBINSON* (1828), Beat. 83.—*IR.*

a. — Vendor falsely denying part payment of purchase-money.—Where a purchaser objected to the title offered, & refused to pay the balance

PART V. SECT. 9, SUB-SECT. 2.—B.

1546 i. Title shown after action brought—Costs up to report of good title.—The general rule in actions for specific performance is that, subject to the general discretion exercisable over costs by the *ct.* or judge, costs are given against the vendor up to the time at which he has shown a good title.—*BAXTER v.*

DERGASZ (Sask.), [1925] 4 D. L. R. 801; [1925] 3 W. W. R. 593.—*CAN.*

1546 ii. ——Under decrees for specific performance, the vendee is considered as entitled to his costs up to the time when the vendor evidences a good title; when that is done, the vendee is bound to declare that he is satisfied, & will accept the title if the

Sect. 9.—Costs: Sub-sect. 2, B. & C. (a) & (b).]

insisted on the purchase-money being paid not to himself but to his solr. or his solr.'s clerk, to neither of whom he had given any written authority to receive it. On the purchaser declining to complete the purchase in that mode, the vendor brought an action against him for the purchase-money:—*Held*: the vendor ought to pay all the costs of a suit instituted by the purchaser for the specific performance of the contract & for an injunction to stay the proceedings at law.—*VINEY v. CHAPLIN* (1858), 2 De G. & J. 468; 27 L. J. Ch. 434; 31 L. T. O. S. 142; 4 Jur. N. S. 619; 6 W. R. 562; 44 E. R. 1071, L. C. & L. J.J.; *subsequent proceedings*, 3 De G. & J. 282, L. C. & L. J.J.

Annotations:—*Expld.* *Essex v. Daniell*, *Daniell v. Essex* (1875), L. R. 10 C. P. 538. *Consd.* *Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D. 387. *Refd.* *Re Shanks, Ex p. Swinbanks* (1879), 11 Ch. D. 525; *Re Hetling & Merton's Contract*, [1893] 3 Ch. 269. *Mentd.* *Bourdillon v. Roche* (1858), 27 L. J. Ch. 681; *St. Aubyns v. Smart* (1867), L. R. 5 Eq. 183; *Dundonald v. Masterman* (1869), L. R. 7 Eq. 504; *Plumer v. Gregory* (1874), L. R. 18 Eq. 621; *Gordon v. James* (1885), 53 L. T. 641; *A.-G. v. Odell* (1905), 92 L. T. 621.

1554. Doubt as to title removed at hearing—By vendor's act.—*ASHLEY v. WAUGH*, No. 649, *ante*.

1555. Vendor dying after contract—Liability of estate for costs—Vendor's will necessitating action for specific performance.—Where a person, having contracted to sell or lease an estate, dies leaving a will, which renders the institution of a suit for specific performance necessary, his estate must bear the costs. *Scrus*, if he dies intestate.—*SANDERSON v. CHADWICK* (1863), 2 New Rep. 414.

1556. ——— Vendor dying intestate.—*SANDERSON v. CHADWICK*, No. 1555, *ante*.

1557. Liability of vendor's assignee in bankruptcy—Action continued by assignee.—A vendor resisted a bill for specific performance. He became bkpt. & his assignee afterwards continued the resistance, but failed at the hearing:—*Held*: the assignee must pay pltf.'s costs of suit incurred subsequent to the bkpcy.—*FOXWELL v. GREATORREX*, *FOXWELL v. TURNER* (1861), 33 Beav. 345; 55 E. R. 401.

Annotation:—*Copsd.* *Cook v. Hathway* (1869), L. R. 8 Eq. 612.

1558. Purchaser entitled to substantial deduction from purchase-money.—*POWELL v. ELLIOT*, No. 1405, *ante*.

1559. Declaration of right to forfeit deposit & re-sell—In lieu of decree for specific performance.—In an action by a vendor for the specific performance of an agreement to purchase real estate, the purchaser having accepted the title, but having failed to complete at the time fixed, there being a condition empowering the vendor, in case of the failure of the purchaser to comply with any of the conditions of sale, to forfeit the deposit & resell the property:—*Held*: in lieu of judgment for specific performance, a declaration may be made even though deft. had not appeared to the writ, that the vendor was entitled to forfeit the deposit, & resell the property, if the writ has claimed such a declaration in the alternative, but the order should

direct pltf. to pay the costs of the action.—*KINGDON v. KIRK* (1887), 37 Ch. D. 141; 57 L. J. Ch. 328; 58 L. T. 383; 36 W. R. 430.

Annotation:—*Refd.* *Farrant v. Olver* (1922), 91 L. J. Ch. 758.

1560. Failure to accept proper compromise.—*RICHARDS v. DUNN* (1895), 39 Sol. Jo. 469.

*C. Liability of Purchaser.**(a) In General.*

1561. Disregard of prior decision—In favour of same title.—*BISCOE v. WILKS*, No. 614, *ante*.

1562. Costs of investigating title.—On a reference to inquire as to pltf.'s title, the master found that pltf. could make a good title, but he did not find that he could make such title before the filing of the bill, the consideration of the time at which pltf.'s title could be made having been expressly excluded, at the hearing, from the terms of the reference:—*Held*: deft. was liable to the costs of investigating the title in the master's office.—*CROOME v. LEDIARD* (1835), 2 My. & K. 293; 39 E. R. 955.

Annotations:—*Folld.* *Abbott v. Swoorder* (1852), 4 De G. & Sm. 448; *Abbott v. Calton* (1853), 22 L. J. Ch. 936. *Refd.* *McNicol v. Kay* (1856), 4 W. R. 801.

1563. ————A decree for specific performance of a contract to purchase, with a reference as to title having been made against the purchaser:—*Held*: he was bound to pay the costs of having the title investigated in chambers.—*McNICOL v. KAY* (1856), 28 L. T. O. S. 20; 4 W. R. 801.

1564. ——— Knowledge of defects before hearing—Waiver of objections.—A bill prayed the specific performance of an agreement, "if a good title could be made." At the hearing it was declared that the agreement ought to be specifically performed, & it was referred to the master to inquire whether a good title could be made. The master reported in the negative. Pltf. on further directions waived all objections to the title, & proposed to take the property; this was resisted by the vendor:—*Held*: pltf. was entitled, but being aware at the first hearing, of the objections to the title, he ought to pay the costs of the investigation in the master's office.—*BENNETT v. FOWLER* (1840), 2 Beav. 302; 48 E. R. 1197.

Annotation:—*Distd.* *Wilson v. Willhams* (1857), 3 Jur. N. S. 810.

1565. Unsuccessful defence—Abandonment of contract.—(1) Where time is not of the essence of the contract, & there is unnecessary delay by one of the parties in completing, the other has a right, by notice, to limit the time for completing the contract, & upon default to abandon the contract.

(2) A bill was filed by a vendor for the specific performance of a contract: the purchaser insisted that the contract had been abandoned; failing in this defence he was ordered to pay the costs of suit up to the hearing, & the usual reference was made as to title.—*TAYLOR v. BROWN* (1839), 2 Beav. 180; 9 L. J. Ch. 14; 48 E. R. 1149.

Annotations:—*As to* (1) *Consd.* *Webb v. Hughes* (1870), L. R. 10 Eq. 281; *Green v. Sevin* (1879), 13 Ch. D. 589. *Refd.* *Southcomb v. Exeter (Bp.)* (1847), 6 Hare, 213.

of the purchase money, but remained in possession, & the vendor brought ejectment, falsely denying the payment of part of the purchase money, the purchaser was held entitled to the costs of a suit to restrain the ejectment, & compel specific performance, notwithstanding that the vendor made a good title when required by the ct.—*HEALEY v. WARD* (1860), 8 Gr. 337.—*CAN.*

b. ——— Counterclaim by purchaser for performance with warranty of title—Liability of vendor for costs from time of payment in of purchase-money.]

v. DARROW (N. S.) (1901), 31 S. C. R. 196.—*CAN.*

1556 i. Vendor dying after contract—Liability of estate for costs—Vendor dying intestate.—Where a party having contracted to sell an estate dies intestate & a suit becomes necessary, it is clear upon all the authorities that each party should pay his own costs, because, as it has been said, it is the act of God.—*WHITE v. BECK* (1871), 20 W. R. 275.—*IR.*

c. ——— Infant heirs-at-law.]—The vendor of real estate had died

before the execution of the conveyances, & his infant heirs filed a bill praying for specific performance of the contract, which defts, the vendees, admitted & expressed their willingness to carry out but for the obstacle created by the death of the vendor leaving his heirs-at-law infants. The ct. under the circumstances made a decree for specific performance of the agreement, but without costs to either party; the costs of the infants to be defrayed out of the balance of purchase money payable by defts.—*WEIHE v. FERRIE* (1863), 10 Gr. 98.—*CAN.*

1566. Purchaser's action unnecessary.] — *RICHARDS v. WILLIAMS* (1843), 1 L. T. O. S. 431.

1567. Question raised not one of title—Purchaser unsuccessful—No title made until after decree.]—Where a purchaser objects to specific performance of contract for sale upon other grounds than those of title, & fails, & the vendor does not make out his title until after decree, the purchaser is liable to the costs of the vendor's suit for specific performance, except the costs of making out the vendor's title.—*ABBOTT v. CALTON* (1853), 22 L. J. Ch. 936.

1568. — Question of contract.]—Where a decree for specific performance, with inquiry as to title, is granted in an action in which questions of contract only, & not of title, are raised, the purchaser will be ordered to pay the costs of the action & inquiry upon title being shown.—*BANFIELD v. PICARD* (1911), 55 Sol. Jo. 649.

1569. Good title shown to all except immaterial portion.]—In suits for specific performance, the rule of the ct. is to make the costs follow the result; & therefore, where pltf. filed his bill for specific performance, & showed a good title to all the lands except a portion of small value, & not material to the beneficial enjoyment of the remainder.

The ct. in decreeing specific performance with compensation directed the costs to be paid by left.—*CARVER v. RICHARDS* (1860), 3 L. T. 142; 5 Jur. N. S. 667;

1570. Action brought during amicable negotiations.]—*CHESTER v. METROPOLITAN RY. CO.* (1865), 11 L. T. 699; 11 Jur. N. S. 214; 13 W. R. 333.

1571. Good possessory title shown before action brought—Title proved afterwards in chambers.]—A vendor is entitled to costs of action if he showed & offered a good possessory title before action, though it is not proved till afterwards in chambers.—*GAMES v. BONNOR* (1881), 54 L. J. Ch. 517; 33 W. R. 61, C. A.

Innotations:—Mentd. Re Nisbet & Potts' Contract, [1901] 1 Ch. 391, *Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1.

1572. Abstract not setting out all material documents—Only costs incurred after amendment of abstract.]—*BURNABY v. EQUITABLE REVERSIONARY INTEREST SOCIETY*, No. 683, *ante*.

(b) *Proceedings due to Purchaser's Conduct.*

1573. Insistence on groundless objections—Vendor deterred from producing evidence.]—In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the master reports, that a good title was not shown till after the filing of the bill, if that finding proceeded on the ground that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other & unsubstantial objections.—*LONG v. COLLIER* (1828), 4 Russ. 267; 38 E. R. 806.

Innotations:—Distd. Wilkinson v. Hartley (1852), 15 Beav. 183. *Refd. Abbott v. Swarder* (1852), 19 L. T. O. S. 311. *Mentd. Townsend v. Champenowne* (1839), 3 Y. & C. Ex. 505; *Freer v. Hesse* (1853), 4 De G. M. & G. 495.

PART V. SECT. 9, SUB-SECT. 2.—
C. (a).

1567 i. Question raised not one of title—Purchaser unsuccessful—No title made until after decree.]—*PLATT v. BLIZZARD* (1881), 29 Gr. 46.—CAN.

PART V. SECT. 9, SUB-SECT. 2.—
C. (b).

1580 i. Good title shown prior to

institution of proceedings.]—In an action for specific performance by a vendor, whose title was, to the knowledge of the purchaser, a possessory one of long standing, in conformity with a family arrangement, ample proof thereof having been offered before action:—*Held*: the vendor was entitled to his costs of action & of proving his title in the master's office.—*DAME v. SLATER* (1891), 21 O. R. 375.—CAN.

1574. Defence preventing vendor obtaining reference of title.]—In a suit for specific performance, a purchaser who set up a defence which prevented pltf. obtaining on motion a reference as to title, & failing in establishing it, was ordered to pay the costs up to, & inclusive of, the hearing.—*HYDE v. DALLAWAY* (1842), 4 Beav. 606; 8 Jur. 119; 49 E. R. 474.

1575. Effect of vendor's delay in showing title.]—*ABBOTT v. SWORDER*, No. 428, *ante*.

1576. —.]—When a vendor succeeds in a suit for specific performance, he is entitled to costs, notwithstanding the title was first shown in the master's office, if the suit was occasioned solely by the conduct of deft.—*PEERS v. SNEYD* (1853), 17 Beav. 151; 51 E. R. 990.

1577. —.]—A purchaser, who had altogether denied the vendor's right to a specific performance, ordered to pay the costs of suit, instituted by the vendor for that purpose down to the hearing, although the title was not finally completed until after the decree.—*CARRODUS v. SHARP* (1855), 20 Beav. 56; 52 E. R. 523.

Annotation:—Mentd. Barsht v. Tagg, [1900] 1 Ch. 231.

1578. —.]—Deft., a purchaser, ordered to pay all the costs, though a good title was not shown until after the institution of the suit, by the production of a declaration which was not the cause of dispute, & had not been previously required.—*BRIDGES v. LONGMAN* (1857), 24 Beav. 27; 53 E. R. 267.

Annotations:—Mentd. Re Chawner's Trusts (1869), 38 L. J. Ch. 726; *A.-G. of Victoria v. Ettersbank* (1875), L. R. 6 P. C. 354.

1579. Refusal to complete after approval of conveyance.]—*HIRST v. STOKES*, No. 1105, *ante*.

1580. Good title shown prior to institution of proceedings.]—In a suit by vendor for specific performance, costs were given to him, although both parties were in the wrong as to the only point in contest, namely, as to interest on the purchase-money, a good title having been shown prior to the institution of the suit, & it appearing that the conduct of the purchaser had prevented the completion down to that time.—*SHERWIN v. SHAKESPEARE* (1853), 17 Beav. 267; 23 L. J. Ch. 177; 21 L. T. O. S. 252; 1 W. R. 460; 51 E. R. 1036; *affd.* (1854), 5 De G. M. & G. 517; 2 Eq. Rep. 957; 23 L. J. Ch. 898; 24 L. T. O. S. 45; 18 Jur. 843; 2 W. R. 668, L. JJ.

Annotations:—Refd. Williams v. Glenton (1866), 1 Ch. App. 200. *Mentd. Regents Canal Co. v. Ware* (1857), 23 Beav. 575; *Vickers v. Hand* (1859), 26 Beav. 630; *Palmerston v. Turner* (1864), 33 Beav. 521; *Herbert v. Salisbury & Yeovil Ry.* (1866), L. R. 2 Eq. 221; *Re Phillips, Ex p. Kiveton Coal Co.* (1872), 7 Ch. App. 730. *Met. Ry. v. Defries* (1877), 2 Q. B. D. 189; *Re Riley v. Streetfield* (1886), 56 L. T. 48; *Re London Corp'n. & Tubb's Contract*, [1894] 2 Ch. 521, *Bennett v. Stone*, [1903] 1 Ch. 509.

1581. Other proceedings rendered necessary—In absence of proceedings against purchaser.]—S. contracted to sell a moiety of an estate to G., the purchase to be completed on June 21, 1854, & if "from any cause whatever" the purchase should not be completed on that day, the purchaser to pay interest. Just before June 21, the other part owner set up a claim to the entirety, & refused to produce the deeds. G. applied at distant intervals to know when the vendor would

d. Delay in asserting rights.]—Where defts. set up a defence to a bill, which if tenable would have formed sufficient ground for their having taken steps to set aside the transaction which it was now sought to enforce, but they had not done so, although twelve years had elapsed since the act was done which they questioned, & which it was shown they had all the while been aware of, the ct. ordered them to pay

Sect. 9.—Costs: Sub-sect. 2, C. (b) & (c), & D.

complete, & never expressed a wish to rescind. In 1857, S. filed a bill for partition, & died in Mar. 1858, leaving a will made in 1856, by which he devised his estates to infants, two of whom were his heirs. In July, 1861, S.'s exors. revived the partition suit, & in Jan. 1862, G. was made a party by amendment, pursuant to an arrangement made at his request in May, 1861. In July, 1862, a decree for partition was obtained & the certificate made in July, 1863. G., who had, in June, 1854, when the dispute arose with the co-owner, given notice that he would not pay interest, but had ever since employed the purchase-money in his trade, refusing to pay interest, S.'s exors., in 1864, filed a bill against him & the infant devisees for specific performance, & the Master of the Rolls decreed specific performance, & ordered G. to pay interest from June, 1854, & to pay all pltf.'s costs:—*Held*: the purchaser ought not to have been ordered to pay the whole costs, for if there had been no dispute about the interest a suit would have been necessary on account of the devise to the infants, & in such a suit the purchaser, in the opinion of KNIGHT BRUCE, L.J., would have been entitled to his costs; & in the opinion of TURNER, L.J., would in the circumstances of the case neither have received nor paid costs.—*WILLIAMS v. GLENTON* (1866), 1 Ch. App. 200; 35 L. J. Ch. 284; 13 L. T. 727; 12 Jur. N. S. 175; 14 W. R. 294, L. J.

Annotations:—*Refd.* North v. Percival, [1898] 2 Ch. 128. *Mentd.* *Re* Riley to Streatfield (1886), 34 Ch. D. 386; *Re* Hetling & Merton's Contract, [1893] 3 Ch. 269; *Re* London Corp'n. & Tubbs' Contract, [1894] 2 Ch. 524; *Re* Woods & Lewis' Contract, [1898] 2 Ch. 211, Day v. Singleton, [1899] 2 Ch. 320; *Bennett v. Stone*, [1903] 1 Ch. 509.

(c) Groundless Objections by Purchaser.

1582. Whether liable for costs.—Lands were settled on A. for life, remainder to his wife for life, remainder to their children, with a power of revocation & appointment to new uses by the husband & wife jointly; proviso that if A. should become bkpt., etc., then the limitation to him for life should cease, & the lands should go to trustees during his life, for the benefit of his wife & children. A. agreed for the sale of this estate, & proposed to make title to the purchaser by executing this power of revocation. The conveyancer on the part of the purchaser required an indemnity against A.'s having committed any secret acts of bkpey., for that the power of revocation would be extinguished by the forfeiture of the life interest of A. On a bill filed by A. to compel the performance of this contract, the ct. thought there was no ground for the objection, & that the mistake in opinion of the conveyancer could not save deft. from costs.—*MALING v. HILL* (1785), 1 Cox, Eq. Cas. 186; 29 E. R. 1121, L. C.

1583. —.]—*THORPE v. FREER*, No. 1595, *post*.

1584. —.]—To a bill by a vendor for the specific performance of a contract for the sale of property, deft. raised three objections, & at the hearing failed in two; the usual reference was made to inquire if pltf. could make a good title:—*Held*: deft. ought to pay so much of the costs of the suit as had been occasioned by his unsuccessful objections.—*SMALLWOOD v. COTTY* (1837), 6 L. J. Ch. 265.

1585. —.]—(1) Where a vendor had entered into a covenant for himself, his heirs, exors., &

administrators, not to erect certain buildings upon a piece of land contracted to be sold, & neither in the agreement for sale of the land nor the abstract of title was any notice taken of the covenant:—*Held*: the purchaser was not bound to complete his contract.

(2) Unnecessary evidence having been gone into on both sides, & some untenable exceptions having been taken to a title in a suit for specific performance of a contract for the purchase of land, the ct., though it gave judgment for deft., would not allow him his costs of the evidence or the costs occasioned by the untenable exceptions.—*BRISTOW v. WOOD* (1844), 1 Coll. 480; 14 L. J. Ch. 50; 4 L. T. O. S. 92; 9 Jur. 99; 63 E. R. 508.

1586. —.]—A trustee, having power to sell land in order to raise £600, & the expenses, put it up to sale in two lots, & sold the first for £600, & the second for £510. The second lot consisted of more than 3 acres of land, & was described in the particulars of sale as readily convertible into building ground:—*Held*: the sale of the second lot was not improper, & the purchasers must pay the costs of a suit for specific performance brought against them by the trustee.

A purchaser failing in his objections to the title, must pay the costs of the suit (*KINDERSLEY, V.-C.*).—*THOMAS v. TOWNSEND* (1852), 16 Jur. 736.

1587. —.]—*AUSTIN v. MARTIN*, No. 1117, *ante*.

1588. — On reference as to title—*Plaintiff insisting on reference.*—*ALLEN v. CURRIE*, No. 1549, *ante*.

1589. — — — Costs of action after first decree.]

—A suit was instituted by A., as vendor, against B. for the specific performance of a contract of sale of leasehold property. B. by his answer, stated that the sale had been made by auction, & insisted that A. was not entitled to a decree, on the ground that he had employed puffers at the sale. At the hearing of the cause, it was decided that the case set up by B. was not a valid defence to the suit, & the usual reference was made to the master. In the master's office, an objection was made by B. to the title, which was at once removed by A. The master found that A. had made a good title to the property, but had first shown a good title in the master's office:—*Held*: B. ought to pay all the costs of the suit after the first decree.—*WOODWARD v. MILLER* (1846), 16 L. J. Ch. 16; 8 L. T. O. S. 183; 10 Jur. 1027.

1590. — — — Costs of proceedings in which vendor's title established.]—On a sale of real estate by a trustee, under a will open to suspicion as having been obtained by undue influence, the title was approved, but before the actual completion of the contract the heir-at-law gave notice that he intended to dispute the will, & brought an action against the tenant for rent: the purchaser thereupon refused to complete, & a bill for specific performance was filed, but before it came to a hearing the action brought by the heir was tried, & a verdict given against the heir; a reference as to title was then directed, & the master having reported in favour of the title, a decree was made for specific performance. On appeal, however, by the purchaser, the Lord Chancellor ordered the case to stand over generally, with liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The Lord Chancellor

the costs of the suit.—*MILLER v. OSTRANDER* (1866), 12 Gr. 349.—*CAN.*

e. Attempt to repudiate after agreement to complete.—Action to

obtain decree for specific performance against a purchaser who sought to repudiate contract, but who, prior to hearing of action agreed to complete:—

Held: pltf. was entitled to a decree & to have costs of the action paid by deft.—*MCCREEDY v. TREANOR* (1918) 52 I. L. T. 100.—*IR.*

thereupon confirmed the decree for specific performance, & directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed, & also to pay the costs of the suit subsequently to the hearing when the reference as to title was directed; his Lordship held that at that time there had been such reasonable inquiry into the title as ought to have satisfied the purchaser, & that therefore the consequences of the further proceedings by which the will was established, both in reference to the costs of the suit for specific performance & the payment of interest, must fall on the purchaser.—*GROVE v. BASTARD* (1851), 1 De G. M. & G. 69; 42 E. R. 478, L. C.

D. No Costs Given.

1591. Title not clear on abstract.]—Decree for specific performance without costs to pltf. the vendor: the title, though established before the master, not being clear upon the abstract.—*v. COLLINGE* (1814), 3 Ves. & B. 143, n.; 35 E. R. 433.

1592. No title shown.]—*LEWIS v. LOXHAM*, No. 1200, *ante*.

1593. ———.]—Where a bill for specific performance is filed by a purchaser, & it turns out that the vendor cannot make a good title, the bill is dismissed, but without costs.—*MALDEN v. FYSON* (1816), 9 Beav. 317; 7 L. T. O. S. 108; 50 E. R. 377; *subsequent proceedings* (1847), 11 Q. B. 292. *Annotations:—**Refd.* *Swinfen v. Chelmsford* (1860), 5 H. & N. 890; *Omions v. Cohen* (1865), 2 Hem. & M. 354; *Thomas v. Rowlands* (1886), 3 T. L. R. 148.

1594. Fair objection to title.]—Specific performance decreed against a purchaser of the fee, but without costs, a fair objection having been made to the title.—*ASLABLE v. RICE* (1818), 3 Madd. 256; 56 E. R. 503.

*Annotation:—**Mentd.* *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1.

1595. ———.]—If a purchaser makes frivolous objections to a title, he pays the costs; but not if he makes a fair objection, or insists on inquiry as to a material fact, respecting which there is a fair doubt.—*THORPE v. FREEER* (1819), 4 Madd. 466; 56 E. R. 777.

1596. Vendor refusing to produce documents insisted on by purchaser.]—*NEWALL v. SMITH*, No. 621, *ante*.

1597. Allegations on both sides incorrect.]—A vendor filed a bill for specific performance, alleging that deft. had accepted the title; deft. resisted it on the ground that the bkpcy. under which pltf. claimed was invalid. Neither allegation turned out correct, & though a good title was first shown in the master's office, the decree was made without costs.—*SIDEBOTHAM v. BARRINGTON* (1842), 5 Beav. 261; 49 E. R. 578.

*Annotation:—**Refd.* *Fraser v. Wood* (1845), 8 Beav. 339.

1598. Vendor unable to convey.]—A railway co. having under their act the usual power to sell surplus lands, with a direction to offer them in the first instance to the owners of the adjoining lands, entered into a contract for sale to a stranger, & then made an offer of the same lands to the parties who were entitled to the right of pre-emption, which offer was declined; the purchaser refused to complete his contract, because the last mentioned offer had not been made prior to the contract with him, & the co. filed a bill to compel specific performance:—*Held*: the objection was a question of conveyance & not of title, & the purchaser

must complete the contract; but the ct. refused to give pltf. the costs of the suit.—*LONDON & GREENWICH RY. CO. v. GOODCHILD* (1844), 3 Ry. & Can. Cas. 507; 13 L. J. Ch. 224; 8 Jur. 455.

1599. Walver by purchaser of time for completion—Vendor unable to give vacant possession—Purchaser refusing to complete.]—Where a purchaser had by his acts waived the time of completion in the first instance & had gone on for some time inducing the vendor to incur expenses to perfect his title, & suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the ct., although it dismissed a bill filed against such a purchaser for a specific performance, dismissed it without costs.—*NOKES v. KILMOREY* (LORD) (1847), 1 De G. & Sm. 444; 63 E. R. 1141.

1600. Unsuccessful defence of imbecility & fraud.]—*MICKLETHWAIT v. NIGHTINGALE*, No. 353, *ante*.

1601. Misleading plan—Sufficient doubt to induce investigation.]—*WESTON v. BIRD*, No. 509, *ante*.

1602. Vendor's conduct necessitating action.]—A contract for the purchase of copyright from deft. not having been completed, in consequence of his having, though he considered time was of the essence of the contract, fixed a later period than that originally agreed upon for that purpose, and for the payment of the purchase-money, it was, on motion by deft. to dismiss a bill for specific performance with costs, & on cross motion by pltf. to dismiss the bill without costs:—*Held*: as pltf. had been compelled to resort to the ct. for relief, his bill must be dismissed without costs.—*GOODDAY v. SLEIGH* (1854), 24 L. T. O. S. 121; 1 Jur. N. S. 201; 3 W. R. 87.

1603. Misconduct of both parties.]—*PARR v. LOVEGROVE*, No. 1528, *ante*.

1604. Claim by third party—Independently of vendor & purchaser.]—*HESELTINE v. SIMMONS*, No. 589, *ante*.

1605. Groundless objection by purchaser.]—A vendor being entitled under a limitation to uses to bar dower, without a power of appointment, the purchaser insisted on the concurrence of the dower trustee. The trustee being abroad, the vendor filed a bill to enforce specific performance, without his being a party to the conveyance. The judge held, that the objection was well founded, & made a decree for specific performance, with an order vesting the estate of the dower trustee in the purchaser upon the execution of the conveyance by the vendor; but considering the objection, though tenable, to be frivolous & vexatious, he gave no costs to either party:—*Held*: an appeal by the purchaser, the objection was frivolous & vexatious, & ought not to have been insisted on; & costs ought not to be given to the purchaser.—*COLLARD v. ROE* (1859), 4 De G. & J. 525; 28 L. J. Ch. 560; 7 W. R. 623; 45 E. R. 204, L. C. & L. J.J.

1606. Action rendered necessary by lunacy of vendor—To obtain vesting order.]—Where, by the lunacy of a vendor, a decree in a suit for specific performance is necessary as ground for a vesting order, no costs will be given on either side.—*CRESSWELL v. HAINES* (1861), 31 L. J. Ch. 237; 8 Jur. N. S. 208; 10 W. R. 121.

*Annotation:—**Refd.* *Lysaght v. Edwards* (1876), 24 W. R. 778.

1607. Purchaser not acceding to inexpensive mode of settling dispute.]—In conditions of sale of leaseholds it was stated that the purchaser should

PART V. SECT. 9, SUB-SECT. 2.—D.

1603 i. Misconduct of both parties.]—*COLE v. CROSS* (1912), 19 W. L. R. 780; 1 W. W. R. 458; 1 D. L. R. 127; 22 Man. L. R. 1.—CAN.

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have possession on a certain day; "all outgoing" up to that day being cleared by the vendors. The vendors refused to pay half a quarter's rent which had accrued due between the last quarter day & the date fixed for completion. The purchaser, after several attempts at accommodation, declined to complete:—*Held*: the vendors were entitled to specific performance, subject to their paying the half quarter's rent in question; but as the purchaser had refused to accede to inexpensive modes which had been proposed for adjusting the dispute, there should be no order as to costs.—*LAWES v. GIBSON* (1865), L. R. 1 Eq. 135; 35 L. J. Ch. 148; 13 L. T. 316; 29 J. P. 792; 11 Jur. N. S. 873.

1608. Vendor able to discover defect before sale.]—*PHILLIPSON v. GIBSON*, No. 674, *ante*.

1609. Purchaser's delay in making objection.]—Where a decree is made for specific performance of a contract for sale, & an inquiry is directed in general terms whether the vendor can make a good title, it must be understood to mean a good title having regard to the terms of the contract; but if the vendor wishes to prevent objections which have been waived before the suit from being renewed under the inquiry, that point should be considered

at the hearing & notices in the decree. Land was described in a contract for sale as freehold, but it was shown by the abstract that it was formerly copyhold, & had been enfranchised under the Enfranchisement Acts. A decree was afterwards made at the suit of the vendor for specific performance & a general inquiry directed as to title, in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under the Enfranchisement Acts:—*Held*: the objection was fatal to the title; but as the purchaser had taken the objection so late he was not allowed his costs.—*UPPEYTON v. NICKOLSON* (1871), 6 Ch. App. 436; 40 L. J. Ch. 401; 25 L. T. 4; 35 J. P. 532; 19 W. R. 733, L. J.J.

Annotations:—*Refd.* *McGrory v. Alderdale Estate Co.*, [1918] A. C. 503. *Mentd.* *Re Lord & Fullerton's Contract* (1895), 41 W. R. 195; *Re Jackson & Haden's Contract*, [1906] 1 Ch. 412.

1610. Unsuccessful action by purchaser on question other than title—Complications arising by vendor's conduct.]—*BALLARD v. SHUTT*, No. 1543, *ante*.

1611. Vendor failing to disclose covenant with third party.]—*GREENHALGH v. BRINDLEY*, No. 1375, *ante*.

1610 i. Unsuccessful action by purchaser on question other than title—Complications arising by vendor's conduct.]—*EDGECOMBE v. MCLELLAN* (1907), 4 N. B. Eq. Rep. 1; 6 E. L. R. 46.—*CAN.*

i. Unsuccessful defence of fraud.]—The vendee set up that he had been led into drink by the fraudulent contrivances of the vendor, & while intoxicated had been induced to sign the agreement, in which the price stipulated was most exorbitant. It was

clearly shown that the purchaser had executed the contract while intoxicated, & that the price was exorbitant, but the ct. exonerated the vendor from any fraud, & therefore refused deft. his costs on dismissing the bill for specific performance.—*SCHOFIELD v. TUMMONDS* (1858), 6 Gr. 568.—*CAN.*

g. —.]—*TENUTE v. WALSH* (1893), 21 O. R. 309.—*CAN.*

h. Delay in completion of title.]—A purchaser from defts. at a public

auction, filed a bill for specific performance, injunction, & compensation, alleging misconduct of deft.'s agents at the sale & otherwise, & consequent damage to him, which allegations were partly disproved by the evidence. However, as the delay in completing the title was owing in a great measure to defts., the ct. made a decree for specific performance & injunction; but without costs or compensation.—*MOSSOP v. TRUST & LOAN CO.* (1865), 11 Gr. 204.—*CAN.*

SPECIFICATION.

See BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; PATENTS AND INVENTIONS;
WORK AND LABOUR.

SPIRITUOUS LIQUORS.

See INTOXICATING LIQUORS; REVENUE

SPORTING RIGHTS.

See AGRICULTURE; COMMONS AND RIGHTS OF COMMONS; GAME; TRESPASS.

SPRING GUNS.

See CRIMINAL LAW AND PROCEDURE.

SQUARES.

See OPEN SPACES AND RECREATION GROUNDS.

STAGE COACHES.

See CARRIERS ; STREET AND AERIAL TRAFFIC.

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See COPYRIGHT AND LITERARY PROPERTY ; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

STAKEHOLDER.

See AUCTION AND AUCTIONEERS ; CONTRACT ; GAMING AND WAGERING ; INTERPLEADER.

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<i>Bills</i>	See PARLIAMENT.
<i>Colonial Legislative Powers</i>	„ DEPENDENCIES.
<i>Conflict of Laws</i>	„ CONFLICT OF LAWS.
<i>Departments of State</i>	„ CONSTITUTIONAL LAW.
<i>Enactment of Statute</i>	„ PARLIAMENT.
<i>Estates of the Realm</i>	„ CONSTITUTIONAL LAW; PARLIAMENT.

<i>Executive Government</i>	See CONSTITUTIONAL LAW.
<i>Judicial Decisions as Authorities</i>	„ JUDGMENTS.
<i>Parliamentary Procedure</i>	„ PARLIAMENT.
<i>Prerogatives of the Crown</i>	„ CONSTITUTIONAL LAW.

Part I.—In General.

1. Meaning of statute—Act.]—The word statute may mean what we call an Act of Parliament, or a code, as the Statute of Westminster I, or all the Acts passed during one session of Parliament which was the original meaning of the word (LORD CAMPBELL, C.J.) *R. v. BAKEWELL* (1857), 7 E. & B. 848; 26 L. J. M. C. 150; 29 L. T. O. S. 209; 3 Jur. N. S. 1003; 5 W. R. 655; 21 J. P. Jo. 357; 119 E. R. 1161.

2. ——— Code.]—*R. v. BAKEWELL*, No 1, *ante*.

3. ——— All Acts of a session.]—*R. v. BAKEWELL*, No 1, *ante*.

4. Distinguished from Parliamentary declaration.]—The Earl was beheaded by Henry of Lancaster when he invaded England, & before he had received or even claimed the Crown. There was no evidence whether there had been any trial, or form of trial, before the beheading. When Henry was declared King a proceeding took place in Parliament in which the Commons were represented to have prayed that all that was done in “the pursuit, arrest, & judgment” of the Earl might be declared good for the common profit of the realm. The King, with the assent of the Lords Temporal, declared that it was so. This proceeding was entered on the *Placita Coronæ* in Parliament, but not on the Rolls of Parliament.

Semble: this was not an Act of Parliament; but, it was a solemn adjudication pronounced by the King in open Parliament at the prayer of the Commons, & with the advice of the Lords, & must be taken as a Parliamentary declaration that, whatever had been the nature of the grant to the Earl, it was wholly at an end.—*WILTES PEERAGE CLAIM* (1869), L. R. 4 H. L. 126.

Annotations:—**Mentd.** *Re Buckhurst Peerage* (1876), 2 App. Cas. 1; *Rhondda's Claim*, [1922] 2 A. C. 339.

5. Objects of statute law.]—Statute law, which corrects, abridges and explains the common law (COKE, C.J.).—*ROWLES v. MASON* (1612), 2 Brownl. 192; 123 E. R. 892.

6. ———.]—Every act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law (LORD LANGDALE, M.R.).—*ELY (DEAN) v. BLISS* (1842), 5 Beav. 574; 11 L. J. Ch. 351; 6 Jur. 496; 19 E. R. 700; *on appeal* (1844), 3 L. T. O. S. 98, L. C.

7. Validity of statutes—Necessity for concurrence of three estates of the realm.—Proceedings by King & Lords.]—*ANON.* (1488), Jenk. 177; 145 E. R. 117.

8. ——— ——— ———.]—The words, by authority of Parliament, in an Act or charter are sufficient to make it an Act of Parliament.

An Act of Parliament penned by assent of the King and of the Lords Spiritual & Temporal & of the Commons, is a good Act. But an Act penned that the King with the assent of the Lords, or that the King with the assent of the Commons, is no Act of Parliament.

If they be entered in the Parliament roll & always allowed for Acts of Parliament, it shall be intended that it was by authority of Parliament (*per CUR.*).—*THE PRINCE'S CASE* (1606), 8 Co. Rep. 13b; 77 E. R. 496.

Annotations:—**Consd.** *G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927. **Refd.** *Dublin Corpn. Case* (1619), Palm. 1; *Hutchins v. Player* (1663), O'Bridg. 272; *A.-G. v. London (Bp.)*, *Lancaster & Birch* (1693), 4 Mod. Rep. 200; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *A.-G. v. Plymouth Corpn.* (1754), Wight. 134; *Clayton v. A.-G.* (1834), 1 Coop. temp. Cott. 97; *Penryn Corpn. v. Holm* (1877), 2 Ex. D. 328. **Mentd.** *Noedler v. Winchester (Bp.)* (1614), Hob. 220; *Osseries (Bp.) Case* (1619), Palm. 22; *St. Katherine's Hospital Case* (1671), 1 Vent. 149; *R. v. Warden of the Fleet* (1700), 1 Eq. Cas. Abr. 129; *Grand Opinion for Prerogative Concerning the Royal Family* (1717), Fortes. Rep. 401; *Jones v. Strafford* (1730), 3 P. Wms. 79; *Basset v. Basset* (1744), 3 Atk. 203; *Lomax v. Holmden* (1749), 1 Ves. Sen. 290; *Millar v. Taylor* (1769), 4 Burr. 2303; *A.-G. to Prince of Wales v. St. Aubyn* (1811), Wight. 167; *Jewison v. Dyson* (1842), 9 M. & W. 540; *Tolson v. Kaye* (1843), 6 Man. & G. 536; *Wensleydale Peerage Case* (1856), 8 State Tr. N. S. 479; *Beauchamp v. Winn* (1869), 4 Ch. App. 562, *Re Buckhurst Peerage* (1876), 2 App. Cas. 1.

9. ——— ——— Proceedings by Commons.]—*REGICIDES TRIAL. HARRISON'S CASE* (1660), 5 State Tr. 947, 1026.

10. ——— ——— Proceedings by King—Proceedings in Convocation.]—No new laws can be made to bind the whole people, but by the King, with the advice & consent of both Houses of Parliament, & by their united authority.

Every man may be said to be party to, & the consent of every subject is included in, an Act of Parliament; but in Canons made in Convocation, & confirmed by the Crown only, all these are wanting, except the royal assent.

Subsequent Acts of Parliament in the affirmation giving new penalties, do not repeal former ordained by preceding Acts without negative words.

A later Act of Parliament hath never been construed to repeal a prior Act, without words of repeal, unless there be a contrariety & repugnancy between them, or at least some notice taken of the former law in the subsequent one, so as to indicate an intention in the law makers to repeal it (LORD

PART I.

Validity of statutes.]—When a appears on its face to have

been duly passed by a competent legislature, the cts. must assume that all things have been rightly done in respect of its passage, & cannot

entertain any argument that there is a defect of parliamentary procedure lying behind the Act.—*R. v. IRWIN*, [1926] Exch. C. R. 127.—**CAN.**

HARDWICKE, C.J.).—MIDDLETON v. CROFTS (1736), 2 Atk. 650; Ridg. temp. H. 109; Cunn 114; Lee temp. Hard. 326; 26 E. R. 788.

Annotations:—*Mentd.* *Ex p.* Brinckman (1895), 11 T. L. R. 387; Bell v. Graham, Marshall v. Graham (1907), 76 L. J. K. B. 690.

11. ——— **Proceedings by King & Commons.]**—THE PRINCE'S CASE, No. 8, *ante*.

12. ——— ———.]—Where the commons by petition prayed the King, that a charter made, & the liberties thereby granted, to a corpn. might be confirmed in Parliament; & the King answered, that it was assented & agreed in Parliament, that the liberties in the petition mentioned, should be confirmed under the King's great seal—& the charter was confirmed by the King accordingly:—*Held*: the proceeding in Parliament was not an Act of Parliament, so as to prevent the King from granting to the corpn. a new charter, varying the mode of election of their officers provided by the former charter.—*R. v. HAYTHORNE* (1826), 5 B. & C. 410; 8 Dow. & Ry. K. B. 228; 108 E. R. 153.

13. ——— ——— **With advice of Lords.]**—WILTES PEERAGE CLAIM, No. 4, *ante*.

——— ———.]—*See, now*, Parliament Act, 1911 (c. 13).

14. ——— **Conclusiveness in courts.]**—*Ex p.* SELWYN (CANON) (1872), 36 J. P. Jo. 54.

15. **May override common law principles of justice.]**—An Act of Parliament may be so worded as expressly to authorise a procedure inconsistent with the principles of justice recognised by the common law of England. Parliament is omnipotent (VAUGHAN WILLIAMS, L.J.).—*R. v. LOCAL GOVERNMENT BOARD, Ex p. ARLIDGE*, [1914] 1 K. B. 160; 83 L. J. K. B. 86; 109 L. T. 651; 78 J. P. 25; 30 T. L. R. 6; 11 L. G. R. 1186, C. A.; *on appeal, sub nom. LOCAL GOVERNMENT BOARD v. ARLIDGE*, [1915] A. C. 120, H. L.

Annotations:—*Mentd.* Hall v. Manchester Corpn. (1915), 84 L. J. Ch. 732; *R. v. Amphlett*, [1915] 2 K. B. 223; Cassel v. Inglis, [1916] 2 Ch. 211; *R. v. Central Tribunal, Ex p. Parton* (1916), 86 L. J. K. B. 799; Clements v. County of Devon Insee. Committee, [1918] 1 K. B. 94; De Verteuil v. Knaggs, [1918] A. C. 557; *R. v. London Appeal Tribunal, Ex p. Sparrow* (1918), 62 Sol. Jo. 383; Dowling v. G. E. Ity. (1919), 88 L. J. K. B. 380; *R. v. Housing Appeal Tribunal*, [1920] 3 K. B. 334; Everett v. Griffiths, [1921] 1 A. C. 631; Wilson v. Esquimalt & Nanaimo Ity., [1922] 1 A. C. 202.

Printing of statutes.]—*See* PRESS & PRINTING, Vol. XXXVII., p. 552, Nos. 138, 139.

Judicial notice of statutes.]—*See* EVIDENCE, Vol. XXII., pp. 144, 145, Nos. 1200–1216; Interpretation Act, 1889 (c. 63), s. 9.

Part II.—Classification and Framework.

SECT. 1.—CLASSIFICATION.

SUB-SECT. 1.—PUBLIC, LOCAL, PRIVATE.

A. In General.

16. **Origin of classification—Resolution of Lords & Commons—Requiring publication in separate volumes.]**—(1) On May 1, 1797, the House of Lords resolved that the Queen's printer should class the general statutes, & special & public, & local & private, in separate volumes, & on May 8, 1801, there was a resolution of the House of Commons, agreed to by the House of Lords, that the general statutes, public, local & personal, in each session, should be classed in separate volumes: that was the commencement of that division of the statutes (PARKE, B.).

(2) It [7 & 8 Vict. c. 84] is clearly of a local & personal nature, local in being confined to local limits, & personal as affecting a particular description of persons only, as distinguished from that of all the Queen's subjects (PARKE, B.).—*RICHARDS v. EASTO* (1846), 3 Dow. & L. 515; 15 M. & W. 244; 15 L. J. Ex. 163; 8 L. T. O. S. 253; 10 Jur. 695; 153 E. R. 840.

Annotations:—*As to* (2) *Consd.* *R. v. L. C. C.*, [1893] 2 Q. B. 454. *Refd.* *Barnet v. Cox* (1847), 11 Q. B. 617; *Filliter v. Phippard* (1817), 11 Q. B. 347; *Law v. Dodd* (1848), 1 Exch. 845; *Moore v. Shepherd* (1854), 10 Exch. 424; *Shepherd v. Sharp* (1856), 1 H. & N. 115; *Carr v. Royal Exchange Assee.* (1862), 1 B. & S. 956.

17. **Dependent on substance & character.]**—The test of what are "local & personal" Acts is the substance & character of the Acts themselves, & not the mere form of description.—*R. v. LONDON COUNTY COUNCIL* (1893), 69 L. T. 440; 37 Sol. Jo. 619, D. C.; *on appeal*, [1893] 2 Q. B. 454, C. A.

Annotation:—*Refd.* *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), Ltd., [1924] 1 K. B. 171.

18. **Not dependent on technical considerations—Clause declaring Act to be public.]**—*DAWSON v. PAVER*, No. 1689, *post*.

19. **Statutes in part public.]**—An Act of Parliament concerning the revenue of the King is a public law; but it may be private in respect to some clauses in it relating to a private person (HOLT, C.J.).—*ANON.* (1698), 12 Mod. Rep. 249; 88 E. R. 1298.

Annotation:—*Consd.* *R. v. L. C. C.*, [1893] 2 Q. B. 454.

20. ———.]—An Act of Parliament may be general in part & particular in other part (HOLT, C.J.).—*INGRAM v. FOOT* (1701), 12 Mod. Rep. 611; 1 Ld. Raym. 708; 88 E. R. 1555.

Annotation:—*Refd.* *R. v. L. C. C.*, [1893] 2 Q. B. 454.

21. ———.]—*R. v. LONDON COUNTY COUNCIL*, No. 22, *post*.

B. Public General Acts.

22. **Characteristics—Application to whole community.]**—Now, a general Act, *prima facie*, is that which applies to the whole community. In the natural meaning of the term it means an Act of Parliament which is unlimited both in its area & as regards the individual, in its effects; & as opposed to that you get statutes which may well be public because of the importance of the subjects with which they deal & their general interest to the community, but which are limited in respect of area, a limitation which makes them local, or limited in respect of individuals or persons a limitation which makes them personal (BOWEN, L.J.).

All Acts which deal with the administration of justice differ *in toto* from the class of local & personal Acts. They are not limited in the true sense either as regards place or persons (BOWEN, L.J.).

It does not require much authority to show that when the Legislature speaks of amending any local or personal Act its language is to be applied to portions of Acts which are local & personal just as much as to an Act which is entirely of that

PART II. SECT. 1, SUB-SECT. 1.—B.

22 1. **Characteristics—Application to whole community.]**—*MARKLAND v. BARTLET* (1824), Tay, 146.—*CAN.*

nature. The question is not in such a case whether the entire statute is local & personal, but whether the portion of the statute which is proposed to be amended is so (BOWEN, L.J.).

Although some parts of an Act of Parliament may be public & general, yet other parts of the same Act of Parliament may be local & personal (KAY, L.J.).—*R. v. LONDON COUNTY COUNCIL*, [1893] 2 Q. B. 454; 63 L. J. Q. B. 4; 69 L. T. 580; 58 J. P. 21; 42 W. R. 1; 9 T. L. R. 601; 37 Sol. Jo. 669; 4 R. 531, C. A.

Annotation:—*Reid. R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd., [1924] 1 K. B. 171.*

23. — Rights of public involved.—Metropolitan Police Acts are not “Acts of a local & personal nature” within Limitations of Actions & Costs Act, 1842 (c. 97), s. 5, which extends the time of bringing actions under such Acts to two years.

They are classed with the “public & general Acts” & not with the “public local & personal Acts” according to the division directed by the Houses of Parliament as mentioned in *Richards v. Easto*, No. 16, *ante*; & they are not, in our judgment, of a local & personal nature within Limitations of Actions & Costs Act, 1842 (c. 97), considering the public importance of the rights involved in them & the generality of their application in all districts within Metropolitan Police Acts (DENMAN, C.J.).—*BARNETT v. COX* (1846), 9 Q. B. 617; 2 New Mag. Cas. 16; 2 New Sess. Cas. 486; 16 L. J. M. C. 27; 8 L. T. O. S. 160; 11 J. P. 118; 115 E. R. 1410; *sub nom.* *BARRETT v. COX*, 11 Jur. 118.

Annotations:—*Dbtd. Moore v. Shepherd* (1854), 10 Exch. 424. *Distd. Shepherd v. Sharp* (1856), 1 H. & N. 115. *Reid. R. v. L. C. C., [1893] 2 Q. B. 454.*

24. — Area—Application to unlimited area.—*R. v. LONDON COUNTY COUNCIL*, No. 22, *ante*.

25. — Application to wide area.—*BARNETT v. COX*, No. 23, *ante*.

26. — Unlimited in effect.—*R. v. LONDON COUNTY COUNCIL*, No. 22, *ante*.

27. — Publication among public general Acts.—*BARNETT v. COX*, No. 23, *ante*.

28. General & special Acts distinguished.—All statutes which concern the King are general laws, of which the judges will take notice without pleading.—*CROMWELL'S (LORD) CASE* (1581), 4 Co. Rep. 12 b.; 76 E. R. 877.

Annotations:—*Mentd. Birchley's Case* (1585), 4 Co. Rep. 16a; *Davis v. Gardiner* (1593), 4 Co. Rep. 16b; *Shrewsbury v. Stanhop* (1594), Poph. 66; *Brittridge's Case* (1602), 4 Co. Rep. 18b; *Frost v. Eyre* (1616), 3 Bulst. 265; *Wright v. Gerrard* (1618), Hob. 306; *Say & Seal v. Stephens* (1628), Cro. Car. 135; *Barnardiston v. Soame* (1674), 6 State Tr. 1063; *Shaftsbury v. Digby* (1676), Freem. K. B. 429; *Townsend v. Hughes* (1676), Freem. K. B. 222; *How v. Prin* (1702), 7 Mod. Rep. 107; *Oldroyd v. Crampton* (1837), 7 L. J. C. P. 57; *Edsall v. Russell* (1842), 4 Man. & G. 1090; *Bremridge v. Latimer* (1864), 4 New Rep. 285.

29. ——*HOLLAND'S CASE* (1597), 4 Co. Rep. 75a; 76 E. R. 1047; *sub nom.* *ARMIGER v. HOLLAND*, Cro. Eliz. 601; *Moore*, K. B. 542.

Annotations:—*Reid. Colt & Glover v. Coventry & Lichfield (Bp.)* (1616), Hob. 140; *Dodson v. Lynn* (1637), Cro. Car. 475; *Apperley v. Hereford (Bp.)* (1833), 9 Bing. 681; *Alston v. Atlay* (1837), 7 Ad. & El. 289. *Mentd. R. v. Canterbury (Archbp.)* (1634), Cro. Car. 354; *R. v. London (Bp.)* (1639), W. Jo. 404; *Swift v. Heirs* (1639), March. 31; *Yates v. Dryden* (1640), Cro. Car. 589; *Williams v. Fry* (1672), 3 Keb. 19; *R. v. London (Bp.)* (1694), Comb. 300. *R. v. Mason* (1702), 2 Salk. 447; *Wolferstan v. Lincoln (Bp.)* (1763), 2 Wils. 174; *Botham v. Gregg* (1834), 10 Bing. 352.

30. ——*R. v. LONDON COUNTY COUNCIL*, No. 22, *ante*.

27 i — *Publication among public Acts.*—An Act is not a public because it contains a clause to that & is placed among public Acts

in the statute book.—*FIRST OF MAY MINING CO. v. CARIBOO GOLD FIELDS, LTD.* (circa. 1895), 2 M. M. Cas. CAN.

C. Local and Personal Acts.

See, generally, Part VII., post.

31. Characteristics—Application to particular area.—An Act of Parliament for establishing a court of requests, empowering certain comrs. to adjudicate on demands, not exceeding a certain amount, by any persons against debts resident within certain limits, & having a clause making it a public Act, is a “public local, & personal Act,” within Limitations of Actions & Costs Act, 1842 (c. 97), s. 5.—*COCK v. GENT* (1843), 12 M. & W. 234; 1 Dow. & L. 413; 13 L. J. Ex. 24; 2 L. T. O. S. 152; 8 J. P. 25; 152 E. R. 1184.

Annotations:—*Consd. Richards v. Easto* (1846), 15 M. & W. 244. *Distd. Carr v. Royal Exchange Asso.* (1862), 1 B. & S. 956.

32. ——*RICHARDS v. EASTO*, No. 16, *ante*.

33. ——*R. v. LONDON COUNTY COUNCIL*, No. 22, *ante*.

34. — Application to particular persons.—*RICHARDS v. EASTO*, No. 16, *ante*.

35. ——*R. v. LONDON COUNTY COUNCIL*, No. 22, *ante*.

36. — Publication among local & personal Acts.—55 Geo. 3 is avowedly classed among the local & personal Acts. It is so printed by the King's printer, & must be taken to be an Act commonly called local & personal. [32 Geo. 3] is in *pari materia* with 55 Geo. 3, & must, therefore, be considered to be of the same character with that (POLLOCK, C.B.).—*MOORE v. SHEPHERD* (1854), 10 Exch. 424; 3 C. L. R. 54; 3 W. R. 57; 156 E. R. 502.

Annotation:—*Distd. Carr v. Royal Exchange Asso.* (1862), 1 B. & S. 956.

37. ——Statutes which, since the resolution of the House of Commons in 1801, have been printed by the King's printers amongst the public local & personal Acts, are statutes commonly called public, local & personal within Limitations of Action & Costs Act, 1842 (c. 97), s. 5.—*SHEPHERD v. SHARP* (1856), 1 H. & N. 115; 25 L. J. Ex. 254; 27 L. T. O. S. 274; 20 J. P. 676; 4 W. R. 570; 156 E. R. 1140; *sub nom.* *SHARP v. SHEPHERD*, 2 Jur. N. S. 617, Ex. Ch.

Annotation:—*Consd. R. v. L. C. C., [1893] 2 Q. B. 454.*

D. Private Acts.

See Part VII., post.

38. Characteristics—Application to particular class of persons—Number immaterial.—*NICHOLLS v. TIRRETT* (1702), 7 Mod. Rep. 96; 87 E. R. 1118.

39. — All persons using canal.—*BRETT v. BEALES*, No. 1686, *post*.

40. ——*R. v. LONDON COUNTY COUNCIL*, No. 22, *ante*.

SUB-SECT. 2.—DECLARATORY AND ENACTING.
See Part IV., Sect. 9, post.

SUB-SECT. 3.—FISCAL AND REVENUE.
See Part VI., post.

SUB-SECT. 4.—PENAL AND REMEDIAL.
See Part V., post.

b. *Objects & scope general Provision for special application to particular places immaterial.*—*RUSSELL v. R.* (1882), 7 App. Cas. 829, P. C.—CAN.

*Sect. 1.—Classification: Sub-sects. 5, 6, 7, 8 & 9.
Sect. 2: Sub-sect. 1, A. & B.; sub-sects. 2 & 3.]*

SUB-SECT. 5.—ENABLING AND RESTRAINING.
See Part IV., Sect. 10, post.

SUB-SECT. 6.—OBLIGATORY AND PERMISSIVE.
See Part IV., Sect. 11, post.

SUB-SECT. 7.—MANDATORY AND DIRECTORY.
See Part IV., Sect. 8, post.

SUB-SECT. 8.—AFFIRMATIVE AND NEGATIVE.
See Part IV., Sect. 7, sub-sect. 8, post.

SUB-SECT. 9.—TEMPORARY AND PERPETUAL.
See Part IV., Sect. 12, post.

SECT. 2.—FRAMEWORK.

SUB-SECT. 1.—HEADING OR TITLE.

A. In General.

See, generally, Short Titles Act, 1896 (c. 14).

41. Acts not originally intitled.]—Originally there were no titles to the Acts, but only a petition & the King's answer (LORD HARDWICKE, C.).—*A.-G. v. WEYMOUTH* (LORD) (1743), Amb. 20; 27 E. R. 11, L. C.

Annotations:—Refd. Salkeld v. Johnson (1848), 2 Exch. 256. **Mentd.** *Arnold v. Chapman* (1748), 1 Ves. Sen. 108; *Mogg v. Hodges* (1750), 2 Ves. Sen. 52; *A.-G. v. Tyndall* (1761), 2 Eden, 207; *Mvers v. Perigal* (1852), 17 Jur. 115; *Jeffries v. Alexander* (1860), 8 H. L. Cas. 591, *Arden v. Arden* (1885), 29 Ch. D. 702.

42. —.]—The title of the Act is but a new usage & begun about 11 Hen. 7 (TREBY, C.J.).—*CHANCE v. ADAMS* (1696), 1 Ld. Raym. 77; 91 E. R. 948.

Annotations:—Refd. Doe d. Burtwhistle v. Vardill (1810), 6 Bing. N. C. 385; *Nixon v. Nanney* (1841), 1 Q. B. 747; *Coomber v. Berks JJ.* (1882), 9 Q. B. D. 17. **Mentd.** *Dyer v. Best* (1866), L. R. 1 Exch. 152.

Short title.]—*See Part X., Sect. 2, post.*

Use of title in construing statute.]—*See Part III., Sect. 2, sub-sect. 8, A., post.*

B. Whether Part of Statute.

43. Former law.]—The style or title of an Act is not parcel of the Act.—*POWLER'S CASE* (1610), 11 Co. Rep. 29 a; 77 E. R. 1181.

Annotations:—Refd. Salkeld v. Johnson (1848), 2 Exch. 256. **Mentd.** *Foster's Case* (1615), 11 Co. Rep. 58b; *Holmes's Case* (1631), Cro. Car. 376; *Bealy v. Sampson* (1689), 2 Vent. 93; *R. v. Whistler* (1702), 2 Ld. Raym. 842; *Ratcliffe's Case* (1719), 1 Stra. 267; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *R. v. Breeme* (1780), 1 Leach, 220.

44. —.]—(1) The title of an Act of Parliament is not a part of the law or enacting part, no more than the title of a book is part thereof, for the title is not the law, but the name or description given to it by the makers (HOLT, C.J.).

(2) The preamble of a statute is no part of it, but contains generally the motives or inducements thereof (HOLT, C.J.).—*MILLS v. WILKINS* (1703), Holt, K. B. 662; 6 Mod. Rep. 62; 2 Salk. 609; 3 Salk. 331; 90 E. R. 1266.

Annotations:—As to (1) Apld. Salkeld v. Johnson (1848), 2 Exch. 256. **Refd.** *R. v. Longmead* (1795), 3 Leach, 694; *Coomber v. Berks JJ.* (1882), 9 Q. B. D. 17.

45. —.]—*A.-G. v. WEYMOUTH* (LORD), No. 41, ante.

46. —.]—The title is no part of the law; it does not pass with the same solemnity as the law itself (MANSFIELD, C.J.).—*R. v. WILLIAMS* (1757), as reported in 2 Keny. 68; 1 Wm. Bl. 93; 96 E. R. 51.

Annotations:—Refd. R. v. Wallis (1793), 5 Term Rep. 375; *Salkeld v. Johnson* (1848), 2 Exch. 256. **Mentd.** *R. v. M'Kay* (1826), 5 B. & C. 640; *Darley v. R.* (1846), 12 Cl. & Fin. 520; *R. v. Grimshaw* (1847), 17 L. J. Q. B. 19; *Lloyd v. R.* (1862), 2 B. & S. 656; *R. v. Backhouse* (1866), 7 B. & S. 911.

47. —.]—No more argument can justly be built upon the title prefixed in some editions of the statutes, than upon the marginal notes against its different sections (TINDAL, C.J.).—*BIRTWHISTLE v. VARDILL* (1840), 7 Cl. & Fin. 895; 7 E. R. 1308; *sub nom. Doe d. BIRTWHISTLE v. VARDILL*, West. 500; 1 Scott, N. R. 828; *sub nom. Doe d. BURTWHISTLE v. VARDILL*, 6 Bing. N. C. 385, H. L.

Annotations:—Mentd. Re Wright's Trusts (1856), 2 K. & J. 595; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Skottowe v. —* (1871), 40 L. J. Ch. 366; *Harvey v. Farnie* (1880) 6 P. D. 35; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Re Andros, Andros v. Andros* (1883), 24 Ch. D. 637; *Escallier v. Escallier* (1885), 54 L. J. P. C. 1; *Re Grey's Trusts, Grey v. Stamford*, [1892] 3 Ch. 88.

48. —.]—*SALKELD v. JOHNSON* (OR JOHNSTON), No. 119, post.

49. —.]—The title of an Act of Parliament is no part of the law, but it may tend to show the object of the legislature (WIGHTMAN, J.).—*JOHNSON v. UPHAM* (1859), 2 E. & E. 250; 28 L. J. Q. B. 252; 33 L. T. O. S. 327; 5 Jur. N. S. 681; 121 E. R. 95.

Annotations:—Refd. Fenton v. Thorley, [1903] A. C. 443; *Re Boaler, Re Vexatious' Actions Act, 1896*, [1915] 1 K. B. 21. **Mentd.** *Fell v. Whittaker* (1871), L. R. 7 Q. B. 120.

50. —.]—(1) An Act of Parliament, though not expressly repealed by a subsequent Act, is by being brought into contradiction with it, virtually repealed either in whole or in part (COCKBURN, C.J.)

(2) Recitals in a private Act of Parliament could never be held to bind persons who were not parties to the Act (COCKBURN, C.J.).

(3) . . . The title of the Act, which I apprehend is no part of the Act & ought not in strictness to be referred to (BYLES, J.).

(4) An estate Act is to be construed according to the intention of the Legislature clearly expressed therein, & its validity cannot be questioned on the suggested ground that all parties who ought to have been were not before Parliament during its discussion or that Parliament assented to it under a false impression imposed upon them by interested parties in the absence of other parties equally interested.

(5) Where the performance of an Act is made a condition precedent to the exercise of a power, & the performance afterwards becomes impossible by act of law, the result is, that the exercise of the power becomes impossible, not that it can be exercised without the performance of the act.—*SHREWSBURY (EARL) v. SCOTT* (1859), 6 C. B. N. S. 1; 29 L. J. C. P. 34; 33 L. T. O. S. 368; 141 E. R. 350; *affd.* (1860), 6 O. B. N. S. 221, Ex. Ch.

Annotations:—Generally, Refd. Lang v. Purves (1862), 15 Moo. P. C. C. 389; *Ormond Investment Co. v. Betts*, [1928] A. C. 143.

51. —.]—*CLAYDON v. GREEN, GREEN v. CLAYDON* No. 72, post.

52. Title read as part of statute.]—The title of an Act of Parliament is to be read as part of the enactments.

Now, & for some years past, the title of an Act of Parliament has been part of the Act. In old

d. — *Recitals in private & local statutes.*]—Recitals in private & local statutes are not conclusive evidence of the matters recited.—A.-G. OF BRITISH COLUMBIA v. A.-G. OF CANADA (1901), 8 B. C. R. 242; 11 B. C. 258.—CAN.

2.—*Framework: Sub-sects. 4, 5, 6, & 7, A.*

SUB-SECT. 4.—HEADING OF PARTS.

61. Nature of heading—Distinguished from marginal notes.]—These various headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sects. which immediately follow them, as a preamble to a statute may be looked to, to explain its enactments, but as affording, as it appears to me, a better key to the constructions of the sects. which follow than might be afforded by a mere preamble (CHANNELL, B.).—EASTERN COUNTIES & LONDON & BLACKWALL RY. COS. v. MARRIAGE (1860), 9 H. L. Cas. 32; 31 L. J. Ex. 73; 11 E. R. 639, H. L.; *reversg.* S. O. *sub nom.* MARRIAGE v. EASTERN COUNTIES RY. CO. & LONDON & BLACKWALL RY. CO. (1857), 2 H. & N. 625, Ex. Ch.

*Annotations:—*Consd. Shiel v. Sunderland Corpn. (1861), 6 H. & N. 796; Latham v. Lafone (1867), L. R. 2 Exch. 115. *Distd.* Union S.S. Co. of New Zealand v. Melbourne Harbour Trust Comrs. (1884), 9 App. Cas. 365. *Refd.* Wilson v. Halifax Corpn. (1868), L. R. 3 Exch. 114; Hammersmith & City Ry. v. Brand (1869), L. R. 4 H. L. 171; Arrow Shipping Co. v. Tyne Improvement Comrs., [1894] A. C. 508. *Mentd.* Tetley v. Wanless (1866), L. R. 1 Exch. 21.

62. ———.]—I may observe that these headings in this Act are not to be looked upon as marginal notes inserted, perhaps, not by Parliament, but by the printer, because they are referred to in the body of the Act itself (LORD CAIRNS, C.).—LANG v. KERR, ANDERSON & CO. (1878), 3 App. Cas. 529, H. L.

63. ———.]—These headings are not, in my opinion, mere marginal notes, but the sects. in the group to which they belong must be read in connection with them & interpreted by the light of them (LORD HERSHELL.).—INGLIS v. ROBERTSON, [1898] A. C. 616; 67 L. J. P. C. 108; 79 L. T. 224; 14 T. L. R. 517, H. L.

64. ——— Part of Act of Parliament.]—I cannot come to the conclusion that the heading of a series of sects. introduced into an Act of Parliament is not to be considered as part of the Act. I think that that word “appeal” at the head of the sect. may properly be considered as part & used for the purpose of construing any doubtful matter in the sects. under that very heading (BRETT, L.J.).—R. v. LOCAL GOVERNMENT BOARD (1882), 10 Q. B. D. 309; 52 L. J. M. C. 4; 48 L. T. 173; 47 J. P. 228; 31 W. R. 72, C. A.

*Annotations:—*Mentd. *Ex p.* Wake (1883), 11 Q. B. D. 291; Eccles v. Wirral R. S. A. (1886), 17 Q. B. D. 107; Walthamstow L. B. v. Staines (1891), 60 L. J. Ch. 738; Peebles v. Oswaldtwistle U. D. C. (1896), 75 L. T. 689; *Re* Grosvenor & West-end Ry. Terminus Hotel Co. (1897), 76 L. T. 337; R. v. L. G. Board, *Ex p.* Street (1907), 96 L. T. 650; R. v. Kensington Income Tax Comrs., [1914] 3 K. B. 429; R. v. L. G. Board, *Ex p.* Thorp (1914), 84 L. J. K. B. 1184; *Re* Clifford & O’Sullivan, [1921] 2 A. C. 570; R. v. Electricity Comrs., *Ex p.* London Electricity Joint Committee Co. (1920), Ltd., [1924] 1 K. B. 171; R. v. Powell, *Ex p.* Camden, [1925] 1 K. B. 641.

Reference to heading—To assist construction of part.]—See Part III., Sect. 2, sub-sect. 8, C., *post*.

SUB-SECT. 5.—SECTIONS AND PROVISOS.

65. Sections—Not a term of magic.]—EDWARDS v. SHERREN, No. 512, *post*.

PART II. SECT. 2, SUB-SECT. 4.

e. Object of heading—To facilitate reference.]—UNION STEAM SHIPPING CO. OF NEW ZEALAND v. MELBOURNE HARBOUR TRUST COMRS. (1882), 8 V. L. R. (L.) 167.—AUS.

PART II. SECT. 2, SUB-SECT. 5.

f. Sections—Nature of.]—The word “section” does not necessarily mean one of the divisions of an Act numbered as such, but may refer, if the context requires it, to any distinct enactment, of which there may be

several included under one number.—

66. Provisoes—Nature.]—(1) Now, in order to ascertain the sense in which they [particular words] are used in this Act of Parliament, we may fairly look to other Acts of Parliament relating to the same subject-matter; & if we find these very words used in a restrained sense in those Acts, we ought to construe them in the same sense in this Act, for it is a fair rule of construction, that the same words in a statute *in pari materia* respecting the same subject, should receive the same meaning (BAYLEY, J.).

(2) Now a proviso is something engrafted on a preceding enactment (BAYLEY, J.).—R. v. TAUNTON ST. JAMES (INHABITANTS) (1829), 9 B. & C. 831; 4 Man. & Ry. K. B. 695; 2 Man. & Ry. M. C. 406; 8 L. J. O. S. M. C. 26; 109 E. R. 309.

*Annotations:—*Generally. *Mentd.* R. v. Elmley Castle (1832), 3 B. & Ad. 826; R. v. St. Mary-at-the Walls, Colchester (1834), 5 B. & Ad. 1023.

—Construction.]—See Part III., Sect. 2, sub-sect. 9, *post*.

SUB-SECT. 6.—MARGINAL NOTES, PUNCTUATION, BRACKETS.

67. Marginal notes—Distinguished from headings.]—LANG v. KERR, ANDERSON & CO., No. 62, *ante*.

68. ——— Significance of.]—BIRTWHISTLE v. VARDILL, No. 47, *ante*.

69. ———.]—EASTERN COUNTIES & LONDON & BLACKWALL RY. COS. v. MARRIAGE, No. 61, *ante*.

70. ———.]—I thought you could not properly look at the marginal note of an Act of Parliament. Some of the marginal notes are grossly inaccurate (BRAMWELL, L.J.).

I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do with the amendment of the marginal note. I never knew a marginal note considered by the House of Commons (BAGGALLAY, L.J.).—A.-G. v. GREAT EASTERN RY. CO. (1879), 11 Ch. D. 449; 48 L. J. Ch. 428; 40 L. T. 265; 27 W. R. 759; C. A.; *on appeal* (1880), 5 App. Cas. 473, H. L.

*Annotations:—*Refd. R. v. Bedfordshire County Council, *Ex p.* Sear, [1920] 2 K. B. 465. *Mentd.* A.-G. v. Shrewsbury (Kingsland) Bridge Co. (1882), 21 Ch. D. 752; Guinness v. Land Corpn. of Ireland (1882), 22 Ch. D. 349; L. & N. W. Ry. v. Price (1883), 11 Q. B. D. 485; Small v. Smith (1884), 10 App. Cas. 119; Wenlock v. River Dee Co. (1885), 10 App. Cas. 354; Harris v. De Pinna (1886), 33 Ch. D. 238; Henderson v. Bank of Australasia (1888), 40 Ch. D. 170; Johns v. Balfour (1889), 5 T. L. R. 389; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Atzlewood (1889), 44 Ch. D. 412; Foster v. L. C. & D. Ry., [1895] 1 Q. B. 711; A.-G. v. L. & N. W. Ry., [1900] 1 Q. B. 78; L. C. C. v. A.-G., [1902] A. C. 165; A.-G. v. Mersey Ry., [1907] 1 Ch. 81; *Re* Kingsbury Collieries & Moore’s Contract, [1907] 2 Ch. 259; Peel v. L. & N. W. Ry., [1907] 1 Ch. 5; Metropolitan Water Board v. Solomon (1908), 77 L. J. Ch. 517; A.-G. v. West Gloucestershire Water Co., [1909] 2 Ch. 338; Amalgamated Soc. of Railway Servants v. Osborne, [1910] A. C. 87; Vacher v. London Soc. of Compositors, [1912] 3 K. B. 547; *Re* Woking Urban District Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300; Dundee Harbour Trustees v. Nicol, [1915] A. C. 550; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251; A.-G. v. Fulham Corpn., [1921] 1 Ch. 440; A.-G. v. Westminster City Council, [1924] 2 Ch. 416; Deuchar v. Gas Light & Coke Co., [1925] A. C. 691.

71. ——— Whether part of Act—Note on Parliament Roll.]—The Parliament Roll itself also con-

several included under one number.—DAIN v. GOSSAGE (1873), 11 P. R. 103.—CAN.

g. Illustrations appended to sections—How far binding.]—NANAK RAM v. MEHIN LAL (1877), 1 L. R. 1 All. 487.—IND.

tains a marginal note to this form, directing a separate order to be used for each highway intended to be stopped up. This note, since it is found on the Parliament Roll, must be considered as part of the Act, & receive its due weight accordingly (LORD DENMAN, C.J.).—*R. v. MILVERTON (INHABITANTS)* (1836), 5 Ad. & El. 841; 2 Har. & W. 434; 1 New. & P. K. B. 179; Nev. & P. M. C. 51; 6 L. J. M. C. 73; 111 E. R. 1385.

Annotations:—**Mentd.** *R. v. Jones* (1840), 12 Ad. & El. 684; *Gracie v. Clinch* (1843), 4 Q. B. 606; *R. v. Kent JJ.* (1904), 73 L. J. K. B. 858.

72. ——— Note on Queen's Printer's copy.]—

The marginal note to a sect. of a statute in the copy printed by the Queen's Printer, forms no part of the statute itself, & is not binding as an explanation or construction of the sections.

Formerly, at one stage of the bill in Parliament, it was ordered to be ingrossed upon one or more rolls of parchment. That practice seems to have continued down to the session of 1849. Since that time the only record of the proceedings of Parliament . . . is to be found in the copy printed by the Queen's Printer. . . . This change . . . cannot affect the rule which treats the title of the Act, the marginal notes, & the punctuation, not as forming part of the Act, but merely as *temporanea expositia* (WILLES, J.).—*CLAYDON v. GREEN, GREEN v. CLAYDON* (1868), L. R. 3 C. P. 511; 37 L. J. C. P. 226; 18 L. T. 607; 16 W. R. 1126.

Annotations:—**Mentd.** *Cowles v. Gale* (1871), 7 Ch. App. 13, n.; *Sharpe v. Wakefield* (1888), 21 Q. B. D. 66; *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705.

73. ———.]—*Seemle*, the marginal notes to an Act of Parliament now form part of the Act, & may be used for the purpose of interpreting it.—*Re VENOUR'S SETTLED ESTATES, VENOUR v. SELLON* (1876), 2 Ch. D. 522; 45 L. J. Ch. 409; 24 W. R. 752.

Annotations:—**Consd.** *A.-G. v. G. E. Ry.* (1879), 27 W. R. 759. **Dbtd.** *Sutton v. Sutton* (1882), 22 Ch. D. 511. The dictum in that case is not strictly correct (JESSEL, M.R.); *De Beauvais v. Green* (1906), 22 T. L. R. 816. **Mentd.** *Stanford v. Roberts* (1882), 52 L. J. Ch. 50; *Jesse v. Lloyd* (1883), 48 L. T. 656.

74. ———.]—*SUTTON v. SUTTON*, No. 625, *post*.

75. ———.]—*DE BEAUVAIS v. GREEN* (1906), 22 T. L. R. 816; *sub nom. GREEN v. BEAUVAIS*, 50 Sol. Jo. 715; *on appeal* (1907), 24 T. L. R. 43, C. A.

76. ———.]—*Re BOALER*, No. 55, *ante*.

77. ———.]—In the case of the proviso now to be interpreted the language used by the Legislature appears to me to be reasonably plain & the application of the proviso can in my opinion be ascertained by calling in aid a universally accepted rule of law. If the result is not what the Legislature intended it is for the Legislature to amend the proviso rather than for the Law Cts. to attempt the necessary amendment by inserting plain language with some other than its natural meaning in order to produce a result which it is thought the Legislature must have intended (BANKES, L.J.).

The side notes are not part of the Act, & I believe are not considered or amended by the Legislature (SCRUTTON, L.J.).—*WILKES v. GOODWIN*, [1923] 2 K. B. 86; 92 L. J. K. B. 580; 129

L. T. 44; 39 T. L. R. 262; 67 Sol. Jo. 437; 21 L. G. R. 239, C. A.

Annotations:—**Mentd.** *Crane v. Cox* (1923), 92 L. J. K. B. 544; *Dick v. Duncan* (1923), 92 L. J. Ch. 320; *Rimmer v. Carson* (1923), 39 T. L. R. 349; *Wood v. Carwardine*, [1923] 2 K. B. 185.

78. ———.]—**Private Act.**—*Seemle*, in some private Acts of Parliament the marginal notes may form part of the Act.—*Re WOKING URBAN DISTRICT COUNCIL (BASINGSTOKE CANAL) ACT*, 1911, [1914] 1 Ch. 300; 83 L. J. Ch. 201; 110 L. T. 49; 78 J. P. 81; 30 T. L. R. 135; 12 L. G. R. 214, C. A.

Annotations:—**Consd.** *R. v. Bedfordshire County Council, Ex p. Sear*, [1920] 2 K. B. 465. **Mentd.** *A.-G. v. N. E. Ry.*, [1915] 1 Ch. 905; *Morris v. Harris*, [1927] A. C. 252.

— **Reference to, for interpretation.**]—*See* Part III., Sect. 2, sub-sect. 8, D., *post*.

79. **Punctuation.**]—*CLAYDON v. GREEN, GREEN v. CLAYDON*, No. 72, *ante*.

80. ———.]—To my mind it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops (LORD ESHER, M.R.).—*DEVONSHIRE (DUKE) v. O'CONNOR* (1890), 24 Q. B. D. 468; 59 L. J. Q. B. 206; 62 L. T. 917; 54 J. P. 740; 38 W. R. 420; 6 T. L. R. 155, C. A.

Annotations:—**Consd.** *R. v. Speyer, R. v. Cassel*, [1916] 1 K. B. 595. **Mentd.** *Ecroyd v. Coulthard*, [1898] 2 Ch. 358.

81. ———.]—We must construe these words of this statute now some five hundred & sixty years old without reference to commas or brackets but merely looking to the language (LORD READING, C.J.).—*R. v. CASEMENT*, [1917] 1 K. B. 98; 86 L. J. K. B. 467; 115 L. T. 277; 80 J. P. 316; 32 T. L. R. 667; 60 Sol. Jo. 656; 25 Cox, C. C. 503; 12 Cr. App. Rep. 99, C. C. A.

82. **Brackets.**]—*DEVONSHIRE (DUKE) v. O'CONNOR*, No. 80, *ante*.

83. ———.]—*R. v. CASEMENT*, No. 81, *ante*.

SUB-SECT. 7.—SCHEDULES.

A. In General.

84. **Whether schedule part of Act.**]—The schedule is as much a part of the statute, & is as much an enactment, as any other part (BRETT, L.J.).—*A.-G. v. LAMPLUGH* (1878), 3 Ex. D. 214; 47 L. J. Q. B. 555; 38 L. T. 87; 42 J. P. 356; 26 W. R. 323, C. A.

Annotations:—**Consd.** *Panagotis v. S.S. Pontiac*, [1912] 1 K. B. 74. **Mentd.** *Halesowen Ry. v. G. W. Ry. & Mid. Ry.* (1883), 4 Ry. & Can. Tr. Cas. 224.

85. **Discrepancy between Act & schedule.**]—It would be giving too much effect to the loose words in the schedule, if we were to decide that they had repealed the positive directions of the preceding Act (PATTESON, J.).—*ALLEN v. FLICKER* (1839), 10 Ad. & El. 639; 4 Per. & Dav. 735; 113 E. R. 243; *sub nom. ALLEN v. TRICKER*, 9 L. J. Q. B. 42; 3 Jur. 1029.

Annotation:—**Consd.** *Panagotis v. S.S. Pontiac*, [1912] 1 K. B. 74.

86. ———.]—We have also to consider the language of the sect. itself to which the schedule is appended; & if there be any contradiction between the two, which upon fair construction there perhaps will not be found to be, upon

PART II. SECT. 2, SUB-SECT. 6.

73 i. **Marginal notes—Whether part of Act.**]—*Re BALDWIN* (1891), 12 N. S. W. L. R. (L.) 128; 8 N. S. W. W. N. 39.—**AUS.**

73 ii. ———.]—Marginal notes to a statute are not part of the statute.—*HIRSHMAN v. BEAL* (1916), 27 O. W. R. 245; 38 O. L. R. 40.—**CAN.**

73 iii. ———.]—*DUKHI MULLAH v. HALWAY* (1895), 1 L. R. 23 Calo.

73 iv. ———.]—Marginal notes to sects. of an Act do not form part of the Act.—*PUNARDEO NARAIN SINGH v. RAM SARUP ROY* (1898), 1 L. R. 25 Calo. 858; 2 C. W. N. 577.—**IND.**

79 i. **Punctuation.**]—The punctua-

tion of statutes does not control the sense if the meaning is otherwise reasonably clear.—*CHARLTON (SHIRE) v. RUSE* (1912), 14 C. L. R. 220.—**AUS.**

79 ii. ———.]—In construing statutes the cts. pay little, if any, attention to punctuation.—*MEDICINE HAT CORPN. v. HOWSON*, [1920] 2 W. W. R. 811; 53 D. L. R. 264; 15 Alta. L. R. 508.—**CAN.**

Sect. 2.—Framework: Sub-sect. 7, A., B., C. & D. Part III. Sect. 1: Sub-sect. 1.]

ordinary principles the form, which is made to suit rather the generality of cases than all cases, must give way (LORD DENMAN, C.J.).—*R. v. BAINES* (1840), 12 Ad. & El. 210; Arn. & H. 119; 4 Per. & Dav. 362; 5 J. P. 94; 113 E. R. 792.

Annotations:—Refd. *Richards v. Dyke* (1842), 3 Q. B. 256. *Mentd.* *Carus Wilson's Case* (1845), 7 Q. B. 984; *Martin v. Mackonochie* (1878), 3 Q. B. D. 730; *L. C. C. v. Dundas*, [1904] P. 1.

87. —.]—If the enacting part & the schedule cannot be made to correspond, the latter must yield to the former (LORD COTTENHAM, C.).—*Re BAINES* (1840), Cr. & Ph. 31; 4 Jur. 1194; 41 E. R. 401, L. C.

Annotations:—Consd. *Dean v. Green* (1882), 8 P. D. 79. *Appl. Ex p. Bell Cox* (1887), 19 Q. B. D. 307. *Refd.* *Richards v. Dyke* (1842), 3 Q. B. 256; *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. D. 376.

Reference to, for interpretation.]—See Part III., Sect. 2, sub-sect. 8, F., post.

B. Forms Appended in Schedules.

88. *How far variation permissible.]—An order made by justices of peace under 13 Geo. 3, c. 78, s. 19, for stopping up an old footway & setting out a new one, must follow the form prescribed in the schedule annexed to the Act, & set forth the length & breadth of the new footway; otherwise it is no answer to a justification of a right of way pleaded to an action of trespass *quare clausum fregit* brought by the owner of the soil over which the old way led. The statute requires, that the form set forth in the schedule "shall be used on all occasions, with such additions & variations only as may be necessary to adapt it to the particular exigency of the case." Under these words a material variance from the form prescribed is fatal, & may be taken advantage of in a collateral proceeding.—*DAVISON v. GILL* (1800), 1 East, 64; 102 E. R. 25.*

Annotations:—Refd. *Goss v. Jackson & Bushell* (1800), 3 Esp. 198; *R. v. Milverton* (1836), 5 Ad. & El. 841; *Catterall v. Sweetman* (1845), 1 Rob. Eccl. 304. *Mentd.* *Galbreath v. Armour* (1845), 4 Bell, Sc. App. 374; *Badger v. South Yorkshire Ry. & River Dun Co.* (1858), 1 E. & E. 359; *Salisbury v. G. N. Ry.* (1858), 5 C. B. N. S. 174.

89. —.]—It would be quite contrary to the recognised principles upon which cts. of law construe Acts of Parliament, to enlarge the conditions of the enactment, & thereby restrain its operation, by any reference to the words of a mere form, given for convenience' sake in a schedule, & still more so, when that restricted operation is not favourable to the liberty of the subject, but the reverse (LORD PENZANCE).—*DEAN v. GREEN* (1882), 8 P. D. 79; 46 J. P. 742.

Annotations:—Appl. Ex p. Bell Cox (1887), 19 Q. B. D. 307. *Refd. Ex p. Bell Cox* (1887), 20 Q. B. D. 1.

90. —.]—But we think that the decision of the question ought not to depend upon a critical examination of the forms in the schedule, which are inserted merely as examples and are only to be followed implicitly so far as the circumstances of each case may admit (TINDAL, C.J.).—*BARTLETT v. GIBBS* (1813), 5 Man. & G. 81; Bar. & Arn. 98; Cox & Atk. 18; 1 Lut. Reg. Cas. 73; 7 Scott,

N. R. 609; Pig. & R. 46; 13 L. J. C. P. 10; 2 L. T. O. S. 189; 134 E. R. 490.

Annotations:—Mentd. *Daniel v. Camplin* (1845), 7 Man. & G. 167; *Hitchins v. Brown* (1845), 2 C. B. 25; *Burton v. Gery* (1847), 5 C. B. 7; *Onions v. Bowdler* (1847), 5 C. B. 65; *Howitt v. Stephens* (1858), 5 C. B. N. S. 30; *Barlow v. Mumford* (1866), L. R. 2 C. P. 81; *Bondle v. Watson* (1871), L. R. 7 C. P. 163; *Porrett v. Lord* (1879), 5 C. P. D. 65; *Ford v. Hoar* (1884), 14 Q. B. D. 507; *Foskett v. Kaufman* (1885), 16 Q. B. D. 279; *Hurcum v. Hilleary*, [1891] 1 Q. B. 579; *Soutter v. Roderick*, [1896] 1 Q. B. 91; *Kitchen v. Johnson* (1898), 79 L. T. 422.

— *Bills of sale.]—See BILLS OF SALE, Vol. VII., pp. 51–54, Nos. 268–283, 288.*

— *Medical certificate in lunacy.]—See LUNATICS, Vol. XXXIII., p. 266, No. 1855.*

C. Agreements Scheduled to Statute.

91. *Validity of agreement.]—I apprehend it to be clear beyond the possibility of argument, that when an agreement between two cos. who are coming for an Act of Parliament is scheduled to the Act of Parliament, & when an enactment is found in the body of the Act that each co. shall be required to implement & fulfil all the provisions & stipulations in the agreement, every provision & stipulation in the agreement becomes as obligatory & binding on the two cos. as if those provisions had been repeated in the form of statutory sects. (LORD CAIRNS, C.).—*CALEDONIAN RY. CO. v. GREENOCK & WEMYSS BAY RY. CO.* (1874), L. R. 2 Sc. & Div. 347, H. L.*

Annotations:—Consd. *Halesowen Ry. v. G. W. Ry. & Mid. Ry.* (1883), 48 L. T. 710. *Appl. R. v. Mid. Ry.* (1887), 19 Q. B. D. 510. *Consd & Expld.* *L. C. & D. Ry. v. S. E. Ry.* (1888), 40 Ch. D. 100. *Consd.* *Jersey v. G. W. Ry.* (1893), [1894] 3 Ch. 625, n. *Expld.* *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352. *Consd.* *Crosfield v. Manchester Ship Canal Co.*, [1901] 2 Ch. 123. *Refd.* *Cale. Ry. & Campbell & Firth of Clyde Steam Packet Co. v. Greenock & Wemyss Bay Rty. & Greenock & Wemyss Bay Rty. & Pier Traffic Joint Committee* (1882), 4 Ry. & Can. Tr. Cas. 135; *Barry Ry. v. Taff Vale Ry.*, [1895] 1 Ch. 128; *R. v. Marylebone County Court Judge & G. W. Ry., Ex p. Phillips*, [1906] 2 K. B. 126; *Sanderson v. Armour* (1922), 91 L. J. P. C. 167.

92. —.]—*R. v. MIDLAND RY. CO.* (1887), 19 Q. B. D. 540; 56 L. J. Q. B. 585; 57 L. T. 619; 41 J. P. 550; 36 W. R. 270; *nom.* *MIDLAND RY. CO. v. GREAT WESTERN RY. CO.* (No. 3), 5 Ry. & Can. Tr. Cas. 267.

Annotations:—Consd. *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352. *Refd.* *Rhyinney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (1900), 83 L. T. 111. *Mentd.* *R. v. London County JJ. & L. C. C.*, [1894] 1 Q. B. 453.

93. —.]—An agreement scheduled to an Act of Parliament was thereby "confirmed & declared to be valid & binding upon the parties thereto" — *Held*: every clause of the agreement had statutory validity, so that no objection could be taken on the ground of remoteness or uncertainty.—*MANCHESTER SHIP CANAL CO. v. MANCHESTER RACECOURSE CO.*, [1901] 2 Ch. 37; 70 L. J. Ch. 468; 84 L. T. 436; 49 W. R. 418; 17 T. L. R. 410; 45 Sol. Jo. 394, C. A.

Annotations:—Consd. *Re Wilton's S. E.*, [1907] 1 Ch. 50; *Ryan v. Thomas* (1911), 55 Sol. Jo. 364. *Mentd.* *Crosfield v. Manchester Ship Canal Co.* (1904), 73 L. J. Ch. 345; *Talbot v. Scarsbrick* (1908), 77 L. J. Ch. 436; *Sharpe v. Durrant* (1911), 55 Sol. Jo. 423.

94. —.]—*WESTGATE & BIRCHINGTON WATER CO. v. POWELL-COTTON*, No. 1716, *post*.

PART II. SECT. 2, SUB-SECT. 7.—B.

*h. Whether part of Act.]—Whatever may be said of schedules to different Acts of Parliament, the forms given in the schedule to Mechanics' Lien Act, R. S. O., c. 126, & referred to in sect. 16 (2), are as much part of that enactment as if they were set out therein instead of, as they are, in the schedule.—*TRUAX**

v. DIXON (1889), 17 O. R. 366.—**CAN.**

PART II. SECT. 2, SUB-SECT. 7.—C.

k. Whether part of Act.]—CANADIAN NORTHERN PACIFIC RY. CO. v. NEW WESTMINSTER (CITY) (B. C.), [1917] A. C. 602; 36 D. L. R. 507, P. C.—**CAN.**

l. —.]—In order to make an agree-

ment scheduled to a statute a part of the statute itself words in the statute merely confirming & validating the agreement are not sufficient, but words must be found therein from which such intention can be inferred.—*WINNIPEG CORPN. v. WINNIPEG ELECTRIC RY. CO.*, [1921] 2 W. W. R. 282; 31 Man. L. R. 131; 59 D. L. R. 257.—**CAN.**

D. Plans Annexed by Way of Schedules.

95. Act empowering compulsory acquisition of land.]—A public co. taking land under compulsory powers, is bound to give to the landowner precise information as to the quantity of land to be taken, & the way in which it is to be used; & where any doubt arises as to the extent of the power conferred by the Legislature, the ct. will construe it in the way most beneficial to the landowner.

In legislating for public undertakings & conferring compulsory powers to take land, Parliament has at all times manifested the utmost anxiety to impose upon the co. or the undertakers the obligation of giving to the landowner the most precise & definite information with regard to the quantity of land to be taken, & the manner in which the land is intended to be affected, & the enactments contained in the Acts of Parliament conferring the powers to carry an undertaking into effect will be generally found to embody, by reference, the plans & the notice given by the plans to the landowners of the intention of the co. (LORD WESTBURY, C.).—*SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO.* (1865), 4 De G. J. & Sm. 679; 6 New Rep. 184; 34 L. J. Ch. 380; 12 L. T. 360; 11 Jur.

N. S. 453; 13 W. R. 729 E. R. 1082, L. C.

Annotations :—*Consd. Re Huddersfield Corpn. & Jacomb* (1874), L. R. 17 Eq. 476. *Refd. Morris v. Tottenham & Forest Gate Ry.*, [1892] 2 Ch. 47.

96. Form part of statute.]—If an Act of Parliament refer to a plan to the extent that the Act refers to the plan & for the purpose for which the Act refers to the plan undoubtedly it is part of the Act (LORD COTTREHAM, C.).—*NORTH BRITISH RY. CO. v. TOD* (1846), 12 Cl. & Fin. 722; 4 Ry. & Can. Cas. 449; 10 Jur. 975; 8 E. R. 1595, H. L.

Annotations :—*Appld. Beardmer v. L. & N. W. Ry.* (1849), 1 H. & Tw. 161. *Consd. Ware v. Regent's Canal Co.* (1858), 1 De G. & J. 212; A.-G. v. G. E. Ry. (1872), 7 Ch. App. 475. *Appld. Edinburgh Street Tram. Co. v. Black* (1873), L. R. 2 Sc. & Div. 336. *Consd. Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299. *Refd. Broynton v. L. & N. W. Ry.* (1846), 2 Coop. temp. Cott. 108; *R. v. Caledonian Ry.* (1850), 16 Q. B. 19; A.-G. v. Tewkesbury & Malvern Ry. (1863), 1 De G. J. & Sm. 423; *Mackett v. Herne Bay Comrs.* (1876), 35 L. T. 202. *Mentd. Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221.

97. —.]—When the Act directs compliance with deposited plans & sects., they are regarded as embodied in the statute.—*EDINBURGH STREET TRAMWAYS CO. v. BLACK* (1873), L. R. 2 Sc. & Div. 336; 37 J. P. 692, H. L.

Part III.—Interpretation.

SECT. 1.—FUNCTIONS OF COURT.

SUB-SECT. 1.—IN GENERAL.

98. To interpret statutes—Not to alter or amend.]—We have nothing to do with policy or with any unexpressed intentions of Parliament. Our duty is simply to ascertain the meaning of the Act as it stands (LORD LOREBURN, C.).—*A.-G. & BOARD OF EDUCATION v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL, Ex p. GRENSIDE*, [1907] A. C. 29; 76 L. J. K. B. 97; 95 L. T. 845; 71 J. P. 41; 23 T. L. R. 171; 51 Sol. Jo. 129; 5 L. G. R. 89, H. L.

Annotations :—*Refd. Wilford v. West Riding of Yorkshire County Council*, [1908] 1 K. B. 685; *Gillow v. Durham County Council*, [1913] A. C. 54. *Mentd. R. v. Board of Education*, [1909] 2 K. B. 1045; *Martin v. Eccles Corpn.*, [1919] 1 Ch. 387.

99. —.]—*VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS, No. 54, ante.*

100. —.]—If we the judges had been makers of the law, this question had not been; but we are to proceed upon the laws as made, & cannot alter them. This is not a thing of our promotion, & this I speak to satisfy such as might object against us. This statute was made in a time when the Pope's power was warmly pursued, & laws were then made, which in the circumstances of another time would not have been made (VAUGHAN, C.J.).—*HARRISON v. BURWELL* (1670), as reported in, 2 Vent. 9; 86 E. R. 278.

Annotations :—*Refd. Camden v. Home* (1791), 4 Term Rep. 382; *R. v. Dibden*, [1910] P. 57. *Mentd. Hill v. Good* (1672), *Freem. K. B.* 73; *R. v. Chadwick* (1848), 11 Q. B. 205; *Wing v. Taylor* (1861), 30 L. J. P. M. & A. 258.

PART III. SECT. 1, SUB-SECT. 1.

98 i. To interpret statutes—Not to alter or amend.]—When it is found that a statute is within the competency of the legislature, & the language thereof is sufficiently clear to enable the ct. to determine what the legislature meant, the ct. must give effect to it, whether or not it alters principles theretofore adopted or is out of harmony with those principles which economists believe to be sound.—*BRATTS LAKE*

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MUNICIPALITY v. HUDSON'S BAY CO., [1918] 2 W. W. R. 962; 11 Sask. L. R. 357; *affd.* 12 Sask. L. R. 28.—*CAN.*

98 ii. —.]—*LETHBRIDGE CORPN. v. NORTHERN TRUSTS CO. (Alta.)*, [1925] 4 D. L. R. 422.—*CAN.*

98 iii. —.]—It is the business of judges to expound, & not to improve the law; & in dealing with statutes especially, they should take care not to pass the limits of their office, which is that of interpreters only.—*R. v.*

101. —.]—This ct. cannot take on itself legislative functions; it must administer the law as it stands; certainly, with such qualifications as the law permits. The ct. is not bound to a strictness at once harsh & pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *de minimis non curat lex* (SIR WILLIAM SCOTT).—*THE REWARD* (1818), 2 Dods. 265; 165 E. R. 1482.

102. —.]—We have no jurisdiction to review Acts of Parliament, we sit here to construe the law, not to make it. If the words admit of only one interpretation, we are bound to give that to them (LORD CAMPBELL).—*R. v. FINCHLEY SURVEYORS, Ex p. POUNCEY* (1854), 2 C. L. R. 1593.

103. —.]—If a ct. of law be once satisfied that the consequences are the legitimate result of a true construction; it becomes the province of the Legislature, & not of a ct. of law, to correct, if necessary, such consequences (DR. LUSHINGTON).—*THOMSON & ALLAWAY v. HALL* (1852), 2 Rob. Eccl. 426; 21 L. T. O. S. 291; 16 Jur. 1144.

104. —.]—It is suggested that we are to perform a sort of ancillary part, as if we were members of the Legislature, & are to supply all that may be necessary to give effect to this construction of the Act, but we cannot do so. We must treat this Act of Parliament as providing for that which is found in it & nothing more (POLLOCK, C.B.).—*A.-G. v. HIGGINS* (1857), as reported in, 2 H. & N. 339.

Annotations :—*Mentd. In the Goods of Ewing* (1881), 6 P. D. 19; *A.-G. v. Sudeley*, [1896] 1 Q. B. 354; *A.-G. v. New*

MILLES, R. v. CARROLL (1842), *Jebb & B.* 219.—*IR.*

98 iv. —.]—*THOMSON v. GALLOWAY (Earl)*, [1919] S. C. 611; 56 Sc. L. R. 448; [1919] 2 S. L. T. 5.—*SCOT.*

m. Constitutionality of statute.]—The constitutionality of a statute will only be considered where necessary to a decision of a question before the ct.—*Re DICKINSON* (1892), 2 B. C. R. 262.—*CAN.*

R R

Sect. 1.—Functions of court: Sub-sects. 1 & 2, A.]

York Breweries Co., [1898] 1 Q. B. 205; *Brassard v. Smith*, [1925] A. C. 371; *Baelz v. Public Trustee*, [1926] Ch. 863; *Re Aschrott, Clifton v. Strauss*, [1927] 1 Ch. 313; *London & South American Investment Trust v. British Tobacco Co. Australia*, [1927] 1 Ch. 107.

105. ———.]—(1) A statute which refers to the matter of a common law liability & declares to whom it shall attach, will not thereby create a new & extended application of that liability, unless it contains words expressly declaring such a purpose.

(2) If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God (LORD CAIRNS, C.).

(3) I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the cts. of law act in construing instruments in writing; & a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used, but, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, & seeing what the circumstances were with reference to which the words were used, & what was the object, appearing from those circumstances, which the person using them had in view (LORD BLACKBURN).

(4) It is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the ct. injudicious; & I believe that it is not disputed that what LORD WENSLEYDALE used to call the golden rule is right, viz., that we are to take the whole statute together, & construe it altogether, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the ct. that the intention could not have been to use them in their ordinary signification, & to justify the ct. in putting on them some other signification, which, though less proper, is one which the ct. thinks the words will bear (LORD BLACKBURN).

(5) If in a local & personal Act we found words that seemed to express an intention to enact something quite unconnected with the purpose of the promoters, & which the committee would not, if it did its duty, have allowed to be introduced into such an Act, I think the judges would be justified in putting almost any construction on the words that would prevent its having that effect. But I do not think it impossible that the Legislature can have intended in such an Act to create a new liability to damages unknown to Common Law (LORD BLACKBURN).—*WEAR RIVER COMRS. v. ADAMSON* (1877), 2 App. Cas. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 42 J. P. 244; 26 W. R. 217; 3 Asp. M. L. C. 521, H. L.

Annotations:—As to (1) Consd. Western Counties Ry. v. Windsor & Annapolis Ry. (1882), 7 App. Cas. 178. *Apld. Valentine v. Hyde*, [1919] 2 Ch. 129; *British-American Tobacco Co. v. Jones* (1925), 134 L. T. 405. *As to (2) Refd. Jackson v. Blanche (Owners), The Hopper No. 66*, [1908] A. C. 126. *As to (3) Apld. Eastman Photographic Materials Co. v. Comptroller-General of Patents*, [1898] A. C. 571; *Butterley Co. v. New Hucknall Colliery Co.*, [1910] A. C. 381; *Broken Hill Proprietary Co. v. Peninsula & Oriental Steam Navigation Co.*, [1917] 1 K. B. 688; *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488. *Consd. G. W. Ry. & Mid. Ry. v. Bristol Corpn.*, 87 L. J. Ch. 414. *Apld. Re Burnyeat, Burnyeat v.*, [1923] 1 Ch. 52; *Abraham v. Mac Fisheries*, [1925]

2 K. B. 18. *Refd. Jones v. Hulton*, [1909] 2 K. B. 444; *Hollinshead v. Hazleton*, [1916] 1 A. C. 428; *O'Grady v. Wilmot*, [1916] 2 A. C. 231; *Rhondda's Claim*, [1922] 2 A. C. 339. *As to (4) Apld. Hudson's Bay Co. v. MacLay* (1920), 36 T. L. R. 469. *Refd. Metropolitan Water Board v. New River Co.* (1904), 20 T. L. R. 687; *Badische Anilin & Soda Fabrik v. Hickson*, [1906] A. C. 419. *As to (5) Apld. A.-G. v. Gas Light & Coke Co.* (1902), 18 T. L. R. 517. *Refd. G. N. Pico & Brompton Ry. v. A.-G.* (1908), 98 L. T. 731. *Generally, Refd. The Merle* (1874), 31 L. T. 447; *Arrow Shipping Co. v. Tyne Improvement Comrs.*, *The Crystal*, [1894] A. C. 508; *Nicoll v. Nicolle*, [1922] 1 A. C. 284; *Postmaster-General v. Beck & Politzer*, [1924] 1 K. B. 308; *Witham Outfall Board v. Boston Corpn.* (1926), 136 L. T. 756; *G. W. Ry. v. S.S. Mostyn, The Mostyn*, [1928] A. C. 57. *Mentd. Eglinton v. Norman* (1877), 46 L. J. Q. B. 557; *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876; *Re Gibbs, Martin v. Harding*, [1907] 1 Ch. 465; *Gayler & Pope v. Davies*, [1924] 2 K. B. 76; *The St. Nicolai* (1925), 133 L. T. 640; *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.

106. ———.]—We have nothing to do with questions of hardship; if the law is in fault it must be altered by the Legislature, our only duty is to apply it to the facts before us (GROVE, J.).—*ALLKINS v. JUPE* (1877), 2 C. P. D. 375; *sub nom. ALLKINS v. JUPE, SAME v. PEMBROKE, SAME v. OPPENHEIM, SAME v. CHOISY*, 46 L. J. Q. B. 824.

Annotations:—Mentd. Berridge v. Man On Insee. (1886), 18 Q. B. D. 346; *Gedgo v. Royal Exchange Assce. Corpn.*, [1900] 2 Q. B. 214; *British Workman's & General Assce. Co. v. Cunliffe* (1902), 18 T. L. R. 425.

107. ———.]—It is not our duty to amend defective legislation but simply to administer the law as it stands (MATHEW, J.).—*R. v. YATES* (1883), as reported in, 48 J. P. 102, D. C.; *on appeal* (1885), 14 Q. B. D. 648, C. A.

Annotations:—Mentd. R. v. Labouchere (1884), 12 Q. B. D. 320; *Re Simmons* (1885), 15 Q. B. D. 348; *Ex p. Pulbrook* (1891), 66 L. T. 159; *R. v. Perryman, Ex p. Perryman* (1891), 8 T. L. R. 72; *Thorpe v. Priestnall*, [1897] 1 Q. B. 159; *Beardsley v. Giddings* (1904), 2 L. G. R. 719, *Re Boaler*, [1914] 1 K. B. 122.

108. ———.]—One might wish the law to be different, but the ct. had no right to extend the ambit of the statute (VAUGHAN WILLIAMS, J.).—*YATES v. HIGGINS*, [1896] 1 Q. B. 166; 65 L. J. M. C. 31; 60 J. P. 88; 44 W. R. 335; 12 T. L. R. 163; 40 Sol. Jo. 227, D. C.

109. ———.]—*WILKES v. GOODWIN*, No. 77, *ante*.

110. ———. According to expressed not presumed intention of Parliament.]—We disclaim altogether the assumption of any right to assign different meanings to the same words in an Act of Parliament on the ground of a supposed general intention in the Act. We find it necessary to give a fair & reasonable construction to the language used by the Legislature; but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the Act consistent with any views of our own (LORD DENMAN, C.J.).—*R. v. POOR LAW COMRS., Re HOLBORN UNION* (1838), 6 Ad. & El. 56; 3 Nev. & P. K. B. 77; 7 L. J. M. C. 33; 2 J. P. 22; 112 E. R. 21.

111. ———.]—No doubt the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy or injustice. . . . But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable (WILLES, J.).—*AREL v. LEE* (1871), L. R. 6 C. P. 365; 1 Hop. & Colt. 515; 40 L. J. C. P. 154; 23 L. T. 844; 35 J. P. 343; 19 W. R. 625.

Annotations:—Apld. Boon v. Howard (1874), L. R. 9 C. P. 277. *Mentd. Cull v. Austin, Austin v. Cull* (1872), L. R. 7 C. P. 227.

112. ———.]—I prefer that mode of construing a statute by which you look at the words

used & if they are plain give effect to them, to the mode of construction by which you first satisfy yourself what Parliament ought to have meant & then interpret the statute by saying that it has so said (LORD COLERIDGE, C.J.).—*R. v. MANSEL JONES* (1889), 23 Q. B. D. 29; 60 L. T. 860; 37 W. R. 508; *sub nom. Re HEREFORD MUNICIPAL ELECTION PETITION, Ex p. GARROLD* (SOLICITOR), 5 T. L. R. 411, D. C.

Annotations:—*Mentd. R. v. St. Mary Abbot's, Kensington Asst. Com.* (1891), 60 L. J. M. C. 52; *R. v. Mansel Jones* (1894), 10 T. L. R. 515.

113. Mistaken recital of existing law—How far court bound.]—Cts. of Justice are not bound by a mistake of the Legislature as to what the existing law is (LORD CRANWORTH, V.-C.).—*Re DIRECT WEST END & CROYDON RY. CO.*, *Ex p. LLOYD* (1851), as reported in, 1 Sim. N. S. 248; 61 E. R. 96.

Annotations:—*Apprvd. Shrewsbury v. Scott* (1859), 1 C. B. N. S. 1. *Refd. Ormond Investment Co. v. Betts*, [1928] A. C. 143. *Mentd. Re London & Birmingham Extension, etc. Ry., Pritchard's Case* (1851), 4 D. G. & Sim. 328; *Re Great Western Extension Atmospheric Ry., Wryghte's Case* (1852), 2 D. G. M. & G. 636.

114. ———.]—A mere recital in an Act of Parliament, either of fact or law, is not conclusive; & we are at liberty to consider the fact or the law to be different from the statement in the recital (LORD CAMPBELL, C.J.).—*R. v. HAUGHTON (INHABITANTS)* (1853), 1 E. & B. 501; 22 L. J. M. C. 89; 17 J. P. 585; 17 Jur. 455; 118 E. R. 523; *sub nom. R. v. HOUGHTON (INHABITANTS)*, 20 L. T. O. S. 217; 6 Cox, C. C. 101.

Annotations:—*Apld. Merttens v. Hill*, [1901] 1 Ch. 842. *Refd. Feversham v. Emerson* (1855), 11 Exch. 385; *Jones v. Mersey Docks & Harbour Board, Mersey Docks & Harbour Board v. Cameron* (1865), 6 New Rep. 378; *Great Torrington Commons Conservators v. Moore Stevens* (1903), 73 L. J. Ch. 121. *Mentd. Petrie v. Nuttall* (1856), 25 L. J. Ex. 200; *R. v. Maybury* (1864), 4 F. & F. 90; *R. v. Hutchings* (1881), 6 Q. B. D. 300; *Wakefield Corp'n. v. Cooke*, [1903] 1 K. B. 417.

115. ———.]—*MERSEY DOCKS & HARBOUR BOARD v. CAMERON, JONES v. MERSEY DOCKS & HARBOUR BOARD*, No. 1706, *post*.

116. Protection of private proprietors against public companies.]—I have always thought that it was the duty of cts. of justice to construe Acts of Parliament in the manner best calculated to protect the interests of private proprietors as against public cos. (KNIGHT BRUCE, L.J.).—*GROSVENOR (LORD) v. HAMPSHIRE JUNCTION RY. CO.* (1857), as reported in, 26 L. J. Ch. 731; 29 L. T. O. S. 319, C. A.

Annotations:—*Refd. Chambers v. L. C. & D. Ry.* (1862), 11 W. R. 479; *Kerford v. Seacombe, Hoylake & Deeside Ry.* (1888), 57 L. J. Ch. 270. *Mentd. Cole v. West London & Crystal Palace Ry.* (1859), 27 Beav. 242; *Eastern Counties, etc. Cos. v. Marriage* (1860), 9 H. L. Cas. 32; *Hewson v. South Western Ry.* (1860), 2 L. T. 369; *King v. Wycombe Ry.* (1860), 24 J. P. 279; *St. Thomas Hospital v. Charing Cross Ry.* (1861), 1 John. & H. 400; *Fergusson v. L. B. & S. C. Ry.* (1863), 3 D. G. J. & Sim. 653; *Marson v. L. C. & D. Ry.* (1868), L. R. 6 Eq. 101; *Harvie v. South Devon Ry.* (1874), 31 L. T. 424; *Allhuson v. Ealing & South Harrow Ry.* (1898), 78 L. T. 285.

117. Not Court of Appeal from Parliament.]—As to those Acts of Parliament . . . they are the law of this land & we do not sit here as a ct. of appeal from Parliament (WILLES, J.).—*LEE v. BUDE & TORRINGTON RY. CO.* (1871), L. R. 6 C. P. 576; 24 L. T. 827; 19 W. R. 954.

Annotation:—*Apld. R. v. Yates* (1883), 48 J. P. 102.

118. Correction of legislation under effect of error—Legislature deceived as to existence of right.—Even if it can be proved that the Legislature was deceived [as to the existence of a right] it would not be competent for a ct. of law to disregard its enactments. If a mistake has been made, the Legislature alone can correct it (*per CUR.*).—*LABRADOR CO. v. R.*, [1893] A. C. 104; *sub nom.*

LABRADOR CO. v. R., *R. v. LABRADOR CO.*, 62 L. J. P. C. 33; 67 L. T. 730, P. C.

Annotation:—*Mentd. A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

Ecclesiastical Courts.]—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 321, Nos. 1216–1220.

Colonial courts.]—*See DEPENDENCIES*, Vol. XVII., pp. 465–466, Nos. 317–322

Houses of Parliament.]—*See PARLIAMENT*, Vol. XXXVI., p. 290, Nos. 395, 396.

Courts of Admiralty.]—*See ADMIRALTY*, Vol. I., p. 102, Nos. 34; 37–40.

SUB-SECT. 2.—CONSIDERATION OF CIRCUMSTANCES RELATING TO PASSING OF ACT.

A. In General.

119. Not within purview of court.]—(1) We propose to construe the Act of Parliament, according to the legal rules for the interpretation of statutes, principally by the words of the statute itself, which we are to read in their ordinary sense, & only modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity but no further. It is proper also to consider the state of the law which it proposes or purports to alter the mischiefs which existed, & which it was intended to remedy, & the nature of the remedy provided, & to look at the statutes *in pari materia* as a means of explaining this statute. . . . We shall not refer to the Report of the Real Property Comrs., published shortly before the passing of this Act . . . not conceiving that we can legitimately do so (POLLOCK, C. B.).

(2) The title of the Act . . . is certainly no part of the law &, in strictness, ought not to be taken into consideration at all (POLLOCK, C. B.).

(3) The preamble is undoubtedly a part of the Act & may be used to explain it, & is, as LORD COKE says, “a key to open the meaning of the makers of the Act, & the mischiefs it was intended to remedy”; but, on the other hand, although it may explain, it cannot control the enacting part, which may, & often does, go beyond the preamble (POLLOCK, C. B.).—*SALKELD v. JOHNSON (OR JOHNSTON)* (1848), 2 Exch. 256; *Cripps' Church Cas.* 148; 3 New Mag. Cas. 48; 18 L. J. Ex. 89; 11 L. T. O. S. 180; 12 J. P. 325; 154 E. R. 187; *subsequent proceedings* (1849), 1 Mac. & G. 242, L. C.

Annotations:—*As to (2) Refd. Shrewsbury v. Scott* (1859), 6 C. B. N. S. 1. *Generally, Mentd. Toyinbee v. Brown* (1848), 3 Exch. 117; *Wilson v. Eden* (1854), 23 L. J. Ch. 105; *Esdalle v. Payne* (1885), 52 L. T. 530; *Harper v. Hedges*, [1923] 2 K. B. 314.

120. ———.]—*Re LAMENAUDE'S PATENT*, No. 215, *post*.

121. ——— Motives of legislature.]—It is never, as it seems to me, very safe ground, in the construction of a statute, to give weight to views of its policy, which are themselves open to doubt & controversy (LORD SELBOURNE, C.).—*MUNICIPAL BUILDING SOCIETY v. KENT* (1884), 9 App. Cas. 260; 53 L. J. Q. B. 290; 51 L. T. 6; 32 W. R. 681, H. L.

Annotations:—*Mentd. French v. Municipal Permanent Bldg. Soc.* (1884), 53 L. J. Ch. 743; *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 609; *Buckle v. Lordonny* (1887), 56 L. J. Ch. 437; *Re Royal Liver Friendly Soc.* (1887), 35 Ch. D. 332; *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777; *Municipal Permanent Investment Bldg. Soc. v. Richards* (1888), 39 Ch. D. 372; *Re Knight & Tabernacle Permanent Bldg. Soc.* (1891), 64 L. T. 204; *Norton v. Counties Conservative Permanent Benefit Bldg. Soc.*, [1895] 1 Q. B. 246; *Crosfield v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123.

122. ———.]—“I prefer to say nothing as to some opinions expressed in the Ct. of Appeal

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with regard to this Act & the motives supposed to have actuated those who passed it (LORD LORE-BURN, C.).—CONWAY v. WADE, [1909] A. C. 506; 78 L. J. K. B. 1025; 101 L. T. 248; 25 T. L. R. 779; 53 Sol. Jo. 754, H. L.

*Annotations:—*Reid. Dallimore v. Williams & Jossion (1914), 30 T. L. R. 432. *Mentd.* Sanken v. Busnach (1912), 28 T. L. R. 515; Vacher v. London Soc. of Compositors, [1912] 3 K. B. 547; Scrutton v. Lewis (1913), *Times*, Jan. 16; Larkin v. Long, [1915] A. C. 814; Pratt v. British Medical Assocn., [1919] 1 K. B. 244; Valentine v. Hyde, [1919] 1 Ch. 129; Davies v. Thomas, [1920] 2 Ch. 189; Hodges v. Webb, [1920] 2 Ch. 70; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40; White v. Riley, [1921] 1 Ch. 1; Sorrell v. Smith, [1925] A. C. 700.

123. ———.]—R. v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL, No. 135, *post*.

124. ———.]—VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS, No. 54, *ante*.

125. ———.]—As I have often had occasion to observe in this House, it is no duty of ours to speculate on the reasons which may have influenced Parliament, largely for the good reason that we do not know them (LORD HALDANE.).—MURRAY v. INLAND REVENUE COMRS., as reported in [1918] A. C. 541; 119 L. T. 258, H. L.

*Annotation:—*Mentd. Northumberland v. I. R. Comrs., [1920] A. C. 825.

B. Proceedings in Parliament.

126. Cannot be referred to.]—The sense & meaning of an Act of Parliament must be collected from what it says when passed into a law; & not from the history of changes it underwent in the House where it took its rise. That history is not known to the other House, or to the Sovereign (WILLES, J.).—MILLAR v. TAYLOR (1769), 1 Burr. 2303; 98 E. R. 201

*Annotations:—*Consd. Caird v. Sime (1887), 12 App. Cas. 326; Rhondda's Claim, [1922] 2 A. C. 339. *Mentd.* Boulton v. Bull (1795), 2 Hy. Bl. 463; Beckford v. Hood (1798), 7 Term Rep. 620; Whittingham v. Wooler (1817), 2 Swan. 428; Abernethy v. Hutchinson (1825), 1 H. & Tw. 28; Barnett v. Glossop (1835), 1 Scott. 621; Chappell v. Purday (1841), 4 Y. & C. Ex. 485; Colburn v. Simms (1843), 1 Haro. 543; Chappell v. Purday (1845), 14 M. & W. 303; Prince Albert v. Strange, A.-G. v. Strange (1849), 2 De G. & Sm. 652; Novello v. Sudlow (1852), 12 C. B. 177; Jefferys v. Boosey (1854), 4 H. L. Cas. 815; Cumberland v. Copeland (1861), 7 H. & N. 118; Reade v. Conquest (1861), 9 C. B. N. S. 755; Philip v. Pennell, [1907] 2 Ch. 577; Mansell v. Valley Printing Co., [1908] 2 Ch. 411; Monckton v. Gramophone Co. (1912), 106 L. T. 84; Moore Filter Co. v. Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239; Performing Right Soc. v. London Theatre of Varieties, [1921] A. C. 1

127. ———.]—We were pressed with the history of the introduction of this clause into the statute in its passage through Parliament. We cannot, however, take judicial notice of such facts, even if they were capable of being correctly ascertained. The law must be interpreted by the general rules of construction, & we cannot travel out of its language in search of any supposed intention (LORD DENMAN, C.J.).—R. v. CAPEL (1810), 12

Ad. & El. 382; 4 Per. & Dav. 87; 9 L. J. M. C. 65; 4 J. P. 378; 4 Jur. 886; 113 E. R. 857.

*Annotations:—*Mentd. R. v. Westbrook (1847), 10 Q. B. 178; Hackney & Lamberhurst Tithe Commutation Rent Charges (1858), E. R. & E. 1; Staley v. Castleton Overseers (1864), 5 B. & S. 505; Llanrhadr-y-Mochnant Overseers & Llanfyllin Union Assmt. Com. v. St. Asaph (1896), 15 W. R. 223.

128. ———.]—In construing an Act of Parliament, we cannot go into what was said in either House of Parliament before the Act was passed (LORD DENMAN, C.J.).—R. v. WHITTAKER (1848), as reported in 2 Car. & Kir. 636.

*Annotation:—*Mentd. R. v. May & Darling (1851), 5 Cox, C. C. 176.

129. ———.]—EDINBURGH & DALKEITH RY. CO. v. WAUCHOPE, No. 1695, *post*.

130. ———.]—(1) In a criminal statute you must be quite sure that the offence charged is within the letter of the law (POLLOCK, C.B.)

(2) In construing the statute it is our duty to ascertain the true legal meaning of the words used by the Legislature, & to collect the intention from the language of the statute itself, either the preamble or the enactments, & not to make out the intention from some other sources of information & then construe the words of the statute so as to meet the assumed intention. . . . We cannot, & ought not, even if the matter before us seemed to be within the mischief which it is supposed the statute was meant to remedy, to deal with it as a crime unless it be plainly & without doubt included in the language used by the legislature (POLLOCK, C.B.).

(3) In order to know what a statute does mean, it is one important step to know what it does not mean, then that which it is suggested or supposed to be what it does mean must be consistent & in harmony with what it is clear that it does not mean. What it forbids must be consistent with what it permits (POLLOCK, C.B.).

(4) Neither this ct. nor any other ct. can construe any statute & least of all a criminal statute, by what counsel are pleased to tell us were alterations made in committee by a member of Parliament who was "no friend of the bill," even though the journals of the House should give some sanction to the proposition (POLLOCK, C.B.).

(5) When two intents are mentioned, & they are put in the alternative thus, with intent to do such a thing or with intent to do another, the obvious & the grammatical mode of reading the clause would be, to make the two intentions the alternatives (POLLOCK, C.B.).—A.-G. v. SILLIM (1864), 2 H. & C. 431; 33 L. J. Ex. 92; 10 Jur. N. S. 262; 12 W. R. 257; 159 E. R. 178; *sub nom.* R. v. SILLIM. THE ALEXANDRA, 3 New Rep. 299; 11 L. T. 223; 2 Mar. L. C. 100; *on appeal*, 10 H. L. Cas. 704, H. L.

*Annotations:—*As to (1) Reid. Unwin v. Clark (1866), 7 B. & S. 400. *Generally, Reid.* R. v. West Riding of Yorkshire County Council, [1906] 2 K. B. 676. *Mentd.* R. v. Stephens (1866), 7 B. & S. 710; Waterhouse v. Gilbert (1885), 15 Q. B. D. 569; Darlow v. Shuttleworth, [1902] 1 K. B. 721; National Telephone Co. v. Postmaster-General, [1913] 2 K. B. 611.

(1895), 1 L. R. 22 Calc. 1017.—IND.

126 vi. ———.]—R. v. BAL GANGADHAR THAK & KESHAR MAHADEB BAL (1897), 1 L. R. 22 Bom. 112.—IND.

126 vii. ———.]—In interpreting a statute the intention of the legislature can be collected from no other evidence than the statute itself, & evidence of language used at the debate of the legislature at the enactment is inadmissible.—BOK v. ALLEN (1884), 1 S. A. R. 119.—S. AF.

126 viii. ———.]—The ct. cannot go behind a statute as printed or investigate the proceedings of the legislature.—COLONIAL SECRETARY v. BAKER (1885), 6 N. L. R. 111.—S. AF.

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126 i. Cannot be referred to.]—SMILES v. BELFORD (1877), 1 A. R. 436; 1 Cart. 576.—CAN.

126 ii. ———.]—The reports of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in the statute.—GOSSELIN v. R. (Que.) (1903), 33 S. C. R. 255; 23 C. L. T. 210.—CAN.

126 iii. ———.]—For the purpose of ascertaining the intention of the legislature in passing an Act, where that intention, so far as can be gathered from the Act itself, appears doubtful,

it is not permissible to refer, for this purpose, to the various forms in which the Bill was brought before the legislature.—SHAIK MOOSA v. SHAIK ESSA (1884), 1 L. R. 8 Bom. 241.—IND.

126 iv. ———.]—In construing a statute the ct. cannot refer to the statement of objects & reasons attached to a Bill or to the report of a Select Committee, or to the debates of the legislature, but can only look to the statute itself.—KADIR BAKSH v. BHAWANI PRASAD (1892), 1 L. R. 14 All. 145.—IND.

126 v. ———.]—Proceedings of the legislature cannot be referred to as legitimate aids to the construction of an Act.—R. v. SRI CHURN CHUNGO

131. —.]—We cannot assume a mistake in an Act of Parliament. . . . We must construe Acts of Parliament as they are, without regard to consequences, except in those cases where the words used are so ambiguous that they may be construed in two senses, & even then we must not regard what happened in Parliament, but look to what is within the four corners of the Act, & to the grievance intended to be remedied, or, in penal statutes, to the offence intended to be corrected (GROVE, J.).—*RICHARDS v. MCBRIDE* (1881), 8 Q. B. D. 119; 51 L. J. M. C. 15; 45 L. T. 677; 46 J. P. 247; 30 W. R. 120, D. C.

Annotation :—*Reid. R. v. Dilden*, [1910] P. 57.

132. —.]—*SOUTH EASTERN RY. CO. v. RAILWAY COMRS. & HASTINGS CORPN.* (1881), as reported in 50 L. J. Q. B. 201, C. A.

Annotations :—*Mentd.* *Dublin Whiskey Distillery Co. v. Mid. G. W. Ry. of Ireland Co.* (1881), 4 Ry. & Can. Tr. Cas. 32; *G. W. Ry. v. Railway Comrs.* (1881), 7 Q. B. D. 182; *Huddersfield Corpn. & Huddersfield Chamber of Commerce v. G. N. Ry. & M., S. & L. Ry.* (1881), 3 Ry. & Can. Tr. Cas. 564; *Beeston Brewery Co. v. Mid. Ry.* (No. 1) (1885), 5 Ry. & Can. Tr. Cas. 53; *Girardot, Flinn v. Mid. Ry.* (No. 2), *Beeston Brewery Co. v. Mid. Ry.* (No. 2) (1885), 5 Ry. & Can. Tr. Cas. 60; *Newry Navigation Co. v. G. N. Ry., Ireland* (1889), 7 Ry. & Can. Tr. Cas. 176; *R. v. Railway Comrs. & Distington Iron Co.* (1889), 22 Q. B. D. 642; *Winsford L. B. v. Cheshire Lines Committee* (1890), 21 Q. B. D. 456; *R. v. G. W. Ry.* (1893), 62 L. J. Q. B. 572; *Darlaston L. B. v. L. & N. W. Ry.*, [1894] 2 Q. B. 694; *Glamorganshire County Council v. G. W. Ry.* (1894), 8 Ry. & Can. Tr. Cas. 196; *West Ham Corpn. v. G. E. Ry.* (1895), 9 Ry. & Can. Tr. Cas. 7; *Milner v. G. N. Ry.*, [1900] 1 Q. B. 795; *Cowan v. N. B. Ry.* (No. 2) (1901), 11 Ry. & Can. Tr. Cas. 96; *Metropolitan Water Board v. L., B. & S. C. Ry.*, [1910] 2 K. B. 890; *N. E. Ry. v. Ferens* (1911), 15 Ry. & Can. Tr. Cas. 17; *Leek U. D. C. v. North Staffordshire Ry.* (1913), 15 Ry. & Can. Tr. Cas. 105; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Nottingham Corpn. v. Mid. Ry.* (1922), 128 L. T. 539.

133. —.]—*CENTRAL WALES & CARMARTHEN JUNCTION RY. CO. v. LONDON & NORTH WESTERN RY. CO. & GREAT WESTERN RY. CO.* (1883), 4 Ry. & Can. Tr. Cas. 211.

Annotation :—*Mentd.* *G. W. Ry. v. Severn & Wye & Severn Bridge Ry. & Mid. Ry., Severn & Wye & Severn Bridge Ry. v. G. W. Ry.* (No. 2) (1887), 5 Ry. & Can. Tr. Cas. 170.

134. .]—It may be stated generally that Parliament in passing a private Act looks to the public advantage & security, & also looks to the interference with private rights . . . it has been said that the particular provisions may rather be regarded as words of contract to which the Legislature has given its sanction than the words of the Legislature itself. . . . I concur with the language of FITZGIBBON, L.J. that we "cannot interpret the Act by any reference to the bill, nor can we determine its construction by any reference to its original form" (LORD HALSBURY, C.).—*HERRON v. RATHMINES & RATHGAR IMPROVEMENT COMRS.*, [1892] A. C. 498; 67 L. T. 658, H. L.

Annotations :—*Mentd.* *Fielden v. Morley Corpn.* (1898), 14 T. L. R. 566; *The Johannesburg*, [1907] P. 65; *A.-G. v. Frimley & Farnborough Water Co.*, [1908] 1 Ch. 727; *A.-G. v. Barnet District Gas & Water Co.* (1909), 101 L. T. 651.

135. —.]—Both sides sought to refer to what passed in Parliament as supporting their respective contentions as to the meaning of the enactment, but such evidence was, of course, inadmissible (COLLINS, M.R.).—*R. v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL*, [1906] 2 K. B. 676; 95 L. T. 248; 70 J. P. 451; 22 T. L. R. 783; 4 L. G. R. 992; *sub nom. R. v. YORKSHIRE (W. R.) COUNTY COUNCIL*, *Ex p. A.-G. & BOARD OF EDUCATION*, 75 L. J. K. B. 933, C. A.; *on appeal*,

nom. A.-G. v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL, [1907] A. C. 29, H. L.

Annotations :—*Mentd.* *Wilford v. West Riding of Yorkshire County Council*, [1908] 1 K. B. 685; *R. v. Board of Education*, [1909] 2 K. B. 1045; *Gillow v. Durham County Council*, [1913] A. C. 54; *Martin v. Eccles Corpn.*, [1919] 1 Ch. 387.

136. —.]—It is well established that in a ct. of law the motives which influenced the Legislature in passing any particular enactment or the purposes or objects it desired to effect can only be legitimately obtained from the language of the enactment itself viewed through the light of the circumstances in reference to which that language was used. The reports of the debate leading up to the passing of it cannot be looked at (LORD ATKINSON).—*HOLLINSHEAD v. HAZLETON*, [1916] 1 A. C. 428; 85 L. J. P. C. 60; 114 L. T. 292; 32 T. L. R. 177; [1916] H. B. R. 85, H. L.

Annotation :—*Mentd.* *Hamilton v. Caldwell* (1919), 88 L. J. P. C. 173.

137. —.]—The words of the statute are to be construed so as to ascertain the mind of the legislature from the natural & grammatical meaning of the words which it has used, & in so construing them the existing state of the law, the mischiefs to be remedied & the defects to be amended, may legitimately be looked at together with the general scheme of the Act (LORD BIRKENHEAD, C.).

(2) The debate upon the bill, the fate of amendments proposed & dealt with in committee of either House cannot be referred to, to assist in construing the language of the Act as ultimately passed into law with the royal assent (LORD WRENBURY).—*RHONDDA'S (VISCOUNTESS) CLAIM*, [1922] 2 A. C. 339; 92 L. J. P. C. 81; 128 L. T. 155; 38 T. L. R. 759; 66 Sol. Jo. 630, H. L.

SUB-SECT. 3.—AS TO MISINTERPRETATION OF STATUTES.

138. Duty of court to correct erroneous interpretations.—If the construction put upon a statute is manifestly erroneous, we are bound to give it the true construction, though I admit that, where the matter is doubtful, the ct. would from what may be called the courtesy due to another ct. of co-ordinate jurisdiction, pay attention to its decisions (POLLOCK, C.B.).—*CUMBERLAND v. COPELAND* (1861), 7 H. & N. 118; 31 L. J. Ex. 19; 158 E. R. 416; *on appeal* (1862), 1 H. & C. 194, Ex. Ch.

139. Misinterpretation by government department or local authority—In exercise of statutory powers—Validity of Statutory Rules & Regulations.—(1) The Board of Trade made certain rules known as the Register of Patent Agents Rules, 1889, which were laid before Parliament & no objection was taken to them within the forty days specified by the principal Act. They provided (*inter alia*) for the mode by which a patent agent practising before the Act of 1888 should be entered in the register; & also for the payment of an entrance fee, & an annual fee by all patent agents continuing on the register, & for erasure from the register of the name of any person whose annual fee was not paid:—*Held*: the rule having been laid before both Houses of Parliament for forty days without being annulled were of the same effect as if they were contained in the statute, & as long as they remained in force it was not competent to question their authority.

(2) If a ct. of justice, before whom all these questions must ultimately come, considers that

PART III. SECT. 1, SUB-SECT. 3.
n. *Relevancy to question of prohibition.*—No misinterpretation, actual or

apprehended, of a statute, is relevant to the question of prohibition unless the misinterpretation itself gives juris-

diction.—*Re ROYSTON PARK SUB-DIVISION & STEELTON CORPN.* (1913), 28 O. L. R. 629; 4 O. W. N. 1273.—CAN.

Sect. 1.—Functions of court: Sub-sect. 3. Sect. 2: Sub-sect. 1.]

certain rules are rules which do not come within this sect., in my opinion they would be *ultra vires*, & it would be the duty of the ct. not to regard them as operative (LORD MORRIS).—PATENT AGENTS INSTITUTE v. LOCKWOOD, [1894] A. C. 347; 63 L. J. P. C. 75; 71 L. T. 205; 10 T. L. R. 527; 6 R. 219, H. L.

Annotations:—As to (1) *Consd.* Tattersall v. Sladen, [1928] Ch. 318. *Refd.* *Re* London & General Bank (1894), 38 Sol. Jo. 682; Baker v. Williams, [1898] 1 Q. B. 23; Devonport Corpn. v. Tozer, [1902] 2 Ch. 182; Brightman v. Tate (1919), 35 T. L. R. 209; Barwick v. S. E. & C. Ry., [1920] 2 K. B. 387; Simmonds v. Newport Abercrom Black Vein Steam Coal Co., [1921] 1 K. B. 616; R. v. Electricity Comrs., *Ex p.* London Electricity Joint Committee Co. (1920), Ltd., [1924] 1 K. B. 171. *Generally*, *Mentd.* Starey v. Graham (1899), 47 W. R. 392; Stephens v. Chown, Stephens v. Clark, [1901] 1 Ch. 894.

140. ———.]—By virtue of Education Act, 1902 (c. 42), s. 7, the local education authority is, in respect of a non-provided school, under the obligation of maintaining it as it was when the Act came into force, that is, as a complete school for children of all school ages, & giving instruction in all branches, classes, or standards for the time being taught in public elementary school, subject to the power of the local education authority to vary from time to time the syllabus or details of instruction. The power of control, & the power to give directions as to secular instruction in such a school possessed by the local education authority, do not include a power to direct a discontinuance of the giving of secular instruction altogether to individual scholars or to scholars of a particular age, or to all scholars who have attained a certain degree of efficiency, but have not completed their school career. If, therefore, such a direction is given so as to alter the fundamental character of the school & frustrate the object for which it was funded, it is *ultra vires*, & the Board of Education has no jurisdiction to decide that it is *intra vires*. A dispute between the local education authority & the managers of a non-provided school in respect of which such a direction which is thus *ultra vires* has been given does not arise under Education Act, 1902 (c. 42), s. 7, alone, & is not excluded from the jurisdiction of the ct. by sub-sect. 3 of sect. 7.

I come to the conclusion that no question here has arisen which excludes the jurisdiction of the ct. (CHANNELL, J.).—WILFORD v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL, [1908] 1 K. B. 685; 77 L. J. K. B. 436; 98 L. T. 670; 72 J. P. 107; 24 T. L. R. 286; 6 L. G. R. 244; *sub nom.* WALFORD v. WEST RIDING COUNTY COUNCIL, 52 Sol. Jo. 263.

Annotations:—*Apprvd.* R. v. Board of Education, [1910] 2 K. B. 165. *Refd.* Martin v. Eccles Corpn., [1919] 1 Ch. 387.

141. ———.]—Education Act, 1902 (c. 42), s. 7 (3), which provides that "if any question arises under this section between the local education authority & the managers of a school not provided by the authority that question shall be determined by the Board of Education," does not enable the Board of Education to legislate, & if its decision is based upon a wrong interpretation of the Act such decision is not final, & it is

competent to the ct. in an action, notwithstanding that decision, to do what is right between the parties; but in all matters of fact not involving a wrong construction of the statute the decision of the Board of Education is final.—R. v. BOARD OF EDUCATION, [1910] 2 K. B. 165; 79 L. J. K. B. 595; 74 J. P. 259; 8 L. G. R. 549; *sub nom.* R. v. BOARD OF EDUCATION, *Ex p.* SWANSEA, OXFORD STREET (CHURCH OF ENGLAND) SCHOOL MANAGERS, 102 L. T. 578; 26 T. L. R. 422, C. A.; *affd. sub nom.* BOARD OF EDUCATION v. RICE, [1911] A. C. 179, H. L.

Annotations:—*Consd.* Dyson v. A.-G., [1911] 1 K. B. 410; R. v. Port of London Authority, *Ex p.* Kynoch, [1919] 1 K. B. 176; R. v. Electricity Comrs., *Ex p.* Ealing B. C. (1922), 128 L. T. 100. *Refd.* R. v. Metropolis Police Comr., *Ex p.* Holloway (1911), 75 J. P. 490; R. v. Customs & Excise Comrs., [1913] 3 K. B. 483; L. G. Board v. Arlidge, [1915] A. C. 120; R. v. Amphlett, [1915] 2 K. B. 223; Cassel v. Inglis, [1916] 2 Ch. 211; De Verteuil v. Knaggs, [1918] A. C. 557; West Suffolk County Council v. Olorenshaw (1918), 82 J. P. 292; Weinberger v. Inglis, [1919] A. C. 606; R. v. Housing Appeal Tribunal, [1920] 3 K. B. 334; Everett v. Griffiths, [1921] 1 A. C. 631; Reitzes De Marienwert v. Austrian Property Administrator, [1924] 2 Ch. 282; R. v. Electricity Comrs., *Ex p.* London Electricity Joint Committee Co. (1920), Ltd., [1924] 1 K. B. 171; Roberts v. Hopwood, [1925] A. C. 578; Short v. Poole Corpn., [1926] Ch. 66; Wigg v. A.-G. of the Irish Free State (1927), 96 L. J. P. C. 88.

142. ———.]—By regulations made by the Home Secretary in 1904, under Factory & Workshop Act, 1901 (c. 22), s. 79, after reciting that the processes of loading & unloading any ship in dock had been certified to be dangerous, it was provided that the means of access between the ship & the shore for the use of the persons employed should, subject to certain qualifications, be a gangway of the kind therein described, & that it should be the duty of the owner, master, or officer in charge of the ship to provide the prescribed means of access:—*Held*: the regulations, in so far as they imposed upon the owner of the ship the duty of providing a safe means of access, were not inconsistent with the provisions of the Act & were *intra vires*.—MACKAY v. MONKS (JAMES HENRY) (PRIESTON) LTD., [1918] A. C. 59; 87 L. J. P. C. 28; 118 L. T. 65; 82 J. P. 105; 34 T. L. R. 34, H. L.

Misinterpretation by inferior court.—Whether ground for prohibition.]—See CROWN PRACTICE, Vol. XVI., p. 381, Nos. 2187–2189.

——— **To county court.]—**See COUNTY COURTS, Vol. XIII., p. 549, Nos. 1042–1046.

——— **Whether ground for mandamus.—To magistrates.]—**See MAGISTRATES, Vol. XXXIII., p. 423, No. 1357.

SECT. 2.—RULES OF INTERPRETATION.

SUB-SECT. 1.—IN GENERAL.

Statutory rules of interpretation.]—See Sect. 3, *post*.

143. Statement of rules.]—For the sure & true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned & considered: (a) What was the common law before the making of the Act; (b) what was the mischief & defect for which the common law did not provide; (c) what remedy the Parliament has

PART III. SECT. 2, SUB-SECT. 1.

143 i. Statement of rules.]—For the sure & true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), our things are to be discerned & considered. (1) What was the common law before the making of the Act. (2) What was the mischief or defect for which the common law did not

provide. (3) What remedy the Parliament hath resolved & appointed to cure the disease of the Commonwealth. (4) The true reason of the remedy, & then the office of all the judges is always to make such construction as shall suppress the mischief & advance the remedy, & to suppress subtle inventions & evasions for the continuance of the mischief & *pro privato*

commodo, & to add force & life to the sure & remedy according to the true intent of the makers of the Act *pro bono publico*.—KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. v. BRITISH COLUMBIA PRESSED BRICK CO. (B. C.) (1918), 56 S. C. R. 539, 545.—CAN.

o. Difference between English & French versions of Quebec statutes.]—

resolved and appointed to cure the disease of the commonwealth; & (d) the true reason of the remedy (*per* CUR.).—HEYDON'S CASE (1584), 3 Co. Rep. 7a; 76 E. R. 637.

Annotations:—*Consd.* Warburton v. Loveland (1832), 6 Bl. N. S. 1; A.-G. v. Walker (1849), 3 Exch. 242. *Apld.* Miller v. Salomons (1852), 7 Exch. 475. *Consd.* A.-G. v. Sillom (1863), 2 H. & C. 431; Peck v. North Staffordshire Ry. (1863), 10 H. L. Cas. 473. *Distd.* R. v. Sillim, The Alexandria (1864), 3 New Rep. 299. *Apld.* Easton v. Richmond Highway Board (1871), L. R. 7 Q. B. 69. *Consd.* R. v. Castro (1874), L. R. 9 Q. B. 350. *Expld.* River Wear Comrs. v. Adamson (1877), 2 App. Cas. 743. *Consd.* R. v. Holbrook (1878), 4 Q. B. D. 42; Harding v. Preece (1882), 11 Q. B. D. 281; Bradlaugh v. Clarke (1883), 8 App. Cas. 354; *Re* Leavesley, [1891] 2 Ch. 1. *Apld.* Eastman Photographic Materials Co. v. Comptroller General of Patents, [1898] A. C. 571. *Consd.* A.-G. v. Metropolitan Electric Supply Co., [1905] 1 Ch. 24; Conway v. Wade, [1908] 2 K. B. 844; O'Grady v. Wilmot, [1916] 2 A. C. 231; Banbury v. Bank of Montreal, [1918] A. C. 626; British-American Tobacco Co. v. Jones (1925), 134 L. T. 405. *Refd.* Bicknell v. Tucker (1612), 2 Brownl. 153; Fawkeners v. Bellingham (1627), Cro. Car. 80; James v. Tutney (1639), Cro. Car. 532; A.-G. v. Andrew (1655), Hard. 23; Pelton v. Harrison, [1891] 2 Q. B. 422; *Re* Mayfair Property Co., Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28; Sadler v. Whiteman, [1910] 1 K. B. 868; A.-G. v. Brown, [1920] 1 K. B. 773; Nicolle v. Nicolle, [1922] 1 A. C. 284. *Mentd.* Worcester's Case (1606), 11 Co. Rep. 37a; Lee v. Brown (1617), Poph. 128; Rowden v. Maltster (1621), Cro. Car. 42; Harrington v. Smith (1658), 1 Sid. 73; Beckman v. Maplesden (1662), O'Brigg. 60; Wolferstan v. Lincoln (Bp.) (1763), 2 Wils. 174; Doe d. Wightwick v. Truby (1774), 2 Wm. Bl. 943; Doe d. Tunstill v. Bottrill (1833), 5 B. & Ad. 131; Crofts v. Middleton (1856), 8 De G. M. & G. 192; Bruce v. Allesbury, [1892] A. C. 356; Hunting v. Matthews (1913), 11 L. G. R. 723; Dobb v. Dobb (1918), 87 L. J. Ch. 321.

144. Construction a matter of law.]—In explaining an Act of Parliament, it is impossible to contend, that evidence should be admitted; for that would be to make it a question of fact in place of a question of law. The judge is to direct the jury as to the point of law, & in doing so, must form his judgment of the meaning of the legislature in the same manner as if it had come before him by demurrer, where no evidence could be admitted (EYRE, C.B.).—A.-G. v. CAST-PLATE GLASS CO. (1792), 1 Anst. 39; 145 E. R. 793.

Annotation:—*Mentd.* Shore v. Wilson (1842), 9 Cl. & Fin. 355.

145. —.]—The meaning of words in an Act of Parliament is a question of law, not a matter of evidence (POLLOCK, C.B.).—MASON v. BIBBY (1861), 2 H. & C. 881; 33 L. J. M. C. 105; 12 W. R. 382; 159 E. R. 365.

Annotations:—*Mentd.* R. v. Lilley, *Ex p.* Taylor (1910), 104 L. T. 77; R. v. Braithwaite, [1918] 2 K. B. 319.

146. Construction according to rule of common law.]—Judges have always expounded general statutes according to the rules of the common law.—HARBERT'S CASE (1584), 3 Co. Rep. 11b; 76 E. R. 647.

Annotations:—*Mentd.* Cecil's Case (1597), 7 Co. Rep. 18b; Garnon's Case (1598), 5 Co. Rep. 88a; Rooke's Case (1598), 5 Co. Rep. 99b; Drury's Case (1610), 8 Co. Rep. 141b; Waldron v. Vicars (1622), Palm. 283; Coke's Case (1623), Godb. 289; R. v. Hampden (1637), 3 State Tr. 826; Fowle v. Doble (1674), 1 Mod. Rep. 181; R. v. Baden (1694), Show. Parl. Cas. 72; Bankers Case (1695), Skin. 601; Lane v. Cotton (1701), 12 Mod. Rep. 472; Gore v. Gore (1733), Kel. W. 254; Kent v. Kent (1734), Kel. W. 194; Galton v. Hancock (1743), 2 Atk. 427; Stileman v. Ashdown (1743), Amb. 13; Dyke v. Sweeting (1745), Willes, 585; Gorton v. Hancock (1745), Ridg. temp. H. 301; R. v. Curtis (1750), Park. 95; R. v. Cotton (1751),

Park. 112; Deering v. Winchelsea (1787), 2 Bos. & P. 270; Giles v. Grover (1832), 9 Bing. 128; Cassidy v. Stewart (1841), 2 Scott, N. R. 432; Hunter v. Hunt (1845), 1 C. B. 300; Wolmershausen v. Gullick, [1893] 2 Ch. 514; Ruabon SS. Co. v. London Assce., [1900] A. C. 6; *Re* Darby's Estate, Rendall v. Darby, [1907] 2 Ch. 465.

147. —.]—It is a safe rule of construction that statutes made in imitation of the common law shall be expounded according to the rules of law in like cases.—R. v. DRUMMOND (1746), Fost. 88; 168 E. R. 44, H. L.

148. Construction according to rules applicable to other documents.]—It is safer to abstain from imposing with regard to Acts of Parliament any further canons of construction than those applicable to all documents (BOWEN, L.J.).—LAMPLUGH v. NORTON (1889), 22 Q. B. D. 452; 58 L. J. Q. B. 279; 53 J. P. 389; 37 W. R. 422; 5 T. L. R. 304, C. A.

Annotation:—*Refd.* Woolley & Woolley v. Broad (1892), 66 L. T. 680.

149. Construction of other codes.]—In construing a British Act of Parliament, very little assistance can be derived from ancient or modern codes of other countries; but yet cases have occurred & do occur in cts. of law, where, in interpreting an Act of Parliament, the context of which does not furnish the necessary information, or precise meaning, that the assistance of foreign codes, from which the principle of that particular statute has been borrowed, has been resorted to, in order to give the true interpretation of the Act (SIR H. JENNER FUST).—DRUMMOND v. PARISH (1843), 3 Curt. 522; 7 Jur. 538; 163 E. R. 812.

Annotations:—*Refd.* *In the Goods of* Hiscock, [1901] 1 P. 78; *Re* Wernher, Wernher v. Beit, [1918] 1 Ch. 339. *Mentd.* Whyte v. Repton (1844), 3 Notes of Cases, 97; *In the Goods of* Hill (1845), 1 Rob. Eccl. 276; Bowles v. Jackson (1854), 1 Ecc. & Ad. 294; Herbert v. Herbert (1855), Dea. & Sw. 10; *In the Goods of* Thorne (1865), 4 Sw. & Tr. 36; *In the Estate of* Donner (1917), 31 T. L. R. 138; *In the Estate of* Gossage, Wood v. Gossage, [1921] P. 194; *In the Estate of* Grey, [1922] P. 140; *Re* Booth, Booth v. Booth, [1926] P. 118.

150. Strict construction of provisions conferring benefits on particular class.]—Statutory provisions giving preference to particular creditors must be strictly construed.—*Re* JARDINE, *Ex p.* FLEET (1850), 4 De G. & Sm. 52; 19 L. J. Bcy. 10; 15 L. T. O. S. 435; 14 Jur. 685; 64 E. R. 730.

Annotation:—*Mentd.* *Re* Aberdeen (1896), 13 T. L. R. 7.

151. Man read as woman.]—(1) There is no doubt that in many statutes "men" may be properly held to include women (BOVILL, C.J.).

(2) It is a well-known rule in the construction of statutes that as they are framed for the guidance of the people, their language is to be construed in its ordinary & popular sense (BYLES, J.).—CHORLTON v. LINGS (1868), L. R. 4 C. P. 374; 1 Hop. & Colt. 1; 38 L. J. C. P. 25; 19 L. T. 534; 32 J. P. 824; *sub nom.* CHORLTON v. LINGS, ABBOTT'S CASE, 17 W. R. 284.

Annotations:—*As to* (1) *Consd.* Rhondda's Claim, [1922] 2 A. C. 339. *Refd.* Beresford-Hope v. Sandhurst (1889), 23 Q. B. D. 79; Nairn v. St. Andrews University, [1909] A. C. 147; *Re* Royal Naval School, Seymour v. The School (1910), 79 L. J. Ch. 366. *Generally, Refd.* A.-G. v. Liverpool Corp., [1922] 1 Ch. 211. *Mentd.* Chorlton v. Kessler (1868), L. R. 4 C. P. 397; Stowe v. Jolliffe (No. 2) (1874), 43 L. J. C. P. 265; De Souza v. Cobden (1891), 65 L. T. 130; Drax v. Ffooks (1895), 2 T. L. R. 34; Bebb v. Law Society, [1911] 1 Ch. 286.

q. Construction of section.—*Whole of section must be given effect to.]*—MONTREAL LIGHT, HEAT & POWER CO. v. CITY OF MONTREAL, [1924] 2 D. L. R. 605.—CAN.

r. Consideration of matters outside Act.]—In construing an expression of doubtful import occurring in a statute, the ct. may well have regard to considerations outside the language of the Act.—R. v. ATMARIM (1907), 1 L. R. 31 Bom. 480.—IND.

The English & French versions of Quebec statutes are of equal authority, but when a difference occurs between the two versions there is uncertainty as to the intention of the legislature & one or other the versions must prevail according to the following rules. If the variance occurs in a statute consolidating previous statutes or in a statute founded upon our pre-existing law that version must prevail which is the more consistent with the

former law; if the variance occurs in a statute changing the law that version shall prevail which is the more consistent with the intention of the legislature & the ordinary rules of legal interpretation shall apply to determine such intention.—R. v. DAVIDSON (1898), Q. R. 15 S. C. 83.—CAN.

p. —.]—DAVIS v. MONTREAL CORPN. (Que.) (1897), 27 S. O. R. 539.—CAN.

Sect. 2.—Rules of interpretation: Sub-sects. 1 & 2, A.]

152. Plural read as singular.]—In construing a statute, plural is to be read as singular whenever the nature of the subject-matter requires it (LORD SELBORNE, C.).—*CONELLY v. STEER* (1881), 7 Q. B. D. 520; 50 L. J. Q. B. 326; 45 L. T. 402; 29 W. R. 529, C. A.

Annotation:—Mentd. Lyons ■ Tucker (1881), 7 Q. B. D. 523.

Statutory rules of Interpretation.]—See Sect. 3, post.

SUB-SECT. 2.—WORDS CONSTRUED IN THEIR ORDINARY MEANING.

A. In General.

See DEEDS, Vol. XVII., pp. 264 et seq.

153. Statement of rule.]—They ought not to make any construction against the express letter of the statute for nothing can so express the meaning of the makers of the Act as their own direct words, for *index animi sermo (per CUR.)*.—*EDRICH'S CASE* (1603), 5 Co. Rep. 118a; 77 E. R. 238.

Annotations:—Mentd. Lovles's Case (1614), 10 Co. Rep. 78a; Bingham & Parkhurst's Case (1628), Litt. 93; Lanyon v. Carne (1670), 2 Wms. Saund. 161; Hool v. Bell (1697), 1 Ld. Raym. 172.

154. —.]—It is in no instance safe to depart from the words of an Act of Parliament, & the court never will do it, unless they see most evidently from the preamble & the context, that to construe the words literally, would be to defeat the meaning of the Act (KENYON, C.J.).—*R. v. WENSLEY (INHABITANTS)* (1793), Nolan, 182; 5 Term Rep. 154; 101 E. R. 88.

155. —.]—(1) Where the words of the statute are clear & unequivocal the ct. is bound to interpret & to apply them according to their obvious meaning (SIR WILLIAM SCOTT).

(2) This statute must be understood as composing a law for the regulation of that [West Indian] trade, & shall not be construed to repeal a

former statute by mere inference, when there is another subject to which it will apply (SIR WILLIAM SCOTT).—*THE MARY* (1811), 1 Dods. 68; 165 E. R. 1235.

156. —.]—It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed (Bayley, J.).—*R. v. RAMSGATE (INHABITANTS)* (1827), 6 B. & C. 712; 9 Dow. & Ry. K. B. 688; 4 Dow. & Ry. M. C. 470; 108 E. R. 613; *sub nom.* *R. v. ST. LAWRENCE, RAMSGATE (INHABITANTS)*, 5 L. J. O. S. M. C. 69.

Annotation:—Apld. R. v. Ashley Hay (1828), 8 B. & C. 27.

157. —.]—It is a safe rule of construction not to speculate upon the probable intention, but to adhere to the words of an Act of Parliament in their grammatical & natural sense, unless it appears certainly & clearly from the context that they were intended to be used in some other sense (PARKE, J.).—*R. v. DITCHEAT (INHABITANTS)* (1829), 9 B. & C. 176; 4 Man. & Ry. K. B. 151; 2 Man. & Ry. M. C. 144; 7 L. J. O. S. M. C. 110; 109 E. R. 66.

Annotations:—Refd. R. v. St. Nicholas, Rochester (1834), 5 B. & Ad. 219; R. v. Westbury on Trym (1857), 7 E. & B. 444. *Mentd.* R. v. St. Mary Kalendar (1839), 9 Ad. & El. 626; Harris v. Amery (1865), Hop. & Ph. 294.

158. —.]—We abide by the words of an Act of Parliament, taken in their ordinary & popular sense, which is a safe rule of construction (TENTERDEN, C.J.).—*R. v. ST. ANDREW THE LESS, CAMBRIDGE* (1830), 10 B. & C. 742; 5 Man. & Ry. K. B. 639; 3 Man. & Ry. M. C. 57; 8 L. J. O. S. M. C. 84; 109 E. R. 626.

159. —.]—It is better to adhere to the plain words of the statute, than to force constructions (ABINGER, C.B.).—*BOTHEROYD v. WOOLLEY* (1835), 1 Gale, 66; 5 Tyr. 522; 4 L. J. Ex. 153.

Annotation:—Mentd. Cattley v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651.

160. —.]—Where I find a statute expressly requiring something to be done, & the words of that statute are, as they are here, clear beyond all doubt, I shall require something extremely cogent

PART III. SECT. 2, SUB-SECT. 2.—A.

153 i. Statement of rule.]—MARKEIL v. WOLLASTON (1906), 4 C. L. R. 141.—AUS.

153 ii. —.]—*RYAN v. SYDNEY HARBOUR TRUST COMRS* (1912), 12 S. R. N. S. W. 91; 29 N. S. W. W. N. 15.—AUS.

153 iii. —.]—*Re TAILORING TRADES' WAGES BOARD* (1915), 11 Tas. L. R. 107.—AUS.

153 iv. —.]—*GRATTAN v. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES* (1904), 9 O. L. R. 433; 4 O. W. R. 389; 25 C. L. T. 104.—CAN.

153 v. —.]—Where the legislature has used in the enactment in question language so free from ambiguity & so clear & explicit as to leave no doubt as to its meaning, the ct. must construe the enactment according to its expressed intention.—*R. v. BANK OF MONTREAL* (1919), 47 N. B. R. 69; 49 D. L. R. 288.—CAN.

153 vi. —.]—*R. & ALBERTA PROVINCIAL TREASURER v. CANADIAN NORTHERN RY. CO. & CANADIAN NATIONAL RY. CO. (Alta.)*, [1920] 3 W. W. R. 283; 53 D. L. R. 691.—CAN.

153 vii. —.]—Where the language of a statute is so free from ambiguity as to leave no doubt as to the intention of the legislature, no rules of construction are applicable.—*R. v. BANK OF MONTREAL* (1920), 47 N. B. R. 69; 49 D. L. R. 288.—CAN.

153 viii. —.]—In the construction of statutes their words must be inter-

preted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.—*VANCOUVER ISLAND (BR.) v. VICTORIA CORPN. (B. C.)*, [1921] 3 W. W. R. 214; 59 D. L. R. 399.—CAN.

153 ix. —.]—*R. & ALBERTA PROVINCIAL TREASURER v. CANADIAN NORTHERN RY. CO.*, [1923] 3 D. L. R. 719; [1923] A. C. 714; [1923] 3 W. W. R. 547.—CAN.

153 x. —.]—*CANADIAN DRUG CO., LTD. v. LIQUOR BOARD (N. B.)*, [1924] 4 D. L. R. 273.—CAN.

153 xi. —.]—*Re NAVY LEAGUE OF CANADA, HALIFAX BRANCH ASSESSMENT*, [1927] 4 D. L. R. 184; 59 N. S. R. 212.—CAN.

153 xii. —.]—*GUREEBULLAH SIKKAR v. MOHUN LALI SHAHA* (1881), 1 L. R. 7 Calc. 127; 8 C. L. R. 409.—IND.

153 xiii. —.]—Where it is not suggested that a word bears any technical sense in the context in which it occurs, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense.—*CURRIMBOY EBRAHIM v. MUNICIPAL COMRS.* (1909), 1 L. R. 34 Bom. 496.—IND.

153 xiv. —.]—*KARI SINGH v. R.* (1912), 1 L. R. 40 Calc. 433.—IND.

153 xv. —.]—*CAULFIELD v. MA-GUIRE* (1856), 5 I. Ch. R. 78.—IR.

153 xvi. —.]—In construing any Act of Parliament, the rules of construction are these: first, you must give to every word as far as possible, a meaning, & apply it in its proper meaning. But secondly, & as corollary to that rule, where there are general words of description, following an enumeration of particular things, such general words are to be construed distributively, *reddendo singula singulis*: & if the general words will apply to some things & not to others, the general words are to be applied to those things to which they will, & not to those to which they will not apply: that rule is beyond all controversy.—*M'NEILL v. CROMMELIN* (1858), 8 I. C. L. R. 61; 10 Ir. Jur. 297.—IR.

153 xvii. —.]—If the legislature uses language as to the meaning of which there could be no doubt if it were used by an ordinary person, there can be no doubt as to its meaning when used by the legislature.—*SHANAGAN v. TANNER* (1905), 24 N. Z. L. R. 970.—N.Z.

153 xviii. —.]—The meaning of statutes must not be extended beyond the plain effect & necessary implication of the language used.—*COLONIAL GOVERNMENT v. GODDARD* (1900), 3 Buch. A. C. 301.—S. AF.

153 xix. —.]—*GREENSHIELDS v. WILLENBERG* (1908), 25 S. C. 556.—S. AF.

153 xx. —.]—*YOUNG v. R.*, [1911] E. D. L. 231.—S. AF.

153 xxi. —.]—*SELUKA v. SUSKIN & SALKOW*, [1912] T. P. D. 258.—S. AF.

to satisfy me that the new rules dispense with the proof of the thing thus required (WILLIAMS, J.).—*SHEARWOOD v. HAY*, *WILLS v. LANGRIDGE* (1836), 5 Ad. & El. 383; 2 Har. & W. 250; 5 L. J. K. B. 246; 111 E. R. 1210.

Annotations:—**Mentd.** *Pritchard v. M'Gill* (1837), 2 M. & W. 380; *Martin v. Smith* (1838), 6 Scott, 268; *Wagstaffe v. Sharpe* (1838), 3 M. & W. 521; *Jones v. Flint* (1839), 2 Per. & Dav. 594; *Richmond v. Coles* (1842), 11 L. J. Q. B. 155; *Varney v. Hickman* (1847), 10 L. T. O. S. 248; *Wright v. Greenroyed* (1861), 5 L. T. 347.

161. —.]—To arrive at such conclusion we ought to be quite clear before we deny any word its known & natural meaning, that it was not intended to be used by the legislature in that sense; so far from that being the case here, I do not even think it probable that the legislature would have excluded steamboats; & I have no difficulty in saying that the words of the act are sufficient to comprehend them (LORD DENMAN, C.J.).—*TISDELL v. COMBE* (1838), 7 Ad. & El. 788; 3 Nev. & P. K. B. 29; 1 Will. Woll. & H. 5; 7 L. J. M. C. 48; 2 Jur. 32; 112 E. R. 667.

Annotation:—**Refd.** *Reed v. Ingham* (1854), 3 E. & B. 889.

162. —.]—Acts of Parliament ought always to be construed as using words in their common & ordinary sense, unless it appears from the other parts of the enactment that an absurdity will follow from so doing (PARKE, B.).—*BROWN v. MACMILLAN*, *SAME v. MACPHERSON* (1840), 8 Dowl. 852; 7 M. & W. 196; H. & W. 46; 10 L. J. Ex. 147; 4 Jur. 1090; 151 E. R. 736.

163. —.]—The words are too plain to leave any doubt that such an appeal existed under that Act; they cannot be satisfied in any other way & must not be cut out of the Act (LITTLEDALE, J.).—*R. v. WEST RIDING OF YORKSHIRE JJ.*, *Re LEES* (1811), 1 Q. B. 325; 5 J. P. 354; 113 E. R. 1156; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ.*, *Ex p. LEES*, 4 Per. & Dav. 668; 10 L. J. M. C. 86; 5 Jur. 1180.

164. —.]—*SUSSEX PIERAGE CASE*, No. 569, *post*.

165. —.]—The first & cardinal rule is this, is there any plain & evident meaning arising from the words used, taking them in their ordinary acceptation, in conjunction with known rules of grammar? If there be no difficulty in arriving at a rational meaning in conformity to these principles, there is nothing more to be done; for nothing is more contrary to sound reason or safe principle, than to attempt, by the exercise of ingenuity, to attach to words a far-fetched meaning, contrary to common sense & common perception. . . .

The next step is, upon consideration of the whole statute, to determine its character, & especially whether it be remedial or not. . . .

It is expedient, where there have been no decisions as to the statute in question, to examine with care decisions which have taken place as to preceding statutes *in pari materia*; but great caution is necessary in the use of such last materials, for the minutest diversity of words may make a distinction (DR. LUSHINGTON).—*HUDSON v. PARKER* (1844), 1 Rob. Eccl. 14; 3 Notes of Cases, 236; 8 Jur. 786; 163 E. R. 948.

Annotations:—**Mentd.** *Faulds v. Jackson* (1845), 11 Notes of Cases Supp. 1; *Leech v. Bates* (1849), 6 Notes of Cases, 699; *Bryan v. White* (1850), 2 Rob. Eccl. 315; *Thomson & Allaway v. Hall* (1852), 2 Rob. Eccl. 426; *Norton v. Bazett* (1856), Dea. & Sw. 259; *Charlton v. Hindmarsh* (1859), 1 Sw. & Tr. 433; *In the Goods of Gunstan Blake v. Blake* (1882), 7 P. D. 102.

166. —.]—We must give the ordinary sense to the words of the Act of Parliament (*per CUR.*).—*R. v. BAYLEY* (1844), 3 L. T. O. S. 220.

167. —.]—In modern Acts of Parliament,

especially in those full of words, the most literal construction is the safest.—*R. v. ROSE* (1844), 6 Q. B. 153; 1 Dav. & Mer. 300; 1 New Mag. Cas. 63; 1 New Sess. Cas. 272; 13 L. J. M. C. 155; 3 L. T. O. S. 179; 8 J. P. 807; 8 Jur. 777; 115 E. R. 59.

Annotation:—**Mentd.** *R. v. Randall* (1855), 4 E. & B. 564.

168. —.]—In construing all Acts of Parliament, it is right to consider in what sense a word is generally used, & to resort to any other interpretation only when it is clearly the object of the framers of the Act that the word shall receive a more restricted, or a more extensive signification, than the term naturally suggests (SIR H. FUST).—*FAULKNER v. LITCHFIELD & STEARN* (1845), 1 Rob. Eccl. 184; 3 Notes of Cases, 511; 5 L. T. O. S. 21; 9 Jur. 234; 163 E. R. 1007.

Annotations:—**Mentd.** *Liddell v. Westerton*, *Liddell v. Beale* (1857), 29 L. T. O. S. 54; *Martin v. Mackonochie*, *Flamank v. Simpson* (1868), 1 L. R. 3 A. & E. 116; *St. James Norland (Vicar, etc.) v. Parishioners of Same*, [1894] P. 256; *St. Luke's, Chelsea v. Wheeler*, [1904] P. 257; *Re St. George, Newcastle-on-Tyne*, [1907] P. 381, n.; *Wimbledon v. Eden*, *Re St. Mark's, Wimbledon*, [1908] P. 167; *Hayes v. Fulford*, [1910] P. 18.

169. —.]—In a ct. of law we have only to ascertain the meaning of the words used by the legislature, & when that is ascertained, we have to carry it into effect, & we are not to inquire whether the enactments are dictated by sound policy or not; that question is exclusively for the consideration of Parliament (PARKE, B.).—*RYDER v. MILLS* (1850), 3 Exch. 853; 19 L. J. M. C. 82; 14 L. T. O. S. 445; 14 J. P. 145; 154 E. R. 1090.

Annotations:—**Refd.** *Gorham v. Exeter (Bp.)* (1850), 5 Exch. 630. **Mentd.** *Chandos v. I. R. Comrs.* (1851), 6 Exch. 464.

170. —.]—The ct., in construing agreements, as well as in construing Acts of Parliament, is in general bound to put on the passages met with, whether in an agreement or a statute, that meaning which is the plain, clear, obvious result of the language made use of (POLLOCK, C.B.).—*TIELENS v. HOOPER* (1850), 5 Exch. 830; 20 L. J. Ex. 78; 155 E. R. 363; *sub nom. TIETENS v. HOOPER*, 16 L. T. O. S. 237.

171. —.]—When an Act of Parliament says a person is to be deemed to be in any particular capacity, it must be taken that he is, & is henceforward to be taken to be the very person he is deemed to be (COLERIDGE, J.).—*WOLTON v. GAVIN* (1850), 16 Q. B. 48; 15 Jur. 329; 117 E. R. 794; *sub nom. WALTON v. GAVIN*, 16 L. T. O. S. 300.

Annotations:—**Mentd.** *Wolton v. Freeze* (1851), 18 L. T. O. S. 158; *R. v. Roberts* (1878), 38 L. T. 690.

172. —.]—There is no doubt upon the plain meaning of the words of the statute, & their literal construction leads to no absurdity (POLLOCK, C.B.).—*JONES v. PHILLIPS* (1851), 7 Exch. 85; 21 L. J. Ex. 6; 16 J. P. 394; 155 E. R. 866.

173. —.]—You should give to words in Acts of Parliament the meaning they actually bear, unless that could not have been intended by the Legislature, because of an evident inconvenience (MAULE, J.).—*ARNOLD v. RIDGE* (1853), 13 C. B. 745; 1 C. L. R. 309; 22 L. J. C. P. 235; 21 L. T. O. S. 141; 17 J. P. 375; 17 Jur. 896; 1 W. R. 389; 138 E. R. 1394.

Annotation:—**Mentd.** *Arnold v. Gravesend Corpn.* (1856), 1 K. & J. 574.

174. —.]—We must look to the intention of the Legislature as expressed in the Act (LORD CAMPBELL, C.J.).—*SALOMONS v. MILLER* (1853), 8 Exch. 778; 1 C. L. R. 245; 22 L. J. Ex. 169; 21 L. T. O. S. 198; 17 Jur. 463, Ex. Ch.; *affg. S. C. sub nom. MILLER v. SALOMONS* (1852), 7 Exch. 475.

Annotations:—**Mentd.** *Evans v. Birmingham Corpn.* (1853), 21 L. T. O. S. 182; *Lancaster & Carlisle Ry. v. Heaton*

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(1858), 8 E. & B. 952; *Shrewsbury v. Scott* (1859), 6 C. B. N. S. 1; *Maden v. Catanach* (1861), 10 W. R. 112; *R. v. Yates* (1883), 48 J. P. 102; *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667.

175. —.]—The golden rule in the construction of an Act of Parliament is to put on the words of it their natural & grammatical construction, although that may lead to some inconvenience, absurdity, or mischief; it being for the judges to construe Acts of Parliament, & not to legislate, & for the legislature to provide a remedy when one is wanted.—*WOODWARD v. WATTS* (1853), 2 E. & B. 452; 1 C. L. R. 1044; 22 L. J. M. C. 149; 17 J. P. 600; 17 Jur. 790; 118 E. R. 836.

176. —.]—(1) The general rule is, that words in an Act of Parliament & indeed in every other instrument, must be construed in their ordinary sense, unless there is something to show plainly that they cannot have been used, & so in fact, were not used in that sense (*MAULE, J.*).

(2) The heading of an Act of Parliament does not at all affect its construction (*LORD ST. LEONARDS*).

(3) When I say that the legislature must *prima facie* be taken to legislate only for its own subjects, I must be taken to include under the word "subjects" all persons who are within the Queen's dominions, & who thus owe to her a temporary allegiance (*JERVIS, C.J.*).

It is clear that the legislature has no power over any persons except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the Kingdom. The legislature can impose no duties except on them; & when legislating for the benefit of persons, must *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, & whose interests the legislature is under a correlative obligation to protect (*PARKE, B.*).

Generally, we must assume that the legislature confines its enactments to its own subjects, over whom it has authority & to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, & may without express words make it appear that such is the intendment of those provisions. But the presumption is rather against the extension & the proof of it is rather upon those who would maintain such to be meaning of the enactments (*LORD BROUGHAM*).—*JEFFERYS v. BOOSEY* (1851), 4 H. L. Cas. 815; 3 C. L. R. 625; 24 L. J. Ex. 81; 23 L. T. O. S. 275; 1 Jur. N. S. 615; 10 E. R. 681, H. L.; *reversq. S. C. sub nom. BOOSEY v. JEFFERYS* (1851), 6 Exch. 580, Ex. Ch.

Annotations:—As to (3) Expld. *Routledge v. Low* (1868), L. R. 3 H. L. 100. *Apld.* *Macleod v. A.-G. for New South Wales*, [1891] A. C. 455; *Adam v. British & Foreign S.S. Co.*, [1898] 2 Q. B. 430. *Consd.* *Davidsson v. Hill*, [1901] 2 K. B. 606. *Refd.* *Sheehy v. Professional Life-Assee.* (1857), 2 C. B. N. S. 211; *Austria (Emperor) v. Day & Kossuth* (1861), 3 De G. F. & J. 217; *Boucicault v. Delafield* (1863), 1 Hem. & M. 597; *Boucicault v. Chatterton* (1876), 5 Ch. D. 267; *Krzus v. Crow's Nest Pass Coal Co.*, [1912] A. C. 590; *Falcon v. Famous Players Film Co.*, [1926] 2 K. B. 471. *Generally, Mentd.* *Buxton v. James* (1851), 18 L. T. O. S. 134; *Novello v. Sudlow* (1852), 12 C. B. 177; *Novello v. James* (1854), 5 De G. M. & G. 876; *Shepherd v. Conquest* (1856), 17 C. B. 427; *Walton v. Lavater* (1860), 8 C. B. N. S. 162; *Reade v. Conquest* (1861), 9 C. B. N. S. 755; *Cumberland v. Copeland* (1862), 1 H. & C. 194; *Gambart v. Ball* (1863), 8 L. T. 426; *Morris v. Wright* (1870), 5 Ch. App. 279; *Layland v. Stewart* (1876), 46 L. J. Ch. 103; *Taylor v. Neville* (1878), 47 L. J. Q. B. 254; *Fairlie v. Boosey* (1879), 41 L. T. 73; *Caird v. Sime* (1887), 12 App. Cas. 326; *Tuck v. Priestner* (1887), 19 Q. B. D. 629; *Trade Auxillary Co. v. Middlesborough & District Tradesmen's Protection Assocn.* (1889), 40 Ch. D. 425; *Labouchere v. Hess* (1897), 77 L. T. 559; *Walter v. Lane* (1900), 69 L. J. Ch. 699; *Mansell v. Valley Printing Co.*, [1908] 1 Ch. 567; *Monckton v. Gramophone Co.* (1912), 106 L. T. 84.

177. —.]—*R. v. FINCHLEY SURVEYORS, Ex p. POUNCEY*, No. 102, *ante*.

178. —.]—(1) The enactment may produce inconvenience, but it is not such as to enable us to say that the intention of the legislature is other than that which is expressly enacted (*ALDERSON, B.*).

(2) We do not sit here as legislators, but to administer the law as we find it, & to construe the statute according to its natural meaning (*PLATT, B.*).—*HONIBALL v. BLOOMER* (1854), 10 Exch. 538; 3 C. L. R. 167; 24 L. J. Ex. 11; 156 E. R. 552; *sub nom. HONEYBALL v. BLOOMER*, 1 Jur. N. S. 188.

Annotations:—Generally, Mentd. *Greaves v. Eastern Counties Ry.* (1859), 5 Jur. N. S. 733; *Batley v. Kynock* (1875), L. R. 20 Eq. 632; *Parnell v. Mort, Liddell* (1885), 29 Ch. D. 325.

179. —.]—When a statute requires an act to be done immediately, I do not see how we can construe it to mean that the act may be done some weeks afterwards (*POLLOCK, C.B.*).—*LEECH v. LAMB* (1855), 11 Exch. 437; 25 L. J. Ex. 17; 1 Jur. N. S. 1175; 156 E. R. 902; *sub nom. LEACH v. LAMB*, 4 W. R. 99.

Annotation:—Consd. *Barker v. Lewis & Peat*, [1913] 3 K. B. 31.

180. —.]—If there be no absurdity in construing the words of this Act literally, why should we not do so (*ALDERSON, B.*).—*GWYN v. HARDWICKE* (1856), 1 H. & N. 49; 25 L. J. M. C. 97; 20 J. P. 359; 156 E. R. 1113.

Annotations:—Mentd. *R. v. Waller* (1875), 31 L. T. 777; *Esher & Dittons U. C. v. Marks* (1902), 71 L. J. K. B. 309.

181. —.]—The language of a statute taken in its plain ordinary sense & not "its policy" or supposed intention, is the safer guide in construing its enactments.—*PHILPOTT v. ST. GEORGE'S HOSPITAL (PRESIDENT, ETC.)* (1857), 6 H. L. Cas. 338; 27 L. J. Ch. 70; 30 L. T. O. S. 15; 21 J. P. 691; 3 Jur. N. S. 1269; 5 W. R. 845; 10 E. R. 1326, H. L.

Annotations:—Mentd. *Hartshorne v. Nicholson* (1858), 26 Beav. 58; *Dent v. Allcroft* (1861), 30 Beav. 335; *Hall v. Warren* (1861), 9 H. L. Cas. 420; *Sewell v. Crewe-Read* (1866), L. R. 3 Eq. 60; *Cresswell v. Cresswell* (1868), L. R. 6 Eq. 69; *Re Watmough's Trusts* (1869), L. R. 8 Eq. 272; *Sinnett v. Herbert* (1871), L. R. 12 Eq. 201; *Chamberlayne v. Brockett* (1872), 21 W. R. 299; *Re Cox, Cox v. Davie* (1877), 7 Ch. D. 204; *Re Hedgman, Morley v. Coxon* (1878), 26 W. R. 674; *Re Christmas, Martin v. Lacon* (1885), 30 Ch. D. 544; *Re Holburne, Coates v. Mackillop* (1885), 53 L. T. 212; *Cotton v. Imperial & Foreign Agency & Investment Corp.*, [1892] 3 Ch. 454.

182. —.]—It is an old rule in the interpretation of statutes that words are to be construed in their ordinary & popular sense (*BYLES, J.*).—*SMITH v. LINDO* (1858), 4 C. B. N. S. 395; 27 L. J. C. P. 196; 31 L. T. O. S. 132; 4 Jur. N. S. 484; 6 W. R. 552; 140 E. R. 1138; *on appeal*, 5 C. B. N. S. 587, Ex. Ch.

Annotation:—Mentd. *Scott v. Jackson* (1865), 19 C. B. N. S. 134.

183. —.]—*HENRY v. NEWCASTLE TRINITY HOUSE BOARD* (1858), 8 E. & B. 723; 27 L. J. M. C. 57; 22 J. P. 515; 4 Jur. N. S. 685; 120 E. R. 269; *sub nom. R. v. HENRY*, 30 L. T. O. S. 256; *sub nom. HENRY v. TRINITY HOUSE (MASTER PILOTS & BRETHREN)*, 6 W. R. 232, D. C.

184. —.]—We must give to the words found in this Act their ordinary interpretation (*WATSON, B.*).—*PALMER v. ROUSE* (1858), as reported in, 3 H. & N. 505; 157 E. R. 569.

Annotation:—Mentd. *The Gas Float Whitton No. 2*, [1896] P. 42.

185. —.]—We ought to put such a construction on the language of the legislature as gives full effect to the expressions used (*MARTIN, B.*).—*JONES v. WILLIAMS* (1859), 4 H. & N. 706; 33 L. T. O. S. 185; 157 E. R. 1019.

186. —.]—Where by the use of clear & unequivocal language, capable only of one construction, any thing is enacted by the legislature, we must enforce it, although, in our own opinion, it may be absurd or mischievous. But, if the language employed admit of two constructions, & according to one of them the enactment would be absurd & mischievous, & according to the other it would be reasonable & wholesome, we surely ought to put the latter construction upon it as that which the legislature intended (LORD CAMPBELL).—*R. v. SKEEN* (1859), Bell, C. C. 97; 28 L. J. M. C. 91; 23 J. P. 101; 5 Jur. N. S. 151; 7 W. R. 255; 8 Cox, C. C. 143, C. C. R.

Annotations:—*Consd.* *Conway v. Wade*, [1908] 2 K. B. 844; *Scott v. Northumberland & Durham Miners' Permanent Relief Fund Friendly & Approved Soc.*, [1920] 1 K. B. 174. *Refd.* *Sadler v. Whiteman*, [1910] 1 K. B. 868. *Mentd.* *R. v. Robinson* (1867), L. R. 1 C. C. R. 80; *R. v. Gunnell* (1886), 55 L. T. 786.

187. —.]—*ARCHER v. JAMES*, No. 1522, *post*.

188. —.]—I admit that the common distinction between penal & remedial Acts, viz., that the one is to be construed strictly, the other liberally, ought not to be erased from the mind of a Judge, yet, whatever be the Act, be it penal, & certainly if remedial, we ought always to look for its true construction. In that respect, there ought to be no distinction between a penal & a remedial statute. If the remedial statute does not extend to the particular matter under consideration, we have no power to legislate so as to extend it. Undoubtedly, we are thus far bound to a strict construction in a penal statute, that if there be a fair & reasonable doubt, we must act as in revenue cases, where the rule is, that the subject is not to be taxed without clear words for that purpose (POLLOCK, C.B.).

I apprehend that in the construction of every Act of Parliament, we must endeavour, as far as we can to ascertain its true meaning, & in a penal action not to apply the Act unless the case is clearly within its terms (MARTIN, B.).—*NICHOLSON v. FIELDS* (1862), 7 H. & N. 810; 31 L. J. Ex. 233; 158 E. R. 695.

Annotations:—*Mentd.* *Lewis v. Carr* (1876), 1 Ex. D. 481; *Fletcher v. Hudson* (1881), 7 Q. B. D. 611.

189. —.]—*A.-G. v. SILLEM*, No. 130, *ante*.

190. —.]—The construction... appears to me not ungrammatical, & it ought therefore to be upheld unless there is to be collected from the whole of the statute taken together, or from any portion of it, a different intention, or unless such an interpretation is likely to produce mischief or general inconvenience (KNIGHT BRUCE, L.J.).—*GIBBONS v. SNAPE* (1863), 1 De G. J. & Sm. 621; 2 New Rep. 563; 33 L. J. Ch. 103; 9 L. T. 132; 9 Jur. N. S. 1096; 11 W. R. 1087; 46 E. R. 246.

Annotation:—*Mentd.* *Green v. Paterson* (1886), 32 Ch. D. 95.

191. —.]—When an Act of Parliament is passed to bring about a particular result, we are bound by our office to give that construction which we believe is the true construction, that is, that which was meant by the legislature, notwithstanding any apparent defect in the language used (POLLOCK, C.B.).—*HUXHAM v. WHEELER* (1864), 3 H. & C. 75; 4 New Rep. 114; 33 L. J. M. C. 153; 10 L. T. 342; 28 J. P. 345; 10 Jur. N. S. 545; 12 W. R. 713; 159 E. R. 454.

192. —.]—*CHORLTON v. LINGS*, No. 151, *ante*.

193. —.]—The legislature chose to alter what was then supposed to be the law as to corporate property in general, & expressly provided also that certain property should be exempt. The legislature has so enacted & we have no power to set the statute at nought, even if we thought it expedient that the exemption should not con-

tinue (MELLOR, J.).—*R. v. OLDHAM CORPN.* (1868), L. R. 3 Q. B. 474; 9 B. & S. 202; 37 L. J. M. C. 169; 16 W. R. 789.

194. —.]—Nothing is so dangerous as to limit, by precise definition an Act which is for the public benefit, & which should therefore be construed according to its plain ordinary sense (BYLES, J.).—*R. v. MANNING & ROGERS* (1871), L. R. 1 C. C. R. 338; 41 L. J. M. C. 11; 25 L. T. 573; 36 J. P. 228; 20 W. R. 102; 12 Cox, C. C. 106, C. C. R.

195. —.]—The governing rule with regard to the construction of all statutes by a ct. of law administering the law is, that the ct. is bound to construe them as nearly as possible according to the ordinary received meaning of the words & ordinary grammatical construction of the phrases & sentences used in them. The ct. ought not in any case to depart from such ordinary sense & ordinary grammatical construction, unless an interpretation according to both or either appears by the context to be contrary to the manifest intention of the legislature (BRETT, J.).—*CULL v. AUSTIN*, *AUSTIN v. CULL* (1872), L. R. 7 C. P. 227; 1 Hop. & Colt. 741; 41 L. J. C. P. 153; 26 L. T. 767; 36 J. P. 502; 20 W. R. 767.

Annotation:—*Apld.* *Boon v. Howard* (1874), L. R. 9 C. P. 277.

196. —.]—*LEWIS v. CARR*, No. 1500, *post*.

197. —.]—It is of course possible to show that the word "meeting" has a meaning different from the ordinary meaning, but there is nothing here to show this to be the case (LORD COLERIDGE, C.J.).—*SHARP v. DAWES* (1876), 2 Q. B. D. 26; 46 L. J. Q. B. 104; 36 L. T. 188; 25 W. R. 66, C. A.

Annotations:—*Consd.* *Re Sanitary Carbon Co.*, [1877] W. N. 223. *Distd.* *East v. Bennett*, [1911] 1 Ch. 163. *Mentd.* *Re Fireproof Doors*, *Umney v. The Co.*, [1916] 2 Ch. 142.

198. —.]—The statute... is to be construed in its popular sense; meaning, of course, by the words "popular sense" that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it (POLLOCK, B.).—*GRENFELL v. INLAND REVENUE COMRS.* (1876), 1 Ex. D. 242; 45 L. J. Q. B. 465; 31 L. T. 426; 24 W. R. 582.

Annotations:—*Refd.* *Chicago Ry. Terminal Elevation Co. v. I. R. Comrs.* (1896), 75 L. T. 157; *Brown v. I. R. Comrs.*, *Gordon v. I. R. Comrs.* (1900), 84 L. T. 71. *Mentd.* *Baring v. I. R. Comrs.*, [1898] 1 Q. B. 78.

199. —.]—All we have to consider is what is the plain meaning of the words (JAMES, L.J.).—*RODERICK v. ASTON LOCAL BOARD* (1877), 5 Ch. D. 328; 46 L. J. Ch. 802; 36 L. T. 328; 41 J. P. 516; 25 W. R. 403, C. A.

Annotations:—*Refd.* *Jury v. Barnsley Corpn.*, [1907] 2 Ch. 600. *Mentd.* *Jones v. Conway & Colwyn Bay Joint Water Supply Board*, [1893] 2 Ch. 603; *L. & N.W. Ry. v. Evans*, [1893] 1 Ch. 16; *Glamorganshire Canal Navigation v. Nixon's Navigation Co.* (1901), 85 L. T. 53; *Morris v. Mynyddislwyn U. D. Co.*, [1917] 2 K. B. 309.

200. —.]—I base my decision on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Ct. of Admlty. (JAMES, L.J.).—*THE SCHILLER (CARGO EX)* (1877), 2 P. D. 145; 36 L. T. 714; 3 Asp. M. L. C. 439, C. A.

Annotations:—*Mentd.* *The Sarpedon (Cargo Ex)* (1877), 3 P. D. 28; *The Renpor* (1883), 8 P. D. 115; *The Elton*, [1891] P. 265; *The Tagus* (1902), 87 L. T. 598.

201. —.]—We must construe words either in their popular sense & as they are used in common parlance, or we must look to the words of the Act to see the intention of the legislature (KELLY, C.B.).—*JONES v. CWMORTHEN SLATE CO., LTD.* (1879), 4 Ex. D. 97; 48 L. J. Q. B. 486; 40 L. T. 461; 27 W. R. 431; *on appeal*, 5 Ex. D. 93, C. A.

Annotations:—*Mentd.* *Glasgow Corpn. v. Farie* (1888), 13 App. Cas. 657; *Glenboig Union Fireclay Co. v. I. R. Comrs.* (1922), 12 Tax. Cas. 427.

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202. —.]—When from the nature of the provision contained in an Act of Parliament it is clear that a restriction must be put upon the ordinary & literal signification of some word or expression, & it is uncertain from anything to be found in the Act itself, or in the circumstances judicially cognisable under which the provision was inserted, what the exact character & extent of that restriction is, it is the duty of the cts. to put no greater restriction than the nature of the provision & the subject-matter to which it relates necessarily impose (THESIGER, L. J.).—SULLIVAN v. MITCALFE (1880), 5 C. P. D. 455; 49 L. J. Q. B. 815; 44 L. T. 8; 29 W. R. 181, C. A.

*Annotations:—***Refd.** Broome v. Speak, [1903] 1 Ch. 586. **Mentd.** Howard v. Escombe (1887), 3 T. L. R. 316; Cuckett v. Keswick, [1902] 2 Ch. 456; Stevens v. Hoare (1904), 20 T. L. R. 407; Calthorpe v. Trechmann (1905), 75 L. J. Ch. 90; Nash v. Calthorpe, [1905] 2 Ch. 237; Macleay v. Tait, [1906] A. C. 24.

203. —.]—Statutes, like other documents, are constantly conceived according to the popular use of language (LORD SELBORNE, C.).—PHARMACEUTICAL SOCIETY v. LONDON & PROVINCIAL SUPPLY ASSOCN., LTD. (1880), 5 App. Cas. 857; 49 L. J. Q. B. 736; 43 L. T. 389; 45 J. P. 20; 28 W. R. 957, H. L.

*Annotations:—***Consd.** Hirst v. West Riding Union Banking Co., [1901] 2 K. B. 560. **Refd.** Chapleo v. Brunswick Permanent Bldg. Soc. (1881), 6 Q. B. D. 696; G. W. Ry. v. Swindon & Cheltenham Extension Ry. (1882), 52 L. J. Ch. 306; Re Jeffcock's Trusts (1882), 51 L. J. Ch. 507; Enniskillen Union Grdns. v. Hillard (1881), 15 Cox, C. C. 643; Pharmaceutical Soc. v. White, [1901] 1 K. B. 601; Pearks, Gunston & Tee v. Ward, Honnen & Southern Counties Dairies Co., [1902] 2 K. B. 1; Wills v. Tozer (1901), 53 W. R. 74; Edwards v. Pharmaceutical Soc. of Great Britain, [1910] 2 K. B. 766; Re Royal Naval School, Seymour v. Royal Naval School, [1910] 1 Ch. 806; Willmott v. London Road Car Co., [1910] 2 Ch. 525. **Mentd.** Pharmaceutical Soc. v. Wheeldon (1890), 21 Q. B. D. 683; R. v. Tyler & International Commercial Co., [1891] 2 Q. B. 588; Pharmaceutical Soc. v. Nash (1910), 80 L. J. K. B. 416; R. v. Cory, [1927] 1 K. B. 810.

204. —.]—It seems to me that the popular signification must be looked to (GROVE, J.).—GORDON v. JENNINGS (1882), 9 Q. B. D. 45; 51 L. J. Q. B. 417; 46 L. T. 531; 46 J. P. 519; 30 W. R. 704, D. C.

*Annotations:—***Consd.** Moriarty v. Regent's Garage & Engineering Co., [1921] 1 K. B. 423. **Refd.** Re Rosso, Parsons v. Rosso (1923), 93 L. J. Ch. 8. **Mentd.** Lee v. Parkes (1884), 28 Sol. Jo. 617; Horwood v. Millar's Timber & Trading Co., [1916] 2 K. B. 44.

205. —.]—It is a sound maxim of law that every word ought, *prima facie*, to be construed in its primary & natural sense, unless a secondary or more limited sense is required by the subject or the context (*per* CUR.).—A.-G. OF ONTARIO v. MERCER (1883), 8 App. Cas. 767; 52 L. J. P. C. 84; 49 L. T. 312, P. C.

*Annotations:—***Consd.** S.S. Magnhild v. McIntyre, [1920] 3 K. B. 321. **Appld.** R. v. A.-G. of British Columbia, [1921] A. C. 213; Re Ellwood, [1927] 1 Ch. 455. **Refd.** St. Catherine's Milling & Lumber Co. v. R. (1888), 14 App. Cas. 46; A.-G. of British Columbia v. A.-G. of Canada (1889), 14 App. Cas. 295; A.-G. for Alberta v. A.-G. for Canada, [1928] A. C. 475. **Mentd.** Maritime Bank of Canada v. New Brunswick Receiver General, [1892] A. C. 437; A.-G. v. British Museum Trustees, [1903] 2 Ch. 598.

206. —.]—(1) It seems to me, first, that words of popular meaning must be taken in their popular sense, unless there is something in the context to alter it (BOWEN, L. J.).

(2) It was not within the purview of any possible object of the legislature that a public body in this country should be invested with more power of interfering with the exercise of private enterprise & adventure than was really necessary for the protection of those public interests which are entrusted to their charge (BOWEN, L. J.).—WANDSWORTH BOARD OF WORKS v. UNITED TELEPHONE

Co. (1884), 13 Q. B. D. 904; 53 L. J. Q. B. 449; 51 L. T. 148; 48 J. P. 676; 32 W. R. 776, C. A.

*Annotations:—***As to** (2) **Refd.** Fareham L. B. & Fareham Electric Light Co. v. Smith (1891), 7 T. L. R. 443; Baird v. Tunbridge Wells Corp., [1894] 2 Q. B. 867; A.-G. v. Conduit Colliery Co., [1895] 1 Q. B. 301; St. Mary, Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31; Finchley Electric Light Co. v. Finchley U. D. C., [1903] 1 Ch. 437. **Generally, Refd.** Holmfirth L. B. v. Shore (1895), 59 J. P. 344. **Mentd.** Westminster Corp. v. Johnson, Westminster Corp. v. Fuller, [1904] 2 K. B. 737; Postmaster-General v. Liverpool Corp. (1922), 92 L. J. K. B. 382; Noble v. Harrison, [1926] 2 K. B. 332.

207. —.]—A much used & ordinary rule of construction which is this that you are to take the words of an Act of Parliament in their plain & ordinary sense unless there is something in the context which obliges you to take them in some other larger or more limited sense (BRETT, M. R.).—*Re* PARKER, *Ex p.* BOARD OF TRADE (1885), 15 Q. B. D. 196; 54 L. J. Q. B. 372; 52 L. T. 670; 1 T. L. R. 464; 2 Morr. 158, C. A.; *on appeal, sub nom.* TURQUAND v. BOARD OF TRADE (1886), 11 App. Cas. 286, H. L.

*Annotations:—***Appld.** The Suevic, [1908] P. 292. **Mentd.** *Re* Wells & Croft, *Ex p.* Official Receiver (1895), 72 L. T. 359; *Re* Cohen, [1905] 2 K. B. 704.

208. —.]—If there is nothing to modify, nothing to alter, nothing to qualify the language which the instrument contains, it must be construed in the ordinary & natural meaning of the words & sentences (LORD HALSBURY, C.).—ST. JOHN, HAMPSHIRE, VESTRY v. COTTON (1886), 12 App. Cas. 1; 56 L. J. Q. B. 225; 56 L. T. 1; 51 J. P. 340; 35 W. R. 505; 3 T. L. R. 161, H. L.

209. —.]—Unless there is some reason for doing otherwise, we must put upon the words "any such mortgage" their ordinary grammatical construction (LORD HERSCHELL, C.).—WESTERN SUBURBAN & NOTTING HILL PERMANENT BENEFIT BUILDING SOCIETY v. MARTIN (1886), 17 Q. B. D. 609; 55 L. J. Q. B. 382; 54 L. T. 822; 51 J. P. 36; 34 W. R. 630; 2 T. L. R. 672, C. A.

*Annotation:—***Mentd.** Municipal Permanent Investment Bldg. Soc. v. Richards (1888), 39 Ch. D. 372.

210. —.]—I am quite aware that meanings in dictionaries must not be taken as authoritative exponents of words in Acts of Parliament, but it is a well-known rule that such words should be read as used in their ordinary sense, unless the context shows otherwise, & we may therefore look to dictionaries in order to ascertain what is the ordinary meaning of words (LORD COLERIDGE, C. J.).—R. v. PETERS (1886), 16 Q. B. D. 636; 55 L. J. M. C. 173; 54 L. T. 545; 50 J. P. 631; 34 W. R. 399; 2 T. L. R. 359; 16 Cox, C. C. 36, C. C. R.

*Annotations:—***Refd.** R. v. Juby (1886), 55 L. T. 788. **Mentd.** R. v. Dawson (1888), 5 T. L. R. 87; R. v. Dyson, [1894] 2 Q. B. 176.

211. —.]—GOWAN v. WRIGHT (1886), 18 Q. B. D. 201; 56 L. J. Q. B. 131; 35 W. R. 297; 3 T. L. R. 258, C. A.

*Annotations:—***Mentd.** *Re* Russell, *Ex p.* Guest (1888), 37 W. R. 21; Crawshaw v. Harrison, [1894] 1 Q. B. 79; Taylor v. Sturrock, Sturrock v. Sturrock, [1900] A. C. 225.

212. —.]—It seems to me that no judge had authority to limit the Act, & to put upon the words of an Act of Parliament a limitation which is not according to the ordinary meaning of the words (LORD ESHER, M. R.).—*Re* NORMAN (1886), 16 Q. B. D. 673; 54 L. T. 143; 34 W. R. 313; 2 T. L. R. 272; *sub nom.* *Re* NORMAN, *Ex p.* BRADWELL, 55 L. J. Q. B. 202, C. A.

*Annotations:—***Consd.** Wickins v. Wickins, [1918] P. 265. **Mentd.** *Re* Eley (1887), 56 L. J. Ch. 905; *Re* Cheesman, [1891] 2 Ch. 289; *Re* P. & M. (1895), 39 Sol. Jo. 640; *Re* Hirst & Capes, [1908] 1 K. B. 982; *Re* Massey (1909), 101 L. T. 517.

213. —.]—Not a bad mode of treating an Act of Parliament is to see how it would be read supposing no legal case depended on the construction of it (GROVE, J.).—*FOSTER v. DIPHWYS CASSON SLATE CO.* (1887), 18 Q. B. D. 428; 56 L. J. M. C. 21; 51 J. P. 470; 3 T. L. R. 301, D. C.

214. —.]—I think that the right way to decide on Acts of Parliament is to take the grammatical meaning, unless there is something in the context or in the nature of the provisions which is sufficient to displace the ordinary rule (CHITTY, J.).—*CHISLEHURST COMMON CONSERVATORS v. NEWTON* (1887), [1901] 1 Ch. 389, n.; 70 L. J. Ch. 224, n.; 83 L. T. 522, n.

Annotations:—*Refd.* *Cook v. Mitcham Common Conservators*, [1901] 1 Ch. 387. *Mentd.* *Collis v. Amphlett*, [1918] 1 Ch. 232.

215. —.]—In order to ascertain the intention of the legislature it is necessary first to consider the language of the Act itself, & if that language be clear, & free from ambiguity, it is the duty of the ct. to give effect to it (MANISTY, J.).—*GUYER v. R.* (1889), 23 Q. B. D. 100; 58 L. J. M. C. 81; 60 L. T. 824; 53 J. P. 436; 37 W. R. 586; 16 Cox, C. C. 657, D. C.

Annotations:—*Mentd.* *Pudney v. Eccles*, [1893] 1 Q. B. 52; *Robertson v. Johnson*, [1893] 1 Q. B. 129.

216. —.]—What is the rule of construction to be applied? It is that the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute (LORD ESHER, M.R.).—*SHARPE v. WAKEFIELD* (1888), 22 Q. B. D. 239; 58 L. J. M. C. 57; 60 L. T. 130; 53 J. P. 20; 37 W. R. 187; 5 T. L. R. 140, C. A.; *on appeal*, [1891] A. C. 173, H. L.

Annotations:—*Consd.* *Sidney v. N. E. Ry.*, [1916] 2 K. B. 760. *Refd.* *R. v. Leigh* (1896), 75 L. T. 339. *Mentd.* *R. v. Surrey JJ.* (1888), 52 J. P. 423; *Fleetwood v. Hull* (1889), 23 Q. B. D. 35; *Royal Aquarium v. Parkinson* (1891), 8 T. L. R. 144; *R. v. L. C. C., Ex p. Akkersdyk*, *Ex p. Fermentia*, [1892] 1 Q. B. 190; *Murray v. Freer* (1893), 57 J. P. 101; *R. v. Miskin Higher JJ.*, [1893] 1 Q. B. 275; *Sharp v. Hughes* (1893), 57 J. P. 104; *R. v. West Riding of Yorkshire County Council*, [1896] 2 Q. B. 386; *Evans v. Conway JJ.*, [1900] 2 Q. B. 224; *Igoe v. Shann* (1901), 70 L. J. K. B. 616; *R. v. Howard*, [1902] 2 K. B. 363; *Raven v. Southampton JJ.*, [1901] 1 K. B. 130; *R. v. Dodds*, [1905] 2 K. B. 40; *R. v. Tolhurst, Ex p. Farrell, R. v. Cox, Ex p. West*, [1905] 2 K. B. 478; *Dartford Brewery Co. v. London County Quarter Sessions* (1906), 75 L. J. K. B. 597; *Joicey & Eden's Exors. v. N. E. Ry.* (1906), 96 L. T. 35; *R. v. Southampton JJ., Ex p. Fuller, Smith & Turner* (1906), 94 L. T. 442; *R. v. Woodhouse*, [1906] 2 K. B. 501; *Liverpool Corp'n. v. Walker*, [1908] 1 K. B. 28; *R. v. L. C. C., Ex p. London & Provincial Electric Theatres*, [1915] 2 K. B. 466; *Cassel v. Inglis*, [1916] 2 Ch. 211; *R. v. Brighton Corp'n., Ex p. Tilling* (1916), 85 L. J. K. B. 1552; *Frome United Breweries Co. v. Bath JJ.*, [1926] A. C. 586; *R. v. Southampton County Confirming Committee, Ex p. Slade* (1928), 45 T. L. R. 72.

217. —.]—An Act of Parliament is to be construed according to the ordinary meaning of the words in the English language as applied to the subject-matter, unless there is some very strong ground, derived from the context or reason, why it should not be so construed (LORD ESHER, M.R.).—*HORNSEY LOCAL BOARD v. MONARCH INVESTMENT BUILDING SOCIETY* (1889), 24 Q. B. D. 1; 59 L. J. Q. B. 105; 61 L. T. 867; 54 J. P. 391; 38 W. R. 85; 6 T. L. R. 30, C. A.

Annotations:—*Consd.* *Re Owen*, [1894] 3 Ch. 220. *Refd.* *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413. *Mentd.* *Stock v. Meukin*, [1899] 2 Ch. 496; *R. v. L. G. Board, Ex p. Thorp* (1914), 84 L. J. K. B. 1184; *Re Jauncey, Bird v. Arnold* (1926), 134 L. T. 728.

218. —.]—The true rule is to take the words used in their ordinary & natural sense & to construe them accordingly without reference to any supposed intention of the legislature which cannot be gathered from the natural & ordinary meaning

of the words (STEPHEN, J.).—*MALLINSON v. CARR*, [1891] 1 Q. B. 48; 63 L. T. 459, D. C.

Annotations:—*Refd.* *Hobbs v. Winchester Corp'n.*, [1910] 2 K. B. 471. *Mentd.* *Wieland v. Butler-Hogan* (1904), 73 L. J. K. B. 513; *Firth v. McPhail* (1905), 3 L. G. R. 478; *Bothamley v. Jolly*, [1915] 3 K. B. 425.

219. —.]—It is said that for some reason the primary & natural meaning of the words is to be extended, & that we should hold that there was a collision when there was none. I am at a loss to see why. I think an Act of Parliament . . . ought never to be dealt with in this way, unless for a cause amounting to a necessity or approaching to it (LORD BRAMWELL).—*M'COWAN v. BAINE, THE NIOBE*, [1891] A. C. 401; 65 L. T. 502; 7 Asp. M. L. C. 89, H. L.

Annotations:—*Mentd.* *The Devonian*, [1901] P. 221; *Re Margetts & Ocean Accident & Guarantee Corp'n.*, [1901] 2 K. B. 792; *Devonshire (Owners) v. Leslie (Owners)*, [1912] A. C. 634; *Bennett S.S. Co. v. Hull Mutual S.S. Protecting Soc.*, [1914] 3 K. B. 57; *Fenwick v. Merchants Marine Insee.*, [1914] 3 K. B. 827; *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. v. Same*, [1915] 1 K. B. 471.

220. —.]—Unless there was something in the Act to extend or alter its meaning it must be given its ordinary & usual signification (LORD ESHER, M.R.).—*MOIR v. WILLIAMS*, [1892] 1 Q. B. 264; 61 L. J. M. C. 33; 66 L. T. 215; 56 J. P. 197; 40 W. R. 69; 8 T. L. R. 44; 36 Sol. Jo. 40, C. A.

Annotation:—*Refd.* *Waite's Exors. v. I. R. Comrs.*, [1914] 3 K. B. 196.

221. —.]—I am aware that where words of a statute are clear, we must interpret them according to their natural meaning, whatever the consequence may be; but it is a strong argument in favour of the reasonable conclusion to show that a conclusion that is unreasonable would follow from a construction that is not in accordance with the plain words of the Act (COLERIDGE, C.J.).—*FELLOWS v. LORD STANLEY (OWNERS)*, [1893] 1 Q. B. 98; 41 W. R. 253; 5 R. 115, D. C.

222. —.]—The Act of Parliament is all-powerful, & when its meaning is unequivocally expressed, the necessity for rules of construction disappears & reaches its vanishing point. . . . Where an express statutory right is given to make & maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make & to maintain it. . . . On the other hand the legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him (BOWEN, L.J.).—*LONDON & NORTH WESTERN RY. CO. v. EVANS*, [1893] 1 Ch. 16; 62 L. J. Ch. 1; 67 L. T. 630; 41 W. R. 149; 9 T. L. R. 50; 2 R. 120, C. A.

Annotations:—*Consd.* *Bradford Corp'n. v. Pickles*, [1894] 3 Ch. 53; *Jordeson v. Sutton Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53; *Musselburgh Real Estate Co. v. Musselburgh*, [1905] A. C. 491; *Woolcombers v. Bradford Corp'n.* (1906), 70 J. P. 434; *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508; *Re Ellis & Ruislip-Northwood U. D. C.*, [1920] 1 K. B. 313. *Refd.* *Clippens Oil Co. v. Edinburgh & District Water Trustees*, [1904] A. C. 64; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854. *Mentd.* *G. W. Ry. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157; *Bishop Auckland Industrial Co-op. Flour & Provision Soc. v. Butterknowle Colliery Co.* (1904), 73 L. J. Ch. 635.

223. —.]—Our duty is to construe the words of the sect. We cannot review the proceedings of the legislature & say that something which is clearly within the words used in the sect. is not within their meaning on the ground that the legislature ought not to have so provided (RIGBY,

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L.J.).—*BARTLETT v. FORD'S HOTEL CO.*, [1895] 1 Q. B. 850; 64 L. J. Q. B. 452; 72 L. T. 529; 14 R. 408, C. A.; *on appeal, sub nom. FORD'S HOTEL CO. v. BARTLETT*, [1896] A. C. 1, H. L.

Annotation:—Mentd. Zalinfoff v. Hammond, [1898] 2 Ch. 92.

224. —.]—There being no definition of the precise meaning that the legislature intended, we have to look at the ordinary & natural meaning of the word, unless that meaning is displaced by anything contained in the statute (*LORD RUSSELL, C.J.*).—*R. v. TOMLINSON*, [1895] 1 Q. B. 706; 64 L. J. M. C. 97; 72 L. T. 155; 43 W. R. 544; 11 T. L. R. 212; 39 Sol. Jo. 247; 18 Cox, C. C. 75; 15 R. 207, C. C. R.

Annotations:—Refd. R. v. Boyle & Merchant, [1914] 3 K. B. 339. *Mentd. Allen v. Flood*, [1898] A. C. 1; *R. v. Wyatt* (1921), 91 L. J. K. B. 402.

225. —.]—I have no right to add to the requirements of the statute nor to take from the requirements thus enacted. The sole guide must be the statute itself (*LORD HALSBURY, C.*).—*SALOMON v. SALOMON & CO., SALOMON & CO. v. SALOMON*, [1897] A. C. 22; 66 L. J. Ch. 35; 75 L. T. 426; 45 W. R. 193; 13 T. L. R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H. L.; *reversg. S. C. sub nom. BRODERIP v. SALOMON*, [1895] 2 Ch. 323, C. A.

Annotations:—Mentd. Seligman v. Prince, [1895] 2 Ch. 617; *Re London Health Electrical Institute* (1896), 76 L. T. 98; *Munkittrick v. Perryman & Hands* (1896), 74 L. T. 149; *Hadley v. Hadley* (1897), 77 L. T. 131; *Re Wragg*, [1897] 1 Ch. 796; *Re Olympia*, [1898] 2 Ch. 153; *St. Louis Breweries v. Apthorpe* (1898), 47 W. R. 334; *Apthorpe v. Peter Schoenhofen Brewing Co.* (1899), 80 L. T. 395; *Re Hirth, Ex p. Trustee*, [1899] 1 Q. B. 612; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Re Raphael, Ex p. Salomon*, [1899] 1 Ch. 853; *Gramophone & Typewriter v. Stanley*, [1906] 2 K. B. 856; *A.G. for Canada v. Standard Trust Co. of New York*, [1911] A. C. 498; *Yeatman v. Homberger* (1912), 107 L. T. 43; *Booth v. Helliwell*, [1914] 3 K. B. 252; *The Tomlin, The Rothersand* (1914), 112 L. T. 257; *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K. B. 768; *R. v. Grubb*, [1915] 2 K. B. 683; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307; *Blair v. Haycock Cadle Co.* (1917), 34 T. L. R. 39; *I. R. Comrs. v. Cavan Central Co-op. Agricultural & Dairy Soc.* (1917), 12 Tax Cas. 1; *Hood v. Magee* (1918), 7 Tax Cas. 327; *Re Express Engineering Works*, [1920] 1 Ch. 466; *I. R. Comrs. v. Sansom*, [1921] 2 K. B. 492; *Radcliffe v. I. R. Comrs.* (1921), 90 L. J. K. B. 568; *Rainham Chemical Works v. Belvedere Fish Guano Co.*, [1921] 2 A. C. 465; *Re Facey Ex p. Trustees*, [1923] 2 Ch. 1; *British Thomson-Houston Co. v. Sterling Accessories, Same v. Crowther & Osborn*, [1924] 1 Ch. 33; *Parker & Cooper v. Reading*, [1926] Ch. 975; *Thomas v. Evans, Jones v. South-West Lancashire Coal-Owners' Assocn.*, [1927] 1 K. B. 33.

226. —.]—It is impossible to limit the use of an ordinary & common English word simply because the rest of the clause is unfortunately expressed (*WILLS, J.*).—*LONDON COUNTY COUNCIL v. EDWARDS*, [1898] 2 Q. B. 75; 67 L. J. Q. B. 648; 78 L. T. 558; 62 J. P. 377; 19 Cox, C. C. 65, D. C.

227. —.]—Nevertheless it is right to construe an Act of Parliament strictly, & in dealing with real property especially to stand on the old ways (*KEKEWICH, J.*).—*Re PAWLEY & LONDON & PROVINCIAL BANK*, [1900] 1 Ch. 58; 69 L. J. Ch. 6; 81 L. T. 507; 48 W. R. 107; 44 Sol. Jo. 25.

Annotation:—Mentd. Hewson v. Shelley, [1913] 2 Ch. 384.

228. —.]—It is not competent for this ct. to introduce, by implication only, a provision directly contradictory of an unambiguous enactment addressed to the very point itself (*COLLINS, M.R.*).—*R. v. DODDS*, [1905] 2 K. B. 40; 74 L. J. K. B. 599; 93 L. T. 319; 69 J. P. 210; 53 W. R. 559; *sub nom. R. v. DODDS, Ex p. ROBERTS & WALKER & SON*, 21 T. L. R. 391, C. A.

Annotations:—Refd. R. v. Jackson (1906), 96 L. T. 77; *R. v. Crewe Licensing JJ., Ex p. Bricker* (1914), 111 L. T. 1074. *Mentd. R. v. Southampton JJ., Ex p. Fuller*,

Smith & Turner (1906), 70 J. P. 137; *Smith v. Portsmouth JJ.*, [1906] 2 K. B. 229; *R. v. Shann*, [1910] 2 K. B. 418; *R. v. Customs & Excise Comrs.*, [1914] 2 K. B. 390.

229. —.]—It might well be that the difference between the Act of 1853 & the Act of 1890 was accidental, but the ct. had to construe the Act of Parliament as it was drawn (*VAUGHAN WILLIAMS, L.J.*).—*FITCH v. BERMONDSEY GUARDIANS*, [1905] 1 K. B. 524; 74 L. J. K. B. 250; 92 L. T. 343; 69 J. P. 102; 53 W. R. 308; 21 T. L. R. 206; 49 Sol. Jo. 222; 3 L. G. R. 300, C. A.

Annotation:—Mentd. Glamorgan County Asylum Committee of Visitors v. Cardiff Grdns., [1910] 1 K. B. 547.

230. —.]—*WOOLCOMBERS, LTD. v. BRADFORD CORPN.* (1906), 70 J. P. 434; 4 L. G. R. 1038.

231. —.]—The Legislature may have had no such exact case as this in its contemplation but whether it had or whether it had not, if the words of the sect. are so clear as to create no doubt in the mind of a person applying the ordinary rules of construction of the English language it matters not whether the Legislature contemplated or whether it did not contemplate such an exact case as this (*BUCKNILL, J.*).—*THE SUEVIC*, [1908] P. 292; 77 L. J. P. 152; 99 L. T. 474; 72 J. P. 407; 21 T. L. R. 699; 11 Asp. M. L. C. 149; 6 L. G. R. 946, D. C.

Annotation:—Refd. The Olympic, [1913] P. 92.

232. —.]—It is only another example of the looseness of phraseology which is used in the Act, & the danger therefore of attempting to construe its provisions by attributing exactly the same force to the same word wherever you find it. You cannot do it. I have not to consider what the consequences will be one way or the other; I have to say what is the meaning of the words the Legislature has used (*WARRINGTON, J.*).—*PARRISH v. HACKNEY CORPN.*, [1911] 2 K. B. 822; 81 L. J. K. B. 304; 105 L. T. 859; 76 J. P. 89; 27 T. L. R. 532; 55 Sol. Jo. 670; 9 L. G. R. 983; *Konst. & W. Rat. App.* 303; *on appeal*, [1912] 1 K. B. 669, C. A.

Annotations:—Mentd. L. C. C. v. Islington Assmt. Com. (1915), 79 J. P. 353; *R. v. Westminster Assmt. Com., Ex p. London & Provincial Victuallers, R. v. Islington Assmt. Com., Ex p. Royal Agricultural Hall Co.* (1917), 86 L. J. K. B. 1161.

233. —.]—The question is one of the construction of the Act of Parliament, and although, as I shall point out, the construction for which the Crown contends is one which leads to results which seem to me incongruous & improbable, yet I have to construe the Act of Parliament & give effect to the meaning of the words as I find them (*BUCKLEY, L.J.*).—*R. v. INCOME TAX SPECIAL COMRS., Ex p. ESSEX HALL*, [1911] 2 K. B. 434; 80 L. J. K. B. 1035; 104 L. T. 704; 5 Tax Cas. 636, C. A.

Annotations:—Mentd. College of Preceptors v. Jenkins (1919), 89 L. J. K. B. 27; *Coman v. Rotunda Hospital, Dublin*, [1921] 1 A. C. 1.

234. —.]—One ought to read it [the Act] in its natural meaning without the insertion of the terms which, it seems to me, it is necessary to insert in order to support applt.'s contention (*KENNEDY, L.J.*).—*TUFF v. GUILD OF DRAPERS OF CITY OF LONDON*, [1913] 1 K. B. 40; 82 L. J. K. B. 174; 107 L. T. 635; 29 T. L. R. 36; 57 Sol. Jo. 43, C. A.

Annotation:—Mentd. Neall v. Beadle (1912), 57 Sol. Jo. 77.

235. —.]—The duty of a ct. of law is simply to take the statute it has to construe as it stands, & to construe its words according to their natural significance. While reference may be made to the state of the law, & the material facts & events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the

probable opinions & motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must, indeed, be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated (LORD HALDANE, C.).—*INLAND REVENUE COMRS. v. HERBERT*, [1913] A. C. 326; 82 L. J. P. C. 119; 108 L. T. 850; 29 T. L. R. 502; 57 Sol. Jo. 516; 11 L. G. R. 865, H. L.

Annotations:—*Distd. Re Boaler, Re Vexatious Actions Act*, 1896, [1915] 1 K. B. 21. *Refd. Lumsden v. I. R. Comrs.*, [1914] A. C. 877. *Mentd. Fitzwilliam v. I. R. Comrs.*, [1914] A. C. 753; *I. R. Comrs. v. Smyth*, [1914] 3 K. B. 406; *I. R. Comrs. v. Walker*, [1915] A. C. 509.

236. —.]—*SMEED, DEAN & CO. v. PORT OF LONDON AUTHORITY*, No. 501, *post*.

237. —.]—*CAMDEN (MARQUIS) v. INLAND REVENUE COMRS.*, No. 994, *post*.

238. —.]—The duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation (LORD HALDANE, C.).—*LUMSDEN v. INLAND REVENUE COMRS.*, [1914] A. C. 877; 84 L. J. K. B. 45; 111 L. T. 993; 30 T. L. R. 673; 58 Sol. Jo. 738, H. L.; *affg.*, [1913] 3 K. B. 809, C. A.

Annotations:—*Mentd. I. R. Comrs. v. Hewitt* (1913), 109 L. T. 896; *Hayllar v. I. R. Comrs.*, [1914] 1 K. B. 528; *I. R. Comrs. v. Clay*, 1 K. B. 339; *I. R. Comrs. v. Walker*, [1915] A. C. 509.

239. —.]—The notional passing of property on death introduced by Finance Act, 1894 (c. 30), s. 2, does not apply to sect. 5, & the words of the latter sect. are to be construed in their ordinary & natural sense.—*A.-G. v. MILNE*, [1914] A. C. 765; 83 L. J. K. B. 1083; 111 L. T. 343; 30 T. L. R. 476; 58 Sol. Jo. 577, H. L.

240. —.]—*QUEBEC RAILWAY, LIGHT, HEAT & POWER CO. v. VANDRY*, No. 2100, *post*.

B. Construction Unreasonable.

241. Reasonable construction preferred.]—We are bound to construe every statute according to the plain & ordinary import of its words, & to act upon that construction, unless we should find ourselves bound by an uniform course of well considered decisions, giving a different effect to the provisions of the statute; or unless that construction would lead to such consequences, that we can safely pronounce that the Legislature must have had a different intention from that which the ordinary import of the word conveys (BAYLEY, J.).—*R. v. GREAT DRIFFIELD (INHABITANTS)* (1828), 8 B. & C. 684; 7 L. J. O. S. M. C. 36; 108 E. R. 1197.

Annotation:—*Mentd. R. v. Cassington* (1831), 2 B. & Ad. 874.

242. —.]—It is a sound rule of construction . . . applicable to modern as well as to ancient statutes, perhaps more so, of necessity, in consequence of the looseness of expression which now

prevails, that, in the construction of general references in Acts of Parliament, such references only must be made as will stand with reason & with right; & when a provision is in its original & natural application limited in respect to time & place, it is to give to general words of incorporation a meaning contrary to reason, & it may be . . . contrary to right, to hold that they apply to it (LORD DENMAN, C.J.).—*R. v. BADCOCK* (1845), 6 Q. B. 787; 1 New Mag. Cas. 207; 4 L. T. O. S. 412; 9 Jur. 250; *sub nom. R. v. TAUNTON MARKET TRUSTEES*, 1 New Sess. Cas. 543; 14 L. J. M. C. 58; 9 J. P. 245.

Annotations:—*Refd. R. v. St. Leonard's, Shoreditch*, (1849), 13 Q. B. D. 964. *Mentd. R. v. St. George the Martyr, Southwark* (1847), 16 L. J. M. C. 129; *R. v. Longwood Overseers* (1849), 13 Q. B. 116; *R. v. Harrogate Comrs.* (1850), 15 Q. B. 1012; *Birkenhead Docks Trustees v. Birkenhead Overseers* (1853), 2 E. & B. 148; *R. v. Hull JJ.* (1854), 4 E. & B. 29; *R. v. Manchester Overseers* (1854), 18 Jur. 267; *Coe v. Wise* (1864), 5 B. & S. 440; *Jones v. Mersey Docks & Harbour Board, Mersey Docks & Harbour Board v. Jones* (1865), 6 New Rep. 378.

243. —.]—*NEWRY & ENNISKILLEN RY. CO. v. COOMBE* (1849), 3 Exch. 565; 5 Ry. & Can. Cas. 633; 18 L. J. Ex. 325; 12 L. T. O. S. 475.

Annotations:—*Refd. Leeds & Thirsk Ry. v. Fearnley* (1849), 4 Exch. 24; *R. v. Midland Counties & Shannon Junction Ry.* (1863), 9 L. T. 155. *Mentd. West Cornwall Ry. v. Mowatt* (1850), 19 L. J. Q. B. 478; *Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher* (1851), 6 Ry. & Can. Cas. 622; *Deposit Life Assoc. v. Ayscough* (1856), 11 E. & B. 761; *Edwards v. Kilkenny & Great Southern & Western Ry.* (1863), 14 C. B. N. S. 526.

244. —.]—The construction contended for leads to consequences so extensive & so alarming that it ought not to be adopted, unless it is plain that such was the intention of the Act (WILDE, C.J.).—*GARRARD v. TUCK* (1849), 8 C. B. 231; 18 L. J. C. P. 338; 14 L. T. O. S. 547; 13 Jur. 871; 137 E. R. 498.

Annotations:—*Refd. Knight v. Bowyer* (1858), 2 De G. & J. 421; *Drummond v. Saut* (1871), L. R. 6 Q. B. 763. *Mentd. Melling v. Leak* (1855), 16 C. B. 652; *Bateman v. Boynton* (1866), 14 W. R. 598; *Locking v. Parker* (1872), 8 Ch. App. 35, n.

245. —.]—I go upon the words of the statute without importing into the case the least personal recollection of the object of the statute, which I have no right to do. I go upon the obvious meaning of the statute. The words are very general, but we must put a reasonable construction upon them (LORD BROUGHAM).—*Re LAMENAUE'S PATENT* (1850), 2 Web. Pat. Cas. 161.

246. —.]—Words are not to be treated as inoperative, if by reasonable intendment they can be made operative (POLLOCK, C.B.).—*M'KINNON v. PENSON* (1853), 8 Exch. 319; 22 L. J. M. C. 57; 21 L. T. O. S. 35; 17 J. P. 153; *on appeal* (1854), 9 Exch. 609.

Annotations:—*Refd. Kondall v. King* (1856), 17 C. B. 483; *Gibson v. Preston Corpn.* (1870), L. R. 5 Q. B. 218; *Cowley v. Newmarket L. B.*, [1892] A. C. 345; *Maguire v. Liverpool Corpn.*, [1905] 1 K. B. 767. *Mentd. Young v. Davis* (1863), 9 L. T. 145; *Parsons v. St. Mathew, Bethnal Green* (1867), L. R. 3 C. P. 56; *Wilson v. Halifax Corpn.* (1868), L. R. 3 Ex. 114; *Holborn Grdns. v. St. Leonard's Vestry* (1876), 41 J. P. 38; *Bathurst Corpn. v. Macpherson* (1879), 1 App. Cas. 256; *Kent v. Worthing L. B.* (1882), 10 Q. B. D. 118; *Victoria Corpn. v. Patterson, Victoria Corpn. v. Lang*, [1899] A. C. 615.

247. —.]—We must put a reasonable construction on the Act of Parliament (BLACKBURN, J.).—*HARRISON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1860), 2 B. & S. 122; 29 L. J. Q. B. 209; 2 L. T. 423; 24 J. P. 499; 6 Jur. N. S. 954;

PART III. SECT. 2, SUB-SECT. 2.—B.

241 i. Reasonable construction preferred.]—Where general words in two parts of an Act may be so construed as to be in apparent conflict, the ct. will not select or insist upon

an interpretation of either set of words so to establish that conflict, but will rather select or insist upon such an interpretation as will prevent the conflict.—*R. v. HOWE, McNEIL v. HOWE* (1890), 2 B. C. R. 36. —CAN.

241 ii. —.]—The ct. will only construe "or," used in a statute, as "and" when the natural meaning would give rise to an interpretation unreasonable, inconsistent or unjust.—*GORMAN v. KNIGHT CENTRAL GOLD MINING CO., LTD.*, [1911] T. P. D. 597.—S. AF.

Sect. 2.—Rules of interpretation: Sub-sect. 2, B. & C.]

8 W. R. 524; 121 E. R. 1018; *on appeal* (1862), 2 B. & S. 152, Exch.

Annotations:—*Reid*. *Stevens v. L. B. & S. C. Ry.* (1877), 42 J. P. 70; *Williams v. Mid. Ry.* (1907), 98 L. T. 81; *Sutcliffe v. G. W. Ry.*, [1910] 1 K. B. 478. **Mentd.** *Wilton v. Royal Atlantic Mail Steam Navigation Co.* (1861), 8 Jur. N. S. 231; *Peck v. North Staffordshire Ry.* (1863), 10 H. L. Cas. 473; *Kendall v. L. & S. W. Ry.* (1872), L. R. 7 Exch. 373; *Ashenden v. L. B. & S. C. Ry.* (1880), 5 Ex. D. 180; *Dickson v. G. N. Ry.* (1886), 18 Q. B. D. 176.

248. —.]—*Re CLEVELAND'S (DUKE) HARTE ESTATES* (1861), 1 Drew. & Sm. 481; 30 L. J. Ch. 862; 7 Jur. N. S. 769; 9 W. R. 883; 62 E. R. 462.

Annotation:—**Mentd.** *Re Sexton Barns S. E.* (1862), 10 W. R. 416.

249. —.]—If a clause of an Act of Parliament is capable of two constructions, one interpretation being strained, & amounting almost to an absurdity, & the other reasonable, the reasonable construction must be adopted (**KINDERSLEY, V.-C.**).—*POLE v. POLE* (1865), 2 Drew. & Sm. 420; 6 New Rep. 19; 34 L. J. Ch. 586; 12 L. T. 337; 11 Jur. N. S. 477; 13 W. R. 648; 62 E. R. 680.

Annotations:—**Mentd.** *Shrewsbury v. North Staffordshire Ry.* (1865), L. R. 1 Eq. 593; *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356; *Re Berkeley's Will, Re Gloucester & Berkeley Canal Act, 1870* (1874), 10 Ch. App. 56; *Re Lacon's Settlement, Lacon v. Lacon*, [1911] 1 Ch. 351.

250. —.]—I hold it to be an essential canon of construction that, if the words are susceptible of a reasonable & also of an unreasonable construction, the former construction must prevail (**KEATING, J.**).—*BOON v. HOWARD* (1874), L. R. 9 C. P. 277; 2 Hop. & Colt. 208; 43 L. J. C. P. 115; 30 L. T. 382; 38 J. P. 678; 22 W. R. 535.

Annotation:—**Mentd.** *Bradley v. Baylis, Morfee v. Novis, Kirby v. Biffen* (1881), 8 Q. B. D. 195.

251. —.]—Their lordships are of opinion that the second construction which is not absolutely inconsistent with the phraseology of the enactment & is by far the more reasonable of the two ought to be adopted (*per CUR.*).—*THE FANNY M. CARVILL v. PERU (OWNERS)* (1875), 13 App. Cas. 455, n.; 44 L. J. Adm. 34; 32 L. T. 646; 24 W. R. 62; 2 Asp. M. L. C. 565, P. C.

Annotations:—**Reid**. *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876; *China Merchants' Steam Navigation Co. v. Bignold, The Hochung, The Lapwing* (1882), 7 App. Cas. 512; *The Hermond* (1890), 62 L. T. 670; *Eastern S.S. Co. v. Smith, The Duke of Buccleuch*, [1891] A. C. 310; *The Argo* (1900), 82 L. T. 602; *The Corinthian*, [1909] P. 260. **Mentd.** *Re The Englishman* (1877), 3 P. D. 18; *The Mary Hounsell* (1879), 4 P. D. 204; *Re The Glamorganshire* (1888), 13 App. Cas. 454; *The Sanspareil* (1900), 82 L. T. 356; *The Devonian*, [1901] P. 221; *The Anselm*, [1907] P. 151; *The Pitgaveney*, [1910] P. 215.

252. —.]—Acts of Parliament must be read in the light of common sense (**SIR ROBERT PHILLIMORE**).—*THE CYBELE* (1877), 2 P. D. 224; 47

L. J. P. 13; 37 L. T. 165; 25 W. R. 830; 3 Asp. M. L. C. 478; *on appeal* (1878), 3 P. D. 8.

Annotation:—**Mentd.** *Young v. S.S. Scotia*, [1903] A. C. 501.

253. —.]—My view of an Act of Parliament . . . which is made applicable to a large trade or business is, that it should be construed, if possible, not according to the strictest & nicest interpretation of language, but according to a reasonable & business interpretation of it with regard to the trade or business with which it is dealing (**BRETT, M.R.**).—*THE DUNELM* (1884), 9 P. D. 164; 53 L. J. P. 81; 51 L. T. 214; 32 W. R. 970; 5 Asp. M. L. C. 304, C. A.

Annotations:—**Reid**. *The Grovehurst*, [1910] P. 316. **Mentd.** *The Chusan* (1885), 53 L. T. 60; *The Tweedsdale* (1889), 14 P. D. 164; *The Sophia Rebecca* (1902), *Times*, Feb. 6.

254. —.]—Having to choose then between two constructions, one which involves the rejection of an important word found in the enactment, or the assumption that it was ignorantly inserted as synonymous with "composition" & the other which does no real violence to the language, & involves only the assumption that the Legislature used the word "charged" in a sense that it certainly bore in previous enactments, it appears to me that the sounder view is to adopt the latter construction (**LORD HERSCHELL**).—*PAYNE v. ESDAILE* (1888), 13 App. Cas. 613; 58 L. J. Ch. 299; 59 L. T. 568; 53 J. P. 100; 37 W. R. 273, H. L.; *reversg. S. C. sub nom. ESDAILE v. PAYNE* (1886), 54 L. T. 705, C. A.

Annotations:—**Mentd.** *London City Union v. Esdaile* (1887), 51 J. P. 564; *Re Hodgson's S. E., Altamont v. Forsyth* (1912), 106 L. T. 456; *Busby v. Avgherino*, [1928] A. C. 290.

255. —.]—The rules for the construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule, viz. that, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat* (**BOWEN, L.J.**).—*CURTIS v. STOVIN* (1889), 22 Q. B. D. 513; 58 L. J. Q. B. 174; 60 L. T. 772; 37 W. R. 315; 5 T. L. R. 218, C. A.

Annotations:—**Appld.** *R. v. Vasey & Lally* (1905), 22 T. L. R. 1. **Reid**. *Burkitt v. Thomas*, [1892] 1 Q. B. 99. **Mentd.** *Parsons v. Lakenheath School Board* (1889), 5 T. L. R. 497; *Davey v. Robinson*, [1923] 1 K. B. 563.

256. —.]—*Re LEVY & DEBENTURE CORPN.'S CONTRACT* (1894), 42 W. R. 533; 38 Sol. Jo. 530; 8 R. 820.

C. Construction leading to Absurdity or Repugnance.

See DEEDS, Vol. XVII., pp. 270, 271, Nos. 847–852, 859–862.

257. Construction to avoid absurdity or repugnance.]—*MITCHELL v. TORUP* (1766), Park. 227; 145 E. R. 764.

Annotation:—**Consd.** *Re Aaron, Ex p. Lowe* (1832), 1 L. J. Bey. 54.

PART III. SECT. 2, SUB-SECT. 2.—C.

257 i. Construction to avoid absurdity or repugnance.]—*OTTAWA CORPN. v. HUNTER (Ont.)* (1900), 31 S. C. R. 7.—**CAN.**

257 ii. —.]—The ct. will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable.—*ESQUIMALT WATERWORKS CO. v. VICTORIA CITY CORPN.* (1901), 10 B. C. R. 193; 24 C. L. T. 105.—**CAN.**

257 iii. —.]—In the construction of statutes an interpretation leading to invalidity is not to be adopted.—*Dow v. PARSONS* (1917), 51 N. S. R. 41; 36 D. L. R. 510.—**CAN.**

257 iv. —.]—The literal construction of a sect. of a statute should not be adopted if it results in an absurdity

or an inconsistency with the intention of the legislature as apparent from the whole statute.—*Re RICHARD BROTHERS CO.'S ESTATE, STUART MANUFACTURING CO. v. WHITAKER*, [1917] 2 W. W. R. 722; 11 Alta. L. R. 495.—**CAN.**

257 v. —.]—*R. v. LIGGETTS-FINDLAY DRUG STORES, LTD.*, [1919] 3 W. W. R. 1025; 49 D. L. R. 491; 15 Alta. L. R. 124.—**CAN.**

257 vi. —.]—*R. v. BANK OF MONTREAL* (1919), 47 N. B. R. 69; 49 D. L. R. 288.—**CAN.**

257 vii. —.]—If the words of a statute are clear they must be followed even though they lead to a manifest absurdity. The ct. has nothing to do with the question whether or not the legislature committed an

absurdity. If, however, the words of a statute admit of two interpretations, then they are not clear, & if one interpretation leads to an absurdity & the other does not, the ct. will conclude that the legislature did not intend to lead to an absurdity & will adopt the other interpretation.—*VANCOUVER ISLAND (BP.) v. VICTORIA CORPN. (B. C.)*, [1921] 3 W. W. R. 214; 59 D. L. R. 399.—**CAN.**

257 viii. —.]—*M'NEILL v. CROMMELIN* (1858), 8 I. C. L. R. 61; 10 Ir. Jur. 297.—**IR.**

257 ix. —.]—*HIBERNIAN MINE CO. v. TUKE* (1858), 8 I. C. L. R. 321.—**IR.**

257 x. —.]—Where to give to the words of a statute their ordinary meaning would lead to an absurdity so glaring that the legislature could not

258. —.—.]—We are to construe provisions in Acts of Parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified (PARKE, J.).—*R. v. PEASE* (1832), 4 B. & Ad. 30; 1 Nev. & M. K. B. 690, 1 Nev. & M. M. C. 535; 2 L. J. M. C. 26; 110 E. R. 366.

Annotations :—**Refd.** *Pilgrim v. Southampton & Dorchester Ry.* (1849), 7 C. B. 205; *Kearns v. Cordwainers Co.*, *Cordwainers Co. v. Kearns* (1859), 5 Jur. N. S. 1216; *Cale. Ry. v. Lockhart* (1860), 3 L. T. 65; *R. v. Bradford Navigation Co.* (1865), 6 B. & S. 631; *Hammersmith, etc. Ry. v. Brand* (1869), L. R. 4 H. L. 171; *A.-G. v. Leeds Corp.* (1870), 5 Ch. App. 583; *A.-G. v. Gas Light & Coke Co.* (1877), 37 L. T. 746; *Evans v. M. S. & L. Ry.* (1887), 36 Ch. D. 626; *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153; *C. & S. L. Ry. v. L. C. C.* (1891), 65 L. T. 362; *Canadian Pacific Ry. v. Roy*, [1902] A. C. 220; *Itatteo v. Norwich Electric Tram. Co.* (1902), 18 T. L. R. 562. **Mentd.** *R. v. Scott* (1842), 3 Q. B. 513; *Lawrence v. G. N. Ry.* (1851), 16 Q. B. 643; *Ricketts v. East & West India Docks, etc., Ry.* (1852), 12 C. B. 160; *Re Penny* (1857), 7 E. & B. 660; *Manley v. St. Helens Canal & Ry.* (1858), 2 H. & N. 840; *Vaughan v. Taff Vale Ry.* (1860), 5 H. & N. 679; *Stockport Waterworks Co. v. Potter* (1861), 7 H. & N. 160; *Croft v. L. & N. W. Ry.* (1863), 3 B. & S. 436; *Parry v. Croydon Commercial Gas & Coke Co.* (1863), 28 J. P. 86; *Stapley v. L. B. & S. C. Ry.* (1865), 35 L. J. Ex. 7; *Mersey Dock Trustees v. Gibbs, Mersey Dock Trustees v. Penhallow* (1866), L. R. 1 H. L. 93; *Jones v. Festiniog Ry.* (1868), L. R. 3 Q. B. 733; *Dungey v. London Corp.* (1869), 38 L. J. C. P. 298; *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221; *Smith v. Mid. Ry. & L. & Y. Ry.* (1877), 37 L. T. 224; *Matson v. Baird* (1878), 3 App. Cas. 1082; *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co.* (1878), 9 Ch. D. 503; *Powell v. Fall* (1880), 5 Q. B. D. 597; *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; *R. v. Sheward* (1882), 9 Q. B. D. 741; *Gas Light & Coke Co. v. St. Mary Abbots, Kensington, Vestry* (1884), Cab. & El. 368; *R. v. Essex* (1884), 14 Q. B. D. 753; *L. B. & S. C. Ry. v. Truman* (1885), 11 App. Cas. 45; *Lowther v. Curwen* (1887), 58 L. T. 168; *Harrison v. Southwark & Vauxhall Water Co.*, [1891] 2 Ch. 409; *Hollday v. Wakefield Corp.*, [1891] A. C. 81; *A.-G. v. Met. Ry.*, [1891] 1 Q. B. 384; *Shelfer v. City of London Electric Lighting Co.*, *Monx's Brewery Co. v. City of London Electric Lighting Co.* (1891), 64 L. J. Ch. 216; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74; *West v. Bristol Tramways & Carriage Co.* (1908), 72 J. P. 145; *G. C. Ry. v. Hewlett*, [1916] 2 A. C. 511.

259. —.—.]—It clearly is not within the object which the Legislature had in view, & although it may be within the literal meaning of the words, taken by themselves, we must not give to them a construction which will not only be contrary to the general intention of the Legislature but which will lead to [an] absurd consequence (LORD TEN-TERDEN, C.J.).—*SIMPSON v. UNWIN* (1832), 3 B. & Ad. 134; 1 L. J. M. C. 28; 110 E. R. 50.

Annotations :—**Refd.** *Crofts v. Middleton* (1856), 8 De G. M. & G. 192; *Guyer v. R.* (1889), 23 Q. B. D. 100; *R. v. London (Bp.)* (1889), 23 Q. B. D. 414.

260. —.—.]—The words of the clause must be read in their usual sense & order, unless they would thereby be contrary to the declared intentions of the Legislature, or repugnant to each other.—*WILLIAMS v. ROBERTS* (1835), 1 Cr. M. & R. 676; 1 Gale, 56; 5 Tyr. 421; 4 L. J. Ex. 78; 149 E. R. 1252.

261. —.—.]—It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, & to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such incon-

venience, but no further (PARKE, B.).—*BECKE v. SMITH* (1836), 2 M. & W. 191; 2 Gale, 242; 6 L. J. Ex. 54; 150 E. R. 724.

Annotations :—**Apld.** *Hollingworth v. Palmer* (1849), 18 L. J. Ex. 409. **Distd.** *R. v. Bird* (1851), 2 Den. 94 at p. 132; *A.-G. v. Yolverton* (1861), 7 H. & N. 306. **Consd.** *Christopherson v. Lottinga* (1864), 15 C. B. N. S. 809. **Distd.** *Richards v. McBride* (1881), 8 Q. B. D. 119. **Refd.** *Smeeton v. Collier* (1817), 1 Exch. 457; *Lewis v. Hance* (1848), 12 J. P. Jo. 293; *R. v. Wiley* (1850), 4 Den. 37; *Jones v. Harrison* (1851), 6 Exch. 328; *Miller v. Salomons* (1852), 7 Exch. 475; *Gaudet v. Brown, Brown v. Gaudet, Geipel v. Cornforth, The Argos (Cargo Ex), The Hewsons* (1873), L. R. 5 P. C. 131; *Curtis v. Stovin* (1889), 5 T. L. R. 218; *Cox v. Hakes* (1890), 15 App. Cas. 506; *R. v. Dilbin*, [1910] P. 57. **Mentd.** *Nunes v. Carter* (1866), L. R. 1 P. C. 342.

262. —.—.]—Now the sound rule of construction with respect to Acts of Parliament, is to read them in the ordinary & usual grammatical sense, giving full effect to their provisions, unless such mode of construction leads to manifest inconvenience, or is repugnant to the evident intention of the Legislature. If, in the present case, such construction would have the effect of defeating any antecedent vested right, then we ought to construe the Act so as to support, not defeat it.—*EDWARDS v. LAWLEY* (1840), 8 Dowl. 234.

Annotation :—**Refd.** *Nelstrop v. Scarisbrick* (1810), 4 Jur. 582.

263. —.—.]—*BROWN v. MACMILLAN, SAME v. MACPHERSON*, No. 162, *ante*.

264. —.—.]—Such construction [the ordinary grammatical construction] ought to prevail, unless it lead to an absurdity, or be manifestly repugnant to the intention of the Legislature, as collected from the context (PARKE, B.).—*TURNER v. SHEFFIELD & ROTHERHAM RY. CO.* (1842), 10 M. & W. 425; 3 Ry. & Can. Cas. 222; 152 E. R. 536.

Annotations :—**Mentd.** *Brine v. G. W. Ry.* (1862), 2 B. & S. 402; *Brand v. Hammersmith & City Ry.* (1867), L. R. 2 Q. B. 223.

265. —.—.]—It is a good trial to go by, in all cases to take the grammatical construction of the statute, & to act upon it, unless it leads to some incongruity or manifest absurdity.—*DODGSON v. SCOTT* (1848), 2 Exch. 457; 6 Dow. & L. 27; 5 Ry. & Can. Cas. 654; 17 L. J. Ex. 321; 11 L. T. O. S. 292; 12 Jur. 521; 154 E. R. 571.

Annotations :—**Mentd.** *Bank of England v. Johnson* (1849), 18 L. J. Ex. 238; *Devereux v. Kilkenny & Great Southern & Western Ry.*, *Re Emery* (1850), 5 Exch. 834; *Heward v. Wheatley, Ex p. Wilson* (1852), 5 De G. & Sm. 552; *O'Flaherty v. McDowell* (1857), 6 H. L. Cas. 112; *Davis v. Morris* (1883), 10 Q. B. D. 436.

266. —.—.]—*SALKELD v. JOHNSON (OR JOHNSTON)*, No. 119, *ante*.

267. —.—.]—The rule we have always followed of late years has been to construe statutes like all other written instruments, according to the ordinary grammatical sense of the words used, & if they appear contrary to the recognized & expressed intention of the Legislature, or present any absurdity or inconsistency with grammatical sense, they must be modified so as to obviate that inconvenience, but no further (*per* CUR.).—*HOLLINGWORTH v. PALMER* (1849), 4 Exch. 267; 18 L. J. Ex. 409; 13 L. T. O. S. 363; 13 J. P. 553; 154 E. R. 1211.

Annotation :—**Refd.** *The Ferret, Phillips v. Highland Ry.* (1883), 48 L. T. 915.

268. —.—.]—*MACDOUGALL v. PATERSON*, No. 1401, *post*.

269. —.—.]—I think the true rule for the construction of a statute is that the cts. ought to adhere to the ordinary meaning of the words used, & to the grammatical construction, unless that is at variance with the intention of the Legislature,

have contemplated it, or to a result contrary to the intention of the legislature as shown from the context, the ct. will so interpret the statute as

to remove the absurdity, & give effect to the intention of the Legislature.—*VENTER v. R.*, [1907] T. S. 910.—**S. AF.**

257 xl. —.—.]—*STORM & Co. v. DURBAN MUNICIPALITY*, [1925] App. D. 49.—**S. AF.**

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to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, & no further (MARTIN, B.).—*R. v. BIRD* (1851), 2 Den. 94; *T. & M.* 437; 20 L. J. M. C. 70; 15 J. P. 173; 15 Jur. 193; 5 Cox, C. C. 20; 169 E. R. 431, C. C. R.

Annotations **Mentd.** *Girdlestone v. Brighton Aquarium Co.* (1878), 3 Ex. D. 137; *R. v. Miles* (1890), 24 Q. B. D. 423.

270. —.]—Statutes are to be construed according to their plain & obvious meaning, unless any manifest injustice or absurdity will ensue from such a construction (POLLOCK, C.B.).—*JONES v. HARRISON* (1851), 6 Exch. 328; 2 L. M. & P. 257; *Rob. L. & W.* 565; *Cox, M. & H.* 489; 20 L. J. Ex. 166; 17 L. T. O. S. 41; 15 Jur. 337; 155 E. R. 567.

Annotations :—**Refd.** *Macdougall v. Paterson* (1851), 11 C. B. 755; *Mouisse v. Royal British Bank* (1856), 1 C. B. N. S. 67; *Julius v. Oxford* (Lord Bp.) (1880), 5 App. Cas. 214. **Mentd.** *Latham v. Spodding* (1851), 17 Q. B. 440; *Asplin v. Blackman* (1852), 7 Exch. 386; *Crake v. Powell* (1852), 2 E. & B. 210; *Moredith v. Gittins* (1852), 18 Q. B. 257; *Collins v. Johnson* (1855), 16 C. B. 588.

271. —.]—Where the language of an Act of Parliament admits of but one interpretation, the cts. of law have no right to alter it, however absurd the conclusions to which the words lead; but if there are several ways of construction, then the ct. is bound to take that most in accordance with the spirit of the Act (POLLOCK, C.B.).

We may depart from the strict grammatical construction when it leads to inconsistency, repugnancy, or absurdity, to be collected from the entire Act (PARKE, B.).—*GARNEY v. HARRIS* (1852), 19 L. T. O. S. 94; 17 J. P. 168.

272. —.]—It is best to adhere to the ordinary grammatical construction of a statute, unless it leads to an apparent inconsistency or absurdity (PARKE, B.).—*BRETTELL v. DAWES* (1852), 7 Exch. 307; 7 Ry. & Can. Cas. 444; 18 L. T. O. S. 246; 16 Jur. 274; 155 E. R. 963.

273. —.]—It is, however, true that words which are plain enough in their ordinary sense may, when they would involve an absurdity, or inconsistency, or repugnance to the clear intention of the Legislature, to be collected from the whole of the Act, or Acts, in *pari materia* to be construed with it, or other legitimate grounds of interpretation, be modified or altered, so as to avoid that absurdity, inconsistency, or repugnance, but no further (PARKE, B.).—*MILLER v. SALOMONS* (1852), 7 Exch. 475; 8 State Tr. N. S. 111; 21 L. J. Ex. 161; 19 L. T. O. S. 68; 16 Jur. 375; 155 E. R. 1036; *affd. sub nom. SALOMONS v. MILLER* (1853), 8 Exch. 778.

Annotations :—**Refd.** *Evans v. Birmingham Corpn.* (1853), 21 L. T. O. S. 182; *Shrewsbury v. Scott* (1859), 6 C. B. N. S. 141; *R. v. Yates* (1883), 48 J. P. 102; *Paterson v. Ardrossan Harbour Co.* (1926), 19 B. W. C. C. 621. **Mentd.** *Lancaster & Carlisle Ry. v. Heaton* (1858), 8 E. & B. 952; *A. G. v. Bradlaugh* (1885), 14 Q. B. D. 667.

274. —.]—I doubt, if it were laid down as a general rule, that the grammatical construction of a clause shall prevail over its legal meaning, whether a more certain rule would be arrived at, than if it were laid down that its legal meaning shall prevail over its grammatical construction. . . . It must, however, be conceded that where the grammatical construction is quite clear & manifest & without doubt, that construction ought to prevail, unless there be some strong & obvious reason to the contrary (POLLOCK, C.B.).—*WAUGH v. MIDDLETON* (1853), 8 Exch. 352; 22 L. J. Ex. 109; 20 L. T. O. S. 262; 155 E. R. 1383.

Annotations :—**Refd.** *Larpent v. Bibby* (1855), 5 H. L. Cas. 181; *Re Athlumney, Ex p. Wilson*, [1898] 2 Q. B. 547.

275. —.]—The statute must be construed according to its plain grammatical meaning, unless such construction would lead to manifest absurdity, in which case its language may be modified so as to remove that absurdity (PARKE, B.).—*EASTERN UNION RY. CO. v. COCHRANE* (1853), 9 Exch. 197; 7 Ry. & Can. Cas. 792; 2 C. L. R. 292; 23 L. J. Ex. 61; 22 L. T. O. S. 104; 17 Jur. 1103; 2 W. R. 43; 156 E. R. 84.

276. —.]—We must therefore go on what has been called the golden rule of construction in putting a meaning on the wording of a statute, that we must construe the words used by the Legislature in their ordinary grammatical sense, unless they be words which, if construed strictly, would lead to an absurdity (JERVIS, C.J.).—*MATTISON v. HART* (1854), 14 C. B. 357; 23 L. J. C. P. 108; 18 Jur. 380; 2 W. R. 237; 139 E. R. 147; *sub nom. MATHIESON v. HART*, 2 C. L. R. 314.

Annotation :—**Refd.** *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 69.

277. —.]—In construing wills, statutes & all written instruments, the grammatical & ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical & ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency but no further.—*GREY v. PEARSON* (1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473; 29 L. T. O. S. 67; 3 Jur. N. S. 823; 5 W. R. 451; 10 E. R. 1216, H. L.; *affg. S. C. sub nom. PEARSON v. RUTTER* (1853), 3 De G. M. & G. 398, L. C.

Annotations :—**Apld.** *Cale. Ry. v. N. B. Ry.* (1881), 6 App. Cas. 114. **Consd.** *Re Levy, Ex p. Walton* (1881), 17 Ch. D. 746; *Harding v. Prezzo* (1882), 9 Q. B. D. 281; *Faber v. Lathom* (1897), 77 L. T. 168; *The Suevic*, [1908] P. 292; **Apld.** *Cave v. Horsell*, [1912] 3 K. B. 533. **Consd.** *Vacher v. London Soc. of Compositors*, [1913] A. C. 107. **Apld.** *Bodega Co. v. Martin*, [1915] 2 Ch. 385. **Consd.** *Scott v. Northumberland & Durham Miners' Permanent Relief Fund Friendly & Approved Soc.*, [1920] 1 K. B. 171; *Victoria City Corpn. v. Vancouver Island (Bp.)*, [1921] 2 A. C. 384; *The Ruapehu*, [1927] P. 47. **Refd.** *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68; *Slingsby v. Grainger* (1859), 7 H. L. Cas. 273; *Thellusson v. Rendleham* (1859), 7 H. L. Cas. 429; *Sutton v. Ennis* (1870), 18 W. R. 882; *Reed v. Branthwaite* (1871), L. R. 11 Eq. 511; *Lowther v. Bentinck* (1874), L. R. 19 Eq. 166; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142; *Hill v. East & West India Dock Co.* (1881), 9 App. Cas. 418; *Mills v. Dunham*, [1891] 1 Ch. 576; *Rogers v. Maddocks* (1892), 62 L. J. Ch. 219. *R. v. Halliday*, [1917] A. C. 260. *Whitmore v. King* (1918), 87 L. J. Ch. 647. **Mentd.** *Baker v. Baker* (1858), 6 H. L. Cas. 616; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823; *Seccombe v. Edwards* (1860), 28 Beav. 410; *Seeger v. Duthie* (1860), 6 Jur. N. S. 1095; *Coates v. Hart* (1863), 32 Beav. 319; *Re Sanders' Trusts* (1866), L. R. 1 Eq. 675; *Day v. Day* (1870), 18 W. R. 417; *Surtees v. Surtees* (1871), L. R. 12 Eq. 400; *Allgood v. Blake* (1873), L. R. 8 Exch. 160; *Robinson v. Evans* (1873), 43 L. J. Ch. 82; *Waring v. Currey* (1873), 22 W. R. 150; *Keogh v. Keogh* (1874), 22 W. R. 508; *Sweeting v. Pridoux* (1876), 45 L. J. Ch. 378; *Leach v. Jay* (1877), 6 Ch. D. 496; *Taylor v. St. Helens Corpn.* (1877), 6 Ch. D. 264; *Edwards v. West* (1878), 38 L. T. 481; *Re Martin, Smith v. Martin* (1885), 54 L. J. Ch. 1071.

278. —.]—*R. v. SKEEN*, No. 186, *ante*.

279. —.]—As to what has been said of an Act of Parliament not binding if it is contrary to reason, that can receive no countenance from any ct. of justice whatever. A ct. of justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable, & all that we can do is to try & find out what the Legislature intended. If a literal translation or construction of the words would lead to an injustice & absurdity, another construction possibly might be put upon them, but still it is a question of construction, & there is no power of dispensation from the words used (LORD CAMPBELL).—*LOGAN v. BURSLEM, THE GUIANA* (1842), 4 Moo. P. C. C.

284; 7 Jur. 1; 13 E. R. 312; *sub nom.* THE GUIANA, LOGAN v. R., 3 L. T. 217, P. C.

280. —.]—*Semble*: the rule of construction to be followed in construing a statute is that which is to be found in *Becke v. Smith*, No. 261, *ante*, viz., to adhere to the ordinary meaning of the words used in the statute & their grammatical construction unless it be at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance.—A.-G. v. YELVERTON (1861), 7 H. & N. 306; 30 L. J. Ex. 333; 5 L. T. 451; 7 Jur. N. S. 1250; 158 E. R. 490.

Annotations:—*Mentd.* A.-G. v. Floyer, A.-G. v. Smythe (1861), 31 L. J. Ex. 404; A.-G. v. Abdy (1862), 1 H. & C. 266; A.-G. v. Gardner (1863), 1 H. & C. 639; A.-G. v. Gell (1865), 3 H. & C. 615; Wolverton v. A.-G., [1898] A. C. 535.

281. —.]—The rule of construction is undoubted that where words are in any degree ambiguous, a meaning should not be put upon them which would lead to absurd or mischievous consequences, while one could be found whose consequences would not be absurd or mischievous (LORD WESTBURY, C.).—*Re JOWETT, Ex p. OSBORN* (1864), 5 New Rep. 98; 34 L. J. Bcy. 15; 11 L. T. 356; 10 Jur. N. S. 1137; 13 W. R. 146, L. C.

282. —.]—The construction of the Act upon which the question depends ought to be one which imputes to the Legislature a reasonable intention in passing the Act & not one which will create an absurdity (JESSEL, M.R.).—*HAWES v. PAVELEY* (1876), 1 C. P. D. 418; 46 L. J. Q. B. 18; 34 L. T. 836; 24 W. R. 895, C. A.

Annotation:—*Mentd.* Rogers v. L. C. & D. Ry. (1877), 26 W. R. 192.

283. —.]—It is no doubt a rule of interpretation that the grammatical construction of a sentence must be followed, but this is not to be adopted when it leads to difficulty (GROVE, J.).—*RUTHER v. HARRIS* (1876), 1 Ex. D. 97; 33 L. T. 825; 40 J. P. 454; *sub nom.* RUTHER v. HARRIS, 45 L. J. M. C. 103.

Annotation:—*Apld.* Williams v. Evans (1876), 1 Ex. D. 277.

284. —.]—I have always understood it to be a rule of interpretation applicable to statutes that they are to be construed according to the strict grammatical meaning of the language used, unless such a construction leads to an absurd result (GROVE, J.).—*WILLIAMS v. EVANS* (1876), 1 Ex. D. 277; 35 L. T. 864; 41 J. P. 151.

Annotation:—*Apld.* A.-G. v. Beauchamp, [1920] 1 K. B. 650.

285. —.]—*STONE v. YEOVIL CORPN.* (1876), 2 C. P. D. 99; 46 L. J. Q. B. 137; 36 L. T. 279; 42 J. P. 212; 25 W. R. 240, C. A.

Annotations:—*Apld.* R. v. Vasey & Lally (1905), 22 T. L. R. 1. *Mentd.* *Re Gough & Aspatia*, Silloth & District Joint Water Board (1903), 88 L. T. 421.

286. —.]—Where a strictly literal construction leads to a manifest absurdity, a construction may be adopted which will carry out what may be reasonably supposed to have been the intention of the Legislature (GROVE, J.).—*HIGHAM v. WRIGHT* (1877), 2 C. P. D. 397; 46 L. J. M. C. 223; 37 L. T. 187; 41 J. P. 679.

287. —.]—*RIVER WEAR COMRS. v. ADAMSON*, No. 105, *ante*.

288. —.]—I prefer to adhere to the golden rule of construction, that the words of a statute are to be read in their ordinary sense, unless the so construing them will lead to some incongruity or manifest absurdity (GROVE, J.).—*COLLINS v. WELCH* (1879), as reported in 5 C. P. D. 27; *on appeal*, 5 C. P. D. p. 31, C. A.

Annotations:—*Mentd.* Marsden v. L. & Y. Ry. (1881), 7 Q. B. D. 641; Jones v. Curling (1881), 13 Q. B. D. 262; Huxley v. West London Extension Ry., Hughes v. Merrett, Wood v. Madge (1886), 17 Q. B. D. 373; Roberts v. Jones, Willey v. G. N. Ry., [1891] 2 Q. B. 194.

289. —.]—A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, & the words are susceptible of another construction which will carry out the manifest intention.—*Re LEVY, Ex p. WALTON* (1881), 17 Ch. D. 746; 50 L. J. Ch. 657; 45 L. T. 1; 30 W. R. 395, C. A.

Annotations:—*Consd.* Harding v. Preece (1882), 9 Q. B. D. 281; Hill v. East & West India Dock Co. (1881), 9 App. Cas. 448; De Vexi v. O'Connell, [1908] A. C. 298. *Reid.* *Re Cock, Ex p. Shilson* (1887), 20 Q. B. D. 343; Horitable Reversionary Co. v. Millar, [1892] A. C. 598; O'Grady v. Willmot, [1916] 2 A. C. 231; R. v. Halliday, [1917] A. C. 260; Tozer v. Viola, [1918] 1 Ch. 75; Victoria City Corp. v. Vancouver Island (Rp.), [1921] 2 A. C. 384. *Mentd.* *Re Clarke, Ex p. East & West India Dock Co.* (1881), 17 Ch. D. 759; *Re Latham, Ex p. Glegg* (1881), 19 Ch. D. 7; *Re Morrish, Ex p. Hart Dyke* (1882), 22 Ch. D. 410; Wood v. Hayes (1885), 1 T. L. R. 207; Wise v. Lansdell, [1921] 1 Ch. 420; *Re Lister, Ex p. Bradford Overseers & Bradford Corp.*, [1926] Ch. 149.

290. —.]—In such a case the simple application of the words in their primary & unqualified sense is not always sufficient, & will sometimes fail to carry out the manifest intention of the law-giver as collected from the statute itself, & the nature of the subject-matter & the mischief to be remedied. Where, therefore, the simple application of the words in an unqualified sense leads apparently to some injustice or absurdity at variance with, or not required by, the scope & object of the legislation, it becomes necessary to examine further & to test, by certain settled rules of interpretation, what was the real & true intention of the legislature, & having ascertained it, then to apply the words, if they are capable of being so applied, so as to give effect to that intention (WATKIN WILLIAMS, J.).—*HARDING v. PREECE* (1882), 9 Q. B. D. 281; 51 L. J. Q. B. 515; 47 L. T. 100; 46 J. P. 616; 31 W. R. 42, D. C. *Annotation*:—*Mentd.* Stacey v. Hill (1900), 69 L. J. Q. B. 796.

291. —.]—(1) Their lordships do not intend to depart from the rule that, in the construction of a statute, the ordinary meaning of the words must be adhered to unless that meaning is at variance with the intention of the Legislature to be collected from the statute itself, or leads to some absurdity or repugnance (*per CUR.*).

(2) The right to use an instrument, so simple & at the same time so potent, sweeping away at one stroke defences otherwise unassailable, may properly be regarded as a new right. It seems to follow from these considerations that if this new right is to be enforced the special & appropriate remedy provided by the legislature must be pursued (*per CUR.*).—*PIETERMARITZBURG CORPN. v. NATAL LAND & COLONIZATION CO.* (1888), 13 App. Cas. 478; 57 L. J. P. C. 82; 58 L. T. 895, P. C.

Annotation:—*As to* (1) *Apld.* A.-G. v. Vitagraph Co., [1915] 1 Ch. 206.

292. —.]—The ordinary canon of construction, that is to say, by giving them their ordinary meaning in the English language as applied to such a subject-matter, unless some gross & manifest absurdity would be thereby produced (LORD ESHER, M.R.).—*CLERICAL, MEDICAL & GENERAL LIFE ASSURANCE SOCIETY v. CARTER* (1889), 22 Q. B. D. 444; 58 L. J. Q. B. 224; 53 J. P. 276; 5 T. L. R. 291; 2 Tax Cas. 437, C. A.

Annotations:—*Apld.* Plymouth, Stonehouse & Devonport Tram. Co. v. General Tolls Co. (1896), 75 L. T. 467. *Reid.* L. C. C. v. Grove (1896), 61 J. P. 52. *Mentd.* Leeds Permanent Benefit Bldg. Soc. v. Mallandaine, [1897] 2 Q. B. 402; Revell v. Edinburgh Life Insco. (1906), 5 Tax Cas. 221; Butler v. Mortgage Co. of Egypt (1927), 138 L. T. 328.

293. —.]—You are not so to construe the Act of Parliament as to reduce it to rank absurdity.

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You are not to attribute to general language used by the Legislature in this case any more than in any other case a meaning that would not only [not] carry out its object but produce consequences which to the ordinary intelligence are absurd (LINDLEY, L.J.).—THE DUKE OF BUCCLEUCH (1889), 15 P. D. 86; 62 L. T. 94; 6 Asp. M. L. C. 471, C. A.; *on appeal, sub nom.* EASTERN S.S. CO., LTD. v. SMITH, THE DUKE OF BUCCLEUCH, [1891] A. C. 310, H. L.

Annotations:—Mentd. The Hermod (1890), 62 L. T. 670; The Duke of Buccleuch, [1892] P. 201; The Argo (1900), 82 L. T. 602; The Sanspareil (1900), 82 L. T. 356; The Devonian, [1901] P. 221; The Anselm (1906), 94 L. T. 853; Paquin v. Beauclerk, [1906] A. C. 148; The Bellanoch, [1907] P. 170; The Aristocrat, [1908] P. 9; The Corinthian, [1909] P. 260; The Pitgaveny, [1910] P. 215.

294. —.—.]—VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS, No. 54, *ante*.

295. —.—.]—INLAND REVENUE COMRS. v. HERBERT, No. 235, *ante*.

296. —.—.]—In construing the statute you must give its words their ordinary signification unless when so applied they produce an inconsistency or an absurdity or inconvenience so great as to convince the ct. that the intention could not be to use them in their ordinary signification (GREER, J.).—HUDSON'S BAY CO. v. MACLAY (1920), 36 T. L. R. 469.

Annotation:—Mentd. Robinson v. R., [1921] 3 K. B. 183.

D. Construction leading to Hardship or Injustice.

297. **Alternative construction adopted if possible.**—(1) By an easy transposition of the words of the Act a construction agreeable to justice may be read (*per CUR.*).

(2) It cannot be presumed that the Act had a retrospect to take away an action to which pltf. was then entitled (*per CUR.*).—GILMORE v. SHUTER (1678), T. Jo. 108; Freem. K. B. 466; 1 Vent. 330; 2 Lev. 227; 84 E. R. 1170; *sub nom.* GILMORE v. SHOOTER, 2 Mod. Rep. 310; *sub nom.* HELMORE v. SHUTER, 2 Show. 16.

Annotations:—As to (2) Distd. Towler v. Chatterton (1829), 6 Bing. 258, *Consd.* Moon v. Durden (1848), 2 Exch. 22; Bowling v. Camp (1922), 128 L. T. 342. *Apld.* Henshall v. Porter, [1923] 2 K. B. 193. *Refd.* Ashburnham v. Bradshaw (1740), West temp. Hard. 505; R. v. Leeds & Bradford Ry. (1852), 18 Q. B. 343; Comill v. Hudson (1857), 6 W. R. 37; Williams v. Smith (1857), 2 H. & N. 443; *Re Athlunney, Ex p. Wilson*, [1898] 2 Q. B. 547. *Generally, Refd.* The Alexander (1841), 1 Notes of Cases, 185.

298. —.—.]—It shows the wisdom of the law in not too strictly adhering to the words of an Act of Parliament, where they would work injustice (ABBOTT, C.J.).—GILLON v. BODDINGTON (1824), 1 C. & P. 541; Ry. & M. 161; 171 E. R. 1308.

Annotations:—Distd. Freeborn v. Leeming, [1926] 1 K. B. 160. *Mentd.* Howell v. Young (1826), 5 B. & C. 259; Wordsworth v. Harley (1830), 1 B. & Ad. 391; Nicklin v. Williams (1854), 10 Exch. 259; Bonomi v. Backhouse (1858), E. B. & E. 622; Mitchell v. Darley Main Colliery Co. (1884), 14 Q. B. D. 125.

299. —.—.]—If the words of the statute were capable of being modified so as to avoid an inconvenience plainly & manifestly arising from a strict construction of them, we ought to do so (LORD

ABINGER, C.B.).—WRIGHT v. WILLIAMS (1836), 1 M. & W. 77; 1 Gale, 410; Tyr. & Gr. 375; 5 L. J. Ex. 107; 150 E. R. 353.

Annotations:—Consd. Flight v. Thomas (1841), 8 Cl. & Fin. 231. *Mentd.* Richards v. Fry (1838), 7 Ad. & El. 698; Ward v. Robins (1846), 15 M. & W. 237; Pye v. Mumford (1848), 11 Q. B. 666; Carlyon v. Lovering (1857), 1 H. & N. 784; Cooper v. Hubbuck (1862), 12 C. B. N. S. 456; Hollins v. Verney (1884), 13 Q. B. D. 304; Clark v. Somersetshire Drainage Comrs. (1888), 38 W. R. 890; Gardner v. Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592; Colls v. Home & Colonial Stores, [1904] A. C. 179; Hyman v. Van Den Bergh, [1908] 1 Ch. 167.

300. —.—.]—I would rather, if I can, put a large construction on the words of an Act of Parliament, when, by so doing, I can do what I conceive to be justice, than interpret them so strictly as, in my opinion, to permit the co. to do an injustice (*per CUR.*).—*Re NORTH MIDLAND RAILWAY ACT, Ex p. SLATERS* (1849), 5 Ry. & Can. Cas. 700; 18 L. J. Ch. 431.

Annotation:—Consd. *Re Doncaster's Estate* (1855), 25 L. J. Ch. 381, n.

301. —.—.]—JONES v. HARRISON, No. 270, *ante*.

302. —.—.]—MATTISON v. HART, No. 276, *ante*.

303. —.—.]—We may not put a strained construction on the language of the legislature, unless the natural construction would lead to something manifestly unjust or inconvenient which the legislature could hardly be supposed to have intended (LORD CAMPBELL, C.J.).—ELIAS v. NIGHTINGALE (1858), 8 E. & B. 698; 27 L. J. M. C. 151; 30 L. T. O. S. 285; 22 J. P. 131; 4 Jur. N. S. 166; 6 W. R. 291; 120 E. R. 260.

304. —.—.]—It must be observed that the doing occasionally what I must not call injustice, for that would imply that it was contrary to law, but hardship to particular individuals is almost a necessary condition of any human law (LORD CRANWORTH).—RORKE v. ERRINGTON (1859), 7 H. L. Cas. 617; 5 Jur. N. S. 1227; 11 E. R. 246, H. L.

Annotations:—Mentd. Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540; Jacomb v. Turner, [1892] 1 Q. B. 47; Hewson v. Shelley, [1913] 2 Ch. 384; Eastwood v. Ashton, [1915] A. C. 900.

305. —.—.]—LOGAN v. BURSLEM, THE GUIANA, No. 279, *ante*.

306. —.—.]—The ct. will not strain the words of an Act of Parliament even to do moral justice.—*Re MUSGRAVE'S WILL* (1860), 2 L. T. 719; 6 Jur. N. S. 797.

Annotation:—Mentd. *Re Harrison's Estate* (1870), L. R. 10 Eq. 532.

307. —.—.]—The question depends entirely upon the construction of the Act of Parliament, & it seems to me, that the true mode of dealing with Acts of Parliament is to give them their ordinary meaning, & to carry out what the legislature in words enacts. Even if the result of such a construction is attended with injustice, still the true mode is to carry it out, instead of endeavouring to tamper with it, & to give it what is supposed to be a construction more consonant with justice (MARTIN, B.).—ORNAMENTAL PYROGRAPHIC WOODWORK CO. v. BROWN (1863), 2 H. & C. 63; 2 New

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297 i. **Alternative construction adopted if possible.**—COSHAM v. COSHAM (1899), 25 V. L. R. 418.—AUS.

297 ii. —.—.]—Where there are two constructions the one of which will do great & unnecessary injustice, & the other of which will avoid that injustice & keep exactly within the purpose for which the statute was passed, it is the bounden duty of the

ct. to adopt the second & not to adopt the first of those constructions.—R. v. SYMINGTON (1895), 4 B. C. R. 323.—CAN.

297 iii. —.—.]—WINNIPEG CITY v. BROCK (1911), 45 S. C. R. 271.—CAN.

297 iv. —.—.]—Where the language of a statute is so free from ambiguity as to leave no doubt as to the intention of the legislature, no rules of construction are applicable & the ct. will give

full effect to such intention even though the enactment may cause injustice.—R. v. BANK OF MONTREAL (1920), 47 N. B. R. 69; 49 D. L. R. 288.—CAN.

297 v. —.—.]—BALKARAN RAI v. GOBIND NATH TEWARI (1890), 1 L. R. 12 All. 129.—IND.

297 vi. —.—.]—THOMSON v. GALLO-WAY (EARL), [1919] S. C. 611; 56 Sc. L. R. 448; [1919] 2 S. L. T. 5.—SCOT.

Rep. 81; 32 L. J. Ex. 190; 8 L. T. 506; 9 Jur. N. S. 578; 11 W. R. 600; 159 E. R. 27.

Annotations:—**Reid**, *Hulls v. Estcourt* (1863), 32 L. J. Ex. 193. **Mentd.** *Re English, etc., Rolling Stock Co., Lyon's Case* (1866), 35 Beav. 646; *North Stafford Steel etc. Co. v. Ward* (1868), L. R. 3 Exch. 172; *Peirce v. Jersey Waterworks Co.* (1870), L. R. 5 Exch. 209.

308. —.]—Where the legislature has spoken in positive terms, it is not for us to speculate upon their intention, nor to vary the effect which ought to be given to the Act by what we may consider to be the hardship or injustice arising from it (**COCKBURN, C.J.**).—*R. v. CALTHROP* (1863), 4 B. & S. 216; 27 J. P. 550; 122 E. R. 441; *sub nom. R. v. CLOTHROP*, 11 W. R. 826.

309. —.]—(1) In the construction of every written agreement, the surrounding circumstances are necessary to its proper construction & that rule applies as much to an Act of Parliament as to an agreement between parties (**BYLES, J.**).

(2) Where an Act of Parliament is susceptible of two constructions, one of which will have the effect of destroying the property of large numbers of the community & the other will not, we must assume that the legislature intended the former to be applied to it (**ERLE, C.J.**).—*CHELSEA VESTRY v. KING* (1864), 17 C. B. N. S. 625; 5 New Rep. 85; 34 L. J. M. C. 9; 11 L. T. 419; 29 J. P. 39; 10 Jur. N. S. 1150; 13 W. R. 157; 144 E. R. 250.

310. —.]—The ct. is bound to construe it &, as far as it can, to make it available for carrying out the objects of the legislature & for doing justice between the parties (*per* **CUR.**).—*PHILLIPS v. PHILLIPS* (1866), L. R. 1 P. & D. 169; 35 L. J. P. & M. 70; 14 L. T. 604; 14 W. R. 902.

311. —.]—The question, as my brother Willes said, is whether the word "decided" in the statute is to be read as conclusively decided, or only *prima facie*. It seems to me not clear that the legislature meant the former, & therefore as such a meaning would be contrary to natural justice, I think we are bound to hold the contrary (**BRETT, J.**).—*SIMPSON v. SMITH* (1871), L. R. 6 C. P. 87; 40 L. J. M. C. 89; 24 L. T. 100.

Annotations:—**N.F.** *Plumstead Board of Works v. Spackman* (1884), 13 Q. B. D. 878. **Mentd.** *Cheetham v. Manchester Corp'n.* (1875), L. R. 10 C. P. 249; *Manners v. Johnson* (1875), 1 Ch. D. 673; *L. C. C. v. Cross* (1892), 61 L. J. M. C. 160.

312. —.]—Where a statute is capable of two constructions, one of which will work manifest injustice, & the other will work no injustice, you are to assume that the legislature intended that which would work no injustice (**BRETT, L.J.**).—*R. v. MONCK* (1877), 2 Q. B. D. 544; 46 L. J. M. C. 251; 36 L. T. 720; *sub nom. R. v. BERKS JJ.*, 42 J. P. 196, C. A.

313. —.]—I think also that there is a general rule of construction of statutes which is applicable to the matter, namely, unless you are obliged to do so, you must not suppose that the legislature intended to do a palpable injustice, & it seems to me that in a case where the claim is for an injury done to a person against his will, it would be palpable injustice to deprive the lessor of a remedy against the separate estates, just as much as it would be to deprive him of a remedy against the joint estate (**BRETT, L.J.**).—*Re SHAND, Ex p. CORBETT* (1880), 14 Ch. D. 122; 49 L. J. Bcy. 74; 42 L. T. 164; 28 W. R. 569, C. A.

314. —.]—*HARDING v. PREECE*, No. 290, *ante*.

315. —.]—(1) It is not for this or any other ct. to decline to give effect to a clearly expressed statute because it may lead to apparent hardship (**LORD BLACKBURN**).

(2) We are bound by a former decision of this ct. which held that the enactment as to the

necessity for a seal is mandatory & not directory (**LORD BLACKBURN**).

(3) We ought, in general, in construing an Act of Parliament, to assume that the legislature knows the existing state of the law (**LORD BLACKBURN**).—*YOUNG & Co. v. ROYAL LEAMINGTON SPA CORPN.* (1883), 8 App. Cas. 517; 52 L. J. Q. B. 713; 49 L. T. 1; 47 J. P. 660; 31 W. R. 925, II. L.

Annotations:—*As to* (2) **Reid**, *Bournemouth Comrs. v. Watts* (1884), 14 Q. B. D. 87; *Tunbridge Wells Improvement Comrs. v. Southborough L. B.* (1888), 60 L. T. 172; *British Insulated Wire Co. v. Prescott U. D. C.*, [1895] 2 Q. B. 463; *Lawford v. Billericay R. C.*, [1903] 1 K. B. 772; *Hoare v. Kingsbury U. C.*, [1912] 2 Ch. 452; *Baker v. Holme Cultram U. C.* (1915), 85 L. J. K. B. 799; *Nixon v. Erith U. D. C.*, [1924] 1 K. B. 819. **Generally, Mentd.** *L. & N. W. Ry. & G. W. Ry. v. Price* (1883), 52 L. J. Q. B. 754; *Scott v. Clifton School Board* (1884), 14 Q. B. D. 500; *Soothill Upper U. C. v. Waketield R. C.*, [1905] 2 Ch. 516; *Spencer, Whatley & Underhill v. Southall-Norwood U. D. C.* (1905), 69 J. P. 308; *Mackay v. Toronto City Corp'n.*, [1920] A. C. 208.

316. —.]—(1) I think that your lordships, without doing any real violence either to the spirit or to the language of the Act of Parliament, may dispose of that argument in a manner which certainly will avoid consequences in the last degree inconvenient & I may add unjust, which otherwise might possibly result (**LORD SELBORNE, C.**).

(2) There is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory in the sense that they were not meant to be a condition precedent to a grant or whatever it may be, but a condition subsequent (**LORD BLACKBURN**).—*MIDDLESEX JJ. v. R.* (1884), 9 App. Cas. 757; 53 L. J. Q. B. 505; 51 L. T. 513; 48 J. P. 804; 33 W. R. 49; 15 Cox, C. C. 542, H. L.; *affg. S. C. sub nom. R. v. MIDDLESEX JJ.* (1883), 11 Q. B. D. 656, C. A.

317. —.]—If that is the true interpretation of the statute, if there are no means of avoiding such an interpretation of the statute, a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect he has & with all the vigour of mind that he has, against such an interpretation of an Act of Parliament; &, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended (**BRETT, M.R.**).—*PLUMSTEAD BOARD OF WORKS v. SPACKMAN* (1884), 13 Q. B. D. 878; 53 L. J. M. C. 142; 51 L. T. 757; 49 J. P. 132, C. A.; *on appeal, sub nom. SPACKMAN v. PLUMSTEAD BOARD OF WORKS* (1885), 10 App. Cas. 229, II. L.

Annotations:—**Reid**, *City of London Electric Lighting Co. v. London Corp'n* (1901), 65 J. P. 563; *Hall v. Manchester Corp'n.* (1915), 84 L. J. Ch. 732. **Mentd.** *Barlow v. St. Mary Abbots, Kensington Vestry* (1886), 11 App. Cas. 257; *Gilbart v. Wandsworth District Board of Works* (1888), 60 L. T. 149; *L. C. C. v. Cross* (1892), 61 L. J. M. C. 160; *Worley v. St. Mary Abbots, Kensington Vestry*, [1892] 2 Ch. 404; *Wendon v. L. C. C.* (1893), 70 L. T. 94; *R. v. L. C. C., Ex p. Edwardes* (1894), 15 It. 66; *Allen v. L. C. C.* (1895), 64 L. J. M. C. 228; *Lavy v. L. C. C.*, [1895] 2 Q. B. 577; *Clode v. L. C. C.*, [1914] 3 K. B. 852; *L. G. Board v. Arlidge*, [1915] A. C. 120; *De Verteuil v. Knaggs*, [1918] A. C. 557; *L. C. C. v. Galsworthy*, [1918] A. C. 851; *L. C. C. v. Met. Ry.*, [1919] 1 K. B. 283.

318. —.]—It is a very old canon on the construction of statutes that the construction which leads to the least inconvenience of the two is to be preferred. That is what **LORD COKE** calls the "*argumentum ab inconvenienti*" (**BOWEN, L.J.**).—*GARD v. CITY OF LONDON COMRS. OF SEWERS* (1885), 28 Ch. D. 486; 54 L. J. Ch. 698; 52 L. T. 827; 1 T. L. R. 208, C. A.

Annotations:—**Mentd.** *Teuliere v. St. Mary Abbots, Kensington Vestry* (1885), 30 Ch. D. 642; *Lynch v. London City Comrs. of Sewers* (1886), 32 Ch. D. 72; *Gordon v.*

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St. Mary Abbotta, Kensington Vestry, [1894] 2 Q. B. 742; A.-G. v. London Parochial Charities Trustees, [1896] 1 Ch. 541; Aldis v. London City Corpn. (1899), 47 W. R. 514; Fernley v. Limehouse Board of Works (1899), 68 L. J. Ch. 344; Denman v. Westminster Corpn., Cording v. Westminster Corpn., [1906] 1 Ch. 464; Davies v. London City Corpn., [1913] 1 Ch. 415; Clanricarde v. Congested Districts Board for Ireland (1914), 79 J. P. 481; Conron v. L. C. C., [1922] 2 Ch. 283.

319. ——]—I find in *Maxwell on the "Interpretation of Statutes,"* p. 184, in a section headed "Construction against impairing obligations or permitting advantage from one's own wrong" . . . On the general principle of avoiding injustice & absurdity any construction would be rejected, if escape from it were possible, which enabled a person to defeat a statute or impair the obligation of his contract by his own act or otherwise to profit by his own wrong (LORD ESHER, M.R.).—GOWAN v. WRIGHT (1886), 18 Q. B. D. 201; 56 L. J. Q. B. 131; 35 W. R. 297; 3 T. L. R. 258, C. A.

Annotations:—Mentd. *Re Russell, Ex p. Guest* (1888), 4 T. L. R. 781; *Crawshaw v. Harrison*, [1894] 1 Q. B. 79; *Taylor v. Sturrock, Sturrock v. Sturrock*, [1900] A. C. 225.

320. ——]—A very strong case of injustice arising from giving the language of an Act of Parliament its natural meaning must be made out before the ct. will construe a sect. in a way contrary to the natural meaning of the language used (CAVE, J.).—*Re HALL* (1888), 21 Q. B. D. 137; 57 L. J. Q. B. 494; 59 L. T. 37; 36 W. R. 892, D. C. **Annotation:—Mentd.** *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K. B. 171.

321. ——]—In such a matter as the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, & from which one's own judgment recoils, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction (LORD COLERIDGE, C.J.).—*R. v. CLARENCE* (1888), 22 Q. B. D. 23; 58 L. J. M. C. 10; 59 L. T. 780; 53 J. P. 149; 37 W. R. 166; 5 T. L. R. 61; 16 Cox, C. C. 511, C. C. R.

Annotation:—Mentd. *R. v. Moss & Moss* (1889), 5 T. L. R. 224.

322. ——]—Where the legislature has used words in an Act which, if generally construed, must lead to palpable injustice & to consequences revolting to the mind of any reasonable man, the ct. will always endeavour to place on such words a reasonable limitation, on the ground that the legislature could not have intended such consequences to ensue, unless express language in the Act or binding authority prevents such limitation being interpolated into the Act.—*Re BROCKELBANK, Ex p. DUNN & RAEBURN* (1889), 23 Q. B. D. 461; 58 L. J. Q. B. 375; 61 L. T. 543; 37 W. R. 537; 5 T. L. R. 444; 6 Morr. 138, C. A.

Annotations:—Refd. *R. v. Dilden*, [1910] P. 57. **Mentd.** *Re Jones, Ex p. Jones* (1890), 24 Q. B. D. 589.

323. ——]—It is a sound & well known rule of construction of a statute that if there are two constructions one of which will do great & unnecessary injustice & the other will avoid the injustice & keep exactly within the purpose & objects for which the statute was passed, it is the bounden

duty of a ct. to adopt the second & not the first of those constructions (LORD FIELD).—*HERITABLE REVERSIONARY CO. v. MILLAR*, [1892] A. C. 508, H. L.

Annotation:—Mentd. *Bank of Scotland v. Macleod*, [1914] A. C. 311.

324. ——]—In the absence of authority, I think we ought to be guided by the bare letter of the statute, unless there is something in principle, or on the ground of public convenience or failure of justice, to qualify the *prima facie* meaning of the language used (WRIGHT, J.).—*R. v. DURHAM JJ.*, [1895] 1 Q. B. 801; 64 L. J. M. C. 187; 43 W. R. 423; *sub nom. R. v. DURHAM JJ., Ex p. NEWTON*, 72 L. T. 465; 59 J. P. 264; 18 Cox, C. C. 120; 15 R. 319, D. C.

325. ——]—Where the words of an Act of Parliament are susceptible of two meanings adequately satisfying the language, & great harshness is produced by one of them, that circumstance has legitimate influence in inclining a ct. to adopt the other.—*SIMMS v. REGISTRAR OF PROBATES*, [1900] A. C. 323; 69 L. J. P. C. 51; 82 L. T. 433; 16 T. L. R. 331, P. C.

Annotations:—Apld. *Payne v. R.*, [1902] A. C. 552. **Refd.** *Bullivant v. A.-G. for Victoria*, [1901] A. C. 196; *Brunton v. Stamp Duties Comr.*, [1913] A. C. 747. **Mentd.** *A.-G. v. Richmond (No. 2)* (1908), 78 L. J. K. B. 1; *Re Whitworth, O'Rourke v. Darbishire*, [1919] 1 Ch. 320.

326. ——]—When in construing an Act of Parliament one finds that the primary & natural meaning of the words would lead to a conclusion which it is improbable, if not impossible that the legislature should have intended, one ought then, if the words are capable of another construction which does not involve the same improbabilities or hardship, to adopt that other construction (VAUGHAN WILLIAMS, L.J.).—*METROPOLITAN WATER BOARD v. COLLEY'S PATENTS, LTD.*, [1911] 2 K. B. 38; 80 L. J. K. B. 929; 104 L. T. 478; 75 J. P. 217; 27 T. L. R. 286; 55 Sol. Jo. 311; 9 L. G. R. 483, C. A.; *on appeal, sub nom. COLLEY'S PATENTS, LTD. v. METROPOLITAN WATER BOARD*, [1912] A. C. 24, H. L.

Annotations:—Refd. *Metropolitan Water Board v. Avery*, [1914] A. C. 118; *Oddenino v. Metropolitan Water Board*, [1914] 2 Ch. 734; *Northern Theatres Co. v. Shillito*, [1925] 2 K. B. 100.

327. ——]—If the words are ambiguous & are fairly capable of two different meanings one of which will or may work an injustice & the other will not or may not work an injustice then the latter interpretation is the one which should be preferred. But if the words are plain the ct. has no right to put an unnatural interpretation upon them simply because the putting of the natural interpretation upon them might work an injustice (LORD STERNDAL, M.R.).—*WANKIE COLLIERY CO. v. INLAND REVENUE COMRS.*, [1921] 3 K. B. 344; 90 L. J. K. B. 1051; 125 L. T. 595; 37 T. L. R. 738; 65 Sol. Jo. 626, C. A.; *on appeal*, [1922] 2 A. C. 51, H. L.

Annotations:—Mentd. *Smith v. Moore*, [1921] 2 A. C. 13; *Boase Spinning Co. v. Inland Revenue Comrs.* (1926), 135 L. T. 211.

E. Technical Words.

See DEEDS, Vol. XVII., p. 271, Nos. 863–873.

328. Whether technical or popular meaning preferred.]—When the Legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears (PARKE, B.).—*BURTON v.*

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328 i. Whether technical or popular meaning preferred.]—It is a primary rule of interpretation that a word having a popular meaning ought to

be construed in that sense. One exception to that rule is that, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense,

where the law has attached that sense to them.—*R. v. RAMCHANDRA BHASKAR MANTRI* (1910), 1 L. R. 34 Bom. 593.—**IND.**

328 ii. ——]—If the legislature uses legal or technical terms, it may well

REEVELL (1847), 16 M. & W. 307; 16 L. J. Ex. 85; 11 Jur. 71; 153 E. R. 1206.

Annotations:—*Reid*. R. v. Income Tax Comrs. (1888), 22 Q. B. D. 296. *Mentd.* Stratton v. Pettit (1855), 16 C. B. 420; Bond v. Rosling (1861), 1 B. & S. 371.

329. —.]—In the absence of any statutable definition, we must assume that the word is used in the Excise Acts in the sense in which it is ordinarily understood (ROLFE, B.).—A.-G. v. BAILEY (1847), 1 Exch. 281; 2 New Mag. Cas. 324; 17 L. J. Ex. 9; 10 L. T. O. S. 208; 154 E. R. 119.

Annotation:—*Mentd.* Bailey v. Harris (1849), 12 Q. B. 905.

330. —.]—In construing an ordinary Act of Parliament, every word must be understood according to its legal meaning, unless the context shows that the Legislature has used it in a popular or more enlarged sense; but in a penal enactment, where it is sought to depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a larger or more popular sense must plainly appear.—STEPHENSON v. HIGGINSON (1851), 3 H. L. Cas. 638; 10 E. R. 252, H. L.

Annotations:—*Consd.* Income Tax Special Purposes Comrs. v. Pemsel, [1891] A. C. 531. *Mentd.* Law Society of the United Kingdom v. Shaw, Same v. Waterlow (1882), 51 L. J. Q. B. 249.

331. —.]—Where words have been long used in a technical sense, & have been judicially construed to have a certain meaning, & have been adopted by the Legislature as having a certain meaning prior to a particular statute, in which they are used, the rule of construction of statutes requires, that the words used in such statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words.—RUCKMABOYE v. LULLOORHOY MOTTICHUND (1852), 5 Moo. Ind. App. 234; 8 Moo. P. C. C. 4; 22 L. T. O. S. 203; 18 E. R. 884, P. C.

332. —.]—In construing Acts of Parliament the presumption is, where nothing to the contrary appears in the context, that an expression is used in conformity with a similar expression known in Common Law.—THE MAGELLAN PIRATES (1853), 1 Ecc. & Ad. 81; 18 Jur. 18; 164 E. R. 47.

333. —.]—We cannot put a technical interpretation on the words of this statute, but must construe it according to the ordinary meaning of the words as commonly understood (POLLOCK, C.B.).—GOWENS v. MOORE (1858), as reported in 3 H. & N. 540; 157 E. R. 584.

334. —.]—The whole of the sect. & the whole of the Act is of a strictly technical character from beginning to end. As far as I can see technical words are used in their proper technical senses. The nature of the rights defined & the nature of the remedies given are all technical; & *prima facie* it appears to me that the rule applies that technical words must have their technical meaning given to them unless you can find something in the context to overrule them (JESSEL, M.R.).—LAIRD v. BRIGGS (1881), 19 Ch. D. 22; 45 L. T. 238, C. A.

Annotations:—*Reid*. Symons v. Leaker (1885), 15 Q. B. D. 629. *Mentd.* Frampton v. White (1896), 40 Sol. Jo. 275; Roberts & Lovell v. James (1903), 89 L. T. 282.

335. —.]—R. v. SLATOR, No. 869, *post*.

336. —.]—THE DUNELM, No. 253, *ante*.

337. —.]—When we have to consider an Act of Parliament, we must treat it in the following way: Acts of Parliament sometimes deal with matters which affect everybody, & every circumstance in life. In these cases they use the ordinary

language of the country with regard to eve

But sometimes Acts of Parliament are passed with special reference to particular well-known trades or businesses, or particular well-known transactions, in which there are terms which everybody who is conversant with the particular business or trade, or with those special transactions use, & the meaning of which everybody who deals with those matters understands. When Acts of Parliament deal with matters of this kind those who draft the Acts do not use the common words of the language, but use the words generally used & understood in those particular trades, businesses, or transactions (LORD ESHER, M.R.).—UNWIN v. HANSON, [1891] 2 Q. B. 115; 60 L. J. Q. B. 531; 65 L. T. 511; 55 J. P. 662; 39 W. R. 587; 7 T. L. R. 488, C. A.

338. —.]—The statute which has to be interpreted is one dealing with commercial matters, & its language must be interpreted according to its commercial meaning (LORD ESHER, M.R.).—COTTON v. VOGAN & Co., [1895] 2 Q. B. 652; 65 L. J. Q. B. 40; 73 L. T. 553; 59 J. P. 742; 12 T. L. R. 14; 40 Sol. Jo. 9; 8 Asp. M. L. C. 98; 14 R. 763, C. A.; *affd.*, [1896] A. C. 457, H. L.

339. —.]—LORD ADVOCATE v. STEWART, No. 2101, *post*.

340. —.]—(1) The language of sect. 70 of the Scottish Act is similar to that of sect. 77 of the English Railways Clauses Act . . . [&] unless there be some controlling reason to the contrary, the interpretation in both countries should be the same (LORD SHAW OF DUNFERMLINE).

(2) When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense (LORD LORE-BURN, C.).

(3) The usual construction of general words following particular matters enumerated is to limit them by restricting their application to matters similar in kind to those specifically mentioned (LORD GORELL).—NORTH BRITISH RY. Co. v. BUDHILL COAL & SANDSTONE Co., [1910] A. C. 116; 79 L. J. P. C. 31; 101 L. T. 609; 26 T. L. R. 79, H. L.

Annotations:—*Reid*. A.-G. v. Salt Union, [1917] 2 K. B. 488. *Mentd.* Caledonian Ry. v. Glenboig Union Fireclay Co., [1911] A. C. 290; Barnard-Arque-Roth-Stearns Oil Co. v. Farquharson (1912), 107 L. T. 332; Symington v. Caledonian Ry., [1912] A. C. 87; Australia Commonwealth v. Hazeldell, [1921] 2 A. C. 373.

341. —.]—It is a stringent rule of construction that in construing an Act of Parliament . . . containing technical words those words must be given their technical meaning (FARWELL, L.J.).—MASON v. BOLTON'S LIBRARY, LTD., [1913] 1 K. B. 83; 107 L. T. 673; *sub nom.* CHETWYND'S TRUSTEE v. BOLTONS LIBRARY, LTD., 82 L. J. K. B. 217; 20 Mans. 1, C. A.

342. When controlled by context.]—When it is clear from the context of an instrument in what sense words are used in that instrument the sound rule of construction is to attribute to them that meaning even though the words be technical & have technically a different meaning (COLERIDGE, J.).—GRAHAM v. EWART (1850), 1 H. & N. 550; 26 L. J. Ex. 97; 28 L. T. O. S. 174; 21 J. P. 150; 3 Jur. N. S. 163; 156 E. R. 1320, Ex. Ch.; *affd.* *sub nom.* EWART v. GRAHAM (1859), 7 H. L. Cas. 331, H. L.

Annotations:—*Appld.* Musgrave v. Forster (1871), L. R. 2 Q. B. 590. *Mentd.* Bruce v. Hellwell (1860), 5 H. & N. 609; Blades v. Higgs (1865), 11 H. L. Cas. 621; Jeffryes v. Evans (1865), 19 C. B. N. S. 246; Hilton & Walkerfield

be that they ought to be interpreted according to their legal & technical meaning, but it is quite competent for the legislature to use ordinary &

popular language. If the legislature uses language as to the meaning of which there could be no doubt if it were used by an ordinary person, there

can be no doubt as to its meaning when used by the legislature.—SHANAGAN v. TANNER (1905), 24 N. Z. L. R. 970.—N.Z.

Sect. 2.—Rules of interpretation: Sub-sect. 2, E., F. & G.; sub-sect. 3.]

Overseers v. Bowes Overseers (1866), L. R. 1 Q. B. 359; *Leconfield v. Dixon* (1867), L. R. 3 Exch. 30; *Sowerby v. Smith* (1874), L. R. 9 C. P. 524; *Rogers v. St. Germans Union* (1876), 35 L. T. 332; *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468; *Fitzhardinge v. Purcell* (1908), 99 L. T. 154.

F. Words Used in Different Senses.

343. General rule—Words construed in same sense.]—*R. v. POOR LAW COMRS., Re HOLBORN UNION*, No. 110, *ante*.

344. ———.]—I do not consider that it would be at all consistent with the law, or with the course of this ct., to put a different construction upon the same word in different parts of an Act of Parliament, without finding some very clear reason for doing so (*TURNER, L.J.*).—*Re NATIONAL SAVINGS BANK ASSOCN., LTD.* (1866), 1 Ch. App. 547; 35 L. J. Ch. 808; 15 L. T. p. 128; 14 W. R. 1005, L. J.J.

Annotations:—Mentd. Re Diamond Fuel Co. (1879), 13 Ch. D. 400; *Re Consolidated South Rand Mines Deep*, [1909] W. N. 66.

345. ———.]—It is a sound rule of construction to give the same meaning to the same word occurring in different parts of an Act of Parliament (*CLEASBY, B.*).—(*COURTAULD v. LEGH* (1869), L. R. 4 Exch. 126; 38 L. J. Ex. 45; 19 L. T. 737; 17 W. R. 466.

Annotations:—Mentd. Cooper v. Straker (1888), 40 Ch. D. 21; *Collis v. Laughier*, [1891] 3 Ch. 659; *Smith v. Baxter*, [1900] 2 Ch. 138; *Collis v. Home & Colonial Stores*, [1904] A. C. 179; *Ambler v. Gordon*, [1905] 1 K. B. 417.

346. ———.]—As a general rule a word is to be considered as used throughout an Act of Parliament in the same sense & therefore we may look through the other sects. in order to arrive at the construction of this sect. (*JESSEL, M.R.*).—(*SPENCER v. METROPOLITAN BOARD OF WORKS* (1882), 22 Ch. D. 142; 52 L. J. Ch. 249; 47 L. T. 459; 31 W. R. 347, C. A.

Annotation:—Refd. G. W. Ry. v. Swindon & Cheltenham Extension Ry. (1882), 52 L. J. Ch. 306.

347. Word used in different senses.]—*DAVISON v. BARBER* (1617), Hob. 183; *Moore, K. B.* 886; 80 E. R. 330.

Annotations:—Mentd. Thomas v. Sorrell (1673), *Freem. K. B.* 85; *Elde v. Stephens* (1723), 2 Ld. Raym. 1333.

348. ———.]—The principal question relates to the meaning of the word "yard" & the true way of construing the Act is to look at the different sections in which that word, either singly or with anything adjoined to it, in the way of an adverbial substantive, or anything else which may give it a particular qualification, is used, & then to consider whether it is not evident, on the face of the Act, that the word must have different significations in the different sects. (*SHADWELL, V.-C.*).—(*STONE v. COMMERCIAL RY. CO.* (1839), 1 Ry. & Can. Cas. 375; *on appeal*, 4 My. & Cr. 122, L. C.

Annotations:—Mentd. Walker v. Eastern Counties Ry. (1818), 5 Ry. & Can. Cas. 469; *Adams v. London & Blackwell Ry.* (1850), 2 H. & Tw. 285; *Hill v. G. N. Ry.* (1854), 3 Eq. Rep. 324; *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575; *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426; *Stretton v. Great Western & Brentford Ry.* (1870), 40 L. J. Ch. 51, n.; *Richardson v. Elmit* (1876), 2 C. P. D. 9; *Eccl. Comrs. v. City of London Sewers Comrs.* (1880), 14 Ch. D. 305.

349. ———.]—(Considerable difficulty arises in the construction of this Act of Parliament, by reason of the word "rent" being used in two different senses throughout. . . . In the very first sect. of the Act, the interpretation clause, it is used in both senses (*LORD DENMAN, C.J.*).—(*DOE d. ANGELL v. ANGELL* (1846), 11 Q. B. 328; 15 L. J.

Q. B. 193; 6 L. T. O. S. 520; 10 Jur. 705; 115 E. R. 1299.

Annotations:—Refd. Baines v. Lumley (1868), 16 W. R. 674. *Mentd. Lightfoot v. Maybery*, [1914] A. C. 782; *Silcocks v. Silcocks*, [1916] 2 Ch. 161.

350. ———.]—(1) Once it becomes necessary to seek the meaning of a term occurring in a statute the true rule of construction appears to us to be not to limit the latitude of departure so as to adhere to the nearest possible approximation to the ordinary meaning of the term or to the sense in which it may have been used before but to look to the purpose of the enactment, the mischief to be prevented & the remedy which the legislature intended to apply (*per CUR.*).

(2) When it is said that in construing the statute in question the same effect must be given to the word "marry" in both parts of the sentence & that consequently as the first marriage must necessarily be a perfect & binding one the second must be of equal efficacy in order to constitute bigamy it is at once self evident that the proposition as then stated cannot possibly hold good (*per CUR.*).—(*R. v. ALLEN* (1872), L. R. 1 C. C. R. 367; 41 L. J. M. C. 97; 26 L. T. 664; 36 J. P. 820; 20 W. R. 756; 12 Cox, C. C. 193, C. C. R.

Annotation:—Generally. Mentd. R. v. Deo (1884), 15 Cox, C. C. 579.

351. ———.]—Now it is obvious that the word "property" is used in two totally different senses (*NORTH, J.*).—(*Re SMITH, GREEN v. SMITH* (1883), 24 Ch. D. 672; 52 L. J. Ch. 921; 49 L. T. 297.

G. Different Words Used of Same Subject-Matter.

352. Presumption of different meaning.]—When the legislature in the same sentence uses different words we must presume they were used in order to express different ideas (*LORD TENTERDEN, C.J.*).—(*R. v. GREAT BOLTON (INHABITANTS)* (1828), 8 B. & C. 71; 2 Man. & Ry. K. B. 227; 1 Man. & Ry. M. C. 404; 6 L. J. O. S. M. C. 81; 108 E. R. 969.

353. ———.]—The employment of different language in the same Act may in some cases help to show that the legislature had in view different objects, but a change in language cannot be relied on as furnishing a general rule of construction (*per CUR.*).—(*JAWLESS v. SULLIVAN* (1881), 6 App. Cas. 373; 50 L. J. P. C. 33; 44 L. T. 897; 29 W. R. 917, P. C.

354. ———.]—It is a rule of construction that where in the same Act of Parliament, & in relation to the same subject-matter, different words are used, the ct. must see whether the legislature has not made the alteration intentionally & with some definite purpose; *prima facie* such an alteration would be considered intentional (*LORD ESHER, M.R.*).—(*BRIGHTON PARISH GUARDIANS v. STRAND UNION GUARDIANS*, [1891] 2 Q. B. 156; 60 L. J. M. C. 105; 64 L. T. 722; 55 J. P. 743; 39 W. R. 581; 7 T. L. R. 552, C. A.

355. ———.]—*GOLDSMID v. HAMPTON* (1858), 5 C. B. N. S. 94; 27 L. J. C. P. 286; 31 L. T. O. S. 248; 4 Jur. N. S. 1108; 6 W. R. 768; 141 E. R. 37.

Annotations:—Refd. Reed v. Wiggins (1862), 13 C. B. N. S. 220. *Mentd. Reeves v. Hawkes* (1861), 6 L. T. 53.

SUB-SECT. 3.—CONSTRUCTION WITH REFERENCE TO CONSEQUENCES.

356. Words of statute clear—Consequences not regarded.]—Where the law is known, & clear,

PART III. SECT. 2, SUB-SECT. 2.—F.

347 i. Words used in different senses.]

—Where there are similar words found in two different sects. of an Act of Parliament they are not of necessity

to be construed similarly.—(*CROWDER v. IRISH NORTH-WESTERN RY. CO.* (1869), 17 W. R. 804.—*IR.*

though it be unequitable & inconvenient, the judges must determine as the law is, without regarding the unequity or inconvenience.

Those defects, if they happen in the law can only be remedied by Parliament; therefore we find many statutes repealed, & laws abrogated by Parliament, as inconvenient, which before such repeal or abrogation, were in the cts. of law to be strictly observed.

But where the law is doubtful & not clear, the judges ought to interpret the law to be as is most consonant to equity, & least inconvenient.—*DIXON v. HARRISON* (1669), Vaugh. 36; 124 E. R. 958.

Annotations:—**Refd.** Precedence, etc., of the Judges (undated), Fortes. Rep. 382. **Mentd.** *Herring v. Brown* (1686), Comb. 11; *Shortridge v. Lamplugh* (1702), 2 Ld. Raym. 798; *Armstrong d. Neve v. Woolsey* (1755), Barnes, 467; *Hill v. Saunders* (1825), 4 B. & C. 529.

357. ———.]—It is true, when the words of a law extend not to an inconvenience rarely happening, & do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is *casus omisus*, & that the law intended *quæ frequentius accidunt*.

But it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom.—*BOLE v. HORTON* (1673), Vaugh. 360; 124 E. R. 1113.

Annotation:—**Mentd.** *Smith v. Tindal* (1706), 11 Mod. Rep. 102.

358. ———.]—If the legislator has made use of words which are plain, it may be a question in some cases whether we may not control them so as to prevent their working an injury, but we cannot, in this case, deprive the clear words of the of their fair meaning, because in some other cases it would apply to produce some inconvenience (*LORD ELLENBOROUGH, C.J.*).—*WALLIS v. SMITH* (1804), 1 Smith, K. B. 346.

—Where the language of the Act is clear & explicit, we must give effect to it, whatever may be the consequences; for in that case, the words of the statute speak the intention of the legislature (*per CUR.*).—*WARBURTON v. LOVELAND* (1832), 6 Bli. N. S. 1; 2 Dow. & Cl. 480; 5 E. R. 499, II. L.

Annotations:—**Appld.** *Smecton v. Collier* (1847), 1 Exch. 457. **Apprvd.** *Edwards v. Hodges* (1855), 15 C. B. 477; *Grey v. Pearson* (1857), 6 H. L. Cas. 61. **Appld.** *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354. **Refd.** *Toldervy v. Colt* (1836), 1 M. & W. 250; *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68; *R. v. Bird* (1851), 5 Cox, C. C. 20; *Gundry v. Pinniger* (1852), 1 De G. M. & G. 502; *Miller v. Salomons* (1852), 7 Exch. 475; *A.-G. v. Hallett* (1857), 2 H. & N. 368; *Thollusson v. Rendlesham* (1859), 7 H. L. Cas. 429; *Christopherson v. Lotinga* (1864), 15 C. B. N. S. 809; *Reed v. Braithwaite* (1871), L. R. 11 Eq. 514; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; *R. v. Yates* (1883), 48 J. P. 102; *Hill v. East & West India Dock Co.* (1884), 9 App. Cas. 448; *Bodega Co. v. Martin*, [1915] 2 Ch. 385. **Mentd.** *Re Atkinson* (1852), 2 De G. M. & G. 140; *Doe d. Newman v. Rusham* (1852), 17 Q. B. 723; *Mill v. Hill* (1852), 3 H. L. Cas. 828.

360. ———.]—In construing a statute, we must not look to cases of very rare & singular occurrence, but to those of every day's experience, & whatever may be the consequence, we must interpret the statute according to the plain import of the language employed in it (*TINDAL, C.J.*).—*HYDE v. JOHNSON* (1836), 2 Bing. N. C. 776; 2 Hodg. 94; 3 Scott, 289; 5 L. J. C. P. 291; 132 E. R. 299.

Annotations:—**Mentd.** *Clark v. Alexander* (1844), 8 Scott, N. R. 147; *Toms v. Cuming* (1845), Cox. & Atk. 60; *Grant v. Maddox* (1846), 15 L. J. Ex. 104; *Davies v. Hopkins* (1857), 3 C. B. N. S. 376; *Francis v. Hawksley* (1859), 33 L. T. O. S. 182; *R. v. Kent JJ.* (1873), L. R. 8 Q. B. 305; *Williams v. Mason* (1873), 28 L. T. 232; *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301; *Re Whitley Partners* (1886), 32 Ch. D. 337.

361. ———.]—No inconvenience is so great as the straining the words of a statute, or the departure from established rules, in order to meet a specific grievance (*COLERIDGE, J.*).—*R. v. IPSWICH RECORDER* (1838), 8 Dowl. 103; 1 Will. Woll. & H. 337.

362. ———.]—We have been strongly pressed with the inconveniences that may result from this construction of the statute. We are not insensible to them, but the only proper effect of that argument is to make the ct. cautious in forming its judgment. We cannot on that account, put a forced construction on the Act of Parliament (*per CUR.*).—*HALL v. FRANKLIN* (1838), 3 M. & W. 259; 1 Horn & H. 8; 7 L. J. Ex. 110; 2 Jur. 97; 150 E. R. 1141.

Annotation:—**Mentd.** *Re London & Eastern Banking Corpn., Ex p. Longworths Exors.* (1859), 29 L. J. Ch. 55.

363. ———.]—It is certainly very possible that all the consequences of this enactment were not before the legislature in framing this statute; but that consideration will not authorise us to refuse to give effect to language which is clear & unambiguous (*LORD DENMAN, C.J.*).—*R. v. WHISENDINE (INHABITANTS)* (1842), 2 Q. B. 450; 1 Gal. & Dav. 560; 11 L. J. M. C. 42; 6 J. P. 185; 6 Jur. 192; 114 E. R. 178.

Annotation:—**Mentd.** *R. v. Whitby* (1870), L. R. 5 Q. B. 325.

364. ———.]—*ABEL v. LEE*, No. 111, *ante*.

365. ———.]—It is the duty of judges in all cases to give fair & full effect to Acts of Parliament without regard to the particular consequence in the special case, & not to indulge in conjecture as to what the legislature would have done if a particular case had been presented to their notice (*JESSEL, M.R.*).—*A.-G. v. NOYES* (1881), 8 Q. B. D. 125; 51 L. J. Q. B. 135; 45 L. T. 520; 30 W. R. 434, C. A.

Annotation:—**Refd.** *Birmingham Corpn. v. Birmingham Canal Navigations Co.* (1905), 49 Sol. Jo. 536.

366. ———.]—The argument *ab inconvenienti* cannot prevail against the plain words of the statute (*GROVE, J.*).—*CLARK v. WALLOND* (1883), 52 L. J. Q. B. 321; 31 W. R. 551; *sub nom.* *CLARK v. LOWLEY*, 48 L. T. 762; 47 J. P. 551, D. C.

367. ———.]—It must be admitted that if language of the legislature, interpreted according to the recognised canons of construction involves this result, your Lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the legislature (*LORD HERSHELL*).—*COX v. HAKES* (1890), 15 App. Cas. 506; 54 J. P. 820; 6 T. L. R. 465; *sub nom.* *BELL-COX v. HAKES*, 60 L. J. Q. B. 89; 63 L. T. 392; 39 W. R. 145; 17 Cox, C. C. 158, II. L.; *reversq. S. C. sub nom. Ex p. COX* (1887), 20 Q. B. D. 1, C. A.

Annotations **Refd.** *Re Standard Manufacturing Co.* [1891] 1 Ch. 627; *Watney, Combe, Reid v. Berners*, [1914] 3 K. B. 288. *Re Vexatious Actions Act, 1896, Re Boaler*, [1915] 1 K. B. 21. **Mentd.** *R. v. Barnardo* (1889), 23 Q. B. D. 305; *Barnardo v. McHugh*, [1891] A. C. 388; *R. v. Barnardo, Jones's Case*, [1891] 1 Q. B. 194; *R. v. Jackson* (1891), 64 L. T. 679; *The Tynwald*, [1895] P. 142; *Seaman v. Burley*, [1896] 2 Q. B. 344; *R. v. Halliday*, [1917] A. C. 260; *Brady v. Gibb* (1921), 37 T. L. R. 975; *R. v. Cannon Row Police Station, Ex p. Brady* (1921), 91 L. J. K. B. 98; *Fashender v. A.-G., Kramer v. A.-G.*, [1922] 2 Ch. 850; *Secretary of State for Home Affairs v. O'Brien*, [1923] A. C. 603; *Campbell v. Pollak*, [1927] A. C. 732; *Eshughayi Eleko v. Nigeria Government Administering Officer*, [1928] A. C. 459.

368. ———.]—Unless leading to breach of common law.]—Where a statute is so specially framed as this is, we ought not to travel out of its words, & engraft exceptions upon it which are not expressed. Still, if it could be shown, that, by following those words strictly, a party did anything *contra bonos mores* or against the common

Sect. 2.—Rules of interpretation: Sub-sects. 3 & 4, A.]

law, there might be good reason for departing from their literal construction. But here there is nothing of the kind. *Primâ facie*, every act may be done on a Sunday (MAULE, J.).—*RAWLINS v. WEST DERBY OVERSEERS* (1846), 2 C. B. 72; Cox & Atk. 132; 1 Lut. Reg. Cas. 373; Bar. & Arn. 599; Pig. & R. 229; 15 L. J. C. P. 70; 10 Jur. 268; 135 E. R. 868.

Annotation:—*Mentd.* *Hughes v. Griffiths* (1862), 13 C. B. N. S. 321.

369. Words capable of alternative construction—Alternative consequences considered.]—I think it must be obvious to anybody who reads this rule that it is capable of either construction. It is unfortunately expressed in such language that it leaves it quite as much open with regard to its form of expression to the one interpretation as to the other. What, then, is to be done? We must try & get at the meaning of what was intended by considering the consequences of either construction (BRETT, L.J.).—*THE R. L. ALSTON* (1882), 8 P. D. 5; 48 L. T. 469; 5 Asp. M. L. C. 43, C. A. *Annotation*:—*Consd.* *The Philadelphian*, [1900] P. 43.

370. ———.]—*REID v. REID*, No. 1084, *post*.

371. ———.]—If the language is ambiguous & admits of two views you must not adopt that view which leads to manifest public mischief (BOWEN, L.J.).—*R. v. LONDON COUNTY J.J. & LONDON COUNTY COUNCIL*, [1893] 2 Q. B. 476; 63 L. J. Q. B. 148; 69 L. T. 682; 58 J. P. 69; 9 R. 14; Ryde's Rat. App. (1891–93) 360, C. A.; *on appeal, sub nom.* *LONDON COUNTY COUNCIL v. ST. GEORGE'S UNION ASSESSMENT COMMITTEE*, [1894] A. C. 600, H. L.

Annotations—*Consd.* *Paterson v. Ardrossan Harbour Co.* (1926), 19 B. W. C. C. 621. *Apld.* *Penman v. Caprington & Auchlochan Collieries* (1926), 19 B. W. C. C. 604. *Mentd.* *R. v. City of London Assmt Com.*, [1907] 2 K. B. 764; *R. v. London County J.J.*, *Ex p. Locke, Lancaster & Johnson* (1928), 139 L. T. 609.

372. ———.]—Where the intention of the legislature is not easily gathered from the language of an Act of Parliament, we are entitled, in endeavouring to elucidate it, to follow out the consequences which would seem to flow from this or that interpretation. The more novel or momentous the consequences, the more explicit & direct should we expect the enactment to be (LORD COBHAM).—*MANSION HOUSE ASSOCN. OF RAILWAY TRAFFIC v. LONDON & SOUTH WESTERN RY. CO.*, as reported in [1895] 1 Q. B. 927; 9 Ry. & Can. Tr. Cas. 20.

PART III. SECT. 2, SUB-SECT. 3.

369 i. Words capable of alternative construction—Alternative consequences considered.]—Where the language of an enactment is susceptible of two constructions, regard must be had to the general object & purpose of the Act, & if the act done is not within the general purview of the statute, regard may be had to the consequences of either construction. If one construction will do manifest injustice & the other avoid it, the latter construction shall be adopted.—*INGHAM v. HIE LEE* (1912), 15 C. L. R. 267.—AUS.

369 ii. ———.]—*SPIER v. HUNTER RIVER STEAM NAVIGATION CO.* (1860), 2 Legge, 1351.—AUS.

369 iii. ———.]—*HICKEY v. STALKER*, [1924] 1 D. L. R. 440; 53 O. L. R. 414.—CAN.

PART III. SECT. 2, SUB-SECT. 4.—A.

376 i. How far intention considered.]—It is the duty of the ct. so to interpret Acts of Parliament as to give them full effect, so as to carry out the manifest intention of the legislature, even though the ct. be compelled to strike

out words to do so.—*R. v. DRAPER* (1870), 1 V. R. (Law) 118.—AUS.

376 ii. ———.]—*Re WOOD* (1900), 26 V. L. R. 1.—AUS.

376 iii. ———.]—*Re' SOOKA NAND VERMA* (1905), 7 W. A. L. R. 225.—AUS.

376 iv. ———.]—*Re YATES, Ex p. WALSH, Re YATES, Ex p. JOHNSON* (1925), 37 C. L. R. 36; [1926] Argus. L. R. 46.—AUS.

376 v. ———.]—*FRUIT MARKETING COMMITTEE OF DIRECTION v. COLLINS* (1925), 38 C. L. R. 410; 31 Argus L. R. 322.—AUS.

376 vi. ———.]—*R. v. FREEMAN* (1890), 22 N. S. R. (10 R. & G.) 506.—CAN.

376 vii. ———.]—In construing an Act of Parliament it is the duty of the ct. to consider what the facts were in respect to which it was framed, & the object as appearing from the Act, & taking all these together, to see what is the intention appearing from the language when used with reference to such facts, & with such an object.—*R. v. HAWTHORNE (B. C.)* (1907), 5 W. L. R. 279.—CAN.

376 viii. ———.]—*KAULBACH v. WOOD-*

373. ———.]—I think that, at all events, the language of the sect. admits of the two interpretations which I have mentioned. In considering which ought to be adopted, regard may be paid to the consequences of adopting one or other of them (STIRLING, J.).—*Re CHAYTOR*, [1900] 2 Ch. 804; 69 L. J. Ch. 837; 49 W. R. 125; 16 T. L. R. 546; 44 Sol. Jo. 674.

Annotation:—*Mentd.* *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

374. ———.]—I entirely agree with the observation of resp.'s counsel that we have only to interpret this statute, & that we are bound to give it the fullest meaning the words compel us to do. But when the language is couched in such general terms, then, as has been remarked upon this very statute, the cts. can give such decisions as the words admit of without imposing consequences which would be very serious (LORD ALVERSTONE, C.J.).—*BULLEN v. WARD* (1905), 74 L. J. K. B. 916; 93 L. T. 439; 69 J. P. 422; 54 W. R. 411; 21 T. L. R. 753; 49 Sol. Jo. 743; 21 Cox, C. C. 28, D. C.

Annotation:—*Mentd.* *Amoretto v. James*, [1915] 1 K. B. 124.

375. ———.]—Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; & that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system (LORD SHAW OF DUNFERMLINE).—*SHANNON REALTIES, LTD. v. ST. MICHEL (VILLEDE)*, [1924] A. C. 185; *sub nom.* *SHANNON REALTIES, LTD. v. ST. MICHEL TOWN, PESANT v. SAME*, 93 L. J. P. C. 81; 130 L. T. 518, P. C.

Construction leading to hardship or injustice.]—

See Sub-sect. 2, D., *ante*.

Construction leading to absurdity or repugnance.]

—See Sub-sect. 2, C., *ante*.

Unreasonable construction.]—*See* Sub-sect. 2, B., *ante*.

SUB-SECT. 4.—CONSTRUCTION WITH REFERENCE TO INTENTION OF LEGISLATURE.

A. In General.

376. How far intention considered.]—The judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was

WORTH (1915), 49 N. S. R. 46.—CAN.

376 ix. ———.]—*COLEMAN v. HALIFAX CORPN.* (1915), 48 N. S. R. 442.—CAN.

376 x. ———.]—*R. v. MINOR* (1920), 53 N. S. R. 551.—CAN.

376 xi. ———.]—For the purpose of ascertaining the intention of the legislature in passing an Act, where that intention, so far as can be gathered from the Act itself, appears doubtful, the objects & reasons may be referred to.—*SHAIK MOOSA v. SHAIK ESSA* (1884), 1 L. R. 8 Bom. 241.—IND.

376 xii. ———.]—In interpreting statutes the more literal construction ought not to prevail if it is opposed to the intention of the legislature as apparent by the statute, & if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.—*R. v. HORI* (1899), 1 L. R. 21 All. 391.—IND.

376 xli. ———.]—*LALA SURAJ PROSAD v. GOLAB CHAND* (1901), 1 L. R. 28 Calc. 517; 5 C. W. N. 640.—IND.

376 xiv. ———.]—When the words of a statute admit of but one meaning a ct. is not at liberty to speculate

particular.—**STRADLING v. MORGAN** (1560), 1 Plowd. 201; 75 E. R. 308.

Annotations :—**Consd.** *Garnett v. Bradley* (1878), 3 App. Cas. 944. **Refd.** *Agard v. Candish* (1594), Cro. Eliz. 327; *Foster's Case* (1615), 11 Co. Rep. 56 b; *A.-G. v. Andrew* (1656), Hard. 23; *R. v. O'Connell* (1843), 2 L. T. O. S. 248; *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192; *Keer v. Brown* (1859), 28 L. J. Ch. 477; *Re Anglesea Colliery Co.* (1866), 1 Ch. App. 555; *Re National Savings Bank Assn.* (1866), 1 Ch. App. 547; *Re Poland* (1866), 1 Ch. App. 356; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Cox v. Hakes* (1890), 15 App. Cas. 506; *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; *Eastman Photographic Materials Co. v. Comptroller General of Patents, Designs & Trademarks*, [1898] A. C. 571; *R. v. West Riding of Yorkshire County Council*, [1906] 1 K. B. 676; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *A.-G. v. Brown*, [1920] 1 K. B. 773; *Rhondda's Claim*, [1922] 2 A. C. 339; *Secretary of State for Home Affairs v. O'Brien*, [1923] A. C. 603. **Mentd.** *Caudrey's Case* (1591), 5 Co. Rep. 1 a; *Canterbury (Archbp.) Case*, *Green v. Bulser* (1596), 2 Co. Rep. 46 a; *Bonham's Case* (1610), 8 Co. Rep. 113 b; *Powtler's Case* (1610), 11 Co. Rep. 29 a; *Oxford University Case* (1613), 10 Co. Rep. 53 b; *Redo v. Sanderson* (1617), Cro. Jac. 440; *Grissell v. Leo* (1623), Palm. 368; *Case of Comendams*, *Woodley v. Exeter (Bp.) & Mannering* (1624), Win. 94; *Wiseman v. Cotton* (1663), 1 Keb. 505; *R. v. Hornby*, *Banker's Case* (1694), 5 Mod. Rep. 29; *Waddington v. Thellwell* (1769) 4 Burr. 2450; *R. v. Amery* (1786), 1 Term Rep. 363; *Meath (Bp.) v. Winchester* (1836), 3 Bing. N. C. 183; *A.-G. v. Sillem* (1863), 2 H. & C. 431; *Coomber v. Berks JJ.* (1882), 9 Q. B. D. 17.

377. —. —. —. (1) Whoever would consider an Act well ought always to have particular regard to the intent of it, & according as the intent appears he ought to construe the words (*per Cur.*).

(2) The King is bound by the statute, for of a law which belongs to a common person, be it the common law, or a special law, every man shall take advantage, which the King of common right cannot defeat (*per Cur.*).

(3) It is usual for the legislature in Acts of restraint which they intend to bind the King to name him expressly, & if he is not expressly named it has always been taken heretofore that the legislature intended only to bind the subjects (*per Cur.*).

(4) In general statutes made for the safety of inheritances, or for the public good, the expositors of them have construed them according to the course of the common law, viz., that they shall include the King, notwithstanding he is not named (*per Cur.*).—**WILLION v. BERKLEY** (1561), 1 Plowd. 227; 75 E. R. 345.

Annotations :—**As to (1)** **Refd.** *Wolferstan v. Lincoln (Bp.) & Whitehead* (1763), 2 Wils. 174; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192. **As to (2)** **Refd.** *Ecclesiastical Persons Case* (1601), 5 Co. Rep. 11 a; *Case of a Fine* (1601), 7 Co. Rep. 32 a. **As to (3)** **Refd.** *R. v. London (Bp.) & Lancaster* (1693), 1 Show. 441; *A.-G. v. Donaldson* (1812), 10 M. & W. 117. **As to (4)** **Refd.** *Magdalen College Cambridge Case* (1615), 11 Co. Rep. 66 b. **Generally, Refd.** *Prince's Case* (1606), 8 Co. Rep. 1 a; *A.-G. v. Allgood* (1743), Park. 1. **Mentd.** *Heydon's Case* (1584), 3 Co. Rep. 7 a; *Sadlers' Co. Case* (1588), 4 Co. Rep. 54 b; *Strata Mercolla's Case* (1591), 9 Co. Rep. 24 a; *Woods' Case*, *R. v. Bushopp*, *A.-G. v. Bushopp* (1595), 1 Co. Rep. 40 b; *Anderson's Case* (1597), 7 Co. Rep. 21 a; *Butt's Case* (1600), 7 Co. Rep. 23 a; *Atkins v. Longville* (1604), Cro. Jac. 50; *Rutland's Case* (1605), 6 Co. Rep. 52 b; *Calvin's Case* (1609), 7 Co. Rep. 2 a; *Turnor's Case* (1610), 8 Co. Rep. 132 a; *Peytoe's Case* (1611), 9 Co. Rep. 77 b; *Priddle & Napper's Case* (1612), 11 Co. Rep. 8 b; *Seymour's Case* (1612), 10 Co. Rep. 95 b; *Sutton's Hospital Case* (1612), 10 Co. Rep. 23 a; *Whistler's Case* (1613), 10 Co.

on the intention of the legislature to construe them according to its own notions of what ought to have been enacted. Its duty is not to make the law reasonable but to expound it as it stands, according to the real sense of the words & if there is a *casus omisus* it is for the legislature, & not for the ct., to remedy the defect.—**PIARA SINGH v. MULA MAL** (1923), 1 L. R. 4 Lab. 223.—**IND.**

376 xv. —. —. —. **KEARNEY'S CASE** (1836), Alc. Reg. Cas. 22; 5 Ir. L. Rec. N. S. 64; Welsh Reg. Cas. 276.—**IR.**

376 xvi. —. —. —. **A.-G. (BUTLER) v.**

SHEEHAN, [1927] I. R. 546.—**IR.**

376 xvii. —. —. —. **OTAGO DISTRICT LAND BOARD v. HIGGINS** (1884), 3 N. Z. L. R. C. A. 66.—**N.Z.**

376 xviii. —. —. —. When the meaning of an expression in a statute is clear, no other meaning can be imported into it on the assumption that the legislature meant more than it said.—**RE ELECTRICITY SUPPLY CORPN. (N.Z.), LTD.**, [1921] N. Z. L. R. 791.—**N.Z.**

376 xix. —. —. —. **SMITH v. MCARTHUR**, [1904] A. C. 389, P. C.—**N.Z.**

376 xx. —. —. —. If the meaning of a

Rep. 63 a; *Winchcombe v. Winchester (Bp.) & Pulleston* (1616), Hob. 165; *R. v. Hampden* (1637), 3 State Tr. 826; *Wiseman v. Cotton* (1663), 1 Keb. 505; *R. v. Hornby*, *Banker's Case* (1695), 5 Mod. Rep. 29; *Banbury v. Wood* (1703), 1 Salk. 5; *R. v. Berkley & Bragge* (1754), 1 Keny. 80; *Doe d. Hayne v. Redfern* (1810), 12 East, 96; *Holloway v. Berkeley* (1826), 6 B. & C. 2; *Meath (Bp.) v. Winchester* (1836), 3 Bing. N. C. 183.

378. —. —. —. (1) For everything which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter & intent also (*per Cur.*).

(2) For the better apprehension of the purview, the preamble of the Act is to be considered, which **DYER, J.**, termed a "key to open the minds of the makers of the Act, & the mischiefs which they intended to redress" (*per Cur.*).—**STOWEL v. ZOUCII (LORD)** (1569), 1 Plowd. 353; 75 E. R. 536.

Annotations :—**As to (1)** **Refd.** *Boulton v. Bull* (1795), 2 Hy. Bl. 463; *N. W. Ry. v. Mc Michael*, *Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher* (1851), 5 Exch. 114, 121. **As to (2)** **Consd.** *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A. C. 531; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468. **Appld.** *Bourne v. Keane*, [1919] A. C. 815. **Refd.** *R. v. City of London Court Judge*, [1892] 1 Q. B. 273; *Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242; *G. W. Ry. & Mid. Ry. v. Bristol Corpn.* (1918), 87 L. J. Ch. 414. **Generally, Refd.** *Parliament in Ireland Case* (1613), 12 Co. Rep. 110; *Newry & Enniskillen Ry. v. Coombe* (1819), 3 Exch. 565. **Mentd.** *Bedford's Case* (1586), 7 Co. Rep. 7 b; *Dormer's Case* (1593), 5 Co. Rep. 40 a; *Penryn v. Corbet* (1596), Cro. Eliz. 464; *Bingham's Case*, *Stroud d. Albert v. Horsey* (1600), 2 Co. Rep. 91 a; *Case of a Fine* (1602), 3 Co. Rep. 84 a; *Whittingham's Case* (1603), 8 Co. Rep. 42 b; *Calvin's Case* (1608), 7 Co. Rep. 1 a; *Underhill v. Kelsey* (1609), Cro. Jac. 226; *Lechford's Case* (1610), 8 Co. Rep. 99 a; *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Seymour's Case* (1612), 10 Co. Rep. 95 b; *Bartholomew v. Belfield* (1613), Cro. Jac. 332; *Magdalen College Cambridge Case* (1616), 11 Co. Rep. 66 b; *Fawkeners v. Bellingham* (1627), Cro. Car. 80; *Benyon v. Evelyn* (1664), O'Bridg. 324; *King v. Dilliston* (1688), 3 Mod. Rep. 221; *Dighton v. Greenvil* (1693), 2 Vent. 321; *Clayton v. Kinaston* (1697), 1 Ld. Raym. 419; *Konsey v. Heyward* (1697), 1 Ld. Raym. 432; *Buckinghamshire v. Drury* (1762), Wilm. 177; *Doe d. Tarrant v. Hellier* (1789), 3 Term Rep. 162; *Beckford v. Wade* (1805), 17 Ves. 87; *Doe v. Jesson* (1805), 6 East, 80; *Horn v. Horn* (1806), 7 East, 529; *Wells v. Iggulden* (1821), 3 B. & C. 186; *Lane v. Bennett* (1836), 1 M. & W. 70; *Tolson v. Kaye* (1813), 6 Man. & G. 536; *Cox v. Beavan* (1849), 8 C. B. 334; *Ruckmaboye v. Lulloohoy Mottichund* (1853), 8 Moo. P. C. C. 4; *Knowlton v. R.* (1864), 5 B. & S. 532.

379. —. —. —. The intent of the statutes is more to be regarded & pursued than the precise letter of them, for oftentimes things, which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the Act, & the best way to construe an Act of Parliament is according to the intent rather than according to the words (*per Cur.*).—**EYSTON v. STUDD** (1574), 2 Plowd. 463; 75 E. R. 692.

Annotations :—**Refd.** *Foster v. Pitfall* (1582), Cro. Eliz. 2; *R. v. Hampden* (1637), 3 State Tr. 826; *Wolferstan v. Lincoln (Bp.) & Whitehead* (1763), 2 Wils. 174; *R. v. Pease* (1832), 4 B. & Ad. 30; *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1; *Edwards v. Freeman* (1875), 2 P. Wms. 435; *Garnett v. Bradley* (1878), 26 W. R. 698; *Rhondda's Claim*, [1922] 2 A. C. 339. **Mentd.** *Foster v. Cockburn* (1743), Park. 70; *R. v. O'Connell* (1813), 2 L. T. O. S. 248; *R. v. Newmarket Income Tax Comrs.*, *Ex p. Huxley*, [1916] 1 K. B. 788.

sect. is not clear, the ct. is entitled & bound to bear in mind the circumstances under which the statute was passed & the object which the legislature had in view.—**CHOTABHAI v. UNION GOVERNMENT**, [1911] App. D. 13.—**S. AF.**

376 xxi. —. —. —. In interpreting a statute, the intention of the legislature must be collected from what the legislature has said, not arrived at from conjectures of what the legislature might or ought to have meant.—**SELUKA v. SUSKIN & SALKOW**, [1912] T. P. D. 258.—**S. AF.**

Sect. 2.—Rules of interpretation: Sub-sect. 4, A.]

380. —.]—Acts of Parliament, & wills, are to be construed according to the intent.—*BUTLER & BAKER'S CASE* (1591), 3 Co. Rep. 25 a; 3 Leon. 271; 76 E. R. 684; *sub nom.* *BUTLER v. BAKER & DELVES*, Poph. 87.

*Annotations:—**Appld.* Court of Wards Case (1627), Cro. Car. 33. *Mentd.* *Menville's Case* (1585), 13 Co. Rep. 19; *Mountjoy's Case* (1589), 5 Co. Rep. 3 b; *Jennings v. Bragg* (1595), Cro. Eliz. 447; *Fitzwilliam's Case* (1604), 6 Co. Rep. 32 a; *Pexhall's Case* (1609), 8 Co. Rep. 83 b; *Lovies's Case* (1613), 10 Co. Rep. 78 a; *Sydowne v. Holme* (1635), Cro. Car. 422; *R. v. Hampden* (1637), 3 State Tr. 826, at p. 1212; *Norrice & Norrice's Case* (1640), March. 23; *Berry v. White* (1662), O'Bridg. 82; *Geary v. Bearcroft* (1666), O'Bridg. 484; *Thompson v. Leach* (1690), 1 Vent. 198; *Wankford v. Wankford* (1702), 1 Salk. 299; *Arthur v. Bokenham* (1708), 11 Mod. Rep. 148; *Brunker v. Cook* (1708), 11 Mod. Rep. 121; *Atkin v. Herwick* (1719), 10 Mod. Rep. 431; *Windham v. Chetwynd* (1757), 1 Burr. 414; *Buckinghamshire v. Drury* (1762), Wilm. 177; *Brydges v. Chandos* (1791), 1 Ves. 417; *Goodtitle d. Holford v. Otway* (1796), 1 Bos. & P. 576; *Cave v. Holford* (1798), 3 Ves. 650; *Crowther v. Ramsbottom* (1798), 7 Term Rep. 654; *Goodright d. Fowler v. Forrester* (1807), 8 East, 552; *Doe d. Tofield v. Tofield* (1809), 11 East, 246; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671; *Balme v. Hutton* (1831), 2 Tyr. 17; *Lucas v. Nockells* (1833), 10 Bing. 157; *Bramah v. Roberts* (1835), 1 Bing. N. C. 481; *Mills v. Oddy* (1835), 2 Cr. M. & R. 103; *Garland v. Carlisle* (1837), 4 Cl. & Fin. 693; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517; *Siggers v. Evans* (1855), 5 E. & B. 367; *Xenos v. Wickham* (1867), L. R. 2 H. L. 296; *Standing v. Bowring* (1885), 31 Ch. D. 282; *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Re Arbib & Class's Contract*, [1891] 1 Ch. 601; *Smith v. Kerr* (1902), 18 T. L. R. 456; *Mallott v. Wilson*, [1903] 2 Ch. 491.

381. —.]—*MAGDALEN COLLEGE, CAMBRIDGE CASE*, No. 1039, *post*.

382. —.]—*SCOTT v. A'CHEZ* (1743), Park. 21; 145 E. R. 702.

383. —.]—In construing an Act of Parliament, whether public, general or of the nature of the Act now under consideration, we are bound to ascertain as far as we can what was the intention of the legislature, & if the language used be sufficient, to give effect to such intention (*COLTMAN, J.*).—*BOYD v. CROYDON RY. CO.* (1838), 4 Bing. N. C. 669; 6 Dowl. 721; 6 Scott, 461; 7 L. J. C. P. 241; 2 J. P. 680; 132 E. R. 946.

384. —.]—The act ought to be construed according to its plain words, & not by resorting to any supposed intention of the legislature, unless there be something in the other parts of it to point to some other construction (*PARKE, B.*).—*HOLT v. MIERS* (1839), 5 M. & W. 168; 2 Horn & H. 80; 8 L. J. Ex. 233; 3 Jur. 1000; 151 E. R. 72.

Annotation:—Mentd. *Re Poynter, Ex p. Terrewist* (1839), 9 L. J. Ch. 6.

385. —.]—The rules for interpreting statutes have been much discussed in these arguments, but we apprehend that, in applying them to questions on the effect of an enactment, we can never safely lose sight of its object (*LORD DENMAN, C.J.*).—*R. v. SHROPSHIRE JJ.* (1841), 2 Q. B. 87; 114 E. R. 36; *sub nom.* *R. v. SALOP JJ.*, 1 Gal. & Dav. 146; 10 L. J. M. C. 141; 5 J. P. 484; 5 Jur. 1107.

386. —.]—We are bound, as much as we can, to give effect to what is discovered to be the intention of the legislature; & instead of giving effect to doubts, where the language may be obscure, or not perfectly plain, I think we are bound, wherever we see the meaning & intention of the legislature, to put such a construction on the language used as may give effect to the intention, if that intention be sufficiently plain (*POLLOCK, C.B.*).—*YOUNG v. SMITH* (1840), 15 M. & W. 121; 4 Ry. & Can. Cas. 135; 15 L. J. Ex. 81; 6 L. T. O. S. 351; 10 J. P. 201; 10 Jur. 52; 153 E. R. 787.

*Annotations:—**Refd.* *Lawton v. Hickman* (1847), 9 Q. B. 563. *Mentd.* *Bousfield v. Wilson* (1846), 16 M. & W. 185;

Brunton v. Thompson (1846), 7 L. T. O. S. 430; *Re Charles, Ex p. Barton* (1846), 4 Ry. & Can. Cas. 371; *Doyle v. Muntz* (1846), 5 Haro, 509; *Shaw v. Holland* (1846), 15 M. & W. 136; *Abbott v. Rogers* (1855), 16 C. B. 277.

387. —.]—We must construe this statute by what appears to have been the intention of the legislature. But we must ascertain that intention from the words of the statute & not from any general inferences drawn from the nature of the objects dealt with by the statute (*LORD BROUGHAM*).—*FORDYCE v. BRIDGES* (1847), 1 H. L. Cas. 1; 11 Jur. 157; 9 E. R. 649, H. L.

*Annotations:—**Appld.* *R. v. Doubleday* (1861), 3 E. & E. 501. *Refd.* *River Wear Comrs. v. Adamson* (1877), 1 App. Cas. 743.

388. —.]—When one of two constructions consists with the intention of the legislature to be gathered from the statute, & the other is inconsistent therewith, the first is to be observed (*per CUR.*).—*R. v. CHRISTCHURCH (INHABITANTS)* (1848), 12 Q. B. 149; 3 New Sess. Cas. 320; 18 L. J. M. C. 28; 12 L. T. O. S. 214; 12 J. P. 792; 12 Jur. 1072; 116 E. R. 823.

Annotation:—Mentd. *Ipswich Union Grdns. v. West Ham Union Grdns.* (1887), 20 Q. B. D. 407.

389. —.]—*HOLLINGWORTH v. PALMER*, No. 267, *ante*.

390. —.]—We have no authority to introduce any qualification or condition into an Act of Parliament; but we are to interpret the language of the legislature. To do this we must look at the intention of the legislature as it is to be collected from the Act, & the state of the law at the time when it passed (*LORD CAMPBELL, C.J.*).—*R. v. TRAFFORD* (1850), 15 Q. B. 200; 4 New Mag. Cas. 82; 4 New Sess. Cas. 130; 117 E. R. 431; *sub nom.* *R. v. LANCASHIRE JJ.*, 19 L. J. M. C. 199; 15 L. T. O. S. 159; 14 J. P. 528; 14 Jur. 552.

Annotation:—Mentd. *R. v. Hammond* (1850), 4 New Sess. Cas. 316.

391. —.]—*R. v. BIRD*, No. 269, *ante*.

392. —.]—In construing an Act of Parliament, it is most desirable, where practicable, to ascertain the reasons which induced Parliament to pass such an enactment; & where that can be done without a violent construction, to give such a meaning as the legislature intended, in consequence of the reasons on which the enactment itself passed. Where no reason can be ascertained the words must be followed according to their most plain & obvious meaning (*DR. LUSHINGTON*).—*In the Goods of COOPER, In the Goods of SMITH* (1852), 18 L. T. O. S. 307.

393. —.]—When the terms [of a statute] admit of two meanings, that must be preferred which is in conformity with the object of the statute (*JERVIS, C.J.*).—*JOHNSON v. HARRIS* (1854), 15 C. B. 357; 3 C. L. R. 235; 24 L. J. C. P. 40; 24 L. T. O. S. 133; 3 W. R. 104; 139 E. R. 462.

*Annotation:—**Refd.* *Hodges v. Callaghan* (1857), 3 Jur. N. S. 369.

394. —.]—In determining the question before us, we have therefore to consider not merely the words of this Act of Parliament, but the intent of the legislature, to be collected from the cause & necessity of the Act being made, from a comparison of its several parts, & from foreign, meaning extraneous, circumstances, so far as they can be justly considered to throw light upon the subject (*TURNER, L.J.*).—*HAWKINS v. GATHERCOLE* (1855), 6 De G. M. & G. 1; 3 Eq. Rep. 348; 24 L. J. Ch. 332; 24 L. T. O. S. 281; 19 J. P. 115; 1 Jur. N. S. 481; 3 W. R. 194; 43 E. R. 1129, L. J.

*Annotations:—**Appld.* *Burder v. O'Neill* (1863), 2 New Rep. 551; *Re Cambrian Rys. Co.'s Scheme* (1867), 3 Ch. App. 278, n. *Consd.* *Garnett v. Bradley* (1878), 3 App. Cas. 944; *Re Leavesley*, [1891] 2 Ch. 1; *Eastman Photographic Materials Co. v. Comptroller-General of Patents*,

Designs & Trade-mks., [1898] A. C. 571. **Apld.** Birmingham Corp'n. v. Birmingham Canal Navigations (1905), 21 T. L. R. 548; A.-G. v. Brown, [1920] 1 K. B. 773. **Refd.** Cope v. Doherty (1858), 2 De G. & J. 614; *Re* Poland (1866), 35 L. J. Bcy. 19; Norwich (Bp.) v. Pearse (1868), L. R. 2 A. & E. 281; *Beloley v. Carter* (1869), 4 Ch. App. 230; *Re Meredith, Ex p. Chick* (1879), 11 Ch. D. 731; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Seward v. The Vera Cruz* (1884), 10 App. Cas. 59; *R. v. West Riding of Yorkshire County Council*, [1906] 2 K. B. 676; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Re Plymouth Corp'n. & Walter*, [1918] 2 Ch. 351; *Nicolle v. Nicolle*, [1922] 1 A. C. 284; *Rhondda's Claim*, [1922] 1 A. C. 339; *Woodfield v. Bond*, [1922] 2 Ch. 40; *Pateron v. Ardrossan Harbour Co.* (1926), 19 B. W. C. C. 621. **Mentd.** *Arnold v. Gravesend Corp'n., Pallister v. Gravesend Corp'n.* (1856), 25 L. J. Ch. 776; *Parry v. Jones* (1856), 1 C. B. N. S. 339; *McBean v. Deane* (1885), 30 Ch. D. 520; *Baird v. Tunbridge Wells Corp'n.*, [1894] 2 Q. B. 867; *Porthcawl U. C. v. Brogden*, [1917] 1 Ch. 534.

395. —.]—(1) In all cases the statute must be construed according to what appears to be the intention of the legislature (LORD CAMPBELL, C.J.).

(2) In construing the local Act we cannot look to the preliminary negotiations (LORD CAMPBELL, C.J.).—**BRAMSTON v. COLCHESTER CORPN.** (1856), 6 E. & B. 246; 25 L. J. M. C. 73; 27 L. T. O. S. 76; 20 J. P. 564; 2 Jur. N. S. 809; 4 W. R. 491; 119 E. R. 856.

396. —.]—Upon doubtful expressions we ought to put a construction such as to meet the objects which the legislature in the Act of Parliament had in view (LORD CAMPBELL, C.J.).—**R. v. SPATLEY** (1856), 6 E. & B. 363; 25 L. J. Q. B. 257; 27 L. T. O. S. 102; 20 J. P. 628; 2 Jur. N. S. 735; 4 W. R. 527; 119 E. R. 900.

397. —.]—(1) If then the legislature has used an ambiguous word in a definite sense in one passage of a clause in an Act of Parliament, it is in accordance with the rules of sound construction & legitimate inference to hold that the same word is used in the same sense when found in another passage of the same clause, unless any repugnancy or incongruity would result from such construction (CROWDER, J.).

The rule laid down by SIR EDWARD COKE in these words "It is the most natural & genuine exposition of a statute to construe one part of the statute by another part of the same statute; for that best expresseth the meaning of the makers" (CROWDER, J.).

(2) The construction of the Act of Parliament must depend upon the meaning & intention of the legislature at the time it was passed (WIGHTMAN, J.).—**FERMOY PEERAGE CLAIM** (1856), 8 State Tr. N. S. 723; 5 H. L. Cas. 716; 28 L. T. O. S. 15; 10 E. R. 1084, 11 L.

Annotations:—*Generally, Refd.* *Pochin v. Duncombe* (1857), 1 H. & N. 812. **Mentd.** *Wensleydale Peerage Case* (1856), 8 State Tr. N. S. 479, at p. 550.

398. —.]—No doubt formerly it was the practice to construe not only penal statutes, but statutes which interfered with the common law as strictly as possible, but in my opinion that is not a proper course of proceeding. We ought faithfully to interpret Acts of Parliament as we think the legislature meant (POLLOCK, C.B.).—**DOBSON v. COLLIS** (1856), 1 H. & N. 81; 25 L. J. Ex. 267; 27 L. T. O. S. 127; 4 W. R. 512; 156 E. R. 1126.

Annotations:—**Mentd.** *Re Pentreguinea Fuel Co., Pegg's Claim* (1862), 4 De G. F. & J. 541; *Davey v. Shannon* (1879), 4 Ex. D. 81; *Taylor v. Garnett* (1892), 36 Sol. Jo. 593; *Lavalette v. Riches* (1907), 24 T. L. R. 2; *Hanau v. Ehrlich* (1911), 106 L. T. 1.

399. —.]—The words of the Act must likewise here also be taken as they stood, whatever might be the conjecture as to the intention (KINDERSLEY, V.-C.).—**HARTLEY v. ALLEN** (1858), 27 L. J. Ch. 621; 31 L. T. O. S. 69; 4 Jur. N. S. 500; 6 W. R. 407.

Annotations:—**Mentd.** *Re Maxwell's Trusts* (1863), 1 Hem. & M. 610; *Straker v. Wilson* (1871), 6 Ch. App. 506, n.

400. —.]—(1) It does not follow because general words are used in an Act of Parliament, that every case which falls within the words is to be governed by the Act. It is the duty of cts. of justice so to construe the words as to carry into effect the meaning & intention of the legislature.

(2) [The provisions] are plainly taken from 53 Geo. 3, c. 159, & the prior Acts in which that statute was founded, & those Acts had before the passing of this Act been decided not to apply to foreign rights. The legislature cannot be supposed to have been ignorant of that decision at the time this Act was passed & it cannot, I think, be imputed to it that with that knowledge, it intended to alter the law on this important question without some more definite expression of that intention (TURNER, L.J.).

(3) This is a British Act of Parliament, & it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights & liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the Act ought to be express or the context of it to be very clear (TURNER, L.J.).—**COPE v. DOHERTY** (1858), 2 De G. & J. 614; 27 L. J. Ch. 600; 31 L. T. O. S. 307; 4 Jur. N. S. 699; 6 W. R. 695; 44 E. R. 1127, L. J.J.

Annotations:—*As to (3) Refd.* *Burns v. Chapman* (1858), 5 C. B. N. S. 481; *General Iron Screw Collier Co. v. Schurmanns* (1860), 1 John. & H. 180; *The Johannes* (1860), Lush. 182; *The Annapolis, The Johanna Stoll* (1861), Lush. 295; *The Scotia* (1869), 20 L. T. 375; *R. v. Keyn* (1876), 2 Ex. D. 63; *Davidsson v. Hill*, [1901] 2 K. B. 606; *Poll v. Dambe*, [1901] 2 K. B. 579; *Varesick v. British Columbia Copper Co.* (1906), 1 B. W. C. C. 446; *The Wilhelmina*, [1923] P. 112. *Generally, Mentd.* *The Victor* (1860), Lush. 72; *The Wild Ranger* (1862), Lush. 553; *The Amalia* (1863), Brown & Lush. 151;

401. —.]—(1) Clear & express words are required to make a statute retrospective.

(2) The rule, that in construing Acts of Parliament the cts. will sometimes disregard the language of the legislature in order to carry out its intention, is confined to cases where that intention appears by necessary implication from the statute, & does not hold where the adhering to the language would merely be productive of inconvenience (MARTIN, B.).—**YOUNG v. HUGHES** (1859), 4 H. & N. 76; 28 L. J. Ex. 161; 32 L. T. O. S. 259; 5 Jur. N. S. 102; 7 W. R. 231.

402. —.]—The intention of the legislature must be ascertained from the words of a statute & not from any general inferences to be drawn from the nature of the objects dealt with by the statute (HILL, J.).—**R. v. DOUBLEDAY** (1861), 3 E. & E. 501; 121 E. R. 530; *sub nom.* **DICKSON v. DOUBLEDAY**, 30 L. J. M. C. 99; 25 J. P. 421; 7 Jur. N. S. 705; *sub nom.* **DIXON v. DOUBLEDAY**, 3 L. T. 663.

403. —.]—**R. v. SMITH**, No. 455, *post*.

404. —.]—In construing those sects. we should give effect, as far as we can, to the intention of the legislature in enacting them (MARTIN, B.).—**LACHARME v. QUARTZ ROCK MARIPOSA GOLD MINING Co.** (1862), 1 H. & C. 134; 31 L. J. Ex. 335; 158 E. R. 832.

Annotation:—**Mentd.** *Dickson v. Neath & Brecon Ry.* (1869), L. R. 4 Exch. 87.

405. —.]—In order to construe an Act the ct. must look at the object the legislature had in view in passing it (SHEE, J.).—**WYATT v. GREAT WESTERN RY. Co.** (1865), 6 B. & S. 709; 6 New Rep. 259; 34 L. J. Q. B. 204; 12 L. T. 568; 29 J. P. 630; 11 Jur. N. S. 825; 13 W. R. 837; 122 E. R. 1356.

Annotations:—**Mentd.** *Skelton v. L. & N. W. Ry.* (1867), L. R. 2 C. P. 631; *Dublin, Wicklow, Wexford Ry. v. Slattery* (1878), 3 App. Cas. 1155; *Lax v. Darlington Corp'n.* (1879), 5 Ex. D. 28; *R. v. Strange* (1889), 16 Cox, C. C. 552.

Sect. 2.—Rules of interpretation: Sub-sect. 4, A. & B.]

406. —.]—I think the Act ought to be construed with a view of ascertaining what was the real meaning of the legislature (MARTIN, B.).—PEARSON v. KINGSTON-UPON-HULL LOCAL BOARD OF HEALTH (1865), 3 H. & C. 921; 35 L. J. M. C. 36; 13 L. T. 181; 29 J. P. 695; 159 E. R. 798.

407. —.]—KENT v. ASTLEY (1869), as reported in 10 B. & S. 802; 21 L. T. 425; 34 J. P. 374; 18 W. R. 185.

*Annotations:—*Refd. Redgrave v. Lee (1874), L. R. 9 Q. B. 363. *Mentd.* Hoare v. Green, [1907] 1 K. B. 315.

408. —.]—One must look at the Act of Parliament to see what the intention of the legislature was (MALINS, V.-C.).—BEIL v. HOLBY (1873), L. R. 15 Eq. 178; 42 L. J. Ch. 266; 21 W. R. 321.

*Annotation:—*Mentd. Re Bayley-Worthington & Cohen's Contract, [1908] 1 Ch. 26.

409. —.]—It is impossible for us to speculate upon what the intention of the legislature may have been; we must only construe the language which they have used (LORD CHELMSFORD).—A.-G. v. GREAT EASTERN RY. CO. (1873), L. R. 6 H. L. 367; 22 W. R. 281, H. L.

*Annotations:—*Refd. Yarmouth Corp'n. v. Simmons (1878), 10 Ch. D. 518. *Mentd.* Edinburgh Street Tram. Co. v. Black (1873), L. R. 10 Sc. & Dw. 336; Mackelt v. Herne Bay Comrs. (1876), 35 L. T. 202; Taff Vale Ry. v. Cardiff Ry., [1917] 2 Ch. 299.

410. —.]—(1) The more literal construction of a sect. of a statute ought not to prevail if it is opposed to the intentions of the legislature as apparent by the statute; & if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated (LORD SELBORNE, C.).

(2) We have, in that preamble, a sufficient guide to the solution of anything which may be ambiguously or imperfectly expressed (LORD SELBORNE, C.).—CALEDONIAN RY. CO. v. NORTH BRITISH RY. CO. (1881), 6 App. Cas. 114; 29 W. R. 685, H. L.

*Annotations:—*As to (1) *Apld.* Re Levy, *Ex p.* Walton (1881), 17 Ch. D. 746; Harding v. Preece (1882), 9 Q. B. D. 281.

Consd. Spencer v. Metropolitan Board of Works (1882), 22 Ch. D. 142. *Apld.* N. E. Ry. v. Hastings, [1900] A. C. 260. *Consd.* R. v. Halliday, [1917] A. C. 260. *Refd.* Victoria City Corp'n. v. Vancouver Island (Bp.), [1921] 2 A. C. 384. *Generally, Mentd.* Re Taylor's Estate, Tomlin v. Underhay (1882), 22 Ch. D. 495; Re Wood's Estate, Wood v. Ward (1886), 51 L. T. 932.

411. —.]—It is the duty of the ct. to find out what the meaning of the legislature is; & to attach a rational & beneficial meaning, if possible, rather than an irrational & an injurious meaning, to the statutes which have been passed by the legislature (JESSEL, M.R.).—MERSEY STEEL & IRON CO. v. NAYLOR, BENZON & CO. (1882), 9 Q. B. D. 648; 51 L. J. Q. B. 576; 47 L. T. 369; 31 W. R. 80, C. A.; *on appeal* (1884), 9 App. Cas. 434, H. L.

*Annotations:—*Mentd. Soc. Générale de Paris v. Milders (1883), 49 L. T. 55; Eberle's Hotels & Restaurant Co. v. Jonas (1887), 18 Q. B. D. 459; Pratt v. Inman (1889), 43 Ch. D. 175; Booth v. Bowron (1892), 8 T. L. R. 641; Dickenson v. Funshaw (1892), 8 T. L. R. 271; Sovereign Life Assce. v. Dodd, [1892] 1 Q. B. 405; Christie v. Taunton, Delmard, Lane, Re Taunton, Delmard, Lane, [1893] 2 Ch. 175; Gueret v. Audouy (1893), 62 L. J. Q. B. 633; Re Hett, Maylor (1894), 10 T. L. R. 412; Re Auriferous Properties (No. 2), [1898] 2 Ch. 428; Cornwall v. Henson, [1900] 2 Ch. 298; Re Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546; Ebbw Vale Steel, Iron & Coal Co. v. Blaina Iron & Tinplate Co. (1901), 6 Com. Cas. 33; Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry. (1905), 69 L. J. Ch. 813; Millar's Karri & Jarrah Co. (1902) v. Weddel, Turner (1908), 100 L. T. 128; General Billposting Co. v. Atkinson, [1909] A. C. 118; Biddell v. Clemens, Horst (1910), 103 L. T. 661; Dennis v. Tunnard & Moore (1911), 56 Sol. Jo. 162; Inverkip S. S. Co. v. Bunge, [1917] 1 K. B. 193; Veithardt & Hall v. Rylands (1917), 116 L. T. 706; Ertel Bleber v. Rio Tinto Co., Dynamit Act. v. Same, Vereinigte Königs & Laurahütte Act. v. Same, [1918] A. C. 260; Morris v. Baron, [1918]

A. C. 1; Re Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 316; Bank Line v. Capel, [1919] A. C. 435; Bradley v. Newsom, [1919] A. C. 16; Payzu v. Saunders, [1919] 2 K. B. 581; Re Lavey, *Ex p.* Trustees, [1920] 1 K. B. 674; Ruffy-Arnell v. R., [1922] 1 K. B. 599; Martin v. Stout, [1925] A. C. 359; Tyldesley U. D. C. v. Leigh R. D. C. (1925), 23 L. G. R. 243; Re City Life Assce., Grandfield's Case, [1926] Ch. 191.

412. —.]—(1) Where a penalty is created by statute & nothing is said as to who may recover it, & it is not created for the benefit of a party grieved, & the offence is not against an individual, it belongs to the Crown, & the Crown alone can maintain a suit for it.

(2) All statutes are to be construed by the cts. so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering these words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject-matter, & for the object with which that statute was made; it being a question to be determined by the ct., & a very important one, what was the object for which it appears that the statute was made (LORD BLACKBURN).

(3) Where a statute was passed for the purpose of repealing & in part, re-enacting former statutes, all the statutes *in pari materia* are to be considered, in order to see what it was that the legislature intended to enact in lieu of the repealed enactments (LORD BLACKBURN).

It appears to me to be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed, in order to ascertain what the legislature meant to enact in their room & stead (LORD WATSON).—BRADLAUGH v. CLARKE (1883), 8 App. Cas. 354; 52 L. J. Q. B. 505; 48 L. T. 681; 47 J. P. 405; 31 W. R. 677, H. L.; *reversg.* S. C. *sub nom.* CLARKE v. BRADLAUGH (1881), 7 Q. B. D. 38, C. A.

*Annotations:—*As to (1) *Refd.* Bradlaugh v. Newdegate (1883), 11 Q. B. D. 1; Neville v. London Express Newspaper (1918), 88 L. J. K. B. 282. As to (2) *Refd.* Banbury v. Bank of Montreal, [1918] A. C. 626. *Generally, Mentd.* Bradlaugh v. Gossett (1884), 12 Q. B. D. 271; A.-G. v. Bradlaugh (1885), 14 Q. B. D. 667; Dixon v. Farrer (1886), 17 Q. B. D. 658; Charrington, Sells, Dale v. Mid. Ry. (1901), 11 Ry. & Can. Tr. Cas. 222.

413. —.]—I say that we must look to what the purpose is (LORD CAIRNS).—HILL v. EAST & WEST INDIA DOCK CO. (1884), 9 App. Cas. 448; 53 L. J. Ch. 842; 51 L. T. 163; 48 J. P. 788; 32 W. R. 925, H. L.; *affg.* S. C. *sub nom.* EAST & WEST INDIA DOCK CO. v. HILL (1882), 22 Ch. D. 14, C. A.

*Annotations:—*Apld. Raiton v. Wood (1890), 15 App. Cas. 363; Heritable Reversionary Co. v. Millar, McKay's Trustee, [1892] A. C. 598; De Vesce v. O'Connell, [1908] A. C. 298; Ball v. Hunt (1912), 5 B. W. C. C. 459; Tozer v. Viola, [1918] 1 Ch. 75. *Refd.* Re Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343; R. v. Dilden, [1910] P. 57; O'Grady v. Wilmot, [1916] 2 A. C. 231. *Mentd.* Harding v. Preece (1882), 9 Q. B. D. 281; Lybbe v. Hart (1885), 29 Ch. D. 8; Re Finley, *Ex p.* Clothworkers Co. (1888), 21 Q. B. D. 475; Stacey v. Hill (1900), 69 L. J. Q. B. 796; Revill v. Bethell, [1918] 1 K. B. 638.

414. —.]—It is a familiar rule of construction that, although the ct. are *prima facie* bound to read the words of an Act according to their ordinary meaning in the language, if there are other circumstances which show that the words must have been used by the legislature in a sense larger than their ordinary meaning, the ct. is bound to read them in that sense (LORD ESHER, M.R.).—BARLOW v. ROSS (1890), 24 Q. B. D. 381; 59 L. J. Q. B. 183; 62 L. T. 552; 38 W. R. 372, C. A.

415. —.]—If words in a statute are ambiguous & are capable of two constructions, that construction ought to be preferred which best carries into effect the object of the legislature & best conforms with the rest of the statute (LINDLEY,

L.J.).—*Re LEAVESLEY*, [1891] 2 Ch. 1; 60 L. J. Ch. 385; 64 L. T. 269; 39 W. R. 276, C. A.

Annotations:—*Mentd.* *Re Plenderleith*, [1893] 3 Ch. 332; C. L. v. C. F. W., [1928] P. 223.

416. —.]—It seems to their lordships that the proper mode of dealing with the Act is to construe it, as it was construed in *Coppen v. Moore*, No. 497, *post*, in accordance with the intent & meaning of the legislature (*per CUR.*).—*TRADE & CUSTOMS COMRS. v. BELL & CO., LTD.*, [1902] A. C. 563; 71 L. J. P. C. 109; 87 L. T. 156; 18 T. L. R. 765, P. C.

417. —.]—It is always necessary in construing a statute, & in dealing with the words you find in it, to consider the object with which the statute was passed, because it enables one to understand the meaning of the words introduced into the enactment (*CHANNELL, J.*).—*REIGATE RURAL DISTRICT COUNCIL v. SUTTON DISTRICT WATER CO.* (1908), 99 L. T. 168; 72 J. P. 301; 6 L. G. R. 936, D. C.; *on appeal* (1909), 78 L. J. K. B. 315, C. A.

Annotation:—*Mentd.* *Carlisle R. D. C. v. Carlisle Corpn.*, [1909] 1 K. B. 471.

418. —.]—It has been well established that in the construction of a statute it is perfectly legitimate to give to some of its words a meaning different from their ordinary meaning where that is necessary to forward & effect the main purpose & object of the enactment (*LORD ATKINSON*).—*BALL v. HUNT & SONS, LTD.*, [1912] A. C. 496; 81 L. J. K. B. 782; 106 L. T. 911; 5 B. W. C. C. 459, H. L.

Annotations:—*Refd.* *Harwood v. Wyken Collieries Co.*, [1913] 2 K. B. 158; *Denholm v. Jackson* (1926), 19 B. W. C. C. 92. *Mentd.* *Macdonald (or Duris) v. Wilsons & Clyde Coal Co.*, [1912] A. C. 513; *Dempsey v. Caldwell* (1913), 7 B. W. C. C. 823; *Green v. Cammell, Laird*, [1913] 3 K. B. 665; *Jackson v. Hunstet Engine Co.*, [1916] 2 K. B. 8; *Purdie v. Colville* (1923), 16 B. W. C. C. 307; *Hamilton v. Shelton Iron, Steel & Coal Co.*, *Laird v. Same*, *Thimms v. Same* (1926), 96 L. J. K. B. 295; *Williams v. Tredegar Iron & Coal Co.* (1927), 96 L. J. K. B. 722; *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647; *Lewis v. Guest, Keen & Nettelfold*, *Watkins v. Same*, *Tucker v. Same*, *Ingram v. Crawshay (Cyfartha)*, [1928] 1 K. B. 20.

419. —.]—In construing the statute no further effect should be given to it than the words require except so far as is necessary to achieve the purpose of the legislature (*SWINFEN EADY, L.J.*).—*TOZER v. VIOLA*, [1918] 1 Ch. 75; 117 L. T. 746; 34 T. L. R. 73, C. A.

Annotation:—*Refd.* *Revell v. Bethell*, [1918] 1 K. B. 638.

B. Suppressing the Mischief and Advancing the Remedy.

420. General rule.—The judges will construe all remedial statutes so as to suppress the mischief & extend the remedy.—*PARKER v. SANDERS* (1617), *Cro. Jac.* 418; 79 E. R. 357.

421. —.]—*HICKFORD v. MACHIN* (1624), *Win.* 82; 124 E. R. 69; *sub nom.* *MESKIN v. HICKFORD, J. Bridg.* 16.

422. —.]—In expounding remedial laws, it is a settled rule of construction to extend the remedy as far as the words will admit (*LORD KENYON, C.J.*).—*TURTLE v. HARTWELL* (1795), 6 Term Rep. 426; 101 E. R. 630.

423. —.]—This was a remedial statute & in advancement of the remedy, all was to be done

that could be done in a way consistent with any construction of it (*LORD ELDON, C.*).—*JOHNES v. JOHNES* (1814), 3 Dow. 1; 3 E. R. 969, H. L.

Annotations:—*Refd.* *Noble v. Ahler* (1886), 11 P. D. 158. *Mentd.* *Wright v. It.* (1849), 14 Q. B. 148.

424. —.]—In construing doubtful Acts, it certainly is the duty of the ct. to suppress the evil & advance the remedy;—the law does not require impossibilities of any party;—nor is it to be presumed, that the legislature intends to introduce rules in contradiction to its general policy (*SIR JOHN NICHOLL*).—*STALLWOOD v. TREDGER* (1815), 2 Phillim. 287; 161 E. R. 1147.

Annotations:—*Mentd.* *Catterall v. Sweetman* (1847), 1 Rob. Eccl. 304, 580; *Chichester v. Muir* (1863), 3 Sw. & Tr. 223.

425. —.]—*YORK (DEAN & CHAPTER) v. MIDDLEBURGH*, No. 611, *post*.

426. —.]—I admit that words may be construed in a sense different from their ordinary one, when the context requires it . . . or when the Act is intended to remedy some existing mischief & such a construction is required to render the remedy effectual. For we must always construe an Act so as to suppress the mischief & advance the remedy (*PARKE, B.*).—*LYDE v. BARNARD* (1836), 1 M. & W. 101; 1 Gale, 388; Tyr. & Gr. 250; 5 L. J. Ex. 117; 150 E. R. 363.

Annotations:—*Apld.* *Miller v. Salomons* (1852), 7 Exch. 475. *Refd.* *A.-G. v. Sillem* (1864), 2 H. & C. 431; *Curtis v. Stovin* (1889), 22 Q. B. D. 513; *Banbury v. Bank of Montreal*, [1918] A. C. 626. *Mentd.* *Tatton v. Wade* (1856), 4 W. R. 548; *Magee v. Lavell* (1874), 30 L. T. 169.

427. —.]—This Act is remedial as well as penal, & must be liberally construed, in order to give effect to its provisions, & prevent the mischief contemplated by it (*BOLLAND, B.*).—*HARDING v. STOKES* (1836), 1 M. & W. 354; 2 Gale, 41; Tyr. & Gr. 599; 5 L. J. Ex. 178; 150 E. R. 470.

Annotation. *Mentd.* *Baker v. Rusk* (1850), 15 Q. B. 870.

428. —.]—Although we should not travel out of the words of a statute, for the purpose of reaching a mischief, which we may conceive to be within its spirit, yet, when there are sufficient words it is right we should consider its policy, & promote it by our construction (*WILLIAMS, J.*).—*R. v. WAINFLEET ALL SAINTS (INHABITANTS)* (1840), 11 Ad. & El. 656; 3 Per. & Dav. 72; 9 L. J. M. C. 31; 113 E. R. 563; *sub nom.* *R. v. WAKEFIELD ALL SAINTS (INHABITANTS)*, 4 J. P. 74.

429. —.]—*FENWICK v. LAYCOCK* (1841), 2 Q. B. 108; 1 Gal. & Dav. 532; 11 L. J. Q. B. 146; 6 Jur. 341; 114 E. R. 43.

Annotations:—*Mentd.* *Daintree v. Hutchinson* (1842), 10 M. & W. 85; *Greville v. Chapman* (1843), 8 Jur. 189; *Re Morgan, Pillgren v. Pillgren* (1881), 18 Ch. D. 93.

430. —.]—This statute is remedial, & ought to be construed widely & liberally, so as to remedy all the evils to prevent which it was passed (*DR. LUSHINGTON*).—*THE ALEXANDER* (1841), 1 Wm. Rob. 288; 1 Notes of Cases, 185; 5 Jur. 1066; 166 E. R. 602.

Annotations:—*Mentd.* *The Sophie* (1842), 1 Wm. Rob. 368; *The Ella A. Clark* (1863), Brown. & Lush. 32; *The Two Ellens* (1871), L. R. 3 A. & E. 345; *The Riga* (1872), L. R. 3 A. & E. 516; *Giovanni Daputo v. Wylhe, The Pieve Superiore* (1874), L. R. 5 P. C. 482; *Gunn v. Roberts* (1874), 22 W. R. 652; *Laws v. Smith, The Rio Tinto* (1884), 9 App. Cas. 356; *Northcote v. Henrich Bjorn (Owners)*, *The Henrich Bjorn* (1886), 11 App. Cas. 270; *The Cella* (1888), 36 W. R. 540; *The Mogileff*, [1921] P. 236.

benefit, in order to extend the remedy, & suppress the mischief contemplated by the Act, is a well-established & subsisting rule.—*MURPHY v. LEADER* (1841), 4 L. L. R. 139; 2 Leg. Rep. 166; *Jobb & B.* 66.—*IR.*

420 iv. —.]—*WOODS v. LINDSAY*, [1910] S. C. (J.) 88; 47 Sc. L. R. 774. [1910] 2 S. L. T. 68; 6 Adam, 294.—*SCOT.*

PART III. SECT. 2, SUB-SECT. 4.—B.

420 ii. General rule.—*KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. v. BRITISH COLUMBIA PRESSED BRICK CO.* (1918), 56 S. C. R. 539.—*CAN.*

420 ii. —.]—A power to interfere with the ordinary rights of citizens will not be inferred in the absence of express grant, unless it be necessarily

implied as incidental to other powers expressly granted or is indispensable to repress the mischief contemplated & advance the remedy given.—*SOMU PILLAI v. MAYAVARAM MUNICIPAL COUNCIL* (1905), 1 L. R. 28 Mad. 520.—*IND.*

420 iii. —.]—The rule of giving an equitable construction to Acts of Parliament passed for the public

Sect. 2.—Rules of interpretation: Sub-sect. 4, B. & C.; sub-sect. 5, A.]

431. ———.]—SALKELD v. JOHNSON (OR JOHNSTON), No. 119, *ante*.

432. ———.]—It is a rule applicable to the construction of all statutes, that you must suppress the mischief, & advance the remedy to which they relate (KNIGHT BRUCE, L.J.).—*Re MATHESON, Ex p. MATHESON* (1852), 1 De G. M. & G. 448; 21 L. J. Bey. 18; 18 L. T. O. S. 295; 42 E. R. 625; *sub nom. Re MATHESON, Ex p. MATTHESON*, 16 Jur. 769, L. J.J.

Annotation:—Mentd. *Re Copeland, Ex p. Copeland* (1852), 2 De G. M. & G. 914.

433. ———.]—It is, no doubt, the duty of the cts. so to construe statutes as to suppress the mischief against which they are directed, & to advance the remedy they were intended to provide. But it is one thing to construe the words of a statute liberally, & another to extend its operation beyond what the words of it express (TURNER, L.J.).—*ALEXANDER v. BRAME* (1855), 7 De G. M. & G. 525; 3 Eq. Rep. 919; 25 L. T. O. S. 298; 1 Jur. N. S. 1032; 3 W. R. 642; 44 E. R. 205, L. J.J.; *on appeal sub nom. JEFFRIES v. ALEXANDER* (1860), 8 H. L. Cas. 594, H. L.

Annotations:—Mentd. *Marsh v. A.-G.* (1860), 3 L. T. 615; *Patch v. Shore* (1862), 2 Drew. & Sm. 589; *Richards v. Davies* (1862), 13 C. B. N. S. 69; *Brook v. Badley* (1867), L. R. 4 Eq. 106; *Coleman v. Llanelly Rty. & Dock Co.* (1867), 17 L. T. 86; *Fox v. Lownds* (1875), L. R. 19 Eq. 453; *Attree v. Hawe* (1878), 9 Ch. D. 337; *Re Robson, Emley v. Davidson* (1881), 19 Ch. D. 156; *Re Christmas, Martin v. Lacon* (1885), 30 Ch. D. 544; *Cotton v. Imperial & Foreign Agency & Investment Corp.*, [1892] 3 Ch. 454.

434. ———.]—PARDO v. BINGHAM, No. 1108, *post*.

435. ———.]—R. v. ALLEN, No. 350, *ante*.

436. ———.]—If we can fairly construe an Act so as to carry out what from the nature of the case must obviously have been the intention of the legislature, although the words may be a little difficult to deal with, & although they may possibly admit of more than one interpretation, we ought to adopt that interpretation which will make the law uniform & will remedy the evil which prevailed in all the cases to which the law can be fairly applied (JESSEL, M.R.).—*FREME v. CLEMENT* (1881), 18 Ch. D. 499; 50 L. J. Ch. 801; 44 L. T. 399; 30 W. R. 1.

Annotation:—Refd. *Holyland v. Lewin* (1881), 26 Ch. D. 266.

437. ———.]—RICHARDS v. MCBRIDE, No. 131, *ante*.

438. ———.]—RHONDDA'S (VISCOUNTESS) CLAIM, No. 137, *ante*.

439. Case within words of statute but not within mischief.]—I am of opinion that although this is a case within the words of the statute it is not within the mischief intended to be remedied & therefore is out of its purview (ABBOTT, C.J.).—*Doe d. NETHERCOTE v. BARTLE* (1822), 5 B. & Ald. 492; 1 Dow. & Ry. K. B. 81; 106 E. R. 1271.

Annotations:—Refd. *Johnson v. Clark*, [1908] 1 Ch. 303; *Rickard v. Graham* (1910), 102 L. T. 482. **Mentd.** *King v. Turner* (1829), 2 Sim. 545; *Doe d. Clarke v. Ludlam* (1831), 7 Bing. 275; *Doe d. Edmunds v. Mewellin* (1835), 5 L. J. Ex. 84; *Saumerez v. Saumerez* (1839), 4 My. & Cr. 331.

440. Case within mischief but not within words of statute.]—We cannot extend the provisions of

the Act merely because a particular contract or instrument is within the mischief intended to be remedied. If there is any enactment which ought to be construed strictly, it is a clause which declares that one thing shall mean another (POLLOCK, C.B.).—*ALLSOPP v. DAY* (1861), 7 H. & N. 457; 31 L. J. Ex. 105; 5 L. T. 320; 8 Jur. N. S. 41; 10 W. R. 135; 158 E. R. 552.

Annotations:—Mentd. *Byerley v. Prevost* (1871), L. R. 6 C. P. 144; *Re Bampffield, Ex p. Stooke, Re Bampffield, Ex p. Newport Credit Co.* (1872), 20 W. R. 925; *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313; *Re Walden, Ex p. Odell* (1878), 10 Ch. D. 76; *Marsden v. Meadows* (1881), 7 Q. B. D. 80; *North Central Wagon Co. v. M. S. & L. Ry.* (1887), 35 Ch. D. 191.

C. History of Legislation.

441. How far considered.]—*In the Goods of COOPER, In the Goods of SMITH, No. 392, ante.*

442. ———.]—If the words are really & fairly doubtful, then, according to well-known legal principles, & principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates (LORD COLERIDGE, C.J.).—*R. v. Most* (1881), 7 Q. B. D. 244; 50 L. J. M. C. 113; 44 L. T. 823; 45 J. P. 696; 29 W. R. 758; 14 Cox, C. C. 583, C. C. R.

Annotations:—Mentd. *R. v. Labouchere, Vallombrosa's Case* (1884), 50 L. T. 177; *R. v. Krause* (1902), 66 J. P. 121; *R. v. Antonelli & Barberi* (1905), 70 J. P. 4; *R. v. Bowman* (1912), 76 J. P. 271.

443. ———.]—It is useless to enter into an inquiry with regard to the history of an enactment, & any supposed defect in the former legislation on the subject, which it was intended to cure, in cases where the words of the enactment are clear (LORD ESHER, M.R.).—*R. v. LONDON (Bp.)* (1889), 24 Q. B. D. 213; 59 L. J. Q. B. 169; 62 L. T. 167; 54 J. P. 340, 356; 38 W. R. 214 *sub nom. R. v. LONDON (Bp.), Re ST. PAULS REREDOS*, 6 T. L. R. 112, C. A.; *affd. sub nom. ALLCROFT v. LONDON (LORD Bp.)*, *LIGHTON v. LONDON (LORD Bp.)*, [1891] A. C. 666, H. L.

Annotations:—Mentd. *R. v. London (Bp.), Leighton's Case*, [1891] 2 Q. B. 18; *St. John the Baptist Timberhill (Vicar, etc.) v. St. John the Baptist Timberhill (Rectors)*, [1895] P. 71; *St. John Pendlebury (Vicar, etc.) v. St. John Pendlebury (Parishioners)*, [1895] P. 178; *Barsham Suffolk (Rector) v. Barsham Suffolk (Parishioners)*, [1896] P. 256; *Great Bardfield (Vicar) v. All Having Interest*, [1897] P. 185; *Fild v. Ommanney* (1920), 36 T. L. R. 695; *Re St. Luke's Southport* (1920), 36 T. L. R. 733.

444. ———.]—It is said that, if we construe this sect. according to its plain meaning, we shall be imputing to the legislature that by this sect. they passed a law which is not entirely consistent with previous legislation, & with the legal history of this matter. That is not, in my opinion, a sufficient reason for not giving to this sect. the plain meaning of the words used. It is not a sufficient reason to compel or justify us in refusing to give to this section that which appears to be the manifest meaning of the legislature (VAUGHAN WILLIAMS, L.J.).—*HERTFORDSHIRE COUNTY COUNCIL v. BARNET RURAL COUNCIL*, [1902] 2 K. B. 48; 71 L. J. K. B. 610; 86 L. T. 880; 66 J. P. 531; 50 W. R. 582; 18 T. L. R. 609, C. A.

445. ———. Reports of Commissioners.]—Where an Act of Parliament is supposed to have been founded on a report of Comrs. appointed by the Crown, that report ought not to be referred to in a

PART III. SECT. 2, SUB-SECT. 4.—C.

441 i. How far considered.]—It is very doubtful whether the cts. of law are at liberty, in construing Acts of Parliament, to do so with reference to the course of previous legislation, or to inferences which they may be disposed to draw from previous statutes,

as to the probable intentions of the legislature.—*COOPER v. MACKENZIE* (1906), 8 F. (Ct. of Sess.) 1202; 43 Sc. L. R. 416; 13 S. L. T. 870.—**SCOT.**

441 ii. ———.]—RAMACHANDRA JOISHI v. HAZI KASSIM (1892), 1 L. R. 16 Mad. 207.—IND.****

445 i. ———. Reports of Commissioners.]

—For the purpose of construing a sect. of an Act & ascertaining the intention of the legislature, the report of the Indian Law Commissioners or a Select Committee appointed to consider the Bill may be referred to.—*ROMESH CHUNDER SANNYAL v. HIRU MONDAL* (1890), 1 L. R. 17 Calc. 852.—**IND.**

ct. of justice as a guide in construing the statute.—*MARTIN v. HEMMING* (1854), as reported in 24 L. J. Ex. 3; 18 Jur. 1002.

Annotations:—*Mentd.* *Forshaw v. Lewis* (1855), 10 Exch. 712; *Osborne v. London Dock Co.* (1855), 24 L. J. Ex. 140; *James v. Barnes* (1856), 17 C. B. 561.

446. ———.]—I cannot for the purpose of construing [the Act], look at the intention expressed by the Comrs. (*KINDERSLEY, V.-C.*).—*EWART v. WILLIAMS* (1854), 3 Drew. 21; 61 E. R. 808; *on appeal* (1855), 7 De G. M. & G. 68, L. J.J.

447. ———.]—The report of the common law Comrs., on which that statute was founded, cannot be referred to as an aid in its construction.—*ARDING v. BONNER* (1856), 2 Jur. N. S. 763; *subsequent proceedings*, 2 Jur. N. S. 790.

Annotation:—*Mentd.* *Solomon v. Graham* (1856), 2 Jur. N. S. 859.

448. ——— *International convention.*]—Application that the Comptroller of Trade Marks should be directed to register a trade mark, the registration of which was applied for by the Carter Medicine Co. of New York. The mark consisted of the words "Carter's Little Liver Pills" inclosed in lines. Appets. disclaimed any right to the exclusive use of the word "pills." The mark had been registered in New York with a statement that the words "Carter" & "pills" did not form an essential part of the trade mark. The International Convention for the Protection of Industrial Property of 1883, to which the United Kingdom & the United States had both subsequently acceded, provides in effect that the subjects of every contracting State shall be entitled to registration in every other State of trade marks which they have registered in their own country:—*Held*: the words of the convention could not be referred to in construing the Act.—*Re CARTER MEDICINE Co.'s TRADE MARK*, [1892] 3 Ch. 472; 61 L. J. Ch. 716; 67 L. T. 717; 41 W. R. 13; 8 T. L. R. 639; 36 Sol. Jo. 571; 3 R. 1.

SUB-SECT. 5. CONSTRUCTION WITH REFERENCE TO PRE-EXISTING LAW AND CIRCUMSTANCES.

A. Pre-Existing Law.

449. Knowledge imputed to legislature.]—It is important to keep in view the state of the law, with which we must assume that the legislature was acquainted, when that statute passed (*LORD DENMAN, C.J.*).—*R. v. WATFORD (INHABITANTS)* (1816), 9 Q. B. 626; 2 New Mag. Cas. 13; 2 New Sess. Cas. 460; 16 L. J. M. C. 1; 8 L. T. O. S. 136; 11 J. P. 39; 115 E. R. 1413.

Annotation:—*Mentd.* *R. v. Hartpury* (1847), 2 New Mag. Cas. 185.

450. ———.]—*SALKELD v. JOHNSON (OR JOHNSTON)*, No. 119, *ante*.

451. ———.]—It is by no means an inconvenient mode of construing statutes, to presume that the legislature was aware of the state of the law at the time they passed (*POLLOCK, C.B.*).—*JONES v. BROWN* (1848), 2 Exch. 329; 5 Dow. & L. 716; Cox, M. & H. 102; 17 L. J. Ex. 163; 11 L. T. O. S. 129; 12 Jur. 380; 154 E. R. 519.

Annotation:—*Mentd.* *Borrodalle v. Nelson* (1854), 14 C. B. 655.

452. ———.]—*R. v. TRAFFORD*, No. 390, *ante*.

PART III. SECT. 2, SUB-SECT. 5.—A.

449 i. Knowledge imputed to legislature.]—It is presumed that the legislature in making any enactment, knows the previous state of the law upon the subject-matter & legislates upon the basis of, & with reference to it. If so, the meaning of the words it uses can-

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not be understood in the absence of that which was their basis.—*WALLIS v. RUSSELL*, [1902] 2 I. R. 585.—*IR.*

t. How far considered.]—*PRABHAKARBHAT v. VISHWAMBHAR PANDIT* (1884), I. L. R. 8 Bom. 313.—*IND.*

a. ———.]—In interpreting a statute, it should not be considered what the

453. ———.]—*A.-G. v. POWIS (EARL)*, No. 573, *post*.

454. ———.]—The Act is to be construed with reference to the state of the law, relating to carriers, at the date of its passing.—*M'MANUS v. LANCA-SHIRE & YORKSHIRE RY. CO.* (1859), 4 H. & N. 327; 28 L. J. Ex. 353; 33 L. T. O. S. 259; 5 Jur. N. S. 651; 7 W. R. 547; 157 E. R. 805, Ex. Ch.

Annotations:—*Reid.* *Beal v. South Devon Ry.* (1860), 5 H. & N. 875; *Hodgman v. West Midland Ry.* (1864), 5 B. & S. 173; *G. N. Ry. v. L. E. P. Transport & Depository*, [1922] 2 K. B. 742. *Mentd.* *Lewis v. G. W. Ry.* (1860), 29 L. J. Ex. 425; *McCance v. L. & N. W. Ry.* (1861), 7 H. & N. 477; *Harrison v. L. B. & S. C. Ry.* (1862), 31 L. J. Q. B. 113; *Peck v. North Staffordshire Ry.* (1863), 10 H. L. Cas. 473; *Gregory v. West Midland Ry.* (1864), 2 H. & C. 944; *Rooth v. N. E. Ry.* (1867), 15 L. T. 624; *Kendall v. L. & S. W. Ry.* (1872), L. R. 7 Exch. 373; *McCawley v. Furness Ry.* (1872), L. R. 8 Q. B. 57; *Cohen v. G. E. Ry.* (1876), 45 L. J. Q. B. 298; *Harris v. G. W. Ry.* (1876), 1 Q. B. D. 515.

455. ———.]—Every statute must be construed with reference to itself & to the following questions, what was the state of the law previously to the passing of the statute, & what was the apparent purpose of the new statute. . . . Every statute must stand & be construed by itself. . . . When a statute is susceptible of two meanings, that must be chosen which is most consistent with the presumed intention of the legislature (*ERLE, C.J.*).—*R. v. SMITH* (1862), Le. & Ca. 131; 31 L. J. M. C. 105; 5 L. T. 761; 26 J. P. 388; 8 Jur. N. S. 199; 10 W. R. 273; 9 Cox, C. C. 110; 169 E. R. 1333, C. C. R.

Annotations:—*Mentd.* *R. v. Moody* (1862), 31 L. J. M. C. 156; *R. v. Purdey* (1861), 13 W. R. 75; *Graham v. Robinson* (1867), L. R. 2 Q. B. 387; *R. v. Brown* (1913), 8 Cr. App. Rep. 173; *R. v. O'Connor*, [1913] 1 K. B. 557.

456. ———.]—In considering the subsequent Acts of Parliament we must attribute to the legislature the knowledge of the difference between the existing courses of practice in Bkpcy. & in Chancery (*SELWYN, L.J.*).—*Re BARNED'S BANKING CO., KELLOCK'S CASE, Re XERES WINE SHIPPING CO., Ex p. ALLIANCE BANK* (1868), 3 Ch. App. 769; 39 L. J. Ch. 112; 18 L. T. 671; 16 W. R. 919, L. J.J.

Annotations:—*Mentd.* *Re Oriental Commercial Bank, Ex p. Maxoudoff* (1868), 16 W. R. 781; *Re BARNED'S BANKING CO., Coupland's Claim* (1869), 5 Ch. App. 167; *Re BARNED'S BANKING CO., Forwood's Claim* (1869), 5 Ch. App. 18; *Re BARNED'S BANKING CO., Johnston's Case* (1869), 20 L. T. 266; *Re Blakely Ordnance Co., Metropolitan & Provincial Bank's Claim* (1869), L. R. 8 Eq. 244; *Re Contract Corp'n., Ebbw Vale Co.'s Case* (1869), 5 Ch. App. 112; *Re Humber Ironworks & Shipbuilding Co., Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643; *Re Joint Stock Discount Co., Warrant Finance Co.'s Case* (1869), 5 Ch. App. 86; *Re BARNED'S BANKING CO., Ex p. Bank of England* (1870), 39 L. J. Ch. 759; *Re Oxford & Canterbury Hall Co.* (1870), 5 Ch. App. 433; *Re BARNED'S BANKING CO., Leech's Claim* (1871), 6 Ch. App. 388; *Re Oriental Steam Co.* (1874), 22 W. R. 622; *Re BARNED'S BANKING CO., Ex p. Joint Stock Discount Co.* (1875), 23 W. R. 281; *Re Coal Consumer's Assocn.* (1876), 4 Ch. D. 625; *Stone v. City & County Bank* (1877), 3 C. P. D. 282; *Re Northern Counties of England Fire Inso.* (1880), 50 L. J. Ch. 273; *Re Land Financiers Assocn.* (1881), 16 Ch. D. 373; *Lovel v. Lovel* (1881), 45 L. T. 252; *Mersey Steel & Iron Co. v. Naylor* (1882), 9 Q. B. D. 618.

457. ———.]—*PARDO v. BINGHAM*, No. 1108, *post*.

458. ———.]—The legislature, knowing of the exception which existed at the time the statute was passed with regard to small contracts of frequent occurrence, which are necessary for the carrying on of the business of the corp'n., intended to get rid of any discussion as to what were small

law was before the passing of that statute, but what the legislature has said is to be the law after the passing of the same.—*LALA SURAJ PRASAD v. GOLAB CHAND* (1901), I. L. R. 28 Calc. 517; 5 C. W. N. 610.—*IND.*

b. ———.]—*JOHNSON v. MADRAS RY. CO.* (1905), I. L. R. 28 Mad. 479.—*IND.*

T T

Sect. 2.—Rules of interpretation: Sub-sect. 5, A. & B.; sub-sect. 6.]

matters (BRETT, L.J.).—HUNT v. WIMBLEDON LOCAL BOARD (1878), 4 C. P. D. 48; 48 L. J. Q. B. 207; 40 L. T. 115; 43 J. P. 284; 27 W. R. 123, C. A.

*Annotations:—*Refd. Young v. Royal Leamington Spa Corp'n. (1883), 11 App. Cas. 517. *Mentd.* Eaton v. Basker (1881), 7 Q. B. D. 529; Bournemouth Comrs. v. Watts (1884), 14 Q. B. D. 87; Phelps & Woodford v. Upton Snodsbury Highway Board (1885), Cab. & El. 524; Hoare v. Lewisham Corp'n. (1901), 85 L. T. 281; Soothill Upper U. C. v. Wakefield R. C. (1904), 74 L. J. Ch. 703; Spencer, Whatley & Underhill v. Southall Norwood U. D. C. (1905), 69 J. P. 308; Hodge v. Matlock Bath & Scarthin Nick U. D. C. & Nuttall (1910), 75 J. P. 65.

459. —.]—YOUNG & CO. v. ROYAL LEAMINGTON SPA CORPN., No. 315, *ante*.

460. —.]—Where cases have been decided on particular forms of words in cts., & Acts of Parliament use those forms of words which have received judicial construction in the absence of anything in the Acts showing that the legislature did not mean to use the words in the sense attributed to them by the cts., the presumption is that Parliament did so use them (LORD COLERIDGE, C.J.).—BARLOW v. TEAL (1885), 15 Q. B. D. 403; 54 L. J. Q. B. 400; 53 L. T. 52; 49 J. P. 423; 1 T. L. R. 491, D. C.; *on appeal*, 15 Q. B. D. 501, C. A.

*Annotations:—*Apld. *Re* Leeds Institute of Science, Art & Literature & Leeds City Council, [1909] 1 Ch. 500; *Re* Demerara Rubber Co., [1913] 1 Ch. 331. *Mentd.* Friend v. Shaw (1887), 20 Q. B. D. 374; Bruner v. Moore (1903), 52 W. R. 295.

461. —.]—I think, having regard, as I am entitled to have regard, to the state of the law when this sect. was passed, that the legislature did not intend to permit that in such an action as this the validity of the patent should be directly brought forward, & intended only to allow the question of infringement to be tried (CHITTY, J.).—KURTZ v. SPENCE (1886), 33 Ch. D. 579; 55 L. J. Ch. 919; 55 L. T. 317; 35 W. R. 26; Griffin's Patent Cases (1884–1886), 141.

*Annotation:—**Mentd.* Challenger v. Royle (1887), 57 L. T. 734.

462. —.]—In order to construe [the Act of 1883] rightly it is necessary to bear in mind how the law stood at the time it was passed (LINDLEY, L.J.).—PHILIPPS v. REES (1889), 24 Q. B. D. 17; 59 L. J. Q. B. 1; 61 L. T. 713; 54 J. P. 293; 38 W. R. 53; 6 T. L. R. 14, C. A.

463. —.]—We think the legislature must be taken to have been aware of the state of the law, as pronounced by the House of Lords, 1878; & if those who frame the Act of Parliament had intended that an appeal should lie, they would have either given it by express words, or taken care to use language, the importance of which had been pointed out ten years before by the decision in the House of Lords in the case to which we have referred. But the legislature has not done so. It has used a popular, & not a technical or legal word; & we are of opinion that it must be taken to have intentionally used a word which would exclude the right of appeal (*per* CUR.).—*Ex p.* KENT COUNTY COUNCIL & DOVER COUNCIL, *Ex p.* KENT COUNTY COUNCIL & SANDWICH COUNCIL, [1891] 1 Q. B. 725; *sub nom.* *Re* DOVER COUNCIL & KENT COUNTY COUNCIL, *Ex p.* DOVER COUNCIL, *Re* KENT COUNTY COUNCIL & SANDWICH COUNCIL, *Ex p.* KENT COUNTY COUNCIL, 60 L. J. Q. B. 435; *sub nom.* *Re* KENT COUNTY COUNCIL & DOVER & SANDWICH BOROUGH COUNCIL, 65 L. T. 213; 55 J. P. 647; 39 W. R. 465; 7 T. L. R. 487, C. A.

*Annotations:—*Refd. *Re* Knight & Tabernacle Permanent Bldg. Soc., [1892] 1 Q. B. 613. *Mentd.* *Re* Herefordshire County Council & Leominster Town Council (1894), 15 R. 77; Thetford Corp'n. v. Norfolk County Council, [1898] 1 Q. B. 468.

464. —.]—It appears to me that to construe the statute now in question it is not only legitimate but highly convenient to refer both to the former Act & to the ascertained evils to which the former Act had given rise & to the later Act which provided the remedy (LORD HALSBURY, C.).—EASTMAN PHOTOGRAPHIC MATERIALS CO. v. COMPTROLLER-GENERAL OF PATENTS, [1898] A. C. 571; 67 L. J. Ch. 628; 79 L. T. 195; 47 W. R. 152; 14 T. L. R. 527; *sub nom.* *Re* EASTMAN PHOTOGRAPHIC MATERIALS CO., LTD.'S APPLICATION, 15 R. P. C. 476, II. L.

*Annotations:—*Refd. *R. v.* West Riding of Yorkshire County Council, [1906] 2 K. B. 676; O'Grady v. Wilmet, [1916] 2 A. C. 231; Banbury v. Bank of Montreal, [1918] A. C. 626; Dobb v. Dobb (1918), 87 L. J. Ch. 321; *Re* Wernher, Wernher v. Belt, [1918] 1 Ch. 339. *Mentd.* Field v. Wagon Syndicate (1900), 82 L. T. 231; *Re* Linotype Co.'s Trade Mk., [1900] 1 Ch. 238; *Re* National Biscuit Co.'s Appln. (1901), 70 L. J. Ch. 318; *Re* Uneda Trade Mk., [1901] 1 Ch. 550; Kodak v. London Stereoscopic & Photographo Co., Kodak v. Houghton, *Re* Kodak Trade Mks. (1903), 19 T. L. R. 297; Hommel v. Gebruder, Bauer (1904), 20 T. L. R. 585; A.-G. v. Metropolitan Electric Supply Co., [1905] 1 Ch. 24; Christy v. Tipper, [1905] 1 Ch. 1; *Re* Gestetner's Trade Mk., [1908] 1 Ch. 513; *Re* Orwoola Trade Mk. (1909), 53 Sol. Jo. 672; *Re* Soc. le Ferment Applns. (1911), 28 T. L. R. 175; *Re* Du Cros Applns., [1912] 1 Ch. 644; *Re* Akt. Carl Lindström Trade Mk., [1914] 2 Ch. 103; *Re* Cording's Appln., [1916] 1 Ch. 422; *Re* Garrett's Trade Mk. (1916), 85 L. J. Ch. 350; *Re* Yalding Manufacturing Co. Appln. (1916), 33 R. P. C. 285; *Re* Elisman, London Appln. (1920), 37 R. P. C. 135; *Re* Diamond T. Motor Car Co., [1921] 2 Ch. 583; *Re* Salter (trading as the Salter Paint & Colour Co.) Appln. (1923), 40 R. P. C. 402; *Re* Davis' Trade Mks., Davis v. Sussex Rubber Co., [1927] 2 Ch. 315.

465. —.]—PRYOR v. PRYOR, [1900] P. 157; 69 L. J. P. 90.

*Annotation:—**Mentd.* Squire v. Squire, [1905] P. 4.

466. —.]—(1) In construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended; but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done (LORD HALSBURY, C.).

(2) Before construing the words of the sect. . . . your lordships are entitled to consider the state of the law before the sect. was passed, with a view to ascertaining the mischief to which the enactment is directed (LORD DAVEY).—HILDER v. DEXTER, [1902] A. C. 474; 71 L. J. Ch. 781; 87 L. T. 311; 51 W. R. 225; 18 T. L. R. 800; 7 Com. Cas. 258; 9 Mans. 378, H. L.; *reversg.* S. C. *sub nom.* DEXTER v. UNITED GOLD COAST MINING PROPERTIES, LTD., 17 T. L. R. 708, C. A.

*Annotations:—*Generally, *Mentd.* A.-G. v. Hastings Corp'n. (1902), 1 L. G. R. 41; De La Cour v. Clinton, Trechmann v. Calthorpe (1904), 90 L. T. 615; Shorto v. Colwill (1909), 101 L. T. 598; Hong Kong & China Gas Co. v. Glen, [1914] 1 Ch. 527.

467. —.]—It has been laid down in several cases that where you are dealing with an Act of Parliament, the first thing you have to do is to look & see what the Act of Parliament says. If it is clear & unequivocal, then you have no right to try & interpret it by the law as it stood before the passing of the Act of Parliament, but if it be not clear & not unequivocal, then it may be that the previous law is useful for the purpose of seeing which of the obscure constructions is the one you ought to adopt (PICKFORD, J.).—POLURRIAN S.S. CO., LTD. v. YOUNG (1913), 109 L. T. 901; 30 T. L. R. 126; 12 Asp. M. L. C. 449; 19 Com. Cas. 143; *on appeal*, [1915] 1 K. B. 922, C. A.

*Annotations:—**Mentd.* Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781; Wilson, Bobbin v. Green

(1915), 31 T. L. R. 605; *Horlock v. Beal* (1916), 114 L. T. 193; *Moore v. Evans*, [1917] 1 K. B. 458; *Roura & Forgas v. Townend*, [1919] 1 K. B. 189; *Cohen v. Standard Marine Insee.* (1925), 30 Com. Cas. 139.

468. —.—.]—A knowledge of the judicial construction . . . put on sects. 161 & 162 of the Companies Act, 1862 (c. 89), must be imputed to the legislature (SWINFEN-EADY, J.).—*Re DEMERARA RUBBER CO., LTD.*, [1913] 1 Ch. 331; 82 L. J. Ch. 220; 108 L. T. 318; 20 Mans. 148.

469. —.—.]—In construing an Act of Parliament it is in my view legitimate to consider (a) the state of the law at the time the Act of Parliament was passed & the changes it was passed to effect; (b) the sects. & structure of the Act of Parliament as a whole (SANKY, J.).—*A.-G. v. BROWN*, [1920] 1 K. B. 773; 89 L. J. K. B. 1178; 122 L. T. 558; 84 J. P. 113; 36 T. L. R. 165; *on appeal*, [1921] 3 K. B. 29, C. A.

—Codifying & consolidating statutes.]—See Part XI., *post*.

B. Surrounding Circumstances.

470. How far referred to.]—The ct. cannot impute to the legislature, in passing statutes confirming titles created by means of parliamentary powers, ignorance of the transactions which had taken place in exercise of such powers.—*BEADEN v. KING* (1852), 9 Hare, 499; 22 L. J. Ch. 111; 68 E. R. 608.

Annotation:—*Mentd.* *Whidborne v. Eccl. Comrs for England* (1877), 7 Ch. D. 375.

471. —.—.]—*INCORPORATED CHURCH BUILDING SOCIETY v. COLES* (1851), 1 K. & J. 145; 3 Eq. Rep. 176; 24 L. J. Ch. 103; 24 L. T. O. S. 167; 19 J. P. 4; 3 W. R. 101; 69 E. R. 405; *affd.* (1855), 5 De G. M. & G. 324, L. C.

Annotations:—*Refd.* *Fisher v. Brierley* (1860), 21 J. P. 515. *Mentd.* *Cresswell v. Cresswell* (1868), 18 L. T. 392.

472. —.—.]—*HAWKINS v.* No. 394, *ante*.

CHELSEA VESTRY v. KING, No. 309, *ante*.

474. —.—.]—*RIVER WEAR COMRS. v. ADAMSON*, No. 105, *ante*.

475. —.—.]—While it is true that we have no right to construe the Act itself by the practice which has taken place under that Act, it is equally true that we are entitled to construe that Act, not only upon the actual words used, but with reference to the practice which had grown up & was existing at the time when that Act was passed (THESIGER, L.J.).—*YEWENS v. NOAKES* (1880), 6 Q. B. D. 530; 50 L. J. Q. B. 132; 44 L. T. 128; 45 J. P. 468; 1 Tax Cas. 260, C. A.

Annotations:—*Consd.* *L. C. C. v. South Metropolitan Gas Co.*, [1901] 1 Ch. 76. *Mentd.* *Rolfe v. Hyde* (1881), 6 Q. B. D. 673; *Wootten v. Rolfe* (1881), 47 L. T. 252; *City Bank v. Last* (1882), 47 L. T. 251; *Simmons v. Heath Laundry Co.*, [1910] 1 K. B. 543; *Bobbey v. Crosbie* (1915), 84 L. J. K. B. 856; *L. C. C. v. Perry* (1915), 79 J. P. 312; *Performing Right Soc. v. Mitchell & Booker (Palais De Danse)*, [1921] 1 K. B. 762.

476. —.—.]—In construing a statute, the ct. may consider the circumstances & the position of the parties at the time of its passing, but not the prior negotiations.—*TAFF VALE RY. CO. v. DAVIS & SONS, LTD.*, [1891] 1 Q. B. 43; 63 L. J. Q. B. 347; 42 W. R. 215; 9 R. 82, C. A.; *on appeal*

sub nom. *DAVIS & SONS, LTD. v. TAFF VALE RY. CO.*, [1895] A. C. 542, H. L.

Annotations:—*Refd.* *Corbett v. S. E. & C. Ry.'s Managing Committee*, [1906] 1 Ch. 12; *A.-G. v. N. E. Ry.*, [1915] 1 Ch. 905. *Mentd.* *Barry Ry. v. Taff Vale Ry.*, [1895] 1 Ch. 128; *Crosfield v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123; *Ward v. Mid. Ry.* (1916), 86 L. J. K. B. 161.

477. —.—.]—In the construction of a statute it is, of course, at all times, & under all circumstances, permissible to have regard to the state of things existing at the time the statute was passed & to the evils which, as appears from its provisions, it was designed to remedy (LORD ATKINSON).—*KEATES v. LEWIS MERTHYR CONSOLIDATED COLLIERIES, LTD.*, [1911] A. C. 641; 80 L. J. K. B. 1318; 105 L. T. 450; 75 J. P. 505, H. L.

478. —.—.]—In construing a statute the object is to ascertain the meaning of the legislature, & in order to ascertain the true meaning it is necessary to ascertain the circumstances with reference to which the words were used & what was the object appearing from those circumstances which the legislature had in view (FRASER, J.).—*ABRAHAM v. MACFISHERIES, LTD.*, [1925] 2 K. B. 18; 94 L. J. K. B. 562; 133 L. T. 89.

Annotation:—*Refd.* *Carrington Manufacturing Co. v. Saldin* (1925), 133 L. T. 432.

SUB-SECT. 6.—CONSTRUCTION WITH REFERENCE TO CONTEXT AND SUBJECT-MATTER.

479. General rule.]—There are two rules by which the expressions of the legislature are to be interpreted. First, if any part of an Act of Parliament is penned obscurely, & other passages in the same Act will elucidate that obscurity, recourse ought to be had to such context for that purpose. Secondly, if there are several Acts upon the same subject, they are to be taken together as forming one system, & as interpreting & enforcing each other (GOULD, J.).—*R. v. HOLLAND PALMER* (1784), 1 Leach, 352; 168 E. R. 279.

Annotation:—*Mentd.* *R. v. Smith* (1831), 5 C. & P. 107.

480. —.—.]—We must construe the Act with reference to the subject-matter (LE BLANC, J.).—*GOULD v. COLLYER* (1804), 1 Smith, K. B. 334.

481. —.—.]—The statute must be construed *secundum subjectam materiam* (LORD ELLENBOROUGH, C.J.).—*WIGAN v. FOWLER* (1816), as reported in 1 Stark. 459.

Annotations:—*Mentd.* *Broughton v. Manchester Water Works Co.* (1819), 3 B. & Ald. 1; *Perring v. Dunston* (1826), Ry. & M. 426.

482. —.—.]—The meaning of particular words in Acts of Parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used, & the object that is intended to be attained (ABBOTT, C.J.).—*R. v. HALL* (1822), 1 B. & C. 123; 2 Dow. & Ry. K. B. 241; 1 L. J. O. S. K. B. 20; 107 E. R. 47.

Annotations:—*Appld.* *Presant v. Goodwin* (1860), 1 Sw. & Tr. 544; *The Lion* (1869), L. R. 2 P. C. 525; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L. J. K. B. 565. *Refd.* *Hugh v. Escombe* (1861), 4 L. T. 517. *Mentd.* *R. v. Poynder* (1823), 2 Dow. & Ry. K. B. 258; *Darley v. R.* (1846), 12 Cl. & Fin. 520; *Re St. Martins in the Fields Grdns.* (1851), 17 L. T. O. S. 140.

PART III. SECT. 2, SUB-SECT. 6.

479 i. (General rule.)—A ct. must in every case have regard to the whole position, & determine upon a construction of the whole Act whether Parliament has in the particular provision adopted that other meaning judicially affixed instead of what must be assumed to be the primary meaning of the words it uses which a ct. unfettered might otherwise act upon.—*MELBOURNE CORPN. v. BARRY* (1922), 31 C. L. R.

174.—AUS.

479 ii. —.—.]—A strict application of the rules of grammar is not to be insisted upon where so doing would be inconsistent with the obvious meaning of the context; even the ordinary meaning of words used is to yield to the context.—*McGOWAN v. ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY (GOVERNOR & COMPANY)* (1901), 21 C. L. T. Occ. N. 64; 5 Terr. L. R. 147.—CAN.

479 iii. —.—.]—A statute is to be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which renders it necessary to read them in a sense which is not their ordinary sense in the English language as so applied.—*HARDY v. R.* (1905), 26 N. L. R. 35.—S. AF.

Colt v. L. & N. Ry., [1904] 1 K. B. 501.

489. ———.]—*A.-G. v. SILLIEM*, No. 130, *ante*.

490. ———.]—It is, I apprehend, in accordance with the general rule of construction in every case, that you are not only to look at the words, but you are to look at the context, the collocation, & the object of such words relating to such a matter, & interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under such circumstances (*BLACKBURN, J.*).—*REIN v. LANE* (1867), L. R. 2 Q. B. 144; 8 B. & S. 83; 36 L. J. Q. B. 81; 15 W. R. 345; 2 Mar. L. C. 448. *Annotation*:—*Mentd.* *Horse v. Graham* (1869), L. R. 5 C. P. 9.

491. ———.]—It is better to decide this question upon the Act of Parliament on the matter, & apply to sect. 1 the ordinary rules of construction, at the same time bearing in mind the tenor of the statute. In Acts of Parliament it is impossible to state every case to which it is to apply. Here we have words used including every case coming within the jurisdiction. Though we have had no definition suggested to us of the words "any order for the payment of money or otherwise," we are justified, looking at the other parts of the Act, in saying that they are general words (*CLEASBY, B.*).—*MORANT v. TAYLOR* (1876), as reported in 24 W. R. 461, C. A.

Annotations:—*Refd.* *Re Hampshire JJ.* (1888), 52 J. P. 311; L. C. C. v. Owner of 14, Lee Street, Stepney (1926), 135 L. T. 182. *Mentd.* *Paddington Vestry v. Snow* (1881), 45 L. T. 475; L. C. C. v. Cross (1892), 61 L. J. M. C. 160.

492. ———.]—I quite agree that in construing an Act of Parliament we are to see what is the intention which the legislature has expressed by the words; but then the words again are to be understood by looking at the subject-matter they are speaking of & the object of the legislature, & the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances & another object would & might have produced (*LORD BLACKBURN*).—*EDINBURGH STREET TRAMWAYS CO. v. TORBAIN* (1877), as reported in 3 App. Cas. 58, H. L.

Annotation:—*Apld.* *Rhondda's Claim*, [1922] 2 A. C. 339.

D. C.

Annotations:—*Refd.* *Fortescue v. St. Matthew Bethnal Green Vestry*, [1891] 2 Q. B. 170; *Summers v. Holborn District Board of Works* (1893), 68 L. T. 226.

496. ———.]—I of course recognise the usual rule observed in the construction of Acts of Parliament, that general, following specific words should be limited to things *ejusdem generis* with those before enumerated; but this rule of construction must be controlled by another equally general one, that Acts of Parliament ought, like wills or other documents, to be construed so as to carry out the object sought to be accomplished by them, so far as it can be collected from the language employed (*HAWKINS, J.*).—*HAWKE v. DUNN*, [1897] 1 Q. B. 579; 66 L. J. Q. B. 364; 76 L. T. 355; 61 J. P. 292; 45 W. R. 359; 13 T. L. R. 281; 41 Sol. Jo. 351; 18 Cox, C. C. 543, D. C.

Annotations:—*Refd.* *Re Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143. *Mentd.* *McInaney v. Hildreth*, [1897] 1 Q. B. 600; *R. v. Humphrey*, [1898] 1 Q. B. 875; *Betton v. Bushy* (1899), 68 L. J. Q. B. 859; *Brown v. Patch* (1899), 63 J. P. 421; *Buxton v. Scott* (1909), 100 L. T. 390.

497. ———.]—In answer to the question whether upon the facts stated the decision of the magistrates was in point of law correct, our answer is that it was. When the scope & object of the Act are borne in mind any other conclusion would to a large extent render the Act ineffective for its avowed purposes (*LORD RUSSELL, C.J.*).—*COPPEN v. MOORE*, [1898] 2 Q. B. 306; 67 L. J. Q. B. 689; 78 L. T. 520; 62 J. P. 453; 46 W. R. 620; 14 T. L. R. 414; 42 Sol. Jo. 539; 19 Cox, C. C. 45, D. C.

Annotations:—*Apld.* *Trade & Customs Comrs. v. Bell*, [1902] A. C. 563. *Refd.* *Christie, Manson & Wood v. Cooper*, [1900] 2 Q. B. 522; *Hobbs v. Winchester Corpn.*, (1910), 102 L. T. 841; *Armitage v. Nicholson* (1913), 108 L. T. 993; *Moussell v. London & North Western Ry.*, [1917] 2 K. B. 836; *Buckingham v. Duck* (1918), 120 L. T. 84; *Burns v. Scholfield* (1922), 128 L. T. 382. *Mentd.* *Cameron v. Wiggins* (1900), 70 L. J. Q. B. 15; *Langley v. Bombay Tea Co.*, [1900] 2 Q. B. 460; *R. v. Butcher* (1908), 99 L. T. 622.

498. ———.]—It is a dangerous assumption to suppose that the legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes

is so precisely accurate that you can pick out from various Acts this & that expression & skilfully piecing them together, lay a safe foundation for some remote inference (LORD LOREBURN, C.).—*NAIRN v. ST. ANDREWS UNIVERSITY*, [1909] A. C. 147; 78 L. J. P. C. 54; 100 L. T. 96; 25 T. L. R. 160, H. L.

Annotations:—*Consd.* Rhondda's Claim, [1922] 2 A. C. 339. *Mentd.* *Bebb v. Law Soc.* (1914), 83 L. J. Ch. 363.

499. —.]—It is our duty to put such an interpretation upon the sect. as upon the whole seems to us more consistent than any other with the language which has been used (COZENS-HARDY, M.R.).—*METROPOLITAN WATER BOARD v. LONDON BRIGHTON & SOUTH COAST RY. CO.*, [1910] 2 K. B. 890; 79 L. J. K. B. 1179; 103 L. T. 304; 74 J. P. 409; 26 T. L. R. 676; 8 L. G. R. 930, C. A.

Annotations:—*Refd.* *Metropolitan Water Board v. Avery*, [1914] A. C. 118. *Mentd.* *Colley's Patents v. Metropolitan Water Board*, [1912] A. C. 24; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

500. —.]—The whole sect. must be looked at & construed according to the ordinary meaning of the English language. There is nothing in the statute which would justify the ct. in restricting the meaning of the word because of what appears in the previous sects. We must consider what was the intention of Parliament, which could have inserted words restricting the meaning, had it intended the meaning to be so restricted (ISAACS, C.J.).—*R. v. LOWDEN*, [1914] 1 K. B. 144; 109 L. T. 832; 78 J. P. 111; 30 T. L. R. 70; 58 Sol. Jo. 157; 9 Cr. App. Rep. 195; 23 Cox, C. C. 643, C. C. A.

501. —.]—(1) It must never be forgotten that, in construing an Act of Parliament, one must bear in mind what is the subject-matter of the sect. & see what is its scope & object (VAUGHAN WILLIAMS, L.J.).

(2) The sound principle, in dealing with a statutory enactment, is to construe plain words in their natural sense. It is for us so to construe them; it is the province of the legislature to remove any inconvenient, or, as some people might judge, unjust, results, which may be traced to the construction of the plain words of the enactment construed as according to their natural meaning they ought to be construed (KENNEDY, L.J.).—*SMEED, DEAN & CO. v. PORT OF LONDON AUTHORITY*, [1913] 1 K. B. 226; 82 L. J. K. B. 323; 108 L. T. 171; 29 T. L. R. 122; 12 Asp. M. L. C. 297, C. A.

502. —.]—Where an ambiguous word such as "houses" is used in a statute, it is to be interpreted in accordance with the context & object of the statute.—*B. AERODROME, LTD. v. DELL*, [1917] 2 K. B. 380; *sub nom.* *BRIGHTON-SHOEHAM AERODROME, LTD. v. DELL*, 86 L. J. K. B. 1331; 117 L. T. 272; 81 J. P. 205; 33 T. L. R. 375; 15 L. G. R. 609, D. C.

503. —.]—In the construction of statutes their words must be interpreted in their ordinary grammatical sense unless there be something in the context or in the object of the statute in which they occur or in the circumstances with reference to which they are used to show they were used in a special sense different from their ordinary grammatical sense (*per* CUR.).—*VICTORIA CITY CORPN.*

v. VANCOUVER ISLAND (BP.), [1921] 2 A. C. 384; 90 L. J. P. C. 213, P. C.

504. *Later & earlier expressions.*—The legislature exercised, in making this Act of Parliament, just the same absolute authority with respect to the benefits it conferred & the restrictions it put on those benefits, as any capricious testator might have used, & is very apt to use, in the course of making his will. The rule applied to those cases certainly is, that the last part controls the first, & so I must treat it with respect to this Act of Parliament (*per* CUR.).—*LANCASTER & CARLISLE RY. CO. v. MARYPORT & CARLISLE RY. CO.* (1846), 4 Ry. & Can. Cas. 504.

SUB-SECT. 7.—CONSTRUCTION WITH REFERENCE TO WHOLE STATUTE.

505. *General rule.*—The office of a good expositor of an Act of Parliament is to make construction on all the parts together & not of one part only by itself.—*LINCOLN COLLEGE'S CASE* (1595), 3 Co. Rep. 58 b; 76 E. R. 761.

Annotations:—*Refd.* *R. v. London (Bp.) & Lancaster* (1693), 1 Show. 411; *Crofts v. Middleton* (1856), 1 De G. M. & G. 192. *Mentd.* *Noko v. Awder* (1595), Cro. Eliz. 373; *Spirit v. Bence* (1634), Cro. Car. 368; *Lyn v. Wyn* (1665), O'Bridg. 122; *Bouls v. Horton* (1672), Freeman K. B. 56; *Wakeman v. Blackwell* (1676), 1 Mod. Rep. 218; *Williamson v. Hancock* (1676), 2 Mod. Rep. 14; *Smith v. Tyndal* (1705), 2 Salk. 685; *Taylor d. Atkyns v. Horde* (1757), 1 Burr. 60; *Wolferstan v. Lincoln (Bp.) & Whitehead* (1763), 2 Wils. 171; *Malins v. Freeman* (1838), 6 Scott. 187; *Gosling v. Veley* (1850), 14 L. T. O. S. 526, *Re Casey's Patents*, *Stewart v. Casey*, [1892] 1 Ch. 101.

506. —.]—As a will ought to receive construction by due consideration of the intention of testator collected out of all the parts of the will, so the meaning of an Act of Parliament ought to be expounded by an examination of the intention of the makers thereof collected out of all the causes therein so that there be no repugnance but a concordancy in all the parts thereof (TANFIELD, J.).—*CHAMBERLAIN'S CASE* (1610), Lane, 117; 145 E. R. 346.

507. —.]—Every word of the statute must be considered both of the preamble & enacting clause (LEE, L.J.).—*RYALL v. ROWLES* (1749), 1 Ves. Sen. 348; 1 Atk. 165; 1 Wils. 260; 27 E. R. 1074.

Annotations:—*Refd.* *West v. Skip* (1749), 1 Ves. Sen. 239; *Mason v. Vere* (1779), 2 Wm. Bl. 1309. *Mentd.* *Row v. Dawson* (1749), 1 Ves. Sen. 331; *Doddington v. Hallet* (1750), 1 Ves. Sen. 497; *Ward v. Turner* (1752), 2 Ves. Sen. 431; *Ex p. Dumas* (1754), 2 Ves. Sen. 582; *Ex p. Shank* (1754), 1 Atk. 234; *Worsley v. Demattos & Slader* (1758), 1 Burr. 467; *Wilson v. Day* (1759), 2 Burr. 827; *Falkner v. Case* (1781), 1 Bro. C. C. 125; *Atkinson v. Malng* (1788), 2 Term Rep. 462; *Plumb v. Flutt* (1791), 2 Anst. 432; *Gordon v. East India Co.* (1797), 7 Term Rep. 228; *Lingham v. Biggs* (1797), 1 Bos. & P. 82; *Evans v. Blecknell* (1801), 6 Ves. 174; *Jones v. Gibbons* (1804), 9 Ves. 407; *Horn v. Baker* (1808), 9 East, 215; *Taylor v. Plumer* (1815), 3 M. & S. 562; *Re Frazer, Ex p. Monro* (1819), Buck. 300; *Hartley v. Smith* (1819), Buck. 368; *Storer v. Hunter* (1824), 3 B. & C. 368; *Dearle v. Hall, Loveridge v. Cooper* (1828), 3 Russ. 1, 48; *Hubbard v. Bagshaw* (1831), 4 Sim. 326; *Re Severn, Ex p. Tennyson* (1832), Mont. & B. 67; *Buck v. Lee* (1834), 1 Ad. & El. 804; *Re Ogden, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Gardner v. Lachlan* (1838), 4 My. & Cr. 129; *Reeves v. Capper* (1838), 5 Bing. N. C. 136; *Belcher v. Capper* (1842), 4 Man. & G. 502; *Kitty v. Bridges* (1843), 2 Y. & C. Ch. Cas. 486; *Belcher v. Bellamy* (1848), 2 Exch. 303; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Bartlett v. Bartlett* (1857), 1 De G. & J. 127; *North v. Gurney*

exposes individuals to penalties & forfeitures.—*CLERKE v. CALKIN* (1880), 20 N. B. R. (4 P. & B.) 98.—CAN.

d. —.]—A statute ought to be construed so that, if it can be prevented, no clause, sect. or word shall be superfluous, void or insignificant.—*SWAMINATHA AYYAR v. VAIDYANATHA SASTRI* (1905), I. L. R. 28 Mad. 46.—IND.

PART III. SECT. 2, SUB-SECT. 7.

505 i. *General rule.*—*CONLAN v. PALFREYMAN* (1912), 8 Tas. L. R. 20.—AUS.

505 ii. —.]—It is the most natural & genuine exposition of a statute to construe one part by another for that best expresseth the meaning of the makers; & this exposition is *ex visceribus actus*.—*R. v. MALLOW*

UNION GUARDIANS (1860), 12 I. C. L. R. 35.—IR.

505 iii. —.]—*MCKENZIE v. Hogg* (1894), 13 N. Z. L. R. 158.—N.Z.

c. *Construction to give effect to all parts.*—An Act of Parliament should be so construed as to give effect to all parts of the Act, & assure the attainment of its objects, even although it

Sect. 2.—Rules of interpretation: Sub-sects. 7 & 8, A.]

(1861), 1 John. & H. 509; *Grainge v. Warner*, *Re Grainge* (1865), 6 New Rep. 219; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Cooke v. Hemming* (1868), L. R. 3 C. P. 334; *Re Bainbridge*, *Ex p. Fletcher* (1878), 1 Ch. D. 218; *Re West of England & South Wales District Bank*, *Ex p. Dale* (1879), 11 Ch. D. 772; *Re Hallett's Estate*, *Knatchbull v. Hallett* (1880), 13 Ch. D. 696; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426; *Re Patrick*, *Bills v. Tatham* (1890), 63 L. T. 752; *Re Richards*, *Humber v. Richards* (1890), 45 Ch. D. 589; *Thomas v. Searles*, [1891] 2 Q. B. 408; *English & Scottish Mercantile Investment Trust v. Brunton*, [1892] 2 Q. B. 1; *Re Wyatt*, *White v. Ellis*, [1892] 1 Ch. 188; *Ward v. Duncombe*, [1893] A. C. 369; *Sharman v. Mason*, [1899] 2 Q. B. 679; *Rose v. Buckett*, [1901] 1 K. B. 449; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334.

508. —.]—It is a positive enactment, & you blend altogether so as to elicit from the whole one plain sense of the Act (*LORD ELLENBOROUGH, C.J.*).—*HORN v. HORN* (1806), 7 East, 529; 3 Smith, K. B. 522; 103 E. R. 204.

Annotations:—Refd. *Keats v. Hick* (1821), 5 Moore, C. P. 629; *Blake v. Attersoll* (1824), 4 Dow. & Ry. K. B. 549. *Mentd.* *Cumberland v. Kelley* (1832), 3 B. & Ad. 602.

509. —.]—The intention of the legislature in passing an Act of Parliament must be gathered not only from the clause under consideration, but from the whole statute (*LITLEDALF, J.*).—*MILLS v. FUNNELL* (1824), 2 B. & C. 899; 4 Dow. & Ry. K. B. 561; 2 L. J. O. S. K. B. 190; 107 E. R. 616.

510. —.]—This is a penal statute, & must according to the rules by which Acts of Parliament are construed, receive a strict interpretation. Our law will not allow of constructive offences; no man incurs a penalty unless the Act which subjects him to it is clearly within the spirit & letter of the statute imposing such penalty. The meaning of the words of an Act of Parliament is to be ascertained from the subject to which it refers, so that the same words receive a very different construction in different statutes. The intent of the legislature is not to be collected from any particular expression, but from a general view of the whole of an Act of Parliament. Your lordships will perceive that these are not merely technical rules established by lawyers for the determination of questions arising on statutes, but that they are maxims of common sense, the observance of which is necessary to conduct us to a right understanding of every kind of written instrument (*BEST, C.J.*).—*ANON.* (1825), 3 Bing. 193; 130 E. R. 488, H. L.

511. —.]—*BRETT v. BRETT*, No. 529, *post*.

512. —.]—There is no magic in the word section as applied to an Act of Parliament, or in the different parts of it being numbered or marked with particular numbers, or any reason why we should put a different construction on each of them (*LORD ABINGER, C.B.*).—*EDWARDS v. SHERREN* (1843), 11 M. & W. 595; 1 Dow. & L. 338; 12 L. J. Ex. 441; 7 Jur. 954; 152 E. R. 943.

513. —.]—The intention of the Legislature in every Act of Parliament is to be collected, not by travelling out the Act, but by looking to the whole of the Act itself (*WILDE, C.J.*).—*R. v. MANNING* (1849), 2 Car. & Kir. 887; 1 Den. 467; 7 State Tr. N. S. 1029; T. & M. 155; 19 L. J. M. C. 1; 13 J. P. 715; 13 Jur. 962, C. C. R.

Annotations:—Mentd. *R. v. Faderman*, *Lewis v. Gordon* (1850), 3 Car. & Kir. 353; *Ex p. Newton* (1855), 3 C. L. R. 1122.

514. —.]—You are to look at the whole Act of Parliament, the whole context, & see whether that is the true interpretation whether they might be compulsory or only enabling (*COLERIDGE, J.*).—*R. v. NORTH METROPOLITAN RY. CO.* (1856), 27 L. T. O. S. 156.

515. —.]—It is not the proper mode of construing a statute to take one sect., or part of it,

in order to ascertain the real meaning, but the general scope & object should be looked at (*WILLES, J.*).—*YOUNG v. DAVIS* (1863), 2 H. & C. 197; 9 L. T. 145; 10 Jur. N. S. 79; 11 W. R. 735; 159 E. R. 82, Ex. Ch.

Annotations:—Refd. *Gibson v. Preston Corpn.* (1870), L. R. 5 Q. B. 218; *Cowley v. Newmarket L. B.*, [1892] A. C. 345. *Mentd.* *Hartnall v. Ryde Comrs.* (1863), 4 B. & S. 361; *Parsons v. St. Mathew*, *Bethnal Green* (1867), L. R. 3 C. P. 56; *Wilson v. Halifax Corpn.* (1868), L. R. 3 Exch. 114; *Mill v. Hawker & Wickett* (1874), 30 L. T. 894; *Taylor v. Greenhalgh* (1874), L. R. 9 Q. B. 487; *Holborn Grdns. v. St. Leonards*, *Shoreditch Vestry* (1876), 41 J. P. 38; *Loughborough Highway Board v. Curzon* (1886), 55 L. J. M. C. 122; *R. v. Poole Corpn.* (1887), 19 Q. B. D. 602; *Saunders v. Holborn District Board of Works* (1891), 71 L. T. 519; *Rundle v. Hearle* [1898] 2 Q. B. 83; *Maguire v. Liverpool Corpn.*, [1905] 1 K. B. 767.

516. —.]—Some effect must always be given to all the words in a statute creating an offence (*CLEASBY, B.*).—*MONCK v. HILTON* (1877), 2 Ex. D. 268; 46 L. J. M. C. 163; 36 L. T. 66; 41 J. P. 214; 25 W. R. 373.

Annotations:—Refd. *R. v. Entwistle*, *Ex p. Jones*, [1899] 1 Q. B. 816. *Mentd.* *Davis v. Curry*, [1918] 1 K. B. 109; *Stonehouse v. Masson*, [1921] 2 K. B. 818.

517. —.]—*RIVER WEAR COMRS. v. ADAMSON*, No. 105, *ante*.

518. —.]—To this we answer that in doing so we should violate a settled canon of construction, namely, that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant (*COCKBURN, C.J.*).—*R. v. OXFORD (BP.)* (1879), 4 Q. B. D. 215; 40 L. T. 152; 43 J. P. 237; *on appeal*, *sub nom. JULIUS v. OXFORD (BP.)* (1880), 5 App. Cas. 214, II. I.

Annotations:—Consd. *Central Wales & Carmarthen Junction Ry. v. L. & N. W. Ry. & G. W. Ry.* (1883), 4 Ry. & Can. Tr. Cas. 211. *Refd.* *S. E. Ry. v. Ry. Comrs. & Hastings Corpn.* (1880), 50 L. J. Q. B. 201; *R. v. Barclay* (1881), 8 Q. B. D. 306; *Loosemore v. Tiverton & North Devon Ry.* (1882), 22 Ch. D. 25; *Dormont v. Furness Ry.* (1883), 11 Q. B. D. 496; *Leduc v. Ward* (1886), 51 L. T. 211; *Emmott v. Star Newspaper Co.* (1892), 9 T. L. R. 111; *R. v. Mitchell*, *Ex p. Livesey*, [1913] 1 K. B. 561; *R. v. Marshland Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155; *Mersey Docks & Harbour Board v. Hay*, [1923] A. C. 345. *Mentd.* *Fleming v. Manchester Corpn.* (1881), 44 L. T. 517; *Re Sergeant v. Dale*, *Ex p. Dale*, *Re Perkins v. Enraght*, *Ex p. Enraght* (1881), 43 L. T. 769; *R. v. Bloomsbury County Court Judge* (1886), 2 T. L. R. 665; *Abergavenny v. Llandaff (Bp.)* (1888), 20 Q. B. D. 460; *Re Baker*, *Nichols v. Baker* (1890), 44 Ch. D. 262; *Pure Spirit Co. v. Fowler* (1890), 25 Q. B. D. 235; *R. v. St. Pancras Vestry* (1890), 62 L. T. 440; *Allcroft v. London (Lord Bp.)*, *Lighton v. London (Lord Bp.)*, [1891] A. C. 666; *R. v. London (Bp.)* (1891), 55 J. P. 773; *Hakes v. Cox*, [1892] P. 110; *Kirkheaton District L. B. v. Ainley*, [1892] 2 Q. B. 274; *River Thames Conservators v. Port of London Sanitary Authority*, [1894] 1 Q. B. 647; *Russell v. Russell*, [1895] P. 315; *R. v. Turner*, *Judge*, [1897] 1 Q. B. 445; *Re Knight*, [1898] 1 Ch. 257; *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; *Re White (No. 2)* (1898), 42 Sol. Jo. 198; *R. v. Locke*, [1910] 2 K. B. 201; *Golden Horseshoe Estates Co. v. R.*, [1911] A. C. 480; *R. v. Metropolitan Police Comrs.*, *Ex p. Holloway*, [1911] 2 K. B. 1131; *Taylor v. Faires* (1920), 65 Sol. Jo. 116; *Tate & Lyle v. L. & N. E. Ry. & L. M. & S. Ry.* (1926), 43 T. L. R. 49.

519. —.]—Any one who contends that a sect. of an Act of Parliament is not to be read literally must be able to show one of two things, either that there is some other sect. which cuts down its meaning, or else that the sect. itself is repugnant to the general purview of the Act (*JESSEL, M.R.*).—*NUTH v. TAMPLIN* (1881), 8 Q. B. D. 247; *Colt*, 249; 51 L. J. Q. B. 177; 30 W. R. 346, C. A.

Annotation:—Apld. *Birmingham Corpn. v. Birmingham Canal Navigations* (1905), 21 T. L. R. 548.

520. —.]—*CALEDONIAN RY. CO. v. NORTH BRITISH RY. CO.*, No. 410, *ante*.

521. —.]—In construing an Act of Parliament one must first see what is the primary meaning of the words, & then see whether they can be interpreted in their primary meaning. . . . But then

you are also entitled to take in what I may call the secondary intention of the Act of Parliament, & you must look at the whole Act of Parliament (FIELD, J.).—BARROW-IN-FURNESS CASE (1886), 4 O'M. & H. 76.

Annotations:—**Mentd.** Stepney Case (1886), 4 O'M. & H. 34; West Bromwich Borough Case (1911), 6 O'M. & H. 256.

522. —.]—I think that by applying the rule of literal interpretation, we should fail to arrive at the meaning of the legislature. We must therefore construe the sect. having regard to the other sections of the Act & their language & the obvious intention of those who framed the Act (MATHEW, J.).—SEPTON v. SEPTON (1888), 58 L. T. 281; 52 J. P. 356; 4 T. L. R. 209, D. C.

523. —.]—COLQUHOUN v. BROOKS, No. 1612, *post*.

524. —.]—Both of the latter constructions are within the language of the sect., & in order to ascertain which is to be preferred, their lordships must look at the provisions of the statute & its purview & policy (*per* CUR.).—RAILTON v. WOOD (1890), 15 App. Cas. 363; 59 L. J. P. C. 84; 63 L. T. 13, P. C.

Annotations:—**Appld.** Heritable Reversionary Co. v. Millar, [1892] A. C. 598; City of London Electric Lighting Co. v. London Corpn. (1900), 82 L. T. 531. (*See* (1901), 65 J. P. 563.)

525. —.]—THOMSON v. ST. CATHARINE'S COLLEGE, CAMBRIDGE (MASTER & FELLOWS), ST. CATHARINE'S COLLEGE, CAMBRIDGE (MASTER & FELLOWS) v. THOMSON, MAPPIN'S MASBRO' OLD BREWERY v. THOMSON, ST. CATHARINE'S COLLEGE, CAMBRIDGE (MASTER & FELLOWS) v. ROSSE (DOWAGER COUNTESS), No. 598, *post*.

526. —.]—A.-G. v. BROWN, No. 469, *ante*.

527. Remedial section construed more liberally than penal section.—There is no impropriety in putting a strict construction on a penal clause, & a liberal construction on a remedial clause, in the same Act of Parliament (BEST, C.J.).—SHORT v. HUBBARD (1824), as reported in 2 Bing. 349.

Annotation:—**Mentd.** Edmonds v. Challis (1849), 7 C. B. 413.

528. Determination of nature of statute.—HUDSON v. PARKER, No. 165, *ante*.

SUB-SECT. 8.—CONSTRUCTION WITH REFERENCE TO OTHER PARTS OF STATUTE.

A. Title.

Whether part of framework of statute.—*See* Part II., Sect. 2, sub-sect. 1, *ante*

529. Whether title may be considered in construing statute.—To arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute, it is to be viewed in connection with its whole context, understanding by this, as well the "title" & "preamble" as the "purview," or enacting part, of the statute.—BRETT v. BRETT (1826), 3 Add. 210; 162 E. R. 456; *affd.* (1827), 3 Russ. 437, n.

Annotations:—**Consd.** Emanuel v. Constable (1827), 3 Russ. 436; Salkeld v. Johnson (1848), 2 Exch. 256. **Mentd.** Constable v. Stelbel & Emanuel (1827), 1 Hag. Ecc. 56; Foster v. Banbury (1829), 3 Sim. 40; Doe d. Taylor v. Mills (1833), 1 Mood. & R. 238.

530. —.]—There is no doubt very great authority to show that in the construction of an

Act of Parliament the title must not be neglected, but there is also no doubt but that both the title & preamble of an Act may be exceeded by the Act itself (WILLIAMS, J.).—SMITH v. PRESTON (1836), 2 Har. & W. 93.

531. —.]—The title to the Act . . . is not to be disregarded in putting a construction upon it (LORD DENMAN, C.J.).—HINTON v. DIBBIN (1842), 2 Q. B. 646; 2 Gal. & Dav. 36; 11 L. J. Q. B. 113; 6 Jur. 601; 114 E. R. 253.

Annotations:—**Mentd.** Austin v. Manchester, etc. (1852), 10 C. B. 454; Metcalfe v. L. B. & S. O. Ry. (1858), 4 C. B. N. S. 307; M'Manus v. L. & Y. Ry. (1859), 4 H. & N. 327; Phillips v. Clark (1859), 5 Jur. N. S. 1081; Peck v. North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Treadwin v. G. E. Ry. (1868), L. R. 3 C. P. 308; Harris v. G. W. Ry. (1876), 1 Q. B. D. 515; Morrill v. N. E. Ry. (1876), 1 Q. B. D. 302; M. S. & L. Ry. v. Brown (1883), 8 App. Cas. 703; Shaw v. G. W. Ry., [1894] 1 Q. B. 373.

532. —.]—The title cannot be resorted to for the purpose of construing the provisions of an Act of Parliament.—HUNTER v. NOCKOLDS (1850), 1 Mac. & G. 640; 1 H. & Tw. 644; 19 L. J. Ch. 177; 14 Jur. 256; 41 E. R. 1413, L. C.

Annotations.—**Mentd.** Greenway v. Bromfield, Handley v. Wood (1851), 9 Hare, 201; Cox v. Dolman (1852), 2 De G. M. & G. 592; Elvy v. Norwood (1852), 5 De G. & Sm. 240; Sinclair v. Jackson (1853), 17 Beav. 405; Snow v. Booth (1855), 2 K. & J. 132; Blower v. Blower (1858), 32 L. T. O. S. 193; Lewis v. Duncombe (No. 2) (1861), 29 Beav. 175; Round v. Bell (1861), 30 Beav. 121; Shaw v. Johnson (1861), 1 Drew. & Sm. 412; Mason v. Broadbent (1863), 33 Beav. 296; Edmunds v. Waugh (1866), 35 L. J. Ch. 234; Lawton v. Ford (1866), L. R. 2 Eq. 97; Sutton v. Sutton (1882), 22 Ch. D. 511; Darley v. Tennant (1885), 53 L. T. 257; *Re* Frisby, Allison v. Frisby (1889), 43 Ch. D. 106; Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726; *Re* Lloyd, Lloyd v. Lloyd, [1903] 1 Ch. 385; Shaw v. Crompton, [1910] 2 K. B. 370.

533. —.]—The title of this Act may be some guide to its meaning (COLERIDGE, J.).—BLAKE v. MIDLAND RY. CO. (1852), 18 Q. B. 93; 21 L. J. Q. B. 233; 18 L. T. O. S. 330; 16 Jur. 562; 118 E. R. 35.

Annotations.—**Consd.** Kenrick v. Lawrence (1890), 25 Q. B. D. 99. **Refd.** The George & Richard (1871), L. R. 3 A. & E. 466. **Mentd.** Hadley v. Baxendale (1854), 9 Exch. 341; Stanton v. Collier (1854), 3 E. & B. 274; Franklin v. S. E. Ry. (1858), 3 H. & N. 211; Lynch v. Knight (1861), 5 L. T. 291; Hebden v. West (1863), 3 B. & S. 579; Read v. G. E. Ry. (1868), 9 B. & S. 714; Rowley v. L. & N. W. Ry. (1873), L. R. 8 Exch. 221; Griffiths v. Dudley (1882), 47 L. T. 10; British Columbia Electric Ry. v. Gentile, [1914] A. C. 1034; Barnett v. Cohen, [1921] 2 K. B. 461; Union S.S. Co. of New Zealand v. Robin, [1920] A. C. 651.

534. —.]—If there were any reasonable doubt on the words of the sect. we should look at both the title & the preamble of the Act in putting a construction upon them (LORD CAMPBELL, C.J.).—WILMOT v. ROSE (1854), 3 E. & B. 563; 2 C. L. R. 677; 23 L. T. O. S. 76; 18 J. P. 600; 18 Jur. 518; 2 W. R. 378; 118 E. R. 1253; *sub nom.* WILLMOT v. ROSE, 23 L. J. Q. B. 281.

Annotations.—**Refd.** Hawkins v. Walrond (1876), 1 C. P. D. 280. **Mentd.** Lybbe v. Hart (1885), 29 Ch. D. 8.

535. —.]—JEFFERYS v. BOOSEY, No. 176, *ante*.

536. —.]—SUTTON v. SUTTON, No. 625, *post*.

537. —.]—The title of a statute does not go for much in construing it; but I do not know that it is to be absolutely disregarded (WILLS, J.).—KENRICK & CO. v. LAWRENCE & CO. (1890), 25 Q. B. D. 99; 38 W. R. 779.

Annotations:—**Mentd.** Hildesheimer & Faulkner v. Dunn (1891), 64 L. T. 452; Melville v. Mirror of Life Co., [1895] 2 Ch. 531.

PART III. SECT. 2, SUB-SECT. 8.—A.

529 i. Whether title may be considered in construing statute.—In construing an obscure clause in an Act of Parliament, the ct. may look at the title for assistance.—GREENE v. PROVINCIAL INSURANCE CO. (1880), 4 A. R. 521.—CAN.

529 ii. —.]—It is quite true that,

although the title of an Act of Parliament cannot be made use of to control the express provisions of the Act, yet if there be in those provisions anything admitting of a doubt, the title of the Act is a matter proper to be considered, in order to assist in the interpretation of the Act, & thereby to give to the

doubtful language in the body of the Act, a meaning consistent, rather than at variance with the clear title of the Act.—SHAW v. RUDDIN (1858), 9 I. C. L. R. 211.—IR.

529 iii. —.]—R. v. MALLOW UNION GUARDIANS (1860), 12 I. C. L. R. 35.—IR.

Sect. 2.—Rules of interpretation: Sub-sect. 8, A. & B. (a) & (b).]

538. Short title.]—VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS, No. 54, ante.

539. ———.]—(1) I adhere to the opinion which I expressed in *Vacher & Sons v. London Society of Compositors*, No. 54, ante, namely that while it is admissible to use the full title of an Act to throw light upon its progress & scope it is not legitimate to give any weight in this respect to the short title which is chosen merely for convenience of reference its object being identification, & not description (LORD MOULTON).

(2) It does not appear to me to be consonant with sound principles of construction to cut down the plain meaning & effect of one sect. of an Act because, if this meaning & effect be given to the sect. certain provisions of another sect. might be otiose (LORD PARKER).—*NATIONAL TELEPHONE CO., LTD. v. POSTMASTER-GENERAL*, [1913] A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562, H. L.

Annotations:—As to (1) Consd. Re Boaler, [1915] 1 K. B. 21. *Generally, Mentd. Cheshire Lines Committee v. Butler*, *Greenough & Esplen & Walford (Liverpool)* (1917), 16 Ry. & Can. Tr. Cas. 212; *Oldham, Ashton & Hyde Electric Tramways v. Ashton Corpn.*, [1921] 3 K. B. 511; *Canada Cement Co. v. La Ville De Montréal Est.*, [1922] 1 A. C. 249.

540. Objects of reference to title—To determine scope of Act.]—JOHNSON v. UPHAM, No. 49, ante.

541. ———.]—The title of the Act . . . may be referred to for the purpose of ascertaining generally the scope of the Act (CHITTY, J.).—*EAST & WEST INDIA DOCK CO. v. SHAW, SAVILL & ALBION CO.* (1888), 39 Ch. D. 524; 57 L. J. Ch. 1038; 60 L. T. 142; *sub nom. SHAW, SAVILL & ALBION CO. v. EAST & WEST INDIA DOCK CO.*, 6 Ry. & Can. Tr. Cas. 94.

Annotations:—Apld. Fenton v. Thorley, [1903] A. C. 413. *Refd. Re Boaler*, [1915] 1 K. B. 21. *Mentd. London & India Docks Co. v. G. E. Ry. & Mid. Ry.* (1902), 11 Ry. & Can. Tr. Cas. 57.

542. ———.]—Both by the form of the preamble & by the title of the statute it purports to be an Act of Parliament which contains within itself all such general provisions as are applicable to railways (LORD HALSBURY).—*DARTFORD RURAL COUNCIL v. BEXLEY HEATH RY. CO.*, [1898] A. C. 210; 67 L. J. Q. B. 231; 77 L. T. 601; 62 J. P. 227; 46 W. R. 235, H. L.; *affq. S. C. sub nom. R. v. BEXLEY HEATH RY. CO.*, [1896] 2 Q. B. 74, C. A.

Annotation:—Mentd. G. & S. W. Ry. v. Ayr Corpn., [1912] A. C. 520.

543. ———.]—It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still . . . "the title of an Act of Parliament is no part of the law, but it may tend to show the object of the legislature." Those were the words of WIGHTMAN, J., in *Johnson v. Upham*, No. 49, ante (LORD MACNAGHTEN).—*FENTON v. THORLEY & CO., LTD.*, [1903] A. C. 443; 72 L. J. K. B. 787; 89 L. T. 314; 52 W. R. 81; 19 T. L. R. 684; 5 W. C. C. 1, H. L.

Annotations:—Apld. Re Boaler, [1915] 1 K. B. 21. *Refd. Vacher v. London Society of Compositors*, [1912] 3 K. B. 547. *Mentd. Brintons v. Turvey*, [1905] A. C. 230; *Marshall v. East Holywell Coal Co.*, *Gorley v. Backworth Collieries* (1905), 93 L. T. 360; *Steel v. Cammell, Laird*, [1905] 1 K. B. 232; *Wicks v. Dowell*, [1905] 2 K. B. 225; *Broderick v. L. C. C.*, [1908] 1 K. B. 807; *Fitzgerald v. Clarke*, [1908] 2 K. B. 796; *Ismay, Imrie v. Williamson*, [1908] A. C. 437; *Re Etherington & Lancashire & Yorkshire Accident Insee.*, [1909] 1 K. B. 591; *Clover, Clayton v. Hughes*, [1910] A. C. 242; *Nisbet v. Rayne & Burn* (1910), 80 L. J. K. B. 84; *Warner v. Couchman* (1910), 103 L. T. 693; *Kelly v. Auchenlea Coal Co.* (1911), 4 B. W. C. C. 417; *Murray v. Denholm* (1911), 5 B. W. C. C. 496; *Sherwood v. Johnson* (1912), 5 B. W. C. C. 686;

540 i. Objects of reference to title—To determine scope of Act.]—In construing an Act of Parliament the title may be referred to in order to ascer-

tain the intention of the legislature.—*O'CONNOR v. NOVA SCOTIA TELEPHONE CO., LTD. (N. S.)* (1893), 22 S. C. R. 276.—CAN.

Trim Joint District School Board of Management v. Kelly, [1914] A. C. 667; *M'Ardle v. Swansea Harbour Trust* (1915), 85 L. J. K. B. 733; *Glasgow Coal Co. v. Welsh*, [1916] 2 A. C. 1; *Scott v. Pearson*, [1916] 2 K. B. 61; *Leyland Shipping Co. v. Norwich Union Fire Insee. Soc.*, [1917] 1 K. B. 873; *Tunes (or Grant) v. Kynoch*, [1919] A. C. 765; *Denholme v. Shipping Controller* (1920), 124 L. T. 378; *Flanagan v. Ackers Whitley* (1926), 19 B. W. C. C. 399; *McFarlane v. Hutton (Stovedores)* (1926), 96 L. J. K. B. 357; *Raeburn v. Lochgelly Iron & Coal Co.* (1926), 20 B. W. C. C. 637; *Ferguson v. Shotts Iron Co.* (1927), 20 B. W. C. C. 741; *Muscroft v. Stewarts & Lloyds* (1928), 21 B. W. C. C. 274; *Wiles v. Ellerman's Wilson Line* (1928), 21 B. W. C. C. 191.

544. ———.]—It is important to observe that the Act is intituled "An Act to amend the law with respect to persons carrying on business as money-lenders" (COLLINS, M.R.).—*Re DEBTOR, Ex p. DEBTOR*, [1903] 1 K. B. 705; 72 L. J. K. B. 382; 88 L. T. 401; 51 W. R. 370; 19 T. L. R. 288; 47 Sol. Jo. 334; 10 Mans. 130, C. A.

Annotations:—Mentd. Wells v. Allott, [1904] 2 K. B. 842; *Carringtons v. Smith*, [1906] 1 K. B. 79; *Part v. Bond* (1906), 94 L. T. 390; *Samuel v. Newbold*, [1906] A. C. 461; *Re Attree, Ex p. Ward*, [1907] 1 K. B. 868; *Re Debtor, Ex p. Petitioning Creditor*, [1917] 1 K. B. 60.

545. ———.]—VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS, No. 54, ante.

546. ———.]—To remove ambiguity.]—According to the rule in construing Acts of Parliament, you need not have recourse to the preamble or the title in cases where the enacting portion of the Act is clear, & therefore, as in my opinion the enacting portion of this Act is clear, I shall disregard both the preamble & title, & say that it does include, as it does in the plainest terms, payments not periodical (JESSEL, M.R.).—*Re GRIFFITH, Carr v. GRIFFITH* (1879), 12 Ch. D. 655; 41 L. T. 510; 28 W. R. 28.

Annotations:—Refd. Re Jowitt, Jowitt v. Keeling, [1922] 2 Ch. 442. *Mentd. Re Sharp, Rickett v. Sharp* (1890), 62 L. T. 364; *Re Sale, Nisbet v. Philp*, [1913] 2 Ch. 697.

547. ———.]—The title of an Act may be looked at in order to remove any ambiguity in the words of the Act (HUDDLESTON, B.).—*COOMBER v. BERKS JJ.* (1882), 9 Q. B. D. 17; 51 L. J. Q. B. 297; 46 J. P. 629; 30 W. R. 779; *on appeal*, 10 Q. B. D. 267, C. A.; (1883), 9 App. Cas. 61, H. L.

Annotations:—Refd. A. G. v. Do Keyser's Royal Hotel, [1920] A. C. 508. *Mentd. Nicholson v. Holborn Assmt. Com.* (1886), 18 Q. B. D. 161; *Tunncliffe v. Birkdale Overseers* (1888), 20 Q. B. D. 450; *Bray v. Lancashire JJ.* (1889), 22 Q. B. D. 484; *Showers v. Chelmsford Union Assmt. Com.* (1891), 60 L. J. M. C. 55; *Middlesex County Council v. St. George's Union Assmt. Com.*, [1897] 1 Q. B. 64; *Hornsey U. C. v. Hennell*, [1902] 2 K. B. 73; *Wixon v. Thomas, Lambert v. Thomas, Burrows v. Thomas*, [1911] 1 K. B. 43; *Metropolitan Meat Industry Board v. Sheedy*, [1927] A. C. 899.

548. ———.]—To restrict scope of Act.]—It does not seem reasonable to hold that in this case sect. 3 is to be limited merely because, in the title, the Act is described as an Act to amend the law with respect to wills of personal estate made by British subjects. I am of opinion that the Act ought not to be construed in the restricted sense (GORELL BARNES, J.).—*In the Estate of GROOS*, [1904] P. 269; 73 L. J. P. 82; 91 L. T. 322.

549. ———.]—Our first duty is to look at the words of the sect. If they are quite clear & unambiguous, it would not be right for us to alter the construction by reason of the preamble or the title to the Act (BRAY, J.).—*SAGE v. EICHOLOZ* [1919] 2 K. B. 171; 88 L. J. K. B. 816; 121 L. T. 151; 83 J. P. 170; 35 T. L. R. 382; 17 L. G. R. 354; 26 Cox, C. C. 432.

550. How title construed—Reasonable construction.]—(1) The "long title" of an Act of Parliament is to be read as part of the Act.

540 ii. ———.]—SHEELEY v. REGISTRAR & TAXING MASTER OF SUPREME COURT, [1911] T. P. D. 295.—S. AF.

(2) It is right & necessary to construe the title reasonably (KEKEWICH, J.).—A.-G. v. MARGATE PIER & HARBOUR CO. OF PROPRIETORS, [1900] 1 Ch. 749; 69 L. J. Ch. 331; 82 L. T. 448; 64 J. P. 405; 48 W. R. 518; 44 Sol. Jo. 393.

Annotations:—*Generally*, *Reid*. Bradford Corpn. v. Myers, [1916] 1 A. C. 242. *Mentd.* Ambler v. Bradford Corpn., [1902] 2 Ch. 585; Parker v. L. C. C., [1904] 2 K. B. 501; Sharpington v. Fulham Grdns. (1904), 52 W. R. 617; The Johannesburg, [1907] P. 65.

B. Preamble and Recitals.

(a) In General.

Whether part of framework of statute.—See Part II., Sect. 2, sub-sect. 2, *ante*.

551. Construction of section by reference to recital—Whether confined to section in which recital appears.—I know no rule of construction which compels us to apply the recital in the particular sect. to that sect. only (LORD TENTERDEN, C.J.).—MAGRAVE v. WHITE (1828), 8 B. & C. 412; 2 Man. & Ry. K. B. 440; 6 L. J. O. S. K. B. 361; 108 E. R. 1095.

552. ———.]—BRYAN v. CHILD, No. 635, *post*.

(b) Determination of Scope of Statute.

553. Whether preamble may be considered.—STOWEL v. ZOUCH (LORD), No. 378, *ante*.

554. ———.]—In an Act of Parliament the intention, appearing in the preamble, shall control the letter of the law (TREVOR, M.R.).—BADEN v. PEMBROKE (COUNTESS) (1688), 2 Vern. 52; 23 E. R. 644.

Annotations.—*Mentd.* Trelawney v. Booth (1738), West *emp.* Hard. 441; Scott v. Fenhouliet (1779), 1 Bro. C. C. 69.

555. ———.]—R. v. JONES (1782), 1 Leach, 240, n.; 168 E. R. 223, n.

556. ———.]—In the construction I put upon the Act, I do not in any way restrain the operation of its enacting clauses on their application to cases within the Act; I use the preamble only for the purpose of ascertaining what the cases are to which the act was intended to apply. This is a strictly legitimate process for interpreting an Act of Parliament (WIGRAM, V.-C.).—SALKELD v. JOHNSTON (1842), 1 Hare, 196; 11 L. J. Ch. 201; 6 Jur. 210; 66 E. R. 1004; *on appeal* (1849), 1 Mac. & G. 242, L. C.

Annotations:—*Appld.* Fellowes v. Clay (1843), 4 Q. B. 313. *Mentd.* Gray v. Liverpool & Bury Ry. (1846), 1 Ry. & Can. Cas. 235; *Re* Crosby Tithes (1849), 13 Q. B. 761; Malcolm v. Scott (1850), 3 Mac. & G. 29; Shepherd v. Londonderry (1852), 21 L. J. Q. B. 201; Wilson v. Eden (1854), 23 L. J. Ch. 105; R. v. Yates (1883), 11 Q. B. D. 750; Esdale v. Payne (No. 2) (1885), 53 L. T. 21; Yates v. R. (1885), 52 L. T. 305; St. Catharine's College v. Rosse, [1916] 1 Ch. 73.

557. ———.]—FELLOWES v. CLAY, No. 589, *post*.

558. ———.]—SUSSEX PEERAGE CASE, No. 569,

559. ———.] SALKELD v. JOHNSON (OR JOHNSTON), No. 119, *ante*.

560. ———.]—When an Act of the legislature of the colony declares that an action for a particular wrong shall be tried in a particular way, & if the fact be found, the finding shall be attended with particular consequences, it appears to their Lordships that it would be not less than monstrous to say, that a cause of action thus recognised & thus provided for shall be treated as no cause of action at all. This goes beyond a recital in an Act of legislation, which may according to circumstances, be of more or less weight & be often not conclusive (KNIGHT BRUCE, L.J.).—NORTON v. SPOONER (1854), 9 Moo. P. C. C. 103; 14 E. R. 237, P. C.

561. ———.]—WILMOT v. ROSE, No. 534, *ante*.

562. ———.]—We must look at the preamble to ascertain the true meaning & intention of the legislature (COCKBURN, C.J.).

The preamble does not necessarily restrain a subsequent enactment; but it affords a great explanation of the intended scope & extent of the enactment (CROMPTON, J.).—CARR v. ROYAL EXCHANGE ASSURANCE CO. (1862), as reported in 1 B. & S. 956; 31 L. J. Q. B. 93; 8 Jur. N. S. 384; 121 E. R. 970.

563. ———.]—(1) I do not think it is competent to any ct. to proceed upon the assumption that the legislature has made a mistake (LORD HALSBURY, C.).

(2) You must, he [LORD HARDWICKE] says, as in other sciences, reason by analogy—that is, as I understand it, you must take the meaning of legal expressions from the law of the country to which they properly belong, & in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation & effect of the statute the same in both countries (LORD MACNAGHTEN).

(3) When you find a special meaning assigned to a particular word in an Act of Parliament you must abide by that meaning in construing the Act, you cannot add to it or take away from it, nor can you substitute anything else for it (LORD MACNAGHTEN).

(4) When you find legislation following a continuous practice & repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning (LORD MACNAGHTEN).—INCOME TAX SPECIAL PURPOSES COMRS. v. PEMSEL, [1891] A. C. 531; 61 L. J. Q. B. 265; 65 L. T. 621; 7 T. L. R. 657; 3 Tax Cas. 53, H. L.; *affg.* S. C. *sub nom.* R. v. INCOME TAX COMRS. (1888), 22 Q. B. D. 296, C. A.

Annotations.—*As to* (2) *Reid*. Lord Advocate v. Moray, [1905] A. C. 531. *As to* (4) *Consd.* L. C. C. v. South Metropolitan Gas Co., [1903] 2 Ch. 532. *Generally*, *Consd.* G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414. *Reid*. Bourne v. Keane, [1919] A. C. 815; Chesterman v. Federal Comr. of Taxation, [1926] A. C. 128; Adamson v. Melbourne & Metropolitan Board of Works (1928), 45 T. L. R. 3. *Mentd.* Charterhouse School v. Lamarque (1890), 25 Q. B. D. 121; I. R. Comrs. v. Scott, *Re* Bootham Ward Strays, York, [1892] 2 Q. B. 152; Maughan v. Free Church of Scotland (1893), 3 Tax Cas. 207; *Re* Foveaux, Cross v. London Antivivisection Soc., [1895] 2 Ch. 501; *Re* Nottage, Jones v. Palmer, [1895] 2 Ch. 649; Southwell v. Royal Holloway College, Egham, [1895] 2 Q. B. 487; *Re* Buck, Brutv v. Mackey, [1896] 1 Ch. 727; Cunnack v. Edwards, [1896] 2 Ch. 679; *Re* Macduff, Macduff v. Macduff, [1896] 2 Ch. 451; *Re* Perry Almshouses, *Re* Ross' Charity, [1899] 1 Ch. 21; Blair v. Duncan, [1902] A. C. 37; *Re* Church Patronage Trust, Laurie v. A.-G., [1901] 1 Ch. 643; *Re* Good, Harington v. Watts, [1905] 2 Ch. 60; Grimond v. Grimond, [1905] A. C. 603; *Re* Manser, A.-G. v. Lucas, [1905] 1 Ch. 68; *Re* Sidney, Hingston v. Sidney (1908), 98 L. T. 625; R. v. Income Tax Special Comrs., *Ex p.* University College of North Wales (1909), 78 L. J. K. B. 576; R. v. Income Tax Comrs. (1911), 80 L. J. K. B. 788; *Re* Wedgwood, Allen v. Wedgwood, [1915] 1 Ch. 113; *Re* Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G., [1916] 1 Ch. 100; Houston v. Burns, [1918] A. C. 337; *Re* Bennett, Gibson v. A.-G., [1920] 1 Ch. 305; R. v. Income Tax Special Purposes Comrs., *Ex p.* Dr. Barnado's Homes National Incorporated Assocn., [1920] 1 K. B. 26; Rotunda Hospital Dublin v. Coman (1920), 7 Tax Cas. 517; Barber v. Chudley (1922), 92 L. J. K. B. 711; R. v. Income Tax Special Comrs., *Ex p.* Rank's Trustees (1922), 91 L. J. K. B. 311; *Re* Hummeltberg, Beatty v. London Spiritualistic Alliance, [1923] 1 Ch. 237; Jackson v. Voss, [1923] 2 K. B. 357; *Re* Ludlow, Bence-Jones v. A.-G. (1923), 93 L. J. Ch. 30; *Re* Shakespeare Memorial Trust, Lytton v. A.-G., [1923] 2 Ch. 398; *Re* Tetley, National Provincial & Union Bank of England v. Tetley, [1923] 1 Ch. 258; A.-G. v. National Provincial Bank, [1924] A. C. 262; R. v. Minister of Labour, [1924] 1 K. B. 210; Verge v. Somerville, [1924] A. C. 496; Brighton College v. Marriott, [1925] 1 K. B. 312; *Re* Gray, Todd v. Taylor, [1925] Ch. 362; R. v. Income Tax Special

the preamble cannot be resorted to to control it.—R. v. PICKERING (Y. T.) (1905), 1 W. L. R. 521.—CAN.

in 2 H. & C. 642; 3 New Rep. 295; 33 L. J. M. C. 40; 159 E. R. 266.

Annotations:—**Mentd.** R. v. Stepney Union Grdns. (1874), 43 L. J. M. C. 145; Sharpington v. Fulham Grdns. (1904), 73 L. J. Ch. 777; Chester Waterworks Co. v. Chester Union Grdns. (1907), 96 L. T. 566.

579. ———.]—Although I agree that the recital in the preamble of an Act of Parliament must not be taken to enlarge beyond its natural meaning the enacting part, yet you always may refer to the preamble to see what the intention of the legislature is (POLLOCK, B.).—CHELTENHAM BOROUGH ELECTION CASE, PAKENHAM v. DE FERRIERES (1880), 3 O'M. & H. 86.

580. ———.]—In construing an Act of Parliament where the intentions of the legislature is declared by the preamble we are to give effect to that preamble to this extent, namely that it shows us what the legislature are intending (LORD BLACKBURN).—WEST HAM OVERSEERS v. ILES (1883), 8 App. Cas. 386; 52 L. J. Q. B. 650; 49 L. T. 205; 47 J. P. 708; 31 W. R. 928, H. L.; *affg.* S. C. *sub nom.* ILES v. WEST HAM ASSESSMENT COMMITTEE (1881), 8 Q. B. D. 69, C. A.

Annotations:—**Apld.** Jonas v. St. Dunstan's Overseers (1908), 98 L. T. 691. **Refd.** Re G. N. Ry. & G. C. Ry.'s Joint Appln. (1908), 24 T. L. R. 417.

581. ———.]—BRISTOL CORPN. v. CANNING, SEWERS COMRS. CLERK FOR LOWER LEVEL OF COUNTY OF GLOUCESTER (1906), 95 L. T. 183; *sub nom.* BRISTOL CORPN. v. SEWERS COMRS. FOR LOWER LEVEL OF GLOUCESTER COUNTY, 70 J. P. 528.

582. ———.]—I have been looking through the cases to see whether I can find a case which is an authority as to how far it was permissible to consider the preamble, not where there is a case of ambiguity so much as a case where a flexible expression is used, & I think I have found an authority directly in point in the case of *Salkeld v. Johnston*, No. 119, *ante*. . . . This being a flexible expression, I think I may now consider the preamble (BANKES, L.J.).—ST. CATHARINE'S COLLEGE v. ROSSE, [1916] 1 Ch. 73; 85 L. J. Ch. 121; 113 L. T. 1172, C. A.

Annotation:—**Mentd.** Thomson v. St. Catharine's College, Cambridge, etc., [1919] A. C. 468.

— Where enacting part ambiguous.]—See Sub-sect. 8, B. (c) i., *post*.

ii. Ambiguity in Enacting Part.

583. Whether preamble may be considered.—MASON v. ARMITAGE, No. 605, *post*.

584. ———.]—LEES v. SUMMERSGILL, No. 606, *post*.

585. ———.]—I agree that the preamble of a statute cannot control a clear & express enactment; but the plain intent of the legislature is expressed in the preamble, & the nature of the mischief which is sought to be remedied, may serve to give a definite & qualified meaning to indefinite & general terms (LEACH, M.R.).—EMANUEL v. CONSTABLE (1827), 3 Russ. 436; 5 L. J. O. S. Ch. 191; 38 E. R. 639.

Annotations:—**Apld.** Salkeld v. Johnston (1842), 1 Hare, 196. **Refd.** Re Limond, Limond v. Cunliffe, [1915] 2 Ch. 240. **Mentd.** Doe d. Taylor v. Mills (1833), 1 Mood. & R. 288; Wilkins v. Charretton (1874), 22 W. R. 598.

586. ———.]—The enacting words of an Act of Parliament are not always to be limited by the words of the preamble but must in many instances go beyond it. Yet, as a sound construction of every Act of Parliament I take it the words in the enacting part must be confined to that which is the plain object & general intention of the legislature in passing the Act, & that the preamble

affords a good clue to discover what that object was (LORD TENTERDEN, C.J.).—HALTON v. COVE (1830), 1 B. & Ad. 538; 109 E. R. 887; *sub nom.* HATTON v. COVE, 9 L. J. O. S. K. B. 74.

Annotations:—**Apld.** Powell v. Kempton Park Racecourse Co., [1899] A. C. 143. **Mentd.** Betham v. Gregg (1834), 10 Bing. 352; Alston v. Atlay (1837), 7 Ad. & El. 289.

587. ———.]—WILLIAMS v. BEAUMONT, No. 612, *post*.

588. ———.]—There is no ambiguity in the clause, so that we have no right to call in the preamble to construe the enactment (PATTESON, J.).—SALTERS' CO. v. JAY (1842), 3 Q. B. 109; 2 Gal. & Dav. 414; 11 L. J. Q. B. 173; 6 Jur. 803; 114 E. R. 448.

Annotations:—**Mentd.** R. v. London Corpn. (1847), 13 Q. B. 1; Truscott v. Merchants' Taylors' Co. (1856), 11 Exch. 855; Frewen v. Phillip (1861), 25 J. P. 676; Dent v. Auction Mart Co., Pilgrim v. Same, Mercers' Co. v. Same (1866), L. R. 2 Eq. 238.

589. ———.]—(1) Preamble of an Act may be legitimately used . . . in some cases to control & cut down the enacting part (PATTESON, J.).

(2) That the preamble may well be resorted to for assistance in the exposition of doubtful words in the enacting clause must of course be conceded (WILLIAMS, J.).—FELLOWES v. CLAY (1843), 4 Q. B. 313; 3 Gal. & Dav. 407; 12 L. J. Q. B. 202; 7 J. P. 558; 7 Jur. 343; 114 E. R. 917.

Annotations:—*Generally*, **Mentd.** Salkeld v. Johnston (1846), 2 C. B. 719; Thorpe v. Plowden (1848), 3 Exch. 387; Salkeld v. Johnston (1849), 1 Mac. & G. 242; Martin v. Hemming (1854), 24 L. J. Ex. 3.

590. ———.]—(1) The preamble of an Act of Parliament cannot be resorted to in order to ascertain the intention of the Act, unless there is an ambiguity in the enacting apart.

(2) General provisions in an Act of Parliament do not overrule special provisions; so that where an Act contains special provisions as to particular property, they must be read as exceptions from general provisions, whether contained in the same or any other Act.—TAYLOR v. OLDHAM CORPN. (1876), 4 Ch. D. 395; 46 L. J. Ch. 105; 35 L. T. 696; 25 W. R. 178.

Annotations:—*As to* (2) **Consd.** Re Boulton's Trusts (1882), 51 L. J. Ch. 493. **Apld.** Re New Callao (1882), 47 L. T. 175. **Refd.** Northam Bridge Co. v. R. (1886), 55 L. T. 759. *Generally*, **Refd.** Mid. Ry. v. Watton (1886), 17 Q. B. D. 39; Richards v. Kessick (1888), 57 L. J. M. C. 48; R. v. Goole L. B., [1891] 2 Q. B. 212; Baird v. Tunbridge Wells Corpn., [1894] 2 Q. B. 867; Hill v. Wallacey L. B., [1894] 1 Ch. 133; West Hartlepool Corpn. v. Robinson (1897), 75 L. T. 677; Ystradfydwg & Pontypridd Main Sewerage Board v. Bonsted Surveyor of Taxes, [1906] 1 K. B. 294; Painsel & Wilson v. Tucker, [1907] 2 Ch. 191. **Mentd.** Re Brewer & Hankin's Contract (1899), 80 L. T. 127; Escott v. Newport Corpn., [1904] 2 K. B. 369; Thurrock Grays & Tilbury Joint Sowerage Board v. Thames Land Co (1925), 90 J. P. 1.

591. ———.]—The enacting part of an Act of Parliament is not to be controlled by the title or recitals unless the enacting part is ambiguous, & then the title & recitals may be referred to for the purpose of ascertaining the intention of the legislature.—BENTLEY v. ROTHERHAM & KIMBERWORTH LOCAL BOARD OF HEALTH (1876), 4 Ch. D. 588; 46 L. J. Ch. 284.

592. ———.]—*Re* GRIFFITH, CARR v. GRIFFITH, No. 546, *ante*.

593. ———.]—CALEDONIAN RY. CO. v. NORTH BRITISH RY. CO., No. 410, *ante*.

594. ———.]—There can be no doubt that if in the preamble or in any other part of the Act some purport or intention is expressed, that should be borne in mind in construing everything which is ambiguous or open to more constructions than one; nor do I say that such a view of the purpose

Sect. 2.—Rules of interpretation: Sub-sect. 8, B. (c) ii., & (d).]

or intention of an Act of Parliament may not sometimes properly be collected otherwise than from the declared policy expressed in the preamble, or elsewhere. But we are not to treat everything as the policy, or the intention, or the scheme of the act which any one may surmise to be so. If that is to govern us it should be clearly shown that it is so (LORD SELBORNE, C.).—*TURQUAND v. BOARD OF TRADE* (1886), 11 App. Cas. 286; 55 L. J. Q. B. 417; 55 L. T. 30; 2 T. L. R. 680, II. L.; *affg.* S. C. *sub nom.* *Re PARKER, Ex p. BOARD OF TRADE* (1885), 15 Q. B. D. 196, C. A.

Annotations:—Refd. *The Suevic*, [1908] P. 292. *Mentd.* *Re Wells & Croft, Ex p. Official Receiver* (1894), 2 Mans. 41; *Re Cohen*, [1905] 2 K. B. 704.

595. —.]—Two propositions are quite clear—one that a preamble may afford useful light as to what a statute intends to reach, & another that if an enactment is itself clear & unambiguous, no preamble can qualify or cut down the enactment (LORD HALSBURY, C.).

“Undoubtedly”—I quote from CHITTY, L.J.’s judgment words with which I cordially agree—“it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear & unambiguous terms.” But the preamble is a key to the statute, & affords a clue to the scope of the statute when the words construed by themselves without the aid of the preamble are fairly capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment & defeat the general intention of the legislature. It may well be in this & in other cases that the legislature, taking the recited facts as the occasion of the enactment, has deliberately used larger words to prevent the same kind of mischief in other forms (LORD DAVEY).

Doubtless the contents of a preamble of an Act of Parliament cannot for any purpose control the actual clear provision of the statute; but if the wording of the statute gives rise to doubts as to its proper construction, the preamble can be & ought to be referred to in order to arrive at the proper construction to be put upon the enacting portion of the statute (LORD JAMES OF HEREFORD).—*POWELL v. KEMPTON PARK RACECOURSE CO., LTD.*, [1899] A. C. 143; 68 L. J. Q. B. 392; 80 L. T. 538; 63 J. P. 260; 47 W. R. 585; 15 T. L. R. 266; 43 Sol. Jo. 329; 19 Cox, C. C. 265, II. L.; *affg.*, [1897] 2 Q. B. 242, C. A.

Annotations:—Apld. *Johnston v. Maconochie, Re No. 4, Porchester Gate, Paddington*, [1920] 3 K. B. 417. *Refd.* *Lennox v. Stoddart, Davis v. Stoddart*, [1902] 2 K. B. 21; *Stoddart v. Hawke*, [1902] 1 K. B. 353. *Mentd.* *R. v. Humphrey*, [1898] 1 Q. B. 875; *Belton v. Busby*, [1899] 2 Q. B. 380; *Brown v. Patch*, [1899] 1 Q. B. 892; *Mackenzie v. Hawke*, [1902] 2 K. B. 216; *R. v. Deaville*, *R. v. Deaville, R. v. Simpson*, [1903] 1 K. B. 468; *Tromans v. Hodgkinson*, [1903] 1 K. B. 30; *Martin v. Benzamin*, [1907] 1 K. B. 64; *Lee v. Taylor & Gill* (1912), 107 L. T. 682; *Jackson v. Roth*, [1919] 1 K. B. 102; *Schneiders v. Abrahams*, [1925] 1 K. B. 301; *Clark v. Westaway*, [1927] 2 K. B. 597.

596. —.]—The preamble ought to be looked at for the purpose of finding a guide to any construction which is doubtful, or of deciding between

two constructions which may be put upon the words (LORD ALVERSTONE, C.J.).—*HILL v. PAN-NIFER*, [1904] 1 K. B. 811; 73 L. J. K. B. 556; 90 L. T. 511; 68 J. P. 261; 52 W. R. 588; 20 T. L. R. 324; 48 Sol. Jo. 313; 2 L. G. R. 381, D. C.

Annotations:—Mentd. *R. v. Philbrick, Ex p. Edwards*, [1905] 2 K. B. 108; *Coster v. Headland* (1906), 75 L. J. K. B. 483; *Scott v. Denton*, [1907] 1 K. B. 456; *R. v. Smith, Ex p. Porter*, [1927] 1 K. B. 478.

597. —.]—General words in the heading of a group of sects. cannot be construed as limiting the effect of plain words in a sect. contained in that group.

The correct view of prefatory words of this kind is expressed in *Maxwell on The Interpretation of Statutes*, 4th edit., p. 75, “The function of the preamble is to explain what is ambiguous in the enactment & it may either restrain or extend it as best suits the intention . . .” (FARWELL, L.J.).—*FLETCHER v. BIRKENHEAD CORPN.*, [1907] 1 K. B. 205; 76 L. J. K. B. 218; 96 L. T. 287; 71 J. P. 111; 23 T. L. R. 195; 51 Sol. Jo. 171; 5 L. G. R. 293, C. A.; *affg.*, [1906] 1 K. B. 605.

Annotations:—Refd. *Martins v. Fowler*, [1926] A. C. 746. *Mentd.* *Salt Union v. Brunner, Mond*, [1906] 2 K. B. 822; *Graigola Morthyr Co. v. Swansea Corpn.*, [1928] Ch. 31.

598. —.]—This Act must be construed as a whole. Each part as it bears upon & affects every other & should its language in any part of it not be clear & unambiguous, one must search in the preamble for a guide to the meaning of the obscure provisions (LORD ATKINSON).—*THOMSON v. ST. CATHARINE’S COLLEGE, CAMBRIDGE (MASTER & FELLOWS), ST. CATHARINE’S COLLEGE, CAMBRIDGE (MASTER & FELLOWS) v. THOMSON, MAPPIN’S MASBRO’ OLD BREWERY v. THOMSON, ST. CATHARINE’S COLLEGE, CAMBRIDGE (MASTER & FELLOWS) v. ROSSE (DOWAGER COUNTESS)*, [1919] A. C. 468; 88 L. J. Ch. 163; 120 L. T. 481; 35 T. L. R. 228; 63 Sol. Jo. 264, II. L.

Annotations:—Mentd. *Welldon v. Butterley Co.*, [1920] 1 Ch. 130; *Consett Industrial & Provident Soc. v. Consett Iron Co.*, [1922] 2 Ch. 135.

(d) Control of Enacting Part.

599. Whether enacting part controlled.] —*BARKER v. REDDING* (1627), Palm. 485; W. Jo. 163; 81 E. R. 1183.

Annotations:—Refd. *R. v. Athos* (1723), 8 Mod. Rep. 135; *Ryall v. Rowles* (1750), 1 Ves. Sen. 318. *Mentd.* *Crane v. London Dock Co.* (1864), 6 B. & S. 313; *Moran v. Pitt* (1873), 42 L. J. Q. B. 47.

600. —.]—*L’APOSTRE v. LE PLAISTRIER* (1708), cited in 1 P. Wms. at p. 318; 24 E. R. 406.

Annotations:—Apprvd. *Ryall v. Rolle* (1749), 1 Atk. 165. *Consd.* *West v. Skip* (1749), 1 Ves. Sen. 239. *Mentd.* *Scott v. Surman* (1712), Willes, 400; *Taylor v. Plumer* (1815), 3 M. & S. 562; *Re Sinclair, Ex p. Chaplin* (1884), 53 L. J. Ch. 732.

601. —.]—I can by no means allow of the notion that the preamble shall restrain the operations of the enacting clause (LORD COWPER, C.).—*COPEMAN v. GALLANT* (1716), 1 P. Wms. 314; 24 E. R. 404, L. C.

Annotations:—Consd. *Ryall v. Rolle* (1749), 1 Atk. 165; *Edwards v. Hodges* (1855), 15 C. B. 477; *Drummond v. Drummond* (1866), 2 Ch. App. 32. *Refd.* *West v. Skip* (1749), 1 Ves. Sen. 239. *Mentd.* *Scott v. Surman* (1742), Willes, 400; *Collins v. Forbes* (1789), 3 Term Rep. 316; *Taylor v. Plumer* (1815), 3 M. & S. 562; *Re Kidder, Ex p. Burbridge* (1835), 1 Deac. 131; *Re Sinclair, Ex p. Chaplin* (1884), 53 L. J. Ch. 732.

602. —.]—Enacting words, if they take in the mischief, shall be extended for that purpose,

PART III. SECT. 2, SUB-SECT. 8.—
B. (d).

599 i. Whether enacting part controlled.]—A rule of construction is that the enacting words of a statute may be carried beyond the preamble, if words be found in the former strong enough

for the purpose.—*CHINNA AIYAN v. MAHOMED FAKR-U-DIN SAIB* (1865), 1 Mad. 322.—IND.

599 ii. —.]—Where the enacting sects. of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation or to cut them down.—*R. v. INDARJIT* (1889),

I. L. R. 11 All. 262.—IND.

599 iii. —.]—Where the enacting part of a statute is not exactly co-extensive with the preamble, the former, if expressed in clear & unequivocal terms, will override the latter.—*RAJ MAL v. HARNAM SINGH* (1927), I. L. R. 9 Lah. 260.—IND.

though the preamble to the statute does not warrant it.—*BASSET v. BASSET* (1744), 3 Atk. 203 ; 26 E. R. 918, L. C.

Annotations.—*Apld.* *St. Peter, York v. Middleborough* (1827), 2 Y. & J. 196. *Mentd.* *Campbell v. Leach, Leach & Thomas v. Campbell* (1775), Amb. 740 ; *Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357 ; *Goodall v. Gawthorne* (1854), 2 W. R. 680 ; *Greenaway v. Hart* (1854), 14 C. B. 340 ; *Richards v. Richards* (1860), John. 751 ; *Re Wilmer's Trusts, Moore v. Wingfield*, [1903] 1 Ch. 874.

603. —.]—It is certain that the preamble of a statute cannot restrain the enacting part of it where the enacting part is clearly larger than the preamble (LORD MANSFIELD, C.J.).—*PERKINS v. SEWELL* (1768), 1 Wm. Bl. 654 ; 96 E. R. 380.

Annotations.—*Apld.* *Williams v. Beaumont* (1833), 10 Bing. 260. *Mentd.* *Robinson v. Giffard*, [1903] 1 Ch. 873 ; *A.-G. v. Ritchmond* (No. 2), [1907] 2 K. B. 910.

604. —.]—The preamble cannot control the enacting part of a statute, which is expressed in clear & unambiguous terms (BULLER, J.).—*CRESPIGNY v. WITTENOOM* (1792), 4 Term Rep. 790 ; 100 E. R. 1304.

Annotations.—*Consd.* *Hughes v. Chester & Holyhead Ry.* (1861), 1 Drew. & Sm. 524. *Mentd.* *Hutton v. Lewis* (1794), 5 Term Rep. 639 ; *Bunn v. Guy* (1803), 1 Smith, K. B. 1 ; *Horn v. Horn* (1806), 7 East, 529 ; *Brown v. Douthwaite* (1816), 1 Madd. 446 ; *Blake v. Attersoll* (1821), 2 B. & C. 875 ; *Hicks v. Keats* (1825), 3 L. J. O. S. K. B. 145 ; *Cumberland v. Kelley* (1832), 3 B. & Ad. 602.

605. —.]—If the enacting part of a statute will bear only one interpretation, the preamble shall not confine it ; if doubtful, the preamble may be applied to throw light upon it.—*MASON v. ARMITAGE* (1806), 13 Ves. 25 ; 33 E. R. 204, L. C.

Annotations.—*Consd.* *Hughes v. Chester & Holyhead Ry.* (1861), 1 Drew. & Sm. 524. *Mentd.* *Day v. Wells* (1861), 30 Beav. 220.

606. —.]—The preamble of an Act of Parliament though it may assist ambiguous words, cannot control a clear & express enactment.—*LEES v. SUMMERSGILL* (1811), 17 Ves. 508 ; 34 E. R. 197.

Annotations.—*Consd.* *Hughes v. Chester & Holyhead Ry.* (1861), 1 Drew. & Sm. 524. *Refd.* *Brett v. Brett* (1826), 3 Add. 210 ; *Emanuel v. Constable* (1827), 3 Russ. 436. *Mentd.* *Doe d. Taylor v. Mills* (1833), 1 Mood. & R. 288.

607. —.]—I confess I am not for restraining the generality of the enacting clause by the preamble, without some reason for it (LORD ELLENBOROUGH, C.J.).—*TRUEMAN v. LAMBERT* (1815), 4 M. & S. 234 ; 105 E. R. 821.

Annotations.—*Consd.* *Kearns v. Cordwainers Co.* (1859), 6 C. B. N. S. 388. *Mentd.* *Ranson v. Dundas* (1836), 3 Bing. N. C. 123.

608. —.]—*GILL v. DUNLOP*, No. 567, *ante*.

609. —.]—*EMANUEL v. CONSTABLE*, No. 585, *ante*.

610. —.]—(1) In construing Acts of Parliament, the ct. must take into consideration not only the language of the preamble, or of any particular clause, but of the whole Act ; & if in some of the enacting clauses expressions are found of more extensive import than in others, or than in the preamble, the ct. will give effect to those more extensive expressions, if, upon a view of the whole Act, it appears to have been the intention of the legislature that they should have effect.

In construing such local Acts of Parliament, we are to look not at the preamble, or at the words of any one particular clause, alone, but at the language of the whole ; & if in the preamble, or in any one clause, we find expressions less large & extensive than we find in other parts, & upon a view of the whole we can see that the larger & more extensive expressions used in other parts best show what the intention of the legislature was ; then it is our duty to give effect to the larger expressions, notwithstanding the more limited phrases which may be found in other places. We must look at the whole Act, & form our judgment upon it as a whole (LORD TENTERDEN, C.J.).

(2) I consider it an established & highly useful rule, in the construction of all Acts of Parliament of a local & personal nature, to require that the parties soliciting an Act of Parliament should state in it plainly, & distinctly & unequivocally, what they mean, in order that the public on the one hand, & the legislature on the other, may not be taken by surprise, & may not be left in doubt as to the object & effect of the enactment (BAYLEY, J.).—*DOE d. BYWATER v. BRANDLING* (1828), 7 B. & C. 643 ; 1 Man. & Ry. K. B. 600 ; 6 L. J. O. S. K. B. 162 ; 108 E. R. 863.

Annotation.—*As to* (1) *Refd.* *R. v. O'Connell* (1843), 1 L. T. O. S. 248.

611. —.]—(1) The recitals in the disabling statute do not limit the force of the subsequent enactments to cases in which the mischief by the alienation is done to the personal interest of the successor of the alienor ; for it is evident from the enactment that the legislature intended to apply the prohibition to the case of persons who were seised either as mere trustees, or in a great measure as trustees, & among other persons to the master or guardian of an hospital.

(2) It is by no means unusual in construing a remedial statute, to extend the enacting words beyond their natural import & effect, in order to include cases within the same mischief.

(3) The present case is not only within the words of the statute but also within its equity, & it would be a very inconvenient principle of construction, to impair the combined effect of these united circumstances, by the narrow expressions of the preamble (ALEXANDER, C.B.).—*YORK (DEAN & CHAPTER) v. MIDDLEBURGH* (1828), 2 Y. & J. 196 ; 148 E. R. 888.

612. —.]—In construing an Act of Parliament if the intention of the enacting clause be doubtful the language of the preamble is often material, but it will not control the operation of the enacting clause when the language of the enacting clause is clear (BOSANQUET, J.).—*WILLIAMS v. BEAUMONT* (1833), 10 Bing. 260 ; 3 Moo. & S. 705 ; 3 L. J. C. P. 31 ; 131 E. R. 904.

Annotations.—*Mentd.* *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 87 ; *South Hetton Coal Co. v. North Eastern News Assocn.*, [1894] 1 Q. B. 133.

613. —.]—*SMITH v. PRESTON*, No. 530, *ante*.

614. —.]—(1) Whenever a statute means to include bodies politic & corporate, it always mentions them in its provisions (LORD ABINGER, C.B.).

(2) The general rule is, that the preamble may extend, but cannot restrain, the effect of a particular clause (LORD ABINGER, C.B.).—*WALKER v. RICHARDSON* (1837), 2 M. & W. 882 ; *Murph. & H.* 251 ; 6 L. J. Ex. 229 ; 150 E. R. 1016.

Annotations.—*As to* (1) *Refd.* *Re Royal Naval School, Seymour v. Royal Naval School*, [1910] 1 Ch. 806. *As to* (2) *Apld.* *Kearns v. Cordwainers' Co.* (1859), 6 C. B. N. S. 388. *Generally, Mentd.* *A.-G. v. Glyn* (1841), 12 Sim. 84 ; *Lyon v. Reed* (1841), 13 M. & W. 285 ; *Nickells v. Atherstone* (1817), 10 Q. B. 914 ; *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713 ; *Myers v. Perigal* (1851), 11 C. B. 90 ; *Davison v. Gent* (1857), 1 H. & N. 744 ; *Ashton v. Jones* (1860), 28 Beav. 460.

615. —.]—With respect to 14 Geo. 3, c. 48, I admit that the preamble is somewhat comprehensive, but it ought not to control the act itself (PARK, J.).—*MORGAN v. PEBBER* (1837), 3 Bing. N. C. 457 ; 3 Hodg. 3 ; 4 Scott, 230 ; 6 L. J. C. P. 75 ; 1 Jur. 166 ; 132 E. R. 486.

Annotations.—*Refd.* *Salkeld v. Johnstone* (1842), 11 L. J. Ch. 201. *Mentd.* *Wilson v. Story* (1840), 4 Jur. 463 ; *Trott v. Smith* (1844), 12 M. & W. 688.

616. —.]—The meaning of general words in the enactments of a statute restrained by the preamble.—*GRAY v. SOANES* (1838), 1 Will. Woll. & H. 317 ; 2 Jur. 1040.

Sect. 2.—Rules of interpretation: Sub-sect. 8, B. (d) & (e), & C.]

617. —.]—*FELLOWES v. CLAY*, No. 589,

618. —.]—*SALKELD v. JOHNSTON*, No. 119, *ante*.

619. —.]—*R. v. MANCHESTER CORPN.*, No. 575,

620. —.]—It is a general rule, in the construction of statutes, that the preamble may extend, but cannot restrain, the effect of an enacting clause.—*KEARNS v. CORDWAINERS' CO.*, *CORDWAINERS' CO. v. KEARNS* (1859), 6 C. B. N. S. 388; 28 L. J. C. P. 285; 33 L. T. O. S. 271; 5 Jur. N. S. 1216; 141 E. R. 508.

Annotations:—Mentd. *A.-G. v. Thames Conservators* (1862), 1 Hem. & M. 1; *Lyon v. Fishmongers Co. & Thames Conservators* (1876) 1 App. Cas. 662.

621. —.]—A clear & explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained & cut down by the preamble or recital.

It is, however, a well-established rule that effect is to be given to the clear words of an enacting clause, though they may go far beyond the language of the preamble, that is, where the words of an enacting clause are clear & explicit, then their natural & obvious meaning shall not be restricted or cut down by the use of language of less extensive import in the preamble (*CHANNELL, B.*).—*HUGHES v. CHESTER & HOLYHEAD RY. CO.* (1861), 1 Drew. & Sm. 521; 31 L. J. Ch. 97; 9 W. R. 760; 62 E. R. 478; *on appeal*, 3 De G. F. & J. 352, L. J.J.

Annotation:—Mentd. *Lancashire Brick & Terra Cotta Co. v. L. & Y. Ry.* [1902] 1 K. B. 381.

622. —.]—*BAKER v. BILLERICAY UNION GUARDIANS*, No. 578, *ante*.

623. —.]—When we see, from the preamble or recital, that the single object of the sect. was to provide for the one special case of granting licences, the effect of the preamble is to control the enacting part of the sect. (*KEJLY, C.B.*).—*WINN v. MOSSMAN* (1869), L. R. 4 Exch. 292; 38 L. J. Ex. 200; 20 L. T. 672; 33 J. P. 743; 17 W. R. 924.

Annotations:—Mentd. *R. v. West Riding JJ.*, [1900] 1 Q. B. 291; *R. v. Warwickshire JJ.*, [1902] 2 K. B. 101.

624. —.]—The generality of the words “where justices shall refuse to do any act relating to the duties of their office” is controlled by the recital of the sect., & it is only where the justices need protection that the enactment applies (*BLACKBURN, J.*).—*R. v. PERCY* (1873), as reported in L. R. 9 Q. B. 64.

Annotations:—Refd. *R. v. Biron* (1884), 54 L. J. M. C. 77; *R. v. Phillimore* (1881), 14 Q. B. D. 474, n.

625. —.]—(1) The practice is so uncertain as to the marginal notes that it cannot be laid down that they are always on the Roll, but the title of the Act is always on the Roll (*JESSE, M.R.*).

(2) I do not think that the preamble can be taken to have cut down the express provisions of the statute (*BOWEN, L.J.*).—*SUTTON v. SUTTON* (1882), 22 Ch. D. 511; 52 L. J. Ch. 333; 48 L. T. 95; 31 W. R. 369, C. A.

Annotations:—As to (1) *Apld.* *Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242; *De Beauvals v. Green* (1906), 22 T. L. R. 816. *Generally, Mentd.* *Fearnside v. Flint* (1883), 22 Ch. D. 579; *Re Powers, Lindsell v. Phillips* (1885), 30 Ch. D. 291; *Firth v. Slingsby* (1888), 58 L. T. 481; *Re Frisby, Allison v. Frisby* (1889), 43 Ch. D. 106; *Re Turner, Turner v. Spencer* (1894), 43 W. R. 153; *Re England, Steward v. England*, [1895] 2 Ch. 820; *Kibble v. Fairthorne*, [1895] 1 Ch. 219; *Barnes v. Glenton*, [1899] 1 Q. B. 885; *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *Kirkland v. Peatfield*, [1903] 1 K. B. 756;

Hervey v. Wynn (1905), 22 T. L. R. 93; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330; *Shaw v. Crompton*, [1910] 2 K. B. 370; *Re Turner, Klaffenberger v. Groombridge*, [1917] 1 Ch. 422; *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440; *Re Jauncey, Bird v. Arnold*, [1926] Ch. 471; *Weld v. Petro* (1928), 97 L. J. Ch. 399.

626. —.]—*CHILTON v. PROGRESS PRINTING & PUBLISHING CO.*, No. 564, *ante*.

627. —.]—On behalf of the corpn. & the trustees, who are both resps. in the case, it was contended that sect. 11 only applies to property belonging to or vested in the corpn. which would escape liability to probate, legacy, or succession duty within the recital; but in my view the language in the recital must be read in contradistinction to the language in the enacting sect., which does not refer, as the recital does, to “certain property,” but to “all real & personal property”; & the enacting part of it therefore, in my view, brings in all real & personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period in question (*HORRIDGE, J.*).—*A.-G. v. LONDON CORPN.*, [1913] 1 K. B. 201; 82 L. J. K. B. 144; 108 L. T. 250; 29 T. L. R. 126; 6 Tax Cas. 313; *on appeal*, [1913] 2 K. B. 497, C. A.

628. —.]—Where the words of an Act are clear it is not permissible to look at the preamble of the Act as an aid to control the meaning to be given to the provisions of the Act.—*THE CAIRNBAHN*, [1914] P. 25; 83 L. J. P. 11; 110 L. T. 230; 30 T. L. R. 82; 12 Asp. M. L. C. 455, C. A.

Annotations:—Mentd. *The Umona*, [1911] P. 111; *The Cedric*, [1920] P. 193; *The Batavier III* (1925), 134 L. T. 155.

629. —.]—*SAGE v. EICHOLZ*, No. 549, *ante*.

—.]—*Enacting part ambiguous.*—*See* Sub-sect. 8, B. (c) *ii.*, *ante*.

(c) Extension of Enacting Part

630. *Whether preamble may extend enacting part.*—*WALKER v. RICHARDSON*, No. 614, *ante*.

631. —.]—*KEARNS v. CORDWAINERS' CO.*, *CORDWAINERS' CO. v. KEARNS*, No. 620, *ante*.

632. —.]—I must, therefore, read the enactment as corresponding with the express recital of its object; & if I find words that may be carried further, I must read them with reference to the mischief intended to be remedied & to the express recital of the Act (*MALINS, V.-C.*).—*CROWDER v. STEWART* (1880), 16 Ch. D. 368; *sub nom. Re STEWART, CROWDER v. STEWART*, 50 L. J. Ch. 136; 29 W. R. 331.

Annotations:—Refd. *Re Jones, Calver v. Laxton* (1885), 31 Ch. D. 440. *Mentd.* *Re Williams, Holder v. Williams*, [1904] 1 Ch. 52.

633. —.]—*CHELTEMHAM BOROUGH ELECTION CASE, PAKENHAM v. DE FERRIERES*, No. 579, *ante*.

C. Headings of Parts and Sections.

Whether part of framework of statute.—*See* Part II., Sect. 2, sub-sect. 4, *ante*.

634. *Cannot control statute.*—As regards the heading & marginal notes I am of opinion that it is well settled that such headings & marginal notes cannot control the enactment themselves (*LAWRENCE, J.*).—*Re PENRYN'S (LORD) SETTLEMENT TRUSTS, PENRYN v. ROBERTS*, [1923] 1 Ch. 143; 92 L. J. Ch. 145; 128 L. T. 442.

635. *Reference to heading—To assist construction of part—Where part doubtful.*—... the question is, whether sect. 137 [Bkpey. Act, 1849 (c. 106)], may not be construed differently, by reference to the mode recently introduced in

PART III. SECT. 2, SUB-SECT. 8.—C.

635 i. *Reference to heading—To assist construction of part—Where part doubtful.*—The headings of a statute may be referred to, to assist the construction of ambiguous provisions.—*DONLY v. HOLMWOOD* (1880), 4 A. R. 555.—*CAN.*

statutes, namely, by having certain clauses connected by a sort of preamble to each separate class of clauses, which preamble may really operate as part of the statute. The question then is whether the introductory preamble to that set of clauses, beginning with sect. 133, & terminating with sect. 138, is to be read as incorporated with each of those sects. In my opinion it must, in order to ascertain what the meaning of the legislature was; & so reading the statute, there is no difficulty in construing it (POLLOCK, C.B.).—*BRYAN v. CHILD* (1850), 5 Exch. 368; 1 L. M. & P. 429; 19 L. J. Ex. 264; 15 L. T. O. S. 232; 14 Jur. 510.

Annotation:—*Consd. Gowan v. Wright* (1886), 18 Q. B. D. 201.

636. ———.—*]*—*EASTERN COUNTIES & LONDON & BLACKWALL RY. COS. v. MARRIAGE*, No. 61, *ante*.

637. ———.—*]*—Although we may refer to the introductory words of the sect. to put a construction on a doubtful part of the statute, yet if the language of enactment is clear . . . we should not be justified in limiting that sense by the introductory words (KELLY, C.B.).—*LATHAM v. LAFONE* (1867), L. R. 2 Exch. 115; 36 L. J. Ex. 97; 15 L. T. 627; 15 W. R. 453.

638. ———.—*]*—The headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expression, in a sect. ranged under any particular heading.—*HAMMERSMITH & CITY RY. CO. v. BRAND* (1869), L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238; 34 J. P. 36; 18 W. R. 12, H. L.; *reversg. S. C. sub nom. BRAND v. HAMMERSMITH & CITY RY. CO.* (1867), L. R. 2 Q. B. 223, Ex. Ch.

Annotations:—*Appld. Toronto Corp. v. Toronto Ry., Toronto Ry. v. Toronto Corp.*, [1907] A. C. 315. *Distd. Fletcher v. Birkenhead Corp.*, [1907] 1 K. B. 205; *R. v. Fulham Grdus.* (1909), 7 L. G. R. 881. *Refd. City of Glasgow Union Ry. v. Hunter* (1870), L. R. 2 Sc. & Div. 78; *G. W. Ry. v. Smith* (1876), 2 Ch. D. 235; *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437. *Mentd. Smith v. L. & S. W. Ry.* (1870), L. R. 6 C. P. 14; *R. v. Cambrian Ry.* (1871), L. R. 6 Q. B. 422; *Buecleugh v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418; *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 129, n.; *Jones v. Stanstead, Shefford & Chamblay Railroad Co.* (1872), L. R. 4 P. C. 98; *Hopkins v. G. N. Ry.* (1877), 2 Q. B. D. 224; *Smith v. Mid. Ry. & L. & Y. Ry.* (1877), 37 L. T. 221; *R. v. Sheward* (1880), 9 Q. B. D. 741; *Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; *Cale. Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259; *R. v. L. G. Board & Taylor* (1882), 52 L. J. M. C. 4; *Lea Conservancy Board v. Hertford Corp.* (1884), Cab. & El. 299; *L. B. & S. C. Ry. v. Truman* (1885), 11 App. Cas. 45; *Parkdale Corp. v. West* (1887), 12 App. Cas. 602; *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153; *North Shore Ry. v. Pion* (1889), 14 App. Cas. 612; *Holliday v. Wakefield Corp.*, [1891] A. C. 81; *A.-G. v. Met. Ry.*, [1894] 1 Q. B. 384; *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.* (1894), 64 L. J. Ch. 216; *Emsley v. N. E. Ry.*, [1896] 1 Ch. 418; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 611; *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; *Canadian Pacific Ry. v. Parke*, [1899] A. C. 535; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74; *Canadian Pacific Ry. v. Roy*, [1902] A. C. 220; *Dawson v. G. N. & City Ry.*, [1905] 1 K. B. 260; *Edinburgh Water Trustees v. Sommerville* (1906), 95 L. T. 217; *Dibden v. Skirrow*, [1907] 1 Ch. 437; *Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327; *Price's Patent Candle Co. v. L. C. C.*, [1908] 2 Ch. 526; *West v. Bristol*

Tram. Co. (1908), 77 L. J. Q. B. 684; *Grand Trunk Pacific Ry. v. Fort William Land Investment Co.*, [1912] A. C. 221; *Board of Agriculture for Scotland v. Plummer*, [1916] 1 A. C. 875; *Coldman v. Hill*, [1919] 1 K. B. 443; *Quebec Ry. Light, Heat & Power Co. v. Vandry*, [1920] A. C. 662; *Rockingham Sisters of Charity v. R.*, [1922] 2 A. C. 315.

639. ———.—*]*—*R. v. LOCAL GOVERNMENT BOARD*, No. 64, *ante*.

640. ———.—*]*—This clause is the last of a fasciculus of which the heading is "Track, etc. & Railways" & such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation (*per* CUR.).—*TORONTO CORPN. v. TORONTO RY. CO.*, *TORONTO RY. CO. v. TORONTO CORPN.*, [1907] A. C. 315; 76 L. J. P. C. 57; 96 L. T. 794; 23 T. L. R. 480, P. C.

641. ———.—Where part clear.]—*LATHAM v. LAFONE*, No. 637, *ante*.

642. ———.—*]*—*FLETCHER v. BIRKENHEAD CORPN.*, No. 597, *ante*.

643. ———.—*]*—Though you may look at a heading, as distinguished from a marginal note which is no part of the Act, you must not allow it to cut down the effect of plain words in the sects. (LORD ALVERSTONE, C.J.).—*R. v. FULHAM GUARDIANS*, [1909] 2 K. B. 504; 78 L. J. K. B. 1081; 7 L. G. R. 881; *sub nom. R. v. FULHAM GUARDIANS, Ex p. LONDON COUNTY COUNCIL*, 101 L. T. 537; 73 J. P. 397, D. C.

644. ———.—*]*—I think that there is no ambiguity in the sect. under consideration & that being so it follows . . . that the sect. must be construed according to its plain terms & that its meaning ought not to be affected by the headings of the Act to which it belongs (SALTER, J.).—*JOHNSTON v. MACONOCHE, Re No. 4, PORCHESTER GATE, PADDINGTON*, [1920] 3 K. B. 417; 89 L. J. K. B. 1045; 36 T. L. R. 650; 18 L. G. R. 435; 84 J. P. Jo. 456, D. C.; *affd. on other grounds*, [1921] 1 K. B. 239, C. A.

645. ———.—*]*—Here the heading "officers" is not such a heading as could be grammatically read into any of the sects. which follow. It seems to their lordships to have been inserted for the purpose of convenience of reference, & not intended to control the interpretation of the clauses which follow. It may be indeed that the fact of a clause being found in a certain group may in some cases possibly throw some light upon its meaning (*per* CUR.).—*UNION S.S. CO. OF NEW ZEALAND v. MELBOURNE HARBOUR TRUST COMRS.* (1884), 9 App. Cas. 365; 53 L. J. P. C. 59; 50 L. T. 337; 5 Asp. M. L. C. 222, P. C.

Annotation:—*Refd. Martins v. Fowler*, [1926] A. C. 746.

646. ———.—*]*—The Marriage Ordinance, 1884, of Southern Nigeria, provided by s. 38 that every marriage already duly celebrated in the Colony by any minister of any religious denomination was to be deemed to have been a valid marriage, & by s. 39 that where any person who before the Ordinance had contracted a marriage "validated hereby" or the issue of such marriage, died intestate after the Ordinance, both the real

645 i. ———.—*]*—*R. v. CURRIE* (1871), 31 U. C. R. 582.—*CAN.*

645 ii. ———.—*]*—*Re RYLEY HOTEL CO.* (1910), 15 W. L. R. 229.—*CAN.*

645 iii. ———.—*]*—The headings prefixed to sects. or sets of sects. in a statute are at most preambles, & cannot be made use of to control the enactments themselves when they are expressed in clear and unambiguous terms.—*STEPHENSON v. PARKDALE MOTORS, WONDERS v. PARKDALE*

MOTORS [1924] 4 D. L. R. 1201; 56 O. L. R. 180.—*CAN.*

645 iv. ———.—*]*—The headings of divisions of a statute are in the nature of preambles, & though not conclusive, will be considered in interpreting sects. included under them.—*Ex p. BOUVY* (No. 3) (1900), 18 N. Z. L. R. 608.—*N.Z.*

645 v. ———.—*]*—*M'EWAN v. PERTH MAGISTRATES* (1905), 7 F. (Ct. of Sess.) 714; 42 Sc. L. R. 456, 12 S. L. T. 846.—*SCOT.*

645 vi. ———.—*]*—*CHOTABHAI v. UNION GOVERNMENT*, [1911] App. D. 13.—*S. AF.*

e. How far part controlled by
—Where an Act of Parliament is divided & cut up into parts or heads, it is *prima facie* to be presumed that those heads were intended to indicate a certain group of clauses relating to a particular subject & the ct. will not hold that a clause in a group relating to one subject-matter was intended to apply to some other subject-matter

2.—*Rules of interpretation: Sub-sect. 8, C., D., E., F. & G. (a), (b) & (c).]*

& personal estate of the intestate were to be distributed according to the law of England as to the distribution of the personal estate of intestates. The heading to s. 38 was "Marriages already celebrated," that to s. 39 "Succession to Intestates' Property":—*Held*: s. 39 did not apply in the case of a marriage which was valid apart from s. 38 as well as under it, the words "validated hereby" being less wide than "declared hereby to be valid"; that construction was supported by a consideration of the headings to the sects., which might be regarded as preambles to the provisions following them.—*MARTINS v. FOWLER*, [1926] A. C. 746; 95 L. J. P. C. 189; 135 L. T. 582, P. C.

D. Marginal Notes.

Whether part of framework of statute.]—*See* Part II., Sect. 2, sub-sect. 6, *ante*.

647. Cannot control statute.]—*Re* PENRHYN'S (LORD) SETTLEMENT TRUSTS, *PENRHYN v. ROBERTS*, No. 634, *ante*.

648. May be referred to.]—Although it is not allowed to refer to the marginal reference in construing the clauses in an Act of Parliament, yet one may do so in considering the general sense in which words are used (*CLEASBY, B.*).—*SHEFFIELD WATERWORKS CO. v. BENNETT* (1872), L. R. 7 Exch. 409; 41 L. J. Ex. 233; 27 L. T. 199; 21 W. R. 74; *on appeal* (1873), L. R. 8 Exch. 196.

Annotations—*Refd.* *Smith v. Birmingham Corpn.* (1883), 11 Q. B. D. 195; *Mackworth v. Hellard*, [1921] 2 K. B. 755. *Mentd.* *Dobbs v. Grand Junction Waterworks Co.* (1882), 9 Q. B. D. 151; *Warrington Waterworks Co. v. Longshaw* (1882), 9 Q. B. D. 145; *Bristol Waterworks Co. v. Uren, Uren v. Bristol Waterworks Co.* (1885), 15 Q. B. D. 637; *Rose v. Watson*, [1894] 2 Q. B. 90; *Wilkinson v. Bury Water Board* (1905), 92 L. T. 417.

649. —.]—*Re* VENOUR'S SETTLED ESTATES *VENOUR v. SELLON*, No. 73, *ante*.

E. Illustrations to Sections.

650. Relevant in construing section—Unless repugnant to section.]—Illustrations appended to sects. of a statute should be accepted, if that can be done, as being of relevance & value in con-

dealt with in the Act unless it is perfectly clear that it was so intended.—*Re* COMMERCIAL BANK OF AUSTRALIA (1893), 19 V. L. R. 333.—**AUS.**

f. —.]—*WOOD v. HURL* (1880), 28 Gr. 146.—**CAN.**

g. —.]—A general heading cannot limit the effect of general words used in following sects.—*STONE v. ATKINSON* (CUSTOMS COMR.) (1883), 2 N. Z. L. R. C. A. 90.—**N.Z.**

PART III. SECT. 2, SUB-SECT. 8.—D.

h. *Whether referred to.]—**R. v. MAC-KAY* (Alta.), [1918] 1 W. W. R. 945, 40 D. L. R. 37; 29 Can. Crim. Cas. 191.—**CAN.**

k. —.]—The margined note to an Act, not being part of the Act, cannot aid in its interpretation.—*WELLINGTON CORPN. v. COMPTON* (1915), 35 N. Z. L. R. 779.—**N.Z.**

l. —.]—Marginal notes cannot control the interpretation to be placed upon the context of an Act of Parliament.—*R. v. MANDALAZA*, [1912] C. P. D. 231.—**S. AF.**

m. —.]—It is permissible in trying to ascertain the gist of a section of an Act, to look at the marginal note.—*Er p. BADAT* (1927), 48 N. L. R. 435.—**S. AF.**

PART III. SECT. 2, SUB-SECT. 8.—E.

650 i. Relevant in construing section—

struing the text; they should only be rejected as repugnant to the sect. as the last resort of construction.—*MAHOMED SYEDOL ARIFFIN v. YEOH OOI GARK*, [1916] 2 A. O. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 673, P. C.

F. Schedules.

651. Combined construction of Act & schedule.]

—It seems to me there are two principles or rules of interpretation which ought to be applied to the combination of Act & schedule. If the Act says that the schedule is to be used for a certain purpose & the heading of the part of the schedule in question shows that it is *prima facie* at any rate devoted to that purpose, then you must read the Act & the schedule as though the schedule were operating for that purpose, & if you can satisfy the language of the sect. without extending it beyond that purpose you ought to do it. But if in spite of that you find in the language of the schedule words & terms that go clearly outside that purpose, then you must give effect to them & you must not consider them as limited by the heading of that part of the schedule or by the purpose mentioned in the Act for which the schedule is *prima facie* to be used. You cannot refuse to give effect to clear words simply because *prima facie* they seem to be limited by the heading of the schedule & the definition of the purpose of the schedule contained in the Act (*LORD STERNDAL, M.R.*).—*INLAND REVENUE COMRS. v. GITTUS*, [1920] 1 K. B. 563; 89 L. J. K. B. 313; 122 L. T. 444; 36 T. L. R. 151; 64 Sol. Jo. 208 C. A.; *on appeal*, *sub nom. GITTUS v. INLAND REVENUE COMRS.*, [1921] 2 A. C. 81, H. L.

Annotations—*Refd.* *Robbins v. I. R. Comrs.*, [1920] 1 K. B. 51. *Mentd.* *Wankle Colliery Co. v. I. R. Comrs.*, [1922] 2 A. C. 51; *Birt, Potter & Hughes v. I. R. Comrs.* (1927), 12 Tax Cas. 976.

G. Other Sections.

(a) In General.

652. Use as aid to construction.]—If it be doubtful whether a statute declaring an act, instrument, or contract void makes it voidable only, another clause in the same statute imposing a penalty on such act, instrument, or contract,

it be confined to that of the statute itself.—*OVERSEERS OF THE POOR v. CHASE* (1896), 28 N. S. R. (16 R. & G.) 314.—**CAN.**

p. —.]—*FLEMING v. RAINEY* (1901), 24 N. Z. L. R. 158.—**N.Z.**

q. —.]—*JACOBS v. HART* (1900), 2 F. (Cl. of Sess.) (J) 33; 37 Sc L. R. 618; 7 S. L. T. 425.—**SCOT.**

r. —.]—It is a cardinal principle of construction, that where there is a conflict between the forms given in a sched. to a statute & the enacting part of the statute, the forms must give way to the enacting part.—*SHORE v. CUNNINGHAM*, [1917] 2 I. R. 360.—**IR.**

t. —.]—*Agreement in schedule repugnant to section.]—**VICTORIA CORPN. v. BRITISH COLUMBIA ELECTRIC Ry. Co.* (1910), 13 W. L. R. 336; 15 B. C. R. 43.—**CAN.**

PART III. SECT. 2, SUB-SECT. 8.—G. (a).

652 i. Use as aid to construction.]—The divisions of a statute, under which the clauses are arranged & classified, may be looked to as affording a key to the construction.—*LAWRIE v. RATHBUN* (1876), 38 U. C. R. 255.—**CAN.**

652 ii. —.]—*Re* MACRAE, *Ex p. COOK* (1898), 4 B. C. R. 18.—**CAN.**

*Unless repugnant to section.]—*It is the duty of the ct. to accept if that can be done, illustrations given under a sect. as being of value in the construction of the text; it would require a special case to warrant their rejection on the ground of repugnancy with the sect.—*DURGA PRIYA CHOWDHURY v. DURGA PADA ROY* (1927), 1 L. R. 55 Cal. 154.—**IND.**

PART III. SECT. 2, SUB-SECT. 8.—F.

651 i. Combined construction of Act & schedule.]—*HORSFALL v. SUTHERLAND* (1898), 31 N. S. R. (19 R. & G.) 471.—**CAN.**

651 ii. —.]—A sched. appended to a statute & containing a form prescribed thereby while not conclusive as to the meaning of the Act may be looked at to ascertain what the intention of the legislature was in passing it.—*MCDONALD v. BRUNETTE SAW MILL Co., LTD.* (B. C.), [1922] 1 W. W. R. 1163; 31 B. C. R. 77.—**CAN.**

n. *Conflict between section & schedule.]—*Words printed on a sched. to an Act of Parliament, & which appear to contradict the body of the Act, are to be rejected as of no effect.—*HOUGHTON'S CASE* (1877), 1 B. C. R. pt. 189.—**CAN.**

o. —.]—Where the form given in the schedule to a statute is not in conformity with the statute the form must give way, or the construction of

is a clear test that it is *ipso facto* void.—*Gye v. Felton* (1813), 4 Taunt. 876; 128 E. R. 577.

Annotation:—*Mentd.* *Stewart v. Lawton* (1823), 1 Bing. 374.

653. — Cumulative clauses.—One argument was this, it is a rule in construing Acts of Parliament so to construe every clause that the others shall not be in operation, is that to say that these clauses shall be cumulative if you expound the second so as to embrace this case. That may be so. But if the sense of a particular clause be clear & manifest I should conceive it to be by much the safer course to hold that the legislature did mean two clauses to be cumulative than to say that one is not to be construed as the legislature has expressed it because if you so construe it the other will be cumulative (*ALEXANDER, C.B.*).—*A.-G. v. Jefferys* (1824), as reported in *M'Cle.* 270; 118 E. R. 114.

654. — .]—*FERMOY PERRAGE CLAIM*, No. 397, *ante*.

655. — Subsequent clause restricting meaning.—*NUTH v. TAMPLIN*, No. 519, *ante*.

656. — .]—*NATIONAL TELEPHONE CO., LTD. v. POSTMASTER-GENERAL*, No. 539, *ante*.

657. Clause rejected as surplusage.—Those sects. were probably, or possibly, not put in when the Act was formed but have come into the Acts in this way: Those who have been in either House of Parliament know full well what occurs when a Bill is in Committee. Someone wishes a particular point to be made quite clear, & he asks that a certain sect. or certain words shall be inserted. Then it is said, "We do not need it, because the general words cover it." The answer is "If the general words cover it, why should we not have the sect. to make it clear?" The Minister in charge of the Bill, following expediency, sooner than continue the discussion says, "You shall have the clause," & then that clause is produced afterwards, before those who have to deal with the matter judicially, as a proof that the first clause is to be done away with, or that its principle is to be done away with. I admit that it is a very unfortunate position that the judges are placed in; but before the express words of a statute can be altered so as to have a different meaning that alteration ought to be clearly expressed (*LORD JAMES*).—*GARBUTT v. DURHAM JOINT COMMITTEE*, [1906] A. C. 291; 75 L. J. K. B. 459; 94 L. T. 525; 70 J. P. 265; 54 W. R. 596; 4 L. G. R. 647, H. L.

Annotation:—*Mentd.* *Kydd v. Liverpool Watch Committee*, [1908] A. C. 327.

See No. 680, *post*.

(b) General and Particular Sections.

See Sub-sect. 13, *post*.

(c) Inconsistent Sections.

658. Consistent construction adopted if possible.—In construing Acts of Parliament it is a safe rule to follow the very words of the Act, unless so strict an interpretation be irreconcilable with other clauses, or be contrary to the general intent of the Act, or be inconsistent with some established principle of law, which it may be supposed it was not intended to interfere with (*LITTLEDALE, J.*).—*GILES v. GROVER* (1832), 9 Bing. 128; 6 Bli. N. S.

652 iii. — .]—When an Act is divided into sects. & rules, the proper canon of interpretation is that the sects. lay down general principles & the rules provide the means by which they are to be applied, & they cannot be otherwise applied.—*NABIN CHANDRA TRIPATI v. PRANKRISHNA DE* (1913),

I. L. R. 41 Calc. 108.—*IND.*

a. Reference to repealed portion of Act.—It is proper to look at the repealed portion of an Act in construing what remains of the Act.—*WINNIPEG ELECTRIC RY. CO. v. DELISLE*, [1921] 3 W. W. R. 815; 31 Man. L. R. 355.—*CAN.*

277; 1 Cl. & Fin. 72; 2 Moo. & S. 197; 6 E. R. 843, H. L.

Annotations:—*Mentd.* *Godson v. Sanctuary* (1832), 4 B. & Ad. 255; *Grove v. Aldridge* (1832), 9 Bing. 428; *Balmo v. Hutton* (1833), 9 Bing. 471; *R. v. Maberley* (1834), 4 Tyr. 345; *Garland v. Carlisle* (1837), 11 Bli. 421; *Grainger v. Hill* (1838), 5 Scott, 561; *R. v. Archdall* (1838), 2 J. P. 486; *Woodland v. Fuller* (1840), 11 Ad. & El. 859; *Doe d. Hughes v. Jones* (1812), 9 M. & W. 372; *Playfair v. Musgrove* (1845), 14 M. & W. 239; *Whitworth v. Gaugain* (1846), 1 Ph. 728; *Bothamley v. Heyward* (1862), 8 Jur. N. S. 1156; *Re Johnson, Ex p. Rayner* (1872), 41 L. J. Bey. 26; *Re Clarke*, [1898] 1 Ch. 336.

659. — .]—It is in my opinion so important for the ct., in construing modern statutes, to act upon the principle of giving full effect to their language & of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a sect., which is within its words, but clear & unambiguous evidence that so to do is to fulfil the general intent of the statute; & also that to adhere to the literal interpretation is to decide inconsistently with other & overruling provisions of the same statute. When the evidence amounts to this, the ct. may properly act upon it, for the object of all rules of construction being to ascertain the meaning of the language used, & it being unreasonable to impute to the legislature inconsistent intents upon the same general subject, what it has clearly said in one part must be the best evidence of what it has intended to say in the other; & if the clear language be in accordance with the plain policy & purview of the whole statute, there is the strongest reason for believing that the interpretation of a particular part, inconsistently with that, is a wrong interpretation. The ct. must apply in such a case the same rules which it would use in construing the limitations of a deed; it must look to the whole context, & endeavour to give effect to all the provisions enlarging or restraining, if need be, for that purpose the literal interpretation of any particular part. . . . We are dealing with a statute which has reference, not so much to the common law, as to a large number of previous statutes; that its general intent is in accordance with them, except where it marks out in express language their partial repeal or modification. I find it therefore more difficult to adopt that construction which supposes an intent to repeal them, as to alter important but unspecified provisions, by implication (*COLERIDGE, J.*).—*R. v. POOR LAW COMRS., Re ST. PANCRAS PARISH* (1837), 6 Ad. & El. 1; 1 Nev. & P. K. B. 371; Nev. & P. M. C. 106; Will. Woll. & Dav. 79; 6 L. J. M. C. 41; 1 J. P. 21; 112 E. R. 1.

Annotations:—*Refd.* *R. v. England & Wales Poor Law Comrs., Re Whitechapel Union* (1837), 6 Ad. & El. 34; *R. v. Paynter* (1849), 13 Q. B. 399. *Mentd.* *Re Holborn Union, R. v. England & Wales Poor Law Comrs.* (1838), 6 Ad. & El. 56; *R. v. Poor Law Comrs., Re United Parishes of St. Giles-in-the-Fields & St. George, Bloomsbury, R. v. Poor Law Comrs., Re St. James, Westminster Vestrymen* (1851), 15 Jur. 811; *R. v. St. James, Westminster* (1859), 7 W. R. 739; *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), Ltd., [1924] 1 K. B. 171.

660. — .]—Of course where there are two sects. which according to one construction would be directly opposed to each other & another construction by far the most natural & obvious

PART III. SECT. 2, SUB-SECT. 8.—G. (c)

658 i. Consistent construction adopted if possible.—Where sects. of a statute can be interpreted consistently with each other, such interpretation must be adopted.—*WALKER v. R.*, [1918] Q. S. R. 244.—*AUS.*

Sect. 2.—Rules of interpretation: Sub-sect. 8, G. (c), (d) & (e); sub-sect. 9, A. & B.]

& consistent with the common use of language which would create such inconsistency there is no choice between adopting the one or the other of those constructions (LORD COTTENHAM, C.).—BEARDMER v. LONDON & NORTH WESTERN RY. CO. (1849), 5 Ry. & Can. Cas. 728; 1 H. & Tw. 161; 18 L. J. Ch. 432; 13 Jur. 327; 47 E. R. 1367.

Annotations:—Mentd. L. & N. W. Ry. v. Smith (1849), 13 L. T. O. S. 153; A.-G. v. Tewkesbury & Malvern Ry. (1863), 1 De G. J. & Sm. 423.

661. —.—We ought to endeavour, as far as possible, to reconcile all the provisions of an Act of Parliament, & to give the fullest possible effect to the intention of the legislature, as it can be collected from all the words which are used (COLERIDGE, J.).—BARTON v. BRICKNELL (1850), 13 Q. B. 393; 4 New Sess. Cas. 561; 20 L. J. M. C. 1; 16 L. T. O. S. 212; 15 Jur. 668; 15 J. P. 82; 116 E. R. 1313.

Annotations:—Mentd. Ratt v. Parkinson (1851), 20 L. J. M. C. 208; Haylock v. Sparke (1853), 22 L. J. M. C. 67; Somerville v. Mirehouse (1860), 3 L. T. 291; Pease v. Chaytor (1861), 1 B. & S. 658.

662. —.—An enactment distinct & without exception in itself is not to be controlled or limited by a doubtful implication to be drawn from a previous sect. of the same statute, especially in respect of the prerogatives of the Crown, which are not to be affected, except by distinct enactment.—GOSHAM v. EXETER (BP.), *Ex p. EXETER* (BP.) (1850), 10 C. B. 102; 7 Notes of Cases Supp. LXX.; 19 L. J. C. P. 200; 15 L. T. O. S. 250; 14 Jur. 522; 138 E. R. 41.

663. —.—PRETTY v. SOLLY, No. 832, *post*.

664. —.—It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other (JAMES, L.J.).—EBBS v. BOULNOIS (1875), as reported in 10 Ch. App. 479; 44 L. J. Ch. 691, L. J.J.

Annotations:—Apld. Cholmeley School, Highgate v. Sewell, [1894] 1 Q. B. 906. *Refd.* Imray v. Oakshette, [1897] 2 Q. B. 218. *Mentd.* *Re* Caughey, *Ex p. Ford* (1876), 1 Ch. D. 521; *Re* Pettit's Estate (1876), 1 Ch. D. 478; Meggy v. Imperial Discount Co. (1878), 3 Q. B. D. 711; *Re* Chatterton, *Ex p. Hemming* (1879), 13 Ch. D. 163; *Re* Wainwright, *Ex p. Wainwright* (1881), 19 Ch. D. 140; *Re* Smith, Green v. Smith (1883), 24 Ch. D. 672, *Re* Powell, Powell v. Powell (1904), 20 T. L. R. 374.

665. —.—NATIONAL TELEPHONE CO., LTD. v. POSTMASTER-GENERAL, No. 539, *ante*.

666. Later section overrules former.]—If the two sects. are repugnant the known rule is that the last must prevail (KEATING, J.).—WOOD v. RILEY (1867), as reported in L. R. 3. C. P. 26.

Annotations:—Mentd. Ings v. L. & S. W. Ry. (1868), L. R. 4 C. P. 17; Wood v. Hunt (1868), 16 W. R. 678; R. v. Smith, R. v. Weston, [1910] 1 K. B. 17.

(d) *Exceptions, Provisoes, and Saving Clauses.*
See Sub-sect. 9, *post*.

(e) *Interpretation Clauses.*
See Sect. 3, sub-sect. 2, *post*.

666 i. Later section overrules former.]—When two sects. of an Act conflict, the latter must prevail.—MCKITCHIE v. MORRISON (1886), 19 N. S. R. (7 R. & G.) 66.—CAN.

666 ii. —.—Where two clauses of the same statute, coming into force at the same time, are repugnant, the clause placed last in point of arrangement cannot be held to supersede the other as expressing the latest mind of Parliament.—OTTAWA CORPN. v.

HUNTER (1900), 31 S. C. R. 7 20 C. L. T. 431.—CAN.

666 iii. —.—POTTS v. POTTS (1902), 31 O. R. 452.—CAN.

666 iv. —.—R. v. UNITED SHIP-PERS, LTD. (Ont.) (1923), 40 Can. Crim. Cas. 18.—CAN.

666 v. —.—It is a cardinal principle in the interpretation of a statute that before deciding that one of two apparently inconsistent enactments therein is superfluous, void, or insigni-

SUB-SECT. 9.—CONSTRUCTION OF EXCEPTIONS, PROVISIOES, AND SAVING CLAUSES.

A. Exceptions.

667. Meaning of exception.]—It was objected also that as a general rule of construction an "exception" ought to be something which but for the exception would fall within the primary proposition, & that therefore "conveyance" in s. 51 must be something which comprehends loading, delivery & the like. As a strict grammatical construction this proposition is undeniable. The departure, however, from strict construction required by the view we take is not a violent one (WILLS, J.).—HALL & CO. v. LONDON, BRIGHTON & SOUTH COAST RY. CO. (1885), 15 Q. B. D. 505; 53 L. T. 345; 5 Ry. & Can. Tr. Cas. 28; *on appeal* (1886), 17 Q. B. D. 230, C. A.

Annotations:—Consd. Sowerby v. G. N. Ry. (1891), 60 L. J. Q. B. 467. *Mentd.* Girardot, Flinn v. Mid. Ry. (No. 2), Beeston Brewery Co. v. Mid. Ry. (No. 2) (1885), 5 Ry. & Can. Tr. Cas. 60; Kempson v. G. W. Ry. (1885), 4 Ry. & Can. Tr. Cas. 426; Birchgrove Steel Co. v. Mid. Ry. (1887), 5 Ry. & Can. Tr. Cas. 229; Greenwood v. L. & Y. Ry. (1888), 6 Ry. & Can. Tr. Cas. 39; M. S. & L. Ry. v. Pidcock (1896), 10 Ry. & Can. Tr. Cas. 150; N. E. Ry. v. N. B. Ry. (1897), 10 Ry. & Can. Tr. Cas. 82; A.-G. v. Manchester Corpn., [1906] 1 Ch. 643; A.-G. v. Mersey Ry. (1906), 76 L. J. Ch. 121; L. & Y. Ry. v. Liverpool Corpn., [1915] A. C. 152; Foster v. G. E. Ry. (1920), 37 T. L. R. 268.

668. Duty of court to construe.]—It is not possible to say why the exception was made; but it is made, & must be followed (LORD MANSFIELD).—ATCHESON v. EVERITT (1776), 1 Cowp. 382; 98 E. R. 1142.

Annotation:—Refd. Noble v. Adler (1886), 11 P. D. 158.

669. Construction of.]—The exceptions of a statute shall relate to the day from which the purview takes effect.—R. v. GALL (1698), as reported in 1 Ld. Raym. 370; 91 E. R. 1144.

Annotations:—Mentd. R. v. Pensax (1728), 1 Barn. K. B. 127; R. v. Joakam (1733), 1 Sess. Cas. K. B. 241; Harris v. Rene (1734), 2 Barn. K. B. 420; French v. Cockran (1737), Andr. 25; Garland v. Burton (1738), 2 Stra. 1103; Spencer v. Swannell (1838), 3 M. & W. 154; Greenhow v. Parker (1861), 6 H. & N. 882; Forbes v. Samuel, [1913] 3 K. B. 706.

670. —.—In construing an Act of Parliament, when we find provisions put in by way of precaution not absolutely required, it is by no means necessary to infer that, because these provisions are put in, therefore everything not included in the exception is to be included in the general provision which we find in the Act of Parliament, & which by itself would not include the thing excepted (JESSEL, M.R.).—FRYER v. MORLAND (1876), 3 Ch. D. 675; 45 L. J. Ch. 817; 35 L. T. 458; 25 W. R. 21.

Annotations:—Mentd. A.-G. v. Dowling (1880), 5 Ex. D. 139; Crossman v. R. (1886), 18 Q. B. D. 256; A.-G. v. Montefiore (1888), 21 Q. B. D. 461; A.-G. v. Wolverton, [1896] 2 Q. B. 389; A.-G. v. Brown (1898), 62 J. P. 19; A.-G. v. Hawkins, [1901] 1 K. B. 285.

671. Effect of exception of class of persons.]—Where an Act of Parliament, *ex majore cautela* or otherwise, excludes in plain language from the operation of the Act a class of persons to whom its provisions do not appear to be applicable, such exclusion cannot be held to apply to another class of persons not expressly named.—SMYTH v.

ficant, it shall first be seen whether one is not a qualification of the other, & then, if reconciliation is found impossible, the last must prevail & override the other.—SIKANDAR, KHAN v. BALAND KHAN (1927), L. L. R. 8 Lah. 617.—IND.

PART III. SECT. 2, SUB-SECT. 9.—A

671 i. Effect of exception of class of persons.]—The existence of an exception nominated in the description of an

R., [1898] A. C. 782; 67 L. J. P. C. 129; 79 L. T. 199; 14 T. L. R. 559, P. C.

Annotation:—*Mentd.* *Leaman v. R.* (1920), 36 T. L. R. 835.

672. —.—.]—In the construction of statutes it is not to be assumed that all persons not specifically included in a protecting clause are for that reason alone excluded from the protection of the statute.—*McLAUGHLIN v. WESTGARTH* (1906), 75 L. J. P. C. 117; 94 L. T. 831; 22 T. L. R. 594, P. C.

B. Provisoes and Saving Clauses.

673. Construction of.]—When one finds a proviso to the sect., the natural presumption is that but for the proviso the enacting part of the sect. would have included the subject-matter of the proviso (*LUSH, J.*).—*MULLINS v. SURREY TREASURER* (1880), 5 Q. B. D. 170; 42 L. T. 128; 44 J. P. 456; 14 Cox, C. C. 413, D. C.; *on appeal* (1881), 7 App. Cas. 1, H. L.

Annotation:—*Mentd.* *Mews v. R.* (1882), 8 App. Cas. 339.

674. —.—.]—The proviso, of which, according to the ordinary rules of construction, the effect must be to except out of the earlier part of the sect. something which, but for the proviso, would be within it (*KEKEWICH, J.*).—*DUNCAN v. DIXON* (1890), 44 Ch. D. 211; 59 L. J. Ch. 437; 62 L. T. 319; 38 W. R. 700; 6 T. L. R. 222.

Annotation:—*Mentd.* *Carter v. Silber* (1892), 66 L. T. 473.

675. —.—.] **Saving of Crown rights.]**—(1) A saving clause in a general Act has no operation if it is inconsistent with the express provisions of a subsequent special Act.

(2) *Seemle*: a saving clause in an Act of Parliament in favour of the Crown refers to rights of property or rights in the nature of property which belong to the Crown as Crown property.—*YARMOUTH CORPN. v. SIMMONS* (1878), 10 Ch. D. 518; 47 L. J. Ch. 792; 38 L. T. 881; 26 W. R. 802.

Annotations.—*Generally, Mentd.* *Cole v. Miles* (1888), 57 L. J. M. C. 132; *St. Mary, Islington, Vestry v. Goodman* (1889), 23 Q. B. D. 151.

676. Cannot create new right.]—With respect to the saving clause . . . you cannot out of this saving clause construe any right to be given to the Crown. The right which the Crown had independently of it, & previously to it, is saved & nothing more. The Crown is not to have its right lessened or diminished but nothing whatever is given to the Crown by the saving clause except the mode of ascertaining its rights by petition to the Ct. of Session. As, generally speaking, you cannot raise out of a proviso or exception in a statute any affirmative enactment so you cannot, generally speaking, raise out of a saving clause any affirmative or positive right whatever (*LORD BROUGHAM*).—*LORD ADVOCATE FOR SCOTLAND v. HAMILTON* (1852), 1 Macq. 46, H. L.

Annotations:—*Mentd.* *Ipswich Dock Comrs. v. St. Peter, Ipswich Overseers* (1866), 7 B. & S. 310; *Murphy v. Ryan* (1868), 16 W. R. 678.

677. —.—.]—“Savings” means that it saves all the rights the party previously had, not that it gives him any new rights (*PAGE WOOD, V.-C.*).—*ARNOLD v. GRAVESEND CORPN.* (1856), 2 K. & J. 574; 25 L. J. Ch. 530; 27 L. T. O. S. 97; 20 J. P. 358; 2 Jur. N. S. 703; 69 E. R. 911.

Annotations:—*Apld.* *A.-G. v. Newcastle-on-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492; *Re Thompson, Bedford v. Teal* (1890), 45 Ch. D. 161.

678. —.—.]—A saving clause as a general rule is not intended to give power to a corporation or body to do something which they could not otherwise do, but to prevent the enactment from

interfering with rights already acquired (*COTTON, L.J.*).—*Re THOMPSON, BEDFORD v. TEAL* (1890), 45 Ch. D. 161; 59 L. J. Ch. 689; 63 L. T. 471; 39 W. R. 50; 6 T. L. R. 394, C. A.

Annotations:—*Mentd.* *Re Holmes, Holmes v. Holmes* (1890), 60 L. J. Ch. 267; *Re Pickard, Elmsley v. Mitchell*, [1894] 3 Ch. 704.

679. Whether construed as enacting law.]—The same construction must prevail, I apprehend, in this case, as if the proviso, which has been printed as if incorporated in the second sect., had been, as I think it might with as much or more propriety have been, separated therefrom & made into a different sect. (*HOLROYD, J.*).—*R. v. NEWARK-UPON-TRENT (INHABITANTS)* (1824), 3 B. & C. 59; 4 Dow. & Ry. K. B. 745; 2 Dow. & Ry. M. C. 366; 107 E. R. 656.

Annotation:—*Mentd.* *R. v. Threlkeld* (1832), 1 B. & Ad. 229.

680. —.—.]—(1) If the language of the enacting part of a statute does not contain the provisions which are said to occur in it, those provisions cannot be imported by implication from a proviso (*LORD WATSON*).

(2) I am satisfied that many instances might be given where provisos could be found in legislation that are meaningless because they have been put in to allay fears when those fears were absolutely unfounded & when no proviso at all was necessary to protect the persons at whose instance they were inserted (*LORD PERSCHELL*).—*WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY*, [1897] A. C. 647; 66 L. J. Ch. 726; 77 L. T. 284; 61 J. P. 820; 13 T. L. R. 536, H. L.; *affg.* *S. C. sub nom.* *WEST DERBY UNION GUARDIANS v. METROPOLITAN LIFE ASSURANCE SOCIETY*, *WEST DERBY UNION GUARDIANS v. PRIESTMAN*, [1897] 1 Ch. 335, C. A.

Annotations:—*As to* (1) *Refd.* *Dartford R. C. v. Bexley Heath Ry.* (1897), 67 L. J. Q. B. 231; *Re New River Co. & Metropolitan Water Board* (1901), 68 J. P. 329. *Generally, Mentd.* *Sheffield Corpn. v. Sheffield Electric Light Co.*, [1898] 1 Ch. 203; *A.-G. v. Liverpool Corpn.*, [1922] 1 Ch. 211.

681. —.—.]—It is true that sect. 51 [Railways Clauses (Consolidation) Act, 1845 (c. 20)] is framed as a proviso upon preceding sects. But it is also true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to & not merely qualifying that which goes before (*LORD LOREBURN, C.*).—*RHONDDA URBAN COUNCIL v. TAFF VALE RY. CO.*, [1909] A. C. 253; 78 L. J. K. B. 647; 100 L. T. 713; 73 J. P. 257; 25 T. L. R. 483; 7 L. G. R. 616, H. L.

682. May be treated as surplusage.]—*WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY*, No. 680, *ante*.

See, also, No. 657, *ante*.

683. Construed strictly.]—*WOOLCOMBERS, LTD. v. BRADFORD CORPN.* (1906), 70 J. P. 434; 4 L. G. R. 1038.

684. Construed with enacting part.]—This interpretation makes the enacting part of the sect. & the proviso consistent, & both together to form a complete enactment on the subject. But this view of the statute is made more clear by the proviso which immediately follows (*LORD DENMAN, C.J.*).—*RICKETTS v. BODENHAM* (1836), 4 Ad. & El. 433; 5 L. J. K. B. 102; 111 E. R. 850; *sub nom.* *BODENHAM v. RICKETTS*, 1 Har. & W. 753 6 Nev. & M. K. B. 170.

Annotations:—*Refd.* *Richards v. Dyke* (1842), 3 Q. B. 256; *Pease v. Chaytor* (1863), 3 B. & S. 620; *R. v. Somersetshire JJ.* (1864), 29 J. P. 197; *R. v. Pedler* (1865), 12 L. T. 17. *Mentd.* *Roberts v. Humby* (1837), 3 M. & W. 120; *Re Baines* (1840), Cr. & Ph. 31; *White v. Beard* (1840), 4 J. P. 604; *James v. S. W. Ry.* (1872), L. R. 7 Exch. 287; *Farquharson v. Morgan*, [1894] 1 Q. B. 552.

offence created by statute must be negatived in order to maintain the charge, but if a statute creates an

offence in general with an exception by way of proviso in favour of certain persons or circumstances, the onus is

on the accused to plead & prove himself within the proviso.—*R. v. STRAUSS* (1897), 5 B. C. R. 486.—*CAN.*

Sect. 2.—Rules of interpretation: Sub-sect. 9, B.; sub-sects. 10, 11 & 12, A.]

685. —.]—The proviso must be construed with reference to the preceding parts of the clause to which it is appended (LORD DENMAN, C.J.).—*Ex p. PARTINGTON* (1844), 6 Q. B. 649; 8 Jur. 1167; 115 E. R. 244; *sub nom. Re PARTINGTON*, 14 L. J. Q. B. 57; 4 L. T. O. S. 172.

Annotations:—Consd. R. v. Dibden, [1910] P. 57. **Mentd.** *Re Newlands* (1845), 9 Jur. 199.

686. —.]—We are dealing with a proviso in an enacting clause, which specifies what the ct. is to do in certain cases. We must construe the proviso with reference to the enacting part (COLERIDGE, J.).—*R. v. CROWAN (INHABITANTS)* (1849), as reported in 13 Jur. 1099.

687. —.]—The case rests on the meaning to be given to the precise words of sect. 27, & I quite agree that, if the proviso in sect. 21 stood alone, it would not restrict the operation of sect. 27, but, I think, that when taken in connection with the other sects. of the Act, it does afford some means of ascertaining the intention of the legislature (WIGHTMAN, J.).—*R. v. BELTON* (1848), 11 Q. B. 379; 3 New Sess. Cas. 77; 17 L. J. M. C. 70; 12 J. P. 232; 12 Jur. 392; 116 E. R. 518.

Annotations:—Refd. R. v. Cambridge Union Grdns. (1861), 1 B. & S. 61; *Redheugh Colliery v. Gateshead Assmt. Com.* (1923), 130 L. T. 366. **Mentd.** *R. v. Surrey JJ. Re Abinger* (1852), 16 J. P. 407; *Bowman v. Blyth* (1856), 7 E. & B. 26; *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305; *Ex p. Evans*, [1894] A. C. 16.

688. —.]—I think the proviso is a qualification of the preceding enactment, which is expressed in terms too general to be quite accurate (LORD MACNAGHTEN).—*LOCAL GOVERNMENT BOARD v. SOUTH STONEHAM UNION*, [1909] A. C. 57; 78 L. J. K. B. 124; 99 L. T. 896; 73 J. P. 57; 25 T. L. R. 100; 7 L. G. R. 167, H. L.; *reversg. S. C. sub nom. R. v. LOCAL GOVERNMENT BOARD, Ex p. SOUTH STONEHAM UNION*, [1908] 2 K. B. 368, C. A.

689. —.]—A proviso must be considered with relation to the principal matter to which it stands as a proviso. [It is] dependent on the main enactment (FLETCHER MOULTON, L.J.).—*R. v. DIBDIN*, [1910] P. 57; *sub nom. R. v. DIBDIN, Ex p. THOMPSON*, 79 L. J. K. B. 517; 101 L. T. 722; 26 T. L. R. 150, C. A.; *on appeal, sub nom. THOMPSON v. DIBDIN*, [1912] A. C. 533, H. L.

690. Will not limit express enactment.]—(1) An Act of Parliament is to be construed according to the ordinary & grammatical sense of its language, if there be no inconsistency apparent in its provisions; & a proviso, which, on the face of the Act, is not inconsistent with the other enactments of it, is not to be limited in its effect by reason of local circumstances, not apparent on the face of the Act, causing such inconsistency. But such proviso will not limit an express authority given by the Act.

(2) If the Act, in consequence of local peculiarities, becomes incapable of being carried into effect, is it not reasonable that petitioners for it should suffer for their default, rather than those whose interest it is expressly provided shall be saved harmless? (PARKE, B.).—*SMITH v. BELL* (1842), 10 M. & W. 378; 2 Ry. & Can. Cas. 877; 152 E. R. 517.

691. Effect of repugnancy to body of statute.]—A saving in an Act of Parliament which is repugnant to the body of it, is void.—STROUD'S

CASE (1573), 3 Dyer, 313 a; 1 And. 45; Ben. 237; 73 E. R. 709.

Annotations:—Mentd. Bonham's Case (1610), 8 Co. Rep. 113 b; *Blachly v. Fry* (1695), 1 Salk. 193.

692. —.]—If a saving clause be repugnant to the body of an Act, it is void.—*ALTON WOOD'S CASE, A.-G. v. BUSHOPP* (1600), 1 Co. Rep. 40 b; 76 E. R. 89.

Annotations:—Apld. Riddell v. White (1794), 1 Anst. 281; *Yarmouth Corpn. v. Simmons* (1878), 10 Ch. D. 518. **Mentd.** *Englefield's Case* (1591), 7 Co. Rep. 11 b; *Prince's Case* (1606), 8 Co. Rep. 1 a; *Chandos' Case* (1607), 0 Co. Rep. 55 a; *St. Saviour's, Southwark Case* (1613), 10 Co. Rep. 66 b; *Needler v. Winchester (Bp.)* (1614), Hob. 220; *R. & Waller v. Hanger* (1615), 3 Bulst. 1; *Sheffield v. Ratcliffe* (1615), Hob. 334; *Magdalen College, Cambridge Case* (1616), 11 Co. Rep. 66 b; *Elvis v. York (Archbp.) Taylor & Bishop* (1619), Hob. 315; *Gee v. Freedland* (1626), Cro. Car. 47; *Brockham's Case* (1628), Litt. 128; *Grosso v. Gayer* (1629), Cro. Car. 172; *Collingwood v. Pace* (1661), O. Bridg. 410; *Holland v. Fisher* (1662), O. Bridg. 181; *Bainbridge v. Gardiner* (1665), O. Bridg. 402; *Foot v. Berkley* (1670), 2 Keb. 654; *Thompson v. Leach* (1690), 2 Vent. 195; *R. v. Hornbee* (1691), Freem. K. B. 331; *Symonds v. Cudmore* (1692), Carth. 257; *R. v. London (Bp.) & Lancaster* (1694), 1 Show. 441; *R. v. Chester (Bp.)* (1697), 1 Ld. Raym. 292; *Winter v. Loveday* (1697), 5 Mod. Rep. 378; *Iveson v. Moore* (1698), 1 Salk. 16; *A.-G. v. Allgood* (1743), Park. 1; *R. v. Cotton* (1751), Park. 112; *Alcock v. Cooke* (1829), 2 State, Tr. N. S. 327; *Gledstanes v. Sandwich* (1842), 4 Man. & G. 995; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *A.-G. v. Hallett* (1847), 1 Exch. 211; *Nickels v. Ross* (1849), 8 C. B. 679; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856; *A.-G. v. British Museum Trustees* (1903), 72 L. J. Ch. 743; *Liverpool & North Wales S.S. Co. v. Mersey Trading Co.*, [1908] 2 Ch. 460.

693. —.]—Proviso of a statute repugnant to the purview, is a repeal.—*A.-G. v. CHIELSEA WATERWORKS CO.* (1731), Fitz-G. 195; 91 E. R. 716.

Annotation:—Apld. R. v. Middlesex JJ. (1831), 2 B. & Ad. 818.

694. —.]—(1) The saving clause in the Act of Parliament in this case, has been argued to destroy the effect of the prior enacting clause, which frees the lands in question from payment of tithes. We are of opinion, that it cannot have that force. It falls within the general rule that a saving repugnant to the purview of the instrument is void (*per CUR.*).

(2) In mere private Acts, where at the prayer of A., B. and C. the legislature confirm their contract the enactment is understood to be merely the conveyance of the parties, & is only binding on them (*per CUR.*).—*RIDDILL v. WHITE* (1793), 1 Anst. 281; 4 Gwill. 1387; 145 E. R. 873.

Annotation:—As to (2) Consd. Dawson v. Paver (1817), 5 Hare, 415

695. Repugnancy to subsequent special Act.]—*YARMOUTH CORPN. v. SIMMONS*, No. 675, *ante*.

SUB-SECT. 10.—CONSTRUCTION WITH REFERENCE TO STATUTORY RULES.

696. How far available.]—I do not think that the construction of the Act can be altered or affected by any general order (TURNER, L.J.).—*Re SHUTTLE, Ex p. GODDEN* (1862), 1 De G. J. & Sm. 260; 1 New Rep. 151; 32 L. J. Bcy. 37; 7 L. T. 608; 11 W. R. 158; 46 E. R. 105, L. J.J.

Annotations:—Mentd. Re Llewellyn (1862), 1 New Rep. 230; *Berridge v. Abbott* (1863), 13 C. B. N. S. 507; *Dewhurst v. Kershaw* (1863), 1 H. & C. 726; *Hodgson v. Wightman* (1863), 1 H. & C. 810; *Ilderton v. Castrique* (1863), 14 C. B. N. S. 99; *King v. Randall* (1863), 14 C. B. N. S. 721; *Re Smith's Trust Deed, Ex p. Smith* (1864), 3 De G. J. & Sm. 218; *Turquand v. Moss* (1864), 17 C. B. N. S. 15; *Gregory v. Baillon* (1865), 4 F. & F.

PART III. SECT. 2, SUB-SECT. 9.—B.

691 i. Effect of repugnancy to body of statute.]—A proviso in a statute leaves unaffected the general provisions of the clause on which it is engrafted so far

as they do not conflict with it.—*TESSIER v. KENT* (1849), 3 Nfld. L. R. 136.—NFLD.

b. *Whether construed to enlarge scope of section.]—*A proviso appended to

a sect. is either an explanation or a qualification of the sect. It does not add to, or enlarge the scope of the sect.—*Re BESANT* (1916), 1 L. R. 39 Mad. 1164.—IND.

1069; *Ilderton v. Castrique* (1865), 13 L. T. 566; *Whittaker v. Lowe* (1865), L. R. 1 Exch. 74; *Brooks v. Jennings* (1866), L. R. 1 C. P. 476; *Reeves v. Watts* (1866), 35 L. J. Q. B. 171.

697. —.]—We are of opinion that, where the construction of the Act is ambiguous & doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act (MELLISH, L.J.).—*Re WIER, Ex p. WIER* (1871), 6 Ch. App. 875; 41 L. J. Bcy. 14; 25 L. T. 369; 19 W. R. 1042, L. J.J.

Annotations:—*Expld. Re Green* (1881), 44 L. T. 619. *Mentd. Re Moonen, Ex p. Bouchard* (1879), 12 Ch. D. 26; *Re Powell, Ex p. Powell*, [1891] 2 Q. B. 324.

698. —.]—(1) If & so far as there are direct absolute enactments creating a civil remedy for their breach, the terms on which the penal consequences of such breach may be excused have, in my opinion, no bearing on the civil liability. . . . I doubt if the remission of the penalty has any sufficient bearing on or relation to the civil liability to make it useful or, indeed, admissible as a guide (FARWELL, L.J.).

(2) It would be absurd to give a more direct statutory authority to these special rules than to those actually imposed by Parliament. They are to be read with the general rules as if they were actually inserted by way of addition to sect. 49 [Coal Mines Regulation Act, 1887 (c. 58)], neither abrogating nor overriding, but supplementing (FARWELL, J.).—*WATKINS v. NAVAL COLLIERY Co.* (1897), LTD., [1911] 2 K. B. 162; 80 L. J. K. B. 746; 104 L. T. 439; 55 Sol. Jo. 347, C. A.; *reusd.* on other grounds, [1912] A. C. 693, H. L.

Annotations:—*Generally, Mentd. Pursell v. Clement Talbot* (1914), 111 L. T. 827; *Lennard's Carrying Co. v. Asiatic Petroleum Co.* (1915), 84 L. J. K. B. 1281; *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1920] 3 K. B. 131.

SUB-SECT. 11.—CONSTRUCTION WITH REFERENCE TO RULES OF SUPREME COURT.

699. *When in pari materia.*]—The further question arises whether sect. 28 of Regulation of Railways Act, 1873, is to be construed in the same manner as R. S. C. Ord. 55: it is substantially identical; it gives a power to a judicial tribunal, & therefore it is *in pari materia*; & for these reasons I think that sect. 28 ought to be construed in the same manner as Ord. 55 (BRETT, L.J.).—*Re FOSTER v. GREAT WESTERN RY. Co.* (1882), 8 Q. B. D. 515; 46 L. T. 74; 30 W. R. 398; *sub nom. Re FOSTER v. GREAT WESTERN RY. Co., Ex p. GREAT WESTERN RY. Co.*, 51 L. J. Q. B. 233; 4 Ry. & Can. Tr. Cas. 58, C. A.

Annotations:—*Appld. Re Mills' Estate, Ex p. Works & Public Buildings Comrs.* (1886), 31 Ch. D. 24. *Mentd. Butcher v. Pooler* (1883), 21 Ch. D. 273; *Lambton v. Parkinson* (1887), 35 W. R. 545; *L. C. C. v. Erith Overseers, L. C. C. v. West Ham Union, L. C. C. v. Woolwich Union, L. C. C. v. St. George's Union* (1893), Ryde Rat. App. (1891–93), 382; *Re Barnett & Eccles Corp'n.* (1901), 65 J. P. 757; *Jones v. G. C. Ry.* (1901), 4 W. C. C. 23; *Andrew v. Grove*, [1902] 1 K. B. 625; *Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. Co.* (1905), 93 L. T. 93; *Gray v. Ashburton*, [1917] A. C. 26; *Campbell v. Pollak*, [1927] A. C. 732.

SUB-SECT. 12.—CONSTRUCTION WITH REFERENCE TO OTHER STATUTES.

A. In General.

700. *Later statute within equity of former statute.*]—An Act lately made may be within the

equity of a statute made long since.—*VERNON'S CASE* (1572), 4 Co. Rep. 1a; 76 E. R. 845.

Annotation:—*Appld. Re Bolton Estates, Russell v. Meyrick*, [1903] 1 Ch. 461. *Refd. James v. Tutney* (1639), Cro. Car. 532. *Mentd. Strata Mercella Case* (1591), 9 Co. Rep. 24 a; *Peto v. Checy* (1611), 2 Brownl. 128; *Tyre v. Littleton* (1612), 2 Brownl. 187; *Colt & Glover v. Coventry & Lichfield (Bp.)* (1616), Hob. 140; *R. v. Hampden* (1637), 3 State Tr. 826, 1199; *Fry v. Porter* (1669), 1 Mod. Rep. 300; *Pheasant v. Pheasant* (1670), 1 Cas. in Ch. 181; *Fry's Case* (1672), 1 Vent. 199; *London (Bp.) v. A.-G.* (1691), Show. Parl. Cas. 164; *Klump v. Cruwes* (1695), 2 Lut. App. 1573; *Lane v. Cotton* (1701), 12 Mod. Rep. 472; *Hughes v. Chubb* (1722), 1 Com. 369; *Charles v. Andrews* (1724), 9 Mod. Rep. 151; *A.-G. v. Scott* (1735), Cas. temp. Talb. 138; *Godwin v. Winsmore* (1742), 2 Atk. 525; *Buckinghamshire v. Drury* (1762), Wilm. 177; *Clifford v. Turrell* (1845), 14 L. J. Ch. 390; *Dyke v. Rendall* (1852), 2 De G. M. & G. 209.

701. —.]—Apart from custom, a will had no operation before 32 Hen. 8, c. 1, yet, upon the principle stated in *Vernon's Case*, No. 700, *ante*, that "an Act of late time shall be taken within the equity of an Act made long time before," a jointure under the power conferred upon a tenant in tail by the Act of 1535 could, under the present law, be well created by a testamentary instrument.—*Re BOLTON ESTATES, RUSSELL v. MEYRICK*, [1903] 2 Ch. 461; 72 L. J. Ch. 605; 88 L. T. 851; 52 W. R. 87, C. A.

702. *Construction together if possible.*]—If two statutes can be read together without contradiction, or repugnancy, or absurdity or unreasonableness they should so be read together (BRETT, L.J.).—*R. v. OASTLER & MEWS* (1880), 50 L. J. M. C. 4; *sub nom. R. v. MEWS & OSTLER*, 43 L. T. 403; 45 J. P. 93, C. A.; *on appeal, sub nom. MEWS v. R.* (1882), 8 App. Cas. 339, H. L.

703. —.]—The Act of Parliament having authorised the railway & authorised the use of the existing Thames tunnel, such as it was, for the purpose of the railway, ought not, in my opinion, to be deemed to have been altered or repealed or varied; nor ought any rights given under it to be deemed to have been taken away by the words of a subsequent Act, unless the words of that Act are quite clear. So far as it is possible to construe two Acts of Parliament so as to give full effect to both, I think that it is the duty of the ct. to do it (FARWELL, J.).—*EAST LONDON RY. Co. v. THAMES CONSERVATORS* (1901), as reported in 68 J. P. 302.

Annotations:—*Mentd. Jones v. Llanrwst U. C.*, [1911] 1 Ch. 393; *Fowke v. Berington*, [1914] 2 Ch. 308.

704. *Whether reference permissible.*]—Sometimes whole Acts of Parliament, sometimes groups of clauses of Acts of Parliament, entirely or partially, sometimes portions of clauses are incorporated into later Acts, so that the interpreter has to keep under his eye, or, if he can, bear in his mind, large masses of bygone & not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statute into which they are incorporated; so that you have first to ascertain the meaning of a statute by reference to other statutes, & then to ascertain whether the earlier Acts qualify only or absolutely contradict the later ones, a task sometimes of great difficulty, always of great labour, a difficulty & labour generally speaking wholly unnecessary (MATTHEW, J.).—*KNILL v. TOWSE* (1889), 24 Q. B. D. 186; 59 L. J. Q. B. 136; 62 L. T. 259; 54 J. P. 454; 38 W. R. 382; 6 T. L. R. 123, D. C.; *on appeal* (1890), 24 Q. B. D. 697, C. A.

PART III. SECT. 2, SUB-SECT. 12.

—A.

704 i. *Whether reference permissible.*]—*PARK v. LONG* (1907), 7 W. L. R.

309; 1 Sask. L. R. 31.—CAN.

704 ii. —.]—*Scmble*: the definition of a word in one Act may be used as explanatory of or ancillary to the

definition of that word in another Act.—*COLEMAN CORPN. v. HEAD SYNDICATE*, [1917] 1 W. W. R. 1074; 11 Alta. L. R. 314.—CAN.

Sect. 2.—Rules of interpretation: Sub-sect. 12, A. & B. (a) & (b).]

705. —.]—One statute cannot be an authority for the construction which ought to be placed upon another statute (*per* CUR.).—SMITH v. BAILEY, [1891] 2 Q. B. 403; 60 L. J. Q. B. 779; 65 L. T. 330; 56 J. P. 116; 40 W. R. 28, C. A.

Annotations:—Mentd. Smith v. General Motor Cab Co., [1911] A. C. 188; Kemp v. Elisha, [1918] 1 K. B. 228.

706. —.]—An adjoining owner, in an action under "reverter" sects. to discover possession of disused lands acquired by a railway co. under their Acts of Parliament, must show under which of the Acts the land he claims was so taken, as the land under each Act is subject to its own conditions & incidents.—MACASSEY v. THOMPSON, MACASSEY v. HUSTON (1902), 36 J. L. T. 162, H. L.

Annotation:—Consd. Re Bolton Estates, Russell v. Meyrick (1903), 88 L. T. 851.

707. — Construction of former Act in later Act.]—I will not say it is impossible to ascertain the interpretation of an Act passed in 1817 by reading an Act which was passed in 1871; if the legislature has clearly put a construction on the former Act in the later Act, then for myself I think one may use the later Act (LORD ESHER, M.R.).—GASLIGHT & COKE CO. v. HARDY (1886), 17 Q. B. D. 619; 56 L. J. Q. B. 168; 55 L. T. 585; 35 W. R. 50, C. A.

708. Where statutes not in *pari materia*.]—I decline to consider any other statute proceeding on different lines & including different provisions (LORD HALSBURY, C.).—KNOWLES & SONS, LTD. v. LANCASHIRE & YORKSHIRE RY. CO. (1889), 14 App. Cas. 248; 59 L. J. Q. B. 39; 61 L. T. 91; 54 J. P. 103, H. L.; *affg* S. C. *sub nom.* LANCASHIRE & YORKSHIRE RY. CO. v. KNOWLES (1887), 20 Q. B. D. 391, C. A.

Annotations:—Refd. Chamber Colliery Co. v. Rochdale Canal Co., [1895] A. C. 564; Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co. (1901), 85 L. T. 53. *Mentd.* L. & N. W. Ry. v. Evans, [1892] 2 Ch. 432; A.-G. v. Conduit Colliery Co., [1895] 1 Q. B. 301; New Moss Colliery Co. v. M. S. & L. Ry., [1897] 1 Ch. 725.

709. —.]—INLAND REVENUE COMRS. v. FOREST (1890), 15 App. Cas. 334; 60 L. J. Q. B. 281; 63 L. T. 36; 54 J. P. 772; 39 W. R. 33; 6 T. L. R. 456; 3 Tax Cas. 117, H. L.; *affg* S. C. *sub nom.* RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS (1888), 20 Q. B. D. 621, C. A.

Annotations:—Mentd. Manchester Corpn. v. McAdam, [1896] A. C. 500; Savoy Overseers v. Art Union of London, [1896] A. C. 296; Royal College of Music v. Westminster Vestry, [1898] 1 Q. B. 304; Re Royal College of Surgeons of England, No. 1, [1899] 1 Q. B. 871; Chesterman v. Taxation Federal Comr., [1926] A. C. 128; General Medical Council v. I. R. Comrs., English Branch Council of General Medical Council v. Same (1928), 97 L. J. K. B. 578.

710. —.]—You must . . . not bring into this Act of Parliament authorities upon other Acts of Parliament which were passed . . . for different purposes altogether (LINDLEY, L.J.).—Re GERARD'S (LORD) SETTLED ESTATE, [1893] 3 Ch. 252; 63 L. J. Ch. 23; 69 L. T. 393; 9 T. L. R. 587; 37 Sol. Jo. 648; 7 R. 227, C. A.

Annotations:—Mentd. Re Tucker's S. E., [1895] 2 Ch. 468; Re Wright's S. E. (1900), 83 L. T. 159; Stanford v. Roberts, [1901] 1 Ch. 440; Re De Crespigny's S. E., [1914] 1 Ch. 227.

711. —.]—The decision [referred to by counsel] related to a different ct., a different act, &

a different subject-matter. . . . The learning & the law laid down as to other Acts of Parliament do not conclude the present case (LORD LOREBURN, C.).—KYDD v. LIVERPOOL WATCH COMMITTEE, [1908] A. C. 327; 77 L. J. K. B. 947; 99 L. T. 212; 72 J. P. 395; 24 T. L. R. 772; 6 L. G. R. 903, H. L.

Annotations:—Refd. Lobitos Oilfields v. Admiralty Comrs., Crown S.S. Co. v. Same (1917), 86 L. J. K. B. 1444.

Mentd. Re Carpenter & Bristol Corpn. (1907), 5 L. G. R. 977; R. v. Salford Hundred JJ., [1912] 2 K. B. 567; Piper v. St. Marylebone Licensing JJ., [1928] 1 K. B. 221.

712. —.]—In construing the meaning of a term in an Act of Parliament the ct. will not adopt an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone.—MACBETH & CO. v. CHISLETT, [1910] A. C. 220; 79 L. J. K. B. 376; 102 L. T. 82; 26 T. L. R. 268; *sub nom.* CHISLETT v. MACBETH & CO., LTD., 54 Sol. Jo. 268, H. L.

713. —.]—The guiding & limiting rule is stated by LORD MANSFIELD in R. v. Loxdale, No. 731, *post*. . . . Ere the above rule can be applied however, the ct. must be satisfied that the statutes are in fact in *pari materia* (MCCARDIE, J.).—NICHOL v. FEARBY, NICHOL v. ROBINSON, [1923] 1 K. B. 480; 128 L. T. 662; 87 J. P. 70; 39 T. L. R. 175; 67 Sol. Jo. 335; 21 L. G. R. 157; *sub nom.* NICOL v. FEARBY, SAME v. ROBINSON, 92 L. J. K. B. 280.

Statutes in *pari materia*.]—See Sub-sect. 12, B., *post*.

B. Statutes in *pari materia*.

(a) In General.

714. Whether court entitled to look at earlier statute.]—HUDSON v. PARKER, No. 165, *ante*.

715. —.]—To ascertain what is the meaning of these words in this particular statute, what better means of interpreting them can we have than by looking at statutes passed about the same time in *pari materia* (COLERIDGE, J.).—R. v. CHADWICK (1847), 11 Q. B. 173, 205; Cripps' Church Cas. 34; 17 L. J. M. C. 33; 10 L. T. O. S. 155; 11 J. P. 839; 12 Jur. 174; 2 Cox, C. C. 381; 116 E. R. 441, 452.

Annotations:—Mentd. Fenton v. Livingstone (1859), 33 L. T. O. S. 335; Brook v. Brook (1861), 9 H. L. Cas. 193; R. v. Brighton (1861), 1 B. & S. 417; Re De Wilton, De Wilton v. Montefiore, [1900] 2 Ch. 481; Banister v. Thompson, [1908] P. 362; R. v. Dibdin, [1910] P. 57.

716. —.]—SALKELD v. JOHNSON (OR JOHNSTON), No. 119, *ante*.

717. —.]—The provisions of the several public local Acts with respect to the tolls on different cuts, parts of the same canal, might be compared in order to ascertain the meaning of a clause in the Paddington Act, alleged to create exemptions from toll upon the Paddington cut.—TAME v. GRAND JUNCTION CANAL PROPRIETORS (1856), 11 Exch. 786; 25 L. J. Ex. 222; 20 J. P. 629; 156 E. R. 1049.

718. —.]—We have to construe in this case a statutory proviso applicable to an assessment imposed in terms of the Act of Elizabeth, & I am of opinion that the expressions in the proviso were intended by the legislature & must be taken to have the same meaning which they bear in the older statute (LORD WATSON).—THURSBY v.

7071. — Construction of former Act in later Act.]—A term used in a statute may be interpreted by the meaning given to it in a prior statute.—OTAGO HARBOUR BOARD v. DUNEDIN CORPN. (1881), 3 N. Z. L. R. 293 (S. C.).—N.Z.

of construction arising upon a subsequent statute upon the same branch of law it is legitimate to refer to the former statute.—Re BALDWIN (1891), 12 N. S. W. L. R. (L.) 128; 8 N. S. W. W. N. 39.—AUS.

714 li. —.]—MERCHANTS BANK OF CANADA v. R. (1881), 1 Exch. C. R. 1.—CAN.

c. — Application to penal statutes.]—It would be stretching the principle

of construction in *pari materia* to include a penal provision in another Act, when the legislature has expressly declared the penalty.—NOSEWORTHY v. BOWRING (1885), 7 Nfld. L. R. 78.—NFLD.

d. — Application to private & local Acts.]—The rule of construction that the terms used in a statute may be explained by a reference to the in which the same terms are

PART III. SECT. 2, SUB-SECT. 12.—B. (a).

714 i. Whether court entitled to look at earlier statute.]—Upon a question

729 vii. —.]—M'DONOGH v. BROPHY (1869), I. R. 4 C. L. 485.—IR.

Sect. 2.—Rules of interpretation: Sub-sect. 12, B.
(b), (c), (d), (e) & (f).]

[1907] 1 K. B. 95. **Distd.** *Nichol v. Fearby, Nichol v. Robinson*, [1923] 1 K. B. 480. *As to* (2) **Refd.** *Southampton Dock Co. v. Richards, Same v. Arnett* (1840), 1 Man. & G. 448; *Howard v. Bodington* (1877), 2 P. D. 203. **Generally, Mentd.** *R. v. Newell* (1791), 4 Term Rep. 266; *R. v. Morris* (1792), 4 Term Rep. 550; *Barrs v. Digby* (1805), 1 Bos. & P. N. R. 281; *Walsh v. Southworth* (1851), 16 L. T. O. S. 391.

732. —.] This Act . . . & the Certificate Act . . . ought to be considered together, being *in pari materia* (LORD MANSFIELD).—*R. v. SHENSTON (INHABITANTS)* (1759), Burr. S. C. 474.

Annotations:—**Apld.** *R. v. Croft* (1819), 3 B. & Ald. 171. **Mentd.** *R. v. Halsham* (1831), 9 L. J. O. S. M. C. 93.

733. —.]—*R. v. HOIJAND PALMER*, No. 479, *ante*.

734. —.]—Both statutes are made *in pari materia*; & whatever has been determined in the construction of one of them is a sound rule of construction for the other (BULLER, J.).—*R. v. MASON* (1788), 1 Leach, 487; 2 Term Rep. 581; 100 E. R. 312.

Annotations:—**Mentd.** *R. v. Hunter* (1796), 2 Leach, 624; *R. v. Tomkins* (1807), 3 East, 180; *R. v. Porrott* (1814), 2 M. & S. 379; *O'Connell v. R.* (1844), 11 Cl. & Fin. 155; *R. v. Duffy* (1819), 4 Cox, C. C. 294; *Heymann v. R.* (1873), L. R. 8 Q. B. 102; *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74; *White v. R.* (1876), 13 Cox, C. C. 318; *Bradlaugh v. R.* (1878), 3 Q. B. D. 607.

735. —.]—This statute being made *in pari materia*, ought to receive a similar construction (LAWRENCE, J.).—*R. v. ST. JOHN MADDERMARKET, NORWICH (CHURCHWARDENS)* (1805), as reported in 2 Smith, K. B. 270.

736. —.]—*GRAHAM v. RUSSELL* (1816), 3 Price, 227; 5 M. & S. 498; 2 Marsh. 561; 146 E. R. 244, Ex. Ch.

Annotation:—**Refd.** *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546.

737. —.]—The statutes of 8 & 9 Will. 3 (c. 11) & 13 & 14 Car. 2 (c. 12), s. 1, are *in pari materia* & must receive a similar construction.—*R. v. CROFT (INHABITANTS)* (1819), 3 B. & Ald. 171; 106 E. R. 625.

Annotation:—**Refd.** *R. v. Corfe Mullen* (1830), 9 L. J. O. S. M. C. 19.

738. —.]—All the Ct. of Requests' Acts are *in pari materia*, & they must all receive a similar construction.—*SHADDICK v. BENNETT* (1825), 4 B. & C. 769; 7 Dow. & Ry. K. B. 229; 107 E. R. 1246.

Annotations:—**Mentd.** *Baddley v. Oliver* (1832), 1 Cr. & M. 219; *Fairbrass v. Pottit* (1844), 12 M. & W. 453.

739. —.]—*R. v. TAUNTON ST. JAMES (INHABITANTS)*, No. 66, *ante*.

740. —.]—(1) Ancient statutes are to be construed with reference to the state of things at the time of their passing.

(2) It is a rule that several statutes on the same subject are to be read as one statute.—*M'WILLIAMS v. ADAMS* (1852), 1 Macq. 120, H. L.

Annotation:—**Generally, Mentd.** *Jack v. Isdale* (1866), L. R. 1 Sc. & Div. 1.

741. —.]—*MILLER v. SALOMONS*, No. 273, *ante*.

742. —.]—*MOORE v. SHEPHERD*, No. 36, *ante*.

743. —.]—*CHORLTON v. LINGS*, No. 151, *ante*.

744. —.]—(1) These statutes are to be read & construed together as being *in pari materia*.

(2) Where a statute inflicts a penalty for not doing an act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question, & this principle is not affected by the fact that the penalty has a particular destination.—*REDPATH v. ALLAN, THE HIBERNIAN* (1872),

L. R. 4 P. C. 511; 9 Moo. P. C. C. N. S. 340; 42 L. J. Adm. 8; 27 L. T. 725; 21 W. R. 276; 1 Asp. M. L. C. 492, P. C.

745. —.]—It is to be observed that those two Acts are to be read together by the express provision of the 7th & concluding sect. of the amending Act; & therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act (LORD SELBORNE, C.).—*INTERNATIONAL BRIDGE CO. v. CANADA SOUTHERN RY. CO., CANADA SOUTHERN RY. CO. v. INTERNATIONAL BRIDGE CO.* (1883), 8 App. Cas. 723, P. C.

Annotations:—**Apld.** *Re Kedwell & Flint*, [1911] 1 K. B. 797; *Hart v. Hudson*, [1928] 2 K. B. 629. **Refd.** *Cholmeley School v. Sewell* (1894), 58 J. P. 591. **Mentd.** *Rickett Smith v. Mid. Ry., Derbyshire Silkstone Coal Co. v. Same, Grassmoor Co. v. Same*, [1896] 1 Q. B. 260.

746. Apparent contradiction in series of statutes—**Reconciliation by departure from ordinary meaning of words.**—It was said that if construed according to their ordinary grammatical construction they [the words] would practically contradict other sects. in a series of Acts of Parliament. . . .

If it had been found that reading them in their ordinary sense they would contradict some other enactments, but that reading them in a sense in which, though not their ordinary sense, they were reasonably capable of being read, they would not contradict such other enactments, then I agree that they should be read so that all the enactments should be read together without contradicting each other (BRETT, M.R.).—*R. v. TONBRIDGE OVERSEERS* (1884), 13 Q. B. D. 339; 53 L. J. Q. B. 488; 51 L. T. 179; 33 W. R. 21, C. A.

Annotation:—**Distd.** *Re Plymouth Corpn. & Walter*, [1918] 2 Ch. 354.

Interpretation of colonial statute.]—*See* DEPENDENCIES, Vol. XVII., p. 465, No. 317.

(e) *Where Same Words Used.*

747. Same meaning to be given.]—*R. v. TAUNTON ST. JAMES (INHABITANTS)*, No. 66, *ante*.

748. —.]—When we find the expression in the sect. which recites that doubts had arisen as to the construction of the former Acts, & as to the extent of the exclusive privilege, we think it amounts to a legislative declaration, that the words in the former statutes, are to be construed in the sense which the same words import at the time when the new statute speaks (TINDAL, C.J.).—*BANK OF ENGLAND v. ANDERSON* (1837), 3 Bing. N. C. 589; 2 Keen, 328, 365; 2 Hodg. 294; 4 Scott, 50; 6 L. J. C. P. 158; 1 Jur. 9; 132 E. R. 538.

Annotations:—**Mentd.** *Bank of England v. Booth* (1837), 2 Keen, 466; *Booth v. Bank of England* (1840), 6 Bing. N. C. 415; *MacLae v. Sutherland* (1854), 3 E. & B. 1; *Lucas v. Roberts* (1855), 3 C. L. R. 987; *Austria v. Day* (1861), 3 De G. F. & J. 217.

749. —.]—The same construction should be put on similar provisions in the Bankrupt & Insolvent Acts, & the express words of a statute may be contracted & confined to meet the mischief contemplated by the Act (*per* CUR.).—*JACKSON v. BURNHAM* (1852), 8 Exch. 173; 22 L. J. Ex. 13; 20 L. T. O. S. 129; 155 E. R. 1307.

Annotations:—**Mentd.** *Stanton v. Collier* (1854), 23 L. J. Q. B. 116; *Brearey v. Kemp* (1855), 3 C. L. R. 1259.

750. —.]—I think that, when a construction has been given to the same words in a former statute, such construction ought to be adhered to; if any departure from previous decisions takes

PART III. SECT. 2, SUB-SECT. 12.—B. (c).

747 i. Same meaning to be given.]—*KEDDIE v. SOUTH CANTERBURY DAIRY CO.* (1907), 26 N. Z. L. R. 522.—N.Z.

place, it ought to be upon express words (MARTIN, B.).—JAMES v. COCHRANE (1854), 9 Exch. 552; 22 L. T. O. S. 290; 2 W. R. 267; 156 E. R. 236.

Annotations.—**Refd.** Parker v. Tootal (1865), L. R. 1 Exch. 41. **Mentd.** Withers v. Parker (1859), 28 L. J. Ex. 383; Castrique v. Imrie (1861), 10 C. B. N. S. 340; Wheatley v. Westminster Brymbo Coal Co. (1869), L. R. 9 Eq. 538; Kelantan Government v. Duff Development Co., [1923] A. C. 395.

751. —.]—Our duty is to interpret the views of the legislature, & if the legislature in one Act has used language which is admittedly ambiguous & leads to question, & in a subsequent Act uses language which proceeds upon the hypothesis that a particular interpretation is to be placed upon the earlier Act, I do not think that judges have anything to do except to read the two Acts together, & say that the legislature has acted as its own interpreter, & put a clear interpretation on the earlier Act (SIR FRANCIS JEUNE, P.).—A.-G. v. CLARKSON, [1900] 1 Q. B. 156; 69 L. J. Q. B. 81; 81 L. T. 617; 48 W. R. 216; 16 T. L. R. 51; 44 Sol. Jo. 74, C. A.

Annotations.—**Apld.** Cape Brandy Syndicate v. I. R. Comrs., [1921] 2 K. B. 403. **Distd.** Dewhurst v. Salford Grdns., [1925] Ch. 655. **Consd.** Ormond Investment Co. v. Betts, [1928] A. C. 143. **Refd.** A.-G. for Victoria v. Melbourne Corp., [1907] A. C. 169; *Re* Ryder & Steadman's Contract, [1927] 2 Ch. 62. **Mentd.** *Re* Lewis, Lewis v. Smith (1900), 48 W. R. 420; *Re* St. Albans, Loder v. St. Albans (1900), 49 W. R. 74.

752. —. Unless contrary intention appear.]—MERSEY DOCKS & HARBOUR BOARD v. CAMERON, JONES v. MERSEY DOCKS & HARBOUR BOARD, No. 1706, *post*.

753. —. —.]—When a legislature has used the same words in a similar connection in two statutes it may be presumed in the absence of any context indicating a contrary intention that the same meaning attaches to the words in the later as in the earlier statute.—LENNON v. GIBSON & HOWES, LTD., [1919] A. C. 709; 88 L. J. P. C. 108; 121 L. T. 406, P. C.

(d) Where Different Words Used.

754. Whether different effect intended.]—In sect. 24 we have "having in possession or conveying in any manner anything," whereas the words in sect. 66 of the previous Act were "having or conveying." I think, however, that the two expressions were intended to mean the same thing (BLACKBURN, J.).—HADLEY v. PERKS (1866), as reported in L. R. 1 Q. B. 414; 7 B. & S. 375.

Annotation.—**Refd.** R. v. Whitley (1867), 31 J. P. 565.

755. —.]—When the legislature, in legislating *in pari materia* & substituting certain provisions in that Act for those which existed in the earlier statute, has entirely changed the language of the enactment, it must be taken to have done so with some intention & motive (COCKBURN, C.J.).—R. v. PRICE (1870), L. R. 6 Q. B. 411; 34 J. P. 790; *sub nom.* R. v. PRICE, *Ex p.* LOVIBOND, 22 L. T. 12.

Annotations.—**Refd.** R. v. Holl (1881), 7 Q. B. D. 575. **Mentd.** R. v. Hulme (1870), 35 J. P. 54; Armytage v. Wilkinson (1878), 3 App. Cas. 355; Procco v. Harding (1889), 61 L. T. 837.

—.]—DICKENSON v. FLETCHER, No. 1551, *post*.

757. —.]—*Re* WRIGHT, *Ex p.* ARNOLD

(1876), 3 Ch. D. 70; 45 L. J. Bcy. 130; 35 L. R. 21; 24 W. R. 977, C. A.

Annotations.—**Refd.** *Re* O'Shea's Settlement, *Courage v. O'Shea*, [1895] 1 Ch. 325. **Mentd.** *Re* Gibson, *Ex p.* Bolland (1878), 26 W. R. 481.

758. —.]—Coming to the later Act we find that the language of the sect. is in a very important respect different. . . . Can we say that the new sect. which contains [these additional words] means the same thing as the old sect. where they were omitted. . . . I cannot help thinking . . . that those words were advisedly inserted (LORD ESHER, M.R.).—REED v. NUTT (1890), 24 Q. B. D. 669; 59 L. J. Q. B. 311; 62 L. T. 635; 54 J. P. 599; 38 W. R. 621; 17 Cox, C. C. 86, D. C.

759. —. **Primâ facie inference of different intention.**]—I quite agree that where a variety of language is found in several Acts of Parliament *in pari materia*, *primâ facie* the inference is that the legislature had a different meaning, but that does not of necessity follow (BAYLEY, J.).—R. v. EAST TEIGNMOUTH (INHABITANTS) (1830), 1 B. & Ad. 244; 9 L. J. O. S. M. C. 24; Pratt, 187; 109 E. R. 778.

Annotation.—**Mentd.** R. v. Shaw (1848), 12 Q. B. 419.

760. —. —.]—When the legislature change the words of an enactment, no doubt, it must be taken *primâ facie* that there was an intention to change the meaning of the enactment. This however is not necessarily so (BLACKBURN, J.).—R. v. BUTTLE (1870), L. R. 1 C. C. R. 248; 39 L. J. M. C. 115; 22 L. T. 728; 34 J. P. 565; 18 W. R. 956; 11 Cox, C. C. 566, C. C. R.

Annotation.—**Refd.** R. v. Ettridge, [1909] 2 K. B. 24.

(e) Reference to Repealed Statutes.

761. Whether repealed statute may be referred to.]—A repealed statute *in pari materia* with an existing one may properly be referred to for the purpose of construing the latter.—*Re* COPELAND, *Ex p.* COPELAND (1852), 2 De G. M. & G. 914; 22 L. J. Bcy. 17; 20 L. T. O. S. 286; 17 Jur. 121; 1 W. R. 9; 42 E. R. 1129, L. J.

762. —.]—BRADLAUGH v. CLARKE, No. 112, *ante*.

(f) Reference to Later Statutes.

763. When later Act can be referred to.]—Here there is a subsequent Act of Parliament in similar words, but with a provision superadded, & when we find two Acts on the subject, both affirmative, with something superadded to one, we must look to both & see how the object of the legislature can be effectually carried out (MARTIN, B.).—*Re* BAKER (1857), 2 H. & N. 219; 157 E. R. 92; *sub nom.* *Ex p.* BAKER, 26 L. J. M. C. 155; 29 L. T. O. S. 218; 3 Jur. N. S. 937; 5 W. R. 661. *Annotations*.—**Mentd.** *Re* Smith (1858), 3 H. & N. 227; R. v. Youle (1861), 6 H. & N. 753; Unwin v. Clarke (1866), L. R. 1 Q. B. 417; *Re* Arthers (1889), 22 Q. B. D. 345; James v. Evans (1897), 77 L. T. 78.

764. —.]—The learned judge was not at liberty to use the rule of evidence introduced by that subsequent statute [5 & 6 Will. 4, c. 60] as applicable to the case before him (*per* CUR.).—CASANOVA v. R., THE RICARDO SCHMIDT (1866), L. R. 1 P. C. 268; 4 Moo. P. C. C. N. S. 121; 36 L. J. P. C. 3; 16 E. R. 262; *sub nom.* CASSANOVA

PART III. SECT. 2, SUB-SECT. 12.—B. (e)

761 i. Whether repealed statute may be referred to.]—Acts relating to the same subject though repealed may be referred to for the purpose of giving a construction to similar words in the subsequent Act.—*Ex p.* LUGRIN (1875), 16 N. B. R. (3 Pug.) 125.—CAN.

761 ii. —.]—CRAIN v. COLLEGIATE

INSTITUTE OF OTTAWA (1878), 43 U. C. R. 498.—CAN.

761 iii. —.]—BALESWAR BAGARTI v. BHAGARATHI DAS (1908), 1 L. R. 35 Cal. 701; 12 C. W. N. 657.—IND.

761 iv. —.]—THOMSON v. BENT COLLIERY Co., [1912] S. C. 212.—SCOT.

761 v. —.]—SHAW v. RUDDIN (1858), 9 I. C. L. R. 214.—IR.

PART III. SECT. 2, SUB-SECT. 12.—B. (f).

763 i. When later Act can be referred to.]—PARK v. LONG (1907), 7 W. L. R. 309; 1 Sask. L. R. 31.—CAN.

763 ii. —.]—A prior statute may operate upon the provisions of a subsequent one, without express words.—*Re* PERRIN (1842), 2 Dr. & War. 147.—IR.

Sect. 2.—Rules of interpretation: Sub-sect. 12, B. (f), & C.; sub-sect. 13, A.]

v. R., Re THE RICARDO SCHMIDT, 12 Jur. N. S. 895; 15 W. R. 236, P. C.

Annotations—Mentd. R. v. Casaca (1880), 5 App. Cas. 548; Re Letters Patent No. 139207, Re Carbonit Akt., [1924] 2 Ch. 53.

765. — Ambiguity.]—I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be an ambiguity in the earlier legislation, then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier (LORD STERNDALE, M.R.).—CAPE BRANDY SYNDICATE *v.* INLAND REVENUE COMRS., [1921] 2 K. B. 403; 90 L. J. K. B. 461; 125 L. T. 108; 37 T. L. R. 402; 65 Sol. Jo. 377; 12 Tax Cas. 358, C. A.

Annotations:—Consd. Ormond Investment Co. v. Betts, [1928] A. C. 143. Mentd. I. R. Comrs. v. Newcastle Breweries (1926), 95 L. J. K. B. 936; Nesbitt v. Mitchell (1926), 11 Tax Cas. 211; Devon Mutual S.S. Inseo. Asscn. v. Ogg, (1927), 13 Tax Cas. 181; Rees Roturbo Development Syndicate v. Ducker, Same v. I. R. Comrs. (1928), 13 Tax Cas. 366.

766. — —.]—In cases where there is an ambiguity, a real difficulty of interpretation, it is a legitimate method of determining what Parliament has done, to see what Parliament says subsequently, either definitely or by implication, that it had previously done (SARGANT, L.J.).—ORMOND INVESTMENT CO. *v.* BETTS, [1927] 2 K. B. 326; 96 L. J. K. B. 631; 137 L. T. 142; 13 Tax Cas. 400, C. A.; *on appeal*, [1928] A. C. 143, H. L.

C. Express Incorporation.

767. Effect of incorporation — Provision of earlier Act extended.]—ANON. (1310), Y. B. (vi. Sel. Soc.) 4 Edw. 2, 3, 4.

768. — Whether applicable to both general & special powers & provisions—Special provisions—Right of appeal.]—The fair construction then to be put upon this Act . . . seems to be this: that all the general powers & provisions given & made in Acts *in pari materia* shall be virtually incorporated into this, but that such provisions as are always considered as special provisions shall not. The power of appealing from the judgment of the justices seems to be of this kind & does not attach without being expressly given (ASHURST, J.).—R. *v.* SURREY JJ. (1788), 2 Term Rep. 504; 100 E. R. 271.

Annotations:—Consd. R. v. Badcock (1845), 6 Q. B. 787; R. v. Otto Monsted, [1906] 2 K. B. 456. Refd. R. v. St. Leonard's, Shoreditch (1849), 13 Q. B. 961; R. v. Surrey JJ. (1869), 18 W. R. 166.

769. — — — — — Exemption from liability for nuisance.]—Pltfs. were the owners of electric cables which had been laid under certain public streets. Defts. were the owners of hydraulic mains which had been laid under the same streets under statutory powers. These mains burst in four different places, in each case damaging pltfs.' cables. The bursting of the mains was not due to any negligence on the part of defts. Two of the mains which so burst had been laid under a private Act which did not contain the usual clause providing that nothing in the Act should exempt the co. from liability for nuisance. The other two had been laid under a later Act which did contain such a clause. The later Act also provided that the two Acts should be "read & construed together as

one Act":—*Held*: the effect of the two Acts being read together as one Act was to take away the privilege which, down to the passing of the later Act, defts. had enjoyed, in respect of the two first mentioned mains, of not being liable for damage done by their bursting in the absence of negligence, & consequently in the case of all four of the mains defts. were liable as for a nuisance—CHARING CROSS ELECTRICITY SUPPLY CO. *v.* HYDRAULIC POWER CO., [1914] 3 K. B. 772; 83 L. J. K. B. 1352; 111 L. T. 198; 78 J. P. 305; 30 T. L. R. 441; 12 L. G. R. 807, C. A.

Annotations:—Mentd. Goodbody v. Poplar B. C. (1914), 84 L. J. K. B. 1230; A.-G. v. Corv, Kennard v. Cory (1919), 88 L. J. Ch. 410; Rainham Chemical Works v. Belvedere Fish Guano Co., [1921] 1 A. C. 465; Postmaster-General v. Liverpool Corpn. (1922), 92 L. J. K. B. 382.

770. — Incorporation of one section — Reference to remainder of Act.]—Where a single sect. of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it was taken, & that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the sect. meant, though those other sects. are not incorporated in the new Act (LORD BLACKBURN).—PORTSMOUTH CORPN. *v.* SMITH (1885), 10 App. Cas. 364; 54 L. J. Q. B. 473; 53 L. T. 394; 49 J. P. 676, H. L.

Annotations:—Refd. Jowett v. Idle L. B. (1888), 36 W. R. 530. Mentd. R. v. Burnup (1886), 50 J. P. 598; Richards v. Kessick (1888), 57 L. J. M. C. 48; Foulwick v. Croydon R. S. A., [1891] 2 Q. B. 216.

771. — Incorporated part becomes part of new statute.]—*Re WOOD'S ESTATE, Ex p. WORKS & BUILDINGS COMRS.*, No. 1063, *post*.

772. — —.]—By an Act incorporating Lands Clauses Consolidation Acts the Metropolitan Board of Works were authorised to acquire specified land for the purpose of the G. street improvement, & to purchase easements over such land. By sect. 33 of their Act they were required to sell or let specified portions of the land for the construction & maintenance of artizans' dwellings, so that the land should be cleared of existing houses by degrees & a minimum number of dwellings should be provided. By an Amendment Act the Board were required to devote three plots of land, the subject of the G. improvement, to provide a minimum number of artizans' dwellings, & sect. 33 of the principal Act was repealed with respect to the G. improvement:—*Held*: provisions as to selling & letting similar to those contained in sect. 33 of the principal Act were implied by the Amendment Act.—WIGRAM *v.* FRYER (1887), 36 Ch. D. 87; 56 L. J. Ch. 1098; 57 L. T. 255; 36 W. R. 100; 3 T. L. R. 652.

Annotations:—Mentd. Goddard v. Mid. Ry. (1891), 8 T. L. R. 126; London School Board v. Smith, [1895] W. N. 37.

773. Replacement of section in earlier Act—By section of later Act.]—By 27 & 28 Vict. c. 55, it is expressly enacted that the words of the new enactment are to be read into 2 & 3 Vict. c. 47, in lieu of the repealed sect.

According to the ordinary canons of construction the new clause imposing the penalty of 40s. should be read as part of 2 & 3 Vict. c. 47 (BRUCE, J.).—R. *v.* HOPKINS, [1893] 1 Q. B. 621; 62 L. J. M. C. 57; 68 L. T. 292; 57 J. P. 152; 41 W. R. 431; 9 T. L. R. 294; 37 Sol. Jo. 286; 5 R. 315.

Annotations:—Refd. R. v. Leach, Ex p. Fritchley, [1913] 3 K. B. 40. Mentd. Shields v. Howard (1896), 60 J. P. 727; Bingley v. Quest (1907), 97 L. T. 391.

PART III. SECT. 2, SUB-SECT. 12.—C.

a. Effect of incorporation — Incorporation of one section.]—Where a statute incorporates a sect. of a former statute & directs that it is to apply as if certain words were omitted

therefrom, the incorporated sect. is not to be construed as if such words had never existed therein.—A.-G. *v.* SMITH, [1905] 2 L. R. 553.—IR.

771 i. — Incorporated part becomes part of new statute.]—RADHA PRASAD

ICK *v.* RANIMONI DAS (1910), 1 L. R. 38 Cal. 188.—IND.

i. — Whether amendments of incorporated statute included.]—McKENZIE *v.* JACKSON (1898), 31 N. S. R. (19 R. & G.) 70.—CAN.

SUB-SECT. 13.—CONSTRUCTION WITH REFERENCE TO PREVIOUSLY ACCEPTED INTERPRETATION AND USAGE.

A. In General.

Doctrine of contemporanea expositio.—See Sect. 9, *post*.

774. Effect of previous construction — Over long period.—It cannot be denied that in some cases the plain meaning of an Act of Parliament has been changed by a course of judicial decisions, each going a little & a little further, so that at length the cts. have adopted a construction widely different from that which would, but for such interpretations, have been put upon the plain intent of the words. In all such cases you are to take into consideration, not merely the words of the Act of Parliament, but the decisions on them, which may be said to have been all but imported into the words of the Act, so that the Act is to be construed with reference to such decisions. But I am not aware of any case, in which a single decision, even of a ct. of competent jurisdiction, having before it properly & judicially the matter on which it was pronouncing a judicial decision, has been held to operate so upon the plain meaning of a statute (LORD COTTENHAM, C.).—WATERFORD'S (EARL) CLAIM (1832), 6 Cl. & Fin. 133; 7 E. R. 648, H. L.

Annotation:—**Mentd.** Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479.

775. —.]—MORGAN v. CRAWSHAY, No. 985, *post*.

776. —.]—Now inasmuch as that appears to have been for so long a series of years the practice of the judges at the Central Criminal Ct. & upon all the circuits, we must take it as affording a contemporaneous exposition of the effect of the 10th section of 7 & 8 Geo. 4, c. 28 (COCKBURN, C.J.).—R. v. CUTBUSH (1867), L. R. 2 Q. B. 379; 36 L. J. M. C. 70; *sub nom.* R. v. CUTBUSH, *Ex p.* PAINE, 10 Cox, C. C. 489; *sub nom.* Re PAINE, 8 B. & S. 319; 15 W. R. 742; *sub nom.* R. v. PAINE, 16 L. T. 282; *sub nom.* R. v. MAIDSTONE JJ., *Ex p.* PAINE, 31 J. P. 451.

Annotations:—**Refd.** Castro v. R. (1881), 6 App. Cas. 229; R. v. Martin, [1911] 2 K. B. 450.

777. —.]—We do not think the words of the statute sufficiently wide to justify us in putting a construction upon the statute different from that which has been entertained for one

hundred & sixty years (BLACKBURN, J.).—COX v. LEIGH (1874), L. R. 9 Q. B. 333; 43 L. J. Q. B. 123; 30 L. T. 494; 38 J. P. 455; 22 W. R. 730.

Annotation:—**Mentd.** Lewis v. Davies, [1914] 1 K. B. 469.

778. —.]—When you have ambiguous Acts of Parliament, it is an established maxim of construction that you can go to the use which had been made under the Acts of Parliament which you are interpreting by persons who are bound to obey them with the view of finding out on which side the balance ought to descend, on the ground that the use & custom & habit of those who are acting under Acts of Parliament afford some light with reference to the true construction, if the construction is ambiguous (BOWEN, L.J.).—WENLOCK (BARONESS) v. RIVER DEE Co. (1883), 36 Ch. D. 675, n.; 57 L. T. 402, n., C. A.; *affd.* on other grounds (1885), 10 App. Cas. 354, H. L.

Annotations:—**Mentd.** General Auction Estate & Monetary Co. v. Smith, [1891] 3 Ch. 132; Putney Overseers v. L. & S. W. Ry., [1891] 1 Q. B. 410; Balkis Consolidated Co. v. Tomkinson, [1893] A. C. 396; A.-G. v. L.C.C., [1901] 1 Ch. 781; A.-G. v. De Winton, [1906] 2 Ch. 106; Corbett v. S. E. & C. Ry's. Managing Committee, [1906] 2 Ch. 12; Amalgamated Soc. of Ry. Servants v. Osborne, [1910] A. C. 87; British South Africa Co. v. De Beers Consolidated Mines, [1910] 1 Ch. 354; Re Home & Foreign Investment & Agency Co., [1912] 1 Ch. 72; Sinclair v. Brougham, [1914] A. C. 398; Re Woking U. C. (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300; A.-G. v. Liverpool Corp'n., [1922] 1 Ch. 211; Re Jubilee Cotton Mills, [1923] 1 Ch. 1; Deuchar v. Gas Light & Coke Co., [1925] A. C. 691.

779. —.]—Stat. Limitations was considered by the cts. more than two hundred years ago, & a certain construction was then put upon sect. 4. It is said that that was a construction which strained the language of the statute, & which judges, if they were now construing the sect., would not now place upon it. I do not know how that may be; it was done two hundred years ago, & assuming even that we dissent from that construction we cannot possibly now overrule it, & therefore, as long as the statute remains unrepealed, it must be read as having that construction placed upon it (LORD ESHER, M.R.).—SWINDELL v. BULKELEY (1886), 18 Q. B. D. 250; 56 L. J. Q. B. 613; 56 L. T. 38; 35 W. R. 189; 3 T. L. R. 183, C. A.

780. —.]—The word "daily" in the Act of 1880 [Metropolitan Gas Act] must be construed literally as including Sundays, & the previous practice under that & the earlier Acts was

PART III. SECT. 2, SUB-SECT. 13.—A.

774 i. Effect of previous construction — Over long period.—It is a well-settled principle of construction that the legislature is presumed to know not only the general principles of law but the construction which the cts. have put upon particular statutes. The principle of construction above enunciated is based on the ground that, as the legislature knows what the law is & has the power to alter, any mistakes on the part of the judges may at once be corrected, & the absence of any such correction, specially during a long period of time, indicates that the cts. have rightly ascertained the intention of the legislature.—JOGENDRA CHANDRA ROY v. SHYAM DAS (1909), 1 L. R. 36 Cal. 543.—IND.

774 ii. —.]—BROWNE v. BLAKE (1828), 1 Mol. 368.—IR.

g. —.]—MCKINNON v. LEWTHWAITE (1914), 28 W. L. R. 885; 7 W. W. R. 25; 20 D. L. R. 220; 20 B. C. R. 55.—CAN.

h. —.]—A practice which is in contravention of the law, even if it is the practice of a High Ct., cannot justify a ct. in construing an Act of the legislature in a manner contrary to its

plain wording.—BALKARAN RAI v. GOBIND NATH TEWARI (1890), 1 L. R. 12 All. 129.—IND.

k. —.]—SRI K. L. JAGANNADA RAJU GARU v. SRI RAJAH PRASADA RAO GARU (1915), 1 L. R. 39 Mad. 554.—IND.

l. —.]—It is a well settled principle of interpretation that cts. in construing a statute will give much weight to the interpretation put upon it at the time of its enactment & since, by those whose duty it has been to construe, execute & apply it, although such interpretation has not by any means a controlling effect upon the cts. & may be disregarded for cogent & persuasive reasons.—MATHERA MOHAN SALIA v. KUMARSALIA & CHITTAGONG DISTRICT BOARD (1915), 1 L. R. 43 Cal. 790.—IND.

m. —.]—Although the ct. may have held a certain term in a statute to have been used by the legislature with a particular meaning, other than its ordinary meaning, looking to the context in which it was there used, this will not prevent the ct. from giving its ordinary meaning to the same term in a subsequent statute dealing with the same subject-matter

where from the context the ct. is satisfied that the legislature used the term in its ordinary meaning in the subsequent statute.—Re LAND TRANSFER ACT, 1885, & PUBLIC WORKS ACT, 1903 (1905), 25 N. Z. L. R. 385.—N.Z.

n. —.]—HILIS v. STANFORD (1901), 23 N. Z. L. R. 1061.—N.Z.

o. —.]—Where statute substantially adopted from English or other Colonial statute.—COULSON v. O'CONNELL (1878), 29 C. P. 341.—CAN.

p. —.]—McPHERSON v. R. (1882), 1 Exch. C. R. 53.—CAN.

q. —.]—PARADIS v. R. (1887), 1 Exch. C. R. 191.—CAN.

r. —.]—When a colonial legislature re-enacts an Imperial Act, it enacts it as interpreted by the Imperial Cts., & a fortiori by other Imperial Acts.—LAMB v. CLEVELAND (N. B.) (1891), 19 S. C. R. 78.—CAN.

t. —.]—In the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, & in the absence of any evidence of custom & course of business to the contrary, the Ct. of King's Bench was right in accepting the English rulings, because they were

B. Re-Enactment in Same Terms.

789. Presumption in favour of similar interpretation.—*RUCKMABOYE v. LULLOOBHOY MOTTICHUND*, No. 331, *ante*.

790. —.]—As the statute . . . was re-enacted in *ipsisimis verbis* after this construction had so long been put upon it, this construction must be considered to have the sanction of the Legislature (LORD CAMPBELL, C.J.).—*MANSELL v. R.* (1857), 8 E. & B. 54; 8 State, Tr. N. S. 831; 26 L. J. M. C. 137; 21 J. P. 309; 3 Jur. N. S. 558; 5 W. R. 554; 120 E. R. 20; *on appeal*, 8 E. & B. 85, Ex. Ch.

Annotations :—*Mentd.* *Re Anderson* (1861), 7 Jur. N. S. 122; *Re Fernandes* (1861), 6 H. & N. 717; *R. v. Giorgetti* (1865), 4 F. & F. 546; *R. v. Winsor* (1865), 10 Cox, C. C. 276; *Levinger v. R.* (1870), L. R. 3 P. C. 282.

791. —.]—*COPE v. DOHERTY*, No. 400, *ante*.

792. —.]—*GOLDSMID v. HAMPTON* (1858), 5 C. B. N. S. 94; 27 L. J. C. P. 286; 31 L. T. O. S. 248; 4 Jur. N. S. 1108; 6 W. R. 768; 141 E. R. 37.

Annotations :—*Reid.* *Reed v. Wiggins* (1862), 13 C. B. N. S. 220. *Mentd.* *Reeves v. Hawkes* (1861), 6 L. T. 53.

793. —.]—The language of this latter statute is the same, *mutatis mutandis*, as that used in the statute of James, & the object seems to have been to add actions upon specialties & some others to those mentioned in that statute. It would therefore seem but reasonable that the same construction should be put upon the provisions of the latter statute as has been put upon the former, so far as such a construction may be applicable (WIGHTMAN, J.).—*STURGIS v. DARELL* (1860), 6 H. & N. 120; 29 L. J. Ex. 472; 2 L. T. 808; 6 Jur. N. S. 1351; 8 W. R. 653; 158 E. R. 50, Ex. Ch.

Annotation :—*Mentd.* *Swindell v. Bulkeley* (1886), 18 Q. B. D. 250.

794. —.]—That statute [Treason Act, 1795 (c. 7)] making treasonable the mere compassing, etc., of any one of the acts enumerated, did, in terms, sanction & embody the received interpretation of the Statute of Treasons, with which, it must be presumed, that the legislature was acquainted & which it left undisturbed (WILLES, J.).—*MULCAHY v. R.* (1868), L. R. 3 H. L. 306, H. L.

Annotations :—*Mentd.* *R. v. Meany* (1867), 15 W. R. 1082; *Levinger v. R.* (1870), L. R. 3 P. C. 282; *R. v. Parnell* (1881), 14 Cox, C. C. 508; *Mogul S.S. Co. v. McGregor*, (Gow (1889), 23 Q. B. D. 598; *Quinn v. Leatham*, [1901] A. C. 495; *R. v. Tibbits*, [1902] 1 K. B. 77; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; *R. v. Lynch* (1903), 51 W. R. 619; *R. v. Brailsford*, [1905] 2 K. B. 730; *Montreal Street Ry. v. Normandin*, [1917] A. C. 170; *R. v. Casement*, [1917] 1 K. B. 98; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Davies v. Thomas*, [1920] 2 Ch. 189.

795. —.]—Where a clause in an Act of Parliament which has received a judicial interpretation is re-enacted in the same terms, the legislature is to be deemed to have adopted that interpretation.—*Re CATHCART, Ex p. CAMPBELL* (1870), 5 Ch. App. 703; 23 L. T. 289; 18 W. R. 1056, L. J.

Annotations :—*Apld.* *Young v. Gentle*, [1915] 2 K. B. 661; *Colechester Brewing Co. v. Tending Licensing JJ.*, [1916]

2 K. B. 126. *Mentd.* *Crawcour v. Salter* (1881), 18 Ch. D. 30; *Bursill v. Tanner* (1885), 16 Q. B. D. 1; *Re Arnott, Ex p. Chief Official Receiver* (1888), 60 L. T. 109.

796. —.]—If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, & passed with the same purpose, & for the same object, the safe & well-known rule of construction is to assume that the legislature when using well-known words upon which there have been well-known decisions uses those words in the sense which the decisions have attached to them (JAMES, L.J.).—*GRIEAVES v. TOFIELD* (1880), 14 Ch. D. 563; 50 L. J. Ch. 118; 43 L. T. 100; 28 W. R. 840, C. A.

Annotations :—*Apld.* *Jay v. Johnstone*, [1893] 1 Q. B. 25. *Consd.* *Re Monolithic Building Co., Tacon v. The Co.*, [1915] 1 Ch. 643; *Foster v. G. E. Ry.*, [1920] 2 K. B. 574.

797. —.]—When a case has placed a construction upon an Act of Parliament, which has been again before Parliament, but has not been altered, it would be contrary to every rule for the ct. to alter that construction (LORD ESHER, M.R.).—*FOSKETT v. KAUFMAN* (1885), 16 Q. B. D. 279; 16 L. J. Q. B. 1; 54 L. T. 64; 50 J. P. 484; 34 W. R. 90; 2 T. L. R. 45, C. A.

Annotations :—*Mentd.* *Dashwood v. Ayles* (1885), 16 Q. B. D. 295; *Plant v. Potts*, [1891] 1 Q. B. 256; *Ex p. Baker* (1892), 62 L. J. Q. B. 97; *R. v. McKellar*, [1893] 1 Q. B. 121; *Ilureum v. Hilleary*, [1891] 1 Q. B. 579; *Soutter v. Roderick*, [1896] 1 Q. B. 91; *Kitchen v. Johnson*, [1899] 1 Q. B. 95; *Goodrich v. Great Grimsby*, [1902] 1 K. B. 301.

798. —.]—The Sheriffs Act, 1887 (c. 55), is a consolidating Act & does not profess to amend or alter the provisions of the Acts consolidated. *Primâ facie*, therefore, the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted (FRY, L.J.).—*MITCHELL v. SIMPSON* (1890), 25 Q. B. D. 183; 59 L. J. Q. B. 355; 63 L. T. 405; 55 J. P. 36; 38 W. R. 565; 6 T. L. R. 341, C. A.

Annotations :—*Reid.* *Gilbert v. Gilbert & Boucher*, [1928] P. 1. *Mentd.* *Re Edey* (1891), 63 L. T. 762; *Hes v. T* (1892), 36 Sol. Jo. 502; *Re Watson, Ex p. Watson*, *Johnston v. Watson* (1892), 67 L. T. 519; *Re Smith, Hands v. Andrews*, [1893] 2 Ch. 1.

799. —.]—INCOME TAX SPECIAL PURPOSES COMRS. *v. PEMSEL*, No. 563, *ante*.

800. —.]—Knowing of that decision [*Fitzpatrick v. Kelly* (1873), L. R. 8 Q. B. 337], Parliament in 1875 drafted the present Act in the form in which they did, & it is only reasonable to suppose that from their knowledge of the construction which the judges had put upon the sect. in the earlier Act they could tell what construction the judges would be likely to put upon a similar section in the Act they were passing. . . . (WRIGHT, J.).—*DYKE v. GOWER*, [1892] 1 Q. B. 220; 61 L. J. M. C. 70; 65 L. T. 760; 56 J. P. 168; 8 T. L. R. 117; 17 Cox, C. C. 421, D. C.

Annotations :—*Mentd.* *Morris v. Corbett* (1892), 56 J. P. 649; *Spiera & Pond v. Bennett*, [1896] 2 Q. B. 65; *Bridges v. Griffin*, [1925] 2 K. B. 233.

801. —.]—There is a well-known principle of construction . . . that where the legislature uses in an Act a legal term which has received judicial

PART III. SECT. 2, SUB-SECT. 13.
—B.

789 i. Presumption in favour of similar interpretation.—The rule that, when particular words in a statute have received judicial interpretation & the statute is subsequently repealed & re-enacted in identical terms, the words in the new enactment should be construed in the sense previously attributed to them by the cts. has no application where the received interpretation is not the result of, considered decisions upon the meaning of particular words, but the mere expressions of opinion on a point not necessary for the decision of the particular case.—

WILLIAMS v. DUNN (OFFICIAL ASSIGNEE OF WILLIAMS' ESTATE) (1908), 6 C. L. R. 425.—AUS.

789 ii. —.]—The rule that when a statute has received a construction either from long practice or by judicial interpretation, & is afterwards re-enacted in the same terms, the legislature is deemed to have had that construction in view in the re-enactment, cannot apply to an Act of the Dominion, where different constructions are shown to have obtained in some of the provinces.—*DAVIDSON v. ROSS* (1876), 24 Gr. 22.—CAN.

789 iii. —.]—*CRAIN v. COLLEGIATE INSTITUTE OF OTTAWA* (1878), 43

U. C. R. 498.—CAN.

789 iv. —.]—*BOWMAN v. A.-G.* (B. C.), [1926] 4 D. L. R. 834.—CAN.

789 v. —.]—Where a word which is used in one sense in one Act is re-enacted in a subsequent Act which repeals the former, then unless there is some strong reason to the contrary, it must be read in the same sense in the subsequent Act in which it is re-enacted.—*BALAKRISHNUDU v. NARAYANASAWMY CHETTY* (1914), 1 L. R. 37 Mad. 175.—IND.

789 vi. —.]—*HAMILTON v. BANK OF NEW ZEALAND* (1904), 21 N. Z. L. R. 109.—N.Z.

Sect. 2.—Rules of interpretation: Sub-sect. 13, B., C. & D.; sub-sects. 14 & 15.]

interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted (LORD COLERIDGE, C.J.).—JAY v. JOHNSTONE, [1893] 1 Q. B. 25; 67 L. T. 655; 57 J. P. 215; 9 T. L. R. 33; 37 Sol. Jo. 48, D. C.; *affd.*, [1893] 1 Q. B. 189; 62 L. J. Q. B. 128; 68 L. T. 129; 57 J. P. 309; 41 W. R. 161; 9 T. L. R. 125; 37 Sol. Jo. 114; 4 R. 196, C. A.

Annotations:—Mentd. Taylor v. Holland, [1902] 1 K. B. 676; Weld v. Petro (1928), 97 L. J. Ch. 399.

802. —.]—Now in 1902 the legislature repeated the words which are to be found in the Licensing Act, 1872 (c. 94), s. 12; some words were added, but the material words are repeated almost *ipsissima verba*. Therefore . . . the legislature deliberately used the same language which had received an interpretation not only of a Ct. of competent jurisdiction but of a Ct. of co-ordinate jurisdiction with this Ct., & in my view we are not entitled at this date to consider the question as if it were *res integra* (LORD READING, C.J.).—YOUNG v. GENTLE, [1915] 2 K. B. 661; 84 L. J. K. B. 1570; 113 L. T. 322; 79 J. P. 347; 31 T. L. R. 409; 25 Cox, C. C. 23, D. C.

Annotations:—Mentd. King v. Sim (1916), 85 L. J. K. B. 1621; Lewis v. Dodd, [1919] 1 K. B. 1; Evans v. Fletcher (1926), 135 L. T. 153.

803. —.]—LENNON v. GIBSON & HOWES, LTD., No. 753, *ante*.

804. — Presumption rebuttable.]—MERSEY DOCKS & HARBOUR BOARD v. CAMERON, JONES v. MERSEY DOCKS & HARBOUR BOARD, No. 1706, *post*.

805. — —.]—BARLOW v. TEAL, No. 460, *ante*.

Consolidating statutes.]—See Part XI., *post*.

C. Language Altered in Later Statute.

806. Whether scope of later statute extended.]—If a statute professes merely to repeal a former statute of limited operation, & to re-enact its provision in amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them, is not to be presumed as a necessary inference, unless the intention to the contrary is clearly shown.—BROWN v. McLACHLAN (1872), L. R. 4 P. C. 543; 9 Moo. P. C. C. N. S. 384; 42 L. J. P. C. 18; 21 W. R. 277; 17 E. R. 559, P. C.

807. —.]—The true rule of interpretation where larger words are used in an amending Act than were used in the principal Act is that such larger words were used intentionally & must have a meaning given to them accordingly (LORD ESHER, M.R.).—HURLBATT v. BARNETT & CO., [1893] 1 Q. B. 77; 62 L. J. Q. B. 1; 41 W. R. 33; 37 Sol. Jo. 8; 4 R. 103, C. A.

808. —.]—The mere fact that somewhat different language is used does not necessarily mean that different treatment is to be applied (CHANNELL, J.).—HOLLIDAY & GREENWOOD, LTD. v. DISTRICT SURVEYORS' ASSOCN. & DICKSEE, [1914] 2 K. B. 803; 83 L. J. K. B. 1482; 110 L. T. 983; 78 J. P. 262; 12 L. G. R. 633, D. C.

Annotation:—Mentd. Akers v. Daubney (1915), 13 L. G. R. 1201.

809. Whether court bound to consider decisions on previous Acts.]—I think the proper course is to read the sect. of the Act & to ascertain its meaning & not to trouble ourselves about decisions upon the former Act (JESSEL, M.R.).—*Re TOOMER*,

Ex p. BLAIBERG (1883), 23 Ch. D. 254; 52 L. J. Ch. 461; 49 L. T. 16; 31 W. R. 906, C. A.

Annotations:—Apld. *Re* Monolithic Building Co., Tacon v. Monolithic Building Co., [1915] 1 Ch. 643. *Mentd.* *Re* Johnstone, *Ex p. Abrams* (1881), 50 L. T. 184; Sanguinetti v. Stuckey's Banking Co., [1895] 1 Ch. 176.

810. —.]—It is the duty of the Ct. first of all to find out what the Act of Parliament under consideration means, & not to embarrass itself with previous decisions on former Acts when considering the construction of a plain statute framed in different words from the former Acts. We have first to see what his Act of Parliament says (JESSEL, M.R.).—HACK v. LONDON PROVIDENT BUILDING SOCIETY (1883), 23 Ch. D. 103; 52 L. J. Ch. 541; 48 L. T. 247; 31 W. R. 392, C. A.

Annotations:—Consd. Municipal Bldg. Soc. v. Kent (1884), 9 App. Cas. 260. *Refd.* Norton v. Counties Conservative Permanent Benefit Bldg. Soc., [1895] 1 Q. B. 246. *Mentd.* French v. Municipal Permanent Bldg. Soc. (1884), 53 L. J. Ch. 743; Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin (1886), 55 L. J. Q. B. 382; Walker v. General Mutual Bldg. Soc. (1887), 36 Ch. D. 777; *Re* Knight & Tabernacle Permanent Bldg. Soc., [1891] 2 Q. B. 63; *Re* Whiting, Ormond v. De Launay, [1913] 2 Ch. 1.

811. Inconsistency in clauses of consolidating Act—Consideration of date of first enactment.]—When you find an inconsistency in the clauses of a consolidating Act it may be proper to look at the respective dates of their first enactment to explain that inconsistency (CHANNELL, J.).—HIGGS & HILL, LTD. v. STEPNEY BOROUGH COUNCIL, [1914] 1 K. B. 505; 110 L. T. 377; 78 J. P. 134; 12 L. G. R. 395, D. C.

D. Statutes Applicable to England, Scotland, and Ireland.

812. Statutes applicable to England & Scotland—To receive same construction.]—INCOME TAX SPECIAL PURPOSES COMRS. v. PEMSEL, No. 563, *ante*.

813. —.]—NORTH BRITISH RY. CO. v. BUDHILL COAL & SANDSTONE CO., No. 340, *ante*.

814. — Duty of English Court of first instance—To follow unanimous decision of Court of Session.]—In a case arising on the construction of a statute equally applicable to England & Scotland it is the duty of an English Ct. of first instance to follow an unanimous decision of the Ct. of Session.—*Re* HARTLAND, BANKS v. HARTLAND, [1911] 1 Ch. 459; *sub nom.* *Re* DIXON HARTLAND, BANKS v. HARTLAND, 80 L. J. Ch. 305; 104 L. T. 490; 55 Sol. Jo. 312.

Annotations:—Fold. Brooks v. I. R. Comrs. (1914), 7 Tax Cas. 236. *Consd.* *Re* Turner, Klaffenberger v. Groombridge, [1917] 1 Ch. 422. *Fold.* Howe v. I. R. Comrs., [1918] 2 K. B. 584. (*See* [1919], 88 L. J. K. B. 821.) *Mentd.* *Re* Briggs, Richardson v. Bantoft, [1914] 2 Ch. 413.

815. — — —.]—The Finance (1909–1910) Act, 1910, is a statute which extends to Scotland as well as England, & the decision of the Ct. of Session was an unanimous judgment. It seems to me to deal expressly with the point raised for my decision in this case & I feel it is my duty without expressing my view of the point dealt with to hold that this appeal ought to be allowed (HORRIDGE, J.).—BROOKS v. INLAND REVENUE COMRS., [1913] 3 K. B. 398; 82 L. J. K. B. 1086; 109 L. T. 363; 29 T. L. R. 755; *on appeal, sub nom.* INLAND REVENUE COMRS. v. BROOKS, [1915] A. C. 478, H. L.

Annotations:—Fold. Howe v. I. R. Comrs., [1918] 2 K. B. 584. *Mentd.* Bartlett v. I. R. Comrs., [1914] 3 K. B. 686; Davis v. I. R. Comrs., [1923] 1 K. B. 370; I. R. Comrs. v. Burrell, [1924] 2 K. B. 52.

PART III. SECT. 2, SUB-SECT. 13.—C.

806 i. Whether scope of later statute extended.]—Where a statute is re-

enacted in different words & thereby becomes susceptible of more than one interpretation, it will not be construed as altering the previous statute unless

such alteration is clearly expressed.—LAIRD v. MCGUIRE (1890), 40 N. S. R. 129.—CAN.

816. Statute applicable to England & Ireland—Duty of English Court of first instance—To follow majority decision of Irish Court of Appeal.]—I have a decision of the Irish Ct. in which this point has been decided in favour of appt. by two judges out of three. If I may say so with the greatest respect for the judges who formed the majority I agree with the result arrived at by the Lord Chief Baron who was in the minority, but my attention was directed to the remarks of SWINFEN EADY, J., in *Re Hartland*, No. 814, *ante*. This was followed by HORRIDGE, J., in *Brooks v. Inland Revenue Comrs.*, No. 815, *ante*. I think therefore that under these exceptional circumstances I ought to follow the majority judgment in the Irish cts. (SANKEY, J.).—*HOWE (EARL) v. INLAND REVENUE COMRS.*, [1918] 2 K. B. 584; 88 L. J. K. B. 821; 119 L. T. 580; 34 T. L. R. 573; 7 Tax Cas. 289; *on appeal*, [1919] 2 K. B. 336, C. A.

Annotations:—**Mentd.** *Stocker v. I. R. Comrs.*, [1919] 2 K. B. 702; *Williams v. Singer, Pool v. Royal Exchange Assce.*, [1919] 1 K. B. 108; *Rossdale v. Fryer*, [1922] 2 K. B. 303; *Smith v. Smith*, [1923] P. 191; *I. R. Comrs. v. Pakenham, Same v. Longford, Same v. Longford, (Jascolgne v. I. R. Comrs.)*, [1917] 1 K. B. 594; *Jones v. Wright* (1927), 139 L. T. 43.

SUB-SECT. 14.—CONSTRUCTION WITH REFERENCE TO USAGE OR PRACTICE.

817. Whether local usage or practice controls construction.]—*SHEPPARD v. GOSNOLD* (1673), Vaugh. 159; 124 E. R. 1018.

Annotations:—**Apld.** *A.-G. v. Chitty* (1744), Park. 37; *Re Aaron, Ex p. Lowe* (1832), 1 L. J. Bey. 54; *Fermoy Peerage Claim* (1856), 8 State Tr. N. S. 723. **Mentd.** *R. v. Hornbee* (1691), Freem. K. B. 331; *Anon.* (1697), 1 Ld. Raym. 388; *Courtney v. Bower & Kingston* (1698), 1 Ld. Raym. 501; *Campbell v. Bullman* (1761), Park. 198; *Mitchell v. Torup* (1766), Park. 227; *Legge v. Boyd* (1845), 1 C. B. 92; *Barrow v. Arnaud* (1816), 6 L. T. O. S. 453.

818. ———.]—The usage of a particular place cannot control the operation of a general statute.—*R. v. HOGG* (1787), Cald. Mag. Cas. 266; 1 Term Rep. 721; 1 Bott. 159; 99 E. R. 1341.

Annotations:—**Refd.** *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A. C. 531. **Mentd.** *R. v. Brighton Gas Light & Coke Co.* (1826), 5 B. & C. 466; *Brown v. Granville* (1833), 10 Bing. 69; *R. v. Liverpool Exchange Proprietors* (1834), 1 Ad. & El. 465; *R. v. Haslam* (1851), 17 Q. B. 220; *Tyne Roller Works Co. v. Longbenton Overseers* (1886), 18 Q. B. D. 81; *Kirby v. Hunstet Union* (1905), 1 Konst. Rat. App. 225.

819. ———.]—Corrupt Practices Act must in every case receive its true legal construction, & cannot be affected as to its operation by local custom, or the peculiar circumstances of localities.

—*BRADFORD ELECTION PETITION (No. 1)*, *HALEY v. RIPLEY* (1869), 19 L. T. 718; 1 O'M. & H. 30. *Annotations*:—**Mentd.** *Wigan Pctn.* (1869), 21 L. T. 122; *Turnbull v. Wheldon* (1871), 36 J. P. 212.

820. ———.]—*YEWENS v. NOAKES*, No. 475, *ante*.

821. ———.]—(1) Neither usage nor long-continued practice could have any effect upon the Acts in question.

(2) General provisions do not override special provisions (CHITTY, J.).—*NORTHAM BRIDGE CO. v. R.* (1886), 55 L. T. 759.

822. ———.]—It was said that even if the effect of the Act was immediately to vest the property in the new authority, yet having regard to the long

& venerable practice of the bank, it is essential that there should be some additional instrument. But that practice cannot affect the construction of an Act of Parliament (VAUGHAN WILLIAMS, L.J.).—*OLDHAM CORPN. v. BANK OF ENGLAND*, [1904] 2 Ch. 716; 73 L. J. Ch. 785; 91 L. T. 582; 68 J. P. 584; 53 W. R. 243; 20 T. L. R. 787; 48 Sol. Jo. 724; 2 L. G. R. 1324, C. A.

Annotations:—**Mentd.** *Re Wallsend B. C. & Northumberland County Council*, [1906] 2 Ch. 506; *Re Leeds Institute of Science, Art & Literature & Leeds City Council*, [1909] 1 Ch. 500.

823. ———.]—As against a plain statutory enactment no usage, however long continued, can prevail.—*LORD ADVOCATE v. WALKER TRUSTEES*, [1912] A. C. 95; 106 L. T. 194; 28 T. L. R. 101, H. L.

824. ——— Matter on which statute silent.]—Long usage is of no avail against plain statutory enactments, & it can be binding on parties only as the interpreter of a doubtful law, & as affording a contemporaneous exposition. Where a statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with express directions of the statute.—*DUNBAR MAGISTRATES v. ROXBURGHE (DUCHESS)* (1835), 3 Cl. & Fin. 335; 6 E. R. 1462.

Annotation:—**Refd.** *Lord Advocate v. Walker Trustees*, [1912] A. C. 95.

SUB-SECT. 15.—CONSTRUCTION IN ACCORDANCE WITH INTERNATIONAL LAW.

825. Presumption that statute consistent with rules of international law.]—Sir Benson Maxwell says in his work on the Interpretation of Statutes that “every statute is to be interpreted & applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of International Law.” This passage expresses the rule of construction which is applicable to the present case (HANNEN, J.).—*BLOXAM v. FAVRE* (1883), 8 P. D. 101; 52 L. J. P. 42; 31 W. R. 610; *on appeal* (1884), 9 P. D. 130, C. A.

Annotations:—**Refd.** *In the Estate of Groos*, [1901] P. 269. **Mentd.** *In the Goods of Huber*, [1896] P. 209.

826. ———.]—*COLQUHOUN v. BROOKS*, No. 867, *post*.

827. Statute expressly contrary to International Law—Duty of court to give effect to statute.]—No statute ought, therefore, to be held to apply to foreigners with respect to transactions out of British jurisdiction, unless the words of the statute are perfectly clear; but I never said that if it pleased the British Parliament to make such laws as to foreigners out of the jurisdiction, that cts. of justice must not execute them; indeed, I said the direct contrary, speaking of the Instance Ct. of Admty., reserving any particular considerations that might attach to the Prize Ct. (Dr. LUSHINGTON).—*CHIL v. PAPAYANNI, THE AMALIA* (1863), 1 Moo. P. C. C. N. S. 471; Brown. & Lush. 151; 32 L. J. P. M. & A. 191; 8 L. T. 805; 9 Jur. N. S. 1111; 1 Mar. L. O. 359; 15 E. R. 778; *on appeal*, 1 Moo. P. C. C. N. S. at p. 479, P. C.

Annotations:—**Mentd.** *The Albert* (1863), 3 New Rep. 217; *Lloyd v. Guilbert* (1865), L. R. 1 Q. B. 115; *The Halley* (1868), L. R. 2 P. C. 193; *The Normandy* (1870), L. R.

PART III. SECT. 2, SUB-SECT. 15.

825 i. Presumption that statute consistent with rules of international law.]—*MERCHANTS BANK OF HALIFAX v. GILLESPIE, MOFFAT & CO. (N. S.)* (1885), 10 S. C. R. 312; 5 C. L. T. 276.—**CAN.**

825 ii. ———.]—Every statute is to be interpreted & applied so far as its

language admits so as not to be inconsistent with the comity of nations or with the established rules of international law.—*KESOWJI DAMODAR JAIRAM v. KHIMJI JAIRAM* (1888), 1 L. R. 12 Bom. 507.—**IND.**

825 iii. ———.]—*MORTENSEN v. PETERS* (1906), 8 F. (Ct. of Sess.) (J.) 93.—**SCOT.**

827 i. Statute expressly contrary to international law—Duty of court to give effect to statute.]—*Seemle*: where it is plain that the legislature has intended to disregard or interfere with a rule of international law, the cts. are bound to give effect to its enactments.—*R. v. MEIKLEHAM* (1906), 11 O. L. R. 366; 1 O. W. R. 945.—**CAN.**

Sect. 2.—Rules of interpretation: Sub-sects. 15, 16 & 17, A. & B.]

3 A. & E. 152; *The Northumbria* (1870), 21 L. T. 681; *Ellis v. M'Henry*, *Ellis v. M'Henry* (1871), 40 L. J. C. P. 109; *James v. L. & S. W. Ry.* (1872), L. R. 7 Exch. 187; *The Fanny M. Carvill v. Peru (Owners)* (1875), 13 App. Cas. 455, n.; *The Sisters* (1875), 32 L. T. 837; *The Karo* (1887), 13 P. D. 24.

828. ———.]—If the legislature of England in express terms applies its legislation to matters beyond its legislative capacity, an English ct. must obey the English legislature, however contrary to international comity such legislation may be (*BRETT, L.J.*).—*NIBOYET v. NIBOYET* (1878), 4 P. D. 1; 48 L. J. P. 1; 39 L. T. 486; 27 W. R. 203, C. A.

Annotations:—*Refd.* *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Hurley v. Hurley & Menzies* (1892), 67 L. T. 384; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Keyes v. Keyes & Gray*, [1921] P. 204; *Mitford v. Mitford & Von Kuhlmann*, [1923] P. 130. **Mentd.** *Ingham (falsely called Sachs) v. Sachs* (1886), 56 L. T. 920; *Turner v. Thompson* (1888), 13 P. D. 37; *Forsyth v. Forsyth*, *Eccles v. Foster* (1890), 63 L. T. 263; *Linke (otherwise Van Aerde) v. Van Aerde* (1894), 10 T. L. R. 426; *Armytage v. Armytage*, [1898] P. 178; *Brennan (otherwise Roberts) v. Brennan* (1902), 86 L. T. 599; *Lowenfeld v. Lowenfeld*, *Corbett Intervening* (1903), 19 T. L. R. 443; *Ogden v. Ogden*, [1908] P. 46; *R. v. Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin*, [1917] 1 K. B. 634; *Angbinelli v. Angbinelli*, [1918] P. 247; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146; *Graham v. Graham*, [1923] P. 31; *Salvesen (or von Lorang) v. Austrian Property Administrator*, [1927] A. C. 641.

SUB-SECT. 16.—GENERAL AND PARTICULAR SECTIONS.

829. How far particular clause controls general.]

—The rule is, that where a general intention is expressed, & the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception (*BEST, C.J.*).—(*CHURCHILL v. CREASE* (1828), 5 Bing. 177; 2 Moo. & P. 415; 7 L. J. O. S. C. P. 63; 130 E. R. 1028.

Annotations:—*Consd.* *Terrington v. Hargreaves* (1829), 5 Bing. 489. *Refd.* *Luckin v. Simpson* (1840), 6 Bing. N. C. 353.

830. ———.]—Two clauses in the same statute, & on the same subject, & not inconsistent, the first being general, & the other more particular, must be construed together, & the latter does not repeal the former, but merely controls its operation.—*CASTRIQUE v. PAGE* (1853), 13 C. B. 458; 1 C. L. R. 1; 22 L. J. C. P. 145; 21 L. T. O. S. 60; 17 J. P. 264; 17 Jur. 395; 1 W. R. 288; 138 E. R. 1278.

Annotation:—*Refd.* *Chaplin v. Levy* (1854), 9 Exch. 673.

831. ———.]—Where one clause of an Act of Parliament directs specific acts to be done, but which acts would be included in the general terms of a subsequent prohibitory clause, the former clause is not controlled by the latter.—*DE WINTON*

v. BRECON CORPN. (1859), 26 Beav. 533; 28 L. J. Ch. 600; 33 L. T. O. S. 296; 23 J. P. 627; 5 Jur. N. S. 882; 53 E. R. 1004.

Annotations:—*Consd.* *Brecon Corpn. v. Seymour* (1859), 26 Beav. 548. *Refd.* *Date v. Gas, Coal Collieries*, [1916] 2 K. B. 451. **Mentd.** *Gardner v. L., C. & D. Ry.* (No. 1), *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Assocn. v. Same* (1867), 2 Ch. App. 201; *Re Greensill* (1872), L. R. 8 C. P. 24.

832. ———.]—The rule is, that whenever there is a particular enactment & a general enactment in the same statute, & the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative & the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

Again, wherever two parts of a statute are contradictory, the ct. endeavours to give a distinct interpretation to each of them, by looking at the context (*ROMILLY, M.R.*).—*PRETTY v. SOLLY* (1859), 26 Beav. 606; 33 L. T. O. S. 72; 53 E. R. 1032.

Annotations:—*Apld.* *De Winton v. Brecon Corpn.* (1859), 33 L. T. O. S. 296. *Refd.* *Wakefield v. Buccleuch* (1870), 39 L. J. Ch. 441.

833. ———.]—*TAYLOR v. OLDHAM CORPN.*, No. 590, *ante*.

834. ———.]—*NORTHAM BRIDGE CO. v. R.*, No. 821, *ante*.

835. ———.]—There are very general words in sect. 1; but the subsequent sect. 4, limits the whole of sect. 1 & shows that the general words of that sect. are not to be read in their largest sense (*LORD FISHER, M.R.*).—*Re WATSON, Ex p. JOHNSTON, JOHNSTON v. WATSON*, [1893] 1 Q. B. 21; 62 L. J. Q. B. 85; 41 W. R. 34; 37 Sol. Jo. 8; 4 R. 90; *sub nom. Re WATSON, Ex p. WATSON, JOHNSTON v. WATSON*, 67 L. T. 519, C. A.

Annotations:—*Refd.* *Thompson v. Gill*, [1903] 1 K. B. 760. **Mentd.** *Re Bankruptcy Notice*, [1898] 1 Q. B. 383.

General & particular words.]—*See* Sub-sect. 17, *post*.

SUB-SECT. 17.—GENERAL AND PARTICULAR WORDS.

A. General after Particular Words—*ejusdem generis* Rule.

See DEEDS, Vol. XVII., pp. 273–276, Nos. 882–903.

836. General words construed ejusdem generis as particular words.]—(1) All penal laws should be construed strictly, no case should be held to be reached by them but such as are within both the spirit & letter of such laws (*BEST, C.J.*).

(2) If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of judges, & not by the express authority of the laws. If general words follow an enumeration of particular cases, such general words are by another rule of construction held to apply only to cases of the same kind as those which are expressly men-

PART III. SECT. 2, SUB-SECT. 16.

829 i. How far particular clause controls general.]—When there are specific provisions in a statute, & also general ones, & the latter conflict with the former, the specific provisions are read as exceptions from the general ones.—*BARRY v. UNION GOVERNMENT (MINISTER OF FINANCE)*, [1912] O. P. D. 114.—**S. AF.**

PART III. SECT. 2, SUB-SECT. 17.—A.

836 i. General words construed ejusdem generis as particular words.]—*ANDERSON v. MAUDE (N. S.)* (1911), 10 E. L. R. 194.—**CAN.**

836 ii. ———.]—*NORTHWESTERN LIFE*

ASSURANCE CO. v. K (Sask.), [1922] 1 W. W. R. 962.—**CAN.**

836 iii. ———.]—Where there are general words of description, following an enumeration of particular things, such general words are to be construed distributively, *reddendo singula singulis*; & if the general words will apply to some things & not to others, the general words are to be applied to those things to which they will, & not to those to which they will not apply; that rule is beyond all controversy.—*M'NEILL v. CHROMMELIN* (1858), 8 L. C. L. R. 61, 10 Ir. Jur. 297.—**IR.**

836 iv. ———.]—Although the rule that a general word following a particular &

specific word of the same nature is presumed to be restricted to the same genus as that word, has to be followed with care, it will be always followed where a different construction would lead to absurd results.—*COONEY v. COVELL* (1901), 21 N. Z. L. R. 106.—**N.Z.**

836 v. ———.]—*BUCKIE MAGISTRATES v. SEAFIELD'S (DOWAGER COUNTESS) TRUSTEES*, [1928] S. C. 525–6.—**SCOT.**

836 vi. Particular words of inferior import—Not enlarged by general words.]—When an Act of Parliament begins with words which describe things of an inferior degree & concludes with general words, the latter shall not be extended to anything of a higher degree.—*WILLIAMS v. CORNWALL MUNI-*

tioned (BEST, C.J.).—FLETCHER v. SONDES (LORD) (1827), 3 Bing. 501; 1 Bli. N. S. 144; 130 E. R. 606, H. L.

Annotations:—As to (1) **Reid**. R. v. O'Brien (1848), 7 State Tr. N. S. 1; Egerton v. Brownlow (1853), 4 H. L. Cas. 1. **Generally**, **Mentd.** Doe d. Watson v. Fletcher (1828), 2 Man. & Ry. 206; Robertson v. Macdougall (1828), 3 C. & P. 259.

837. —.—.]—Where several words are put together, & the enumeration of particular subjects is followed by general words, those general words will not refer to subjects of a different class from the preceding words (LORD DENMAN, C.J.).—R. v. NEVILL (1846), 8 Q. B. 452; 1 New Mag. Cas. 480; 2 New Sess. Cas. 195; 15 L. J. M. C. 33; 6 L. T. O. S. 345; 10 J. P. 245; 115 E. R. 946.

Annotations:—**Reid**. East London Waterworks Co. v. Mile End Old Town Trustees (1851), 17 Q. B. 512. **Mentd.** Ingram v. Drinkwater (1875), 44 L. J. P. C. 83.

838. —.—.]—When general words follow specific words previously enumerated, they must be construed to mean something of the same kind as those which went before (COLERIDGE, J.).—EAST LONDON WATERWORKS CO. v. MILE END OLD TOWN TRUSTEES (1851), 17 Q. B. 512; 117 E. R. 1378; *sub nom.* R. v. EAST LONDON WATERWORKS CO., 21 L. J. M. C. 49; 18 L. T. O. S. 73; 16 J. P. 229; 16 Jur. 121.

Annotations:—**Reid**. Met. Ry. v. Fowler, [1893] A. C. 416. **Mentd.** Electric Telegraph Co. v. Salford Overseers (1855), 11 Exch. 181; R. v. West Middlesex Waterworks Co. (1859), 32 L. T. O. S. 356; New River Co. v. St. Pancras Vestry (1880), 45 J. P. 75.

839. —.—.]—(1) It is a penal clause, & must receive a strict construction (LORD CAMPBELL, C.J.).

(2) The general rule is, that a wide term following a narrower one is to be construed to mean other things *ejusdem generis* (ERLE, J.).—R. v. REID (1851), 2 C. L. R. 1495; *sub nom.* R. v. REED, 23 L. T. O. S. 156; 2 W. R. 520.

840. —.—.]—Where there are general words following a specific enumeration, the general words must be confined to subjects *ejusdem generis* as those specified (LORD CAMPBELL, C.J.).—R. v. EDMUNDSON (1859), 2 E. & E. 77; 28 L. J. M. C. 213; 33 L. T. O. S. 237; 23 J. P. 710; 5 Jur. N. S. 1351; 7 W. R. 565; 8 Cox, C. C. 212; 121 E. R. 30.

Annotations:—**Reid**. Gunnestad v. Price, Fullmore v. Wait (1875), L. R. 10 Exch. 65; *Re* Layard, Layard v. Bessborough (1916), 85 L. J. Ch. 505; A.-G. v. Brown, [1920] 1 K. B. 773.

841. —.—.]—When a special term is used, followed by general words, the latter must be taken as *ejusdem generis* with the former (COCKBURN, C.J.).—SCOTT v. WASHINGTON (1865), 13 W. R. 939; *sub nom.* WASHINGTON v. SCOTT, 29 J. P. 598.

842. —.—.]—NORTH BRITISH RY. CO. v. BUDHILL COAL & SANDSTONE CO., No. 340, *ante*.

843. —.—.]—Subject to intendment of statute.]—HAWKE v. DUNN, No. 496, *ante*.

— Particular applications of rule.]—See TITLES *passim*.

844. Particular words of inferior import—Not enlarged by general words.]—The general words of a statute beginning with inferior persons, etc., do not extend to superior persons.

31 Hen. 8, c. 13, beginning with inferior conveyances, the general words "by any other means" cannot be intended of an Act of Parliament.—CANTERBURY'S (ARCHBP.) CASE (1590), 2 Co. Rep. 46, a; 76 E. R. 519.

Annotations:—**Apld.** Cornwallis v. Spurling (1605), Cro. Jac. 57; Wright v. Gerrard (1618), Hob. 306. **Expld.** Brewster v. Kitchin (1697), 1 Ld. Raym. 317. **Consd.** Withers v. Harris (1702), 2 Ld. Raym. 806. **Expld.** Hopwood v. Barefoot (1709), 11 Mod. Rep. 237. **Apprvd.** Drury v. Drury (1761), 1 Eden. 39. **Apld.** Bidleson v. Whytel (1764), 3 Burr. 1545; Copland v. Powell (1823), 3 Moore, C. P. 400. **Reid.** Mun v. Baylies (1673), Freem. K. B. 340; Bridgewater v. Bolton (1704), 6 Mod. Rep. 106; Gunnestad v. Price, Fullmore v. Wait (1875), L. R. 10 Exch. 65. **Mentd.** Priddle & Napper's Case (1612), 11 Co. Rep. 8 b; Gerrard v. Wright (1621), Cro. Jac. 607; Statford v. Neale (1721), 1 Stra. 482; Monck v. Huskisson (1827), 1 Sim. 280.

845. —.—.]—The well-known & established rule that statutes which treat of things or persons of an inferior rank cannot by any general words be extended to those of a superior degree (PARK, J.).—COPLAND v. POWELL (1823), 1 Bing. 369; 8 Moore, C. P. 400; 2 L. J. O. S. C. P. 22; 130 E. R. 149.

846. Subject-matter described by particular words—Brought within purview of statute by particular not general words—Effect of repeal of particular words.]—In order to ascertain the effect of a repealing statute the repealed words must be looked at. Where in any statute special words are followed by general words, any subject-matter which is aptly described by the special words comes within the purview of the statute by force of the special words, & not of the general words. If, therefore, the special words are repealed, the subject-matter ceases to be within the purview of the statute, though aptly described by the general words in the absence of the special words.—A.-G. v. LAMPLOUGH (1878), 3 Ex. D. 214; 47 L. J. Q. B. 555; 38 L. T. 87; 42 J. P. 356; 26 W. R. 323, C. A.

Annotations:—**Reid.** Panagotis v. S.S. Pontiac, [1912] 1 K. B. 74. **Mentd.** Halesowen Ry. v. G. W. Ry. & Mid. Ry. (1883), 4 Ry. & Can. Tr. Cas. 221.

847. General words applicable equally to all particular words.]—I think that as a matter of ordinary construction where several words are followed by a general expression . . . which is as much applicable to the first & other words as to the last, that expression is not limited to the last but applies to all (LORD BRAMWELL).—GREAT WESTERN RY. CO. v. SWINDON & CHELTENHAM RY. CO. (1881), 9 App. Cas. 787; 53 L. J. Ch. 1075; 51 L. T. 798; 48 J. P. 821; 32 W. R. 957, H. L.

Annotations:—**Reid.** Charlton v. Rolleston (1884), 28 Ch. D. 237; *Re* Gerard & Beecham's Contract, [1894] 3 Ch. 295; *Re* C. & S. L. Ry. & St. Mary Woolnoth & St. Mary Woolchurch Haw, [1903] 2 K. B. 728; Taff Vale Ry. v. Cardiff Ry., [1917] 1 Ch. 299. **Mentd.** M. S. & L. Ry. v. Sheffield & South Yorkshire Navigation Co. (1890), 6 T. L. R. 411.

B. Particular after General Words.

848. Qualification of general words preceding.]—WISEMAN v. COTTEN (1663), 1 Sid. 135; 1 Keb. 372; 1 Lev. 79; T. Raym. 76; 82 E. R. 1015; *sub nom.* COTTON v. WISEMAN, Hard. 325.

Annotations:—**Mentd.** Brooke v. Thomlinson (1672), Freem. K. B. 47; Doe d. Bacon v. Brydges (1843), 13 L. J. C. P. 209.

CIPAL CORPN. (1900), 32 O. R. 255.—CAN.

m. Application of rule—Reference to object or mischief aimed at by Act.]—R. v. MEE WAH (1886), 3 B. C. R. 403.—CAN.

n. — To statutes conferring discretionary powers upon judiciary.]—The *ejusdem generis* rule has little, if any value in statutes conferring dis-

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cretionary powers upon the judiciary.—*Re* OLLMAN (Ont.), [1925] 3 D. L. R. 1196; 57 O. L. R. 340.—CAN.

o. — Necessity for limitation of special words to one genus.]—In order that the *ejusdem generis* rule of construction should be applicable, it must be possible to ascribe the special words to one genus before the general words can be limited in their meaning to

things of a special genus.—ALLI v. PRETORIA MUNICIPALITY, [1908] T. S. 1120.—S. AF.

p. — To give meaning narrower than intended.]—The *ejusdem generis* rule must not be used to give words a narrower meaning than they were intended to have.—DE VILLIERS v. PRETORIA MUNICIPALITY, [1912] T. P. D. 626.—S. AF.

X X

Sect. 2.—Rules of interpretation: Sub-sect. 18, A., B., C. & D.]

SUB-SECT. 18.—CONSTRUCTION OF GENERAL PROVISIONS.

A. In General.

849. General rule—General words construed generally.]—General words in a statute must receive a general construction; unless there is in the statute itself some ground for restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment.—**BECKFORD v. WADE** (1805), 17 Ves. 87; 34 E. R. 34, P. C.

Annotations:—Mentd. Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; A.-G. v. Aspinall (1837), 1 Jur. 812; Wedderburn v. Wedderburn (1838), 4 My. & Cr. 41; *Ex p.* Hasell (1839), 3 Y. & C. Ex. 617; Portlock v. Gardner (1842), 6 Jur. 795; Toft v. Stephenson (1848), 7 Haro. 1; A.-G. v. Murdoch (1852), 1 De G. M. & G. 86; Eager v. Barnes & Bridger (1862), 7 L. T. 408; Smallcombe's Case (1867), L. R. 3 Eq. 769; Phillips v. Eyre (1870), L. R. 6 Q. B. 1; Drummond v. Sant (1871), L. R. 6 Q. B. 763; Soar v. Ashwell, [1893] 2 Q. B. 390; Taylor v. Davies, [1920] A. C. 636.

850. ———.]—The rule is clear, that general words are to be construed generally, unless there is something in the Act which shows that such was not the intention of the legislature, but it is clear also that general words are to be restrained to the matter with which the Act is dealing (**WILLES, J.**).—**PHILLIPS v. POLAND** (1866), L. R. 1 C. P. 204; Har. & Ruth. 235; 35 L. J. C. P. 128; 13 L. T. 712; 12 Jur. N. S. 260; 14 W. R. 433; *subsequent proceedings, sub nom. Re POLAND*, 1 Ch. App. 356, L. J.J.

Annotations:—Mentd. Williams v. Rose (1867), L. R. 3 Exch. 5; Wood v. Wood (1868), L. R. 1 P. & D. 467.

851. ———.]—One objection which to my mind is almost conclusive . . . is this, that so to construe the sect. is reading into it words which limit its *prima facie* operation & make it do something different from & smaller than what its terms express (**BOWEN, L.J.**).—**R. v. LIVERPOOL JJ.** (1883), 11 Q. B. D. 638; 52 L. J. M. C. 114; *sub nom. R. v. LANCASHIRE JJ.*, 49 L. T. 244; 32 W. R. 20; *sub nom. R. v. LAWRENCE*, 47 J. P. 596, C. A.

Annotations:—Mentd. R. v. Newcastle Licensing JJ. (1886), 51 J. P. 101; R. v. Market Bosworth Licensing JJ. (1887), 56 L. J. M. C. 96; R. v. West Riding of Yorkshire JJ. (1888), 36 W. R. 855; Stevens v. Green (1889), 23 Q. B. D. 143; Thornton v. Clegg, Sheffield JJ. (1889), 53 J. P. 742; R. v. Powell, [1891] 2 Q. B. 693; Sharp v. Wakefield (1891), 55 J. P. 197; Baldwin v. Dover JJ., [1892] 2 Q. B. 421; Price v. James, [1892] 2 Q. B. 428; Murray v. Freer, [1893] 1 Q. B. 281; Symons v. Wedmore, [1894] 1 Q. B. 401; R. v. West Riding, Yorks. JJ., *Ex p.* Hill (1895), 59 J. P. 278; R. v. London County JJ., [1903] 2 K. B. 19; Wilson v. Crewe JJ. (1905), 74 L. J. K. B. 394; R. v. Bath JJ., *Ex p.* Spiers & Pond (1908), 99 L. T. 54; Wernham v. R., [1914] 1 K. B. 468.

852. Restriction of general words—From intent of legislature.]—**STRADLING v. MORGAN**, No. 376, *ante*.

853. ———.]—**COPE v. DOHERTY**, No. 400, *ante*.

Construction with reference to intention generally, *see* Sub-sect. 4, *ante*.

854. ——— From other words of statute.]—**BECKFORD v. WADE**, No. 849, *ante*.

855. ———.]—**PHILLIPS v. POLAND**, No. 850, *ante*.

856. ———.]—One of the safest guides to the construction of sweeping general words, which it is difficult to apply in their full literal sense, is to examine other words of like import in the same instrument (*per* **CUR.**).—**BLACKWOOD v. R.** (1882),

8 App. Cas. 82; 52 L. J. P. C. 10; 48 L. T. 441; 31 W. R. 645, P. C.

Annotations:—Reid. *Re* Manchester, Duncannon v. Manchester, [1912] 1 Ch. 540. *Mentd.* *Re* Kloebe, Kannreuther v. Geisebrocht (1884), 28 Ch. D. 175; Stamps Comrs. v. Hope, [1891] A. C. 476; Henty v. R., [1896] A. C. 567; *Re* Mandslay & Field (1900), 82 L. T. 378; Woodruff v. A.-G. for Ontario, [1908] A. C. 508; Winans v. A.-G., [1910] A. C. 27; R. v. Lovitt, [1912] A. C. 212; *Re* Scull, Scott v. Morris (1917), 87 L. J. Ch. 59.

857. ———.]—No doubt general words may in certain cases properly be interpreted as having a meaning or scope other than the literal or usual meaning. They may be so interpreted where the scheme appearing from the language of the legislature, read in its entirety, points to consistency as requiring the modification of what would be the meaning apart from any context, or apart from the purpose of the legislation as appearing from the words which the legislature has used, or apart from the general law (**LORD HALDANE, C.**).—**WATNEY, COMBE, REID & CO. v. BERNERS**, [1915] A. C. 885; 84 L. J. K. B. 1561; 113 L. T. 518; 79 J. P. 497; 31 T. L. R. 449; 59 Sol. Jo. 492, H. L.

Annotations:—Consd. R. v. Customs & Excise Comrs., [1928] A. C. 402. *Mentd.* Bodega Co. v. Read (1914), 84 L. J. Ch. 36; Moody v. Cox & Hatt (1917), 116 L. T. 740; A.-G. v. Metropolitan Water Board, [1928] 1 K. B. 833.

858. ——— From subject-matter of statute.]—**PHILLIPS v. POLAND**, No. 850, *ante*.

859. ———.]—Words which are general & not express or precise should be restricted to the fitness of the matter (**ARCHIBALD, J.**).—**WASHER v. ELLIOTT** (1876), 1 C. P. D. 169; 45 L. J. Q. B. 144; 34 L. T. 56; 24 W. R. 432.

Annotations:—Mentd. *Re* Ives, *Ex p.* Addington (1886), 10 Q. B. D. 665; Schuller v. Wood (1894), 64 L. J. Q. B. 243.

860. ——— Words referring to what is lawful & unlawful—Restricted to what is lawful.]—Where general words extend to what is lawful & what is unlawful, they can only in the absence of express provision be applied to what is lawful.—**LONDON, BRIGHTON, ETC. RY. CO. v. LONDON & SOUTH WESTERN RY. CO.** (1859), 4 De G. & J. 362; 28 L. J. Ch. 521; 33 L. T. O. S. 246; 5 Jur. N. S. 801; 45 E. R. 140, L. J.J.

Annotations:—Mentd. Mid. Ry. v. G. W. Ry. (1873), 8 Ch. App. 841; *Re* Woking U. C. (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300.

861. ——— To genus dealt with by statute.]—The rule that statutes extend by inference to cases not originally contemplated depends upon showing that the statute deals with a genus within which the new species is brought; but if the statute shows plainly that the word is not used as describing the whole genus put forward as the one applicable to the case, but only some particular species thereof, the rule has no application.—**BIRMINGHAM CORPN. v. BIRMINGHAM CANAL NAVIGATIONS** (1905), as reported in 21 T. L. R. 548; 3 L. G. R. 1287.

B. Alteration of Common Law or Previous Policy of Law.

862. Presumption against construction to alter previous policy.]—The general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched (**ROMILLY, M.R.**).—**MINET v. LEMAN** (1855), 20 Beav. 269; 3 Eq. Rep. 502; 24 L. J. Ch. 545; 25 L. T. O. S. 57; 19 J. P. 260; 1 Jur.

PART III. SECT. 2, SUB-SECT. 18.—B.
q. General rule.]—In construing Acts of Parliament which infringe

upon the Common Law, the state of the law before the passing of the Act must be ascertained, to determine how far it is necessary to alter that law,

in order to carry out the objects of the Act.—**SWANTON v. GOOLD** (1858), 9 I. O. L. R. 234.—**IR.**

N. S. 410 ; 3 W. R. 359 ; 52 E. R. 606 ; *on appeal*, 7 De G. M. & G. 340, L. J.J.

Annotations :—**Consd.** Farley v. Bonham (1861), 1 John. & H. 177. **Mentd.** Baldwin v. Baldwin (1856), 22 Beav. 419 ; Jacomb v. Turner, [1892] 1 Q. B. 47.

863. Presumption against construction to alter common law.—It is a familiar doctrine that when you have two Acts of Parliament, one special & the other general, the latter does not repeal the former unless there is clear evidence of an intention to do so ; & the same principle must apply to a repeal of the common law. A general Act must not be read as repealing the common law relating to a special & particular matter unless there is something in the general Act to indicate an intention to deal with that special & particular matter (CHANNELL, J.).—*R. v. SALISBURY* (BP.), [1901] 1 K. B. 573 ; 70 L. J. K. B. 423 ; 84 L. T. 320 ; 65 J. P. 373 ; 49 W. R. 399 ; 45 Sol. Jo. 278, D. C. ; *on appeal*, [1901] 2 K. B. 225, C. A.

C. *Expressio unius exclusio alterius*.

864. General rule.—Where a general Act of Parliament confers immunities which expressly exempt certain persons from the effect & operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law ; *expressio unius est exclusio alterius*. *ST. PAUL'S (WARDEN, ETC.) v. LINCOLN* (BP.) as *ST. PAUL'S (DEAN)*, (1817), 4 Price, 65 ; Wils. Ex. 1 ; 146 E. R. 395, Ex. Ch.

Annotation :—**Mentd.** Vivian v. Cochrane (1855), 4 De G. M. & G. 818.

865. —.—The ordinary construction of an Act of the legislature is *expressio unius est exclusio alterius* (TINDAL, C.J.).—*DEWHURST v. FEILDEN* (1845), 7 Man. & G. 182 ; Bar. & Arn. 439 ; 1 Lut. Reg. Cas. 274 ; Pig. & R. 166 ; 8 Scott, N. R. 1013 ; 14 L. J. C. P. 126 ; 4 L. T. O. S. 337 ; 9 J. P. 407 ; 9 Jur. 376 ; 135 E. R. 79.

Annotations :—**Mentd.** Powell v. Price (1847), 4 C. B. 105 ; Jolliffe v. Rice (1818), 2 Lut. Reg. Cas. 90 ; Pownall v. Dawson (1851), 2 Lut. Reg. Cas. 177 ; Thompson v. Ward, Ellis v. Burch (1871), L. R. 6 C. P. 327.

866. Interference with privilege of Parliament.

—(1) It is not because *ex majore cautela* several Acts of Parliament have thought it necessary specially to reserve that privilege that it is to be held to be abolished & annihilated in every other Act of Parliament in which it is not expressly reserved (LORD HATHERLEY, C.).

(2) The privilege which had been established by Common Law & recognised on many occasions by Act of Parliament should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute (LORD HATHERLEY, C.).

(3) That Act [4 Geo. 3, c. 33] has long since been swept away ; but though it has been repealed, its effect as a declaration of the law must still be considered operative & therefore the legislature in the subsequent Acts of Parliament has not deemed it necessary to follow its very words (LORD WESTBURY).—*NEWCASTLE (DUKE) v. MORRIS* (1870), L. R. 4 II. L. 661 ; 40 L. J. Bcy. 4 ; 23 L. T. 569 ; 35 J. P. 548 ; 19 W. R. 26, H. L.

867. Exclusion by inadvertence.—(1) Whenever we find that an outrage on the comity of nations will be produced by our giving full effect to general words in a statute, we must put upon those words such a limitation as will exclude that outrage (LORD ESHER, M.R.).

(2) The maxim *expressio unius exclusio alterius*

has been pressed upon us. I agree with what is said in the ct. below by WILKS, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, & the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice. I think a rigid observance of the maxim in this case would make other provisions of the statute inconsistent & absurd, & result in injustice. I cannot therefore permit it to govern my decision (LOPES, L.J.).—*COLQUHOUN v. BROOKS* (1888), 21 Q. B. D. 52 ; 57 L. J. Q. B. 439 ; 59 L. T. 661 ; 52 J. P. 645 ; 36 W. R. 657 ; 4 T. L. R. 494, C. A. ; *on appeal* (1889), 14 App. Cas. 493, H. L.

Annotations :—**As to** (2) **Consd.** Lowe v. Dorling, [1906] 2 K. B. 772 ; Gregg v. Richards, [1926] Ch. 521. **Generally, Reqd.** Garbutt v. Durham Joint Committee, [1904] 2 K. B. 514. **Mentd.** London Bank of Mexico & South America v. Apthorpe, [1891] 2 Q. B. 378 ; Bartholomay Brewing Co. (of Rochester) v. Wyatt, Nobel Dynamite Trust Co. v. Wyatt, [1893] 2 Q. B. 499 ; San Paulo (Brazilian) Ry. v. Carter, [1896] A. C. 31 ; Apthorpe v. Schoenhofen Brewing Co. (1899), 80 L. T. 395 ; L. C. C. v. A.-G., [1901] A. C. 26 ; R. v. Clerkenwell, General Comrs. of Taxes, [1901] 2 K. B. 879 ; Kodak v. Clark, (1903) 4 Tax Cas. 549 ; De Beers Consolidated Mines v. Howe (1905), 21 T. L. R. 460 ; Gramophone & Typewriter v. Stanley, [1908] 2 K. B. 89 ; American Thread Co. v. Joyce (1912), 106 L. T. 171 ; Liverpool & London & Globe Insco. v. Bennett, Brice v. Northern Assee., Brice v. Ocean Accident & Guarantee Corp., [1912] 2 K. B. 41 ; Drummond v. Collins, [1915] A. C. 1011 ; Mitchell v. Egyptian Hotels, [1915] A. C. 1022 ; Kensington Income Tax Comrs. v. Aramayo, [1916] 1 A. C. 215 ; Brooke v. I. R. Comrs., [1918] 1 K. B. 257 ; Greenwood v. Smith (1921), 91 L. J. K. B. 319 ; I. R. Comrs. v. Sansom, [1921] 2 K. B. 492 ; Singer v. Williams, [1921] 1 A. C. 41 ; Wankie Colliery Co. v. I. R. Comrs., [1921] 3 K. B. 344 ; Williams v. Singer, Pool v. Royal Exchange Assee., [1921] 1 A. C. 65 ; Bradbury v. English Sewing Cotton Co. (1923), 8 Tax Cas. 481 ; Alianza Co. v. I. R. Comrs., [1925] A. C. 644 ; Foulsham v. Pickles, [1925] A. C. 458 ; Swedish Central Ry. v. Thompson, [1925] A. C. 495 ; Whelan v. Henning, [1925] 1 K. B. 387 ; Whitney v. I. R. Comrs., [1926] A. C. 37 ; Shee v. Baker, [1927] 1 K. B. 109 ; I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford, [1928] 1 K. B. 118.

D. *Statutes Applicable to England and Scotland.*

See Interpretation Act, 1889 (c. 63), ss. 23–25, 28, 29.

868. Not construed technically.—In construing the statute, we must bear in mind that, as it applies to the whole of the United Kingdom, the language of the legislature must be taken in its popular sense, without regard to technicalities, whether of English or of Scotch law.—*SALTOUN (LORD) v. ADVOCATE GENERAL* (1860), 3 Macq. 659 ; 3 L. T. 40 ; 8 W. R. 565, H. L.

Annotations :—**Consd.** A.-G. v. Charlton (1876), 45 L. J. Q. B. 354. **Expld.** Income Tax Special Purposes Comrs. v. Pemsel, [1891] A. C. 531. **Reqd.** *Re* Barker (1861), 30 L. J. Ex. 404 ; Braybrooke v. A.-G. (1861), 31 L. J. Ex. 177 ; A.-G. v. Lilford (1864), 3 H. & C. 239 ; A.-G. v. Upton (1866), L. R. 1 Exch. 224 ; *Re* Cowley (1866), L. R. 1 Exch. 288 ; Lord Advocate v. Noray, [1905] A. C. 531. **Mentd.** A.-G. v. Floyer, A.-G. v. Smythe (1861), 31 L. J. Ex. 404 ; *Re* De Lancey (1869), L. R. 4 Exch. 315 ; Fryer v. Morland (1876), 3 Ch. D. 675 ; Zetland v. Lord Advocate (1878), 3 App. Cas. 505 ; Charlton v. A.-G. (1879), 4 App. Cas. 427 ; A.-G. v. Mitchell (1881), 44 L. T. 580 ; Macfarlane v. Lord Advocate, [1894] A. C. 201 ; Buchan v. Lord Advocate, [1909] A. C. 166 ; Hamilton v. Lord Advocate, [1920] A. C. 50.

869. Word construed in technical sense—**Appropriate to each country**—“*Indictment*.”—It always requires the strong compulsion of other words in an Act to induce the ct. to alter the ordinary meaning of a well-known legal term. As there is such a proceeding as an “*indictment*,” in

PART III. SECT. 2, SUB-SECT. 18.—C.

864 i. General rule.—*STEVENSON v. HUNTER* (1903), 5 F. (Ct. of 761.—SCOT.

r. Application where leading to inconsistency or injustice.—The maxim “*expressio unius est exclusio alterius*,” should not be applied when it would

lead to inconsistency or injustice.—*FIRST NATIONAL BANK OF IDAHO SPRINGS, COLORADO v. CURRY* (1910), 20 Man. L. R. 217.—CAN.

Sect. 2.—Rules of interpretation: Sub-sect. 18, D.; sub-sect. 19, A., B. & C.]

Scotland, I think it is far more in accordance with the true construction of the proviso to say that it contemplates that "indictment" with respect to Scotland, & the well-known English indictment with respect to England, than to say that it means neither the one nor the other, but something differing from either & including both (DENMAN, J.).—*R. v. SLATOR* (1881), 8 Q. B. D. 267; 51 L. J. Q. B. 246; 46 J. P. 694; 30 W. R. 410.

870. ——— "Sequestrator."—It is suggested that the word "sequestration" is an English word, used in an English Act, & that it must have the same meaning that it would have in England. . . . I do not follow that at all (NORTH, J.).—*Re WANZER, LTD.*, [1891] 1 Ch. 305; 60 L. J. Ch. 492; 39 W. R. 343; 7 T. L. R. 151.

871. Technical meaning in one country — Applied to analogous case in other country.]—*INCOME TAX SPECIAL PURPOSES COMRS. v. PEMSEL*, No. 563, *ante*.

SUB-SECT. 19. — MISTAKE IN STATUTES.

A. In General.

872. Presumption against mistake.]—*RICHARDS v. MCBRIDE*, No. 131, *ante*.

873. ———.]—*INCOME TAX SPECIAL PURPOSES COMRS. v. PEMSEL*, No. 563, *ante*.

874. Unskilfulness or ignorance in draftsmanship—Whether statute to be reduced to nullity—Where object & intention clear.]—Where the main object & intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law except in the case of necessity or the absolute intractability of the language used.—*SALMON v. DUNCOMBE* (1886), 11 App. Cas. 627; 55 L. J. P. C. 69; 55 L. T. 446, P. C.

Annotations:—Apld. R. v. Vasey, [1905] 2 K. B. 748; *R. v. Ettridge*, [1909] 2 K. B. 24.

B. Rejection of Words and Phrases.

875. Whether word or phrase may be disregarded—Intelligible construction not otherwise possible.]—Where no meaning can be given to the words of a statute without rejecting some of those used in it, or where the statute would become a nullity were all the words retained, the ct. has power to read a sect. as though the words which make it meaningless, or nullify it, were not there (*per CUR.*).—*R. v. ETTRIDGE*, [1909] 2 K. B. 24; 78 L. J. K. B. 479; 100 L. T. 624; 73 J. P. 253;

25 T. L. R. 391; 53 Sol. Jo. 401; 22 Cox, C. C. 101; 2 Cr. App. Rep. 62, C. C. A.

Annotation:—Mentd. R. v. Woodman (1909), 2 Cr. App. Rep. 67.

876. ——— Only in case of necessity.]—I think that the words of a statute never should in interpretation be added to or subtracted from without almost a necessity (LORD BRAMWELL).—*COWPER ESSEX v. ACTON LOCAL BOARD* (1889), 14 App. Cas. 153; 58 L. J. Q. B. 594; 61 L. T. 1; 53 J. P. 756; 38 W. R. 209; 5 T. L. R. 395, H. L.; *reversg. S. C. sub nom. R. v. ESSEX* (1886), 17 Q. B. D. 447, C. A.

Annotations:—Mentd. Re London, Tilbury & Southend Ry. & Gower's Walk Schools (1889), 24 Q. B. D. 326; *M'Murray v. Cadwell* (1889), 6 T. L. R. 76; *Re Tyne-mouth (Corp.) & Northumberland, Saine & Trevelyan, Saine & Orde* (1900), 67 J. P. 425; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74; *London & India Docks Co. v. North London Ry.* (1903), *Times*, Feb. 6; *R. v. Mountford, Ex p. London United Tramways* (1901), Ltd., [1906] 2 K. B. 814; *Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327; *R. v. Middlesex (Clerk of the Peace)*, [1914] 3 K. B. 259; *Holditch v. Canadian Northern Ontario Ry.*, [1916] 1 A. C. 536; *Rockingham Sisters of Charity v. R.*, [1922] 2 A. C. 315.

877. ——— To give effect to intention of statute.]—Effect is to be given to the manifest intention of a statute, & if, in order to make that intention effective, it is necessary to suppress words in the statute, the words must be suppressed.—*R. v. VASEY*, [1905] 2 K. B. 748; 75 L. J. K. B. 19; 93 L. T. 671; 69 J. P. 455; 54 W. R. 218; 22 T. L. R. 1; 50 Sol. Jo. 14; 21 Cox, C. C. 49, C. C. R.

Annotation:—Apld. R. v. Ettridge, [1909] 2 K. B. 24.

878. ——— Statute otherwise a nullity.] *R. v. ETTRIDGE*, No. 875, *ante*.

879. ——— Obscurity of expression insufficient.]—Obscurity of expression & difficulty of construction are not sufficient grounds for rejecting provisions in Acts of Parliament (FARWELL, L.J.).—*INLAND REVENUE COMRS. v. JOICEY* (No. 1), [1913] 1 K. B. 445; 82 L. J. K. B. 162; 108 L. T. 135; 76 J. P. Jo. 616, C. A.

880. ——— Difficulty of construction insufficient.] *INLAND REVENUE COMRS. v. JOICEY* (No. 1), No. 879, *ante*.

C. Supply of Words and Phrases.

881. Court not entitled to add words or phrases.]—We are not aware of any authority to show that if a statute direct certain things to be done to give effect to an instrument, without limiting a time for doing it, that such statute is to be construed as if it had said that it shall be sufficient if the thing be done within a reasonable time (*per CUR.*).—

PART III. SECT. 2, SUB-SECT. 19.—A.

872 i. Presumption against mistake.]—*GUEST v. DIACK* (1897), 29 N. S. R. (17 R. & G.) 504.—CAN.

872 ii. ———.]—A statute is never supposed to use words without a meaning or that are superfluous.—*MEDICINE HAT CORPN. v. HOWSON*, [1920] 2 W. W. R. 811; 53 D. L. R. 264; 15 Alta. L. R. 508.—CAN.

i. Two official versions of statutes—French & English versions—Error in English version.]—A typographical or clerical error in the English text of a statute, as by the insertion of the word "these" instead of the word "third" cannot be corrected by reference to the French text in which no such error occurs, & the ct. will not presume what meaning the Legislature intended, but will take the text as it finds it.—*ARCHAMBAULT v. ROY & POIRIER* (1851), 1 L. C. R. 25.—CAN.

a. ——— Ambiguity in one version.]—Where one of the two official versions of a statute is capable of two construc-

tions, but the other version is capable of only one of those constructions the ct. will apply the construction of the latter version.—*JAFFER v. PAROW VILLAGE MANAGEMENT BOARD*, [1920] C. P. D. 267.—S. AF.

b. When right to alter mistakes ceases.]—The power given to correct mistakes in the arrangement of titles, etc., of Rev. Statutes ceases when the text of the Act is printed.—*R. v. McLAUGHLIN* (1855), 8 N. B. R. (3 All.) 159.—CAN.

c. Whether court may correct mistake.]—*Re HEINZE* (1914), 29 W. L. R. 131; 20 B. C. R. 99.—CAN.

PART III. SECT. 2, SUB-SECT. 19.—B.

877 i. Whether word or phrase may be disregarded—To give effect to intention of statute.]—In interpreting a Statute the ct. may in a proper case delete a word used by the Legislature & read in another, but the ct. will not reject a word of clear meaning unless it is absolutely necessary to do so in

order to avoid an absurdity or to prevent the manifest intention of the legislature from being defeated.—*SKINNER v. PALMER*, [1919] W. L. D. 39.—S. AF.

PART III. SECT. 2, SUB-SECT. 19.—C.

881 i. Court not entitled to add words or phrases.]—Although satisfied that there must have been some error or oversight in drafting a statute, the ct. cannot correct the error or supply the omission, for that would be to legislate, & not to interpret the Act.—*LARENCE v. LARENCE* (1911), 21 Man. L. R. 145; 17 W. L. R. 197.—CAN.

881 ii. ———.]—*Re McCALLUM v. HURRY* (Alta.) (1911), 17 W. L. R. 533.—CAN.

881 iii. ———.]—*CAMERON & CAMERON v. R.*, [1927] 2 D. L. R. 382; [1927] 1 W. W. R. 624; 38 B. C. R. 191.—CAN.

881 iv. ———.]—*A.-G. v. ELECTRIC TRACTION Co.* (1912), 7 Hong Kong L. R. 29.—HONG KONG.

MOSS v. CHARNOCK (1802), 2 East, 399; 102 E. R. 422.

Annotations :—**Refd.** *Palmer v. Moxon* (1813), 2 M. & S. 43; *Boyson v. Gibson* (1847), 4 C. B. 121. **Mentd.** *Mestaer v. Gillespie* (1805), 11 Ves. 621; *Moss v. Mills* (1805), 6 East, 144; *Hubbard v. Johnstone* (1810), 3 Taunt. 177; *Ritchie v. St. Barbe* (1813), 4 Taunt. 768; *Dixon v. Ewart* (1817), 3 Mer. 322; *The Frances* (1820), 2 Dods. 420.

882. ———.]—I cannot concede that we are at liberty, upon any ground whatever, to add a new term to the statute (**COLERIDGE, J.**).—**GWYNNE v. BURNELL** (1840), 7 Cl. & Fin. 572; 6 Bing. N. C. 453; 1 Scott, N. R. 711; West, 342; 7 E. R. 1188, II. L.

Annotations :—**Consd.** *Sturgis v. Darell* (1860), 2 L. T. 808. **Mentd.** *Negelen v. Mitchell* (1841), 7 M. & W. 612; *Galloway v. Jackson* (1842), 3 Scott, N. R. 753; *Atkinson v. Davies* (1843), 11 M. & W. 236; *De Wolf v. Bevan* (1844), 14 L. J. Ex. 124; *Gordon v. Ellis* (1844), 8 Jur. 670; *R. v. Darlington School* (1844), 6 Q. B. 682; *Pain v. Grazebrook* (1845), 2 C. B. 429; *Aston v. Perkes* (1846), 7 L. T. O. S. 186; *Gregory v. Brunswick* (1846), 3 C. B. 481; *Couling v. Cox* (1848), 6 C. B. 703; *Kepp v. Wiggett* (1848), 6 C. B. 280; *Morris v. Chadwick* (1849), 13 L. T. O. S. 208; *Rutland v. Bagshaw* (1850), 14 Q. B. 869; *Berwick Corpn. v. Oswald* (1853), 1 E. & B. 295; *Montreal Street Ry. v. Normandin*, [1917] A. C. 170.

883. ———.]—Every day I see the necessity of not importing into statutes words which are not to be found there (**PATTERSON, J.**).—**KING v. BURRELL** (1840), 12 Ad. & El. 4 Per. & Dav. 207; 4 Jur. 1109; 113 E. R. 886, *sub nom.* *R. v. BURRELL*, 9 L. J. Q. B. 337.

Annotations :—**Apld.** *Thomas v. Bolton* (1928), 139 L. T. 397. **Mentd.** *R. v. Litchfield Corpn.* (1841), 1 Q. B. 453; *King v. Share* (1842), 3 Q. B. 31; *Joule v. Taylor* (1851), 2 L. M. & P. 615; *Clarke v. Gant* (1852), 22 L. J. Ex. 67; *Jeffreys v. Higgins* (1853), 1 C. L. R. 351; *Hunt v. Hibbs* (1860), 5 H. & N. 123.

884. ———.]—We are undoubtedly bound to give to Acts of Parliament a construction in accordance with the plain intention of the legislature; but if Acts of Parliament do not use the words which are necessary to convey their meaning, and the words used are wholly inoperative, as appears to be the case in this instance, we do not feel justified in going the length of altering those words & of supplying others which shall give effect to what was perhaps the intent (**LORD DENMAN, C.J.**).—**GREEN v. WOOD** (1845), 7 Q. B. 178; 14 L. J. Q. B. 217; 5 L. T. O. S. 72; 9 Jur. 756; 115 E. R. 455.

Annotation :—**Mentd.** *Curtis v. Stovin* (1889), Q. B. D. 513.

885. ———.]—The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the legislature; we cannot aid the legislature's defective phrasing of the Act; we cannot add, & mend, &, by construction, make up deficiencies which are left there. If the legislature did intend that which it has not expressed clearly; much more, if the legislature intended something very different; if the legislature intended something pretty nearly the opposite of what is said, it is not for judges to invent something which they do not meet with in the words of the text, aiding their construction of the text always, of course, by the context; . . . it is not for them so to supply a meaning, for, in reality, it would be supplying it; the true way in these cases is, to take the words as the legislature have given them, & to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; &, therefore, if any other meaning was intended than

that which the words purport plainly to import, then let another Act supply that meaning, & supply the defect in the previous Act (*per CUR.*).—**CRAWFORD v. SPOONER** (1846), 6 Moo. P. C. C. 1; 4 Moo. Ind. App. 179; 13 E. R. 582, P. C.

886. ———.]—We have no authority to introduce any qualification or condition into an Act of Parliament; we are to interpret the language of the legislature (**LORD CAMPBELL, C.J.**).—**R. v. TRAFFORD** (1850), 15 Q. B. 200; 4 New Mag. Cas. 82; 4 New Sess. Cas. 130; 117 E. R. 434; *sub nom.* *R. v. LANCASHIRE J.J.*, 19 L. J. M. C. 199; 15 L. T. O. S. 159; 14 J. P. 528; 14 Jur. 552.

Annotations :—**Mentd.** *R. v. Hammond* (1850), 1 New Sess. Cas. 316; *R. v. Kent J.J.* (1850), 14 J. P. Jo. 733.

887. ———.]—**COE v. LAWRENCE**, No. 1486, *post*.

888. ———.]—**FREDERICKS v. PAYNE**, No. 896, *post*.

889. ———.]—The rule in construing any instrument, either an Act of Parliament or any other document, is that it is not to be held that there is a condition precedent unless it is clearly expressed or unless such is the clear inference to be drawn from the language which is used (**BRETT, L.J.**).—**R. v. FRENCH** (1879), 4 Q. B. D. 507; 48 L. J. M. C. 175; 41 L. T. 63; 43 J. P. 699; 28 W. R. 118, C. A.

Annotation :—**Refd.** *Swansea Improvements & Tram. Co. v. Swansea & Mumbles Ry.* (1880), 3 Ry. & Can. Tr. Cas. 339.

890. ———.]—Nothing could be more mischievous than, because an Act of Parliament is deficient, to try & strain the facts in order to bring within the existing legislation that which has been left out of it (**WILLS, J.**).—**PELSALL COAL & IRON CO. v. LONDON & NORTH WESTERN RY. CO.** (No. 2) (1891), 7 Ry. & Can. Tr. Cas. 36.

891. ———.]—The ct. ought to be slow to allow an interpretation to prevail which would introduce an exception which has not been made by the legislature (**MATHEW, L.J.**).—**SMITH v. COLES**, [1905] 2 K. B. 827; 75 L. J. K. B. 16; 93 L. T. 754; 51 W. R. 81; 22 T. L. R. 5; 8 W. O. C. 116, C. A.

Annotations :—**Refd.** *Re Fuller* (1921), 19 L. G. R. 756; *Hampton v. Winward*, [1921] 2 K. B. 669.

892. ——— **Casus omissus.**]—(1) If that has been a *casus omissus* I think it ought to be construed in a way most favourable to those who are seeking to defend their property from invasion. . . . A manufactory does not cease to be one because another person has a right of way over it (**LORD CRANWORTH, L.J.**).

(2) Where the construction of an Act of Parliament, under which property is to be taken compulsorily is doubtful, it should be construed most favourably to those who seek to defend the property from innovation.—**SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.** (1852), as reported in 7 Ry. & Can. Cas. 92; 21 L. J. Ch. 731; 19 L. T. O. S. 131; 16 Jur. 703, L. J.J.

Annotations :—**Generally.** **Mentd.** *Salisbury v. G. N. Ry.* (1852), 17 Q. B. 810; *Pinchin v. London & Blackwall Ry.* (1854), 1 K. & J. 31; *Spackman v. G. W. Ry.* (1855), 1 Jur. N. S. 790; *Hedges v. Met. Ry.* (1860), 28 Beav. 109; *Haynes v. Haynes* (1861), 1 Drew. & Sim. 426; *St. Thomas's Hospital v. Charing Cross Ry.* (1861), 1 John. & H. 400; *Reddin v. Metropolitan Board of Works* (1862), 4 De G. F. & J. 532; *Furniss v. Mid. Ry.* (1868), L. R. 6

893. ———.]—This is a *casus omissus* & we cannot legislate for it (**COCKBURN, C.J.**).—**R. v. DENTON (INHABITANTS)** (1864), 5 B. & S. 821; 34 L. J. M. C. 13; 11 L. T. 371; 29 J. P. 151; 11

892 i. ——— **Casus omissus.**]—Where it appears from the whole of a statute that there is a *casus omissus*, it is not for the cts. to supply the omission or

to read into the statute what it may think Parliament would have inserted had its attention been drawn to the matter.—**CORBY v. MCARTHUR, BAR-**

CLAY v. SAME, SMITH v. SAME, REDMOND v. SAME, HALLEY v. SAME (1903), 23 N. Z. L. R. 419.—N.Z.

Sect. 2.—Rules of interpretation: Sub-sect. 19, C. & D. Sect. 3: Sub-sects. 1 & 2.]

Jur. N. S. 172; 13 W. R. 143; 10 Cox, C. C. 61; 122 E. R. 1036.

894. ———.]—It seems to me to be a *casus omissus* from the Act altogether & if that be so . . . I cannot supply the deficiency (PEARSON, J.).—*Re KNATCHBULL'S SETTLED ESTATES* (1884), 27 Ch. D. 349; 54 L. J. Ch. 154; 51 L. T. 695; 33 W. R. 10; *on appeal* (1885), 29 Ch. D. 588, C. A.

Annotations:—**Mentd.** *Re Sebrights' S. E.* (1886), 33 Ch. D. 429; *Re Egmont's S. E.* (1890), 45 Ch. D. 395; *Re Dalson's S. E.*, [1892] 3 Ch. 522; *Re Howard's S. E.*, [1892] 2 Ch. 233; *Ex p. Castle Rytham, Ex p. Mid. Ry.*, [1895] 1 Ch. 348; *Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778, *Re Manchester's Settlement*, [1910] 1 Ch. 106.

895. ———.]—*REID v. WILSON & WARD*, *REID v. WILSON & KING*, No. 1506, *post*.

896. ——— **Unless for cogent reasons—Avoidance of repugnancy.**]—There is always a strong objection to introducing words into an Act of Parliament, & it ought never to be done unless absolutely necessary in order to avoid repugnance to good sense (POLLOCK, C.B.).—*FREDERICKS v. PAYNE* (1862), 1 H. & C. 584; 32 L. J. M. C. 14; 7 L. T. 329; 27 J. P. 101; 8 Jur. N. S. 1109; 11 W. R. 36; 158 E. R. 1016; *sub nom.* *PAYNE v. FREDERICKS*, 1 New Rep. 32.

897. ——— **Provisions not obvious.**]—It is, I think, a mistake to suppose that this part of the Act was passed simply for the benefit of the ship-owner, & so to approach its construction from that point of view only. This part of the Act was passed, I should suppose, for the convenience of commerce, & in order to facilitate the despatch of business. Possibly it may be used unreasonably or even oppressively by persons who are more bent on giving trouble to others than doing their own business in a business-like way, if such persons there be. But that is hardly a reason for doing violence to language tolerably plain, or for importing into the enactment provisions which are not obvious if it be construed fairly & without any leaning to one side or the other (LORD MACNAGHTEN).—*WHITE & CO. v. FURNESS, WITHEY & CO.*, [1895] A. C. 40; 64 L. J. Q. B. 161; 72 L. T. 157; 7 Asp. M. L. C. 574; 11 R. 53, H. L.; *reversing* S. C. *sub nom.* *FURNESS, WITHEY & CO. v. WHITE (W. N.) & CO.*, [1894] 1 Q. B. 483, C. A.

Annotations:—**Mentd.** *Montgomery v. Foy, Morgan*, [1895] 2 Q. B. 321; *Euterpe S.S. Co. v. Bath* (1897), 2 Com. Cas. 196; *McCheane v. Gyles (No. 2)* (1902), 71 L. J. Ch. 446; *Akt. Ocean v. Harding*, [1928] 2 K. B. 371.

D. Conjunctive and Disjunctive Words.

898. Power of Court—Whether disjunctive read as conjunctive.]—*R. v. COLE* (1801), cited in 2 East, P. C. at p. 767.

Annotations:—**Mentd.** *A.-G. v. King* (1817), 5 Price, 195; *R. v. Wiley* (1850), 4 Cox, C. C. 414.

899. ———.]—I know no authority for such a proceeding unless the context makes the necessary meaning of “or” “and,” as in some instances it does (LORD HALSBURY, C.).—*MERSEY DOCKS & HARBOUR BOARD v. HENDERSON BROTHERS* (1888), 13 App. Cas. 595; 58 L. J. Q. B. 152; 59 L. T. 697; 37 W. R. 449; 4 T. L. R.

896 i. **Unless for cogent reasons—Avoidance of repugnancy.**]—When the intention of the legislature can be collected from the statute itself, words may be modified, altered or supplied in the Statute, so as to obviate any repugnancy to, or inconsistency with such intention.—*QUIN v. O'KEEFE* (1859), 1 R. 10 C. L. 393, 416.—**IR.**

896 ii. ———.]—(*GLA CORPN. v. MICKEL*, [1922] S. C. 59 Sc. L. R. 153.—**SCOT.**

703; 6 Asp. M. L. C. 338, H. L.; *reversing* S. C. *sub nom.* *HENDERSON BROTHERS v. MERSEY DOCKS & HARBOUR BOARD* (1887), 19 Q. B. D. 123, C. A.

Annotations:—**Appld.** *Walker v. York Corpn.*, [1906] 1 K. B. 724. **Mentd.** *The Rutland* (1896), 65 L. J. P. 91; *Mersey Docks & Harbour Board v. Twigge* (1898), 67 L. J. Q. B. 604.

900. ———.]—In construing a statute “or” may be read as “and” if the context makes that the necessary meaning.—*WALKER v. YORK CORPN.*, [1906] 1 K. B. 724; 75 L. J. K. B. 413; 94 L. T. 744; 70 J. P. 270; 54 W. R. 493; 22 T. L. R. 456; 50 Sol. Jo. 391; 4 L. G. R. 524, D. C.

Annotation:—**Consd.** *Brown v. Harrison, Hourani v. Samo* (1927), 137 L. T. 549.

901. ———.]—The case of *Walker v. York Corpn.*, No. 900, *ante*, showed that to obtain consistency it was legitimate for him to read “and” instead of “or” & to do so would give a less surprising result than to alter the latter part of the sub-section (MACKINNON, J.).—*BROWN (R. F.) & CO., LTD. v. HARRISON, HOURANI v. SAME* (1927), 137 L. T. 549; 43 T. L. R. 394; 17 Asp. M. L. C. 294; *on appeal*, 96 L. J. K. B. 1025, C. A.

Annotations:—**Refd.** *Gosse Millard v. Canadian Government Merchant Marine, American Can. Co. v. Same*, [1927] 2 K. B. 432; *Green v. Premier Glynrhonwy Slate Co.*, [1928] 1 K. B. 561. **Mentd.** *Foreman & Ellams v. Federal Steam Navigation Co.*, [1928] 2 K. B. 421; *Gosse Millard v. Canadian Government Merchant Marine* (1928), 45 T. L. R. 63.

902. ———.]—You do sometimes read “or” as “and” in a statute. . . . But you do not do it unless you are obliged because “or” does not generally mean “and” and “and” does not generally mean “or” (SCRUTTON, L.J.).—*GREEN v. PREMIER GLYNRHONWY SLATE CO.*, [1928] 1 K. B. 561; 97 L. J. K. B. 32; 138 L. T. 90; 20 B. W. C. C. 563, C. A.

SECT. 3.—STATUTORY PROVISIONS FOR INTERPRETATION.

SUB-SECT. 1.—IN GENERAL.

See, generally, Interpretation Act, 1889 (c. 63); Statutes (Definition of Time) Act, 1880 (c. 9).

903. Measurement of time—Statutes (Definition of Time) Act, 1880 (c. 9)—Greenwich mean time.]—The expression “sunset” in Local Government Act, 1888 (c. 41), s. 68, is not an expression of time within above Act, & a bicyclist is not compelled under sect. 85 to light his lamp an hour after sunset according to Greenwich mean time, but according to the time of sunset as it varies at different places in England.—*GORDON v. CANN* (1899), 68 L. J. Q. B. 434; 80 L. T. 20; 63 J. P. 324; 47 W. R. 269; 15 T. L. R. 165; 43 Sol. Jo. 225, D. C.

904. Singular includes plural.]—With regard to the meaning of “patentee,” I can find no clear decision as to what is the true meaning of the definition of “patentee” in Patents & Designs Act, 1907 (c. 29), s. 93, namely, “the person for the time being entitled to the benefit of a patent.” The words must, of course, be read as meaning person or persons (COMPTROLLER-GENERAL).—*Re GOLTSTEIN'S APPLICATION* (1910), 27 R. P. C. 289.

PART III. SECT. 3, SUB-SECT. 1.

d. Instruments Act, 1890—Strict construction necessary.]—The ct. has always insisted that the directions given by the above Act shall be strictly followed. The statute creates its own practice, & that being so, the old practice does not apply.—*LISTER v. SCHULTE*, [1915] V. L. R. 374.—**AUS.**

e. Whether assistance may be derived from same words in other statute.]

—The interpretation of general terms in a statute cannot be assisted by reference to the interpretation clause in another statute, by which the same terms are in it given a special construction.—*BAINBRIDGE v. ESQUIMAULT & NANAIMO RY. CO.* (1895), 4 B. C. R. 181; [1896] A. C. 561.—**CAN.**

f. Whether general interpretation statute controls special statute's intention.]—A general interpretation statute cannot be invoked to control the plain

905. —.]—Interpretation Act, 1889 (c. 63), provides that in every Act passed after 1850, unless the contrary intention appears, words in the singular shall include the plural.—*Re CLAYTON'S SETTLED ESTATES*, [1926] Ch. 279; 95 L. J. Ch. 169; 134 L. T. 568; 70 Sol. Jo. 427.

SUB-SECT. 2.—INTERPRETATION CLAUSES.

906. Object of clauses.—The object of these Acts being framed with these interpretation clauses is, by the means & through the agency of the interpretation clause, to avoid the necessity of frequent repetition in describing all the subject-matter to which the Act was intended to apply. It uses one expression & then by the interpretation clause, declares that that expression shall have certain meanings other than the ordinary meaning of the word used; & the way to apply that interpretation clause is, when you find the word used in other enactments, to follow the direction of the interpretation clause &, according to the subject-matter, to read it as if it contained the other words which, by the interpretation clause, it is meant to include (LORD COTTENHAM, C.).—*A.-G. v. WORCESTER CORPN.* (1846), as reported in 15 L. J. Ch. 398; 8 L. T. O. S. 85, L. C.

907. Mode of application.—*A.-G. v. WORCESTER CORPN.*, No. 906, *ante*.

908. Utility.—It has been very much doubted, & I concur in that doubt, whether these interpretation clauses, which are of modern origin, have not introduced more mischief than they have avoided, for they have attempted to put a general construction on words which do not admit of such a construction in the different senses in which they are introduced in the various clauses of an Act of Parliament (LORD ST. LEONARDS, C.).—*ELY (DEAN) v. BLISS* (1852), 2 De G. M. & G. 459; 20 L. T. O. S. 35; 42 E. R. 950, L. C.

Annotations:—*Reid*. *Irish Land Commission v. Grant* (1881), 10 App. Cas. 14. *Mentd.* *Esdaile v. Payne* (1889), 59 L. T. 910; *Howitt v. Harrington*, [1893] 2 Ch. 497.

909. —.]—I hope the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion (COCKBURN, C.J.).—*WAKEFIELD BOARD OF HEALTH v. WEST RIDING & GRIMSBY RY. CO.* (1865), as reported in 6 B. & S. 794; 122 E. R. 1386.

Annotation:—*Mentd.* *Muir v. Hore* (1877), 47 L. J. M. C. 17.

910. —.]—The interpretation clause [is] a modern innovation & frequently does a great deal of harm (BLACKBURN, J.).—*LINDSAY v. CUNDY* (1876), 1 Q. B. D. 348; 45 L. J. Q. B. 381; 34 L. T. 314; 24 W. R. 730; 13 Cox, C. C. 162; *on appeal*, *sub nom.* *CUNDY v. LINDSAY* (1878), 3 App. Cas. 459, H. L.

Annotations:—*Mentd.* *Re Reed, Ex p. Barnett* (1876), 3 Ch. D. 123; *Attenborough v. St. Katharine's Dock Co.* (1878), 3 C. P. D. 450; *Moyce v. Newington* (1878), 4 Q. B. D. 32; *Babcock v. Lawson* (1879), 4 Q. B. D. 394; *R. v. Central Criminal Court JJ.* (1886), 18 Q. B. D. 314; *Bentley v. Vilmon* (1887), 12 App. Cas. 471; *Henderson v. Williams*, [1895] 1 Q. B. 521; *Kings Norton Metal Co. v. Edridge, Merrett, Same v. Roberts* (1897), 14 T. L. R. 98; *Baillie's Case*, [1898] 1 Ch. 110; *G. W. Ry. v. London & County Banking Co.*, [1901] A. C. 414; *Whitehorn v. Davison*, [1911] 1 K. B. 463; *Phillips v. Brooks*, [1919]

2 K. B. 243; *Folkes v. King*, [1923] 1 K. B. 282; *Nanka-Bruce v. Commonwealth Trust*, [1926] A. C. 77; *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28; *Lake v. Simmons*, [1927] A. C. 487.

911. Scope of clauses—Whether definition for all purposes.—We apprehend that an interpretation clause . . . is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances (LORD DENMAN, C.J.).—*R. v. CAMBRIDGESHIRE JJ.* (1838), 7 Ad. & El. 480; 1 Per. & Dav. 249; 1 Will. Woll. & H. 698; 8 L. J. M. C. 6; 112 E. R. 551.

Annotations:—*Mentd.* *R. v. Westbury* (1844), 8 J. P. 532; *R. v. Holy Trinity, Exeter* (1851), 4 New Sess. Cas. 438.

912. —.]—It would be a most extraordinary conclusion for your Lordships to arrive at that because for a particular purpose . . . it is provided in the interpretation clause of an Act of Parliament that fixtures are to be deemed personal chattels, therefore they are made personal chattels for all intents & purposes (LORD CHELMSFORD).—*MEUX v. JACOBS* (1875), L. R. 7 H. L. 481; 44 L. J. Ch. 481; 32 L. T. 171; 39 J. P. 324; 23 W. R. 526, H. L.

Annotations:—*Mentd.* *Bain v. Brand* (1876), 1 App. Cas. 762; *Re Eslick, Ex p. Alexander* (1876), 4 Ch. D. 503; *Cross v. Barnes* (1877), 46 L. J. Q. B. 479; *Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559; *Paine v. Matthews* (1885), 53 L. T. 872; *Sanders v. Davis* (1885), 15 Q. B. D. 218; *Topham v. Greenside Glazed Fire-Brick Co.* (1887), 37 Ch. D. 281; *Thomas v. Kelly* (1888), 60 L. T. 114; *Gough v. Wood*, [1894] 1 Q. B. 713; *Ellis v. Glover & Hobson*, [1903] 1 K. B. 388; *Re Rogerstone Brick & Stone Co., Southall v. Wescombe*, [1919] 1 Ch. 110.

913. —.]—Definition to be consistent with remainder of Act.—An interpretation clause in an Act of Parliament should be understood to define the meaning of the word thereby interpreted in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation.—*MIDLAND RY. CO. v. AMBERGATE, NOTTINGHAM & BOSTON & EASTERN JUNCTION RY. CO.* (1853), 10 Hare, 359; 1 W. R. 162; 68 E. R. 965.

Annotations:—*Mentd.* *Powell Duffryn Steam Coal Co. v. Taff Vale Ry.* (1873), 29 L. T. 575; *Hall v. L., B. & S. C. Ry.* (1885), 15 Q. B. D. 505.

914. —.]—Whether restrictive or enlarging.—The argument . . . is one which I have heard very frequently, viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so (BLACKBURN, J.).—*Ex p. FERGUSON* (1871), L. R. 6 Q. B. 280; 40 L. J. Q. B. 105; 24 L. T. 96; 19 W. R. 746; 1 Asp. M. L. C. 8 *nom.* *Re THAMES STEAMER, Ex p. FERGUSON*, 35 J. P. 468.

Annotations:—*Appld.* *The Gauntlet* (1871), L. R. 3 A. & E. 381. *Reid.* *The Mac* (1882), 7 P. D. 126. *Mentd.* *The C. S. Butler* (1874), L. R. 4 A. & E. 238; *The Gas Float Whitton No. 2*, [1896] P. 42.

915. —.]—The interpretation clause is not of a restrictive but of an enlarging character (SIR R. PHILLIMORE).—*THE GAUNTLET* (1871), L. R. 3 A. & E. 381; 40 L. J. Adm. 34; 25 L. T. 69; 1 Asp. M. L. C. 86; *on appeal, sub nom.* *DYKE v. ELLIOTT, THE GAUNTLET* (1872), L. R. 4 P. C. 184, P. C.

Annotation:—*Mentd.* *Palmer v. Hutchinson* (1881), 6 App. Cas. 619.

Intendment of a special statute.—*RICHARDS v. WOOD* (1906), 12 B. C. R. 182.—CAN.

g. Right of draftsman to rely on Interpretation Act.—In these days the passing of Acts modifying existing statutes, is not infrequent, & the draftsman is entitled to rely on Interpretation Act.—*Re MACDOUGALL'S ESTATE*, [1927] 3 D. L. R. 461; [1927] 1 W. W. R. 612; 21 Sask. L. R. 397.—CAN.

PART III. SECT. 3, SUB-SECT. 2.

906 i. Object of clauses.—It is recognised in England to be a rule with regard to the effect of interpretation clauses of a comprehensive nature that they are not to be taken as strictly defining what the meaning of a word must be under all circumstances, but merely as declaring what things may be comprehended within the term where the circumstances require that

they should.—*R. v. DESOUZA* (1911), 1 L. R. 35 Bom. 412.—IND.

907 i. Mode of application.—“A definition clause does not necessarily, in any statute, apply in all possible contexts in which the word may be found therein. If defined expressions are used in a context which the definition will not fit, then the words may be interpreted according to their ordinary meaning.”—STRATHERN v. PADDEN, [1926] S. C. (J.) 9.—SCOT.

Sect. 3.—Statutory provisions for interpretation:
Sub-sect. 2. Sect. 4: Sub-sects. 1, 2, 3 & 4.]

916. ———.]—The interpretation clause is not restrictive. It does not say that the word "street" shall be confined to any highway not being a turnpike road, but that it shall "apply to & include any highway not being a turnpike road," etc. That is enlarging, not restricting the meaning of "street" (COTTON, L.J.).—*NUTTER v. ACCRINGTON LOCAL BOARD* (1878), 4 Q. B. D. 375; 48 L. J. Q. B. 487; 40 L. T. 802; 43 J. P. 635, C. A.; *on appeal sub nom. ACCRINGTON CORPN. v. NUTTER* (1880), 43 L. T. 710, H. L.

Annotations:—Mentd. Swansea Improvement & Tram. Co. v. County Roads Board for Glamorganshire (1879), 41 L. T. 583; *Re* Stamford & Warrington, *Payne v. Grey*, [1911] 1 Ch. 618.

917. ——— **Natural sense of words not excluded.]**—The legislature, in sect. 105, from the context show that they are using the words "new street" in the ordinary & natural sense of the word; & it does not follow that because, in the interpretation clause, they say the expression "new street" shall include certain other things, we are to say it does not include its own natural sense (BLACKBURN, J.).—*POUND v. PLUMSTEAD BOARD OF WORKS, NORTHBROOK (LORD) v. PLUMSTEAD BOARD OF WORKS* (1871), L. R. 7 Q. B. 183; 41 L. J. M. C. 51; 25 L. T. 461; 36 J. P. 468; 20 W. R. 177.

Annotations:—Appld. St. Giles, Camberwell Vestry v. Crystal Palace Co., [1892] 2 Q. B. 33. *Reid.* St. Mary Islington, Vestry v. Barrett (1874), L. R. 9 Q. B. 278; *Plumstead Board of Works v. British Land Co.* (1875), L. R. 10 Q. B. 203; *L. B. & S. C. Ry. v. St. Giles, Camberwell Vestry* (1879), 4 Ex. D. 239. *Mentd.* *Dryden v. Putney Overseers* (1876), 1 Ex. D. 223; *G. E. Ry. v. Hackney District Works Board* (1883), 8 App. Cas. 687; *Robinson v. Barton Eccles L. B.* (1883), 8 App. Cas. 798; *Hornsey District Council v. Smith*, [1897] 1 Ch. 813; *Allen v. Fulham Vestry* (1898), 79 L. T. 190; *Clerkenwell Vestry v. Edmondson*, [1901] 1 K. B. 264; *Stretford U. D. C. v. Manchester South Junction & Altrincham Ry.* (1903), 68 J. P. 59.

918. ———.]—An interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal & not so as to disturb the meaning of such as are plain (LUSH, J.).—*R. v. PEARCE* (1880), 5 Q. B. D. 386; 49 L. J. M. C. 81; 28 W. R. 568, D. C.

919. ———.]—The fact that the word "parent" includes by the interpretation clause other persons, guardians, persons liable to maintain, & persons who have the actual custody, if there be any such, does not appear to me to prevent the operation of the word "parent" in its primary & obvious sense, where there is a person who comes under that description (LORD COLERIDGE, C.J.).—*LONDON SCHOOL BOARD v. JACKSON* (1881), 7 Q. B. D. 502; 50 L. J. M. C. 134; 45 J. P. 750; 30 W. R. 47, D. C.

920. ——— **Interpretation of ambiguous or equivocal words.]**—*R. v. PEARCE*, No. 918, *ante*.

the common law.—*CHUDLEIGH'S CASE, DILLON v. FREINE* (1595), 1 Co. Rep. 113 b; 1 And. 309; Poph. 70; 76 E. R. 261.

Annotations:—Reid. Fitzwilliam's Case (1605), 6 Co. Rep. 32 a; *Mildmay's Case* (1606), 6 Co. Rep. 40 a. *Mentd.* *Butler v. Baker* (1591), 3 Co. Rep. 25 a; *Woodliff v. Drury* (1595), Cro. Eliz. 439; *Archer's Case, Baldwin v. Smith* (1597), 1 Co. Rep. 63 b; *Smith v. Belay* (1598), Cro. Eliz. 630; *Corbet's Case* (1599), 2 And. 134; *Seymour's Case* (1612), 10 Co. Rep. 95 b; *Portington's Case* (1613), 10 Co. Rep. 35 a; *Blamford v. Blamford* (1615), 3 Bulst. 98; *Bowles's Case* (1615), 11 Co. Rep. 79 b; *Haverhill v. Hare* (1616), 3 Bulst. 250; *Duncombe v. Wingfield* (1618), Hob. 254; *Elvis v. York (Archbp.)*, Taylor & Bishop (1619), Hob. 315; *Buckley v. Simonds* (1623), Win. 59; *Secheverel v. Dale* (1627), Poph. 193; *Beck's Case* (1630), Litt. 344; *Napper v. Sanders* (1632), Hut. 118; *Kent v. Steward & Scott* (1634), Cro. Car. 358; *Spirit v. Bence* (1634), Cro. Car. 368; *Horo v. Dix* (1661), 1 Sid. 25; *Borrey v. White* (1662), O. Bridg. 82; *Pinker v. Litcott* (1665), O. Bridg. 373; *Pybus v. Mitford* (1674), 3 Keb. 338; *Thompson v. Leach* (1690), 2 Vent. 198; *Davis v. Speed* (1692), Carth. 262; *Jones v. Morley* (1697), 1 Ld. Raym. 287; *Hopkins v. Hopkins* (1738), 1 Atk. 581; *Jones v. Meredith* (1739), 2 Com. 661; *Grills v. Mannell* (1742), Willes, 378; *Parkhurst v. Smith* (1742), Willes, 327; *Coryton v. Holyar* (1745), 2 Cox, Eq. Cas. 310; *Garth v. Cotton* (1753), 1 Ves. Sen. 546; *Lethicullier v. Tracy* (1754), 3 Atk. 774; *Burgess v. Wheat*, A.-G. v. Wheat (1759), 1 Eden, 177; *Gale v. Gale* (1789), 2 Cox, Eq. Cas. 136; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Buchanan v. Harrison* (1861), 31 L. J. Ch. 74; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535. *White v. Summers*, [1908] 2 Ch. 256.

922. ———.]—Where a statute is doubtful, it shall be construed by the reason of the common law.—*FERMOR'S CASE* (1602), as reported in 3 Co. Rep. 77 a; 76 E. R. 800.

Annotations:—Mentd. *Podger's Case* (1612), 9 Co. Rep. 104 a; *Printise v. Hodgskin* (1613), 2 Bulst. 138; *Blower v. Ketchmore* (1666), 2 Keb. 31; *Freeman v. Barnes* (1670), 1 Vent. 80; *Parkhurst v. Smith* (1742), Willes, 327; *Le Neve v. Le Neve* (1747), Amb. 436; *Pomfret v. Windsor* (1752), 2 Ves. Sen. 472; *Garth v. Cotton* (1753), 1 Ves. Sen. 546; *Taylor d. Atkins v. Horde* (1755), 1 Keny. 143; *Bright v. Eynon* (1757), 1 Burr. 390; *Doe d. Hitchins v. Lewis* (1758), 1 Burr. 614; *Buckinghamshire v. Drury* (1762), Willes, 177; *Fairclain d. Empson v. Shackleton* (1770), 5 Burr. 2604; *Doe d. Atkins v. Horde* (1777), 2 Cowp. 689; *Doe d. Tarrant v. Helier* (1789), 3 Term Rep. 162; *Reece v. Trye* (1847), 1 De G. & Sm. 273; *R. v. Saddlers' Co* (1863), 32 L. J. Q. B. 337; *Weller v. Stone* (1885), 54 L. J. Ch. 497.

923. Presumption against wrongdoer benefiting by own wrong.]—*GOWAN v. WRIGHT*, No. 319, *ante*.

924. ———.]—It seems to me, in dealing with a sect. which, as regards this case, is one giving a right to indemnity, that, if I can adopt any reasonable construction which will prevent the result of a man getting an indemnity in respect of damage to the production of which he has himself materially contributed, I ought to adopt that construction (KENNEDY, L.J.).—*CORY & SON, LTD. v. FRANCIS, FENWICK & Co., LTD.*, [1911] 1 K. B. 114; 80 L. J. K. B. 341; 103 L. T. 649; 11 Asp. M. L. C. 499, C. A.

Annotations:—Mentd. *Smith's Dock Co. v. Readhead* (1912), 5 B. W. C. C. 449; *Paul v. G. E. Ry.* (1920), 36 T. L. R. 344; *Polemis & Furness, Withy, Re*, [1921] 3 K. B. 560; *The Mollere*, [1925] P. 27.

SECT. 4.—PRESUMPTIONS.

SUB-SECT. 1.—PRESUMPTIONS AS TO SCOPE OF STATUTE.

921. Presumption of application of common law to doubtful cases.]—In doubtful cases statutes ought to be construed according to the reason of

SUB-SECT. 2.—PRESUMPTIONS FROM WORDS USED OR OMITTED IN STATUTES.

Rules of Interpretation.]—See Sect. 2, *ante*.

925. Presumption that words used have a meaning.]—Every word in every statute must have a meaning given to it (LORD BROUGHAM).—

PART III. SECT. 4, SUB-SECT. 1.

h. Presumption against destruction of common law rights.]—Wherever according to the sound construction of a statute, the legislature has authorised a proprietor to make a particular use of his land, & the authority given is in the strict sense of the law permissive only & not imperative, the legislature

must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others.—*CANADIAN PACIFIC RY. CO. v. PARKE* (1897), 11 B. C. R. 6; *revid.* [1899] A. C. 535.—CAN.

k. Presumption that legislature does not exceed its powers.]—In construing statutes the legislature must be presumed to contemplate dealing only with

subjects within its legislative control.—*SCOTT v. SCOTT* (1891), 4 B. C. R. 316.—CAN.

l. ———.]—In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded.—*HEWSON v. ONTARIO POWER CO. OF NIAGARA FALLS (Ont.)* (1905), 36 S. C. R. 596; 25 C. L. T. 137.—CAN.

AUCHTERARDER PRESBYTERY *v.* KINNOULL (EARL) (1839), 6 Cl. & Fin. 616; Macl. & Rob. 220; 4 State Tr. N. S. 1; 7 E. R. 841, H. L.

Annotations:—**Mentd.** Alexander *v.* Macalister (1839), Macl. & Rob. 353; Ferguson *v.* Kinnoull (1842), 4 State Tr. N. S. 785; A.-G. *v.* Welsh (1844), 4 Hare, 572; A.-G. *v.* Murdoch (1849), 7 Hare, 445; Lang *v.* Purves (1862), 15 Moo. P. C. C. 389.

926. —.]—I infer that when this sect. was in terms limited to maintaining the burial ground "of any parish," those words were inserted purposely (ERLE, C.J.).—*R. v. ST. JOHN, WESTGATE, BURIAL BOARD* (1862), 2 B. & S. 703; 31 L. J. Q. B. 205; 6 L. T. 504; 10 W. R. 606; 121 E. R. 1232, Ex. Ch.

Annotations:—**Consd.** *R. v. Bishop Wearmouth Burial Board* (1879), 5 Q. B. D. 67. **Refd.** Foster *v.* Dodd (1866), 7 B. & S. 140.

927. —.]—If your Lordships were to adopt the opinion of the majority of the learned judges in the ct. below in favour of the parish officers, the consequence would be that all those words which follow the word "completed" might be entirely removed, & ought to be removed out of the clause (LORD CAIRNS, C.).—*EAST LONDON RY. CO. v. WHITECHURCH* (1874), L. R. 7 H. L. 81; 43 L. J. M. C. 159; 30 L. T. 412; 38 J. P. 484; 22 W. R. 665, H. L.

Annotations:—**Refd.** A.-G. *v.* Barnet District Gas & Water Co. (1909), 101 L. T. 651. **Mentd.** A.-G. *v.* Leicester Corp'n. (1910), 80 L. J. Ch. 21.

928. —.]—GREEN *v.* R., No. 1176, *post*.

929. —.]—Although it may not always be possible to give a meaning to every word used in an Act of Parliament, yet as a general rule it is right not to treat words as surplusage if a meaning can be fairly given to them (JESSEL, M.R.).—*YORKSHIRE FIRE & LIFE INSURANCE CO. v. CLAYTON* (1881), 8 Q. B. D. 421; 51 L. J. Q. B. 82; 45 L. T. 697; 15 J. P. 569; 30 W. R. 174; 1 Tax Cas. 479, C. A.

Annotations:—**Mentd.** Chapman *v.* Royal Bank of Scotland (1881), 7 Q. B. D. 136; Corke *v.* Brims (1883), 18 J. P. 376; Clerk *v.* British Linen Co. (1885), 49 J. P. 825; Hoddinot *v.* Home & Colonial Stores, [1896] 1 Q. B. 169; Grant *v.* Langston, [1900] A. C. 383; London & Westminster Bank *v.* Smith (1902), 1 Tax Cas. 503; Hillman *v.* Ankerson (1906), 95 L. T. 452; Western *v.* Kensington Assmt. Com. (1907), 76 L. J. K. B. 790; Farmer *v.* Cotton's Trustees, [1915] A. C. 922.

930. —.]—*QUEBEC RAILWAY, LIGHT, HEAT & POWER CO. v. VANDRY*, No. 2100, *post*.

931. —.]—*Re SNOWDOWN COLLIERY CO., LTD., SOUTH-EASTERN COALFIELD EXTENSION CO., LTD. v. SNOWDOWN COLLIERY CO., LTD.*, No. 1124, *post*.

932. Presumption that similar words omitted from former statute on purpose.—The words "instead of a foreclosure," being, as it seems to me, designedly omitted in the recent statute (BRETT, L.J.).—*UNION BANK OF LONDON v. INGRAM* (1882), 20 Ch. D. 463; 51 L. J. Ch. 508; 46 L. T. 507; 30 W. R. 375, C. A.

Annotations:—**Mentd.** Western District Bank *v.* Turner (1882), 47 L. T. 433; Woolley *v.* Colman (1882), 21 Ch. D. 169; Bright *v.* Campbell (1889), 41 Ch. D. 388; Wrigley *v.* Gill, [1906] 1 Ch. 165.

SUB-SECT. 3.—PRESUMPTION OF LOST STATUTE.

933. In what cases lost statute presumed.—*LOPEZ v. ANDREW* (1826), 3 Man. & Ry. K. B. 329, n.; 5 L. J. O. S. K. B. 46.

Annotation:—**Refd.** Harper *v.* Hedges, [1923] 2 K. B. 314.

PART III. SECT. 4, SUB-SECT. 4.

936 i. Presumption of necessary ancillary powers.—Where a statute imposes a duty, it, without express words, gives an action for the failing to perform that duty, & for wrongfully performing it.—*PONNUSAMY TEVAR*

v. MADURA COLLECTOR (1863), 3 Mad. 35.—**IND.**

936 ii. —.]—Although when an Act of Parliament imposing a duty or toll is equally capable of two constructions, it is to be construed so as to relieve & not to impose a burden upon

934. —.]—After a long possession, the ct. will make great presumptions, including, in some cases, even an Act of Parliament, in order to protect a right. The ct. will not, however, adopt such presumption, when the origin of the right or possession is clearly ascertained & negatives such presumption.—*A.-G. v. EWELME HOSPITAL* (1853), 17 Beav. 366; 1 Eq. Rep. 563; 22 L. J. Ch. 846; 23 L. T. O. S. 4; 1 W. R. 523; 51 E. R. 1075.

Annotations:—**Refd.** Harper *v.* Hedges, [1923] 2 K. B. 314. **Mentd.** A.-G. *v.* Boucherett (1855), 25 Beav. 116; A.-G. *v.* Boucherett (1858), 25 Beav. p. 122; A.-G. *v.* Windsor (Dean & Canons) (1860), 30 L. J. Ch. 529.

935. —.]—*Qu.*: whether, for the purpose of giving legal validity to an Act otherwise illegal, an Act of Parliament can under any circumstances be presumed to have been made & lost within the last hundred & fifty years.—*HARPER v. HEDGES*, [1924] 1 K. B. 151; 93 L. J. K. B. 116; 130 L. T. 383; 88 J. P. 33; 40 T. L. R. 156; 68 Sol. Jo. 541, C. A.

SUB-SECT. 4.—WHEN DUTY IMPOSED OR POWER GIVEN BY STATUTE.

936. Presumption of necessary ancillary powers.—*FITZHERBERT v. LEACH* (1638), Cro. Car. 514; 79 E. R. 1043, Ex. Ch.

937. —.]—Wherever a statute enacts anything or prohibits anything for the advantage of any person that person shall have remedy to recover the advantage given him or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity (HOLT, C.J.).—*ANON.* (1703), 6 Mod. Rep. 27; 87 E. R. 791; *sub nom.* *LEWIS v. JONES*, 2 Ld. Raym. 934; 2 Salk. 415; Holt, K. B. 419.

Annotations:—**Expld.** Braithwaite *v.* Skinner (1839), 5 M. & W. 313. **Refd.** Millar *v.* Taylor (1769), 4 Burr. 2303; Webb *v.* Jiggs (1815), 4 M. & S. 113; Hopkins *v.* Swansea Corp'n. (1839), 8 L. J. Ex. 121. **Mentd.** Lothian *v.* Henderson (1803), 3 Bos. & P. 499; The City of Mecca (1879), 5 P. D. 28.

938. —.]—It is a general rule that where an Act of Parliament gives a power of doing a particular act, & possession of land is essential for the purposes of executing it, the party to whom the power is given may use it for the purpose (ABBOTT, C.J.).—*R. v. BRISTOL DOCK CO.* (1827), 6 B. & C. 181; 9 Dow. & Ry. K. B. 309; 4 Dow. & Ry. M. C. 327; 5 L. J. O. S. M. C. 51; 108 E. R. 420.

Annotations:—**Refd.** York & North Midland Ry. *v.* R. (1853), 17 Jur. 690. **Mentd.** R. *v.* S. E. Ry. (1851), 15 Jur. 871; Delamere *v.* R. (1867), L. R. 2 H. L. 419; Lee District Board *v.* L. C. C. (1899), 82 L. T. 306; R. *v.* Marshland Smeeth & Fen District Comrs., *Ex p.* Whitton (1919), 89 L. J. K. B. 116.

939. —.]—I agree that they [the co.] have power . . . to do all other acts which are necessary for the enjoyment of their principal right of crossing; on the principle that, *ubi aliquid conceditur, conceditur etiam id sine quo res ipsa non esse potest* (PARKE, B.).—*CLARENCE RY. CO. v. GREAT NORTH OF ENGLAND, ETC., RY. CO.* (1845), 13 M. & W. 706; 14 L. J. Ex. 137; 153 E. R. 295.

940. —.]—Where a statute authorises a co. to construct certain works, it is to be presumed they have power to execute all works incidental

the subject of the realm, yet if of the two constructions, the one is reasonable & will affect the object of the Act, which the other construction will not, the former is to be adopted.—*HIBERNIAN MINE CO. v. TUKE* (1858), 8 I. C. L. R. 321.—**IR.**

Sect. 4.—Presumptions: Sub-sect. 4. Sects. 5 & 6: Sub-sects. 1 & 2.]

to their main purposes, & which they deem necessary, provided they act *bond fide*.—*WRIGHT v. SCOTT* (1855), 26 L. T. O. S. 180, H. L.

941. —.]—The general rule on this head of law is, that where the Legislature gives power to a public body to do anything of a public character, the Legislature means also to give to the public body all rights, without which the power would become wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only (*BRETT, L.J.*).—*Re DUDLEY CORPN.* (1881), 8 Q. B. D. 86; 51 L. J. Q. B. 121; *sub nom. DUDLEY CORPN. v. DUDLEY'S (EARL) SETTLED ESTATES TRUSTEES*, 45 L. T. 733; 46 J. P. 340, C. A.

Annotations:—Apld. Normanton Gas Co. v. Pope & Pearson (1883), 52 L. J. Q. B. 629. *Distd. South Staffordshire Waterworks Co. v. Mason* (1886), 56 L. J. Q. B. 255. *Apld. Jary v. Barnsley Corpn.*, [1907] 2 Ch. 600. *Refd. London & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53; *Manchester Corpn. v. New Moss Colliery*, [1906] 1 Ch. 278.

942. —.]—Where an obligation is created by statute to maintain something which requires support, or where there is a statutory duty to do something, the necessary result of doing which is that some structure will be required for which support is necessary, and where compensation is given for damage done in the exercise of the powers of the Act, then the cts. will, as a rule, hold that such a structure is entitled to support, & that it cannot be interfered with by adjoining landowners (*FRY, L.J.*).—*NORMANTON GAS CO. v. POPE & PEARSON, LTD.* (1883), 52 L. J. Q. B. 629; 49 L. T. 798; 32 W. R. 134, C. A.

Annotations:—Refd. Truman v. L. B. & S. C. Ry. (1883), 25 Ch. D. 423; *South Staffordshire Waterworks Co. v. Mason* (1886), 56 L. J. Q. B. 255; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *Schweder v. Worthing Gas Light & Coke Co.* (No. 2) (1912), 77 J. P. 41.

943. —.]—Where the Legislature authorises the execution of an undertaking it impliedly authorises the doing of all things reasonably necessary for carrying out such undertaking.—*HARRISON v. SOUTHWARK & VAUXHALL WATER CO.*, [1891] 2 Ch. 409; 60 L. J. Ch. 630; 64 L. T. 804.

Annotations:—Distd. Colwell v. St. Pancras B. Co., [1904] 1 Ch. 707; *Knight v. Isle of Wight Electric Light & Power Co.* (1904), 73 L. J. Ch. 299. *Refd. Gosnell v. Aerated Bread Co.* (1894), 10 T. L. R. 661; *Price's Patent Candle Co. v. L. C. C.* (1908), 7 L. G. R. 84; *Clark v. Lloyds Bank* (1910), 79 L. J. Ch. 615; *Odell v. Cleveland House* (1910), 102 L. T. 602; *De Keyser's Royal Hotel v. Spicer & Minter* (1914), 30 T. L. R. 257; *Phelps v. London Corpn.*, [1916] 2 Ch. 255.

944. —.]—*ALLISON v. CITY & SOUTH LONDON RY. CO.* (1892), *Times*, Feb. 24.

Annotations:—Refd. National Telephone Co. v. Baker, [1893] 2 Ch. 186; *Rapier v. London Tram. Co.*, [1893] 2 Ch. 588.

945. —.]—*LONDON & NORTH WESTERN RY. CO. v. EVANS*, No. 222, *ante*.

946. —.]—If a statutory co. does anything which is outside the express provisions of the statute creating it then it lies with the statutory co. to establish that that which it so does, although not expressly provided for in the Act, is so incidental to that which is expressly authorised by the Act that it must be held by necessary implication to be covered by the express words (*VAUGHAN WILLIAMS, L.J.*).—*A.-G. v. NORTH EASTERN RY. CO.*, [1906] 2 Ch. 675; 76 L. J. Ch. 5; 95 L. T. 512; 70 J. P. 473; 22 T. L. R. 695; 50 Sol. Jo. 630, C. A.

947. —.]—Where a statute authorises the sale of such things as the physical land, buildings, apparatus, & equipment of such a body as a gas

co., things which are comparatively worthless to the purchaser, unless with them he acquires the statutory powers to use them which the vendors enjoyed, the reasonable conclusion to be drawn in the absence of an express provision dealing with the matter is, *prima facie*, that the sale of the physical things carries with it to the purchaser the right & power to use them as the vendor had used them, & that that right & power are part of the subject sold.—*PERTH GAS CO., LTD. v. CITY OF PERTH CORPN.*, [1911] A. C. 506; 80 L. J. P. C. 168; 105 L. T. 266; 27 T. L. R. 526, P. C.

SECT. 5.—STATUTES LIMITING OR EXTENDING COMMON LAW RIGHTS.

See Part IV., Sect. 6, post.

SECT. 6.—BENEVOLENT CONSTRUCTION.

SUB-SECT. 1.—IN GENERAL.

948. Whether equitable construction adopted.]

—*DIXON v. HARRISON*, No. 356, *ante*.

949. —.]—Statutes for public advantage & beneficial laws may extend to things not *in esse* at the time of making them. *Secus*, of penal statutes.—*DAWES v. PAINTER* (1674), as reported in *Freem. K. B.* 175; 89 E. R. 126.

950. —.]—There is always danger in giving effect to what is called the equity of a statute, & it is much safer & better to rely on & abide by the plain words (*LORD TENTERDEN, C.J.*).—*BRANDLING v. BARRINGTON* (1827), 6 B. & C. 467; 9 Dow. & Ry. K. B. 609; 5 L. J. O. S. K. B. 181; 108 E. R. 523.

Annotations:—Consd. Hudson v. Parker (1844), 1 Rob. Eccl. 14. *Refd. Floyer v. Bankes* (1863), 32 L. J. Ch. 610.

951. —.]—We can only say that we must construe the statute, with reference to the terms used in it, & not with relation to any supposed equity in it (*LORD DENMAN, C.J.*).—*FARLEY v. BRIANT* (1835), as reported in 1 Har. & W. 299.

Annotations:—Mentd. Morse v. Tucker (1846), 5 Hare, 79; *Re St. George Steam-Packet Co., Ex p. Hamer's devisees* (1852), 21 L. J. Ch. 832.

952. —.]—No doubt it was perfectly competent to the cts. in Scotland to extend their decisions beyond the letter of the enactments, proceeding upon that which we are accustomed to call in England the equity of the statutes, a mode of interpretation very common with regard to our earlier statutes, & very consistent with the principles & manner according to which Acts of Parliament were at that time framed (*LORD WESTBURY, C.*).—*HAY v. PERTH LORD PROVOST & MAGISTRATES* (1863), 4 Macq. 535, II. L.

Annotations:—Mentd. Sutherland v. Ross (1878), 3 App. Cas. 736; *Wedderburn v. Atholl, Atholl v. Glover Incorporation of Perth*, [1900] A. C. 403.

953. —.]—The subject of extending statutes by inference, to include cases not originally contemplated, is one which has given rise to several decisions, the leading characteristic of which is, that the earlier statute deals with a genus within which a new species is brought by a subsequent Act (*BOVILL, C.J.*).—*R. v. SMITH* (1870), L. R. 1 C. C. R. 266; 39 L. J. M. C. 112; 22 L. T. 554; 34 J. P. 484; 18 W. R. 932; 11 Cox, C. C. 511, C. C. R.

Annotations:—Refd. R. v. Plowden, [1909] 2 K. B. 269. *Mentd. R. v. Streeter*, [1900] 2 Q. B. 601; *R. v. Payne*, [1906] 1 K. B. 97.

954. —.]—I think the principle of the old equitable doctrine laid down in *Le Neve v. Le Neve* (1747), 8 Atk. 646, & subsequent cases which have followed it ought not to be applied or

extended to modern Acts of Parliament (LORD COZENS-HARDY, M.R.).—*Re MONOLITHIC BUILDING CO., TACON v. THE CO.*, [1915] 1 Ch. 643; 84 L. J. Ch. 441; 112 L. T. 619; 59 Sol. Jo. 332, C. A.

Annotation :—*Mentd. Barron v. Potter*, [1915] 3 K. B. 593.

SUB-SECT. 2.—TO WHAT ACTS APPLIED.

955. Remedial statute.—*CHAMBERS v. FLOYD* (1648), Sty. 89; 82 E. R. 553.

956. —.]—Now this was an Act of Parliament made for the benefit of the public, in order to reward persons apprehending felons, & we may fairly construe such a statute liberally, according to common language (GROSE, J.).—*MOSELEY v. STONEHOUSE* (1806), 7 East, 174; 3 Smith, K. B. 181; 103 E. R. 67.

957. —.]—The Act is remedial, & therefore to receive a liberal construction (VAUGHAN, J.).—*GOODFELLOW v. ROBINGS* (1836), 3 Bing. N. C. 1; 2 Hodg. 129; 5 L. J. C. P. 338; 132 E. R. 309; *sub nom. GOODFELLOW v. ROLLINGS*, 3 Scott, 319.

958. —.]—This is a remedial statute, & it ought to be liberally expounded (VAUGHAN, J.).—*GOLDSMID v. LEWIS* (1836), 3 Bing. N. C. 46; 2 Hodg. 142; 3 Scott, 369; 5 L. J. C. P. 297; 132 E. R. 326.

959. —.]—A sect. which is a remedial one should not be narrowed in its construction (TINDAL, C.J.).—*DOE d. WYATT v. BYRON* (1845), 1 C. B. 623; 3 Dow. & L. 31; 14 L. J. C. P. 207; 5 L. T. O. S. 128; 135 E. R. 685.

Annotations :—*Mentd. Hare v. Elms*, [1893] 1 Q. B. 604; *Moore v. Smees & Cornish*, [1907] 2 K. B. 8; *Dendy v. Evans*, [1910] 1 K. B. 263.

960. —.]—A remedial Act should receive a large construction (PARKER, V.-C.).—*MACKENZIE v. MACKENZIE* (1851), 5 De G. & Sm. 338; 21 L. J. Ch. 385; 18 L. T. O. S. 205; 16 Jur. 723; 64 E. R. 1143.

961. —.]—Such provisions as these respecting the indorsement depend on the purpose of the Act. If it be one of public concern, they are construed largely, as in the Annuity Acts, Shipping Acts, & the modern statutory provisions for registering judgments; but if not the effect is limited by the purpose of the Act.—*JORTIN v. SOUTH EASTERN RY. CO.* (1855), 6 De G. M. & G. 270; 3 Eq. Rep. 281; 24 L. J. Ch. 343; 25 L. T. O. S. 16; 1 Jur. N. S. 433; 3 W. R. 190; 43 E. R. 1237, L. J.J.; *on appeal, sub nom. SOUTH EASTERN RY. CO. (DIRECTORS, ETC.) v. JORTIN* (1857), 6 H. L. Cas. 425, H. L.

Annotation :—*Refd. Re Burdett, Ex p. Byrne* (1888), 20 Q. B. D. 310.

962. —.]—The statute being remedial of a grievance . . . ought according to the general rule applicable to such statutes to be construed liberally so as to afford the utmost relief which the fair meaning of its language will allow (*per CUR.*).—*GIOVANNI DAPUETO v. WYLLIE (JAMES) & CO., THE PIEVE SUPERIORE* (1874), L. R. 5 P. C. 482; 43 L. J. Adm. 20; 30 L. T. 887; 22 W. R. 777; 2 Asp. M. L. C. 319, P. C.

Annotations :—*Apld. The Cap Blanco*, [1913] P. 130. *Refd. The Franconia* (1877), 2 P. D. 163. *Mentd. Gunestead*

v. Price, Fullmore v. Wait (1875), 32 L. T. 499; *The Heinrich Bjorn* (1885), 10 P. D. 44; *The Cella* (1888), 13 P. D. 82.

963. —.]—**Statute giving novel remedy.**—Statutes which give novel remedies, should not receive a liberal construction.—*POOL v. NEEL* (1657), 2 Sid. 62; 82 E. R. 1258.

964. Meaning of "remedial."—*HUNTING-TOWER (LORD) v. GARDINER, SAME v. IRELAND*, No. 1533, *post*.

965. Explanatory statute.—Statutes in explanation are always construed beneficially.—*NORWICH'S (DEAN & CHAPTER) CASE* (1598), as reported in 3 Co. Rep. 73 a; 76 E. R. 793.

Annotations :—*Mentd. R. v.* — (1610), Cro. Jac. 247; *Lynne Regis Corp'n. Case* (1612), 10 Co. Rep. 120 a; *Sutton's Hospital Case* (1612), 10 Co. Rep. 1 a; *R. v. London Corp'n.* (1690), 12 Mod. Rep. 17; *Thompson v. Leach* (1690), 2 Vent. 198; *Trinity Chapel, Dublin (Dean) v. Dublin (Archbp.)* (1723), 8 Mod. Rep. 183; *Mirchouse v. Rennell* (1833), 1 Cl. & Fin. 527; *Ford v. Harington* (1869), L. R. 5 C. P. 282.

966. —.]—I deny that Statutes of Explanation shall always be taken literally, for it is impossible that an Act of Parliament should provide for every inconvenience which happens (HOBART, C.J.).—*HILLIARD v. SANDERS* (1625), Win. 121; 124 E. R. 101.

967. —.]—It is a rule with respect to explanatory Acts, not to carry equitable constructions too far, & beyond what the words will justify (LORD HARDWICKE).—*R. v. CASTLECHURCH (INHABITANTS)* (1735), Burr. S. C. 70.

Annotations :—*Mentd. R. v. Sudbrooke* (1803), 4 East, 356; *Beale v. Thompson* (1804), 4 East, 546; *Horlock v. Beal*, [1916] 1 A. C. 486.

968. Statute for advancement of learning.—*MAGDALEN COLLEGE, CAMBRIDGE CASE*, No. 1039, *post*.

969. —.]—The statute shall be said to be made for the public benefit & advantage, by reason that it tends to the advancement of learning. This statute must not be construed strictly, but according to the intention of the legislature.—*GYLES v. WILCOX* (1740), Barn. Ch. 368; 2 Atk. 141; 27 E. R. 682, L. C.

Annotation :—*Mentd. Tonson v. Walker* (1752), 3 Swan. 672.

970. Statute for maintenance of religion.—*MAGDALEN COLLEGE, CAMBRIDGE CASE*, No. 1039, *post*.

971. Statute for sustenance of poor.—*MAGDALEN COLLEGE, CAMBRIDGE CASE*, No. 1039, *post*.

972. Directory statutes.—It is a rule that judges always construe these sort of Acts so as to advance the remedy intended by them; & this statute is to be construed liberally (*per CUR.*).—*R. v. SPARROW* (1739), 2 Sess. Cas. K. B. 184; 1 Const. 5th ed. 25; 2 Stra. 1123; 93 E. R. 179.

Annotations :—*Mentd. R. v. Loxdale* (1758), 1 Burr. 445; *R. v. Stubbs* (1788), 2 Term Rep. 395; *Pearse v. Morrice* (1831), 2 Ad. & El. 84; *Rochester Corp'n. v. R.* (1858), E. B. & E. 1024; *R. v. Lindsey J.J.* (1865), 13 L. T. 524; *R. v. Hanley Revising Barrister, R. v. Stoke on Trent Town Clerk*, [1912] 3 K. B. 518.

973. Statutes in favour of liberty of subject.—Statutes in favour of the liberty of the subject ought to be liberally construed (WILLES, J.).—*ANON.* (1774), Loft, 648; 98 E. R. 845.

974. Distress for Rent Act, 1738 (c. 19).—*BROOKE v. NOAKES*, No. 1544, *post*.

intended to be afforded.—*GODDARD v. COLONIAL GOVERNMENT* (1908), 25 S. C. 207; 3 Buch. A. C. 301; 18 C. T. R. 523.—S. AF.

973 i. Statutes in favour of liberty of subject.—Statutes are to be construed most favourably to personal liberty.—*Re BOWACK* (1892), 2 B. C. R. 216.—CAN.

m. Statutes for laudable public purposes.—It is the duty of the ct.

PART III. SECT. 6, SUB-SECT. 2.

955 i. Remedial statute.—R. S. O., 1887, c. 194, s. 122, which imposes a liability in certain eventualities on innkeepers who give liquor to persons who thereby become intoxicated, is a remedial measure, & should receive a liberal construction.—*TRICE v. ROBINSON* (1888), 16 O. R. 433.—CAN.

955 ii. —.]—*HARRINGTON v. PETERS* (1900), 32 N. S. R. 464.—CAN.

955 iii. —.]—*PETERSON v. BITULITHIC & CONTRACTING CO.* (No. 2) (1913), 24 W. L. R. 19; 4 W. W. R. 223; 12 D. L. R. 444; 23 Man. L. R. 136.—CAN.

955 iv. —.]—If the object of a statute is remedial the construction is favourable to the person or persons to be relieved, but the operative words of the statute must govern as to the conditions against which relief is

Sect. 6.—Benevolent construction: Sub-sect. 2. Sect. 7: Sub-sects. 1 & 2. Sects. 8 & 9. Part IV. Sect. 1.]

975. Prohibitory statutes.]—In all cases where something not *ipsa natura* unlawful is prohibited by statute, the words of prohibition must be taken as they stand; they must not be amplified in order to meet a supposed evil, or restricted in order to protect a natural freedom. In other words, the evil that was to be checked can only be considered so far as necessary for the interpretation of the words, but must not be used for an independent determination of the scope of the remedy (*per CUR.*).—*EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. REED*, [1914] A. C. 587; 83 L. J. P. C. 195; 111 L. T. 50, P. C.

976. Statutes in defence of realm.]—The ct. cannot construe an Act passed for securing the safety of the Realm with the same scrupulous nicety as, for instance, a taxing Act. The safety of the Realm was the supreme law (*per CUR.*).—*NORMAN v. MATHEWS* (1916), as reported in 32 T. L. R. 303, D. C.; *on appeal*, 80 J. P. Jo. 160, C. A.

SECT. 7.—MEASUREMENT OF DISTANCE AND TIME.

SUB-SECT. 1.—DISTANCE.

977. General rule—Similar construction as in contracts.]—We do not think that there is any sound distinction between statutes & contracts in this respect [measurement of distance] (*per CUR.*).—*MOUFLET v. COLE* (1872), L. R. 8 Exch. 32; 42 L. J. Ex. 8; 27 L. T. 678; 21 W. R. 175, Ex. Ch.

SUB-SECT. 2.—TIME.

See Statutes, Definition of Time Act (1880), c. 9; TIME.

978. Greenwich meantime.]—*GORDON v. CANN*, No. 903, *ante*.

SECT. 8.—PROVISIONS AFFECTING JURISDICTION.

Ouster of jurisdiction of courts.]—*See COURTS*, Vol. XVI., pp. 113–114, Nos. 137–143.

SECT. 9.—ANCIENT AND MODERN STATUTES.

979. Distinction between construction of ancient & modern Acts—Ancient Acts construed liberally.]—With regard to the construction of statutes according to the intention of the legislature; we must remember that there is an essential difference between the expounding of modern & ancient Acts of Parliament. In early times the legislature used, & I believe it was a wise course to take, to pass laws in general & in few terms; they were left to the cts. of law to be construed so as to reach all the cases within the mischief to be remedied. But in modern times great care has been taken to

where it finds legislation intended to legalise the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation.—*BUTLAND v. GILLESPIE* (1888), 16 O. R. 486.—*CAN.*

n. War Relief Act.]—War Relief Act should receive such fair, large & liberal

construction & interpretation as will best ensure the attainment of the object of the Act.—*Re SMITH*, [1917] 1 W. W. R. 332; 23 B. C. R. 547.—*CAN.*

o. Statutes of Limitation.]—The Cts. of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of

mention the particular cases in the contemplation of the legislature, & therefore the cts. are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes (*BULLER, J.*).—*BRADLEY v. CLARK* (1793), 5 Term Rep. 197; 101 E. R. 111.

Annotations:—Refd. *Cox v. Morgan* (1801), 2 Bos. & P. 398. *Mentd.* *Pinkerton v. Marshall* (1794), 1 Hy. Bl. 334; *Hovil v. Browning* (1806), 3 Smith, K. B. 156; *Ward v. Fry* (1900), 85 L. T. 394.

980. ———.]—As to the observation about the liberal construction, which the Statute of Gloucester has always received, a well-known distinction prevails between the old Acts of Parliament & modern ones. The old Acts are very short, & employ very general terms, to which, therefore, it has been considered necessary to give a very extensive signification, so as to make them embrace all particulars which will fall upon them; but in modern times, the legislature has adopted the use of a great number of particular terms, to which common sense requires us to apply a very different rule of construction (*COLERIDGE, J.*).—*R. v. GARDNER* (1837), 6 Ad. & El. 112; 1 Nev. & P. K. B. 308; Will. Woll. & Dav. 7; 1 J. P. 124; 112 E. R. 43.

Annotation:—Consd. *R. v. Warwickshire Sheriff* (1811), 2 Ry. & Can. Cas. 661.

981. Doctrine of contemporanea expositio — Applied to ancient Acts.]—*BURTON v. PUT* (1428), 4 Co. Inst. 138.

Annotation:—Consd. *Morgan v. Crawshay* (1871), L. R. 5 H. L. 304.

982. ———.]—*CUPPER v. RAYNER* (1134), 4 Co. Inst. 138.

Annotation:—Consd. *Morgan v. Crawshay* (1871), L. R. 5 H. L. 304.

983. ———.] Were the language . . . obscure instead of being clear we should not be justified in differing from the construction put upon it by contemporaneous & long continued usage, there would be no safety for property or liberty if it could be successfully contended that all lawyers & statesmen have been mistaken for centuries as to the true meaning of an Act of Parliament (*per CUR.*).—*GORHAM v. EXETER* (Bp.) (1850), 15 Q. B. 52; Brod. & F. 107; 7 Notes of Cases Supp. LXI.; 19 L. J. Q. B. 279; 15 L. T. O. S. 87; 14 Jur. 480; 117 E. R. 377; *sub nom.* *R. v. FUST*, 14 J. P. 258.

Annotations:—Consd. *Ridsdale v. Clifton* (1877), 2 P. D. 276; *Associated Newspapers v. City of London Corp.*, [1916] 2 A. C. 429. *Refd.* *Lord Advocate v. Walker Trustees*, [1912] A. C. 95. *Mentd.* *Kimpton v. Willey* (1850), 19 L. J. C. P. 269; *Re Barnard, Ex p. Wetherell* (1852), 2 De G. M. & G. 359; *Re Denison* (1856), 27 L. T. O. S. 300.

984. ———.]—The construction of an old Act of Parliament may be cleared by *contemporanea expositio*, showing the conduct & understanding of parties at the time of its passing, & subsequently; & for this purpose the annals or histories of the period, & antiquarian researches, may be referred to.—*MONTROSE PEERAGE CASE* (1853), 1 Macq. 401; 8 State Tr. N. S. App. A. 1082, H. L.

Annotations:—Mentd. *Wensleydale Peerage Case* (1856), 8 State Tr. N. S. 479; *Herries Peerage Claim* (1858), L. R. 2 Sc. & Div. 258; *Shrewsbury Peerage Case* (1858), 7 H. L. Cas. 1.

985. ———.]—(1) In construing old statutes it has been usual to pay great regard to

this description must be construed strictly. On the contrary, such Acts, where their language is ambiguous or indistinct, should receive a liberal interpretation, & be treated as "statutes of repose" & not as of a penal character or as imposing burdens.—*MANGU LAL v. KANDHAI LAL* (1886), I. L. R. 8 All. 475.—*IND.*

the construction put upon them by the judges who lived at or soon after the time when they were made, because they were best able to judge of the intention of the makers at the time (OPINION OF THE JUDGES).

(2) If we find a uniform interpretation of a statute upon a question materially affecting property, & perpetually recurring, & which has been adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding that interpretation. Disagreeing with it would thereby be shaking rights & titles which have been founded through so many years upon the conviction that that interpretation is the legal & proper one, & is one which will not be departed from (LORD WESTBURY). —MORGAN v. CHAWSHAY (1871), L. R. 5 H. L. 304; 40 L. J. M. C. 202; 20 W. R. 554, H. L.

Annotations:—As to (2) **Consd.** Associated Newspapers v. City of London Corpn., [1916] 2 A. C. 429; Bourne v. Keane, [1919] A. C. 815. **Refd.** R. v. Oxford (Bp.) (1879), 4 Q. B. D. 525. *Generally*, **Mentd.** Guest v. East Dean Overseers (1872), 41 L. J. M. C. 129; Thursby v. Briercliff with Extwistle (1894), 71 L. T. 849; Winstanley v. North Manchester Overseers, [1910] A. C. 7.

986. ———.]—In my opinion such usage as has in this case been termed *contemporanea expositio* is of no value whatever in construing a British statute of the year 1858. When there are ambiguous statements in an Act passed one or two centuries ago it may be legitimate to refer to the construction put upon their expression throughout a long course of years by the unanimous consent of all parties interested as exercising what must presumably have been the intention of the legislature at that remote period. But I feel bound to construe a recent statute according to its own terms (LORD WATSON).—CLYDE NAVIGATION TRUSTEES v. LAIRD (1883), 8 App. Cas. 658, H. L.

Annotations:—**Apld.** Micklethwait v. Vincent (1893), 69 L. T. 57. **Consd.** A.-G. v. Lamesdale R. D. C. (1902), 86 L. T. 822; Goldsmiths' Co. v. Wyatt, [1907] 1 K. B. 95. **Apld.** Sadler v. Whiteman, [1910] 1 K. B. 868. **Consd.** Associated Newspapers v. City of London Corpn., [1916] 2 A. C. 429. **Refd.** N. E. Ry. v. Hastings, [1900] A. C. 260; Assheton Smith v. Owen, [1906] 1 Ch. 179; Lord Advocate v. Walker Trustees, [1912] A. C. 95; Bourne v. Keane, [1919] A. C. 815. **Mentd.** Watcham v. East Africa Protectorate, [1919] A. C. 533.

987. ———.]—Dealing with an ancient statute you may no doubt appeal to continued usage as a means of interpreting, but not in my opinion when you are dealing with an altogether modern contract, as in the present case (JOYCE, J.).—HARRINGTON v. SENDALL, [1903] 1 Ch. 921; 72 L. J. Ch. 396; 88 L. T. 323; 19 T. L. R. 203; *sub nom.* HARRINGTON v. SENDALL, 51 W. R. 463; 47 Sol. Jo. 337.

Annotation:—**Mentd.** Morgan v. Driscoll (1922), 38 T. L. R. 251.

988. ——— Not to modern Acts.]—The Act of Parliament on which this question arises is much too recent to receive exposition from usage (LORD TENTERDEN, C.J.).—KINGSTON-UPON-HULL DOCK

Co. v. BROWNE (1831), 2 B. & Ad. 43; 109 E. R. 1059.

Annotations:—**Mentd.** R. v. Bristol Dock Co. (1841), 5 Jur. 911; Portsmouth Floating Bridge Co. v. Nanco (1843), 6 Scott, N. R. 823; Stockton Ry. v. Barrett (1844), 11 Cl. & Fin. 590; R. v. Kingston-Upon-Hull Dock Co. (1845), 11 Jur. 444; Newmarket Ry. v. Foster (1854), 2 C. L. R. 1617; Farrand v. Cooper (1862), 12 C. B. N. S. 283; The Killarney (1862), Lush, 427; Nicholson v. Williams (1871), L. R. 6 Q. B. 632; Pryce v. Monmouthshire Canal & Ry. (1879), 4 App. Cas. 197; Garston Sailing Ship Co. v. Hickie (1885), 15 Q. B. D. 580; Assheton Smith v. Owen [1906] 1 Ch. 179.

989. ———.]—CLYDE NAVIGATION TRUSTEES v. LAIRD, No. 986, *ante*.

990. ———.]—HARRINGTON v. SENDALL, No. 987, *ante*.

991. ———.]—I do not think the doctrine of *contemporanea expositio* can properly be applied in construing Acts which are comparatively modern (COZENS-HARDY, L.J.).—ASSHETON SMITH v. OWEN, [1906] 1 Ch. 179; 75 L. J. Ch. 181; 94 L. T. 42; 22 T. L. R. 182; 10 Asp. M. L. C. 164, C. A.; *on appeal*, [1907] A. C. 124, H. L.

992. ———.]—In our opinion the principle of "*contemporanea expositio*, etc.," cannot be applied to so modern a statute (*per* CUR.).—GOLD-SMITHS' Co. v. WYATT, [1907] 1 K. B. 95; 76 L. J. K. B. 166; 95 L. T. 855; 71 J. P. 79; 23 T. L. R. 107; 51 Sol. Jo. 99, C. A.

Annotations:—**Refd.** Sadler v. Whiteman, [1910] 1 K. B. 868. **Mentd.** Waddle v. Sunderland Union (1903), 2 Konst. Rat. App. 506; Fabergé v. Goldsmiths' Co., [1911] 1 Ch. 286.

993. ———.]—*Contemporanea expositio* has no application to a modern Act (FARWELL, L.J.).—SADLER v. WHITEMAN, [1910] 1 K. B. 868; 79 L. J. K. B. 786; 102 L. T. 472, C. A.; *on appeal*, *sub nom.* WHITEMAN v. SADLER, [1910] A. C. 514, H. L.

Annotations:—**Mentd.** Blairberg v. Calvert (1910), 26 T. L. R. 328; *Re* Vagliano Anthracite Collieries (1910), 79 L. J. Ch. 769; *Re* Bagley, [1911] 1 K. B. 317; *Re* Campbell, *Ex p.* Seal, [1911] 2 K. B. 992; *Re* Robinson, Clarkson v. Robinson, [1911] 1 Ch. 230; Whiteman v. Director of Public Prosecutions, [1911] 1 K. B. 824; Blair v. Holcombe (1912), 28 T. L. R. 198; R. v. Holden, [1912] 1 K. B. 483; *Re* Blair Open Hearth Furnace Co., [1914] 1 Ch. 390; Finegold v. Cornelius, [1916] 2 K. B. 719; Cornelius v. Phillips, [1918] A. C. 199; Jubilee Cotton Mills v. Lewis, [1924] A. C. 958; *Re* A Debtor, [1927] 2 Ch. 367.

994. ———.]—(1) The rule . . . is that with regard to modern statutes the doctrine of *contemporanea expositio* is of no value (SWINFEN EADY, L.J.).

(2) Expert evidence as to the meaning of ordinary English words in a modern Act of Parliament of general application is not admissible.—CAMDEN (MARQUIS) v. INLAND REVENUE COMRS., [1914] 1 K. B. 641; 83 L. J. K. B. 509; 110 L. T. 173, C. A.; *on appeal sub nom.* INLAND REVENUE COMRS. v. CAMDEN (MARQUIS), [1915] A. C. 241, H. L.

Annotations:—*Generally*, **Mentd.** King v. Cadogan (1915), 113 L. T. 895; Eccl. Comrs. for England v. I. R. Comrs., [1919] 2 K. B. 67.

Part IV.—Operation.

SECT. 1.—PASSING OF THE ACT.

See Interpretation Act, 1889 (c. 63), s. 37.

995. Date of passing—Date of receiving Royal Assent.]—A partner not a trader was indebted to the partnership & also to some of the partners separately. By deeds executed by debtor after Bankruptcy Act, 1861 (c. 134), had received the Royal Assent, but supposed to have been executed

before it came into operation, he covenanted to pay to trustees for the other partners a sum fixed upon as principal, & to pay interest thereon, & he gave a mtge. as security. A debtor's summons was issued for the money covenanted to be paid:—*Held*: the time defined by the words "passing of Bankruptcy Act, 1861 (c. 134)," in the same sect. is the time when Bankruptcy Act, 1861 (c. 134),

Sect. 1.—Passing of the Act. Sects. 2 & 3: Sub-sect. 1.]

received the Royal Assent, & not the time when it came into operation.—*Re DALZELL, Ex p. RASHLEIGH* (1875), 2 Ch. D. 9; 45 L. J. Bcy. 29; 34 L. T. 193; 24 W. R. 495, C. A.

Annotation:—Apld. R. v. Smith, R. v. Weston, [1910] 1 K. B. 17.

996. ———.]—An Act which comes into operation on the passing becomes law as soon as the day commences on which it receives the Royal Assent.—*TOMLINSON v. BULLOCK* (1879), 4 Q. B. D. 230; 48 L. J. M. C. 95; 40 L. T. 459; 43 J. P. 508; 27 W. R. 552, D. C.

Annotation:—Refd. Clarke v. Bradlaugh (1881), 44 L. T. 779.

997. ———.]—*HALL v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1886), 17 Q. B. D. 230; 55 L. J. Q. B. 328; 54 L. T. 713; 34 W. R. 558; 2 T. L. R. 556; 5 Ry. & Can. Tr. Cas. 28, C. A.

Annotations:—Mentd. Kempson v. G. W. Ry. (1885), 4 Ry. & Can. Tr. Cas. 426; Birchgrove Steel Co. v. Mid. Ry. (1887), 5 Ry. & Can. Tr. Cas. 229; Greenwood v. L. & Y. Ry. (1888), 6 Ry. & Can. Tr. Cas. 39; Sawyer v. G. N. Ry. (1891), 60 L. J. Q. B. 467; M. S. & L. Ry. v. Pidcock (1896), 10 Ry. & Can. Tr. Cas. 150; N. E. Ry. v. N. B. Ry. (1897), 10 Ry. & Can. Tr. Cas. 82; A.-G. v. Manchester Corpn., [1906] 1 Ch. 643; A.-G. v. Mersey Ry. (1906), 76 L. J. Ch. 121; Dublin Port & Docks Board v. G. S. & W. Ry., L. & N. W. Ry. v. G. S. & W. Ry. (1907), 13 Ry. & Can. Tr. Cas. 209; G. S. & W. Ry. v. Wallace (1913), 15 Ry. & Can. Tr. Cas. 75; L. & Y. Ry. v. Liverpool Corpn., [1915] A. C. 152; Foster v. G. E. Ry., [1920] 2 K. B. 574.

998. Distinguished from coming into operation.]—*Re DALZELL, Ex p. RASHLEIGH*, No. 995, *ante*.

999. ———.]—The words in Prevention of Crime Act, 1908 (c. 59), s. 10 (1), "Where a person is convicted on indictment of a crime committed after the passing of this Act," meant after the actual passing of the Act on Dec. 21, 1908, & not the date of Aug. 1, 1909, when the Act came into operation.—*R. v. SMITH, R. v. WESTON*, [1910] 1 K. B. 17; 79 L. J. K. B. 1; 101 L. T. 816; 74 J. P. 13; 26 T. L. R. 23; 54 Sol. Jo. 137; 22 Cox, C. C. 219; 3 Cr. App. Rep. 40, C. C. A.

Annotations:—Refd. R. v. Franklin (1909), 3 Cr. App. Rep. 48. Mentd. R. v. Sweeney (1910), 74 J. P. Jo. 77.

SECT. 2.—COMMENCEMENT AND DURATION.

See Acts of Parliament (Commencement) Act, 1793 (c. 13); Interpretation Act, 1889 (c. 63), s. 36 (1) (2).

1000. Date of commencement—Date of receiving Royal Assent—Though prior date specified.]—Although in an Act of Parliament it is expressly enacted that it shall commence & take effect from a day named, yet if the Royal Assent be not obtained until a day subsequent, the provisions of a particular sect., in its terms prospective, do not take effect until such subsequent day.—*BURN v.*

CARVALHO (1835), 1 Ad. & El. 883; 4 Nev. & M. K. B. 893; 110 E. R. 1445, Ex. Ch.

Annotations:—Mentd. Best v. Argles (1834), 2 Cr. & M. 394; Britten v. Britten (1834), 3 L. J. Ex. 181; Leslie v. Guthrie (1835), 1 Bing. N. C. 697; Tibbits v. George (1836), 5 Ad. & El. 107; Hutchinson v. Heyworth (1838), 9 Ad. & El. 375; Lewis v. Edwards (1840), 7 M. & W. 300; Parnham v. Hurst (1841), 8 M. & W. 743; Belcher v. Capper (1842), 4 Man. & G. 502; Rawlings v. Bell (1845), 14 L. J. C. P. 265; Freeman v. Edwards (1848), 17 L. J. Ex. 258; Smith v. Keating (1848), 6 C. B. 136; Boddington v. Castelli (1853), 1 E. & B. 879; Congreve v. Evetts (1854), 10 Exch. 298; Acraman v. Bates (1860), 1 Jur. N. S. 294; Griffin v. Weatherby (1868), 9 B. & S. 726; St. Thomas's Hospital v. Richardson, [1910] 1 K. B. 271.

1001. Effect of suspending Act.]—HILTON v. JONES (1878), 9 Ch. D. 620; 38 L. T. 808; *sub nom. Re RICHARDS, HILTON v. JONES*, 47 L. J. Ch. 740; 26 W. R. 737.

Annotation:—Refd. Sherwin v. Selkirk (1879), 12 Ch. D. 68.

1002. ———.]—Jud. Act, 1873 (c. 66), s. 25 (1), was one of the clauses suspended by Jud. Act, 1874 (c. 83), & so the provisions contained therein, that, in the administration by the ct. of the assets of a person who may die after the passing of the Act & whose estate may prove insufficient to pay his debts, the same rules are to be observed as may be in force under the law of bkpcy., do not apply to the case of a person who died between the date of the passing of 1873 Act & Nov. 1, 1875, when Jud. Act came into operation.—*SHERWIN v. SELKIRK* (1879), 12 Ch. D. 68; 40 L. T. 701; 27 W. R. 812, C. A.

1003. Time of day at which statute commences—Commencement of day of passing or operation.]—TOMLINSON v. BULLOCK, No. 996, *ante*.

1004. ———.]—An Order made by the Food Controller under Defence of the Realm Regulations was dated May 16, 1917, but was not known to the parties to the action or to the public generally till May 17:—*Held*: the Order came into operation only when it became known, namely, on May 17.

I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation (*BAULIACHE, J.*).—*JOHNSON v. SARGANT & SONS*, [1918] 1 K. B. 101; 87 L. J. K. B. 122; 118 L. T. 95; 62 Sol. Jo. 88.

Annotations:—Refd. Brightman v. Tate (1919), 35 T. L. R. 209. Mentd. Shutler v. Rolfe (1920), 36 T. L. R. 828.

1005. Expiration of temporary statute—How period computed.]—Under a special Act which incorporated the Lands Clauses Act, 1845, a railway co. were empowered to take lands compulsorily for the purpose of their undertaking, & the powers of the co. for this purpose were to cease after the expiration of three years from the passing of the Act. The Act received the Royal Assent on Aug. 9, 1899, & on Aug. 9, 1902, the co. gave to ptfs. a notice to treat for the purchase of lands belonging to them & scheduled in the special Act. On an

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1003 i. Time of day at which statute commences—Commencement of day of passing or operation.]—Acts of the Legislature take effect in law from the earliest period of the day on which they are respectively originated & come into force.—*CONVERSE v. MICHIE* (1865), 16 C. P. 167.—*CAN.*

1003 ii. ———.]—Acts of Parliament take effect in law from the earliest moment of the day on which they are passed.—*COLE v. PORTEOUS* (1892), 19 A. R. 111.—*CAN.*

1003 iii. ———.]—*R. v. Rocco* (Ont.), [1924] 1 D. L. R. 601; 41 Can. Crim. Cas. 101.—*CAN.*

p. Whether Act obsolete for non-
—Action for calls under 1 Will 4,

c. 12, against debt. as a stockholder.—*Held*: the said Act was not obsolete for non-user.—*MARMORA FOUNDRY CO. v. MURRAY* (1850), 1 C. P. 29.—*CAN.*

q. Date of commencement—Date of proclamation.]—The proclamation under which Canada Temperance Act was brought into force in the county recited the fact of a scrutiny having been demanded, but did not show in what manner the scrutiny had been disposed of, or that it had ever been determined, except that the period of sixty days had elapsed since the scrutiny was demanded:—*Held*: the proclamation was valid, & the Act was in force.—*R. v. CASSON* (1889), 21 N. S. R. (9 R. & G.) 413.—*CAN.*

r. ———.]—*COPE & TAYLOR v.*

SCOTTISH UNION & NATIONAL INSURANCE CO. (1897), 5 B. C. R. 329.—*CAN.*

t. ———.]—*Re R. v. SLINN* (1926), 47 Can. Crim. Cas. 77; 37 B. C. R. 275.—*CAN.*

a. ———.]—A statute becomes binding immediately upon its promulgation, unless a different intention can be gathered from the terms of the statute itself.—*LYONS v. CROSLY* (1885), 4 S. C. 17.—*S. AF.*

b. ———.]—The general rule that before a law or any regulation or bye-law having the force of a law can become operative it must be duly promulgated, must be read subject to the qualifications that the word "law" in the rule must not be given too wide a connotation & that the enabling

Annotation :—*Reid, Brakspear v. Barton*, [1924] ■ K. B. 88.

SUB-SECT. 1.—IN GENERAL.

1011. Personal application — Only subjects affected—Including all persons resident within King's dominions.]—JEFFERYS *v.* BOOSEY, No. 176. *ante.*

Annotations :—*Refd.* A.-G. for Dominion of Canada v. Cain; A.-G. for Dominion of Canada v. Gilhula, [1908] A. C. 542; Swift v. A.-G. for Ireland, [1912] A. C. 276. **Mentd.** Makin v. A.-G. for New South Wales (1893), 69 L. T. 778.

d. — *Whether territorial only.*]— Unless it clearly appears that an Act of the legislature was intended to have

Sect. 3.—Local limits of operation: Sub-sects. 1 & 2, A., B., C., D., E., F., G. & H. Sect. 4: Sub-sect. 1.]

1017. — Institutions or bodies corporate—Necessity for being named.]—WALKER *v.* RICHARDSON, No. 611, *ante*.

1018. — — — — —.]—Ambiguous words occurring in an Act of Parliament ought not to be extended to institutions which are well known to exist, but are not named in the Act.—*Re* ST. JAMES' CLUB (1852), 2 De G. M. & G. 383; 16 Jur. 1075; 42 E. R. 920; *sub nom.* *Re* ST. JAMES'S CLUB, *Ex p.* GREENWAY, 19 L. T. O. S. 307, L. C.

Annotations:—Mentd. Rigby *v.* Connol (1880), 14 Ch. D. 482; Overton *v.* Hewett (1886), 3 T. L. R. 246; *Re* Bristol Athenæum (1889), 61 L. T. 795; Royal Albert Hall Corpn. *v.* Winchelsea (1891), 7 T. L. R. 362; Wise *v.* Perpetual Trustee Co., [1903] A. C. 139; Carlisle & Silloth Golf Club *v.* Smith (1913), 82 L. J. K. B. 837.

1019. — Extension to foreigners.]—Power of the British legislature extends to foreigners only when within our own jurisdiction.—THE ZOLL-VEREIN (1856), Sw. 96; 27 L. T. O. S. 160; 2 Jur. N. S. 429; 4 W. R. 555; 166 E. R. 1038.

Annotations:—Consd. Cope *v.* Doherty (1858), 4 K. & J. 367; *Apld.* General Iron Screw Collier Co. *v.* Schurmanns (1860), 1 John. & H. 180. *Consd.* The Johannes (1860), Lush. 182; The Amalia (1863), Brown. & Lush. 151. *Apld.* Adam *v.* British & Foreign S.S. Co., [1898] 1 Q. B. 430. *Consd.* The Wilhelmina, [1923] P. 112. *Refd.* R. *v.* Keyn (1876), 2 Ex. D. 63; Davidsson *v.* Hill, [1901] 2 K. B. 606; Poll *v.* Dambe, [1901] 2 K. B. 579. *Mentd.* The Wild Ranger (1862), Lush. 553; The Halley (1867), L. R. 2 A. & E. 3; The Scotia (1869), 20 L. T. 375; The Leon (1881), 6 P. D. 148.

1020. — — — — —.]—Our cts. are not only open but open equally to foreigners as to British subjects, & foreigners who have the benefit of the English common law have also the benefit of English statutes (PHILLIMORE, J.).—DAVIDSSON *v.* HILL, [1901] 2 K. B. 606; 70 L. J. K. B. 788; 85 L. T. 118; 49 W. R. 630; 17 T. L. R. 614; 45 Sol. Jo. 619; 9 Asp. M. L. C. 223, D. C.

Annotation:—Refd. Tomalin *v.* Pearson (1909), 78 L. J. K. B. 863.

1021. — — — Statute inconsistent with international law.]—No British Act of Parliament, or commission founded on it, if inconsistent with the law of nations can affect the rights or interests of foreigners.—LE LOUIS (1817), 2 Dods. 210; 165 E. R. 1461.

Annotations:—Consd. R. *v.* Keyn (1876), 2 Ex. D. 63. *Mentd.* San Juan Nepomuceno (1824), 1 Hag. Adm. 265; Santos *v.* Illidge (1839), 5 Jur. N. S. 1358; Buron *v.* Denman (1848), 2 Exch. 167.

1022. — — — In matters of procedure.]—Although Parliament cannot legislate for foreigners out of the dominions, yet it can fix a time within which application must be made for redress to the tribunals of the Empire; which being matter of procedure, becomes the law of the forum, & by which all mankind are bound.—LOPEZ *v.* BURSLEM, THE GUIANA (1843), 4 Moo. P. C. C. 300; 4 State Tr. N. S. 1331; 2 L. T. O. S. 185; 7 Jur. 1119; 13 E. R. 318, P. C.

1023. — — — Presumption against extension.]—JEFFERYS *v.* BOOSEY, No. 176, *ante*.

1024. — — — — —.]—RUSSELL *v.* CAMBEFORT, No. 1013, *ante*.

Unless intention of legislature clear.]—COPE *v.* DOHERTY, No. 400, *ante*.

1026. — — — — —.]—It is of course possible that an Act might be passed which would affect to deal with rights of foreigners, with which, on the principles of international law, we are not entitled to interfere; but, where such an intention

is not clearly expressed, the presumption is against that construction (PAGE-WOOD, V.-C.).—GENERAL IRON SCREW COLLIER CO. *v.* SCHURMANN'S (1860), 1 John. & H. 180; 29 L. J. Ch. 877; 4 L. T. 138; 6 Jur. N. S. 883; 8 W. R. 732; 1 Mar. L. C. 60; 70 E. R. 712.

Annotations:—Refd. The Amalia (1863), Brown. & Lush. 151; R. *v.* Keyn (1876), 2 Ex. D. 63. *Mentd.* The Annapolis, The Johanna Stoll (1861), Lush. 295; The Saxonia, The Eclipse (1862), Lush. 410; The Wild Ranger (1862), Lush. 553; The Northumbria (1869), L. R. 3 A. & E. 6.

1027. — — — — —.]—CAL v. PAPAYANNI, THE AMALIA, No. 827, *ante*.

1028. — — — — —.]—NIBOYET *v.* NIBOYET, No. 828, *ante*.

1029. — — — — —.]—COLQUHOUN *v.* HEDDON, No. 1007, *ante*.

1030. — — — — —.]—Although no doubt Parliament . . . might if they chose, give the cts. of this country jurisdiction over foreigners, it must always be assumed in the absence of express words to that effect, that it did not intend to do so (LORD COLERIDGE, C.J.).—GRANT *v.* ANDERSON & Co., [1892] 1 Q. B. 108; 61 L. J. Q. B. 107; 65 L. T. 619, D. C.; *on appeal*, [1892] 1 Q. B. at p. 115, C. A.

Annotations:—Refd. St. Gobain Chanvey & Grey Co. *v.* Hoyermann's Agency, [1893] 2 Q. B. 96; Worcester City & County Banking Co. *v.* Firbank, Pauling, [1894] 1 Q. B. 781; Maciver *v.* Burns (1895), 73 L. T. 39. *Mentd.* De Bernales *v.* New York Herald (1893), 68 L. T. 658; Singleton *v.* Roberts-Stocks (1894), 70 L. T. 687; Gralinger *v.* Gough, [1895] 1 Q. B. 71; Okura *v.* Forsbacka Jernverks Akt., [1911] 1 K. B. 715.

1031. — — — — —.]—You ought not to construe an Act of Parliament to affect foreigners unless it is clear that the words of the section do so, as for obvious reasons it would be contrary to the comity of nations for one nation to presume to legislate for the subjects of another (JEUNE, P.).—THE PACIFIC, [1898] P. 170; 67 L. J. P. 65; 79 L. T. 125; 46 W. R. 686; 8 Asp. M. L. C. 422.

1032. — — — Absent foreigners.]—No territorial legislation can give jurisdiction which any foreign cts. ought to recognise against absent foreigners who owe no allegiance or obedience to the power which so legislates.—SHRIDAR GURDYAL SINGH *v.* FARIDKOTE RAJAH, [1891] A. C. 670; 10 T. L. R. 62; 11 R. 340, P. C.

Annotations:—Consd. Employers' Liability Assoc. Corpn. *v.* Sedgwick, Collins, [1927] A. C. 95. *Refd.* Emanuel *v.* Symon, [1908] 1 K. B. 302; Gavin Gibson *v.* Gibson, [1913] 3 K. B. 379. *Mentd.* Pemberton *v.* Hughes, [1899] 1 Ch. 781; Jaffer *v.* Williams (1908), 25 T. L. R. 12; Phillips *v.* Batho, [1913] 3 K. B. 25; Tallack *v.* Tallack & Brookema, [1927] P. 211.

1033. — — — Necessity for express terms.]—JEFFERYS *v.* BOOSEY, No. 176, *ante*.

1034. — — — On whom onus of proof lies.]—JEFFERYS *v.* BOOSEY, No. 176, *ante*.

1035. — — — Acts done outside King's dominions.]—A statute is to be construed *prima facie* to apply only to the United Kingdom, but a statute applicable to Her Majesty's dominions is, if the context permits, to be construed as applying to all British subjects wherever they may be.—R. *v.* JAMESON, [1896] 2 Q. B. 425; 65 L. J. M. C. 218; 75 L. T. 77; 60 J. P. 662; 12 T. L. R. 551; 18 Cox, C. C. 392, D. C.

Annotations:—Refd. R. *v.* Audley, [1907] 1 K. B. 383; R. *v.* Crewe, *Ex p.* Sekgome, [1910] 2 K. B. 576; Coldingham Parish Council *v.* Smith, [1918] 2 K. B. 90. *Mentd.* R. *v.* Stride & Millard, [1908] 1 K. B. 617; R. *v.* Porter (1909), 3 Cr. App. Rep. 237.

Bankruptcy.]—See BANKRUPTCY, Vol. IV., pp. 24-26, 154, Nos. 193-207, 1447.

an extra-territorial effect, it will be presumed that it applies only to matters arising within its jurisdiction.—SIMONSON *v.* CANADIAN NORTHERN RY. Co. (1914), 28 W. L. R. 310; 6

W. W. R. 898; 17 D. L. R. 516; 24 Man. L. R. 267.—CAN.

e. — — — — —.]—All legislation is, *prima facie*, territorial. It binds all subjects of the Crown, but only such

subjects of other countries as have brought themselves within the allegiance of the Sovereign.—KESSOWJI DAMODAR JAIRAM *v.* KHIMJI JAIRAM (1888), 1 L. R. 12 Bom. 507.—IND.

SUB-SECT. 2.—PARTICULAR INSTANCES.

A. Colonial Statutes, and English Statutes in Dependencies.

Repugnancy to English law.]—See DEPENDENCIES, Vol. XVII., pp. 424, 428, Nos. 59–61, 95.

Territorial limitation.]—See DEPENDENCIES, Vol. XVII., pp. 424, 425, Nos. 62–68.

Applicability & construction of statutes.]—See DEPENDENCIES, Vol. XVII., pp. 461–466, Nos. 297–324.

B. Criminal and Penal Statutes.

See Part V., Sect. 3, *post*.

C. Fiscal Statutes.

See Part VI., Sect. 1, *post*.

D. Marriage Statutes.

Marriages abroad—Application of English statutes—Marriage Act, 1823 (c. 76).—See CONFLICT OF LAWS, Vol. XI., p. 420, Nos. 865, 866.

——— **Marriage Act, 1835 (c. 54).—**See HUSBAND & WIFE, Vol. XXVII., p. 63, No. 446.

——— **Foreign Marriage Act, 1892 (c. 23).—**See CONFLICT OF LAWS, Vol. XI., p. 420, Nos. 867, 868.

——— **Royal Marriages Act, 1772 (c. 11).—**See CONSTITUTIONAL LAW, Vol. XI., p. 501, No. 41.

E. Shipping Statutes.

Application to foreign vessels.]—See SHIPPING, Vol. XII., pp. 159–161, 854, 907, Nos. 1–21, 7188–7191, 8006–8007.

F. Statutes affecting Aliens.

See, generally, ALIENS, Vol. II., pp. 119 *et seq*.

Application of statutes to foreigners generally.]—See Nos. 1019–1035, *ante*.

G. Statutes of Limitation.

See, generally, LIMITATION OF ACTIONS, Vol. XXII., pp. 315 *et seq*.

Conflict of Laws—Immovables.]—See CONFLICT OF LAWS, Vol. XI., pp. 486, 487, Nos. 1385–1387.

——— **Movables.]—**See CONFLICT OF LAWS, Vol. XI., pp. 394, 487, 488, Nos. 679, 1388–1397; BILLS OF EXCHANGE, Vol. VI., p. 437, Nos. 2813–2816.

Extended judgments.]—See CONFLICT OF LAWS, Vol. XI., p. 488, No. 1398.

Application to dependencies & dominions.]—See DEPENDENCIES, Vol. XVII., pp. 462, 464, Nos. 301, 314, 315.

H. Workmen's Compensation Acts.

Employment abroad.]—See, generally, Workmen's Compensation Act, 1925 (c. 84), ss. 35–37;

MASTER & SERVANT, Vol. XXXIV., pp. 241–244, 258, Nos. 2059–2078, 2208, 2209.

SECT. 4.—EFFECT ON THE CROWN.

SUB-SECT. 1.—IN GENERAL.

1036. Whether Crown bound—Statutes affecting all persons.]—WILLION v. BERKLEY, No. 377, *ante*.

1037. ———.]—No Act of Parliament can bind the King from any prerogative which is sole & inseparable to his person: but he may dispense with it by a *non obstante*.

But in things which are not incident solely & inseparably to the person of the King, but belong to every subject, & may be severed, an Act of Parliament may absolutely bind the King.—CASE OF NON OBSTANTE (1582), 12 Co. Rep. 18; 77 E. R. 1300.

*Annotation:—*Refd. Thomas v. Sorrel (1673), 3 Keb. 223.

1038. ——— On matters affecting prerogative.]—CASE OF NON OBSTANTE, No. 1037, *ante*.

1039. ——— By general words.]—(1) General words in an Act do not bar the King of any prerogative, estate, right, title or interest.

(2) Acts of Parliament are to be construed according to the intent & meaning of the makers of them.

(3) The law will never make an interpretation to advance private & destroy public interests.

(4) General statutes which provide necessary & profitable remedy for the maintenance of religion, the advancement of good learning, & for the relief of the poor shall be extended generally according to their words (*per Cur.*).—MAGDALEN COLLEGE, CAMBRIDGE CASE (1615), 11 Co. Rep. 66 b; 77 E. R. 1235; *sub nom.* WARREN v. SMITH, MAGDALEN COLLEGE CASE, 1 Roll. Rep. 151.

*Annotations:—*As to (1) *Consd.* A.-G. v. Allgood (1713), Park. 1. *Apld.* Perry v. Eames, Salaman v. Eames, Mercer's Co. v. Eames, [1891] 1 Ch. 658. *Refd.* Thomas v. Sorrell (1673), Freem. K. B. 85; R. v. London (Bp.) & Lancaster (1693), 1 Show. 411, Cayzer, Irvine v. Board of Trade, [1927] 1 K. B. 269. As to (2) *Apld.* R. v. London (Bp.) & Burch (or Birch) (1694), 1 Show. 493. *Consd.* A.-G. v. Walker (1849), 3 Exch. 242. *Refd.* Abergavenny v. Brace (1872), L. R. 7 Exch. 145. As to (4) *Consd.* Colt & Glover v. Coventry & Lichfield (Bp.) (1612), Hob. 140; Thornby v. Fleetwood (1720), 1 Stra. 318; Moore v. Clench (1875), 1 Ch. D. 417. *Generally, Mentd.* R. v. Hampden (1637), 3 State Tr. 826; R. v. Starling (1664), 1 Keb. 675; Lyn v. Wyn (1665), O'Brad. 122; Elways v. Cottesford (1675), 3 Keb. 157; Woodward v. Fox (1691), 2 Vent. 267; Magdalen Hospital v. Knotts (1878), 47 L. J. Ch. 736; Bradlaugh v. Clarke (1883), 8 App. Cas. 354.

See, generally, CONSTITUTIONAL LAW, Vol. XI., pp. 496 *et seq*.

1040. ——— Not unless expressly named.]—WILLION v. BERKLEY, No. 377, *ante*.

1041. ———.]—Where the King claims in respect of his natural capacity as heir to the body

(1849), 1 Ir. Jur. 81.—IR.

1040 vi. ———.]—The general rule that the King is not bound by Acts of Parliament, unless he be particularly named therein, is open to some exception, for if the Act be professedly made for the remedy of some great public evil, the advancement of religion, the encouragement of learning, or the support of the poor, it will bind the King though he be not named in it, if it does not trench upon any of his established prerogatives or directly tend in its operation to expose him to any pecuniary charge.—*Re* LIABILITY OF GOVERNMENT PROPERTY TO ASSESSMENT (1823), 1 Nfld. L. R. 318.—NFLD.

1040 vii. ———.]—The rule that the Crown is not bound or affected by statutes unless specially named

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PART IV. SECT. 4, SUB-SECT. 1.

1036 i. Whether Crown bound—Statutes affecting all persons.]—The Crown, though not named in Administration of Justice Act, is entitled to avail itself of the benefit of its provisions to the same extent as a subject can do so.—A.-G. v. WALKER (1877), 25 Gr. 233; *affd.* 3 A. R. 195.—CAN.

1040 i. ——— Not unless expressly named.]—R. v. POULIOT, ROULEAU & LETENDRE (1888), 2 Exch. C. R. 49; 12 L. N. 31.—CAN.

1040 ii. ———.]—SYDNEY LOUISBURG COAL & RY. CO., LTD. SWORD (N. S.) (1892), 21 S. C. R. 152.—CAN.

1040 iii. ———.]—It is a recognised principle in the interpretation of statutes that the Crown is not reached,

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except by express words or necessary implication, in any case where it would be ousted of an existing prerogative.—A.-G. FOR BRITISH COLUMBIA v. ESQUIMALT & NANAIMO RY. CO. (B. C.) (1911), 19 W. L. R. 693.—CAN.

1040 iv. ———.]—The rule of construction according to which the Crown is not affected by a statute unless expressly named in it applies to India; & the Viceroy & Governor-General as representing the Crown therefore enjoys a like exemption.—SECRETARY OF STATE FOR INDIA v. MATHURABHAI (1889), 1 L. R. 14 Bom. 213.—IND.

1040 v. ———.]—Generally speaking, when the words used in an Act of Parliament are "person or persons," the Crown is not bound.—R. v. DUFFY

4.—*Effect on the Crown: Sub-sects. 1 & 2.*

of a subject *per formam doni*, he shall be bound by an Act of Parliament.

But where he claims in his Royal & politic capacity, a general Act shall not bind him, unless he be expressly named, except in special cases.—

CASE OF A FINE LEVIED BY THE KING (1604), 7 Co. Rep. 32 a; 77 E. R. 459.

Annotation:—*Apld.* R. v. London (Bp.) & Lancaster (1693), 1 Show. 441.

1042. ———.]—Where the King claims a thing with respect to his royal capacity there I think it as a certain rule of law that general words in an Act of Parliament without naming him will not bind him (EYRE, J.).—R. v. LONDON (Bp.) & LANCASTER (1693), as reported in 1 Show. 441; 89 E. R. 688.

Annotation:—*Mentd.* R. v. London (Bp.) & Burch (or Birch) (1694), 1 Show. 413–493.

1043. ———.]—Generally speaking, in the construction of Acts of Parliament the King in his royal character is not included, unless there be words to that effect (LORD KENYON, C.J.).—R. v. COOK (1790), 3 Term Rep 519; 100 E. R. 710.

Annotations:—*Consd.* Coomber v. Berks JJ. (1883), 9 App. Cas. 61; Bray v. Lancashire JJ. (1889), 22 Q. B. D. 484.

Mentd. A.-G. v. Hill (1836), 6 L. J. Ex. 105.

1044. ———.]—The general rule is, that the Crown is not bound unless particularly named in a statute (LITTLEDALE, J.).—R. v. BOULTBEE (1836), 4 Ad. & El. 498; 1 Har. & W. 713; 6 Nev. & M. K. B. 26; 3 Nev. & M. M. C. 496; 5 L. J. M. C. 57; 111 E. R. 874.

Annotation:—*Mentd.* R. v. Hester (1836), 1 Har. & W. 650.

1045. ———.]—Inalienable estates tail are, within Lands Clauses Act, 1845 (c. 18), s. 7, & may, under that statute, be conveyed by the tenant in tail in possession; but that statute does not extend to the Crown, for the King, not being specially named therein, the rights of the Crown are unaffected thereby.—*Re* CUCKFIELD BURIAL BOARD, *Ex p.* ABERGAVENNY (EARL) (1854), 19 Beav. 153; 24 L. J. Ch. 585; 3 W. R. 142; 52 E. R. 307.

Annotation:—*Refd.* Abergavenny v. Brace (1872) L. R. 7 Exch. 145.

1046. ———.]—I consider it a sacred maxim that the Crown is not bound by an Act of Parliament, unless it is quite clear, from the language employed, that the Legislature contemplated including the Crown, & Her Majesty, in giving her Royal Assent, assented that the Crown should be bound, & was fully aware that she was giving her assent to be subject to the provisions of the statute. But where it is clear that the Legislature meant to include every case, whether the Crown were interested or not, & the Lord Chancellor, as keeper of the conscience of the Sovereign, advises the Crown to assent, the Crown, by giving its assent, is bound (LORD CAMPBELL, C.J.).—MOORE v. SMITH (1859), 1 E. & E. 597; 28 L. J. M. C. 126; 32 L. T. O. S. 314; 23 J. P. 133; 5 Jur. N. S. 892; 7 W. R. 206; 120 E. R. 1031.

Annotations:—*Consd.* R. v. Canterbury (Archbp.), [1902] 2 K. B. 503; Thomas v. Pritchard, [1903] 1 K. B. 209; *Re* Letters Patent Nos. 139,207, *Re* Carbonit Akt., [1924] 2 Ch. 53. *Refd.* Walsh v. R. (1888), 16 Cox, C. C. 435; Bain v. A.-G., [1892] P. 217; Swift v. Board of Trade, [1926] 2 K. B. 131.

1047. ———.]—MERSEY DOCKS & HARBOUR

therein, is applicable only to statutes passed since the Union, & does not hold with regard to Acts of the Scottish Parliaments.—ADVOCATE GENERAL v. INVERNESS MAGISTRATES (1856), 18 Duml. Ct. of Sess. 366; 28 Sh. Just. 303.—SCOT.

1048 viii. ———.]—“The inten-

tion that the Crown should be bound” by a statute, or has agreed to be bound, must clearly appear, either from the language used or from the nature of the enactment.—UNION GOVERNMENT v. TONKIN, [1918] App. D. 533.—S. AF.

i. ———.]—Where a liability is imposed on the Crown in right of the

BOARD v. CAMERON, JONES v. MERSEY DOCKS & HARBOUR BOARD, No. 1706, *post*.

1048. ———.]—The Crown is not to be held bound by an Act of Parliament, unless expressly named; & this rule, I think, applies to the case of tolls taken under a local Act (COCKBURN, C.J.).—WEYMOUTH CORPN. v. NUGENT (1865), 6 B. & S. 22; 5 New Rep. 302; 34 L. J. M. C. 81; 11 L. T. 672; 29 J. P. 451; 11 Jur. N. S. 465; 13 W. R. 338; 2 Mar. L. C. 163; 122 E. R. 1106.

Annotation:—*Apld.* Hornsey U. C. v. Hennell, [1902] 2 K. B. 73.

1049. ———.]—The statutes which authorise assessments for relief of the poor are silent as to the Crown. Hence the Crown is subject to no poor rate.—LEITH HARBOUR & DOCKS COMRS. v. INSPECTOR OF THE POOR (1866), L. R. 1 Sc. & Div. 17, II. L.

Annotations:—*Consd.* Greig v. Edinburgh University (1868), L. R. 1 Sc. & Div. 348. *Refd.* Income Tax Special Purposes Comrs. v. Pemsel, [1891] A. C. 531; Worcestershire County Council v. Worcestershire Union Assmt. Com. & St. Nicholas Overseers (1897), 66 L. J. Q. B. 323. *Mentd.* R. v. Hutchins (1881), 11 L. T. 364.

1050. ———.]—In Public Health Act, 1875 (c. 55), there is certainly no express mention of the Crown so as to bind the Crown, & there is certainly no necessary implication that the Crown is to be bound. In the absence of express words, or necessary implication, the Crown is not to be bound nor is the property of the Crown to be affected. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning, & to give it meaning one is obliged to consider what it is intended to apply to the Crown (DAY, J.).—GORTON LOCAL BOARD v. PRISON COMRS. (1887), [1901] 2 K. B. 165, n.; 73 L. J. K. B. 114, n.; 89 L. T. 478, n.; 68 J. P. 27; 52 W. R. 233, n.; 1 L. G. R. 838, n., D. C.

Annotations:—*Consd.* Cooper v. Hawkins, [1901] 2 K. B. 164. *Refd.* *Re* De Keyser's Royal Hotel, De Keyser's Royal Hotel v. R., [1919] 2 Ch. 197.

1051. ———.]—The Crown, not being named in Public Health Act, 1875 (c. 55), s. 150, is not bound by its provisions, & is not liable under that sect. to pay in respect of property owned & occupied for the purposes of the Crown any expenses of paving, etc., a street on which that property abuts.—HORNSEY URBAN COUNCIL v. HENNEL, [1902] 2 K. B. 73; 71 L. J. K. B. 479; 86 L. T. 423; 66 J. P. 613; 50 W. R. 521; 18 T. L. R. 512; 46 Sol. Jo. 452.

Annotations:—*Consd.* Cooper v. Hawkins [1901] 2 K. B. 164. *Refd.* Lewis v. Durham Union (1904), 2 L. G. R. 533; Chare v. Hart (1918), 120 L. T. 443.

1052. ———.]—THOMAS v. PRITCHARD, No. 1074, *post*.

1053. ———.]—COOPER v. HAWKINS, No. 1075, *post*.

1054. ———.]—The rule that the Crown is not bound by a statute unless expressly named, or unless it so appears by necessary implication, applies to a servant of the Crown when acting within the scope of his authority.—CHARE v. HART (1918), 88 L. J. K. B. 833; 120 L. T. 443; 83 J. P. 54; 17 L. G. R. 233, D. C.

1055. ———.]—As to estate right title or interest.—By general words in statute.—MAGDALEN COLLEGE, CAMBRIDGE CASE, No. 1039, *ante*.

1056. ———.]—Not comprehended under term

Dominion it must be ascertained according to the laws of the province in which the cause of action arose in force at the time it was so imposed & cannot be added to by subsequent provincial legislation.—GAUTHIER v. R. (Ont.) (1916), 56 S. C. R. 176; 40 D. L. R. 353.—CAN.

“party.”]—The Queen is never comprehended in a statute by the word “party” (POWELL, J.).—*R. v. TUCHIN* (1704), 2 Ld. Raym. 1061; 92 E. R. 204; *sub nom.* *R. v. TUTCHIN*, 6 Mod. Rep. 268; 1 Salk. 51.

Annotations:—*Consd. A.-G. v. Donaldson* (1842), 10 M. & W. 117. *Refd. A.-G. v. Allgood* (1743), Park. 1. *Mentd. R. v. Seawood* (1727), 2 Ld. Raym. 1472; *R. v. Ellamos* (1734), Cunn. 39; *Wynne v. Thomas* (1745), Willes, 563; *R. v. Wilkes* (1770), 4 Burr. 2527; *R. v. Shipley* (1784), 4 Doug. K. B. 73; *R. v. Burke* (1796), 7 Term Rep. 4; *R. v. Gregory* (1847), 16 L. J. Q. B. 281.

1057. — Crown named in part of Act.—Whether bound by other provisions of Act.—Though the Crown is named in some of the sects. of Bankruptcy Act, 1869 (c. 71), it is not bound by the other provisions of the Act.—*Re BONHAM, Ex p. POSTMASTER-GENERAL* (1879), 10 Ch. D. 595; 48 L. J. Bcy. 84; *sub nom. Re BONHAM, Ex p. POSTMASTER-GENERAL, Re BONHAM, Ex p. LORDS OF THE TREASURY*, 40 L. T. 16; 27 W. R. 325, C. A.

Annotations:—*Appld. Mersey Docks & Harbour Board v. Lucas* (1881), 51 L. J. Q. B. 114. *Consd. A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. *Refd. Re Webb* (Smithfield, London), [1922] 1 Ch. 369.

1058. — Local Act.—It is part of the prerogative of the Crown that it is not bound by any local Act of Parliament—subject to certain exceptions which need not be mentioned . . . unless named or expressly referred to in the Act (JESSEL, M.R.).—*MERSEY DOCKS & HARBOUR BOARD v. LUCAS* (1881), 51 L. J. Q. B. 114; 46 J. P. 388; 1 Tax Cas. 385, C. A.; *on appeal* (1883), 8 App. Cas. 891, H. L.

Annotations:—*Refd. A.-G. v. De Préville*, [1900] 1 Q. B. 223. *Mentd. Paddington Burial Board v. I. R. Comrs.* (1884), 13 Q. B. D. 9; *Last v. London Assee. Corpn.* (1885), 10 App. Cas. 438; *Dublin Corpn. v. M'Adam* (1887), 2 Tax Cas. 387; *Sowrey v. King's Lynn Harbour Mooring Comrs.* (1887), 2 Tax Cas. 201; *Clerical, Medical & General Life Assee. Soc. v. Carter* (1888), 57 L. J. Q. B. 614; *New York Life Insee. v. Styles* (1889), 14 App. Cas. 381; *Styles v. New York Life Insee.* (1889), 2 Tax Cas. 460; *Dillon v. Haverfordwest Corpn.*, [1891] 1 Q. B. 575; *Smyth v. Stretton* (1904), 90 L. T. 756; *Farmer v. Scottish North-American Trust*, [1912] A. C. 118; *Massy v. I. R. Comrs.* (1915), [1919] 2 K. B. 354, n; *Severn Fishery Board v. O'May*, [1919] 2 K. B. 484; *Port of London Authority v. I. R. Comrs.*, [1920] 2 K. B. 612; *Coman v. Rotunda Hospital, Dublin*, [1921] 1 A. C. 1; *Bruce v. Hatton*, [1922] 2 K. B. 206; *Rowntree v. Curtis*, [1925] 1 K. B. 328; *Brighton College v. Marriott*, [1926] A. C. 192; *I. R. Comrs. v. Forth Conservancy Board* (1928), 45 T. L. R. 83.

1059. ——*Weymouth Corpn. v. NUGENT*, No. 1018, *ante*.

1060. — Application to Crown servants.—*COOPER v. HAWKINS*, No. 1075, *post*.

1061. ——*CHARE v. HART*, No. 1054, *ante*.

— **By Implication.**—*See* Sub-sect. 2, *post*.

1062. Statutory restrictions on Crown's rights—Whether repealed by subsequent statutes—Unless expressly re-enacted.—Clauses limiting the right of the Crown are to be considered as repealed by subsequent statutes, unless expressly re-enacted.—*A.-G. v. NEWMAN* (1815), 1 Price, 438; 145 E. R. 1455.

1063. Special Act binding Crown—Incorporation of general Act—Whether Crown bound by incorporated Act.—(1) It was argued that, even if Lands Clauses Act is incorporated with the special Act, Lands Clauses Act does not bind the Crown. I think the answer to that is simple. The special Act clearly binds the Crown, & directly Lands Clauses Act became incorporated with it, it became an integral part of the special Act & bound the

Crown just as the special Act itself did, in the same way as if the provision in Lands Clauses Act had been in terms re-enacted in the special Act (LOPES, L.J.).

(2) If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sects. into the new Act as if they had been actually written in it with the pen, or printed in it (LORD ESHER, M.R.).—*Re WOOD'S ESTATE, Ex p. WORKS & BUILDINGS COMRS.* (1886), 31 Ch. D. 607; 55 L. J. Ch. 488; 54 L. T. 145; 34 W. R. 375, C. A.

Annotations:—*As to* (2) *Refd. Cannon Brewery Co. v. Central Control Board Liquor Traffic*, [1918] 2 Ch. 101. *Generally, Refd. Central Control Board Liquor Traffic v. Cannon Brewery Co.*, [1919] A. C. 714. *Mentd. Re Mills' Estate, Ex p. Works & Public Buildings Comrs.* (1886), 34 Ch. D. 21; *Graham v. Public Works & Buildings Comrs.*, [1901] 2 K. B. 781.

SUB-SECT. 2.—WHETHER BOUND BY IMPLICATION.

1064. Statutes pro bono publico—Safety of inheritances.—*WILLION v. BERKLEY*, No. 377, *ante*.

1065. — Maintenance of religion.—In divers cases, the King is bound by Act of Parliament, although he be not named in it, nor bound by express words, & therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named (*per CUR.*).—*CASE OF ECCLESIASTICAL PERSONS* (1601), 5 Co. Rep. 14 a; 77 E. R. 69.

Annotations:—*Mentd. Geo. v. Freedland* (1626), Cro. Car. 47; *Walker v. Lamb* (1632), Cro. Car. 258; *Threadneedle v. Linum* (1674), Freem. K. B. 179; *A.-G. v. Allgood* (1743), Park. 1.

1066. — Prevention of fraud.—*CASE OF ECCLESIASTICAL PERSONS*, No. 1065, *ante*.

1067. ——The navigation laws are not binding upon the King so as to prevent the conveyance of public stores from one colony to another.

It has been made a question in argument, whether the King is bound by the Navigation Act. This is a very large question, upon a very momentous subject, on which it might not become me to hazard a confident opinion, & the less so, because the principles on which it is laid down in the books, that the King is or is not bound by statutes, are far from being so precise as to furnish a safe conduct to any such opinion. That he is bound, though not named, by acts *pro bono publico*, by acts for prevention of fraud, are descriptions of the royal obligations so wide & so unlimited, that it might be difficult to say what public statutes do or do not bind the King, if these are taken without any technical limitations applied to them. For it would be difficult to say what public statutes are not *pro bono publico*, & for the prevention of fraud, taking fraud in its legal sense, of injury to the rights of others. The utmost that I can venture to admit is, that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes (*per CUR.*).—*THE SWIFT* (1813), 1 Dods. 320; 165 E. R. 1325.

Annotations:—*Consd. The Athol* (1842), 1 Wm. Rob. 374; *The Charkleh* (1873), L. R. 4 A. & E. 59.

1068. — Promotion of good husbandry.—56 Geo. 3, c. 50, although passed for the purpose of general good & public benefit in promoting good husbandry does not extend to bind the Crown.—*R. v. OSBOURNE* (1818), 6 Price, 94; 146 E. R. 752.

PART IV. SECT. 4, SUB-SECT. 2.

g. General rule.—The Executive Govt. of the Commonwealth or of a State is not bound by a statute unless

the intention that it shall be bound is apparent.—*ROBERTS v. AHERN* (1904), 1 C. L. R. 406.—*AUS.*

h. ——The property of the Crown can only be affected by express &

clear enactment, & not by inference or implication.—*LONSDALE (EARL) v. WILSON* (1846), 8 I. L. R. 412; *affd.* (1849), 13 I. L. R. 438; 1 Ir. Jur. 301.—*IR.*

Sect. 4.—Effect on the Crown: Sub-sects. 2 & 3, A., B., C., D., E., F. & G. Sect. 5: Sub-sects. 1 & 2, A.]

1069. Suppression of wrong.]—CASE OF ECCLESIASTICAL PERSONS, No. 1065, ante.

1070. ———.]—I have . . . to consider whether the Courts (Emergency Powers) Act, 1917, binds the Crown. . . . This Act belongs to the class of statutes which binds the Crown as being one for the suppression of wrong (ROWLATT, J.).—*A.-G. OF DUCHY OF LANCASTER v. MORESBY*, [1919] W. N. 69.

1071. Crown claiming in natural capacity—As heir to subject.]—CASE OF A FINE LEVIED BY THE KING, No. 1041, ante.

1072. Statute for union of benefices.]—An Act of Parliament for the consolidation of endowed rectories & vicarages binds the Crown though not named.—*R. v. ARMAGH (ARCHBP.)* (1722), 1 Stra. 516; 8 Mod. Rep. 5; 93 E. R. 671.

1073. Necessary implication.]—*MOORE v. SMITH*, No. 1046, ante.

1074. ———.]—It is a clear rule of law that the Crown is not bound by an Act of Parliament unless it is expressly named, or words of clear implication are used (LORD ALVERSTONE, C.J.).—*THOMAS v. PRITCHARD*, [1903] 1 K. B. 209; 72 L. J. K. B. 23; 87 L. T. 688; 67 J. P. 71; 51 W. R. 58; 19 T. L. R. 10; 47 Sol. Jo. 32; 20 Cox, C. C. 376, D. C. *Annotation:—*Consd. *Re Letters Patent No. 139,207, Re Carbont Akt.*, [1924] 2 Ch. 53.

1075. ———.]—(1) The Crown is not bound by an Act of Parliament unless it is expressly or by necessary implication named therein.

(2) This is an Act of Parliament which, if it binds the Crown, must bind all the great departments of state, no matter what they are (WILLS, J.).—*COOPER v. HAWKINS*, [1904] 2 K. B. 164; 73 L. J. K. B. 113; 89 L. T. 476; 68 J. P. 25; 52 W. R. 233; 19 T. L. R. 620; 1 L. G. R. 833, D. C. *Annotation:—*As to (2) *Appld. Chare v. Hart* (1918), 88 L. J. K. B. 833.

1076. ———.]—*STEWART v. THAMES CONSERVATORS*, No. 2112, post.

1077. ——— Navigation laws—Crown engaging in trade.]—*THE SWIFT*, No. 1067, ante.

1078. ——— Legislation otherwise meaningless.]—*GORTON LOCAL BOARD v. PRISON COMRS.*, No. 1050, ante.

SUB-SECT. 3.—PARTICULAR INSTANCES.

A. Crown as Creditor.

Priority of Crown debts.]—See, generally, CONSTITUTIONAL LAW, Vol. XI., pp. 581, 582, Nos. 830–839.

—— **In bankruptcy.]—**See, generally, BANKRUPTCY, Vol. IV., p. 479; Vol. V., pp. 828, 829, Nos. 7029–7034.

—— **In winding up of company.]—**See, generally, COMPANIES, Vol. X., pp. 912, 913, Nos. 6458–6461.

—— **In administration.]—**See, generally, EXECUTORS, Vol. XXIII., p. 349, Nos. 4157–4163.

1073 i. Necessary implication.]—The rule that the Crown is not bound by a statute except by express words of necessary implication applies only to those representatives of the Crown who have executive authority in the place where the Statute applies, & as to matters to which that executive authority extends. The Constitution binds the Crown as represented by the various States, & takes no account of the States & State Govts. in relation to Commonwealth legislation on matters within the exclusive control of the Commonwealth Govt. & therefore, in the construction of the Commonwealth Statutes, dealing with such

matters, the rule applies to the Sovereign as head of that Govt., but not to the Sovereign as head of the State Govt.—*R. v. SUTTON* (1908), 5 C. L. R. 789.—AUS.

k. 23 Vict. c. 25.]—The above Act exempting certain articles from seizure, does not bind the Crown.—*R. v. DAVIDSON* (1861), 21 U. C. R. 41.—CAN.

l. Statutes pro bono publico.]—A Statute may contain provisions by which the Crown never would be bound unless that were clearly expressed—such, for instance, as the provisions of a taxing statute, or certain enact-

Disobedience to order for payment of Crown debts—Attachment.]—See, generally, CONTEMPT OF COURT, Vol. XVI., p. 41, Nos. 422–426.

B. Fiscal Statutes.

See Part VI., post.

C. Inheritance Law.

Escheat to the Crown.]—See, now, Administration of Estates Act, 1925 (c. 23), ss. 45 (1) (d), 46 (1) (vi); DESCENT, Vol. XVIII., p. 31, Nos. 309–311.

D. Judicial Procedure.

1079. Whether binding on Crown—Provision for writ of error—Application to criminal cases.]—In the case therefore of an Act of Parliament passed expressly for the further advancement of justice, & in its particular enactment using terms so comprehensive as to include all cases brought up by writ of error, we think there is neither authority nor principle for implying the exception of criminal cases, upon the ground that the King, as the public prosecutor, is not expressly mentioned in the Act (TINDAL, C.J.).—*R. v. WRIGHT* (1834), 1 Ad. & El. 434; 3 L. J. Ex. 370; 110 E. R. 1273; *sub nom. WRIGHT v. R.*, 3 Nev. & M. K. B. 892, Ex. Ch.

*Annotations:—*Consd. *De Bode v. R.* (1848), 13 Q. B. 364. *Held. R. v. Seale, R. v. Alford* (1855), 24 L. J. Q. B. 221; *Moore v. Smith* (1859), 5 Jur. N. S. 892; *Weymouth Corpn. v. Nugent* (1865), 5 New Rep. 302. *Mentd. Ashton v. Brevitt* (1845), 14 M. & W. 106; *Rathbone v. Munn* (1868), 9 B. & S. 708.

1080. ———.]—By Law Terms Act, 1830 (c. 70), s. 8, Writs of Error upon any judgments given by the Cts. of Q. B., Common Pleas, or Exchequer, shall hereafter be returnable before the Judges & Barons, or Judges only of the other two Cts., in the Exchequer Chamber:—*Held: the Crown was bound by that enactment, & therefore a Writ of Error lies upon a judgment for the Crown in a Petition of Right to the Exch. Ch.*

The Ct. observed [in *R. v. Wright*, No. 1079, ante] that the Act being “passed expressly for the further advancement of justice,” as appears by the preamble, “& in its particular enactment using terms so comprehensive as to include all cases brought up by writ of error,” there was “neither authority nor principle for implying the exception of criminal cases upon the ground that the King, as the public prosecutor, is not expressly mentioned in the Act.” Nor is there, in our judgment, any authority or principle for implying an exception in the present case. If any special prerogative of the Crown were thereby taken away, as, for instance, if there had been a special tribunal for the decision of writs of error brought by the Crown, or where the Crown was a party, or the Crown had an option, which the subject had not, to have a writ of error against a judgment in its favour in any ct. that it should elect, doubtless such a prerogative would not be taken away. But this is not such a prerogative; & in cases of

ments with penal clauses adjoined, as, for example, certain provisions of Motor Car Act, & so on—yet, when you come to a set of provisions in a Statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound, & this would be so in the case of reputations meant to apply to all the land in a city, & where the Crown's property is not property held *jure coronæ*, but has been acquired from a subject superior for the use of one of the public departments.—*EDINBURGH MAGISTRATES v. LORD ADVOCATE*, [1912] S. C. 1085; 49 Sc. L. R. 873.—SCOT.

writs of error the Crown & the subject are, as to the ct. in which they are to be brought by the common law, on the same footing (WILDE, C.J.).—*DE BODE v. R.* (1849), 13 Q. B. 364; 12 L. T. O. S. 106; 13 J. P. 604; 14 Jur. 970; 116 E. R. 1302, Ex. Ch.; *affd.* (1851), 3 H. L. Cas. 449, H. L.; *affg.* (1845), 8 Q. B. 208.

Annotations:—**Mentd.** *Nelson v. Bridport* (1846), 10 Jur. 871; *Wall's Case* (1848), 6 Moo. P. C. C. 216; *Boosey v. Davidson* (1849), 18 L. J. Q. B. 174; *Wadsworth v. Spain* (1851), 17 Q. B. 171; *Kingswood v. Birmingham* (1861), 8 Jur. N. S. 37; *R. v. Birmingham Overseers* (1861), 1 B. & S. 763; *Tobin v. R.* (1864), 16 C. B. N. S. 310; *Thomas v. R.* (1874), L. R. 10 Q. B. 31; *Rustomjee v. R.* (1876), 2 Q. B. D. 69; *R. v. Brixton Prison, Re Percival* (1907), 76 L. J. K. B. 619; *Marconi's Wireless Telegraph Co. v. R.*, [1918] 1 K. B. 193; *Ruffy-Arnell, etc., Co. v. R.*, [1922] 1 K. B. 599.

1081. — Necessity for naming Crown—Statute extending jurisdiction.—*Qu.*: whether, when an Act of Parliament transfers jurisdiction from one ct. to another, or grants an extension of the jurisdiction of an existing ct., it is necessary, in order to make the act binding on the Crown, that the Crown should be named therein.—*LONDON CORPN. v. A.-G.* (1848), 1 H. L. Cas. 440; 9 E. R. 829, H. L.

1082. — Statute transferring jurisdiction.—*LONDON CORPN. v. A.-G.*, No. 1081, *ante*.
Statutory restrictions on issue of certiorari.—*See CROWN PRACTICE*, Vol. XVI., p. 439, Nos. 3037-3046.

Statutes relating to costs for or against the Crown.—*See CONSTITUTIONAL LAW*, Vol. XI., pp. 531, 533, 534, Nos. 344, 345, 367-369.

E. Prescription Statutes.

Right to light.—*See EASEMENTS*, Vol. XIX., p. 125, Nos. 837, 838.

F. Statutes affecting Prerogative.

See, generally, *CONSTITUTIONAL LAW*, Vol. XI., pp. 491 *et seq.*

G. Statutes of Limitation.

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 322, 323, Nos. 71-80.

Maritime Conventions Act, 1911 (c. 57), s. 8—Action for damage to naval vessel.—*See SHIPPING*, Vol. XII., p. 799, No. 6599.

SECT. 5.—RETROSPECTIVE EFFECT.

SUB-SECT. 1.—IN GENERAL.

1083. Meanings of "retrospective."—The word "retrospective" is used in several different senses. . . . An Act may be called retrospective because it affects existing contracts as from the date of its coming into operation. . . . It may be more properly described as retrospective because it applies to actual transactions which have been completed or to rights & remedies which have already accrued,

or it may apply again to such matters as procedure & evidence; & in each of these matters retrospective legislation has a different effect (MAUGHAN J.).—*GARDNER & Co. v. CONE*, [1928] Ch. 955; 97 L. J. Ch. 491.

1084. Restrospective effect to be no greater than language renders necessary.—(1) The particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non prateritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, & in construing a sect. which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the sect. cease to be plain. That is a necessary & logical corollary of the general proposition that you ought not to give a larger retrospective power to a sect., even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant (BOWEN, L.J.).

(2) If words are ambiguous & one construction leads to enormous inconvenience, & another construction does not, the one which leads to least inconvenience is to be preferred (COTTON, L.J.).—*REID v. REID* (1886), 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100; 34 W. R. 332; 2 T. L. R. 254, C. A.

Annotations:—*As to* (1) **Consd.** *Cuno, Mansfield v. Mansfield* (1889), 43 Ch. D. 12. **Refd.** *The Ydun*, [1899] P. 236. *Generally, Mentd.* *Re Jupp, Jupp v. Buckwell* (1888), 39 Ch. D. 148; *Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51.

1085. ——*LAURI v. RENAD*, No. 1116, *post*.

1086. ——A statute is *prima facie* prospective & does not interfere with existing rights, unless it contains clear words to that effect, or unless, having regard to its object, it necessarily does so, & that a statute is not to be construed to have a greater retrospective operation than its language renders necessary whatever view may be entertained of the probable intention of the legislature unless some manifest absurdity or inconsistency results from such construction (AVORY, J.).—*GLOUCESTER UNION v. WOOLWICH UNION*, [1917] 2 K. P. 374; 86 L. J. K. B. 1187; 117 L. T. 250; 81 J. P. 281; 15 L. G. R. 561, D. C.

SUB-SECT. 2.—PRESUMPTION AGAINST RETROSPECTIVE EFFECT.

A. In General.

1087. General rule.—Generally speaking, the cts. are bound to hold that Acts of Parliament are not retrospective, if it be possible so to construe

PART IV. SECT. 5, SUB-SECT. 1.

m. Marriage Act, 1906—No retrospective operation.—*APPLETON v. APPLETON*, [1915] V. L. R. 361.—**AUS.**

n. Real Property Limitation Act, 1883.—Although the above Act, R. S. M. c. 89, passed in 1883, did not commence & take effect until Jan. 1, 1885, yet it applies to rights & causes of action, which existed or accrued before as well as after the last mentioned date.—*STOVER v. MARCHAND* (1895), 10 Man. L. R. 322.—**CAN.**

o. Principles guiding courts.—In determining whether a statute is to be construed as having a retrospective operation, the cts. have been more

guided by consideration of substantial justice & convenience than by attention to grammatical form.—*Re MATAWHERO B., BLOCK, Ex p. GANNON* (1884), 2 N. Z. L. R. 357 (S. C.).—**N.Z.**

p. Extent of retrospective operation—Not greater than language of Act renders necessary.—*MASON v. PUKEKOHE BOROUGH*, [1923] N. Z. L. R. 521.—**N.Z.**

PART IV. SECT. 5, SUB-SECT. 2.—A.

1087 i. General rule.—It is a general rule that a statute shall not be construed to operate retrospectively unless it is expressly made applicable to past transactions, or the words can have

no meaning unless such a construction is adopted.—*SMITH v. BURKE* (1875), 16 N. B. R. (3 Pug.) 130.—**CAN.**

1087 ii. ——A statute is never retrospective unless made so in express terms.—*ST. JOACHIM DE LA POINTE CLAIRE VILLAGE v. POINTE CLAIRE TURNPIKE ROAD CO.* (Que.) (1895), 24 S. C. R. 486.—**CAN.**

1087 iii. ——A statute will not be considered retroactive unless plainly intended to be so.—*NOBLE v. ESQUESING TOWNSHIP* (1920), 47 O. L. R. 255; 18 O. W. N. 60.—**CAN.**

1087 iv. ——Statutes are *prima facie* deemed to be prospective only. *Nova constitutio futuris formam im-*

Sect. 5.—Retrospective effect: Sub-sect. 2, A. &

them. The reason is that a different construction would lead to great injustice (ROLFE, B.).—A.-G. v. HERTFORD (MARQUIS) (1849), 3 Exch. 670; 18 L. J. Ex. 332; 13 L. T. O. S. 121.

Annotation:—Expld. A.-G. v. Theobald (1890), 24 Q. B. D. 557.

1088. —.—]—In general, cts. of justice will be slow to ascribe a retrospective operation to any statute.—URQUHART v. URQUHART (1853), 1 Macq. 658, H. L.

Annotation Apld. Gardner v. Lucas (1878), 3 App. Cas. 582.

1089. —.—]—It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act (COCKBURN, C.J.).—R. v. IPSWICH UNION (1877), 2 Q. B. D. 269; 46 L. J. M. C. 207; *sub nom.* IPSWICH UNION v. GREAT YARMOUTH GUARDIANS, R. v. BURTON-ON-TRENT, R. v. ASTON UNION, 41 J. P. 374; *sub nom.* R. v. IPSWICH UNION GUARDIANS, R. v. ASTON UNION GUARDIANS, R. v. BURTON-UPON-TRENT UNION GUARDIANS, 25 W. R. 511, D. C.

Annotations:—Refd. Tenterden Union Grdns. v. St. Mary Islington Grdns. (1878), 47 L. J. M. C. 81; Westbury-on-Severn v. Barrow-in-Furness (1878), 3 Ex. D. 88; R v. Abergavenny Union (1880), 6 Q. B. D. 31; Brighton Parish Grdns. v. Strand Union Grdns., [1891] 2 Q. B. 156. Mentd. R. v. Brompton Union (1878), 3 Q. B. D. 479; Sunderland Grdns. v. Sussex Clerk of the Peace (1881), 8 Q. B. D. 99.

1090. —.—]—GARDNER v. LUCAS, No. 1139, *post*.

1091. —.—]—Words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed (LORD SELBORNE).—MAIN v. STARK (1890), 15 App. Cas. 381; 59 L. J. P. C. 68; 63 L. T. 10, P. C.

Annotations:—Consd. *Re* Clemmons Aluminium (1924), 94 L. J. K. B. 487. Apld. *Re* Snowdown Colliery, South-Eastern Coalfield Extension Co. v. Snowdown Colliery Co. (1925), 94 L. J. Ch. 305. Refd. Reynolds v. A.-G. for Nova Scotia, [1896] A. C. 210; *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547; *Re* Waverley Type Writer, D'Esterre v. Waverley Type Writer, [1898] 1 Ch. 699.

1092. —.—]—There is an old & well-known saying with regard to new laws that you are not by a new law to affect for the worse the position in which a man already finds himself at the time when the law is actually passed (CAVE, J.).—*Re* RAISON, *Ex p.* RAISON (1891), 60 L. J. Q. B. 206; 63 L. T. 709; 39 W. R. 271; 7 T. L. R. 185; 8 Morr. 11.

Annotation:—Refd. *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547.

1093. —.—]—The Act being silent as to the date of its coming into force, the general rule applies, & the Act is not retrospective.—*Re* WAVERLEY TYPE WRITER, D'ESTERRE v. WAVERLEY TYPE WRITER, [1898] 1 Ch. 699; 67 L. J. Ch. 360; 78 L. T. 593; 46 W. R. 685; 14 T. L. R. 354; 42 Sol. Jo. 473; 5 Mans. 269.

Annotations:—Apld. Weekes v. Kent, Sussex, & General Land Soc. (1898), 42 Sol. Jo. 449. Consd. *Re* Clemmons Aluminium (1924), 94 L. J. K. B. 487. Refd. *Re* Snowdown Colliery Co., South-Eastern Coalfield Extension Co. v. Snowdown Colliery Co. (1925), 94 L. J. Ch. 305.

1094. —.—]—*Re* SNOWDOWN COLLIERY CO., LTD., SOUTH-EASTERN COALFIELD [EXTENSION

Co., LTD. v. SNOWDOWN COLLIERY CO., LTD., No. 1124, *post*.

1095. Although requisites for action based in antecedent matters.]—We have before shown that the statute is in its direct operation prospective, as it relates to future removals only, & that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing (LORD DENMAN, C.J.).—R. v. ST. MARY, WHITECHAPEL (INHABITANTS) (1848), 12 Q. B. 120; 3 New Sess. Cas. 262; 17 L. J. M. C. 172; 11 L. T. O. S. 473; 116 E. R. 811; *sub nom.* R. v. ST. MARY, WHITECHAPEL (INHABITANTS), R. v. ST. PANCRAS (INHABITANTS), 12 Jur. 792.

Annotations:—Mentd. R. v. Chedgrave (1849), 12 Q. B. 206; Salford Overseers v. Manchester Overseers (1863), 3 B. & S. 599.

1096. Extent of presumption—Where alteration in general law.]—The principle that legislation is presumed not to be retrospective cannot, in the case of an alteration in the general law, be extended to all the consequences of the original enactment.—ROSS v. BEAUDRY, [1905] A. C. 570; 74 L. J. P. C. 106; 93 L. T. 315; 21 T. L. R. 735, P. C.

B. Rebuttal of Presumption.

(a) In General.

1097. Provision against retrospective effect.]—To give an *ex post facto* operation to this enactment would be very mischievous . . . , & unless when otherwise provided all Acts should come into operation from the day of the passing (*per* CUR.).

To give an *ex post facto* operation to this enactment would be very mischievous, because, though it was not possible to say that such a thing was hostile to the spirit of English law, inasmuch as till within a few years back an Act of Parliament passed at the end of a session was held to relate back to the beginning, so that it might in that way be possible that a man should have been committed to prison for a crime created after the thing was done for which he was charged, yet this was very harsh, & a late Act had provided that, unless when otherwise provided, all Acts should come into operation from the day of the passing (PLATT, B.).—R. v. CLINTON (1845), 6 L. T. O. S. 66; *sub nom.* *Ex p.* CLINTON, 6 State Tr. N. S. App. A. 1105.

1098. Circumstances to contrary irresistible.]—An Act of Parliament cannot be held to be retrospective in its operation unless there is something which compels us to hold that it is (LORD ESHER, M.R.).—*Re* NORMAN, *Ex p.* BOARD OF TRADE, [1893] 2 Q. B. 369; 63 L. J. Q. B. 34; 69 L. T. 675; 9 T. L. R. 656; 4 R. 584, C. A.

(b) Clear Intention to Contrary.

1099. Clear intention necessary.]—BRITTON v. WARD (1620), Palm. 113; Cro. Jac. 515; 2 Roll. Rep. 97; 81 E. R. 1003; *reversd.* on other grounds *sub nom.* WARD v. BRITTON (1621), Palm. 219, Ex. Ch.

Annotations:—Mentd. R. v. Hornbee (1691), Freem. K. B. 331; Wallis v. Pain (1739), 2 Com. 633; Smith v. Wyatt (1742), 9 Mod. Rep. 336; Portland v. Bingham (1792), 1 Hag. Con. 157; Rennell v. Lincoln (Bp.) (1827), 7 B. & C. 113; Hine v. Reynolds (1840), 2 Man. & G. 71.

ponere debet non prateritis.—DOOLUB-DASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS (1850), 5 Moo. Ind. App. 109.—IND.

1087 v. —.—]—The law as it exists when a suit is commenced must decide the rights of the parties to the suit, unless the Legislature has expressed a clear intention to vary the relative rights of the parties to each other in the new law.—BUNGSHEDHUR DOSS

v. SHEIKH MOHOMED KHULKEEL (1862), 1 Hay, 369.—IND.

PART IV. SECT. 5, SUB-SECT. 2.—B. (a).

q. Effect of statute coming into operation at distant date.]—The intention to give a statute a retroactive effect is not necessarily to be presumed from a provision fixing a more or less distant date for its coming into force.—SMITH

v. UPPER CANADA COLLEGE (1920), 47 O. L. R. 37; 17 O. W. N. 405; *reversd.* 48 O. L. R. 120; 61 S. C. R. 413.—CAN.

PART IV. SECT. 5, SUB-SECT. 2.—B. (b).

1099 i. Clear intention necessary.]—In construing Acts of Parliament, the intention to be retrospective can only be effectuated by clear & distinct words, & exceptions from retrospective

1100. —.]—**HUNTINGTOWER (LORD) v. GARDINER, SAME v. IRELAND**, No. 1533, *post*.

1101. —.]—A retrospective effect will not be given to a statute unless the statute, by precise words, clearly shows that such was the intention of the legislature.—**THOMPSON v. LACK** (1846), 3 C. B. 540; 16 L. J. C. P. 75; 8 L. T. O. S. 142; 136 E. R. 216.

Annotation:—**Mentd.** Price v. Barker (1855), 4 E. & B. 760.

1102. —.]—The general rule in construing recent statutes is, "*Nova constitutio futuris formam imponere debet, non præteritis*"; but that rule, which is one of construction only, will yield to a sufficiently expressed intention of the legislature that the enactment should have a retrospective operation.—**MOON v. DURDEN** (1848), 2 Exch. 22; 12 J. P. Jo. 161; 151 E. R. 389; *sub nom.* **MOORE v. DURDEN**, 12 Jur. 138.

Annotations:—**Consd.** A. G. v. Hertford (1849), 3 Exch. 670. **Apprvd.** Doolubdass Pettamberdass v. Ramlooll Thackoorseydass (1850), 7 Moo. P. C. C. 239. **Appld.** Jackson v. Woolley (1858), 8 E. & B. 781. **Apprvd.** Williams v. Smith (1859), 4 H. & M. 559. **Consd.** The Ironsides (1862), Lush. 458; Pardo v. Bingham (1869), 4 Ch. App. 735; *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547; West v. Gwynne, [1911] 2 Ch. 1; Henshall v. Porter, [1923] 2 K. B. 193. **Refd.** Marsh v. Higgins (1850), 19 L. J. C. P. 297; M'Kenzie v. Sligo & Shannon Ry. (1852), 21 L. J. Q. B. 380; Pinhorn v. Souster (1852), 8 Exch. 138; *Re* Lord's Arbitration (1854), 3 Eq. Rep. 197. A. G. v. Sillem (1861), 10 H. L. Cas. 704; Evans v. Williams (1865), 2 Drew. & Sm. 324; R. v. Vine (1875), L. R. 10 Q. B. 195; Sussenbach v. Fitzgibbon (1892), 8 T. L. R. 692; Knight v. Lee, [1893] 1 Q. B. 41; The Ydun, [1899] P. 236; R. v. Southampton Income Tax Comrs., *Ex p.* Singer, [1916] 2 K. B. 249; Grocock v. Grocock, [1920] 1 K. B. 1. **Mentd.** Martin v. Hewson (1855), 10 Exch. 737; Bowling v. Camp (1922), 128 L. T. 342.

1103. —.]—**JACKSON v. WOOLLEY** (1858), 8 E. & B. 781; 27 L. J. Q. B. 448; 31 L. T. O. S. 342; 4 Jur. N. S. 656; 6 W. R. 686; 120 E. R. 292, Ex. Ch.

Annotations:—**Appld.** Williams v. Smith (1859), 4 H. & N. 559. **Refd.** *Re* Sanford's Trust, Bennett v. Lytton (1860), 2 John. & H. 155; Flood v. Patterson (1861), 29 Beav. 295; Pardo v. Bingham (1869), 4 Ch. App. 735; Watson v. Woodman (1875), L. R. 20 Eq. 721; West v. Gwynne (1911), 80 L. J. Ch. 578. **Mentd.** Loft v. Dennis (1839), 5 Jur. N. S. 727; R. v. General Council of Medical Education & Registration (1861), 7 Jur. N. S. 798.

1104. —.]—Statutes are not to have a retrospective effect given them unless the intention of the legislature is clearly . . . made manifest to the contrary (*per* CUR.).—**WILLIAMS v. SMITH** (1859), 4 H. & N. 559; 28 L. J. Ex. 286; 33 L. T. O. S. 167; 5 Jur. N. S. 1107; 7 W. R. 503; 157 E. R. 960, Ex. Ch.

Annotations:—**Refd.** Jackson v. Woolley (1858), 8 E. & B. 778; *Re* Cochran's Estate, De Wolf v. Lindsell (1868), L. R. 5 Eq. 209; Hough v. Winders (1881), 12 Q. B. D. 224.

1105. —.]—**YOUNG v. HUGHES**, No. 401, *ante*.

1106. —.]—Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain, & unambiguous language; because it

operation should be construed liberally for the exception.—**NASH v. R.** (1870), 1 V. R. (Eq.) 118.—**AUS.**

1099 ii. —.]—**WILLIAMS v. IRVINE** (Que.) (1893), 22 S. C. R. 108.—**CAN.**

1099 iii. —.]—**MASSEY v. McCLELLAND, BAKER v. McCLELLAND** (1895), 2 Terr. L. R. 179.—**CAN.**

1099 iv. —.]—**McCUTCHEON LUMBER CO. v. MINITONAS RURAL MUNICIPALITY** (1912), 22 W. L. R. 500; 22 Man. L. R. 681; 3 W. W. R. 275; 7 D. L. R. 664.—**CAN.**

1099 v. —.]—A retrospective statute will not interfere with rights that

manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law: &, wherever it is possible to put upon an Act of Parliament a construction not retrospective the cts. will always adopt that construction (**ERLE, C.J.**).—**MIDLAND RY. CO. v. PYE** (1861), 10 C. B. N. S. 179; 30 L. J. C. P. 314; 4 L. T. 510; 9 W. R. 658; 142 E. R. 419.

Annotations:—**Appld.** Young v. Adams, [1898] A. C. 469. **Refd.** R. v. Vine (1875), L. R. 10 Q. B. 195; *Re* Pulborough School Board Election, Bourke v. Nutt, [1894] 1 Q. B. 725; *Re* Cullwick, [1918] 1 K. B. 646; Bowling v. Camp (1922), 128 L. T. 342. **Mentd.** Cuenod v. Leslie, [1909] 1 K. B. 880.

1107. —.]—An Act of Parliament is not to be construed as retrospective by inference, but only by express enactment.—**EVANS v. WILLIAMS** (1865), 2 Drew. & Sm. 324; 5 New Rep. 307; 34 L. J. Ch. 661; 11 L. T. 762; 11 Jur. N. S. 256; 13 W. R. 423; 62 E. R. 644.

1108. —.]—(1) The general rule of law undoubtedly being that except there be a clear indication either from the subject-matter or from the wording of a statute the statute is not to have a retrospective construction (**LORD HATHERLEY, C.**).

(2) We must look to the general scope & purview of the statute & at the remedy sought to be applied & consider what was the former state of the law & what it was that the legislature contemplated (**LORD HATHERLEY, C.**).—**PARDO v. BINGHAM** (1869), 4 Ch. App. 735; 39 L. J. Ch. 170; 20 L. T. 464; 34 J. P. 38; 17 W. R. 419, L. C.

Annotations:—*As to* (1) **Consd.** *Re* Chapman, Cocks v. Chapman, [1896] 1 Ch. 323. **Refd.** West v. Gwynne (1911), 80 L. J. Ch. 578. *As to* (2) **Appld.** *Re* Chapman, Cocks v. Chapman, [1896] 1 Ch. 323. **Refd.** West v. Gwynne (1911), 80 L. J. Ch. 578; R. v. Southampton Income Tax Comrs., *Ex p.* Singer, [1916] 2 K. B. 249. **Generally, Mentd.** Hicks v. Powell (1869), 4 Ch. App. 741; *In the Goods of* Ewing (1881), 6 P. D. 19; O'Grady v. Wilmot, [1926] 2 A. C. 231.

1109. —.]—Retrospective laws are, no doubt, *primâ facie* of questionable policy, & contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future Acts, & ought not to change the character of past transactions carried on upon the faith of the then existing law. "*Leges et constitutiones futuris certum est dare formam negotiis non ad facta præterita revocari; nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.*" Accordingly, the ct. will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature (**WILLES, J.**).—**PHILLIPS v. EYRE** (1870), L. R. 6 Q. B. 1; 10 B. & S. 1004; 40 L. J. Q. B. 28; 22 L. T. 869, Ex. Ch.

Annotations:—**Refd.** Bath Grdns. v. Berwick-upon-Tweed Grdns., [1892] 1 Q. B. 731; Batt v. Metropolitan Water Board, [1911] 1 K. B. 815. **Mentd.** Harris & Adams v. Quine (1869), L. R. 4 Q. B. 653; Ellis v. M'Henry (1871),

1099 vii. —.]—It is a general rule in the construction of statutes that they are prospective unless a retrospective effect is clearly intended, but alterations in the form of procedure are always retrospective.—**McKEE v. LAVARY** (Sask.), [1923] 3 W. W. R. 727; 17 Sask. L. R. 429.—**CAN.**

1099 viii. —.]—**GIRISH CHUNDRASU v. APURBA KRISHNA DASS** (1894), L. L. R. 21 Calc. 910.—**IND.**

1099 ix. —.]—A statute cannot be held to have retrospective operation unless a clear intention to that effect is manifest from the statute.—**NEPRA v. SAYER PRAMANIK** (1927), I. L. R. 55 Calc. 67.—**IND.**

have already passed into judgment unless the intention of the Legislature so to interfere is clearly expressed: it cannot be inferred from a mere expression of a general retroactive effect.—**GRAINGER v. ORDER OF CANADIAN HOME CIRCLES** (1919), 44 O. L. R. 53.—**CAN.**

1099 vi. —.]—It is a general rule that where a statute is passed altering the substantive law, it applies to a state of facts coming into existence after the Act, unless the language of the Act is expressly to the contrary.—**HOPPE v. CANADIAN PACIFIC RY. CO.**, [1922] 1 W. W. R. 491; 66 D. L. R. 317; 17 Alta. L. R. 231.—**CAN.**

Sect. 5.—Retrospective effect: Sub-sect. 2, B. (b) & (c); sub-sects. 3 & 4.]

L. R. & C. P. 228; *A.-G. for Colony of Hong Kong v. Kwok-a-Sing* (1873), *L. R.* 5 P. C. 179; *Rouquette v. Overmann* (1875), 33 *L. T.* 420; *The M. Moxham* (1876), 46 *L. J. P.* 17; *Musgrave v. Pulido* (1879), 5 *App. Cas.* 102; *Batthyany v. Walford* (1886), 33 *Ch. D.* 624; *British South African Co. v. Companhia de Mocambique*, [1893] *A. C.* 602; *Fielding v. Thomas*, [1896] *A. C.* 600; *Machado v. Fontes*, [1897] 2 *Q. B.* 231; *Carr v. Francis Times*, [1902] *A. C.* 176; *R. v. Crewe, Ex p. Sekgome*, [1910] 2 *K. B.* 576; *Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst*, [1910] 1 *P.* 271; *McMillan v. Canadian Northern Ry.*, [1923] *A. C.* 120; *Walpole v. Canadian Northern Ry.*, [1923] *A. C.* 113.

1110. —.].—*Re JOSEPH SUCHE & Co., LTD.*, No. 1236, *post*.

1111. —.].—The question whether an Act of Parliament is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively, unless it is clear that such was the intention of the legislature (*JESSEL, M.R.*).—*QUILTER v. MAPLESON* (1882), 9 *Q. B. D.* 672; 52 *L. J. Q. B.* 44; 47 *L. T.* 561; 47 *J. P.* 342; 31 *W. R.* 75, *C. A.*

*Annotations:—***Refd.** *Leeds Bank v. Walker* (1883), 11 *Q. B. D.* 84; *West v. Gwynne*, [1911] 2 *Ch. 1*. **Mentd.** *Ex p. Thomas* (1889), 60 *L. T.* 728; *Rogers v. Rice*, [1892] 2 *Ch.* 170; *Borthwick v. Elderslie S.S. Co. (No. 2)*, [1905] 2 *K. B.* 516; *Ponnamma v. Arumogam*, [1905] *A. C.* 383; *Matthews v. Smallwood*, [1910] 1 *Ch.* 777; *A.-G. v. Birmingham, Tame & Rea District Drainage Board*, [1912] *A. C.* 788; *Banbury v. Bank of Montreal*, [1918] *A. C.* 626; *Stovin v. Fairbrass* (1919), 88 *L. J. K. B.* 1004; *Robinson v. R.*, [1921] 3 *K. B.* 183.

1112. —.].—*HICKSON v. DARLOW*, No. 1204, *post*.

1113. —.].—It is a well-known maxim & doctrine of law that an Act of Parliament which deals with substantive law, & does not merely regulate procedure, is to apply to the future & not to the past, unless it so specifically provides. Now, one ought to see a very strong indication of intention on the part of the legislature to break through that wholesome rule (*CAVE, J.*).—*SWIRE v. COOKSON* (1883), 48 *L. T.* 877; *on appeal*, 49 *L. T.* 736, *C. A.*; *sub nom. COOKSON v. SWIRE* (1884), 9 *App. Cas.* 653, *H. L.*

*Annotations:—***Mentd.** *Hall v. Smith* (1887), 3 *T. L. R.* 805; *Withers v. Berry* (1895), 39 *Sol. Jo.* 559; *Antoniadis v. Smith*, [1901] 2 *K. B.* 589; *Hopkins v. Gudgeon*, [1906] 1 *K. B.* 690.

1114. —.].—It is clear law that Acts of Parliament are not to be construed so as to be retrospective unless it is expressly so stated (*DENMAN, J.*).—*BLACKBURN CORPN. v. MICKLETHWAITE* (1886), 54 *L. T.* 539; 50 *J. P.* 550.

1115. —.].—As a general rule an Act of Parliament which affects rights is not retrospective, unless the intention of the legislature that it shall be retrospective is plainly expressed or implied (*LORD Esher, M.R.*).—*Re ASHCROFT, Ex p. TODD* (1887), 19 *Q. B. D.* 186; 56 *L. J. Q. B.* 431; 57 *L. T.* 835; 35 *W. R.* 676; 3 *T. L. R.* 641; 4 *Morr.* 209, *C. A.*

1116. —.].—(1) It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; & (2) the same rule involves another & subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary (*LINDLEY, L.J.*).—*LAURI v. RENAD*, [1892] 3 *Ch.* 402; 61 *L. J. Ch.* 580; 67 *L. T.* 275; 40 *W. R.* 678; 8 *T. L. R.* 637; 36 *Sol. Jo.* 572, *C. A.*

*Annotations:—**As to* (1) **Apld.** *Sharp & Knight v. Chant*, [1917] 1 *K. B.* 771; *Ingle v. Farrand*, [1927] *A. C.* 417. **Refd.** *Hanfstaeigl-Art Publishing Co. v. Holloway*, [1893] 2 *Q. B.* 1; *West v. Gwynne* (1911), 80 *L. J. Ch.* 578; *Bowling v. Camp* (1922), 128 *L. T.* 342. *As to* (2)

Sharp & Knight v. Chant, [1917] 1 *K. B.* 771; *Gardner v. Cone*, [1928] *Ch.* 955. **Refd.** *West v. Gwynne* (1911), 80 *L. J. Ch.* 578; *R. v. Southampton Income Tax Comrs.*, *Ex p. Singer*, [1916] 2 *K. B.* 249; *Gloucester Union v. Woolwich Union*, [1917] 1 *K. B.* 374; *Bowling v. Camp* (1922), 128 *L. T.* 342. *Generally, Mentd.* *Cescinsky v. Routledge*, [1916] 2 *K. B.* 325.

1117. —.].—Retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain & unambiguous language.—*YOUNG v. ADAMS*, [1898] *A. C.* 469; 67 *L. J. P. C.* 75; 78 *L. T.* 506; 14 *T. L. R.* 373, *P. C.*

*Annotations:—***Refd.** *Re Cullwick*, [1918] 1 *K. B.* 646. **Mentd.** *Young v. Waller*, [1898] *A. C.* 661.

1118. —.].—*Re PULBOROUGH PARISH SCHOOL BOARD ELECTION, BOURKE v. NUTT*, No. 1208,

1119. —.].—*Re CHAPMAN, COCKS v. CHAPMAN*, No. 1133, *post*.

1120. —.].—It is obviously competent for the legislature, if it pleases, in its wisdom to make the provisions of an Act of Parliament retrospective; but before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act, or arise by necessary & distinct implication (*LORD ASHBORNE*).—*SMITH v. CALLANDER*, [1901] *A. C.* 297; 70 *L. J. P. C.* 53; 84 *L. T.* 801, *H. L.*

*Annotations:—***Apld.** *Ingle v. Farrand*, [1927] *A. C.* 417. **Refd.** *West v. Gwynne* (1911), 80 *L. J. Ch.* 578; *Bowling v. Camp* (1922), 128 *L. T.* 342. **Mentd.** *Mears v. Callender*, [1901] 2 *Ch.* 388; *Re Kidwell & Flint*, [1911] 1 *K. B.* 797; *Re Morse & Dixon* (1917), 87 *L. J. K. B.* 1; *Re Masters & Duveen*, [1923] 2 *K. B.* 729.

1121. —.].—It is certainly all important to remember that no bye-law, nor any statute, ought to have a retrospective operation unless it be clearly expressed that it is to have that operation. That is a statement which is universally recognised (*RIDLEY, J.*).—*HUBBARD v. BROMLEY RURAL DISTRICT COUNCIL* (1905), 69 *J. P.* 437; 3 *L. G. R.* 1377, *D. C.*

1122. —.].—It was argued that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. I assent to this general proposition (*COZENS HARDY, M.R.*).—*WEST v. GWYNNE*, [1911] 2 *Ch.* 1; 80 *L. J. Ch.* 578; 104 *L. T.* 759; 27 *T. L. R.* 414; 55 *Sol. Jo.* 519, *C. A.*

*Annotations:—***Refd.** *Re Snowden Colliery Co., South Eastern Coalfield Extension Co. v. Snowden Colliery Co.* (1925), 94 *L. J. Ch.* 305. **Mentd.** *Henshall v. Porter*, [1923] 2 *K. B.* 193; *Re Clemmons Aluminium* (1924), 91 *L. J. K. B.* 487; *Gardner v. Cone*, [1928] 1 *Ch.* 955.

1123. —.].—*GLOUCESTER UNION v. WOOLWICH UNION*, No. 1086, *ante*.

1124. —.].—It is very important to conform to a very general principle of law which has been stated by *LORD SELBORNE* in *Main v. Stark*, No. 1091, *ante*, as follows "that words [in a statute] not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed." *JESSEL, M.R.*, in *Re Joseph Suche & Co., Ltd.*, No. 1236, *post*, said "I so decide because it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them." The ct. has also to bear in mind the terms of Interpretation Act, 1889 (c. 63), s. 38, by which the legislature has laid down the same principle (*POLLOCK, M.R.*).

The rule is stated in *Maxwell on the Interpretation of Statutes* (6th ed.), p. 382, as follows: "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary & distinct implication"; a statement

of the law approved by the ct. in *West v. Gwynne*, No. 1122, *ante*. When the language of the Act is looked at, every word of the statute must be given full effect to, if it be regarded as a code of future rights (SARGANT, L.J.).—*Re SNOWDOWN COLLIERY CO., LTD., SOUTH EASTERN COALFIELD EXTENSION CO., LTD. v. SNOWDOWN COLLIERY CO., LTD.* (1925), 94 L. J. Ch. 305; 133 L. T. 454; 41 T. L. R. 326; 17 B. W. C. C. 258, C. A.

1125. Expressed intention not to be defeated.]—If a clause in a statute says in so many plain words that the statute shall have retrospective operation, then it must not be construed so as to defeat those express words (LORD ATKINSON).—*INGLE v. FARRAND*, [1927] A. C. 417; 96 L. J. K. B. 523; 136 L. T. 770; 91 J. P. 75; 43 T. L. R. 279; 25 L. G. R. 123; 11 Tax Cas. 446, H. L.

(c) *Inference or Implication.*

1126. Sufficiency of inference or implication.]—*EVANS v. WILLIAMS*, No. 1107, *ante*.

1127. —.]—*PHILLIPS v. EYRE*, No. 1109, *ante*.

1128. —.]—*Re ASHCROFT, Ex p. TODD*, No. 1115, *ante*.

1129. —.]—*SMITH v. CALLANDER*, No. 1120, *ante*.

1130. —.]—*WEST v. GWYNNE*, No. 1122, *ante*.

1131. —.]—*Re SNOWDOWN COLLIERY CO., LTD., SOUTH-EASTERN COALFIELD EXTENSION CO., LTD. v. SNOWDOWN COLLIERY CO., LTD.*, No. 1121, *ante*.

1132. Nature of statute.]—*BRITTON v. WARD* (1620), Palm. 113; Cro. Jac. 515; 2 Roll. Rep. 97; 81 E. R. 1003; *reversd.* on other grounds *sub nom.* *WARD v. BRITTON* (1621), Palm. 219, Ex Ch. *Annotations:—Mentd.* *R. v. Hornbee* (1691), Freem. K. B. 331; *Wallis v. Pain* (1739), 2 Com. 633; *Smith v. Wyatt* (1742), 9 Mod. Rep. 336; *Portland v. Bingham* (1792), 1 Hag. Con. 157; *Rennell v. Lincoln (Bp.)* (1827), 7 B. & C. 113; *Hine v. Reynolds* (1810), 2 Man. & G. 71.

1133. —.]—There are many cases upon the general doctrine whether an Act of Parliament may be read retrospectively or not, & there are many cases upon the meaning of particular statutes; but one has the general law concisely stated by LORD HATHERLEY in his judgment in *Pardo v. Bingham*, No. 1108, *ante*, where he says "The question is . . . secondly, whether on general principles the statute ought, in this particular sect., to be held to operate retrospectively, the general rule of law undoubtedly being that, except there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to have a retrospective construction." Otherwise you assume it is not retrospective, but you may find that presumption rebutted by a consideration of the subject-matter or by the language of the statute (KEKEWICH, J.).—*Re CHAPMAN, COCKS v. CHAPMAN*, [1896] 1 Ch. 323; 65 L. J. Ch. 170; 73 L. T. 658; 44 W. R. 311; *reversd.* on other grounds, [1896] 2 Ch. 763, C. A.

Annotations:—Mentd. *Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479; *Jackson v. Dickinson*, [1903] 1 Ch. 917; *Rawsthorne v. Rowley* (1907), 78 L. J. Ch. 235, n; *Shaw v. Cates*, [1909] 1 Ch. 389.

1134. Nature of case.]—Though the general presumption is that a statute is not intended to have

a retrospective operation, the words of the statute & the special nature of the case may give rise to a contrary inference.—*THE IRONSIDES* (1862), Lush. 458; 31 L. J. P. M. & A. 129; 6 L. T. 59; 1 Mar. L. C. 200.

Annotations:—Consd. *The Langdale* (1907), 76 L. J. P. 154. *Reid.* *The Sheaf Brook*, [1926] P. 61. *Mentd.* *The Danzig* (1863), 2 New Rep. 526.

1135. Grammatical construction.]—(1) It seems to me there is an old & well-known rule which is always applied on construing statutes affecting rights where the words of a statute are doubtful. That rule . . . is that, unless the words of a statute affecting rights are clear to the contrary, either from their grammatical construction or the necessary context, the statute is to be construed prospectively & not so as to affect rights acquired before the statute was passed (BRETT, M.R.).

(2) It is a well-known rule of construction that if the legislature alters existing rights clear words must be employed for the purpose. There is also the converse rule that where nothing but procedure is altered the same canon of construction does not apply (BOWEN, L.J.).—*TURNBULL v. FORMAN* (1885), 15 Q. B. D. 234; 54 L. J. Q. B. 489; 53 L. T. 128; 49 J. P. 708; 33 W. R. 768; 1 T. L. R. 557, C. A.

1136. Necessary context.]—*TURNBULL v. FORMAN*, No. 1135, *ante*.

1137. —.]—*GLOUCESTER UNION v. WOOLWICH UNION*, No. 1086, *ante*.

1138. Resulting absurdity or inconsistency.]—*GLOUCESTER UNION v. WOOLWICH UNION*, No. 1086, *ante*.

SUB-SECT. 3.—OF PARTICULAR STATUTES.

Declaratory statutes.]—See Sect. 9, *post*.

Penal statutes.]—See Nos. 1533–1536, *post*

Fiscal statutes.]—See No. 1613, *post*.

SUB-SECT. 4.—EFFECT ON COVENANTS AND CONTRACTS.

Supervening illegality.]—See CONTRACT, Vol. XII., pp. 298–300, Nos. 2458–2470.

Impossibility of performance.]—See CONTRACT, Vol. XII., pp. 373, 374, Nos. 3099, 3100.

1139. General rule.]—The general rule . . . is expressed in the maxim *nova constitutio futuris formam imponere debet non præteritis, primâ facie*. any new law that is made affects future transactions not past ones. . . . But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid . . . I think the *primâ facie* construction of the Act is that it is not to be retrospective, & it would require strong reasons to show that is not the case (LORD BLACKBURN).—*GARDNER v. LUCAS* (1878), 3 App. Cas. 582, H. L.

Annotations:—Consd. *Wilson v. Miles Platting Bldg. Soc.* (1887), 22 Q. B. D. 381, n. *Apld.* *Bowling v. Camp* (1922), 128 L. T. 312. *Reid.* *Re Debtor* (No. 99 of 1928) (1928), 97 L. J. Ch. 250.

1140. Effect on covenants.]—A penal statute cannot have a retrospective operation: & therefore

PART IV. SECT. 5, SUB-SECT. 2.—
B. (c).

1126 i. Sufficiency of inference or implication.]—*ANANDA KUNJAR BHATTACHARJEE v. SECRETARY OF STATE FOR INDIA* (1916), 1 L. R. 43 Cal. 975 — IND.

1126 ii. —.]—The rule that a retrospective effect will not be given to an Act of Parliament will not apply when

it can be inferred from the provisions of an Act that the Legislature intended the Act to be retrospective. Such an inference can be drawn when the consequence of holding an act to be non-retrospective would lead to an absurdity or practical injustice.—*DUPLESSIS v. RAUBENHEIMER*, [1917] S. A. L. R. [1917] C. P. D. 104.— S. AF.

PART IV. SECT. 5, SUB-SECT. 4.

1140 i. Effect on covenants.]—Action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 264, s. 58 (not re-enacted in Crim. Code, 1892):—*Held:* the alleged criminal act, having been committed before the Code came into force, was not affected by its

Sect. 5.—Retrospective effect: Sub-sects. 4, 5 & 6.]

if a man covenant to do a thing, & it is afterwards prohibited, yet the covenant is binding.—*BRASON v. DEAN* (1684), 3 Mod. Rep. 39; 87 E. R. 24.

1141. —.—.]—Where H. covenants not to do an act or thing which was lawful to do, & an Act of Parliament comes after & compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful & an Act of Parliament comes in & hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful & an Act comes & makes it lawful to do it, such Act of Parliament does not repeal the covenant (*HOLT, C.J.*).—*BREWSTER v. KITCHELL* (1698), 1 Salk. 198; Carth. 438; Comb. 466; Holt, K. B. 669; 1 Ld. Raym. 317; 5 Mod. Rep. 368; 12 Mod. Rep. 166; 3 Salk. 340; 91 E. R. 177.

Annotations:—*Consd.* *Tontong v. Hubbard* (1802), 3 Bos. & P. 291. *Apld.* *Bally v. De Crespigny* (1869), L. R. 4 Q. B. 180; *Newington L. B. v. Cottingham L. B.* (1879), 12 Ch. D. 725; *Re Shipton, Anderson & Harrison's Arbitration*, [1915] 3 K. B. 676. *Refd.* *Hopwood v. Barefoot* (1709), 11 Mod. Rep. 237; *Blandford v. Marlborough* (1743), 1 Atk. 542; *Bradbury v. Wright* (1781), 2 Doug. K. B. 621; *Furtado v. Rodgers* (1802), 3 Bos. & P. 191; *Doe d. Anglesea v. Rugeley* (1844), 6 Q. B. 107; *Moon v. Durden* (1848), 2 Exch. 22; *Festing v. Taylor* (1862), 26 J. P. 261; *Tidswell v. Whitworth* (1867), 15 L. T. 574; *Newby v. Sharpe* (1878), 8 Ch. D. 39; *Blackburn Bobbin Co. v. Allen* (1918), 87 L. J. K. B. 1085; *Eitel Bieber v. Rio Tinto Co., Dynamit Act. v. Same, Vereinigte Konigs & Laurahutte Act. v. Same*, [1918] A. C. 260; *Metropolitan Water Board v. Dick, Kerr*, [1918] A. C. 119. *Mentd.* *Bank of England v. Morrice* (1736), *Leo temp Hard* 219; *Coxe v. Phillips* (1736), *Leo temp Hard* 237; *Balby v. Wells* (1769), Wilm. 341; *Good v. Elliott* (1790), 3 Term Rep. 693; *Milnes v. Branch* (1816), 5 M. & S. 411; *Louch v. Peters* (1834), 1 My. & K. 489; *Waller v. Andrews* (1838), 3 M. & W. 312; *Palmer v. Earle* (1845), 11 M. & W. 428; *Austerberry v. Oldham Corp.* (1885), 29 Ch. D. 750.

—.—.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 461, 465, Nos. 6109–6111.

1142. No expressed intention of legislature to interfere.]—*DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS*, No. 1198, *post*.

1143. Provisions in settlement.]—I agree . . . that this is a statute which ought to be expounded in furtherance & not in derogation of the important objects of public policy for which it was passed. But, on the other hand, it ought not to be strained or extended by any indirect artificial construction, so as to give to particular estates & interests under wills, or other settlements, an operation which would alter their essential conditions & nature, &

convert them into something substantially different (*LORD SELBORNE, C.*).—*Re HAZLE'S SETTLED ESTATES* (1885), 29 Ch. D. 78; 54 L. J. Ch. 628; 52 L. T. 947; 33 W. R. 759, C. A.

Annotations:—*Apld.* *Re Atkinson, Atkinson v. Bruce* (1885), 30 Ch. D. 605. *Refd.* *Re Clitheroe Estate* (1885), 28 Ch. D. 378; *Re Carne's S. E.* (1898), 68 L. J. Ch. 120; *Re Gibbons, Gibbons v. Gibbons*, [1919] 2 Ch. 99; *Re Waleran's Estates* (1927), 136 L. T. 605.

1144. —.—.]—While therefore the ct. must give the Act a liberal interpretation so as to carry into effect the purposes for which it was passed, it is not under any obligation to give it such an interpretation as would destroy the provisions of a settlement which was made in accordance with the law as it stood prior to this Act coming into operation (*PEARSON, J.*).—*Re ATKINSON, ATKINSON v. BRUCE* (1885), 30 Ch. D. 605; 55 L. J. Ch. 49; 53 L. T. 258; 33 W. R. 899; *affd.* on other grounds (1886), 31 Ch. D. 577, C. A.

Annotations:—*Mentd.* *Re Horne's S. E.* (1888), 39 Ch. D. 84; *Re Sumner's S. E.*, [1911] 1 Ch. 315; *Re Beauchamp's Will Trusts, Cadgo v. Barker-Hablo*, [1914] 1 Ch. 676; *Re Astor, Astor v. Astor*, [1922] 1 Ch. 364.

1145. Effect of words "notwithstanding any agreement to the contrary."]—The question is whether in this Act of Parliament the words "notwithstanding any agreement to the contrary" mean notwithstanding any existing agreement to the contrary. . . . I am of opinion that the words "notwithstanding any agreement to the contrary" in this section if read in their ordinary sense apply to any agreement, whether made before the Act or after it (*DARLING, J.*).—*WOOLER v. NORTH EASTERN BREWERIES*, [1910] 1 K. B. 247; 79 L. J. K. B. 138; 101 L. T. 909; 74 J. P. 113; 26 T. L. R. 129, D. C.

Annotation:—*Refd.* *R. v. Customs & Excise Comrs.*, [1928] A. C. 402.

Effect of local personal or private statutes—On private agreement.]—*See* Part VII., Sect. 6, subsect. 2, *post*.

SUB-SECT. 5.—EFFECT ON EXISTING RIGHTS.

See Sect. 6, *post*.

SUB-SECT. 6.—STATUTES MAKING ALTERATION IN JUDICIAL PROCEDURE**1146. Whether held to have retrospective effect.]**

—This [31 Eliz. c. 5, s. 5] regulates the time for

provisions & the covenant was illegal at common law.—*MAJOR v. McCRAVEY* (1898), 29 S. C. R. 182.—CAN.

PART IV. SECT. 5, SUB-SECT. 6.

1146 i. Whether held to have retrospective effect.]—*POPE v. REILLA* (1870), 29 U. C. R. 495.—CAN.

1146 ii. —.—.]—*Re CHAFFEY, MERCHANTS BANK OF CANADA v. DAVIDSON* (1870), 30 U. C. R. 64.—CAN.

1146 iii. —.—.]—*BROWN v. BLACK* (1889), 21 N. S. R. (9 R. & G.) 349.—CAN.

1146 iv. —.—.]—*HURTUBISE & LA BANQUE JACQUES CARTIER v. DESMARTEAU* (Que.) (1891), 19 S. C. R. 562.—CAN.

1146 v. —.—.]—*R. v. FLYNN* (1891), 20 O. R. 638.—CAN.

1146 vi. —.—.]—The introduction by statute of a new scale for the taxation of costs is legislation relating to procedure, & therefore retrospective.—*YODALL v. DOUGLAS* (1893), 2 B. C. R. 342.—CAN.

1146 vii. —.—.]—*PENNY v. R.* (1895), 4 Exch. C. R. 428.—CAN.

1146 viii. —.—.]—*SPENCE v. GRAND TRUNK RY. CO.* (1896), 17 P. R. 172.—CAN.

1146 ix. —.—.]—Statutes affecting the right of appeal are not statutes relating to procedure & are not retroactive.—*KOKSILAH QUARRY CO., LTD. LIABILITY v. R.* (1897), 5 B. C. R. 600.—CAN.

1146 x. —.—.]—60 & 61 Vict. c. 34, which restricts the right of appeal to the Supreme Ct. in cases from Ontario as therein specified, does not apply to a case in which the action was pending when the Act came into force although the judgment directly appealed from may not have been pronounced until afterwards.—*HYDE v. LINDSAY* (Ont.) (1898), 29 S. C. R. 99.—CAN.

1146 xi. —.—.]—An Act conferring a new right of appeal applies to an action pending when the Act came into force, but tried & decided afterwards.—*COURTNAY v. CANADIAN DEVELOPMENT CO.* (1900), 7 B. C. R. 377.—CAN.

1146 xii. —.—.]—Retrospective Act giving right to appeal from Yukon is not retroactive so as to apply to pend-

ing cases.—*CANADIAN & YUKON PROSPECTING CO. v. CASEY* (1900), 7 B. C. R. 373.—CAN.

1146 xiii. —.—.]—*SMITH v. CANADIAN PACIFIC RY. CO.* (1901), 7 Terr. L. R. 56; 21 C. L. T. 193.—CAN.

1146 xiv. —.—.]—A statute increasing the amount that may be sued for in a county ct. is one relating to procedure & applies to pending litigation.—*ROSENBERG v. TYMCHORAK* (1908), 18 Man. L. R. 319.—CAN.

1146 xv. —.—.]—*WORRILL v. MEDLAND BROTHERS* (Ont.), [1921] 2 D. L. R. 1111.—CAN.

1146 xvi. —.—.]—It is a general rule in the construction of statutes that they are prospective unless a retrospective effect is clearly intended, but alterations in the form of procedure are always retrospective.—*McKEE v. LAVARY* (Sask.), [1923] 3 W. W. R. 727.—CAN.

1146 xvii. —.—.]—Where a statute deals with practice & procedure only, it applies, unless the contrary is expressed, to actions begun before it came into force.—*HAFNER v. WESTON & DET-*

PART IV.—OPERATION.

bringing the action, & it imposes a limitation of time in respect of all actions upon penal statutes made, or to be made; therefore a strong & most irresistible conclusion arises upon the face of the statute, that its operation was meant to be general & universal, comprehending all statutes both before & behind, antecedent & subsequent (LORD ELLENBOROUGH, C.J.).—*BARBER v. TILSON* (1815), 3 M. & S. 429; 105 E. R. 672.

Annotations:—*Refd.* *Whitehead v. Wynn* (1816), 5 M. & S. 427; *Spencer v. Swannell* (1837), 3 M. & W. 154; *Forbes v. Samuel*, [1913] 3 K. B. 706. *Mentd.* *Fife v. Bousfield* (1844), 6 Q. B. 100.

1147. —.]—An Act of Parliament passed in 1851 provided that the claim of A. for services rendered to a mining co. should be referred to arbn. in manner provided for by Companies Clauses Consolidation Act, 1845 (c. 16). Two arbitrators had been appointed, & the submission to arbn. made a rule of this ct. The arbitrators could not concur in the appointment of an umpire, & the means provided in Companies Clauses Act, 1845 (c. 16), for appointment of an umpire in such case were limited to the case of a railway co. On the day that C. L. P. Act, 1854 (c. 125) came into operation application was made to this ct. for appointment of an umpire under its provisions:—*Held*: the ct. was authorised, under the general words contained in C. L. P. Act, 1854 (c. 125), s. 12, in appointing an umpire; the Act, in mere matters of procedure, being applicable from the time of its coming into operation to proceedings previously commenced.—*Re LORD* (1854), 1 K. & J. 90; 3 Eq. Rep. 197; 24 L. T. O. S. 129; 3 W. R. 86; 69 E. R. 382; *sub nom.* *Re LORD, Re COPPER MINERS CO.*, 24 L. J. Ch. 145.

Annotations:—*Distd.* *Collins v. Collins* (1858), 26 Beav. 306. *Apld.* *Re Anglo Italian Bank & De Rosaz* (1867), L. R. 2 Q. B. 452. *Consd.* *Re Metropolitan Building Act, Ex p. McBryde* (1876), 1 Ch. D. 200. *Refd.* *R v. Fletcher*, (1862), 10 W. R. 753; *De Rosaz v. Anglo-Italian Bank* (1869), L. R. 4 Q. B. 462.

1148. —.]—*WRIGHT v. HALE*, No. 1231, *post*.

1149. —.]—29 & 30 Vict. c. 32, s. 3, which extends the time for making decrees *nisi* absolute from three to six months, applies to suits pending at the time when the Act came into operation. But where decrees *nisi* had been pronounced before the Act came into operation, whereby three months had been fixed as the time at the expiration of which they were to be made absolute, the ct. held that it was at liberty under the proviso to the sect. "unless the ct. shall, under the power now vested in it, fix a shorter time," to make them absolute at the end of the three months.

Although a suitor may have a vested right to a decree, the mode & method in which he is to approach the ct. in order to obtain it, & the time within which that or any other step in the cause is to be taken, are merely auxiliary to that right, &

may be changed, either by the Legislature or by the rules & orders of the ct., without any infringement of the right itself. I should be prepared to hold, therefore, that the statute applies to all pending suits (THE JUDGE ORDINARY).—*WATTON v. WATTON, Dow v. Dow, DAVIES v. DAVIES* (1866), L. R. 1 P. & D. 227; 35 L. J. P. & M. 95; 14 L. T. 742; 15 W. R. 288.

Annotation:—*Refd.* *Langworthy v. Langworthy* (1886), 55 L. J. P. 33.

1150. —.]—*R. v. BLACKBURN* (1868), 33 J. P. 55; 11 Cox, C. C. 157.

1151. —.]—*KIMBRAY v. DRAPER*, No. 1186, *post*.

1152. —.]—*Held*: County Courts Act, 1867 (c. 142), s. 13, affected procedure, & not the rights of the parties, & therefore was retrospective.—*RATHBONE v. MUNN* (1868), 9 B. & S. 708; 18 L. T. 856.

1153. —.]—The question of jurisdiction turns on the construction of Jud. Act, 1873 (c. 66), s. 22, & it is argued that it is not right to construe it so as to make it affect the rights of parties as they stood when the Act came into operation; but as we construe it it only affects such rights... as arose from a defect of jurisdiction (*JINDLEY, L.J.*).—*HURST v. HURST* (1882), as reported in 21 Ch. D. 278; 31 W. R. 327, C. A.

Annotations:—*Mentd.* *Re Sheward, Sheward v. Brown*, [1893] 3 Ch. 502; *Re Deacon's Trusts, Deacon v. Deacon, Hagger v. Heath* (1906), 95 L. T. 701; *Re Bold, Banks v. Hartland* (1926), 95 L. J. Ch. 201.

1154. —.]—*TURNBULL v. FORMAN*, No. 1135, *ante*.

1155. —.]—*Re ATHLUMNEY, Ex p. WILSON*, No. 1191, *post*.

1156. —.]—As Public Authorities Protection Act, 1893 (c. 62), dealing with procedure only, is retrospective, the action was barred after the expiration of six months from the default complained of.—*THE YDUN*, [1899] P. 236; 68 L. J. P. 101; 81 L. T. 10; 15 T. L. R. 361; 8 Asp. M. L. C. 551, C. A.

Annotations:—*Apld.* *R. v. Chandra Dharma*, [1905] 1 K. B. 335; *Welby v. Parker*, [1916] 2 Ch. 1. *Consd.* *R. v. Southampton Income Tax Comrs., Ex p. Singer*, [1916] 1 K. B. 249. *Refd.* *A.-G. v. Margate Pier & Harbour Co. of Proprietors*, [1900] 1 Ch. 749; *Ambler v. Bradford Corp.*, [1902] 2 Ch. 585; *Parker v. L. C. C.* [1904] 2 K. B. 501; *Sharplington v. Fulham Grdns.*, [1904] 2 Ch. 419; *Lyles v. Southend-on-Sea Corp.*, [1905] 2 K. B. 1; *R. v. James & Mid. Ry., Ex p. Bath R. C.*, [1908] 1 K. B. 958; *Bradford Corp. v. Myers*, [1916] 1 A. C. 242; *Bowling v. Camp* (1922), 128 L. T. 342. *Mentd.* *The Johannesburg*, [1907] P. 65.

1157. —.]—*BATT v. MATTINSON*, No. 2031, *post*.

1158. —.]—The prisoner was convicted, under Criminal Law Amendment Act, 1885 (c. 69), s. 5 (1) of an offence committed on July 15, 1904. The prosecution was not commenced until Dec. 27,

CHON (Sask.), [1927] 3 W. W. R. 839.—CAN.

1146 xviii. —.]—The general rule as laid down in *R. v. Dorabji*, 11 Bom. 117, that "an Act of Limitation, being a law of procedure, governs all proceedings, to which its terms are applicable, from the moment of its enactment, except so far as its operation is expressly excluded or postponed," admits of the qualification that, when the retrospective application of a Stat. Limitations would destroy vested rights or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than other law, to be construed retrospectively.—*KHUSALBHAI v. KABHAI* (1881), 1 L. R. 6 Bom. 26.—IND.

1146 xix. —.]—Alterations in forms of procedure are retrospective in effect,

& apply to pending proceedings.—*HAJRAT AKRAMNISSA BEGAM v. VALIUL-NISSA BEGAM* (1893), 1 L. R. 18 Bom. 429.—IND.

1146 xx. —.]—*BALKRISHNA PAND-HARINATH v. BAPU YESAJI* (1891), 1 L. R. 19 Bom. 204.—IND.

1146 xxi. —.]—It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. An exception to this general rule is where enactments merely affect procedure, but do not extend to rights of action.—*VEDAVALLI NARASIAH v. MANGAMMA* (1903), 1 L. R. 27 Mad. 538.—IND.

1146 xxii. —.]—Legislation which provides a right of appeal unless made retrospective either expressly or

by necessary implication, cannot affect suits which were already instituted before the Act comes into force, as granting the right of appeal is granting a substantive right.—*SAKEENA BIBI v. STEPHENS* (1926), 1 L. R. 4 Ran. 221.—IND.

1146 xxiii. —.]—Law Amendment Act, 1882, s. 6, which enables a mtgor. to sue in ejectment, introduced a rule of procedure only, & consequently applied to actions commenced before it came into force.—*PAXTON v. BUTLER* (1883), 1 N. Z. L. R. 344 (S. C.).—N.Z.

1146 xxiv. —.]—*KERR v. AILSA (MARQUIS)* (1854), 17 Dunl. (Ct. of Sess.) (H. L.) 11; 1 Macq. 736.—SCOT.

1146 xxv. —.]—As a general rule a statute dealing with practice & procedure is taken to be retrospective.—*CURTIS v. JOHANNESBURG MUNICIPALITY*, [1906] T. S. 308.—S. AF.

Sect. 5. Retrospective effect: Sub-sect. 6. Sect. 6: Sub-sect. 1.]

more than three months but less than six months after the commission of the offence. On Oct. 1, Prevention of Cruelty to Children Act, 1904 (c. 15), came into operation, by Sect. 27 of which the time for commencing a prosecution for an offence under Criminal Law Amendment Act, 1885 (c. 69), s. 5 (1), was extended from three months to six months:—*Held*: Prevention of Cruelty to Children Act, 1904 (c. 15), s. 27, related to procedure only, & was therefore retrospective, & the conviction must be upheld.—*R. v. CHANDRA DHARMA*, [1905] 2 K. B. 335; 92 L. T. 700; 69 J. P. 198; 53 W. R. 431; 21 T. L. R. 353; 49 Sol. Jo. 366; *sub nom.* *R. v. DHARMA*, 74 L. J. K. B. 450, C. C. R.

Annotations:—*Consd.* *R. v. James & Mid. Ry., Ex p. Bath R. Co.*, [1908] 1 K. B. 229. *Apld.* *Welby v. Parker*, [1916] 2 Ch. 1.

1159. —.]—5 & 6 Geo. 5, c. 97, s. 1 (4), provides that "it shall not be lawful for any mtgee. under a mtge. to which this Act applies, during the continuance of this Act, & so long as" certain conditions are fulfilled, "to call in his mtge. or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured."

A mtgee., under a mtge. created in 1910, & to which the Act applied, before the Act came into operation issued a writ to enforce his security by foreclosure or sale, & applied by summons in chambers for an order *nisi*. It was admitted that all the conditions of 5 & 6 Geo. 5, c. 97, s. 1 (4), had been fulfilled by the mtgor. The summons was adjourned to the judge after the Act had come into operation. He dismissed it on the ground that the Act was retrospective, & that by attending at the hearing of the summons the mtgee. was taking a step for exercising his right of foreclosure within the meaning of the sect.:—*Held*: the Act did not take away any rights, but merely suspended a particular form of remedy. It related to a matter of procedure & therefore might operate retrospectively.—*WELBY v. PARKER*, [1916] 2 Ch. 1; 85 L. J. Ch. 564; 114 L. T. 876; 32 T. L. R. 403; 60 Sol. Jo. 417, C. A.

1160. —.]—There is no insuperable objection to construing the language of a statute so as to make it apply to pending proceedings. It depends upon the proper interpretation of the language used by the Legislature. If the legislation did not affect rights of action, but only affected the practice & procedure of the cts., it would apply to all actions whether commenced before or after the passing of the Act. If the legislation did affect rights of action, then it would only apply to actions commenced before the passing of the Act if an intention to that effect is to be gathered from the language of the Act (*LORD READING, C.J.*).—*R. v. SOUTHAMPTON INCOME TAX COMRS., Ex p. SINGER*, [1916] 2 K. B. 249; 85 L. J. K. B. 1010; 114 L. T. 1166; 32 T. L. R. 417; *on appeal*, [1917] 1 K. B. 259, C. A.

Annotations:—*Refd.* *R. v. Kensington Income Tax Comrs., Ex p. De Polignac*, [1917] 1 K. B. 486. *Mentd.* *R. v. Aldington, Houghton & Hove Income Tax Comrs., Ex p. Singer* (1916), 85 L. J. K. B. 1753.

1161. —.]—The law is that so far as a statute deals with procedure only it can be retrospective (*LORD HANWORTH, M.R.*).—*Re A DEBTOR* (No. 99 of 1928) (1928), 97 L. J. Ch. 250; 139 L. T. 234; 72 Sol. Jo. 335; B. & C. R. 40, C. A.

1162. — *Remedial statute.*—By Admiralty Court Act, 1861 (c. 10), s. 8, the Ct. of Admlty. has jurisdiction, on a petition being filed by a

part owner of a British ship, alleging that his co-owner, the ship's husband, has rendered false accounts, to order an account to be taken of the earnings & disbursements of the ship, & of moneys received upon insurances of ship & freight. The sect. being remedial, is retrospective, & gives the ct. jurisdiction, notwithstanding the ship has been lost before the date assigned for the Act to come into operation.—*THE IDAS* (1863), Brown. & Lush. 65; 2 New Rep. 45; 167 E. R. 300.

Annotation:—*Consd.* *The Lady of the Lake* (1870), L. R. 3 A. & E. 29.

1163. —.]—*R. v. BIRWISTLE, ETC. JJ.* (1889), 58 L. J. M. C. 158, D. C.

Annotations:—*Apld.* *Lane v. Lane*, [1896] P. 133. *Mentd.* *Forster v. Forster* (1910), 54 Sol. Jo. 403.

1164. — *To reasonable extent.*—*SICHEL v. BORCH* (1864), 2 H. & C. 954; 3 New Rep. 438; 33 L. J. Ex. 179; 9 L. T. 657; 10 Jur. N. S. 107; 12 W. R. 346; 159 E. R. 395.

Annotations:—*Refd.* *Allhusen v. Margarejo* (1868), L. R. 3 Q. B. 310; *Jackson v. Spittall* (1870), L. R. 5 C. P. 542; *Cherry v. Thompson* (1872), L. R. 7 Q. B. 573. *Mentd.* *Horwood v. Wood* (1864), 17 C. B. N. S. 749; *Durham v. Spence* (1870), L. R. 6 Exch. 46; *Cooke v. Gill, Union Bank of London, Garnishees* (1873), 42 L. J. C. P. 98; *Horne v. Rouquette* (1878), 3 Q. B. D. 514.

1165. — *To extent of reopening decided case.*—Extension of the time limited for appealing from decisions in cases which had been adjudicated upon previously to the passing of Mortgagees Legal Costs Act, 1895 (c. 25), & which were right at the time when they were pronounced, will not be allowed, notwithstanding that sect. 3 of that statute is retrospective in its operation.—*EYRE v. WYNN-MACKENZIE*, [1896] 1 Ch. 135; 65 L. J. Ch. 194; 73 L. T. 571; 41 W. R. 273, C. A.

Annotations:—*Apld.* *Day v. Kelland*, [1900] 2 Ch. 745. *Mentd.* *Choese v. Keen*, [1908] 1 Ch. 745.

1166. —.]—In Apr. 1893, upon a foreclosure summons by a solr. mtgee., an order was made directing an account of what was due to pltf. for principal, interest, & taxed costs of the action, followed by provisions for redemption by one of debts. on payment of what should be found due, & foreclosure in default of payment. On Feb. 19, 1898, on the further consideration of the action, an order was made referring it to the taxing master to tax pltf.'s costs of the action:—*Held*: the rights of the parties were ascertained by the first order, which must be construed by the then existing law, & pltf. was not entitled, by reason of the passing of Mortgagees Legal Costs Act, 1895 (c. 25), to charge profit costs.—*DAY v. KELLAND*, [1900] 2 Ch. 745; 70 L. J. Ch. 3; 83 L. T. 447; 49 W. R. 66; 45 Sol. Jo. 10, C. A.

1167. — *Penal statute.*—The ordinary rule that a penal statute is not construed retrospectively does not apply to procedure (*PHILLIMORE, J.*).—*R. v. AUSTIN* (1913), as reported in 8 Cr. App. Rep. 169, C. C. A.

1168. *Right of appeal not matter of procedure.*—A right of appeal to a higher tribunal is a matter of substance, & not of procedure, & such a right, unless expressly or by necessary intendment retrospectively abolished, is not taken away by subsequent legislation. Thus the right of appeal to the King in Council, which was taken away by the Australian Commonwealth Judiciary Act, 1903, but is not retrospective, still subsists in a suit pending when the Act was passed.

In principle, their Lordships see no difference between abolishing an appeal altogether & transferring the appeal to a new tribunal (*per CUR.*).—*COLONIAL SUGAR REFINING CO. v. IRVING*, [1905] A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513, P. C.

Pending actions.—See Sect. 6, sub-sect. 3, *post*.

SECT. 6.—EFFECT ON EXISTING RIGHTS.

SUB-SECT. 1.—IN GENERAL.

1169. Statute interfering construed strictly.]—

An enacting clause in a statute, which interferes with existing rights, must be construed strictly; but the largest & most liberal construction will be given to an exception which protects those rights.—*FINCH v. BIRMINGHAM CANAL NAVIGATION CO.* (1826), 5 B. & C. 820; 8 Dow. & Ry. K. B. 680; 5 L. J. O. S. K. B. 17; 108 E. R. 305.

1170. —.]—It is a general rule, in the interpretation of Acts of Parliament, that an enactment, the effect of which is to cut down, abridge, or restrain any written instrument, shall have a limited construction (LORD TENTERDEN, C.J.).—*MORRIS v. MELLIN* (1827), 6 B. & C. 446; 9 Dow. & Ry. K. B. 503; 108 E. R. 516.

*Annotations:—*Reid. *Bennett v. Daniel* (1830), 10 B. & C. 500; *Bryan v. Child* (1850), 5 Exch. 368.

1171. —.]—This is an enactment creating a privilege against common right, and therefore care should be taken not to enlarge the construction of it (KNIGHT BRUCE, C.J.).—*Re WISE, Ex p. WHIPHAM* (1844), 3 Mont. D. & De G. 564; 13 L. J. Bcy. 8; 2 L. T. O. S. 426; 8 Jur. 201.

1172. —.]—It is an essential principle of construction of all statutes interfering with common law rights & the rights of the public that they should be strictly construed so as to prevent any undue extension of the statutory immunity (SCRUTTON, J.).—*PLACE v. RAWTENSTALL CORPN.* (1916), 86 L. J. K. B. 90; 80 J. P. 433; 60 Sol. Jo. 680; 14 L. G. R. 901, C. A.

1172a. —.]—No rule of law is better settled than the rule that statutes which encroach on the ordinary rights of the subject, whether as to person or property, are subject to a strict construction. The cts. are presumed to incline to such an interpretation of such statutes as will preserve the subject's rights unless express words or clear implication require the opposite result (MCCARDIE, J.).—*BRIGHTMAN & CO., LTD. v. TATE* (1919), as reported in 35 T. L. R. 209.

*Annotations:—*Mentd. *Shutler v. Rolfe* (1920), 36 T. L. R. 828; *Whitham & Butterworth v. Lindley* (1920), 37 T. L. R. 75; *Re Mahmoud & Isphani*, [1921] 2 K. B. 716.

1173. Effect of affirmative statute.]—The statutes . . . being affirmative do not take away the prior exemption (LORD MANSFIELD).—*R. v. PUGH* (1779), 1 Doug. K. B. 187; 99 E. R. 123.

*Annotations:—*Consd. *Garnett v. Bradley* (1878), 3 App. Cas. 944. Reid. *R. v. Clarke* (1787), 1 Term Rep. 679.

1174. New Act imposing new obligation—Effect on privileges under former Act.]—Where an Act confers certain privileges on officers who may be

sued for things done in pursuance of that Act, & a subsequent Act imposes new obligations on the old officers, the privileges of the former statute do not attach on them in respect of things done under the latter.—*BAZING v. SKELTON* (1792), 5 Term Rep. 16; 101 E. R. 9.

1175. Words inserted ex majore cautela.]—*NEWCASTLE (DUKE) v. MORRIS*, No. 866, ante.

1176. Effect of general words.]—As a rule, existing customs or rights are not to be taken away by mere general words in an Act of Parliament. But without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them; & this may be the case though the Act is a private Act of Parliament, & though the particular custom may have been confirmed, years before, by a verdict in a ct. of law.

If upon the face of the Act of Parliament you find that giving the ordinary sense & meaning to the words, you are involved in some inconsistency in any of the other clauses, it may then be necessary to search about & see whether the palpable & obvious construction which the words point at, may not be varied in order that that inconsistency may be avoided (LORD PENZANCE).—*GREEN v. R.* (1876), 1 App. Cas. 513; 35 L. T. 495; 41 J. P. 196, H. L.

1177. —.]—Where a privilege has been granted by an Act of Parliament, it cannot be taken away without a direct repeal of that Act, or inference from another so strong of intention to take it away as to authorise a ct. to say that the two Acts cannot stand together.—*WALSALL OVERSEERS v. LONDON & NORTH WESTERN RY. CO.* (1879), 4 App. Cas. 467; 48 L. J. M. C. 166; 41 L. T. 106; 43 J. P. 748; 28 W. R. 52, H. L.; *affg. S. C. sub nom. R. v. WALSALL OVERSEERS* (1878), 4 Q. B. D. 141, C. A.

*Annotations:—*Appld. *St. Helens Corpn. v. St. Helens Colliery Co.* (1883), 48 J. P. 39; *Bingley U. D. C. v. Mid. Rly.* (1899), 80 L. T. 725.

1178. Effect of directions to do something inconsistent with rights.]—*GREEN v. R.*, No. 1176, ante.

1179. Right made contingent on order—In reference to which party cannot be heard.]—Parliament is no doubt omnipotent, but it would be a very unusual mode of legislation to make the right of a person contingent on an order in reference to which he cannot be heard (FRY, L.J.).—*BROCKWELL v. BULLOCK* (1889), 22 Q. B. D. 567; 58 L. J. Q. B. 289; 53 J. P. 405; 37 W. R. 455, C. A.

*Annotations:—*Mentd. *Re Rhodes, Rhodes v. Rhodes* (1890), 41 Ch. D. 94; *Re Farnham* (No. 2), [1896] 1 Ch. 836; *Re Clarke*, [1898] 1 Ch. 336; *Re Watson, Stamford Grdns. v. Bartlett*, [1899] 1 Ch. 72; *Re J.*, [1909] 1 Ch. 574.

PART IV. SECT. 6, SUB-SECT. 1.

1169 i. Statute interfering construed strictly.]—Where the words in an Act of Parliament which affects the rights of the subject are precise & unambiguous, the Act must be strictly construed & the words given their primary & ordinary meaning, even though such construction creates an absurdity.—*Ex p. STEPHEN MAJOR* (1908), 8 S. R. N. S. W. 68; 25 N. S. W. W. N. 24.—AUS.

1169 ii. —.]—*BOURKE v. MURPHY* (1856), 1 P. E. I. 126.—CAN.

1169 iii. —.]—*R. v. BOOTH* (1883), 3 O. R. 144.—CAN.

1169 iv. —.]—An Act which takes away the legal right of a diligent litigant to bestow it gratis on a stranger is to be construed strictly according to its letter.—*Re CREDITORS' RELIEF ACT 1883, MUIRHEAD v. LAWSON, McLEAN'S CASE* (1884), 1 B. C. R., pt. 2, 113.—CAN.

1169 v. —.]—*Re INGERSOLL, GRAY v. INGERSOLL* (1888), 16 O. R. 194.—CAN.

1169 vi. —.]—*BERGMAN v. THE AURORA* (1893), 3 Exch. C. R. 228.—CAN.

1169 vii. —.]—A statute will be construed as affecting private rights where any other construction would destroy its effect.—*KINNEY v. PLUNKETT* (1894), 26 N. S. R. (14 R. & G.) 158.—CAN.

1169 viii. —.]—Statutes conferring exemptions or privileges in derogation of the general law must be construed strictly.—*LONDON & CANADIAN LOAN & AGENCY CO. v. CONNELL* (1896), 11 Man. L. R. 115.—CAN.

1169 ix. —.]—It is a principle of construction that you must have plain words to take away private rights. They are not to be taken away or even hampered by implication.—*HANF v. YARMOUTH LIGHT & POWER CO., LTD.*,

[1926] 2 D. L. R. 611; 58 N. S. R. 430.—CAN.

1169 x. —.]—The rule that an Act is not to be construed retrospectively so as to defeat an existing right, is only a rule of construction, & must yield to the intention of the Legislature.—*Re RATANSI KALIANJI'S PETITION* (1877), 1 L. R. 2 Bom. 148.—IND.

1169 xi. —.]—It is a general rule in construing statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation.—*BHOBO SUNDARI DEBI v. RAKHAL CHUNDER BOSE* (1886), 1 L. R. 12 Calc. 583.—IND.

1169 xii. —.]—The general rights of the Queen's subjects are not hastily to be assumed to be interfered with & taken away by Act of Parliament. Such statutes are to be strictly construed when their language is doubtful.

Sect. 6.—Effect on existing rights: Sub-sects. 1 & 2, A. & B. (a).]

1180. Meaning of right accrued or acquired.]—

The mere right existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause.—**ABBOTT v. MINISTER FOR LANDS**, [1895] A. C. 425; 64 L. J. P. C. 167; 72 L. T. 402; 11 R. 466, P. C. *Annotations:—*Consd. *Hamilton Gell v. White*, [1922] 2 K. B. 422; *Lambton & Hetton Collieries v. Secretary for Board of Trade Mines Department*, [1923] 1 Ch. 586. *Reid. Reynolds v. A.-G. of Nova Scotia* (1896), 74 L. T. 108; *Briggs v. Dryden, Talbot v. Vickers*, [1925] 2 K. B. 667. *Mentd. Chippendale v. Laidley*, [1909] A. C. 199.

1181. —.]—He is only doing something which the law does not forbid . . . a right enjoyed in that way is not within the meaning of this saving clause a right acquired (*CHANNEL, J.*).—**STAREY v. GRAHAM**, [1899] 1 Q. B. 406; 68 L. J. Q. B. 257; 80 L. T. 185; 47 W. R. 392; 15 T. L. R. 163; 43 Sol. Jo. 223; 16 R. P. C. 106, D. C. *Annotation:—Reid. R. v. Tristram* (1899), 47 W. R. 639.

1182. Confirmation by statute of customary or presumptive right—Merger.]—Where an Act of Parliament, according to its true construction, has embraced & confirmed a right which previously existed by custom or prescription, such right becomes thenceforth a statutory right, & the lower right by custom & prescription is merged in & extinguished by the higher title of the Act of Parliament.—**NEW WINDSOR CORPN. v. TAYLOR**, [1899] A. C. 41; 68 L. J. Q. B. 87; 63 J. P. 161; 15 T. L. R. 67; *sub nom. WINDSOR CORPN. v. TAYLOR*, 79 L. T. 450, H. L.; *affg. S. C. sub nom. TAYLOR v. NEW WINDSOR CORPN.*, [1898] 1 Q. B. 186, C. A.

*Annotations:—*Consd. *A.-G. v. Reynolds*, [1911] 2 K. B. 888. *Mentd. A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508.

1183. Right to transfer appeal.]—COLONIAL SUGAR REFINING CO. *v. IRVING*, No. 1168, *ante*.

Rights of action.]—See Sub-sect. 3, *post*.

Rights of ownership.]—See Sub-sect. 4, *post*.

SUB-SECT. 2.—PRESUMPTION AGAINST INTERFERENCE.

A. In General.

1184. General rule.]—*EDWARDS v. LAWLEY*, No. 262, *ante*.

1185. —.]—It is not the course of legislation to deprive a person of vested rights (*MAULE, J.*).—*JAMES v. ISAACS* (1852), as reported in 1 W. R. 21.

Annotation:—Mentd. Simpson v. Egglington (1855), 10 Exch. 845.

1186. —.]—The rule in construing statutes is, that where the effect of an enactment is to change the rights of parties it is not retrospective; but where it only changes the manner of procedure it applies to actions pending as well as future (*BLACKBURN, J.*).—*KIMBRAY v. DRAPER* (1868),

L. R. 3 Q. B. 160; 9 B. & S. 80; 37 L. J. Q. B. 80; 17 L. T. 540; 16 W. R. 539.

*Annotations:—*Consd. *Bowling v. Camp* (1922), 128 L. T. 342. *Reid. A.-G. v. Theobald* (1890), 24 Q. B. D. 557; *Re A. Debtor* (No. 99 of 1928) (1928), 97 L. J. Ch. 250.

1187. —.]—The right . . . cannot be taken away by a mere implication, which is not necessary for the reasonable construction of the statute (*BRETT, L.J.*).—*R. v. WIMBLEDON LOCAL BOARD* (1882), 8 Q. B. D. 459; 51 L. J. Q. B. 219; 46 L. T. 47; 46 J. P. 292; 30 W. R. 400, C. A.

1188. —.]—(1) Statutes should be interpreted if possible so as to respect vested rights (*BOWEN, L.J.*).

(2) It was argued that savings from a repealing clause would not apply to any express antecedent provision of the Act inconsistent with them, & to this I agree (*LORD COLERIDGE, C.J.*).—*HOUGH v. WINDUS* (1884), 12 Q. B. D. 224; 53 L. J. Q. B. 165; 50 L. T. 312; 32 W. R. 452; 1 Morr. 1, C. A.

*Annotations:—*Consd. *Re Athlumney, Ex p. Wilson*, [1898] 2 Q. B. 547; *Bowling v. Camp* (1922), 128 L. T. 342. *Reid. Re Home, Ex p. Edwards* (1885), 54 L. J. Q. B. 447; *Re Mills' Trusts* (1888), 40 Ch. D. 14; *A.-G. v. Theobald* (1890), 24 Q. B. D. 557; *Re Raison, Ex p. Raison* (1891), 8 Morr. 11; *A.-G. v. Harrison* (1920), 84 J. P. 141. *Mentd. Re Windas & Dunsmore, Ex p. Hough* (1884), 50 L. T. 212; *Garbutt v. Durham Joint Committee*, [1906] A. C. 291.

1189. —.]—*REID v. REID*, No. 1084, *ante*.

1190. —.]—No doubt his maxim *omnis nova constitutio futuris "formam imponere debet non præteritis"* has been applied to the extent that a new law ought to be construed so as to interfere as little as possible with vested rights (*per CUR.*).—*REYNOLDS v. A.-G. FOR NOVA SCOTIA*, [1896] A. C. 240; 65 L. J. P. C. 16; 74 L. T. 108, P. C.

1191. —.]—A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of other interpretation, it ought to be construed as prospective only (*WRIGHT, J.*).—*Re ATHLUMNEY, Ex p. WILSON*, [1898] 2 Q. B. 547; 67 L. J. Q. B. 935; 47 W. R. 141; 42 Sol. Jo. 740; 5 Mans. 322; *sub nom. Re ATHLUMNEY (LORD), Ex p. WILSON v. HASLUCK*, 79 L. T. 303.

*Annotations:—*Consd. *Bowling v. Camp* (1922), 128 L. T. 342. *Mentd. Re Nepean Ex p. Ramechund*, [1903] 1 K. B. 794.

1192. Presumption against destruction of common law rights.]—*RIVER WEAR COMRS. v. ADAMSON*, No. 105, *ante*.

1193. —.]—There seems to me to be a broad general principle underlying all these questions, which is this, that where property is taken compulsorily from any person who is not *sui juris*, & who is not competent to make the subsequent alteration in the disposition or the devolution of that property, which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation,

—*BALVANT RAMCHANDRA v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1905), 1 L. R. 29 Bom. 480.—**IND.**

r. Whether matters not known at time of Act becoming operative included in Act.]—Rule of statutory construction applied that, if matters not known at the time of coming into operation of an Act fall on a fair construction within its words, they should be held to be included in its operation.—*CHAPELL & CO., LTD. v. ASSOCIATED RADIO CO. OF AUSTRALIA, LTD.*, [1925] V. L. R. 350; 47 A. L. J. 12; 31 Argus L. R. 297.—**AUS.**

t. Act providing for payment of costs

*on quashing of bye-law.]—*14 & 15 Vict. c. 109, s. 35, providing that when a bye-law has been quashed the municipality shall pay the costs, has not a retrospective operation, & the ct. therefore discharged a rule calling upon defts. to pay the costs of an application on which a bye-law had been quashed before the passing of that Act.—*BROWN v. YORK COUNTY MUNICIPAL COUNCIL* (1853), 9 U. C. R. 453.—**CAN.**

a. Benevolent construction.]—If there is any kind of legislation which a ct. is justified in stretching to the full extent that the wording admits, it is that which confers on it beneficial

powers of amendment which can invade no actual right & do nobody any real harm.—*BURTON v. TAYLOR* (1909), 29 N. Z. L. R. 149.—**N.Z.**

PART IV. SECT. 6, SUB-SECT. 2.—A.

1184 i. General rule.]—*Re Stewart* (1912), 23 O. W. R. 312; 4 O. W. N. 293; 8 D. L. R. 165.—**CAN.**

1184 ii. —.]—It is a guiding principle in the interpretation of statutes that there is a strong presumption against any intention to interfere with vested rights.—*Re MATAWHERO B. BLOCK, Ex p. GANNON* (1884), 2 N. Z. L. R. 357 (S. C.).—**N.Z.**

that the Legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever (JAMES, L.J.).—*Re BARKER* (1881), 17 Ch. D. 241; 50 L. J. Ch. 334; 44 L. T. 33; 29 W. R. 873, C. A.

Annotations:—*Apld.* *Re Penryhn's Settltmt. Trusts*, *Penryhn v. Roberts*, [1923] 1 Ch. 143. *Refd.* *A.-G. v. Allesbury* (1887), 12 App. Cas. 672; *Herbert v. Herbert*, [1912] 2 Ch. 268; *Hopkinson v. Richardson*, [1913] 1 Ch. 281. *Mentd.* *Re Freer*, *Freer v. Freer* (1882), 22 Ch. D. 622; *Hyett v. Mokin* (1884), 25 Ch. D. 735; *Re Morgan*, *Smith v. May*, [1900] 2 Ch. 474; *Re Alston*, *Sinclair v. Willes*, [1917] 2 Ch. 226.

1194. —.]—I think we ought not to assume without the clearest language that Parliament intended to destroy common law rights of her Majesty's subjects by placing them at the mercy of an irresponsible tribunal or irresponsible department of the state (BOWEN, L.J.).—*RENDALL v. BLAIR* (1890), 45 Ch. D. 139; 59 L. J. Ch. 641; 63 L. T. 265; 38 W. R. 689, C. A.

Annotations:—*Refd.* *Fisher v. Jackson*, [1891] 2 Ch. 84; *Rooke v. Dawson*, [1895] 1 Ch. 480. *Mentd.* *Llanbadarn-fawr School Board v. Charitable Funds, Official Trustees* (1900), 45 Sol. Jo. 45.

1195. —.]—When one is dealing mainly with the way of enforcing & providing for the satisfactory assumption of common law liability, one ought not to construe the words so as to create a new & extended liability unless there is a clear necessity for it (SCRUTTON L.J.).—*BRITISH-AMERICAN TOBACCO Co., LTD.* *JONES* (1925), 134 L. T. 405; 90 J. P. 66; 42 T. L. R. 236; 24 L. G. R. 152, D. C.

1196. Without compensation.] (1) The legislature does not interfere with vested rights without providing compensation.

(2) You are not to interfere with rights unless you find express words (CHITTY, J.).—*ALLHUSEN v. BROOKING* (1884), 26 Ch. D. 559; 53 L. J. Ch. 520; 51 L. T. 57; 32 W. R. 657.

Annotations:—*Generally*, *Mentd.* *Furness v. Bond* (1888), 4 T. L. R. 457; *Foster v. Reeves* (1892), 61 L. J. Q. B. 763; *Gray v. Spyer*, [1922] 2 Ch. 22.

1196 i. Without compensation.]—*R. v. NIMMONS* (1892), 1 Teri. L. R. 415.—CAN.

PART IV. SECT. 6, SUB-SECT. 2.— B. (a).

1197 i. Clear intention necessary.]—In order to make out that a right conferred by statute is to be exercised personally, & not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf.—*EQUITY, TRUSTEES, EXECUTORS & AGENCY Co., LTD. v. MARSTON*, [1908] V. L. R. 23.—AUS.

1197 ii. —.]—*COLONIAL SUGAR REFINING Co., LTD. v. MELBOURNE HARBOUR TRUST COMRS.*, [1927] A. C. 343; 38 C. L. R. 547; [1927] V. L. R. 150; [1927] Argus L. R. 78.—AUS.

1197 iii. —.]—A right granted by a statute, which does not in express terms derogate from the rights of others, cannot be held to have done so by implication.—*COLUMBIA RIVER LUMBER Co. v. YUILL* (1892), 2 B. C. R. 237.—CAN.

1197 iv. —.]—Where the ct. held that the words of a statute were insufficient to confer the right of appeal in certain cases, & the legislature, by an amending Act, extended the right of appeal, but by a subsequent Act repealed the provision extending the right, & substituted one which, in effect, was a re-enactment of the statute which had been the subject of judicial interpretation:—*Held*: it must be assumed that the Legislature did this, intending that the latter Act should receive an interpretation similar to that accorded to its predecessor by the ct.—*HALIFAX*

B. Rebuttal of Presumption.

(a) Clear Intention to Contrary.

1197. Clear intention necessary.]—I consider it a most useful & salutary rule of construction, in cases of this description, that when the object of the Act of Parliament is to impose a burden, or to take away a right, such language must be proved to have been used, as shows most unequivocally that it was the intention of the legislature that the burden should be imposed, or the right taken away (BAYLEY, J.).—*R. v. DUDLEY CANAL NAVIGATION Co.* (1825), 7 Dow. & Ry. K. B. 466; 3 Dow. & Ry. M. C. 469.

1198. —.]—Statutes are *prima facie* deemed to be prospective only . . . & there are no words in this Act sufficient to show the intention of the legislature to affect existing rights (*per* CUR.).—*DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS* (1850), 7 Moo. P. C. C. 239; 5 Moo. Ind. App. 109; 15 Jur. 257; 13 E. R. 873, P. C.

Annotations:—*Mentd.* *Rughoonauth Sahol Chotayloll v. Manickchand & Kaisreechand* (1856), 6 Moo. Ind. App. 251; *Juggomohun Ghose v. Kaisreechand* (1862), 9 Moo. Ind. App. 256; *Rawlings v. General Trading Co.*, [1921] 1 K. B. 635.

1199. —.]—*MARSH v. HIGGINS*, No. 1230, *post*.

1200. —.]—I take it to be a sound rule of construction, that certain rights are not to be taken away by uncertain words (TURNER, L.J.).—*HENRY v. GREAT NORTHERN RY. Co.* (1857), 1 De G. & J. 606; 27 L. J. Ch. 1; 30 L. T. O. S. 141; 3 Jur. N. S. 1133; 6 W. R. 87; 44 E. R. 858, L. C. & L. J.J.

Annotations:—*Mentd.* *Matthews v. G. N. Ry.*, (1859), 28 L. J. Ch. 375; *Corry v. Londonderry & Enniskillen Ry.* (1860), 29 Beav. 263; *Gregory v. Patchett* (1864), 33 Beav. 595; *Re London India Rubber Co.* (1867-68), L. R. 5 Eq. 519; *Webb v. Earle* (1875), L. R. 20 Eq. 556; *London City, Comrs. of Sewers v. Gellatly* (1876), 3 Ch. D. 610; *Allen v. Londonderry & Enniskillen Ry.* (1877), 25 W. R. 524; *Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303; *Re Accrington Corpn. Steam Train*.

who is *sui juris* to appoint an agent to act on his behalf.—*MANJEE BHAI KHATAW v. JAMAL BROTHERS* (1925), 1 L. R. 5 Kan. 483.—IND.

1197 x. —.]—Clear & explicit words are requisite in an Act of Parliament to deprive a subject of a common law right.—*BROPHY v. WARD* (1859), 33 L. T. O. S. 292.—IR.

1197 xi. —.]—Where it is intended to place a burden upon the public by statute, this must be done in clear & unambiguous terms.—*SHEA v. RYAN* (1905), 9 Nfld. L. R. 116.—NFLD.

1197 xii. —.]—A statute to take away a vested right given by a former statute must do so by express enactment or irresistible inference.—*ALLAN v. CAREW* (1896), 14 N. Z. L. R. 569.—N.Z.

1197 xiii. —.]—I cannot agree to the doctrine that we are bound to adopt such a construction as would involve the least possible interference with private rights. Such a doctrine would perhaps not be out of place where the private rights of one or more persons are interfered with for the private benefit of others, but in such a case it would be quite reasonable to presume that the Legislature desired to limit the interference within the narrowest limits. But where the sole object of the interference is to benefit the public, the same presumption would not necessarily exist (DE VILLIERS, C.J.).—*STELLENBOSCH DIVISIONAL COUNCIL v. MYBURGH* (1887), 5 S. C. 8.—S. AF.

1197 xiv. —.]—In interpreting a statute the ct. will not presume that the Legislature intended to curtail the rights of citizens, but if the language be clear & unequivocal, the ct. will give effect to it, although the liberty of the subject be curtailed thereby.—*SODHA v. R.*, [1911] T. P. D. 52.—S. AF.

PILOT COMRS. v. FARQUHAR (1894), 20 N. S. R. (11 R. & G.) 333.—CAN.

1197 v. —.]—If a statute gives a new remedy for a right for which a common law remedy exists, the existing remedy is not taken away without clear language to that effect.—*CAMPBELL v. HALVERSON* (Sask.), [1919] 3 W. W. R. 657.—CAN.

1197 vi. —.]—An Act should not be construed as intended to empower a public body, such as the Board of Public Utility Comrs., to disregard the obligation of contracts without clear expression to that effect.—*Re PUBLIC UTILITIES ACT, NORTHERN ALBERTA NATURAL GAS DEVELOPMENT Co., LTD. v. CITY OF EDMONTON*, [1920] 1 W. W. R. 31; 50 D. L. R. 206; 15 Alta. L. R. 416.—CAN.

1197 vii. —.]—Where the law is altered while a suit is pending, the law as it exists when the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, shows a clear intention to vary the mutual relations of such parties.—*GUJARAT TRADING Co., LTD. v. TRIKAMJI VELJI & Co.* (1866), 3 Bom. O. C. 4.—IND.

1197 viii. —.]—Where the application of the provisions of an amending Act makes it impossible to exercise a vested right of suit, the Act should be construed as not being applicable to such cases.—*GOPESHWAR PAL v. JIBAN CHANDRA CHANDRA* (1914), 1 L. R. 41 Calc. 1125.—IND.

1197 ix. —.]—In order to make out that a right conferred by statute is to be exercised personally & not by an agent, there must be something in the Act, either by way of express enactment or necessary implication which limits the common law right of any person

Sect. 6.—Effect on existing rights: Sub-sect. 2, B. (a) & (b).]

Co., [1909] 2 Ch. 40; *Will v. United Lankat Plantation Co.*, [1912] 1 Ch. 571; *Re Wakley, Wakley v. Vachell*, [1920] 2 Ch. 205.

1201. —.—.]—Where it is contended that a statute affects an existing right, it must be shown not only that the words of the statute are sufficient to embrace it, but that the intention to affect it is clearly expressed.—*CARTER v. CROPLEY* (1857), 8 De G. M. & G. 680; 26 L. J. Ch. 246; 28 L. T. O. S. 347; 21 J. P. 135; 3 Jur. N. S. 171; 5 W. R. 248; 44 E. R. 552, L. JJ.

Annotations:—Refd. A.-G. v. Draper's Co. (1858), 4 Drew. 299. *Mentd. Re Hayle's Estate* (1862), 31 Beav. 139.

1202. —.—.]—Enactments which effect the future rights of parties are to be construed as applicable to future & not past transactions, unless there is a clear intention expressed that they shall also be applicable to past transactions . . . unless there is something in the language strongly pointing to a contrary conclusion, we ought certainly to read the whole clause as either prospective or retrospective. An exception is something taken out of what has gone before, & if what has gone before was retrospective only it would almost follow that that which is excepted is the same (*CLEASBY, B.*).—*WESTBURY-ON-SEVERN v. BARROW-IN-FURNESS* (1878), 3 Ex. D. 88; 47 L. J. M. C. 79; 38 L. T. 315; 42 J. P. 152; 26 W. R. 372.

Annotations:—Refd. Tenterden Union v. St. Mary, Islington Union (1878), 47 L. J. M. C. 81; *Hereford Union v. Warwick Union* (1879), 48 L. J. M. C. 111; *Bath Union v. Berwick-upon-Tweed Union*, [1892] 1 Q. B. 731. *Mentd. Madeley Union v. Bridgnorth Union* (1882), 52 L. J. M. C. 17.

1203. —.—.]—The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of resp. co., unless it appear, by express words, or by plain implication, that it was the intention of the legislature to do so. In order to take away the right it is not sufficient to show that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shown that the legislature have authorised the thing to be done at all events, & irrespective of its possible interference with existing rights (*per CUR.*).—*WESTERN COUNTIES RY. CO. v. WINDSOR & ANNAPOLIS RY. CO.* (1882), 7 App. Cas. 178; 51 L. J. P. C. 43; 46 L. T. 351, P. C.

Annotations:—Apld. Public Works Comr., Cape Colony v. Logan, [1903] A. C. 355; *Central Control Board, Liquor Traffic v. Cannon Brewery Co.*, [1919] A. C. 744; *Re Ellis & Ruislip-Northwood U. D. C.*, [1920] 1 K. B. 313. *Refd. Exchange Bank of Canada v. R.* (1886), 11 App. Cas. 157; *Slattery v. Naylor* (1888), 13 App. Cas. 446; *Re New River Co. & Metropolitan Water Board* (1904), 68 J. P. 329.

1204. —.—.]—It is a well-known principle of law on the construction of Acts of Parliament & especially when the rights & liabilities of persons are altered thereby that they are not to have a retrospective operation, unless it is expressly so stated (*FRY J.*).—*HICKSON v. DARLOW* (1883), 23 Ch. D. 690; 48 L. T. 449; 52 L. J. Ch. 453; 31 W. R. 361 *on appeal*, 23 Ch. D. at p. 693, C. A.

Annotations:—Distd. Blackburn Corpn. v. Micklethwait (1886), 51 L. T. 539. *Refd. Re Athlumney, Ex p. Wilson*, [1898] 2 Q. B. 547. *Mentd. Ex p. Cotton* (1883), 49 L. T. 52; *Brewer v. Square*, [1892] 1 Ch. 111.

1205. —.—.]—*ALLHUSEN v. BROOKING*, No. 1196, *ante*.

1206. —.—.]—*TURNBULL v. FORMAN*, No. 1135, *ante*.

1207. —.—.]—In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words

which indicate that such was the intention of the legislature (*BOWEN, L.J.*).—*Re CUNO, MANSFIELD v. MANSFIELD* (1889), 43 Ch. D. 12; 62 L. T. 15, C. A.

Annotations:—Apld. Lee v. Hawtry, [1898] P. 63; *Banister v. Thompson*, [1908] P. 362. *Refd. Re Drummond & Davies' Contract*, [1891] 1 Ch. 524; *St. Michael Bassishaw (Rector & Churchwardens) v. Parishioners of Same*, [1893] P. 233; *R. v. Dibden*, [1910] P. 57.

1208. —.—.]—It is a well-recognised principle in the construction of statutes that they operate only on cases & facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended.

This principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions. It need not be penal in the sense of punishment.

Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect (*LOPES, L.J.*).—*Re PULBOROUGH PARISH SCHOOL BOARD ELECTION, BOURKE v. NUTT*, [1894] 1 Q. B. 725; 63 L. J. Q. B. 497; 70 L. T. 639; 58 J. P. 572; 42 W. R. 388; 10 T. L. R. 319; 38 Sol. Jo. 327; 1 Mans. 172; 9 R. 395, C. A.

Annotations:—Distd. Lane v. Lane, [1896] P. 133. *Refd. R. v. Customs & Excise Comrs.*, [1928] A. C. 402.

1209. —.—.]—I see nothing in the statutes to interfere with, or prejudice, his legal rights. Very clear words would be required to support the contention that legal rights have been swept away without compensation (*LORD ASHBOURNE*).—*BRADFORD CORPN. v. PICKLES*, [1895] A. C. 587; 64 L. J. Ch. 759; 73 L. T. 353; 60 J. P. 3; 41 W. R. 190; 11 T. L. R. 555; 11 R. 286, H. L.

Annotations:—Mentd. Cochrane v. Smith (1895), 12 T. L. R. 78; *Flood v. Jackson*, [1895] 2 Q. B. 21; *Bradford v. Eastbourne Corpn.* (1896), 60 J. P. 501; *Murray v. Epsom L. B.* (1896), 45 W. R. 185; *Pitts v. George* (1896), 66 L. J. Ch. 1; *Allen v. Flood*, [1898] A. C. 1; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217; *Mostyn v. Atherton* (1899), 68 L. J. Ch. 629; *Quinn v. Leatham*, [1901] A. C. 495; *Husey v. London Electric Supply Corpn.*, [1902] 1 Ch. 411; *Fitzroy v. Cave*, [1905] 2 K. B. 364; *Salt Union v. Brunner, Mond*, [1906] 2 K. B. 822; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588; *Praet v. British Medical Assocn.*, [1919] 1 K. B. 211; *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40.

1210. —.—.]—According to a well-recognised rule on the construction of statutes an alteration in respect of private rights cannot be effected by statute unless made in plain & unambiguous language (*DR. TRISTRAM*).—*LEE v. HAWTREY*, [1898] P. 63.

1211. —.—.]—If it had been intended to alter the law as established by those decisions, I should have expected to find a clear expression of that intention (*COLLINS, L.J.*).—*BURGE v. ASHLEY & SMITH, LTD.*, [1900] 1 Q. B. 741; 69 L. J. Q. B. 538; 82 L. T. 518; 48 W. R. 438; 16 T. L. R. 263, C. A.

Annotations:—Mentd. Shoolbred v. Roberts (1900), 83 L. T. 37; *Salfrey v. Mayer*, [1901] 1 K. B. 11.

1212. —.—.]—It is a sound canon of construction that an intention to take away property without compensation should not be imputed to a legislature unless it be expressed in unequivocal terms.—*PUBLIC WORKS COMR. (CAPE COLONY) v. LOGAN*, [1903] A. C. 355; 72 L. J. P. C. 91; *sub nom. SMART (PUBLIC WORKS COMR.) v. LOGAN*, 88 L. T. 779, P. C.

Annotations:—Apld. Union of South Africa (Minister of Rys. & Harbours) v. Simmer & Jack Proprietary Mines, [1918] A. C. 591; *Central Control Board (Liquor Traffic) v. Cannon Brewery Co.*, [1919] A. C. 744. *Consd. Re Ellis*

& *Ruislip-Northwood U. C.*, [1920] 1 K. B. 343; *France Fenwick v. R.*, [1927] 1 K. B. 458. *Reid. Re Boaler*, [1915] 1 K. B. 21; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854; *Commonwealth of Australia v. Hazeldell*, [1921] 2 A. C. 373.

1213 —.]—It is a well established rule of construction of statutes that you must not construe words so as to take away statutory rights which existed before the enactment containing the words in question was passed, unless the words plainly indicate the intention of the legislature to take away such rights (*SIR LEWIS DIBDIN*).—*BANISTER v. THOMPSON*, [1908] P. 362; 24 T. L. R. 841; *subsequent proceedings, sub nom. THOMPSON v. DIBDIN*, [1912] A. C. 533, H. L.

Annotation:—*Reid. R. v. Dibdin*, [1910] P. 57.

1214. —.]—It is a proposition founded in common sense that, where vested rights have already accrued, & legislation is passed which use words expressive of futurity, such as "shall" or "shall not," which *prima facie* would appear to be meant to be applicable to future cases, it is not to be construed retrospectively so as to affect those vested rights, unless terms are used which clearly compel the ct. to give it that construction. This is only to impute common sense to the legislature; any reasonable person would say that clear terms ought to be used, if it is intended to divest a vested right (*VAUGHAN WILLIAMS, L.J.*).—*SMITHIES v. NATIONAL ASSOCN. OF OPERATIVE PLASTERERS*, [1909] 1 K. B. 310; 78 L. J. K. B. 259; 100 L. T. 172; 25 T. L. R. 205, C. A.

Annotations:—*Reid. Beadling v. Goll* (1922), 39 T. L. R. 128; *Bowling v. Camp* (1922), 128 L. T. 342; *Brookes v. Brown* (1922), 39 T. L. R. 3; *Henshall v. Porter*, [1923] 1 K. B. 193. *Mentd. Gozney v. Bristol, etc. Trade & Provident Soc.*, [1909] 1 K. B. 901; *Long v. Smithson* (1918), 88 L. J. K. B. 223; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 214.

1215. —.]—*Re BOALER*, No. 55, *ante*.

1216. —.]—*GLOUCESTER UNION v. WOOLWICH UNION*, No. 1086, *ante*.

1217. —.]—An intention to take away the property of a subject without giving to him a legal right to compensation, for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms (*LORD ATKINSON*).—*CENTRAL CONTROL BOARD (LIQUOR TRAFFIC) v. CANNON BREWERY CO., LTD.*, [1919] A. C. 744; 88 L. J. Ch. 464; 121 L. T. 361; 83 J. P. 261; 35 T. L. R. 552; 17 L. G. R. 569, H. L.; *affq. S. C. sub nom. CANNON BREWERY CO. v. CENTRAL CONTROL BOARD (LIQUOR TRAFFIC)*, [1918] 2 Ch. 101, C. A.

Annotations:—*Apld. Robinson v. R.*, [1921] 3 K. B. 183. *Consd. Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 3 K. B. 532; *Federated Coal & Shipping Co. v. R.*, [1922] 1 K. B. 42. *Reid. France Fenwick v. R.*, [1927] 1 K. B. 458. *Mentd. Rowland v. Air Council* (1923), 39 T. L. R. 228.

1218. —.]—General or ambiguous words should not be used to take away legitimate & valuable rights from the subject without compensation, if they are reasonably capable of being construed so as to avoid such a result consistently with the general purpose of the transaction (*per CUR.*).—*UNION OF SOUTH AFRICA (MINISTER OF RYS. & HARBOURS) v. SIMMER & JACK PROPRIETARY MINES*, [1918] A. C. 591; 87 L. J. P. C. 117; 119 L. T. 4, P. C.

1218a. —.]—*BRIGHTMAN & CO., LTD. v. TATE*, No. 1172a, *ante*.

1219. —.]—Statutes which alter rights or create liabilities are never held to be retrospective

unless they contain express words to that effect (*AVORY, J.*).—*GROCOCK v. GROCOCK*, [1920] 1 K. B. 1; 88 L. J. K. B. 1068; 121 L. T. 466; 83 J. P. 185; 26 Cox, C. C. 485; 17 L. G. R. 623, D. C.

Annotation:—*Mentd. Colchester v. Peck*, [1926] 2 K. B. 366.

1220. —.]—Existing rights are not to be deemed to be destroyed by a statute unless there be express words or the plainest implication to that effect (*M'CARDIE, J.*).—*HENSHALL v. PORTER*, [1923] 2 K. B. 193; 92 L. J. K. B. 866; 129 L. T. 443; 39 T. L. R. 409; 67 Sol. Jo. 537.

Annotation:—*Reid. Falcon v. Famous Players Film Co.*, [1926] 1 K. B. 393.

1221. —.]—A statute shall not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear & unambiguous terms.—*COLONIAL SUGAR REFINING CO., LTD. v. MELBOURNE HARBOUR TRUST COMRS.*, [1927] A. C. 343; 96 L. J. P. C. 74; 136 L. T. 709, P. C.

1222. Onus of proof of intention.—On those who seek to establish that the legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or necessary implication.—*METROPOLITAN ASYLUM DISTRICT v. HILL* (1881), 6 App. Cas. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 45 J. P. 664; 29 W. R. 617, H. L.

Annotations:—*Consd. L. B. & S. C. Ry. v. Truman* (1885), 11 App. Cas. 45. *Apld. A.-G. v. Dorchester Corpn.* (1906), 94 L. T. 682; *Hanley v. Edinburgh Corpn.* (1913), 77 J. P. 233. *Reid. Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Lea Conservancy Board v. Hertford Corpn.* (1881), 48 J. P. 628; *Eunew v. G. E. Ry.* (1885), 1 T. L. R. 519; *Gas Light & Coke Co v. St. Mary Abbott's, Kensington Vestry* (1885), 15 Q. B. D. 1; *Truman v. L. B. & S. C. Ry.* (1885), 29 Ch. D. 89; *Goolden v. Thames Conservators* (1887), 4 T. L. R. 187; *M'Murray v. Cadwell* (1889), 6 T. L. R. 76; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Rapier v. London Tram. Co.*, [1893] 2 Ch. 588; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *Canadian Pacific Ry. v. Parke*, [1899] A. C. 535; *Goldberg v. Liverpool Corpn.* (1900), 82 L. T. 362; *East Fremantle Corpn. v. Annals*, [1902] A. C. 213; *East London Ry. v. Thames Conservators* (1904), 68 J. P. 302; *Re New River Co. & Metropolitan Water Board* (1904), 68 J. P. 329; *Demerara Electric Co. v. White*, [1907] A. C. 330; *Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214; *Price's Patent Candle Co. v. L. C. Co.*, [1908] 1 Ch. 526. *Mentd. Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449; *Re Cathcart*, [1893] 1 Ch. 466; *A.-G. v. Nottingham Corpn.*, [1901] 1 Ch. 673; *Campbell v. Pollak*, [1927] A. C. 732.

1223. Sufficiency of proof of intention.—*WESTERN COUNTIES RY. CO. v. WINDSOR & ANNAPOLIS RY. CO.*, No. 1203, *ante*.

(b) By Inference or Implication.

1224. Sufficiency of implication.—*WESTERN COUNTIES RY. CO. v. WINDSOR & ANNAPOLIS RY. CO.*, No. 1203, *ante*.

1225. — To prejudice liberty of subject.—No inference from a statute designed in favour of the liberty of the subject, to the prejudice of that liberty.—*CROWLEY'S CASE* (1818), 2 Swan. 1; Buck. 264; 36 E. R. 514.

Annotations:—*Mentd. Re Leak* (1820), 3 Y. & J. 46; *Re Venables, Ex p. Bardwell* (1834), Coop. temp. Brough. 440; *Watson's Case* (1839), 11 Ad. & El. 731; *Re Martin* (1847), 16 L. J. Bey. 6; *Re Belson* (1850), 7 Moo. P. C. C. 114; *Eshugbayi Eleko v. Nigeria Government Administering Officer*, [1928] A. C. 459.

1226. —.]—*HENSHALL v. PORTER*, No. 1220, *ante*.

PART IV. SECT. 6, SUB-SECT. 2.— B. (b).

1224 i. Sufficiency of implication.—A power to interfere with the ordinary J.—VOL. XLII.

rights of citizens will not be inferred in the absence of express grant, unless it be necessarily implied as incidental to other powers expressly granted or is indispensable to repress the mischief

contemplated & advance the remedy given.—*SOMU PILLAI v. MAYAVARAM MUNICIPAL COUNCIL* (1905), 1 L. R. 28 Mad. 520.—IND.

Sect. 6.—Effect on existing right: Sub-sect. 2, B. (b); sub-sects. 3 & 4.]

1227. — Construction otherwise leading to absurdity or inconsistency.]—*Re ATHLUMNEY, Ex p. WILSON*, No. 1191, *ante*.

1228. — —.]—*GLOUCESTER UNION v. WOOLWICH UNION*, No. 1086, *ante*.

SUB-SECT. 3.—RIGHTS OF ACTION.

1229. Presumption against interference.] *GILMORE v. SHUTER*, No. 297, *ante*.

1230. Intention to interfere must be clearly expressed.]—Clear & unambiguous words are necessary to give a retrospective effect to an Act of Parliament, so as to deprive a party of a vested right of act.—*MARSH v. HIGGINS* (1850), 8 C. B. 551; 1 L. M. & P. 253; 19 L. J. C. P. 297; 15 L. T. O. S. 113; 137 E. R. 1007.

Annotations:—Consd. M'Kenzie v. Sligo & Shannon Ry. (1852), 21 L. J. Q. B. 380. *Reid. R. v. Vine* (1875), L. R. 10 Q. B. 195. *Mentd. Waugh v. Middleton* (1853), 8 Exch. 352.

1231. —.]—In dealing with Acts of Parliament which have the effect of taking away rights of action, we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the Legislature; but the case is different where the Act merely regulates practice & procedure (*CHANNELL, B.*).—*WRIGHT v. HALE* (1860); 6 H. & N. 227; 30 L. J. Ex. 40; 3 L. T. 444; 6 Jur. N. S. 1212; 9 W. R. 157; 158 E. R. 94.

Annotations:—Consd. A.-G. v. Sillem (1864), 10 H. L. Cas. 705. *Appl. Kimbray v. Draper* (1868), L. R. 3 Q. B. 160; *Singer v. Hasson* (1884), 50 L. T. 326; *The Ydun*, [1899] P. 236. *Consd. Re A Debtor* (No. 99 of 1928) (1928), 97 L. J. Ch. 250. *Reid. Thistleton v. Frewer* (1861), 31 L. J. Ex. 230; *Rathbone v. Munn* (1868), 9 B. & S. 708; *A.-G. v. Theobald* (1890), 24 Q. B. D. 557; *R. v. Southampton Income Tax Comrs, Ex p. Singer*, [1916] 2 K. B. 249; *Bowling v. Camp* (1922), 128 L. T. 342.

1232. —.]—It follows of necessity that, consistently with every rule by which these Acts of Parliament ought to be interpreted, especially the rule that they should be so interpreted as in no respect to interfere with or prejudice a clear private right or title, unless that private right or title is taken away *per directum*, the right of action under the covenant remains unaffected (*LORD WESTBURY, C.*).—*WALSH v. SECRETARY OF STATE FOR INDIA* (1863), 10 H. L. Cas. 367; 2 New Rep. 339; 32 L. J. Ch. 585; 8 L. T. 839; 9 Jur. N. S. 757; 11 W. R. 823; 11 E. R. 1068, II. L.

Annotations:—Mentd. Grant v. Secretary of State for India (1877), 2 C. P. D. 445; *Re Randell, Randell v. Dixon*

(1888), 38 Ch. D. 213; *Borland's Trustee v. Steel*, [1901] 1 Ch. 279; *S. E. Ry. v. Associated Portland Cement Manufacturers* (1900), Ltd., [1910] 1 Ch. 12.

1233. —.]—In the absence of anything in the Act to show that it is to have a retrospective operation it cannot be so construed as to have the effect of altering the law applicable . . . down to the time when the present action was brought (*DENMAN, J.*).—*LEEDS BANK v. WALKER* (1883), 11 Q. B. D. 84; 52 L. J. Q. B. 590; 47 J. P. 502.

Annotations:—Reid. Bowling v. Camp (1922), 128 L. T. 342; *Woollatt v. Stanley* (1928), 138 L. T. 620. *Mentd. Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.

1234. —.]—It would be altogether contrary to principle to hold that the statute had a retrospective operation so as to take away a vested cause of action unless the language clearly compels us to do so (*MATTHEW, J.*).—*KNIGHT v. LEE*, as reported in [1893] 1 Q. B. 41; 62 L. J. Q. B. 28; 57 J. P. 117; 9 T. L. R. 23.

Annotations:—Consd. Bowling v. Camp (1922), 128 L. T. 342. *Reid. West v. Gwynne*, [1911] 2 Ch. 1. *Mentd. Henshall v. Porter*, [1923] 2 K. B. 193.

1235. — Pending action.]—Where the law is altered by statute, pending an action, the law as it existed when the action was commenced must decide the rights of the parties unless the legislature, by the language used, show a clear intention to vary the mutual relation of such parties.—*HITCHCOCK v. WAY* (1837), 6 Ad. & El. 943; 2 Nev. & P. K. B. 72; *Will. Woll. & Dav.* 491; 6 L. J. K. B. 215; 112 E. R. 360.

Annotations:—Reid. Marsh v. Higgins (1850), 19 L. J. C. P. 297. *Ansdell v. Ansdell* (1880), 5 P. D. 138; *Bowling v. Camp* (1922), 128 L. T. 342.

1236. — —.]—It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them (*JESSEL, M.R.*).—*Re JOSEPH SUCHE & Co., LTD.* (1875), 1 Ch. D. 48; 45 L. J. Ch. 12; 33 L. T. 774; *sub nom. Re JOSEPH SUCHE & Co., LTD., Ex p. NATIONAL BANK*, 24 W. R. 184.

Annotations:—Reid. Re Athlumney, Ex p. Wilson, [1898] 2 Q. B. 547; *Re Waverley Type Writer, D'Esterre v. Waverley Type Writer*, [1898] 1 Ch. 699; *Re Cullwick*, [1918] 1 K. B. 646; *Bowling v. Camp* (1922), 128 L. T. 342; *Re Clemmons Aluminium* (1924), 94 L. J. K. B. 487; *Costello v. Brown* (1924), 94 L. J. K. B. 220; *Re Snowdown Colliery Co., South Eastern Coalfield Extension Co. v. Snowdown Colliery Co.* (1925), 94 L. J. Ch. 305.

1237. — —.]—(1) The words are of a declaratory character declaring that . . . the former Act should be construed as prescribed by the later Act (*HAWKINS, J.*).

(2) It certainly was considered in many cases

PART IV. SECT. 6, SUB-SECT. 3.

1230 i. Intention to interfere must be clearly expressed.]—16 Vict. c. 180, is not retrospective so as to make the notice of action required by it applicable to causes of action accrued before the Act, or to compel the party injured to sue in case, & not in trespass.—*CUSICK v. McRAE* (1854), 11 U. C. R. 509.—CAN.

1230 ii. —.]—29 & 30 Vict. c. 10, s. 5, had not a retrospective operation, so as to enable a bank to recover upon usurious notes given before it was passed.—*COMMERCIAL BANK OF CANADA v. HARRIS* (1867), 26 U. C. R. 594.—CAN.

1230 iii. —.]—*PENMAN v. WINNIPEG ELECTRIC RY CO.*, [1924] 3 D. L. R. 145; [1924] 2 W. W. R. 587; 29 Can. Ry. Cas. 429; 34 Man. L. R. 282.—CAN.

1230 iv. —.]—A right of action is not taken away by a change in the law, unless by express enactment.—*FRAMJI BOMANJI v. HORMASJI BARJORJI* (1866), 3 Bom. O. C. 49.—IND.

1230 v. —.]—Where the law is altered while a suit is pending, the law as it exists when the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, shows a clear intention to vary the mutual relations of such parties.—*GUJARAT TRADING CO., LTD. v. TRIKAMJI VELJI & Co.* (1866), 3 Bom. O. C. 45.—IND.

1230 vi. —.]—An Act of Limitation being restrictive of the ordinary right to take legal proceedings must, where its language is ambiguous, be construed strictly, i.e. in favour of the right to proceed.—*UMIAHANKAR LAKHIMIRAM v. CHHOTALAL VAJERAM* (1875), 1 L. R. 1 Bom. 19.—IND.

1230 vii. —.]—Where the application of the provisions of an amending Act makes it impossible to exercise a vested right of suit, the Act should be construed as not being applicable to such cases. Though procedure may be regulated by an Act for the time being in force, still the intention to take away a vested right without compensation or any saving, is not to

be imputed to the Legislature in any case unless it be expressed in unequivocal terms.—*GOPESHWAR PAL v. JIBAN CHANDRA CHANDRA* (1911), 1 L. R. 41 Calc. 1125.—IND.

1230 viii. —.]—A Stat. Limitations coming into force at its passing will not defeat proceedings already pending, unless there is an express provision to that effect.—*Re PUBLIC WORKS ACTS, 1876 & 1880, WILKIN'S CLAIM* (1881), 1 N. Z. L. R. 4 (S. C.).—N.Z.

1230 ix. —.]—Where there is a right to prosecute an application, & the right is, by a section of the Act which creates it, made subject to a limit of time which may be extended as provided, a section of a subsequent Act repealing the first-mentioned section, & reducing the limit of time & power of extension, would, if construed as applying to pending applications, be an interference with existing rights within the meaning of the rule that there is a presumption against any such interference.—*FALVEY v. TREGOWETH* (1897), 16 N. Z. L. R. 341.—N.Z.

that where a person had commenced an action he had a vested right, & that any subsequent statute ought not to be construed as retro-active so as to alter that right. That is not an invariable rule & it does not apply if the language of the statute is clear & express (POLLOCK, B.).—*A.-G. v. THEOBALD* (1890), 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.

Annotations:—Generally, *Reid. Young v. Adams*, [1898] A. C. 469; *Re Lovell & Collard's Contract*, [1907] 1 Ch. 249.

1238. ———.]—Before you can say that an Act of Parliament prevents a person who is aggrieved from having recourse to the ordinary remedies open to the subjects of the country in general, you must find some negative words, or some clear & distinct enactment to that effect (LINDLEY, L.J.).—*BARRY RY. CO. v. TAFF VALE RY. CO.*, [1895] 1 Ch. 128; 64 L. J. Ch. 230; 71 L. T. 688; 43 W. R. 372, O. A.

Annotation:—*Mentd. Davis v. Taff Vale Ry.*, [1895] A. C. 542.

1239. ———.]—*R. v. SOUTHAMPTON INCOME TAX COMRS.*, *Ex p. SINGER*, No. 1160, ante.

1240. ———.]—*Right of appeal.*—*COLONIAL SUGAR REFINING CO. v. IRVING*, No. 1168, ante.

1241. ———.]—*Act passed pending appeals.*—Though the Act was passed after the judgments both of the county ct. judge & of the Div. Ct. I think we must determine this appeal in accordance with its provisions (ATKIN, L.J.).—*STOVIN v. FAIRBRASS* (1919), 88 L. J. K. B. 1004; 121 L. T. 172; 83 J. P. 241; 35 T. L. R. 659; 17 L. G. R. 583, C. A.

Annotations:—*Consd. Green-Price v. Webb* (1919), 89 L. J. K. B. 216. *Reid. Landrigan v. Simons*, [1924] 1 K. B. 509. *Mentd. Hunt v. Bliss* (1919), 89 L. J. K. B. 174; *Price v. Pritchard* (1919), 89 L. J. K. B. 162; *Stephens v. Tatham* (1919), 83 J. P. Jo. 567; *Vernon Investment Assocn. v. Welch* (1919), 35 T. L. R. 511; *Robinson v. R.*, [1921] 3 K. B. 183.

1242. ———.]—We are of opinion that although the Act was not passed until after the hearing before the county ct. judge still as it was in force at the hearing of the appeal it is applicable to the appeal (*per Cur.*).—*LANDRIGAN v. SIMONS*, [1924] 1 K. B. 509; 93 L. J. K. B. 318; 130 L. T. 608; 40 T. L. R. 244; 68 Sol. Jo. 387; 22 L. G. R. 104.

SUB-SECT. 4.—RIGHTS OF OWNERSHIP.

1243. Presumption in favour of private property.]

—(1) They who enter in such cases must clearly show their authority, & if the words of the statute on which they rely be ambiguous, every presumption is to be made against the co. & in favour of private property (BEST, C.J.).

(2) It is a wise rule in the construction of private Acts of Parliament that they should be construed strictly (PARK, J.).—*SCALES v. PICKERING* (1828), 4 Bing. 448; 1 Moo. & P. 195; 6 L. J. O. S. C. P. 53; 130 E. R. 840.

1244. ———.]—Ambiguous words in an Act of

Parliament, authorising a public co. to take land by compulsory process, are to be construed against the co. & in favour of private property.—*WEBB v. MANCHESTER & LEEDS RY. CO.* (1839), 4 My. & Cr. 116; 1 Ry. & Can. Cas. 576; 41 E. R. 46, L. C.

Annotations:—*Apld. Simpson v. South Staffordshire Waterworks Co.* (1865), 6 New Rep. 184. *Reid. Gray v. Liverpool & Bury Ry.* (1846), 4 Ry. & Can. Cas. 235; *Bontinck v. Norfolk Estuary Co.* (1856), 3 Jur. N. S. 204; *Lamb v. North London Ry.* (1869), 4 Ch. App. 522; *Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714. *Mentd. Tawney v. Lynn & Ely Ry.* (1874), 4 Ry. & Can. Cas. 615; *Stamps v. Birmingham, Wolverhampton & Stour Valley Ry.* (1848), 7 Hare, 251; *Selby v. Colne Valley & Halstead Ry.* (1862), 6 L. T. 709.

1245. ———.]—Persons interfering with the property of individuals, by virtue of an Act of Parliament, are strictly tied down to the limits of the powers given by the Act, & they are bound to show, clearly & distinctly, that they are empowered by the Act to do what they propose to do.—*OLDAKER v. HUNT* (1854), 19 Beav. 485; 52 E. R. 439; *on appeal* (1855), 6 De G. M. & G. 376, L. JJ.

1246. ———.]—*HOUGH v. WINDUS*, No. 1188, ante.

1247. ———.]—Unless contrary intention clearly expressed.]—I should myself agree with the contention of counsel for applts. that where you have ambiguous language used in an Act of Parliament . . . the ct. would ordinarily give a restricted meaning to the word where the statute is imposing greater obligations upon the owner or occupier than exist at common law. . . . But when one looks at the language & the scope of the Act of Parliament now before us, I cannot myself entertain any doubt that Parliament intended to impose this obligation upon the owners or occupiers of all ground whether made or unmade (LORD READING, C.J.).—*GABY v. PALMER* (1916), 85 L. J. K. B. 1240; 80 J. P. 212; 14 L. G. R. 491, D. C.

1248. ———.]—It is an established rule that a statute will not be read as authorising the taking of a subject's goods without payment unless an intention to do so be clearly expressed.—*NEWCASTLE BREWERIES, LTD. v. R.*, [1920] 1 K. B. 854; 89 L. J. K. B. 392; 123 L. T. 58; 84 J. P. 125; 36 T. L. R. 276; 18 L. G. R. 781.

Annotations:—*Consd. A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. *Reid. Hudson's Bay Co. v. MacLay* (1920), 36 T. L. R. 469; *France Fenwick v. R.*, [1927] 1 K. B. 458. *Mentd. Robinson v. R.*, [1921] 3 K. B. 183; *Commercial & Estates Co. of Egypt v. Board of Trade*, [1925] 1 K. B. 271; *Newcastle Breweries v. I. R. Comrs.* (1927), 137 L. T. 426.

1249. Strict construction adopted.]—The rights thus conferred on the miner are, as regards the landowner, of a very onerous character . . . (&) must in my opinion be construed strictly (COCKBURN, C.J.).—*WAKE v. REDFEARN* (1880), 43 L. T. 123; 44 J. P. 681.

Building regulations.—*See HIGHWAYS*, Vol. XXVI., pp. 518, 564, Nos. 2202, 2583, 2584; *PUBLIC HEALTH*, Vol. XXXVIII., pp. 189, 190, Nos. 279–283.

1241 i. ———.]—*Act passed pending appeal.*—*DONEGANI v. DONEGANI* (1835), C. R. 1 A. C. 50.—CAN.

1241 ii. ———.]—*Re GILLESPIE & TORONTO CORPN.* (1892), 19 A. R. 713.—CAN.

1241 iii. ———.]—*COUTURE v. BOUCHARD* (Que.) (1892), 21 S. C. R. 281.—CAN.

PART IV. SECT. 6, SUB-SECT. 4.

1249 i. *Strict construction adopted.*—Acts imposing forfeiture affecting indi-

vidual rights should have a strict construction.—*A.-G. v. WAVERLEY GOLD MINING CO.* (1902), 35 N. S. R. 192.—CAN.

1249 ii. ———.]—*EMERSON v. SKINNER* (1906), 12 B. C. R. 154.—CAN.

1249 iii. ———.]—Where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication, declare that those rights

shall cease, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far as its words extend, & no further.—*KRISTO CHUNDER DASS v. STEEL* (1885), 11 L. R. 12 Cal. 279.—IND.

1249 iv. ———.]—The common law rights of the subject, in respect of the enjoyment of his property, are not to be trenching upon by a statute, under such intention is shown by clear words or necessary implication.—*R. v. MALLOW UNION GUARDIANS* (1860), 12 I. C. L. R. 35.—IR.

SECT. 7.—EFFECT ON EXISTING LAW.

SUB-SECT. 1.—IN GENERAL.

1250. General rule—General law not affected without express reference.]—The general law of the country is not altered or controlled by partial legislation made without any special reference to it.—*DENTON v. MANNERS* (LORD) (1858), 25 Beav. 38; 27 L. J. Ch. 199; 30 L. T. O. S. 314; 22 J. P. 143; 4 Jur. N. S. 151; 6 W. R. 238; 53 E. R. 550; *on appeal*, 2 De G. & J. 675, L. JJ.

Annotation:—*Reid*, *Burr v. Miller*, [1872] W. N. 63.

1251. ———.]—If you want to alter the law which has lasted for centuries & which is almost ingrained in the English constitution . . . to suggest that that is to be dealt with by inference, & that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous (LORD HALSBURY).—*LEACH v. R.*, [1912] A. C. 305; *sub nom.* *LEACH v. PUBLIC PROSECUTIONS DIRECTOR*, 81 L. J. K. B. 616; 106 L. T. 281; 76 J. P. 203; 56 Sol. Jo. 342; 22 Cox, C. C. 721; 7 Cr. App. Rep. 158, H. L.; *reversg.* S. C. *sub nom.* *R. v. ACASTER, R. v. LEACH*, [1912] 1 K. B. 488, C. C. A.

Annotation:—*Mentd.* *Director of Public Prosecutions v. Blady* (1912), 28 T. L. R. 193.

1252. Existing law different from what supposed by legislature—Whether implication of statute operative as negation of existence.]—The enactment is no doubt entitled to great weight as evidence of the law but it is by no means conclusive; & when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence (*per CUR.*).—*MOLLWO, MARCH & CO. v. COURT OF WARDS* (1872), L. R. 4 P. C. 419; 9 Moo. P. C. C. N. S. 214; 17 E. R. 495, P. C.

Annotations.—*Consd.* *Pooley v. Driver* (1876), 5 Ch. D. 458. *Mentd.* *Adams v. N. B. Ry.* (1873), 29 L. T. 367; *Ross v. Parkyns* (1875), L. R. 20 Eq. 331; *Re Howard, Ex p. Tennant* (1877), 6 Ch. D. 303; *Re Megevand, Ex p. Delhasse* (1878), 38 L. T. 106; *Frowde v. Williams* (1886), 56 L. J. Q. B. 62; *Adam v. Newbigging* (1888), 13 App. Cas. 308; *Badeley v. Consolidated Bank* (1888), 38 Ch. D. 238; *Davis v. Davis*, [1891] 1 Ch. 393; *King v. Whichelow* (1895), 64 L. J. Q. B. 801; *Gosling v. Gaskell*, [1897] A. C. 575.

SUB-SECT. 2.—EFFECT ON COMMON LAW.

1253. Restrictive statute restrictively construed.]—Statutes restrictive of the common law receive a restrictive construction.—*ASH v. ABDY* (1878), 3 Swan. 664; 36 E. R. 1014.

PART IV. SECT. 7, SUB-SECT. 1.

b. New rights must be strictly construed.]—*SMOKLER v. WINNIPEG ELECTRIC RY. CO.*, [1923] 3 W. W. R. 211; 33 Man. L. R. 378.—CAN.

c. ———.]—Crop Payments Act, R. S. S., 1920, c. 126, s. 3, conferring as it does upon a certain class of vendors a special right or priority not recognised by the law before the Act was passed, is to be construed strictly, & to be held to apply to such agreements only as are specified in the Act.—*SEIBEL v. DWYER ELEVATOR CO., LTD.* (Sask.), [1923] 4 D. L. R. 1184; [1923] 2 W. W. R. 1051.—CAN.

d. ———.]—*R. v. STANLEY* (Alta.), [1925] 1 W. W. R. 33; 44 Can. Crim. Cas. 366.—CAN.

e. ———.]—*EVERITT v. SCOTT* (1853), 1 W. R. 214.—SCOT.

PART IV. SECT. 7, SUB-SECT. 2.

1253 i. Restrictive statute restrictively construed.]—*Saskatchewan Liquor Licence Act, 1908, & Acts in amendment thereto*, being statutes derogatory

of the common law, should be construed strictly.—*Re MEAN & MOOSE JAW CORPN.* (Sask.) (1911), 17 W. L. R. 14.—CAN.

1253 ii. ———.]—When a statute has provided a special procedure applicable to particular cases the general implications of English Law in favour of the liberty of the subject may be excluded, if the intention of the Legislature to that effect is clearly & definitely expressed.—*LI HONG MI v. A.-G.* (1918), 13 Hong Kong L. R. 6.—HONG KONG.

1253 iii. ———.]—Statutes of Limitation being in limitation of common right are not to be extended by construction to cases not clearly included within their terms.—*PARASHRAM JETHMAL v. RAKHMA VALAD KHANDU* (1890), L. L. R. 15 Bom. 299.—IND.

1253 iv. ———.]—A statute imposing a special penalty for an act which is a common law offence does not repeal the common law unless an express or implied intention to repeal it is clearly manifest in the statute.—*R. v. ROBERTS*, [1908] T. S. 279.—S. AF.

1254. ———.]—An enactment altering the law as to evidence, & creating statutory evidence, whereby the rights of parties may be defeated, must be construed strictly (ERLE, C.J.).—*NOTHARD v. PEPPER* (1864), 17 O. B. N. S. 39; 4 New Rep. 331; 144 E. R. 16; *sub nom.* *NORTHARD v. PEPPER*, 10 L. T. 782; 10 Jur. N. S. 1077; 2 Mar. L. C. 52.

Annotations:—*Reid*, *The Little Lizzie* (1870), L. R. 3 A. & E. 56. *Mentd.* *The Emperor, The Zephyr* (1864), 12 W. R. 890; *Re The Henry Coxon* (1878), 3 P. D. 156; *The Solway* (1885), 10 P. D. 137.

1255. ———.]—*PLACE v. RAWTENSTALL CORPN.*, No. 1172, *ante*.

1256. Intention to abrogate must be clear.]—Where the common law is to be changed & most especially the common law which a statutory provision had recognised & enforced, the intention of any new enactment to abrogate it must be plain, to exclude a construction by which both may stand together (*per CUR.*).—*ESCOTT v. MASTIN* (1842), 4 Moo. P. C. C. 104; Brod. & F. 4; 1 Notes of Cases, 552; 6 Jur. 765; 13 E. R. 241, P. C.; *affg.* S. C. *sub nom.* *MASTIN v. ESCOTT* (1841), 2 Curt. 692.

Annotations:—*Consd.* *Martin v. MacKnochie, Flamank v. Simpson* (1868), L. R. 2 A. & E. 116. *Mentd.* *Sanders v. Head* (1843), 3 Curt. 565; *Titchmarsh v. Chapman* (1844), 3 Curt. 840; *Gorham v. Exeter (Bp.)* (1849), 2 Rob. Eccl. 1; *Cooper v. Dodd* (1850), 2 Rob. Eccl. 270; *Jenkins v. Cook* (1875), L. R. 4 A. & E. 463; *Re Perry Almshouses*, [1898] 1 Ch. 391.

1257. ———.]—The fact that [the Acts in question] interfere with pltf's common law rights is no reason why they should be construed differently from any other Acts of Parliament (BRETT, J.).—*THE WARKWORTH* (1883), 9 P. D. 20; 53 L. J. P. 4; 49 L. T. 715; 32 W. R. 479; 5 Asp. M. L. C. 194; *on appeal* (1884), 9 P. D. 145, C. A.

Annotations:—*Reid*, *The Fanny* (1912), 28 T. L. R. 217; *Asiatic Petroleum Co. v. Lennard's Carrying Co.*, [1914] 1 K. B. 419. *Mentd.* *Carmichael v. Liverpool Sailing Ship Owners' Mutual Indemnity Assocn.* (1887), 19 Q. B. D. 242; *Canada Shipping Co. v. British Shipowners' Mutual Protecting Assocn.* (1889), 22 Q. B. D. 727; *Smitton v. Orient Steam Navigation Co.* (1907), 96 L. T. 848.

1258. ———.]—*R. v. SALISBURY (BP.)*, No. 863, *ante*.

1259. ———.]—The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute.—*CANADIAN PACIFIC RY. CO. v. ROY*, [1902] A. C. 220; 71 L. J. P. C. 51; 86 L. T. 127; 50 W. R. 415; 18 T. L. R. 200, P. C.

Annotations:—*Reid*, *Quebec Ry. Light, Heat & Power Co. v. Vandry*, [1920] A. C. 662. *Mentd.* *McClelland v. Manchester Corpn.* (1911), 76 J. P. 21.

1253 v. ———.]—A statute should be construed in conformity with the common law rather than against it, except where it is clearly intended to alter the common law.—*JOHANNESBURG MUNICIPALITY v. COHEN'S TRUSTEES*, [1909] T. S. 811.—S. AF.

1253 vi. ———.]—Sect. 4 of the Orders framed by the Governor-General under Public Welfare & Moratorium Act, 1914, s. 2 (1) (f), enacts that no person shall communicate to any other person any matter "calculated to excite public feeling":—*Held*: the expression "calculated to excite public feeling" must be narrowly construed so as to interfere as little as possible with the liberty of the subject & the freedom of speech.—*R. v. BUNTING*, [1916] T. P. D. 578.—S. AF.

1253 vii. ———.]—A statute must either explicitly say that it is the intention of the Legislature to alter the common law, or the inference from the statute must be such that the ct. can come to no other conclusion than that the Legislature did have such an intention.—*CASSERLEY v. STUBBS*, [1916] T. P. D. 310.—S. AF.

1260. When common law abrogated—Particular remedy given by statute.]—This Act of Parliament meant to give one remedy only . . . & the common law remedy is taken away (*per CUR.*).—*STEWART v. GREAVES* (1842), 10 M. & W. 711; 2 Dowl. N. S. 485; 12 L. J. Ex. 109; 6 Jur. 1116; 152 E. R. 658.

Annotations :—**Appld.** *O'Flaherty v. McDowell* (1857), 6 H. L. Cas. 142. **Refd.** *Beech v. Eyre* (1843), 5 Man. & G. 415; *Chapman v. Milvain* (1850), 5 Exch. 61; *Beardshaw v. Londeshorough* (1851), 11 C. B. 498; *Davison v. Farmer* (1851), 6 Exch. 242; *Reddish v. Pinnock* (1854), 10 Exch. 213; *Fell v. Burchett* (1857), 7 E. & B. 537. **Mentd.** *Smith v. Goldsworthy* (1843), 4 Q. B. 430; *R. v. Carter* (1845), 1 Den. 65; *Bank of England v. Johnson* (1849), 18 L. J. Ex. 238; *Re London & Eastern Banking Corpn.* (1858), 2 De G. & J. 484.

1261. ———.]—*Semble*, if a peculiar remedy for compensation is given by statute for the "act" of which pltf. complains, the right of action at common law is taken away.—*COE v. WISE* (1866), L. R. 1 Q. B. 711; 7 B. & S. 831; 37 L. J. Q. B. 262; 14 L. T. 891; 30 J. P. 484; 14 W. R. 865, Ex. Ch.

Annotations :—**Refd.** *Mersey Dock Trustees v. Gibbs, Mersey Dock Trustees v. Penhallow* (1866), L. R. 1 H. L. 93; *Colley v. L. & N. W. Ry. & G. W. Ry.* (1880), 42 L. T. 807. **Mentd.** *Harrison v. G. N. Ry.* (1864), 3 H. & C. 231; *Worral Waterworks Co. v. Lloyd* (1866), L. R. 1 C. 1 719; *Wilson v. Halifax Corpn.* (1868), L. R. 3 Exch. 114; *Birch v. St. Marylebone Vestry* (1869), 20 L. T. 697; *Holborn Union Grdns. v. St. Leonard Shoreditch Vestry* (1876), 2 Q. B. D. 145; *River Wear Comrs. v. Adamson* (1877), 37 L. T. 543; *Gibraltar Sanitary Comrs. v. Orfila* (1890), 15 App. Cas. 400; *Jersey v. Uxbridge R. S. A.*, [1891] 3 Ch. 183; *Tozeland v. West Ham Union Grdns.*, [1907] 1 K. B. 920; *Liebig's Extract of Meat Co. v. Mersey Docks & Harbour Board & Nelson*, [1918] 2 K. B. 381; *Boynton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213.

1262. Primâ facie construction in conformity with common law.]—It must be remembered that it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. An additional reason in this case for following the common law is the mischief which would result from a different construction (*BYLES, J.*).—*R. v. MORRIS* (1867), L. R. 1 C. C. R. 90; 36 L. J. M. C. 84; 16 L. T. 636; 31 J. P. 516; 15 W. R. 999; 10 Cox, C. C. 480, C. C. R.

Annotations :—**Mentd.** *Wemyss v. Hopkins* (1875), L. R. 10 Q. B. 378; *R. v. Friel* (1890), 17 Cox, C. C. 325; *R. v. Miles* (1890), 21 Q. B. D. 423; *R. v. Dyson* (1908), 77 L. J. K. B. 813; *R. v. Tonks*, [1916] 1 K. B. 443.

SUB-SECT. 3.—EFFECT ON CUSTOM.

See CUSTOM & USAGES, Vol. XVII., pp. 23, 24, Nos. 247–258.

SUB-SECT. 4.—EFFECT ON EXISTING RIGHTS.

See Part IV., Sect. 6., *ante*.

SUB-SECT. 5.—INCORPORATION OF STATUTES.

1263. Special & general Acts—Special Act excluding general Act.]—Where the special Act excludes the general Act, the latter is not to take effect; but where the special Act makes provisions

consistent with the general Act, we must give effect to them (*POLLOCK, C.B.*).—*NEWCASTLE-UNDER-LYNE, ETC., TURNPIKE ROADS TRUSTEES v. NORTH STAFFORDSHIRE RY. CO.* (1860), 5 H. & N. 160; 157 E. R. 1140; *sub nom. LEECH v. NORTH STAFFORDSHIRE RY. CO.*, 29 L. J. M. C. 150; 1 L. T. 332; 24 J. P. 71; 8 W. R. 216.

Annotations :—**Mentd.** *North of England Ry. v. Langbaugh* (1871), 24 L. T. 544; *R. v. S. E. Ry.* (1875), 40 J. P. 200; *L. & Y. Ry. v. Bury Corpn.* (1889), 11 App. Cas. 417; *Hertfordshire County Council v. G. E. Ry.*, [1909] 1 K. B. 368.

1264. ——— **Provisions of special Act consistent with general Act.]**—*NEWCASTLE-UNDER-LYNE, ETC., TURNPIKE ROADS TRUSTEES v. NORTH STAFFORDSHIRE RY. CO.*, No. 1263, *ante*.

1265. ——— **Materiality of form of incorporation.]**—Whether a special Act only incorporates "such parts of a general Act as are applicable to, & not inconsistent with the special Act," or "the whole Act, except so far as its provisions are expressly varied by the special Act" makes no difference in the application of the general to the special Act.—*WELD v. LONDON & SOUTH WESTERN RY. CO.* (1863), 32 Beav. 340; 1 New Rep. 415; 33 L. J. Ch. 142; 8 L. T. 13; 9 Jur. N. S. 510; 11 W. R. 448; 55 E. R. 133.

1266. ——— **Modification of incorporated Act—Intention of legislature must be clear.]**—This much, however, we may say, that it is not enough that the words of the special enactments are not aptly chosen so as to be in harmony with the enactments in terms incorporated with the Act; nor is it even enough that the language of the special enactments is so incongruous with the incorporated enactments as to show that the person who prepared them had forgotten, or perhaps had never known, what those incorporated enactments were. It must go as far as this, that the special enactments show that the legislature intended to exclude an enactment which, by an accident, not unlikely to occur in this mode of legislation, they have inadvertently incorporated contrary to what they intended (*BLACKBURN, J.*).—*R. v. LONDON CORPN.* (1867), L. R. 2 Q. B. 292; 16 L. T. 280.

Annotations :—**Refd.** *Sharpe v. Met. Dist. Ry.* (1879), 4 Q. B. D. 645; *G. N. & City Ry. v. Tillett*, [1902] 1 K. B. 874. **Mentd.** *Ferrar v. City of London Sewers Comrs.* (1868), L. R. 4 Exch. 1.

1267. ———.]—Where a special Act incorporates & is to be construed together with a public general Act, the special Act does not, by its provisions, modify those of the incorporated statute unless the language of the special Act in express terms alters the general Act, & it is also apparent that the legislature, in passing the special Act, meant to alter the provisions of the general Act.—*WEST HAM CORPN. v. GRANT* (1888), 40 Ch. D. 331; 58 L. J. Ch. 121; 60 L. T. 17; 5 T. L. R. 107.

Annotation :—**Mentd.** *Re Allen & Driscoll's Contract*, [1904] 1 Ch. 493.

1268. ——— **Necessity for express terms.]**—*WEST HAM CORPN. v. GRANT*, No. 1267, *ante*.

1269. Mere incorporation by reference—Whether sufficient to incorporate all earlier provisions.]—*Re WOOD'S ESTATE, Ex p. WORKS & BUILDINGS COMRS.*, No. 1063, *ante*.

Incorporation of provisions of earlier statute—Effect of repeal of earlier statute.]—See Part IX., Sect. 1, sub-sect. 2, D., *post*.

1260 I. When common law abrogated—Particular remedy given by statute.]—*ARMSTRONG v. CAMPBELL* (1854), 4 C. P. 15.—**CAN.**

PART IV. SECT. 7, SUB-SECT. 5.

1. Incorporation of penal statute—

Express words necessary.]—It is perfectly clear that a penal statute cannot be incorporated with another statute without express words.—*MELBOURNE BANKING CO. v. BREWER* (1875), 1 N. S. W. S. C. R. N. S. (L.) 103, n.—**AUS.**

g. Special & general Acts—Whether general provisions of Limitation Act incorporated—Special period prescribed by special Act.]—*SRINIVASA AYYANGAR v. SECRETARY OF STATE* (1912), 1 L. R. 38 Mad. 92.—**IND.**

Sect. 7.—Effect on existing law: Sub-sects. 6, 7, 8 & 9. Sect. 8: Sub-sects. 1 & 2, A. & B.]

SUB-SECT. 6.—MODIFICATION OF EARLIER STATUTES.

1270. Introduction of new terms in later statute—Abrogation of system existing under earlier statute.]—Had it been intended to continue the old system, the use of the old language & the continuance of the old mode would naturally have been expected. Where new language is introduced & a new mode adopted, it must be supposed a new system was intended (BAYLEY, J.).—*FEARNLEY v. MORLEY* (1826), 5 B. & C. 25; 7 Dow. & Ry. K. B. 832; 4 Dow. & Ry. M. C. 117; 4 L. J. O. S. K. B. 225; 108 E. R. 9.

1271. Later statute constituting exemption from earlier statute.]—We think that . . . the operation of the statute of Victoria [1 Vict. c. 55] is to constitute an exemption from the statute [29 Eliz. c. 4] in those cases, in the same way as if it had been expressly enacted that such cases should be exempt from the operation of the statute of Elizabeth [29 Eliz. c. 4] (PARKE B.).—*PILKINGTON v. COOKE* (1847), 16 M. & W. 615; 4 Dow. & L. 347; 17 L. J. Ex. 141; 8 L. T. O. S. 516; 153 E. R. 1336.

*Annotation:—*Reid. *Wrightup v. Greenacre* (1847), 10 Q. B. 1.

1272. Repeal of Act modifying earlier Act—Effect of.]—Effect of the repeal of a statute which modified a former statute considered.

The modification [in 17 & 18 Vict. c. 104] . . . must, no doubt, have affected that Act [9 & 10 Vict. c. 93] so long as it subsisted; but when it was destroyed, its effect must have ceased, otherwise the consequence would be that, where any provision of an Act of Parliament has been modified by a subsequent Act, the modification could not be altered without at the same time repealing or altering the original Act—a proposition which cannot, I think, be maintained (TWINER, L.J.).—*GLAHAM v. BARKER* (1866), 1 Ch. App. 223; 35 L. J. Ch. 259; 13 L. T. 653; 12 Jur. N. S. 82; 14 W. R. 296; 2 Mar. L. C. 298, L. J.

*Annotations:—*Mentd. *L. & S. W. Ry. v. James* (1872), 8 Ch. App. 241; *Davidson v. Hill* (1901), 85 L. T. 118; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38.

SUB-SECT. 7.—REPEAL OF STATUTES.

See Part IX., post.

SUB-SECT. 8.—AFFIRMATIVE AND NEGATIVE STATUTES.

See Part IX., Sect. 1, sub-sect. 2, H., post.

PART IV. SECT. 7, SUB-SECT. 9.

1275 i. Existing jurisdiction taken away by express words only.]—Although the cts. must give effect to a statute which either by express words or by plain & necessary implication takes away the jurisdiction of the ordinary cts., any statute purporting to interfere with the established state of law must receive a strict interpretation.—*ALI MUHAMMAD v. HAKIM* (1928), 1 L. R. 9 Lah. 504.—IND.

1275 ii. —.]—A.-G. FOR IRELAND v. DUBLIN CORPN. (1827), 1 Bl. N. S. 312.—IR.

1275 iii. —.]—The jurisdiction of the Ct. of Ch. cannot be taken away unless by express words.—*BYRNE & STRETCH v. BYRNE* (1841), Fl. & K. 435; *affd.* (1842), 4 L. Eq. R. 621; 2 Dr. & War. 71; 1 Con. & Law. 189.—IR.

1275 iv. —.]—A general rule applicable to the construction of statutes is that there is not to be presumed,

without express words, an authority to deprive the Supreme Ct. of a jurisdiction which it had previously exercised, or to extend what was once the private jurisdiction of the Supreme Ct. to the inferior cts.—*DUNBAR & CO. v. SCOTTISH COUNTY INVESTMENT CO.*, [1920] S. C. 210.—SCOT.

h. Court referred to in general terms—Who may exercise powers.]—Where a statute refers to the ct. in general terms without any express qualifying words, a judge in chambers may exercise the powers conferred thereby.—*Ex p. THURECHT* (1925), 42 N. S. W. W. N. 64.—AUS.

k. Practice laid down by statute must be followed.]—Where any particular practice has been proscribed by statute, it must be strictly followed.—*LINGLEY v. HUESTIS* (1842), 4 N. B. R. (2 Kerr) 4.—CAN.

l. Effect on jurisdiction of court.]—Statutes regulating the practice & procedure of a ct. apply only to matters

SUB-SECT. 9.—EFFECT ON JURISDICTION AND PROCEDURE OF COURTS.

Retrospective statutes.]—*Sec Sect. 5, sub-sect. 6, ante.*

1273. Statute directing particular court for particular defendants—Defendants previously suable in any court—Whether statute extends to persons privileged elsewhere.]—A charter or statute directing that particular persons shall be sued in a particular ct. will not, if such persons were before suable generally anywhere, extend to persons particularly privileged elsewhere.—*JOLLIFFE v. LANGSTON* (1698), 1 Ld. Raym. 342; 91 E. R. 1125.

*Annotation:—*Mentd. *Jefferies v. Beart* (1848), 12 Jur. 1003.

1274. Express words not controlled by rule of practice at sessions.]—A rule of practice at sessions will not control the express words of an Act of Parliament.—*R. v. LINCOLNSHIRE JJ.* (1824), 3 B. & C. 548; 5 Dow. & Ry. K. B. 347; 2 Dow. & Ry. M. C. 454; 107 E. R. 837.

*Annotation:—*Mentd. *R. v. Kimbolton* (1837), 6 Ad. & El. 603.

1275. Existing jurisdiction taken away by express words only.]—An existing jurisdiction cannot be taken away by an Act of Parliament, except by precise & distinct words.—*GALSWORTHY v. DURRANT* (1860), 29 Beav. 277; 2 L. T. 788; 6 Jur. N. S. 743; 8 W. R. 594; 54 E. R. 633; *on appeal*, 2 De G. F. & J. 466, L. O.

*Annotation:—*Mentd. *Re Smith, Green v. Smith* (1883), 24 Ch. D. 672.

1276. Plaintiff barred from bringing action.]—*CROSFIELD (JOSEPH) & SONS, LTD. v. MANCHESTER SHIP CANAL CO.*, No. 1637, *post*.

1277. Plaintiff compelled to follow procedure authorised by statute.]—*CROSFIELD (JOSEPH) & SONS, LTD. v. MANCHESTER SHIP CANAL CO.*, No. 1637, *post*.

SECT. 8.—MANDATORY AND DIRECTORY STATUTES.

SUB-SECT. 1.—IN GENERAL.

1278. Mandatory & directory statutes distinguished.]—I understand the distinction to be, that a clause is directory where the provisions contain mere matter of direction & nothing more; but not so where they are followed by such words as are used here, viz. that any thing done contrary to such provisions shall be null & void to all intents (TAUNTON, J.).—*PEARSE v. MORRICE* (1834), 2 Ad. & El. 84; 4 Nev. & M. K. B. 48; 4 L. J. K. B. 21; 111 E. R. 32.

*Annotations:—*Mentd. *R. v. St. Gregory* (1834), 2 Ad. & El. 99; *Oldroyd v. Crampton* (1837), 4 Bing. N. C. 24; *Willington v. Browne* (1845), 8 Q. B. 169; *Burchell v. Clark* (1876), 2 C. P. D. 88.

within its jurisdiction, & cannot be called in aid to give jurisdiction where it is in question.—*AHRENS v. MCGILLIGAT GRAND TRUNK RY. CO.*, *GARNISHEES* (1873), 23 C. P. 171.—CAN.

m. Witnesses & Evidence Act must be strictly construed.]—*BARTLETT v. NOVA SCOTIA STEEL CO., LTD.* (1904), 37 N. S. R. 259; *affd.* (1905), 35 S. C. R. 527.—CAN.

n. Right of appeal.]—A right of appeal should not be taken away without a clear expression of an intention to do so.—*PURDY v. AMHERST* [1925] 1 D. L. R. 193; 57 N. S. R. 421.—CAN.

PART IV. SECT. 8, SUB-SECT. 1.

1278 i. Mandatory & directory statutes distinguished.]—If an officer of the Legislature—e.g. a magistrate—disobeys a statute, a question arises as to the effect of his disobedience on the thing done. If the matter in which there is disobedience is so essential

1279. —.]—The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially (LORD COLERIDGE, C.J.).—WOODWARD v. SARSONS (1875), L. R. 10 C. P. 733; 44 L. J. C. P. 293: *sub nom.* WOODWARD v. SARSONS & SADLER, BIRMINGHAM MUNICIPAL ELECTION PETITION CASE, 32 L. T. 867.

Annotations :—**Mentd.** Buckrose Division Case (1886), 4 O'M. & H. 110; Phillips v. Goff (1886), 17 Q. B. D. 805; Stepney Borough Case (1886), 4 O'M. & H. 34; Thornbury Case (1886), 4 O'M. & H. 65; Clare Eastern Division Case (1892), 4 O'M. & H. 160; Islington Division Case (1901), 5 O'M. & H. 120; Medhurst v. Lough & Gasquet (1901), 17 T. L. R. 210; Exeter Borough Case (1911), 6 O'M. & H. 228; Montreal Street Ry. v. Normandin, [1917] A. C. 170; Brodie v. Bevan, Dunn v. Bevan (1921), 38 T. L. R. 172; Young v. Darvel (1922), 87 J. P. 8; *Re* North Eastern Derbyshire Petn., Holmes v. Leo & Cleaver (1923), 39 T. L. R. 423.

1280. —.]—Now the distinction between matters that are directory & matters that are imperative is well known to us all in the common language of the cts. at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still that is the recognised language, & I propose to adhere to it. The real question in all these cases is this: a thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the cts. have decided that if it is not done the whole thing fails, & the proceedings that follow upon it are all void. On the other hand, when the cts. hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail (LORD PENZANCE).—HOWARD v. BODINGTON (1877), 2 P. D. 203; 42 J. P. 6.

Annotation :—**Mentd.** Caldow v. Pixell (1877), 2 C. P. D. 562.

1281. —.]—There is a well-known distinction between a case where directions are imperative & a case where they are directory (SWINFEN EADY, L.J.).—R. v. LINCOLNSHIRE APPEAL TRIBUNAL, *Ex p.* STUBBINS, [1917] 1 K. B. 1; 86 L. J. K. B. 292; 115 L. T. 513; 80 J. P. 465; 14 L. G. R. 1101, C. A.

Annotations :—**Refd.** R. v. Leicestershire Appeal Tribunal, *Ex p.* Tivey (1917), 86 L. J. K. B. 807. **Mentd.** R. v. Hertfordshire Appeal Tribunal, *Ex p.* Hills (1916), 86 L. J. K. B. 584.

1282. Whether statute mandatory or directory—To be determined from general scheme.—(1) Although we find in the introductory words of the sect. a general statement applicable to all the sects. to the effect that the proceedings "are to be done" within the times prescribed it appears to us by no means to follow that in each sub-sect. the words must necessarily be construed in the same manner (CHARLES, J.).

(2) We must inquire whether, in each particular case, the words are directory or imperative, & in order to determine the question, must have regard to the general scheme & other sects. of the statute (CHARLES, J.).—R. v. LONDON COUNTY JJ. & LONDON COUNTY COUNCIL, [1893] 2 Q. B. 476; 63 L. J. Q. B. 148; 69 L. T. 438; 58 J. P. 8; 41

W. R. 668; 37 Sol. Jo. 582; Ryde, Rat. App. (1891–1893) 360, D. C.; *on appeal*, [1893] 2 Q. B. at p. 482, C. A.; & LONDON COUNTY COUNCIL v. ST. GEORGE'S UNION ASSESSMENT COMMITTEE, [1894] A. C. 600, H. L.

Annotations :—**Generally.** **Mentd.** R. v. Jones, [1894] 2 Q. B. 382; R. v. Woodhouse, [1906] 2 K. B. 501; Paterson v. Ardrossan Harbour Co. (1926), 19 B. W. C. C. 621; Penman v. Caprington & Auchlochan Collieries (1926), 19 B. W. C. C. 604; R. v. London County JJ., *Ex p.* Locke, Lancaster & Johnson (1928), 139 L. T. 609.

SUB-SECT. 2.—MANDATORY STATUTES.

A. In General.

1283. Must be strictly followed.—LASSELL'S CASE (1587), Owen, 90; Gouldsb. 54, 61; 74 E. R. 921.

Annotations :—**Refd.** A.-G. v. Andrew (1655), Hard. 23; Gilles v. Grover (1832), 9 Bing. 128.

1284. —.]—Where the legislature imposes terms, & prescribes a thing to be done within a certain time, the lapse even of a day is fatal; because no inferior ct. can admit of any terms, but such as directly & precisely satisfy the law.—FARRELL v. TOMLINSON (1761), 5 Bro. Parl. Cas. 438; 2 E. R. 782, H. L.

1285. —.]—WOODWARD v. SARSONS, No. 1279,

1286. —.]—It is plain enough that where the object of a statute is clear, & it contains an absolute & mandatory enactment, the terms of that enactment must be strictly followed (LORD COLERIDGE, C.J.).—PHILLIPS v. GOFF (1886), 17 Q. B. D. 805; 55 L. J. Q. B. 512; 35 W. R. 197; *sub nom.* *Re* SOUTHAMPTON SCHOOL BOARD ELECTION PETITION, PHILLIPS v. GOFF, 50 J. P. 614; 2 T. L. R. 900, D. C.

Annotations :—**Refd.** Montreal Street Ry. v. Normandin, [1917] A. C. 170. **Mentd.** *Re* Brighton & Preston United District School Board Petn. (1897), 13 T. L. R. 214; Morris v. Beves, [1897] 1 Q. B. 449.

1287. — **Proceedings void if statute not complied with.**—HOWARD v. BODINGTON, No. 1280, *ante*.

B. What Constitutes Statute Mandatory.

1288. Negative words used.—It has been asked, what language will make a statute imperative. . . . Negative words would have given it that effect (LORD TENTERDEN, C.J.).—R. v. LEICESTER JJ. (1827), 7 B. & C. 6; 9 Dow. & Ry. K. B. 772; 4 Dow. & Ry. M. C. 518; 108 E. R. 627.

Annotations :—**Consd.** Cole v. Green (1813), 6 Man. & G. 872; Catterall v. Sweetman (1845), 4 Notes of Cases, 222. **Refd.** Gwynne v. Burnell (1835), 2 Scott, 16; Bowman v. Blyth (1857), 27 L. J. M. C. 21; R. v. Worksop Board of Health (1864), 10 L. T. 297; Montreal Street Ry. v. Normandin, [1917] A. C. 170.

1289. —.]—In a statute respecting marriage, prohibitory & negative words do not create a nullity unless such nullity be expressly declared in the statute.—CATTERALL v. SWEETMAN (1845), 1 Rob. Eccl. 304; 4 Notes of Cases, 222; 9 Jur. 951; 163 E. R. 1047; *sub nom.* CATTERALL v. CATTERALL, 6 L. T. O. S. 19.

Annotations :—**Consd.** Campbell v. Corley (1856), 28 L. T. O. S. 109; Chichester v. Mure (1863), 3 Sw. & Tr. 223. **Mentd.** Maclean v. Cristall (1849), 7 Notes of Cases, Supp. 17; Anon. (1857), Dea. & Sw. 295; Beamish v. Beamish (1861), 9 H. L. Cas. 274.

CORPN. (1861), 11 C. P. 255.—CAN.

PART IV. SECT. 8, SUB-SECT. 2.—A.

1283 i. Must be strictly followed.—CALLAHAN v. GEORGE (1898), 21 C. L. T. 600; 8 B. C. R. 146; 1 M. M. Cas. 242.—CAN.

1283 ii. —.]—MONTGOMERY & BRISTOW v. BYRNE (1861), 2 I. C. L. R. 230; 4 Ir. Jur. 46.—IR.

1283 iii. —.]—HILL v. CLONMEL UNION GUARDIANS, [1897] 1 I. R. 272.

& fundamental that the non-compliance renders the thing done void, the statute is said to be imperative or peremptory or mandatory; if the matter is so subsidiary & collateral that the disobedience may safely be ignored, the statute is said to be directory; but this designation is confusing & misleading. The real question is whether prejudice has arisen by the departure from what the statute had laid down.—R. v. McDEVITT (1917), 39 O. L. R. 138.—CAN.

o. — Duty of the court.—In the absence of any clear expression of its intention by the legislature the ct. in deciding whether any particular provisions are imperative or directory, must have due regard to the general scope of the statute, as well as to considerations of convenience & justice.—BURROWS v. BRITISH SOUTH AFRICA CO. (1899), 16 S. C. 482; 9 C. T. R. 518.—S. AF.

p. C. S. C., c. 22—Whether mandatory or permissive.—STREET v. KENT COUNTY

Sect. 8.—Mandatory and directory statutes: Sub-sect. 2, B.; sub-sect. 3, A. & B. Sect. 9.]

1290. Directory or permissive words—Act pro bono publico.]—Words only directory, permissive or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice (COLERIDGE, J.).—*R. v. TITHE COMRS.* (1849), 14 Q. B. 459; 4 New Mag. Cas. 31; 19 L. J. Q. B. 177; 14 J. P. 142; 14 Jur. 290; 117 E. R. 179.

Annotations:—*Apld.* *Macdougall v. Paterson* (1851), 11 C. B. 755. *Consd.* *Julius v. Oxford* (Bp.) (1880), 11 App. Cas. 214. *Apld.* *R. v. Mitchell, Ex p. Livesey*, [1913] 1 K. B. 561. *Refd.* *Jones v. Harrison* (1850), 20 L. J. Ex. 166. *Mentd.* *R. v. Kidwelly & Llanelly Canal & Tramroad Co.* (1850), 15 L. T. O. S. 223; *R. v. Tithe Comrs.* (1852), 18 Q. B. 156; *R. v. East & West India Docks, etc. Ry.* (1853), 2 E. & B. 466.

1291. Enabling words—Act pro bono publico.]—*R. v. TITHE COMRS.*, No. 1290, *ante*.

1292. — Words effectuating legal right.]—*JULIUS v. OXFORD* (Bp.), No. 1351, *post*.

1293. — Not standing alone.]—*R. v. GREAT WESTERN RY. CO.*, No. 1325, *post*.

1294. Statute giving jurisdiction—Express provision for time of exercising jurisdiction.]—When an Act giving any particular jurisdiction plainly intimates an intention that such particular jurisdiction is to be exercised by one particular sessions, that sessions cannot adjourn it to another (COCKBURN, C.J.).—*BOWMAN v. BLYTH* (1857), 7 E. & B. 47; 27 L. J. M. C. 21; 29 L. T. O. S. 312; 22 J. P. 5; 3 Jur. N. S. 886; 119 E. R. 1165, Ex. Ch.

Annotations:—*Consd.* *Rochester Corpn. v. R.* (1858), E. B. & E. 1024. *Distd.* *R. v. Cambridge Union Grdns.* (1861), 1 B. & S. 61; *Lewis v. Davis* (1875), L. R. 10 Exch. 86. *Refd.* *R. v. Lancashire JJ.* (1857), 8 E. & B. 563; *Caldow v. Pixell* (1877), 2 C. P. D. 562; *R. v. Tolson* (1889), 23 Q. B. D. 168; *Redheugh Colliery v. Gateshead Union Assmt. Com.* (1923), 130 L. T. 306.

1295. Affirmative words used — Imperative nature clearly indicated.]—I do not know how language could have made the intent more clear & I can see no sufficient reason for holding the clause directory. Words, though affirmative, are not necessarily so if they are “absolute, explicit, & peremptory,” & so, in my opinion, they are here (LORD O'HAGAN).—*R. v. ALL SAINTS, WIGAN (CHURCHWARDENS)* (1876), 1 App. Cas. 611; 25 W. R. 128; *sub nom.* *R. v. WIGAN (CHURCHWARDENS)*, 35 L. T. 381, H. L.

Annotations:—*Mentd.* *R. v. Bishop Wearmouth Burial Board* (1879), 5 Q. B. D. 67; *R. v. Maidenhead Corpn.* (1882), 9 Q. B. D. 494; *R. v. Poplar B. C. (No. 1)*, [1922] 1 K. B. 72.

1296. Statute conferring private rights.]—In general the provisions of the former [statutes creating public duties] are directory, but of the latter [statutes conferring private rights] imperative (DENMAN, J.).—*CALDOW v. PIRELL* (1877), 2 C. P. D. 562; 46 L. J. Q. B. 541; 36 L. T. 469; 41 J. P. 647; 25 W. R. 773, D. C.

1297. Provisions in respect to time—Unless power of extending time given.]—In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong

reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the ct. (GROVE, J.).—*BARKER v. PALMER* (1881), 8 Q. B. D. 9; 51 L. J. Q. B. 110; 45 L. T. 480; 30 W. R. 59, D. C.

Annotations:—*Mentd.* *Evan Jones Trustees v. Gittins* (1884), 51 L. T. 599; *Sweetland v. Turkish Cigarette Co.* (1899), 80 L. T. 472; *Smythe v. Wiles*, [1921] 2 K. B. 66; *Turner v. Kingsbury Collieries*, [1921] 3 K. B. 169.

1298. Provision as to necessity for seal.]—*YOUNG & CO. v. ROYAL LEAMINGTON SPA CORPN.*, No. 315, *ante*.

SUB-SECT. 3.—DIRECTORY STATUTES.

A. In General.

1299. Meaning of “directory.”]—MIDDLESEX JJ. *v. R.*, No. 316, *ante*.

1300. Strict compliance not necessary.]—All the directions of the Act of Parliament need not be complied with, the form prescribed by the Act is merely directory, & need not be strictly followed (LORD KENYON).—*STANDEN v. STANDEN* (1791), Peake, 45; 170 E. R. 73, N. P.

Annotations:—*Mentd.* *Wilkinson v. Payne* (1791), 4 Term Rep. 468; *R. v. Sourton* (1836), 6 Nev. & M. K. B. 575; *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85.

1301. —.]—WOODWARD *v. SARSONS*, No. 1279, *ante*.

1302. — When strict compliance impossible.]—I am strongly of opinion that the words in this statute are only directory. The ct. can dispense with a strict compliance with the statute, when it is impossible that it should be carried out literally (MELLOR, J.).—*MAYER v. HARDING* (1867), L. R. 2 Q. B. 410; *sub nom.* *Re MAYOR v. HARDING*, 9 B. & S. 27, n.; 16 L. T. 429; 31 J. P. 376; *sub nom.* *MEYER v. HARDING*, 15 W. R. 816.

Annotation:—*Refd.* *Waterton v. Baker* (1868), L. R. 3 Q. B. 173.

1303. — Proceedings not void if statute not complied with.]—Where an Act of Parliament requires a thing to be done generally, without requiring it to be done by any officer, etc., under a penalty, & doth not say that for want of the thing required a writ, etc., shall be void, it has been said, that such Act is directory only, & not making the writ, etc., void (*per CUR.*).—*GRICE v. ALLEN* (1741), Barnes, 414; 94 E. R. 981.

1304. —.]—HOWARD *v. BODINGTON*, No. 1280, *ante*.

B. What Constitutes Statute Directory.

1305. Circumstances not of the essence of act to be done.]—*R. v. LOXDALE*, No. 731, *ante*.

1306. Absence of negative words.]—The general rule of construction has been, that, unless there are negative words in the statute, they are directory only (COLERIDGE, J.).—*R. v. SNEYD* (1841), 5 J. P. 579; 5 Jur. 962.

PART IV. SECT. 8, SUB-SECT. 2.—B.

1291 i. Enabling words—Act pro bono publico.]—In public statutes words only directory, permissive or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice.—*Re M., M. v. REGISTRAR OF BIRTHS* (1924), 26 W. A. L. R. 115.—AUS.

q. Enactments prescribing procedure.]—Enactments prescribing procedure in the cts. are to be construed as imperative.—*FRENCH v. MARTIN* (1892), 8 Man L. R. 362.—CAN.

r. Statute conferring right, privilege

or immunity.]—Where a statute confers a right, privilege or immunity the regulations, or forms & conditions, which it prescribes, are imperative in the sense that the non-observance of them is fatal.—*ORPEN v. CELLERS* (1903), 20 S. C. 261.—S. AF.

PART IV. SECT. 8, SUB-SECT. 3.—A.

t. General rule.]—In construing a statute words are directory unless there is something in the statute which plainly or in effect enacts that a particular thing shall be done in a particular way & in no other manner.—*TORPY v. HART* (1915), 11 Tas. L. R. 6.—AUS.

PART IV. SECT. 8, SUB-SECT. 3.—B.

a. General rule.]—A statutory provision may be regarded as intended to be directory when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential & imperative.—*DRILL v. DE BRUYN*, [1918] O. P. D. 23.—S. AF.

1306 i. Absence of negative words.]—Unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only.—*NIDHI LAL v. MAZHAR HUSAIN* (1884), I. L. R. 7 All. 230.—IND.

1307. —.]—Is the latter part of the sect. imperative, or directory only? It may be observed here . . . that "the words are in the affirmative only, & there are no negative words. . . . It appears to us that this latter part . . . is directory only (TINDAL, C.J.).—*COLE v. GREEN* (1843), 6 Man. & G. 872; 7 Scott, N. R. 682; 13 L. J. C. P. 30; 2 L. T. O. S. 208; 8 J. P. 184; 134 E. R. 1145.

1308. Statute implying condition—Subsequent provisions making statute directory.]—*ROBINSON v. TODMORDEN UNION* (1842), 3 Q. B. 675; 114 E. R. 665; *sub nom. R. v. TODMORDEN & WALSDEN OVERSEERS*, 11 L. J. M. C. 129; *sub nom. ROBINSON v. R.*, 2 Gal. & Dav. 826, Ex. Ch.

1309. Alternative acts directed to be done.]—Where an Act of Parliament directs that, under certain circumstances, one or other of two things shall be done, the party to do the act has the option of doing which act he pleases.—*R. v. SOUTH-EASTERN RY. CO. (DIRECTORS, ETC.)* (1853), 4 H. L. Cas. 471; 1 C. L. R. 932; 21 L. T. O. S. 282; 17 Jur. 901; 10 E. R. 515, H. L.; *affg. S. C. sub nom. SOUTH EASTERN RY. CO. v. R.* (1851), 17 Q. B. 485, Ex. Ch.

Annotations:—*Refd. Leech v. North Staffordshire Ry.* (1860), 1 L. T. 332; *Ireland L. G. Board v. R.*, [1903] A. C. 402.

1310. Indication that acts are to be done forthwith.]—In statutes like this, in which it is indicated that certain things are to be done forthwith, the provision falls within the class of directory rather than that of imperative provisions (ERLE, J.).—*R. v. WARBLINGTON OVERSEERS* (1854), 22 L. T. O. S. 304; 18 J. P. 647; *sub nom. Ex p. WARBLINGTON OVERSEERS*, 18 Jur. 494; *sub nom. R. v. DEVERELL*, 23 L. J. M. C. 121.

Annotations:—*Mentd. R. v. Kingswinford Overseers* (1854), 3 E. & B. 688; *Backhouse v. Bishopwearmouth* (1861), 7 Jur. N. S. 338.

1311. Necessity for express words.]—*QUARTER v. McLAREN*, No. 1863, *post*.

1312. Absence of provision for remedy.]—It is asked what is to be done if the overseers delay so long as to deprive a party of this power to appeal. This would be a defect in the statute, for which it would be for the legislature to provide a remedy, but the existence of such a defect cannot make the statute other than directory (LUSH, J.).—*R. v. INGALL* (1876), 2 Q. B. D. 199; 46 L. J. M. C. 113; 35 L. T. 552; 41 J. P. 181; 25 W. R. 57; *sub nom. INGALL & PHILLIPS v. ALL SAINTS, POPLAR, Ryde, Rat. App.* (1871–85) 176.

Annotations:—*Consd. Caldow v. Pixell* (1877), 2 C. P. D. 562; *Re Regent United Service Stores* (1878), 8 Ch. D. 75; *R. v. London County J.J. & L. C. C.*, [1893] 2 Q. B. 476. *Refd. R. v. Westminster Unions Assmt. Com.*, *Ex p. Woodward*, [1917] 1 K. B. 832.

1313. Statutes creating public duties.]—*CALDOW v. PIXELL*, No. 1296, *ante*.

1314. — Injustice caused by annulling acts in neglect of duty.]—When the provisions of a statute relate to the performance of a public duty & the case is such that to hold null & void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty & at the same time would not promote the main object of the legislature it has been in practice to hold such provisions to the directory only, the neglect of them though punishable not affecting the validity of the acts done (*per CUR.*).—*MONTEAL STREET RY. CO. v. NORMANDIN*, [1917] A. C.

170; 86 L. J. P. C. 113; 116 L. T. 162; 33 T. L. R. 174, P. C.

1315. Discretion given.]—There are several considerations which, in my opinion, strongly support the view that the penalty provision must have been intended by the legislature to be, & ought to be construed as being, directory only. . . . Some discretion as to the penalty is left to the urban authority. The amount of the pecuniary penalty & the form it should take are entirely in the discretion of the authority. Is it, then, unreasonable to suppose that in other respects the urban authority is to have a discretion (ROMER, L.J.).—*SOOTHILL UPPER URBAN COUNCIL v. WAKEFIELD RURAL COUNCIL*, [1905] 2 Ch. 516; 74 L. J. Ch. 703; 93 L. T. 711; 69 J. P. 447; 21 T. L. R. 766; 3 L. G. R. 1208, C. A.

SECT. 9.—DECLARATORY STATUTES.

1316. Declaratory of existing law.]—Declaratory statutes do not prove the law was otherwise before, but rather the reverse (BLACKSTONE, J.).—*NICOL v. VERELST* (1779), 2 Win. Bl. 1277; 96 E. R. 751.

1317. What sufficient to make statute retrospective—Declaratory form.]—*YOUNG v. ADAMS*, No. 1117, *ante*.

1318. — — —.]—The use of the words "It is declared" in a statute does not necessarily import that the statute is merely declaratory of existing law, & therefore retrospective.

The use of the expression "it is declared" to introduce new rules of law is not incorrect, & is far from uncommon (*per CUR.*).—*HARDING v. QUEENSLAND STAMPS COMRS.*, [1898] A. C. 769; 67 L. J. P. C. 141; 79 L. T. 42; 14 T. L. R. 488.

Annotations:—*Distd. Re Lovell & Collard's Contract*, [1907] 1 Ch. 249. *Refd. R. v. Lovitt*, [1912] A. C. 212. *Mentd. Lambe v. Manuel*, [1903] A. C. 68; *Cotton v. R.*, [1914] A. C. 176; *A.-G. v. Bellilos*, [1928] 1 K. B. 798.

1319. — Later statute correcting error in former statute.]—An Act of Parliament made to correct an error by omission in a former statute of the same session, has relation back to the time when the first Act was passed.—*A.-G. v. POUGETT* (1816), 2 Price, 381; 146 E. R. 130.

1320. — Explanatory of former statute.]—This Act is to "explain" the former. Sect. 1 provides for settlements by renting for the future. Sect. 2, therefore, unless it be retrospective, is without object (PARKE, J.).—*R. v. DURSLEY (INHABITANTS)* (1832), 3 B. & Ad. 465; 1 L. J. M. C. 37; 110 E. R. 168.

Annotation:—*Distd. Young v. Adams*, [1898] A. C. 469.

1321. — — —.]—Merchant Shipping Act, 1889 (c. 68), is retrospective, as it declares what the meaning of the principal Act of 1854 always has been, & by it the word "ship" in the Act of 1854 includes "foreign ship."—*JONES v. BENNETT* (1890), 63 L. T. 705; 6 Asp. M. L. C. 596, D. C.

1322. — — —.]—*A.-G. v. THEOBALD*, No. 1237, *ante*.

1323. — — —.]—*Re LOVELL & COLLARD'S CONTRACT*, [1907] 1 Ch. 249; 76 L. J. Ch. 246; 96 L. T. 382.

Annotation:—*Mentd. Re De Leeuw, Jakens v. Central Advance & Discount Corp.*, [1922] 2 Ch. 540.

PART IV. SECT. 9.

1. Action for custom's duties—Subsequent Act passed imposing duties—Whether amounting to legislative declaration that it previously non-existent.]—*GRINNELL v. R.* (1888), 16 S. C. R. 119.—*CAN.*

SECT. 10.—ENABLING STATUTES.

1324. When statutes enabling—Acts authorising companies to make railways.]—Acts of Parliament authorising cos. to make railways are now regarded as but enabling statutes, which give powers, but do not render compulsory or obligatory the exercise of those powers.—SCOTTISH NORTH EASTERN RY. CO. v. STEWART (1859) 3 Macq. 382; 33 L. T. O. S. 307; 5 Jur. N. S. 607; 7 W. R. 458, H. L.

*Annotations:—***Appld.** R. v. G. W. Ry. (1893), 62 L. J. Q. B. 572. **Refd.** Taylor v. Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356; Darlaston L. B. v. L. & N. W. Ry., [1894] 2 Q. B. 694.

1325. — Absence of compulsory words—Effect of acts done in pursuance of statute.]—

(1) One must look at the Act to see whether there are words of compulsion; but if enabling words only are there to be found, then they are not words of compulsion according to the ordinary construction of the English language (LORD ESHER, M.R.).

(2) . . . Take those acts; without the Act of Parliament do they contain an obligation, because you have done those acts, to go on & do something else? . . . If you say that the doing of those acts turned the permissive words in the Act of Parliament into compulsory words, you must find that enactment in the statute; & if you do not find it there, then the doing of the act afterwards cannot make it compulsory that they should go on & do something else (LORD ESHER, M.R.).

(3) The truth is, that when a statute confers powers upon a public body there may be duties which arise out of the powers when they are exercised, but the mere fact that such powers are conferred involves no implication, when the statute is silent upon the point, that the powers must be exercised. Permissive words are not compulsory (BOWEN, L.J.).—R. v. GREAT WESTERN RY. CO. (1893), 62 L. J. Q. B. 572; 69 L. T. 572; 9 T. L. R. 573; 37 Sol. Jo. 669; 9 R. 1, C. A.; *affg.* S. C. *sub nom.* R. v. GREAT WESTERN RY. CO., *Ex p.* RUABON BRICK & TERRA COTTA CO., 69 L. T. 443.

Annotations:—Generally. **Refd.** A.-G. v. SIMPSON, [1901] 2 Ch. 671. **Mentd.** Darlaston L. B. v. L. & N. W. Ry., [1894] 2 Q. B. 694.

SECT. 11.—PERMISSIVE STATUTES.

SUB-SECT. 1.—IN GENERAL.

1326. General rule—Permissive words not obligatory.]—Permissive words in an Act of Parliament are not obligatory.—EDINBURGH, PERTH & DUNDEE RY. CO. v. PHILIP (1857), 2 Macq. 514; 28 L. T. O. S. 315; 3 Jur. N. S. 249; 5 W. R. 377, H. L.

*Annotations:—***Consd.** Scottish North Eastern Ry. v. Stewart (1859), 33 L. T. O. S. 307. **Refd.** R. v. French (1878), 3 Q. B. D. 187; R. v. G. W. Ry. (1893), 62 L. J. Q. B. 572; Darlaston L. B. v. L. & N. W. Ry., [1894] 2 Q. B. 694.

1327. — — —.]—It is obviously a strong construction to treat permissive words as imposing a serious obligation (KAY, J.).—DORMONT v. FURNESS RY. CO. (1883), 11 Q. B. D. 496; 52 L. J. Q. B. 331; 49 L. T. 134; 47 J. P. 711; 5 Asp. M. L. C. 127.

*Annotation:—***Mentd.** The Ella, [1915] P. 111.

1328. — — —.]—R. v. GREAT WESTERN RY. CO., No. 1325, *ante*.

1329. — — — Although serving public purpose.]—An Act of Parliament authorising & empowering a person to improve the passage of boats, & for that purpose to cleanse, scour, & deepen the river, where & as often as occasion should require, although intended to serve a public purpose, must be construed to be permissive only, & not obligatory.—SIMPSON v. A.-G., [1904] A. C. 476; 74 L. J. Ch. 1; 91 L. T. 610; 69 J. P. 85; 20 T. L. R. 761; 3 L. G. R. 190, H. L.; *reversg.* S. C. *sub nom.* A.-G. v. SIMPSON, [1901] 2 Ch. 671, C. A.

*Annotations:—***Mentd.** Newcastle v. Worksop U. C., [1902] 2 Ch. 145; Queenborough Corpn. v. Smeed, Dean (1904), 68 J. P. 241; A.-G. v. Antrobus, [1905] 2 Ch. 188; Dibden v. Skirrow, [1907] 1 Ch. 437; Robinson v. Smith (1908), 24 T. L. R. 573; *Re* Hatschek's Patents, *Ex p.* Zerenner, [1909] 2 Ch. 68; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; Folkestone Corpn. v. Brockman, [1914] A. C. 338; Hammerton v. Dysart, [1916] 1 A. C. 57; Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co. & Robert Donkin (1920), 90 L. J. Ch. 420; Layzell v. Thompson (1927), 137 L. T. 106.

1330. When obligatory.]—TEMPLE v. BANK OF ENGLAND (1802), 6 Ves. 770; 31 E. R. 1300, L. C.

1331. — Statutes for advancement of justice—Each statute to be considered.]—Cases were cited to show that, in the construction of statutes having for their object the advancement of justice, permissive words ought to be treated as obligatory & directive. But a rule of that kind will be applicable or inapplicable according to the terms of the particular statute (WRIGHT, J.).—R. v. TURNER (JUDGE), [1897] 1 Q. B. 445; 66 L. J. Q. B. 417; 76 L. T. 556; 45 W. R. 316; 41 Sol. Jo. 275.

1332. Private rights to be regarded.]—METROPOLITAN ASYLUM DISTRICT v. HILL, No. 1222, *ante*.

1333. —.]—JORDESON v. SUTTON, SOUTH-COATES & DRYPOOL GAS CO., No. 1411, *post*.

1334. —.]—Wherever according to the sound construction of a statute, the Legislature has authorised a proprietor to make a particular use of his land, & the authority given is in the strict sense of law permissive merely, & not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.—CANADIAN PACIFIC RY. CO. v. PARKE, [1899] A. C. 535; 68 L. J. P. C. 89; 81 L. T. 127; 48 W. R. 118; 15 T. L. R. 427, P. C.

*Annotations:—***Consd.** A.-G. v. Dorchester Corpn. (1905), 93 L. T. 290; Metropolitan Water Board v. Solomon, [1908] 2 Ch. 214. **Refd.** West v. Bristol Tramways & Carriage Co. (1908), 72 J. P. 145; Hanley v. Edinburgh Corpn. (1913), 77 J. P. 233.

Discretionary powers.]—*See* Sect. 14, sub-sect. 4, *post*.

SUB-SECT. 2.—WHAT CONSTITUTES STATUTE PERMISSIVE

Use of "it shall be lawful."]—*See* Sect. 13, sub-sect. 1, *post*.

Use of "may."]—*See* Nos. 1355–1360, *post*.

SECT. 12.—TEMPORARY STATUTES.

1335. Continuance of temporary statute—Necessity for.]—If divers statutes be continued until the next Parliament, or next session; & there is a Parliament or a session, & nothing done therein as to continuance, all the said statutes are dis-

PART IV. SECT. 10.

*c. General rule.]—*Enabling words are always compulsory where they are words to effectuate a legal right.—R. v. DAKES (N. B.) (1911), 9 E. L. R. 433.—CAN.

PART IV. SECT. 11, SUB-SECT. 1.

*d. Canada Temperance Act, 1864, s. 17, must be construed as permissive only.]—*WENTWORTH v. MATHIEU, [1900] A. C. 212.—CAN.

continued & gone.—RESOLUTIONS UPON THE STAT. 35 ELIZ. C. 1 CONCERNING SECTARIES (1623), Hut. 61; 123 E. R. 1101.

1336. ——— No particular form of words necessary.]—A statute intitled “An Act to indemnify certain persons upon the terms in this Act mentioned, & for relief of officers, etc.” is continued by a subsequent statute made for that purpose, although, in reciting its title, it is said, “upon the terms therein mentioned, & for the relief of officers, etc.,” for the legislature in continuing a statute are not bound to use any particular form of words.—R. v. LONGMEAD (1795), 2 Leach, 694; 168 E. R. 448.

1337. ——— Effect of continuance.]—Though the time in a temporary law is expired yet if it be continued Acts may be laid to be done by virtue of the first law.—R. v. MORGAN (1736), 2 Stra. 1066; 93 E. R. 1036.

Annotation :—*Refd.* R. v. Smith O’Brien (1848), 7 State Tr. N. S. 1.

1338. ——— On sections not requiring continuance.]—The Act of William IV, [1 & 2 Will. 4, c. LXXVI] was continued by subsequent Acts down to 1889, when the London coal duties were abolished, & the Act was no longer continued. Upon an information under s. 52 of 1 & 2 Will. 4, c. lxxvi., for delivering coal to a purchaser from a cart without having thereon a perfect weighing machine:—*Held*: the Act, 1 & 2 Vict. c. ci., continuing the Act of William IV, for the further term of seven years, & the subsequent continuing Acts, must be read as referring to those sects. only of the Act which would have expired, if they had not been continued, & not to the whole Act, & therefore s. 52. which did not require to be continued, was still in force, & the information was rightly laid under it.—HOUGHTON v. FEAR BROTHERS, LTD. & WILLISHER. [1913] 2 K. B. 343; 82 L. J. K. B. 650; 109 L. T. 177; 77 J. P. 376; 29 T. L. R. 410; 11 L. G. R. 731; 23 Cox, C. C. 494, D. C.

Annotation :—*Refd.* Spencer v. Hooton, Spencer v. Newton & Pycroft, Briggs v. G. N. Ry., Parkinson v. Wigan Coal & Iron Co., Harrison v. Wigan Coal & Iron Co. (1920), 37 T. L. R. 280.

1339. ——— By general Act.]—A local Act for amending the roads & highways in the Isle of Wight, empowered certain comrs. to take certain tolls at the several turnpikes or toll gates which might be erected on the roads by virtue of the Act. The Act authorised the comrs. to borrow money for the purposes of the Act, & to mortgage the tolls for any term during the continuance of the Act, as a security for the repayment of such money. The time limited by the Act for its continuance had expired, unless it was continued by the 4 & 5 Will. 4, c. 10, for continuing the Acts for making turnpike-roads in Great Britain:—*Held*: the local Act though not exclusively a turnpike-road Act was within the spirit of, & continued by 4 & 5 Will. 4, c. 10.—BARNES v. WHITE (1845), 1 C. B. 192; 1 New Sess. Cas. 504; 14 L. J. M. C. 65; 4 L. T. O. S. 333; 9 Jur. 182; 135 E. R. 511.

1340. Effect of repeal by temporary statute—Whether prior law revives—On expiration of repealing statute.]—Where a statute professes to repeal absolutely a prior law & substitutes other provisions on the same subject, which are limited to continue only till a certain time the prior law does not revive after the repealing statute is spent unless the intention of the legislature to that effect

be expressed.—WARREN v. WINDLE (1803), 3 East, 205; 102 E. R. 576.

Annotation :—*Apld.* Taylor v. New Windsor Corpn., [1898] 1 Q. B. 186.

1341. ——— ———.]—It is a question of construction on every Act professing to repeal or interfere with the provision of a former law whether it operate as a total or a partial & temporary repeal (LORD ELLENBOROUGH, C.J.).—R. v. ROGERS (1809), 10 East, 569; 103 E. R. 891.

Annotation :—*Mentd.* R. v. Allen, R. v. Argent, Crussall & Green, R. v. Chamberlain & Hopwood (1826), 1 Mood. C. C. 154.

1342. Effect of repeal of temporary statute—Rights taken away by statute—Whether revived on repeal.]—A turnpike Act, passed in 1819 & which was to continue in operation for twenty-one years, recited that a public bridleway across a farm would, if not stopped up, be the means of enabling persons to evade the tolls granted by the Act, & enacted that the bridleway should be vested in the owner of the farm in exchange for land of his taken for the purposes of the Act, & that, after the turnpike road had been opened for traffic, the bridleway should be stopped up, & it should be unlawful for the public to use it. Subsequent statutes continued the operation of the Act till 1856 when it was repealed:—*Held*: the repeal did not revive the public right to use the bridleway.—GWYNNE v. DREWITT, [1894] 2 Ch. 616; 63 L. J. Ch. 870; 71 L. T. 190; 60 J. P. 104; 43 W. R. 551; 8 R. 814.

1343. ——— ———.]—A municipal corpn. having a prescriptive right to take certain customary tolls for the passage of carriages, cattle, etc. over a bridge belonging to them, obtained in 1734 a local Act which, after reciting their right to take the customary tolls, enacted that the customary tolls should be & remain vested in them, & empowered them to take the said tolls, with a variation as to the exemption of freemen of the borough. In 1819 the corpn. obtained another local Act which repealed the former Act & empowered them to take down the old bridge & build a new one & to take tolls which varied from the old tolls in amount & subject-matter. This Act was temporary & had expired:—*Held*: the prescriptive right to take tolls had been merged in & extinguished by the statutory right given in 1734, & neither had nor could have been revived by the later Act, & the right to take tolls expired with the later Act.—NEW WINDSOR CORPN. v. TAYLOR, [1899] A. C. 41; 68 L. J. Q. B. 87; 63 J. P. 164; 15 T. L. R. 67; *sub nom.* WINDSOR CORPN. v. TAYLOR, 79 L. T. 450, H. L. *affg.* S. C. *sub nom.* TAYLOR v. NEW WINDSOR CORPN., [1898] 1 Q. B. 186, C. A.

Annotations :—*Consd.* A-G. v. Reynolds, [1911] 2 K. B. 888. *Refd.* A-G. v. De Keyser’s Royal Hotel, [1920] A. C. 508.

1344. Duration of temporary statutes—Whether provisions limited to duration of statute.]—STEAVENSON v. OLIVER, No. 2019, *post*.

SECT. 13.—PARTICULAR EXPRESSIONS.

SUB-SECT. 1.—“IT SHALL BE LAWFUL.”

1345. Obligatory Interpretation.]—It is true that in many cases the words “it shall be lawful” in an Act of Parliament are obligatory (LORD CAMP-

PART IV. SECT. 12.

e. Effect of subsequent Act making temporary Act perpetual.]—A temporary Act, when made perpetual by a subsequent Act, is in effect perpetual

ab initio.—R. v. SWINEY (1832), Alc. & N. 131.—IR.

PART IV. SECT. 13, SUB-SECT. 1.

1345 1. Obligatory interpretation.]—

Whether the words “it shall be lawful” in an Act of Parliament are mandatory or not, is to be determined from the context & the general scope & objects of the enactment.—*Re* NICHOL-

Sect. 13.—Particular expressions: Sub-sects. 1, 2, 3 & 4.]

BELL, C.J.).—CASTELLI v. GROOM (1852), 18 Q. B. 490; 21 L. J. Q. B. 308; 19 L. T. O. S. 121; 16 Jur. 888; 118 E. R. 185.

Annotation:—Mentd. Brown v. Mollett (1855), 24 L. J. C. P. 213.

1346. ——It is urged that the Act only says it shall be lawful for the ct. to order it to be paid out. That is the usual courtesy of the legislature, dealing with the judicature, "It shall be lawful" means in substance that it shall not be lawful to do otherwise (JAMES, L.J.).—*Re NEATH & BRECON RY. CO.* (1874), 9 Ch. App. 263; *sub nom. Ex p. NEATH & BRECON RY. CO.*, 43 L. J. Ch. 277; 30 L. T. 3; 22 W. R. 242, L. J.J.

Annotations:—Refd. Sandgate L. B. of Health v. Pledge (1885), 33 W. R. 565. **Mentd.** *Re Mutlow's Estate* (1878), 10 Ch. D. 131.

Obligatory powers.]—See Sect. 14, sub-sect. 3, *post*.

1347. Permissive interpretation.]—The words "It shall be lawful for the said co. to make the said railway" [in 12 & 13 Vict. c. lx., s. 3] are permissive only, & not imperative; & it is a safe rule of construction to give to words used by the legislature their natural meaning, when absurdity or injustice does not follow from such a construction (JERVIS, C.J.).—*YORK & NORTH MIDLAND RY. CO. v. R.* (1853), 1 E. & B. 858; 7 Ry. & Can. Cas. 459; 1 C. L. R. 119; 22 L. J. Q. B. 225; 21 L. T. O. S. 116; 17 Jur. 690; 1 W. R. 358; 17 J. P. Jo. 309; 118 E. R. 657, Ex. Ch.; *reversg. S. C. sub nom. R. v. YORK & NORTH MIDLAND RY. CO.* (1852), 1 E. & B. 178.

Annotations:—Consd. *R. v. L. & Y. Ry.* (1852), 7 Ry. & Can. Cas. 266. **Apld.** *G. W. Ry. v. R.* (1853), 1 E. & B. 874. **Consd.** *Julius v. Oxford (Bp.)* (1880), 5 App. Cas. 214. **Apld.** *R. v. G. W. Ry.* (1893), 62 L. J. Q. B. 572; *R. v. Turner & Hodgson* (1897), 76 L. T. 556. **Consd.** *A. (G. v. Simpson)*, [1901] 2 Ch. 671. **Refd.** *Morgan v. Parry* (1856), 17 C. B. 334; *Scottish North Eastern Ry. v. Stewart* (1859), 33 L. T. O. S. 307; *Forbes v. Lee Conservancy Board* (1879), 48 L. J. Q. B. 402; *R. v. French* (1879), 4 Q. B. D. 507; *S. E. Ry. v. Railway Comrs. & Hastings Corpn.* (1881), 3 Ry. & Can. Tr. Cas. 464; *Darlaston L. B. v. L. & N. W. Ry.*, [1894] 2 Q. B. 694. **Mentd.** *R. v. Ambergate Ry.* (1853), 20 L. T. O. S. 216; *Astley v. M. S. & L. Ry.* (1858), 2 De G. & J. 453; *Roberts v. Roberts* (1862), 3 B. & S. 183; *Tamar Manure Navigation Co. of Proprietors v. Wagstaffe* (1863), 4 B. & S. 288; *Swansea Improvements & Tram. Co. v. Swansea & Mumbles Ry.* (1880), 3 Ry. & Can. Tr. Cas. 339.

1348. ——In the special Act [10 & 11 Vict. c. ccxxvi.] it was enacted that "it should be lawful for" the co. to make a line to R., the line in question, & if they shall think fit "a branch; & that the line to R. "shall commence at," etc. "& shall terminate at R." & the branch "if the same shall be constructed shall be made," etc.:—**Held:** it was not obligatory on the co. to make the line to R., the peculiar words of the special Act not taking the case out of the general rule.—*GREAT WESTERN RY. CO. v. R.* (1853), 1 E. & B. 874; 17 Jur. 695; 118 E. R. 663, Ex. Ch.

Annotations:—Refd. *Forbes v. Lee Conservancy Board* (1879), 48 L. J. Q. B. 402. **Mentd.** *Shackell v. West* (1859), 2 E. & B. 326; *Weld v. S. W. Ry.* (1862), 32 Beav. 340.

1349. — Whether court will limit discretion.]—**Semle:** where an Act of Parliament says, "it shall be lawful" to do anything, thereby leaving a discretion in the person by whom any order or adjudication is to be made, the ct. will not lay

down any rules whereby that discretion may be fettered.—*LAMONT v. BEIFFE* (1842), 6 J. P. 815.

1350. — Unless nature of Act requires imperative construction.]—In all cases where jurisdiction is given to the ct. by Act of Parliament by the words "it shall be lawful," those words, unless they are controlled by other parts of the Act, give the ct. a discretion in the exercise of that jurisdiction.—*Re BRIDGMAN* (1860), 1 Drew. & Sm. 164; 29 L. J. Ch. 844; 8 W. R. 598; 62 E. R. 340.

Annotation:—Mentd. *Re Adams' Trust* (1879), 12 Ch. D. 634.

1351. — Onus on person asserting imperative construction.]—(1) The words in a statute "it shall be lawful" of themselves merely make that legal & possible which there would, otherwise, be no right or authority to do. Their natural meaning is permissive & enabling only. But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to exercise it.

(2) Enabling words are always compulsory where they are words to effectuate a legal right.—*JULIUS v. OXFORD (Bp.)* (1880), 5 App. Cas. 214; 49 L. J. Q. B. 577; 42 L. T. 546; 44 J. P. 600; 28 W. R. 726, H. L.; *affg. S. C. sub nom. R. v. OXFORD (Bp.)* (1879), 4 Q. B. D. 525, C. A.

Annotations:—As to (1) **Consd.** *Loosemore v. Tiverton & North Devon Ry.* (1882), 22 Ch. D. 25. **Apld.** *Re Baker, Nichols v. Baker* (1890), 44 Ch. D. 262. **Consd.** *River Thames Conservators v. Port of London Sanitary Authority*, [1894] 1 Q. B. 647. **Apld.** *R. v. Turner*, [1897] 1 Q. B. 445. **Consd.** *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; *Mersey Docks & Harbour Board v. Hay*, [1923] A. C. 345; *Tate & Lyle v. L. & N. E. Ry. & L. M. & S. Ry.* (1926), 43 T. L. R. 49. **Refd.** *Fleming v. Manchester Corpn.* (1881), 44 L. T. 517; *R. v. Barclay* (1881), 8 Q. B. D. 306; *Dormont v. Furness Ry.* (1883), 11 Q. B. D. 496; *Leduc v. Ward* (1886), 54 L. T. 214; *Abergavenny v. Llandaff (Bp.)* (1888), 20 Q. B. D. 460; *R. v. St. Pancras Vestry* (1890), 62 L. T. 440; *Kirkheaton District L. B. v. Ainley*, [1892] 2 Q. B. 274; *Russell v. Russell*, [1895] P. 315; *Re White* (1898), 42 Sol. Jo. 198; *R. v. Locke*, [1910] 2 K. B. 201; *Golden Horseshoe Estates Co. v. R.*, [1911] A. C. 480; *R. v. Marshland, Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155; *Taylor v. Faires* (1920), 65 Sol. Jo. 116. As to (2) **Apld.** *R. v. Mitchell, Ex p. Livesey*, [1913] 1 K. B. 561. **Refd.** *Emmott v. Star Newspaper Co.* (1892), 9 T. L. R. 111. **Generally, Mentd.** *S. E. Ry. v. Ry. Comrs. & Hastings Corpn.* (1880), 50 L. J. Q. B. 201; *Re Serjeant v. Dale, Ex p. Dale, Re Perkins v. Enraght, Ex p. Enraght* (1881), 43 L. T. 769; *Central Wales & Carmarthen Junction Ry. v. L. & N. W. Ry. & G. W. Ry.* (1883), 4 Ry. & Can. Tr. Cas. 211; *R. v. Bloomsbury County Court Judge* (1886), 2 T. L. R. 665; *R. v. London (Bp.)* (1889), 24 Q. B. D. 213; *Pure Spirit Co. v. Fowler* (1890), 25 Q. B. D. 235; *Allcroft v. London (Bp.)*, *Lighton v. London (Bp.)*, [1891] A. C. 666; *Hakes v. Cox*, [1892] P. 110; *Re Knight*, [1898] 1 Ch. 257; *R. v. Metropolitan Police Comrs., Ex p. Holloway*, [1911] 2 K. B. 1131.

Discretionary powers.]—See Sect. 14, sub-sect. 4, *post*.

SUB-SECT. 2.—"SHALL."

1352. Imperative.]—*STAMPER v. MILLAR* (1744), 3 Atk. 212; 26 E. R. 923, L. O.

1353. ——*DAVIES v. EVANS*, No. 1368, *post*.

1354. Directory.]—There are many cases where "shall" has been held to be merely directory (LOPES, L.J.).—*Re THURLOW (LORD)*, *Ex p. OFFICIAL RECEIVER*, [1895] 1 Q. B. 724; 64 L. J. Q. B. 479; 72 L. T. 642; 59 J. P. 309;

SON, Ex p. NYBERG (1882), 8 V. L. R. (L.) 292.—AUS.

1345 ii. ——*LIESBECK MUNICIPALITY v. PARTIDGE* (1886), 4 S. C. 300.—S. AF.

1347 i. Permissive interpretation.]—The words "shall be lawful" always imply a discretionary power, except

when implied with other provisions excluding all discretion.—*ROGERSON v. MEYER & BERNING* (1837), 2 Men. 38.—S. AF.

PART IV. SECT. 13, SUB-SECT. 2.

1352 i. Imperative.]—Interpretation Act, 31 Vict. c. 1, s. 6 (2) (O.), enacting

that the word "shall" is to be construed as imperative, does not introduce any new rule, but is declaratory only of that established by judicial decision.—*Re LINCOLN ELECTION* (1878), 2 A. R. 324.—CAN.

1352 ii. ——*TUCKER v. KAITI ROAD DISTRICT (INHABITANTS)* (1901), 20 N. Z. L. R. 607.—N.Z.

43 W. R. 403 ; 11 T. L. R. 299 ; 39 Sol. Jo. 366 ;
 2 Mans. 158 ; 14 R. 320, O. A.

Annotations :—*Mentd.* *Re E. A. B.* (1901), 85 L. T. 773 ;
Re Utley (1901), 17 T. L. R. 349 ; *Re Ponsford, Ex p. The*
Bankrupt (1904), 91 L. T. 82.

Obligatory powers.—*See* Sect. 14, sub-sect. 3,
post.

SUB-SECT. 3.—“MAY.”

1355. Usually permissive.—“May” is discretionary ; & if the clause had been meant to be compulsory, the word “must” would have been used, which would have rendered the passage nonsense. “Deemed” is discretionary ; both those words imply necessarily an exercise of judgment (*LITTLEDALE, J.*).—*DE BEAUVOIR v. WELCH* (1827), 7 B. & C. 266 ; 1 Man. & Ry. K. B. 81 ; 1 Man. & Ry. M. C. 7 ; 6 L. J. O. S. K. B. 78 ; 108 E. R. 722.

1356. —.]—There is no doubt that in some cases the word “must” or the word “shall” may be substituted for the word “may,” but that can be done only for the purpose of giving effect to the intention of the legislature ; but in the absence of proof of such intention the word “may” must be taken to be used in its natural & therefore in a permissive & not in an obligatory sense (*per* ‘*UR.*’).—*DELHI & LONDON BANK v. ORCHARD* (1877), L. R. 4 Ind. App. 127, P. C.

1357. —.]—*DAVIES v. EVANS*, No. 1368, *post.*

1358. —.]—I think that great misconception is caused by saying that in some cases “may” means “must.” It never can mean “must” so long as the English language retains its meaning. . . . There is given by the word “may” a power as to the exercise of which there is a discretion (*COTTON, L. J.*).—*Re BAKER, NICHOLS v. BAKER* (1890), 44 Ch. D. 262 ; 59 L. J. Ch. 661 ; 62 L. T. 817 ; 38 W. R. 417 ; 6 T. L. R. 237, C. A.

Annotations :—*Appld.* *Re Johannesburg Land & Gold Trust Co.*, [1892] 1 Ch. 583 ; *R. v. Mitchell, Ex p. Livesey*, [1913] 1 K. B. 561. *Mentd.* *Re Briggs, Earp v. Briggs* (1891), 7 T. L. R. 491 ; *Re Evans, Ex p. Evans*, [1891] 1 Q. B. 143 ; *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652 ; *Re Whitaker, Whitaker v. Palmer* (1900), 83 L. T. 312 ; *Re Kenward, Hammond v. Eade* (1906), 94 L. T. 277.

1359. —.]—Originally, & apart from surrounding circumstances, the word “may” in a statute means “may” & nothing else. . . . But it is equally clear that there are cases where the word “may” has the effect of “must.” . . . Regard must be had to the surrounding circumstances to discover whether the word “may” is to have a permissive or a compulsory meaning (*LORD COLERIDGE, J.*).—*R. v. MITCHELL, Ex p. LIVESSEY*, [1913] 1 K. B. 561 ; 82 L. J. K. B. 153 ; 108 L. T. 76 ; 77 J. P. 148 ; 29 T. L. R. 157 ; 23 Cox, C. C. 273, D. C.

1360. —.]—Although “shall” used in other parts of Act.]—Looking at sect. 159, I find the word “may,” whilst in every other sect., the word “shall” is employed ; this seems to show that the powers given to the board are sometimes

discretionary, & sometimes imperative. In this case, I think the legislature meant to give a discretion to the board to make this order, for the inconvenience would have been very great if it had been imperative.—*R. v. WANDSWORTH DISTRICT BOARD OF WORKS* (1858), 6 W. R. 576.

1361. Imperative construction.—*STAMPER v. MILLAR* (1744), 3 Atk. 212 ; 26 E. R. 923, L. C.

1362. —.]—There are Acts of Parliament in which the word “may” has been construed as if it were imperative, but that cannot be so here (*GROVE, J.*).—*WIDNES ALKALI CO., LTD. v. SHEFFIELD & MIDLAND RY. CO.’S COMMITTEE* (1877), 37 L. T. 131, D. C.

1363. —.]—Act creating public duty.]—Where a statute directs a thing of a public nature, “may” is understood as “shall.”—*R. v. BARLOW* (1693), 2 Salk. 609 ; 91 E. R. 516.

Annotations :—*Consd.* *Jones v. Harrison* (1851), 2 L. M. & P. 257. *Expld.* *Julius v. Oxford* (1880), 5 App. Cas. 211. *Refd.* *R. v. Woolez & Bliss, Re Hart* (1860), 8 Cox, C. C. 337 ; *Mersey Docks & Harbour Board v. Hay*, [1923] A. C. 315.

1364. —.]—Act relating to exercise of judicial duties.]—There is no doubt that “may” in some instances, especially where the enactment relates to the exercise of judicial functions, has been construed to give a power to do the act, leaving no discretion as to the exercise of the power when the facts are such as to call for it (*BLACKBURN, J.*).—*BELL v. CRANE* (1873), L. R. 8 Q. B. 481 ; 42 L. J. M. C. 122 ; 29 L. T. 207 ; 37 J. P. 711 ; 21 W. R. 911.

Annotation :—*Refd.* *Davies v. Evans* (1882), 9 Q. B. D. 238.

1365. —.]—Inferred from surrounding circumstances.]—*R. v. MITCHELL, Ex p. LIVESSEY*, No. 1359, *ante.*

1366. —.]—Construction doubtful—Absurdity resulting from importing discretion—Modification to avoid ineffective construction.]—*MACDOUGALL v. PATERSON*, No. 1101, *post.*

SUB-SECT. 4.—“SHALL AND MAY.”

1367. Whether discretionary or imperative—Imperative.—“Shall & may” in Acts of Parliament, or in private constitutions, are to be construed imperatively.—*A.-G. v. LOCK* (1744), 3 Atk. 164 ; 26 E. R. 897, L. C.

Annotation :—*Mentd.* *St. Mary, Castlegate v. St. Mary, Bishopill the Elder* (1852), 16 J. P. 87.

1368. —.]—(1) When a statute declares that something “shall” be done, the language is considered imperative, & the thing must be done. (2) Where the word “may” is used, the language is as a general rule permissive. (3) No doubt in many cases, the phrase “shall & may be lawful,” has been construed as imperative by the cts. (*GROVE, J.*).—*DAVIES v. EVANS* (1882), 9 Q. B. D. 238 ; 51 L. J. M. C. 132 ; 46 L. T. 418 ; 46 J. P. 471 ; 30 W. R. 548, D. C.

Annotations :—*As to* (2) *Apprvd.* *Grocock v. Grocock*, [1920] 1 K. B. 1. *Consd.* *Colchester v. Peck*, [1926] 2 K. B. 366. *Generally, Refd.* *Re Woodall* (1888), 57 L. J. M. C. 71.

PART IV. SECT. 13, SUB-SECT. 3.

1355 i. Usually permissive.—*SMITH v. WATSON* (1906), 4 C. L. R. 802.—*AUS.*

1355 ii. —.]—*BERNARDIN v. NORTH DUFFERIN MUNICIPALITY* (Man.) (1891), 19 S. C. R. 581.—*CAN.*

1355 iii. —.]—*MATTON v. R.* (1897), 5 Exch. C. R. 401.—*CAN.*

1355 iv. —.]—In a statute providing that municipal corps. may pass bye-laws in relation to certain enumerated matters, the word “may” is permissive only.—*SPEAKMAN v. CALGARY CORPN.* (1908), 1 Alta. L. R. 454 ; 9 W. L. R. 264.—*CAN.*

1355 v. —.]—*Re COAL & PETRO- ACT, JOHNSTON v. MINISTER OF LANDS* (B. C.), [1919] 3 W. W. R. 81.—*CAN.*

1361 i. Imperative construction.—Where a statute says a thing may be done which is for the public benefit, it shall be construed that it must be done ; the word “may” is held to be imperative.—*Ex p. GILBERT* (1873), 14 N. B. R. (1 Pug.) 231.—*CAN.*

1361 ii. —.]—The word “may” in 35 Vict. c. 26, s. 24 (D), is obligatory, & not merely permissive.—*AITCHESON v. MANN* (1883), 9 P. R. 473.—*CAN.*

1361 iii. —.]—*Re DWYER & PORT*

ARTHUR CORPN. (1891), 21 O. R. 175.—*CAN.*

1361 iv. —.]—In a statute providing that the ct. may perform a judicial act for the benefit of a party under given circumstances, the word “may” is imperative.—*FENSON v. NEW WESTMINSTER CORPN.* (1897), 5 B. C. R. 624.—*CAN.*

1361 v. —.]—The word “may” involves a duty.—*R. v. SPERDAKES* (N. B.) (1911), 9 E. L. R. 433.—*CAN.*

1361 vi. —.]—*R. (LOCAL GOVERNMENT BOARD) v. LETTERKENNY UNION GUARDIANS*, [1916] 2 I. R. 18.—*IR.*

Sect. 13.—*Particular expressions: Sub-sects. 4 & 5.*
Sect. 14: *Sub-sects. 1 & 2.*

1369. ——— When clause for public benefit.] —“Shall & may” are only imperative [in an Act of Parliament], when the clause is for the public good or benefit.—*R. v. FLOCKWOLD INCLOSURE COMRS.* (1817), 2 Chit. 251.

1370. ——— Unless absurd consequence results.]—The words “shall & lawfully may” are in their ordinary import obligatory, & ought . . . according to the established rules, to have that construction, unless it would lead to some absurd or inconvenient consequence, or be at variance with the intent of the Legislature, to be collected from other parts of the Act (PARKE, B.). —*CHAPMAN v. MILVAIN* (1850), 5 Exch. 61; 1 L. M. & P. 209; 19 L. J. Ex. 228; 15 L. T. O. S. 7; 14 Jur. 251; 155 E. R. 27.

Annotations:—*Consd. R. v. Pritchard* (1861), Le. & Ca. 31. *Refd. Beardshaw v. Londesborough* (1851), 2 L. M. & P. 561; *Bell v. Fisk* (1852), 12 C. B. 493; *Cobham v. Holcombe* (1860), 8 C. B. N. S. 814. *Mentd. O’Flaherty v. M’Dowell* (1857), 6 H. L. Cas. 142; *Coe v. Wise* (1866), L. R. 1 Q. B. 711.

1371. ——— Unless at variance with intention of Legislature.]—*CHAPMAN v. MILVAIN*, No. 1370, *ante*.

1372. ——— Inference from subject-matter.] —Where the words “shall & may” are used in a statute though they *prima facie* import that the Act to be done is discretionary yet the nature of the subject-matter may require them to be construed as meaning something imperative.—*Re NEWPORT BRIDGE* (1859), 2 E. & E. 377; 29 L. J. M. C. 52; 24 J. P. 133; 6 Jur. N. S. 97; 121 E. R. 142; *sub nom. R. v. MONMOUTHSHIRE JJ.*, 1 L. T. 131; 8 W. R. 62.

Annotations:—*Apld. R. v. Oxford (Bp.)* (1879), 4 Q. B. D. 525. *Refd. Forbes v. Lee Conservancy Board* (1879), 4 Ex. D. 116; *Jullus v. Oxford (Bp.)* (1880), 5 App. Cas. 211.

1373. ——— *Primâ facie* discretionary.] —*Re NEWPORT BRIDGE*, No. 1372, *ante*.

SUB-SECT. 5.—OTHER CASES.

1374. “Deemed” — Discretionary.] — *DE BEAUVOIR v. WELCH*, No. 1355, *ante*.

1375. “Are to be done” — Whether directory or imperative—Necessity for inquiry in each case.] — *R. v. LONDON COUNTY JJ. & LONDON COUNTY COUNCIL*, No. 1282, *ante*.

1376. “It is declared” — Correct for introduction of new rules of law.] — *HARDING v. QUEENSLAND STAMPS COMRS.*, No. 1318, *ante*.

1377. “Preference.”] — *MARRON v. COOTEHILL NO. 2 RURAL COUNCIL*, No. 1405, *post*.

PART IV. SECT. 13, SUB-SECT. 5.

f. “Forthwith.”] — *ADAMS v. ROGERS*, [1907] V. L. R. 245.—AUS.

g. Statement required by statute to be “signed by the applicant or his attorney” — Signature of applicant’s name by his father in his presence whether sufficient.] — *ELLIOTT v. HALL*, [1909] S. R. Q. 340.—AUS.

h. “By any other means whatsoever.”] — *STEPHENS v. JAYASINGA* (1913), 15 W. A. L. R. 55.—AUS.

k. “Herein contained.”] — The words “herein contained,” in 16 Vict. c. 183, s. 11, must be applied only to the clause in which they occur, & not in the whole Act—that being in this case the reasonable, & in general the more obvious, though not inevitable, construction — *McGILL v. PETERBOROUGH & VICTORIA MUNICIPAL COUNCIL* (1854), 12 U. C. R. 44.—CAN.

l. “Year.”] — *Re ASPHODEL TOWN-*

SHIP SCHOOL SECTION NO. 5, TRUSTEES & HUMPHRIES (1894), 24 O. R. 682.—CAN.

m. “As soon as possible.”] — The words “as soon as possible” mean within a reasonable time.—*THE BEATRICE* (1895), 4 B. C. R. 347.—CAN.

n. “Income.”] — *A.-G. OF BRITISH COLUMBIA v. OSTRUM (B. C.)*, [1904] A. C. 144.—CAN.

o. “A caveat.”] — The words “a caveat” in Real Property Act, R. S. M., 1902, c. 148, s. 127, in view of Interpretation Act, R. S. M., 1902, c. 89, s. 8 (m), cannot be construed to mean “only one caveat.”—*ALLOWAY v. ST. ANDREWS RURAL MUNICIPALITY* (1905), 15 Man. L. R. 188.—CAN.

p. “Statute.”] — Such reference to a “statute” in a provincial Act means, unless there is something in the context to the contrary, a statute of the Legislature which is speaking. —

SECT. 14.—STATUTORY POWERS AND DUTIES.

SUB-SECT. 1.—IN GENERAL.

See, generally, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 15 *et seq.*

Particular instances.] — See TITLES *passim*.

1378. Section giving powers of one party to another—New powers given to first party in later section—Whether new powers acquired by other party.] — Where one sect. of a statute gives to A. the power which B. has, & a subsequent sect. gives B. new powers, A. does not acquire the new powers given to B.—*EDWARDS v. HODGES* (1855), 15 C. B. 477; 3 C. L. R. 472; 24 L. J. M. C. 81; 24 L. T. O. S. 237; 1 Jur. N. S. 91; 139 E. R. 510.

1379. Power conditional on performance of act—Subsequent impossibility by act of law—Whether power exercisable without performance of act.] — *SHREWSBURY (EARL) v. SCOTT*, No. 50, *ante*.

1380. Special affirmative powers—Not required because general power given—Whether negative imported.] — When there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative (JESSEL, M.R.).—*Ex p. STEPHENS* (1876), 3 Ch. D. 659; 46 L. J. Ch. 46.

Annotations:—*Mentd. Re Trade-Mk. “Alpine”* (1885), 29 Ch. D. 877; *Re Van Duzer’s Trade-Mk., Re Leaf’s Trade-Mk.* (1887), 31 Ch. D. 623; *Pirle v. Goodall*, [1892] 1 Ch. 35; *Re Wright, Crossley’s Appln. & Royal Baking Powder Co. of New York*, [1900] 2 Ch. 218.

1381. Implied duties—Duty to use reasonable care.] — It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care & skill could obviate. The duty may notwithstanding be absolute; but, if so, it ought to be imposed in the clearest possible terms. The intention of the Legislature is to be gathered from the language used & the subject-matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due & reasonable care in the performance of the duty imposed (BRETT, J.).—*HAMMOND v. ST. PANCRAZ VESTRY* (1874), L. R. 9 C. P. 316; 43 L. J. C. P. 157; 30 L. T. 296; 38 J. P. 456; 22 W. R. 826.

Annotations:—*Consd. Fleming v. Manchester Corpn.*, (1881), 44 L. T. 517; *Bateman v. Poplar District Board of Works (No. 2)* (1887), 37 Ch. D. 272. *Apld. Baron v. Portslade-by-Sea U. C.* (1899), 68 L. J. Q. B. 919. *Consd. Wilson’s Music & General Printing Co. v. Finsbury B. C.*, [1908] 1 K. B. 563. *Refd. Humphreys v. Cousins* (1877), 46 L. J. Q. B. 438; *Stretton’s Derby Brewery Co. v. Derby Corpn.*, [1891] 1 Ch. 431; *Price v. South Metropolitan Gas Co.* (1895), 65 L. J. Q. B. 126; *Queenborough Corpn. v. Smeed, Dean* (1904), 68 J. P. 214. *Mentd. Bateman v. Poplar District Board of Works* (1886), 33 Ch. D. 360.

R. & ALBERTA PROVINCIAL TREASURER v. CANADIAN NORTHERN RY. CO. & CANADIAN NATIONAL RY. CO., [1921] 1 W. W. R. 1178; 16 Alta. L. R. 220; 58 D. L. R. 621.—CAN.

q. “District.”] — *ARCHIBALD v. ROYER*, [1924] 1 D. L. R. 897; 57 N. S. R. 12.—CAN.

r. “Allow.”] — The word “allow” implies a sanction, direct or indirect.—*R. v. FARR*, [1914] C. P. D. 36.—S. AF.

PART IV. SECT. 14, SUB-SECT. 1.

t. Act *prima facie* unlawful.] — An Act which is *prima facie* unlawful cannot be justified as an act done under statutory authority unless the act is expressly authorised by the statute, or is the necessary result of the doing of that which is so authorised.—*FULLARTON v. NORTH MELBOURNE ELECTRIC TRAMWAYS LIGHTING CO.*, [1916] V. L. R. 231; 21 C. L. R. 181.—AUS.

1382. — Provision of requisite accommodation—In respect of which power given.]—(1) When an Act authorised the exaction of a toll, the accommodation for which the toll is authorised must be provided.

(2) The Earl of A. . . . applied to Parliament for an Act which, in the first instance, assumed the shape of a private bill, but which must be judicially noticed as a public Act, & must have all the operation of a public Act (LORD CAIRNS, C.)

(3) It is recognised by an Act of Parliament which was procured by a private person, & from its nature must be taken to imply a contract, made effective by the sanction of the Legislature, between the nobleman who obtained it on his own representation . . . & that of the persons whom it directly affects (LORD O'HAGAN).—*AITON v. STEPHEN* (1876), 1 App. Cas. 456, H. L.

Annotation:—As to (1) Distd. South Staffordshire Mines Drainage Comrs. v. Elwell (1927), 97 L. J. K. B. 13.

1383. Powers ancillary to exercise of powers—Whether all ancillary powers implied.]—*Re DUDLEY CORPN.*, No. 941, ante.

1384. — — —.]—In every case it is for a corpn. . . . to show that it has affirmatively an authority to do particular acts; but . . . in applying that principle, the rule is not to be applied too narrowly, & the corpn. is entitled to do not only that which is expressly authorised, but that which is reasonably incidental to or consequential upon that which is in terms authorised (SARGANT, J.).—*A.-G. v. FULHAM CORPN.*, [1921] 1 Ch. 440; 90 L. J. Ch. 281; 125 L. T. 14; 85 J. P. 213; 37 T. L. R. 156; 19 L. G. R. 411

1385. — — —.]—A statutory power to do certain things is not to be read as not extending to other things ancillary thereto, such as in an electric system the erection of poles whereon to hang the wires.—*WINNIPEG ELECTRIC RY. CO. v. WINNIPEG CITY*, [1912] A. C. 355; 81 L. J. P. C. 193; 106 L. T. 388, P. C.

1386. — Applications for extension of powers—At ratepayer's expense.]—If there were an unlimited power for bodies of this kind to apply wherever they thought fit to Parliament at the expense of their constituents, one can easily see there would be a great deal of that kind of professional business got up which would be done at the expense of the ratepayers; & it is much better, as it seems to me, that persons who do seek to obtain Parliamentary powers should do it at the risk of satisfying Parliament it is right (JAMES, V.-C.).—*A.-G. v. WEST HARTLEPOOL IMPROVEMENT COMRS.* (1870), L. R. 10 Eq. 152; 39 L. J. Ch. 624; 22 L. T. 510; 18 W. R. 685.

Annotations:—Extd. A.-G. v. West Riding of Yorkshire Rivers Board (1905), 69 J. P. 177. *Refd. Hood v. N. E. Ry.* (1870), 19 W. R. 266; *A.-G. v. Merthyr Tydfil Union*, [1900] 1 Ch. 516.

1387. Powers under two statutes—Under which statute power exercised.]—Where a public body has powers under two Acts, it must be taken to have proceeded under that which gave it the most advantages.—*PREHN v. BAILEY, THE ETTRICK* (1881), 6 P. D. 127; 45 L. T. 399; 4 Asp. M. L. C. 465, C. A.

Annotations:—Apld. Fulham Vestry v. Minter, [1901] 1 K. B. 501. *Mentd. Greenshields, Cowie v. Stephens*, [1908] 1 K. B. 51.

a. *Effect of statutory ratification of* 10 Geo. 4, c. 11, did not expressly authorise the Cobourg Harbour Co. to build a wharf in front of the street in question, the recognition of the right in subsequent statutes:—*Held: sufficient.*—*STANDLY v. PERRY* (1877), 2 A. R. 195; *affd.* (1879), 3 S. O. R. 356.—CAN.

PART IV. SECT. 14, SUB-SECT. 2.

b. *General rule.]—*It is a matter of construction of a legislative Act where it merely confers a permissive right (which is optionally exercisable), on a local body or enjoins the performance of an obligatory duty.—*SURATEE BAZAAR CO., LTD. v. RANGOON MUNICIPAL CORPN.* (1927),

1388. — — —.]—*Semble: where a public body may have acted under two statutes, one of which increases its liability, & there is no evidence to show under which statute it did act, the presumption is that it acted in pursuance of that statute under which its liability was not increased.*

—*BURTON v. SALFORD CORPN.* (1883), 11 Q. B. D. 286; 52 L. J. Q. B. 668; 49 L. T. 43; 47 J. P. 614; 31 W. R. 815.

Annotation:—Apprvd. Graham v. Newcastle-upon-Tyne Corpn., [1893] 1 Q. B. 643.

1389. — — —.]—If a public body is enabled to exercise public powers under either of two statutes, it is to be deemed, if there is any difference in respect of the two, to take it under the statute under which it takes most beneficially (PHILLIMORE, J.).—*FULHAM VESTRY v. MINTER*, [1901] 1 K. B. 501; 70 L. J. K. B. 348; 84 L. T. 49; 65 J. P. 180; 49 W. R. 415; 17 T. L. R. 192, D. C.

Annotations:—Refd. L. C. C. v. Wandsworth B. C., [1903] 1 K. B. 797; *Herne Bay U. C. v. Payne* (1907), 76 L. J. K. B. 685.

Powers confined for public benefit—Compulsory purchase.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 103, 120, Nos. 4, 130, 131.

1390. Limitation on contractual rights conferred by statute—Necessity for express words.]—Where by statute contractual rights are conferred, clear words are required in the statute in order to place a limitation upon those contractual rights.—*MORRIS & BASTERT, LTD. v. LOUGHBOROUGH CORPN.*, [1908] 1 K. B. 205; 77 L. J. K. B. 91; 98 L. T. 269; 71 J. P. 521; 51 Sol. Jo. 824; 6 L. G. R. 55, C. A.

Annotation:—Consd. Bourne & Hollingsworth v. Marylebone B. C. (1908), 72 J. P. 129.

1391. Variation of statutory duties by common law principles.]—Where a statute authorises the doing of a particular thing, & provides what are to be the rights & obligations flowing from such action, it is to be considered as a code complete in itself, & no common law principle can be invoked to vary or add to the obligations imposed by the statute.—*SHARPNESS NEW DOCKS & GLOUCESTER & BIRMINGHAM NAVIGATION CO. v. A.-G.*, [1915] A. C. 654; 84 L. J. K. B. 907; 112 L. T. 826; 79 J. P. 305; 31 T. L. R. 254; 59 Sol. Jo. 381; 13 L. G. R. 563, H. L.; *revsg. S. C. sub nom. A.-G. v. SHARPNESS NEW DOCKS & GLOUCESTER & BIRMINGHAM NAVIGATION CO.*, [1914] 3 K. B. 1, C. A.

Annotations:—Consd. A.-G. v. G. N. Ry., [1916] 2 A. C. 356; *A.-G. for Ireland v. Lagan Navigation Co.*, [1924] A. C. 877; *Manchester Corpn. v. Audenshaw U. C. & Denton U. C.*, [1928] 1 Ch. 763. *Refd. Worsborough U. D. C. v. Barnsley British Co-op. Soc.* (1914), 111 L. T. 429; *Butt v. Weston-Super-Mare U. C.*, [1922] 1 A. C. 310; *Welden v. Smith*, [1924] A. C. 484.

SUB-SECT. 2.—CONSTRUCTION.

Sec, generally, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 19–22, Nos. 100–121.

1392. Construed strictly.]—Words creating a power must be strictly interpreted (TINDAL, C.J.).—*EDWARDS v. EXETER (BP.)* (1839), 5 Bing. N. C. 652; 7 Scott. 652; 9 L. J. C. P. 87; 3 Jur. 725; 132 E. R. 1251.

I. L. R. 5 Ran. 722.—IND.

1392 i. Construed strictly.]—*ESQUIMALT & NANAIMO RY. CO. v. WILSON & MCKENZIE, ESQUIMALT & NANAIMO RY. CO. v. DUNLOP (B. C.)* (1920), 54 D. L. R. 584.—CAN.

1392 ii. —.]—*MONCREIFFE v. PERTH HARBOUR COMRS.* (1846), 5 Bell, Sc. App. 333; 18 Sc. Jur. 631.—SCOT.

Sect. 14.—Statutory powers and duties : Sub-sects. 2, 3, 4 & 5, A.]

1393. —.]—A statutory power must be strictly construed.—*Re SUITORS' FEE FUND, Ex p. ADDITIONAL CLERKS IN TAXING MASTERS' OFFICE* (1866), 14 L. T. 819, L. C.

1394. Power for public benefit—Liberal construction.]—An Act empowering a co. to contract for purposes of public advantage ought not to receive a narrow construction.—*DOVER GAS CO. v. DOVER CORPN* (1855), 7 De G. M. & G. 545; 25 L. T. O. S. 277; 19 J. P. 515; 1 Jur. N. S. 812; 44 E. R. 212, L. JJ.

1395. — — — **How intention of legislature measured.]**—In the construction of powers conferred by Act of Parliament upon public bodies, acting for the public benefit alone, the intention of the legislature is not to be measured by the more guarded powers given to public cos. established for trading purposes.—*NORTH LONDON RY. CO. v. METROPOLITAN BOARD OF WORKS, WINTER v. SAME* (1859), John. 405; 28 L. J. Ch. 909; 33 L. T. O. S. 382; 23 J. P. 515; 5 Jur. N. S. 1121; 7 W. R. 640; 70 E. R. 479.

*Annotations:—***Refd.** *Hughes v. Metropolitan Board of Works* (1861), 4 L. T. 318. **Mentd.** *Macey v. Metropolitan Board of Works* (1864), 33 L. J. Ch. 377; *Temple Pier Co. v. Metropolitan Board of Works* (1865), 12 L. T. 369; *Metropolitan Board of Works v. Met. Ry.* (1869), L. R. 4 C. P. 192; *Re Dudley Corpn.* (1881), 8 Q. B. D. 86; *Lewis v. Weston-Super-Mare L. B.* (1888), 40 Ch. D. 55; *Jones v. Conway & Colwyn Bay Joint Water Supply Board*, [1893] 2 Ch. 603.

1396. Power to alter provisions of Act—Strict interpretation.]—When an Act of Parliament confers a power upon a separate body to make alterations in that which the legislature has prescribed, we should look at the Act with a certain degree of care, almost with strictness, in order to ascertain the true sense of the language used; & that we must take care not so to construe it as to enable that body to make alterations which were never intended to be within their province (*POLLOCK, C.B.*).—*CITY OF DUBLIN STEAM PACKET CO. v. THOMPSON* (1866), L. R. 1 C. P. 355; Har. & Ruth. 369; 35 L. J. C. P. 198; 15 L. T. 112; 12 Jur. N. S. 726; 14 W. R. 376; 2 Mar. L. C. 412, Ex. Ch.

1397. Power affecting private rights—Protection given by saving clause—Saving clause liberally construed.]—That a public body . . . should be empowered by Parliament to sell, for money, to private persons the right to execute, for their own benefit, works injuriously affecting the land of an adjoining proprietor without compensating him for that injury . . . is inconsistent with the ordinary principles & with the general course of public legislation on such subjects. When, therefore, we find in the Act which is alleged to confer such powers a saving clause in . . . large & untechnical terms, by which . . . this class of rights may be sufficiently protected, I think we ought not to hesitate to construe it so as to afford that protection (*LORD SELBORNE*).—*LYON v. FISHMONGERS' CO.* (1876), 1 App. Cas. 662; 46 L. J. Ch. 68; 35 L. T. 569; 25 W. R. 165, H. L.

*Annotations:—***Consd.** *Goolden v. Thames River Conservators* (1887), 4 T. L. R. 187. **Refd.** *Bell v. Quebec Corpn.* (1879), 5 App. Cas. 84; *Cale. Ry. v. Walker's Trustees*

1392 iii. —.]—*ABERDEEN COMMERCIAL CO. & ABERDEEN LIME CO. v. GREAT NORTH OF SCOTLAND RY. CO.* (1878), 3 Ry. & Can. Tr. Cas. 205.—*SCOT.*

1392 iv. —.]—Statutory powers granted to a municipality so far as they are made use of for the purpose of levying monetary charges must be strictly construed.—*GERMISTON MUNI-*

CIPALITY v. RAND COLD STORAGE CO., LTD., [1913] T. P. D. 530.—*S. AF.*

c. Distinction between affirmative commands & negative prohibitions.]—*RAMESHUR SINGH v. SHEODIN SINGH* (1889), 1 L. R. 12 All. 510.—*IND.*

PART IV. SECT. 14, SUB-SECT. 3.

1398 i. When power obligatory—Powers

(1882), 7 App. Cas. 259; *Horner v. Whitechapel Board of Works* (1885), 55 L. J. Ch. 289; *Lawes v. Turner & Frere* (1892), 8 T. L. R. 584; *River Thames Conservators v. Smeed, Dean*, [1897] 2 Q. B. 334; *Boyce v. Paddington B. C.*, [1903] 1 Ch. 109. **Mentd.** *Burgess v. Northwick L. B.* (1880), 6 Q. B. D. 264; *Fritz v. Hobson* (1880), 14 Ch. D. 542; *Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449; *A.-G. of Straits Settlements v. Wemyss*, (1888), 13 App. Cas. 192; *North Shore Ry. v. Pion* (1889), 14 App. Cas. 612; *Ramuz v. Southend L. B.* (1892), 67 L. T. 169; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Ellis v. Bedford*, [1899] 1 Ch. 494; *Chaplin v. Westminster Corpn.*, [1901] 2 Ch. 329; *Mellor v. Walmesley*, [1905] 2 Ch. 164; *Wednesbury Corpn. v. Lodge Holes Colliery Co.* (1906), 5 L. G. R. 43; *Jones v. Llanrwst U. C.*, [1911] 1 Ch. 393; *A.-G. of Southern Nigeria v. Holt* (Liverpool), *A.-G. of Southern Nigeria v. Maciver*, [1915] A. C. 599; *Montreal City v. Montreal Harbour Comrs.*, *Tetreault v. Montreal Harbour Comrs.*, [1926] A. C. 299.

SUB-SECT. 3.—OBLIGATORY POWERS.

Sec, also, Sects. 10, 11, 13, ante.

1398. When power obligatory—Powers for public purpose.]—Where an Act of Parliament gives to certain persons a special limited authority, & requires them to exercise it for a public purpose, the ct. in its discretion will order them to exercise it, although the time directed by the Act for its exercise may have passed.—*R. v. NORWICH CORPN.* (1830), 1 B. & Ad. 310; 8 L. J. O. S. K. B. 359; 109 E. R. 802.

*Annotations:—***Refd.** *Bowdon v. Hall* (1843), 4 Q. B. 840; *R. v. St. Mary, Newington Grdns.* (1851), 17 L. T. O. S. 163; *Rochester Corpn. v. R.* (1858), E. B. & E. 1024; *R. v. Hanley Revising Barrister*, *R. v. Stoke-on-Trent Town Clerk*, [1912] 3 K. B. 518.

9139. — — —.]—There is abundant authority to show that where a statute gives an authority to do an act which the public interest demands, especially where judicial functions are created, words which would seem to give merely an option should be so construed as to confer a duty; but in the cases illustrating this principle, the rule has been acted upon only where the general object & intention of the Act are best supported by so holding (*POLLOCK, B.*).—*FORBES v. LEE CONSERVANCY BOARD* (1879), 4 Ex. D. 116; 48 L. J. Q. B. 402; 27 W. R. 688.

*Annotations:—***Refd.** *Boynton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213. **Mentd.** *The Burlington* 1895), 72 L. T. 602.

1400. — — — **Where co-relative duties implied.]**—*R. v. GREAT WESTERN RY. CO.*, No. 1325, *ante.*

1401. — — — **Act to be done in certain event—Obligatory on happening of event—& application for exercise of power.]**—(1) Where a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised, to exercise the authority when the case arises, & its exercise is duly applied for by a party interested, & having the right to make the application.

(2) If it be doubtful in which sense the word "may" is used, we should be justified, by the rule of construction to which we have referred, in considering whether absurdity or repugnance would not follow from holding that a discretion was given, & might accordingly modify the word so as to avoid that consequence (*JERVIS, C.J.*).—*MACDOUGALL v. PATERSON* (1851), 11 C. B. 755; 6 Exch. 337, n.; 2 L. M. & P. 681; Cox, M. & H.

for public purpose.]—When a public body or a co. is established by statutes or is incorporated for special purposes only & is altogether the creature of statute law the prescriptions for its acts & contracts are imperative & essential in their validity.—*MATHERA MOHAN SALIA v. KUMARSALIA & CHITTAGONG DISTRICT BOARD* (1915), 1 L. R. 43 Cal. 790.—*IND.*

544; 21 L. J. C. P. 27; 18 L. T. O. S. 139; 15 J. P. 803; 15 Jur. 1108; 138 E. R. 672.

Annotations:—As to (1) Consd. Re Newport Bridge (1859), 2 E. & E. 377; Julius v. Oxford (Bp.) (1880), 5 App. Cas. 214. Refd. Crako v. Powell (1852), 1 E. & B. 210; York & North Midland Ry. v. R. (1853), 22 L. J. Q. B. 225; Morisse v. Royal British Bank (1856), 1 O. B. N. S. 67; R. v. Wollez & Bliss, Re Hart (1860), 8 Cox, C. C. 337; Taylor v. Fairies (1920), 65 Sol. Jo. 116. Generally, Refd. R. v. Mitchell, Ex p. Livesey, [1913] 1 K. B. 561. Mentd. Meredith v. Gittins (1852), 18 Q. B. 257; Collins v. Johnson (1855), 16 O. B. 588; Bailey & Pegg v. Brvant (1858), 28 L. J. Q. B. 86; Butler v. Ablewhite (1859), 6 C. B. N. S. 740; Corbett v. General Steam Navigation Co. (1859), 28 L. J. Ex. 214; Dunston v. Paterson (1859), 28 L. J. C. P. 97; Pigrim v. Knatchbull (1865), 18 C. B. N. S. 798; Alexander v. Jones (1866), L. R. 1 Exch. 133; Emdon v. Carte (1881), 19 Ch. D. 311.

—]—Compare Nos. 1330, 1331, ante.

SUB-SECT. 4.—DISCRETIONARY POWERS.

1402. Exercise of discretion—Whether court will interfere—Bonâ fide exercise—Power to take land.] If a railway co. are acting *malâ fide*, & trying under their Act of Parliament to get possession of land which they mean to apply to different purposes, a ct. of equity may be justified in interfering by an injunction to prevent them; but if they act *bonâ fide*, they must be considered the proper judges of the portion of land which is required, for their legitimate purposes, & whether they will or will not take the lands. This is the construction to be put on all legislative powers, whether the language be that the co. may take so much of the lands as are necessary or so much as is required or is expedient, or, as in this case, simply, that they may take the lands for the purposes of their undertaking.—*STOCKTON & DARLINGTON RY. CO. v. BROWN* (1860), 9 H. L. Cas. 246; 3 L. T. 131; 24 J. P. 803; 6 Jur. N. S. 1168; 8 W. R. 708; 11 E. R. 724, II. L.

Annotations:—Consd. Flower v. L. B. & S. C. Ry. (1865), 1 Drew. & Sm. 330; James v. Lovel (1887), 56 L. T. 739. Extd. Lewis v. Weston-Super-Mare L. B. (1888), 40 Ch. D. 55. Apld. Stroud v. Wandsworth District Board of Works (1894), 70 L. T. 190. Expld. & Distd. L. & N. W. Ry. v. Westminster Corp., [1904] 1 Ch. 759 (See [1905] A. C. 426). Refd. Simpson v. South Staffordshire Waterworks Co. (1865), 4 De G. J. & Sm. 679; City of Glasgow Union Ry. v. Cale. Ry. (1871), L. R. 2 Sc. & Div. 160; Temple v. Flower (1872), 41 L. J. Ch. 604; Errington v. Met. Dist. Ry. (1882), 19 Ch. D. 559; Wilkinson v. Hull, etc., Ry. & Dock Co. (1882), 20 Ch. D. 323; Roberts v. Hopwood, [1925] A. C. 578; Short v. Poole Corp., [1926] Ch. 66. Mentd. Kemp v. S. E. Ry. (1872), 7 Ch. App. 364; Hooper v. G. W. Ry. (1877), 2 Q. B. D. 339; Betts v. G. E. Ry. (1879), 28 W. R. 50; L. & S. W. Ry. v. Goma. (1882), 20 Ch. D. 562; L. B. & S. C. Ry. v. Truman (1885), 11 App. Cas. 45; C. & S. L. Ry. v. L. C. C. (1891), 65 L. T. 362; Goldberg v. Liverpool Corp., [1900], 82 L. T. 362; Conron v. L. C. C., [1922] 2 Ch. 283.

1403. — By the court—Unfettered discretion.]—When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or Rules did not fetter the discretion of the judges why should the ct. do so? (*BOWEN, L.J.*).—*GARDNER v. JAY* (1885), 29 Ch. D. 50; 54 L. J. Ch. 762; 52 L. T. 395; 33 W. R. 470, C. A.

PART IV. SECT. 14, SUB-SECT. 5.—A.

1406 i. Power to be followed strictly.]—Considering the extensive powers possessed by municipal councils, & the danger there is of these being used unwisely, if not to serve the interests of private individuals, they should be held to a strict compliance with the statutory requirements when proceeding to exercise these powers.—*WHITE v. LOUISE RURAL MUNICIPALITY* (1891), 7 Man. L. R. 231.—*CAN.*

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1406 ii. —.]—In order that a contract may be binding on the Secretary of State for India in Council it must be made in strict conformity with the provisions laid down in the statute governing the matter. If it is not so made, it is not valid against him.—*KESORAM PODDAR & CO. v. SECRETARY OF STATE FOR INDIA* (1926), 1 L. R. 54 Cal. 969.—*IND.*

1406 iii. —.]—Persons who acquire duties & privileges under an Act of

1404. — Whether judicial or ministerial act.]—If defts. intended to act under the statute, & erroneously acted under a wrong sect., they would not be liable in the absence of malice if the act was not merely ministerial (*LORD ESHER, M.R.*).

When a public duty is imposed on persons which they undertake to perform, & the performance of that duty depends upon the exercise of discretion, the carrying out of that duty cannot be said to be a merely ministerial act, but must be considered for the purposes of protection as a judicial act (*LORD ESHER, M.R.*).—*PARTRIDGE v. GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION OF UNITED KINGDOM* (1890), 25 Q. B. D. 90; 59 L. J. Q. B. 475; 62 L. T. 787; 55 J. P. 4; 38 W. R. 729; 6 T. L. R. 313, C. A.

Annotation:—Refd. Everett v. Griffiths, [1921] 1 A. C. 631.

1405. Words importing discretion—"Preference."]—It must be presumed in the case of public bodies . . . that they have acted *bonâ fide* till the contrary be proved (*LORD ATKINSON*).

In connection with the performance of an administrative act the word "preference" as applied to the doing of the act, normally imparts a choice to do or not to do it which resides in the administrator, albeit subject to limitations (*LORD SUMNER*).—*MARRON v. COOTEHILL NO. 2 RURAL COUNCIL*, [1915] A. C. 792; 81 L. J. P. C. 125; 79 J. P. 401; 13 L. G. R. 901, II. L.

Permissive statutes.]—See Sect. 11, ante.

SUB-SECT. 5.—EXERCISE OF POWERS.

A. In General.

See PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 15 *et seq.*

1406. Power to be followed strictly.]—Entrusted as they are by this Act with very extensive powers, it is their [defts.] bounden duty to keep strictly within those powers, & not to be guided by any fancied view of the spirit of the Act which confers them (*TURNER, L.J.*).—*TINKLER v. WANDSWORTH DISTRICT BOARD OF WORKS* (1858), 2 De G. & J. 261; 27 L. J. Ch. 342; 31 L. T. O. S. 27; 22 J. P. 223; 4 Jur. N. S. 293; 6 W. R. 390, L. JJ.

Annotations:—Apld. Ashworth v. Hedden Bridge L. B. (1877), 47 L. J. Ch. 195; Wood v. Widnes Corp., [1897] 2 Q. B. 357. Refd. St. Luke's, Middlesex Vestry v. Lewis (1862), 1 B. & S. 865; Biddulph v. St. George, Hanover Square Vestry (1863), L. T. 44; Hargreaves v. Taylor (1863), 3 B. & S. 613; Vernon v. St. James, Westminster Vestry (1880), 16 Ch. D. 449; St. James & St. John Clerkenwell Vestry v. Feary (1890), 24 Q. B. D. 703; Robinson v. Sunderland Corp., (1898), 18 L. T. 194; Nicholl v. Epping U. C., [1899] 1 Ch. 814; Frost v. Fulham Vestry (1900), 82 L. T. 720; Carlton Main Colliery Co. v. Hemsworth R. D. C., [1922] 1 Ch. 521.

1407. —.]—The scheme to be made binding by this Act of Parliament can only be made so binding if the provisions in this Act of Parliament are closely & exactly followed (*KAY, L.J.*).—*RE NEATH & BRECON RY. CO.*, [1892] 1 Ch. 319; 66 L. T. 40; 40 W. R. 289, C. A.

1408. —.]—Where you are dealing with a statutory body like this you have to see what the powers are which are conferred by the statute & then to come to the conclusion whether the thing

Parliament should obey all its provisions.—*BRADY v. SOUTH AFRICAN TURF CLUB* (1906), C. T. R. 237.—*S. AF.*

1406 iv. —.]—A corp., created for a particular purpose with statutory powers is not entitled to exercise powers not expressly or impliedly authorised.—*DE VILLIERS v. PRETORIA MUNICIPALITY*, [1912] T. P. D. 626.—*S. AF.*

Sect. 14.—Statutory powers and duties: Sub-sect. 5, A. & B.]

done is fairly within their powers, either in actual terms or by reasonable implication therefrom, or whether it is outside those powers. If it is outside them, it is of course *ultra vires* & ought to be restrained (COLLINS, M.R.).—A.-G. v. PONTYPRIDD URBAN COUNCIL, [1906] 2 Ch. 257; 75 L. J. Ch. 578; 95 L. T. 224; 70 J. P. 394; 4 L. G. R. 791, C. A.

Annotations:—*Mentd.* Lambeth Corp. v. South London Electric Supply Corp. (1907), 96 L. T. 440; *Stourcliffe Estate Co. v. Bournemouth Corp.* (1910), 79 L. J. Ch. 455; A.-G. v. N. E. Ry., [1915] 1 Ch. 905.

1409. Power not to be exceeded.]—(1) Where there is a Parliamentary power to sell in fee, but with a restriction of the rights of ownership in the purchaser, & a conveyance to an owner in fee is made under such power, sound construction requires that the restriction imposed upon the purchaser, who becomes the owner in fee, shall not be extended beyond its necessary limits.

(2) Although the ct. has power to restrain parties from using a building which has been erected in a form that is in violation of the terms of a contract, or of an Act of Parliament, yet a small excess in the height of a building beyond that to which it might lawfully have been raised, where no irreparable injury arises from such excess in height would not be a case in which the ct. would interfere by interlocutory injunction to restrain the use of the building after it had been erected.—*DOVER HARBOUR (WARDEN, ETC.) v. SOUTH EASTERN RY. CO.* (1852), 9 Hare, 489; 21 L. J. Ch. 886; 68 E. R. 603.

1410. —.]—LONDON ASSOCN. OF SHIPOWNERS & BROKERS v. LONDON & INDIA DOCKS JOINT COMMITTEE, [1892] 3 Ch. 212; 62 L. J. Ch. 291; 67 L. T. 238; 8 T. L. R. 717; 7 Asp. M. L. C. 195; 2 R. 23, C. A.

Annotations:—*Refd.* Barraclough v. Brown, [1897] A. C. 615. *Mentd.* Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536; *Re* Clay, Clay v. Booth, [1919] 1 Ch. 66.

1411. —.]—(1) A gas co. incorporated by Act of Parliament & subject to the Gasworks (Clauses Act, 1871, with power to buy land by agreement, but not compulsorily, is liable to an action for a nuisance caused by it in carrying out its works, although it is bound under penalty to supply gas within certain limits, & its works are carried out on lands specified in its special Act. To escape liability it would have to show some statutory authority, express or by necessary implication, to do the particular thing complained of in the way in which it was being done, & that it was impossible to exercise the powers conferred without causing damage.

(2) The ct. will grant an injunction to restrain the infringement of a legal right by a co. acting under statutory powers when pltf.'s rights will not be adequately protected or vindicated by damages.

(3) In dealing with the question of remedy by injunction or damages in such a case, the ct. ought to take care to prevent undertakers with statutory powers from exceeding those powers, & under pretence & colour thereof in effect expropriating landowners whose lands are outside their real scope.—*JORDISON v. SUTTON, SOUTH-COATES & DRYPOOL GAS CO.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815; 63 J. P. 692; 15 T. L. R. 374, C. A.

Annotations:—*As to* (1) *Refd.* Goldberg v. Liverpool Corp. (1900), 82 L. T. 362; *Batcheller v. Tunbridge Wells Gas Co.* (1901), 81 L. T. 765. *Generally, Mentd.* Home & Colonial Stores v. Colls (1901), 85 L. T. 701; Salt Union v. Brunner Mond, [1906] 2 K. B. 822; English v. Metropolitan Water Board, [1907] 1 K. B. 588; Fletcher v. Birkenhead Corp., [1907] 1 K. B. 205.

1412. —.]—The rule of law has been laid down that it must be shown that the business can fairly be regarded as incidental to or consequential upon the use of the statutory powers (LORD LOREBURN, C.).—A.-G. v. MERSEY RY. CO., [1907] A. C. 415; 76 L. J. Ch. 568; 97 L. T. 524; 71 J. P. 449; 23 T. L. R. 684; 51 Sol. Jo. 624, H. L.

Annotations:—*Appld.* Deuchar v. Gas Light & Coke Co., [1924] 2 Ch. 426. *Refd.* *Re* Kingsbury Collieries & Moore's Contract, [1907] 2 Ch. 259; A.-G. & Bristol Waterworks Co. v. West Gloucestershire Water Co. (1909), 101 L. T. 258.

1413. —.]—When an administrative body is authorised by statute to take land compulsorily for specified purposes, the ct. will interfere if it uses those powers for different purposes. Whether it does so or not is a question of fact. The administrative body must really intend to act for a statutory purpose (LORD LOREBURN).—*CLANRICARDE (MARQUESS) v. CONGESTED DISTRICTS BOARD FOR IRELAND* (1914), 79 J. P. 481; 31 T. L. R. 120; 13 L. G. R. 415, H. L.

Annotations:—*Appld.* Sydney Municipal Council v. Campbell, [1925] A. C. 338. *Refd.* Marron v. Cootehill (No. 2) R. C. (1915), 84 L. J. P. C. 125.

1414. Must be bona fide.]—When a statute throws a protection round persons sued for anything done in pursuance of it, the question for the jury is, whether deft. acted under the *bona fide* belief, that in doing the act he was acting in pursuance of the statute, & had reasonable grounds for that belief.—*DANVERS v. MORGAN* (1855), 19 J. P. 808; 1 Jur. N. S. 1051; 4 W. R. 21.

1415. —.]—Such powers as were conferred by Market Act of 1862 are at all events to be exercised *bona fide* & with judgment (TURNER, L.J.).—*GALLOWAY v. LONDON CORPN.* (1864), 2 De G. J. & Sm. 213; 4 New Rep. 77; 10 L. T. 439; 28 J. P. 452; 10 Jur. N. S. 552; 12 W. R. 891; 46 E. R. 356, L. J.J.; *on appeal* (1866), L. R. 1 H. L. 34 H. L.

Annotations:—*Appld.* East Fremantle Corp. v. Annois, [1902] A. C. 213. *Refd.* Kent Coast Ry. v. L. C. & D. Ry. (1868), 3 Ch. App. 656; *Quinton v. Bristol Corp.* (1874), 43 L. J. Ch. 783; *Gard v. City of London Sewers Comrs.* (1885), 28 Ch. D. 486; *James v. Lovel* (1887), 56 L. T. 739; *Lewis v. Weston-super-Mare L. B.* (1888), 40 Ch. D. 55; *Donaldson v. South Shields Corp.* (1899), 68 L. J. Ch. 162; *Goldberg v. Liverpool Corp.* (1900), 82 L. T. 362; *Roberts v. Charing Cross, Euston & Hampstead Ry.* (1903), 87 L. T. 732; *Conron v. L. C. C.*, [1922] 2 Ch. 283; *Howard-Flanders v. Maldon Corp.* (1926), 135 L. T. 6. *Mentd.* Carington v. Wycombe Ry. (1868), 3 Ch. App. 377; L. C. & D. Ry. v. London Corp. (1868), 19 L. T. 250; *Baker v. Portsmouth Corp.* (1878), 3 Ex. D. 157; L. B. & S. C. Ry. v. St. Giles, Camberwell Vestry (1879), 4 Ex. D. 239; *Pollard v. Gray, Sturla v. Freccia* (1879), 12 Ch. D. 438; *Swanston v. Twickenham L. B.* (1879), 11 Ch. D. 838; *Robinson v. Barton Eccles L. B.* (1883), 8 App. Cas. 798; *Bristol Grdns. v. Bristol Corp.* (1887), 18 Q. B. D. 549; L. & N. W. Ry. v. Westminster Corp., [1904] 1 Ch. 759.

1416. —.]—The duty of the surveyor in such a case is to take all the circumstances of the case into consideration & come to a conclusion as to the best course to be pursued & report accordingly, & if the court finds that the surveyor has exercised his judgment, & come to a conclusion in good faith, it ought not to interfere, although other courses, to avoid the necessity of entering on private land, might be pointed out & admitted to be practicable, or even although engineers of great eminence might come forward & say that they themselves would have reported in favour of some alternative course.—*LEWIS v. WESTON-SUPER-MARE LOCAL BOARD* (1888), 40 Ch. D. 55; 58 L. J. Ch. 39; 59 L. T. 769; 37 W. R. 121; 5 T. L. R. 1.

Annotations:—*Refd.* Stroud v. Wandsworth District Board of Works, [1894] 1 Q. B. 64; *Robinson v. Sunderland Corp.*, [1899] 1 Q. B. 751; *Kendal v. Lewisham B. C.* (1903), 67 J. P. 236; *Roberts v. Hopwood*, [1925] A. C. 578. *Mentd.* Jones v. Conway & Colwyn Bay Joint Water Supply Board, [1893] 2 Ch. 603.

1417. — Presumption of bona fides—Power exercised by public body.]—MARRON v. COOTEHILL No. 2 RURAL COUNCIL, No. 1405, ante.

1418. Necessity for judgment & discretion.]—GALLOWAY v. LONDON CORPN., No. 1415, ante.

1419. Mode of exercise fixed by statute—No other mode to be adopted.]—When a statutory power is conferred for the first time upon a ct. & the mode of exercising it is pointed out, it means that no other mode is to be adopted (JESSEL, M.R.).—TAYLOR v. TAYLOR, TAYLOR v. KELLY, *Ex p.* TAYLOR (1875), 1 Ch. D. 426; 45 L. J. Ch. 373; *on appeal* (1876), 3 Ch. D. 145, C. A.

Annotations:—Mentd. *Re Harrie's S. E.* (1880), 42 L. T. 583; *Wenlock v. River Dee Co.* (1887), 36 Ch. D. 674.

1420. Must be compatible with purpose of statute.]—Any mode of user by a railway co. of its own land is permissible so long as it is not inconsistent or incompatible with the business for which compulsory powers have been intrusted to them by the legislature, & is not prejudicial to the legal rights of others.—FOSTER v. LONDON, CHATHAM & DOVER RY. CO., [1895] 1 Q. B. 711; 64 L. J. Q. B. 65; 71 L. T. 855; 43 W. R. 116; 11 T. L. R. 80; 39 Sol. Jo. 95; 14 R. 27, C. A.

Annotations:—Apld. *Onslow v. M. S. & L. Ry.* (1895), 64 L. J. Ch. 355; *Taff Vale Ry. v. Pontypridd U. D. C.* (1905), 93 L. T. 126. *Refd.* *Re Gonty & M. S. & L. Ry.*, [1896] 2 Q. B. 439; *Rochdale Canal Co. v. Manchester Ship Canal Co.* (1901), 85 L. T. 585; *A.-G. v. Mersey Ry.*, [1907] 1 Ch. 81; *Young v. Liverpool Assmt. Com.* (1911), 9 L. G. R. 366; *Dundee Harbour Trustees v. Nicol*, [1915] A. C. 550; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Birkdale District Electric Supply Co. v. Southport Corpn.*, [1926] A. C. 355. *Mentd.* *Mid. Ry. v. Wright* (1901), 70 L. J. Ch. 411.

1421. —.] — CLANRICARDE (MARQUESS) v. CONGESTED DISTRICTS BOARD FOR IRELAND, No. 1413, ante.

1422. —.]—A body authorised to take land compulsorily for specified purposes will not be permitted to exercise its powers for different purposes & if it attempts to do so the cts. will interfere (*per CUR.*).—SYDNEY MUNICIPAL COUNCIL v. CAMPBELL, [1925] A. C. 338; *sub nom.* SYDNEY

MUNICIPAL COUNCIL v. CAMPBELL, SAME v. HUGHES MOTOR SERVICE, LTD., 94 L. J. P. C. 65; 133 L. T. 63, P. C.

— **Dedication of highways.]—See HIGHWAYS, Vol. XXVI., pp. 290–292, Nos. 225–241.**

1423. Must be reasonable.]—If the Act of Parliament has authorised the particular thing to be done, then you cannot sue a man or a co. for doing what is a lawful act. In my opinion this principle applies, whether the powers are given to public authorities acting for the public benefit or to railway cos. or others acting for their own profit. To this principle there is, however, one qualification which is well settled, & indeed is admitted by defts.—namely, that in carrying out works authorised by statute you must not act negligently. A co. acting under statutory powers is treated as a private individual acting within his own rights. If a private individual acting within his own rights acts negligently, he is liable; although the act is perfectly lawful, if he does it negligently he is liable, & so it is with a co. having these powers. But there is yet a further proposition which defts. in this case deny, but which appears to me to be well settled. Not only must a co. not be guilty of negligence, but it must also act reasonably (FARWELL, J.).—ROBERTS v. CHARING CROSS, EUSTON & HAMPSTEAD RY. CO. (1903), 87 L. T. 732; 19 T. L. R. 160.

Annotation:—Apld. *Howard-Flanders v. Maldon Corpn.* (1926), 135 L. T. 6.

1424. Must not be negligent.]—ROBERTS v. CHARING CROSS, EUSTON & HAMPSTEAD RY. CO., No. 1423, ante.

B. By Whom Exercisable.

1425. Exercise intrusted to several persons—Exercise by majority.]—Where a number of persons have powers given to meet & do certain acts, which are of a public nature, the general rule is, that a majority of those who are appointed must meet; & that, of those who do meet, the majority then present may exercise the powers.—R. v.

1424 i. Must not be negligent.]—Where an Act of Parliament authorises certain works & makes no provision for compensation to persons injured by those works, no right of action accrues provided the works are carried out with proper care & skill; but if they are carried out negligently, then a right of action does accrue to those persons injured, such injury being caused by the negligent construction of the works.—GRAHAM v. BOARD OF WATER SUPPLY & SEWERAGE (1891), 12 N. S. W. L. R. (L.) 287; 8 N. S. W. W. N. 77.—AUS.

1424 ii. —.]—An action lies for doing that which the Legislature has authorised, if it be done negligently.—VAUGHAN v. WEBB (1902), 2 S. R. N. S. W. 293; 19 N. S. W. W. N. 191.—AUS.

1424 iii. —.]—Where a body corporate created by Statute is given power to carry out works, & to collect funds for that purpose, the body is liable in damages to a person injured by the negligent carrying out of such works & the funds collected must discharge that liability.—MCGOUGH v. FREMANTLE HARBOR TRUST COMRS. (1904), 7 W. A. L. R. 136.—AUS.

1424 iv. —.]—HANCOCK v. MIDLAND JUNCTION MUNICIPALITY CORPN. (1926), 28 W. A. L. R. 91.—AUS.

1424 v. —.]—There is no remedy for damage caused by the exercise of a statutory duty or power unless it is given by statute, or unless the duty or power had been negligently exercised.—JONES v. VICTORIA CORPN. (1890), 2 B. C. R. 8.—CAN.

1424 vi. —.]—No action will lie for doing that which the Legislature has authorised to be done, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorised, if it be done negligently.—ATTCHESON v. PORTAGE LA PRAIRIE RURAL MUNICIPALITY (1893), 9 Man. L. R. 192.—CAN.

1424 vii. —.]—Where a statutory duty is imposed on a co., the co. are liable for any damage caused to the property of another in consequence of the negligent performance of that duty, & the co. cannot avoid liability by showing that the negligence was that of an independent contractor employed by the co.—MURRY v. DOMINION COAL CO., LTD. (1896), 40 N. S. R. 89.—CAN.

1424 viii. —.]—MCLEAN v. DOMINION COAL CO. (1894), 40 N. S. R. 90, n.—CAN.

1424 ix. —.]—There is no cause of action for damages for negligence in not performing a statutory duty, or not exercising a statutory power, but only for negligent acts in the performance of the duty, or the exercise of the power.—GORDON v. VICTORIA CORPN. (1897), 5 B. C. R. 553.—CAN.

1424 x. —.]—Extraordinary powers, conferred by statute, authorising interference with private property must be exercised in such a manner that the rights of the owners may not be disregarded.—MONTREAL CORPN. v. LAYTON (JOHN) & CO., LTD. (Que.) (1913), 47 S. C. R. 514.—CAN.

1424 xi. —.]—MCCRIMMON v. BRIT-

COLUMBIA ELECTRIC RY. CO. (1914), 29 W. L. R. 517; 7 W. W. R. 137; 20 D. L. R. 834.—CAN.

1424 xii. —.]—No action lies against a co. for doing what the Legislature has authorised it to do, unless it be done negligently.—ELLIOTT v. WINNIPEG ELECTRIC RY. CO. (Man.), [1917] 3 W. W. R. 1120; 22 Can. Ry. Cas. 258; 38 D. L. R. 201.—CAN.

1424 xiii. —.]—VIZAGAPATAM MUNICIPAL COUNCIL v. FOSTER (1917), 1 L. R. 41 Mad. 538.—IND.

1424 xiv. —.]—If the legislature authorises a specific act including repeated performance of it at different times, or at different places to be done, & if the performance of that act, & of every other subsidiary act necessary for & identical to the performance of the main act creates nuisance or causes damage, the local body authorised to perform the act, cannot be restrained by injunction nor made liable for damage except on the ground of negligence.—SURATTEE BARA BAZAAR CO., LTD. v. RANGOON MUNICIPAL CORPN. (1927), 1 L. R. 5 Ran. 722.—IND.

PART IV. SECT. 14, SUB-SECT. 5.—B.

d. General rule.]—Where an Act of Parliament creates a body with certain powers, & requires that an act of such body in the exercise of its powers should be done by the members, & no provision is made by or under the authority of the Act for the exercise of the powers by a quorum, or by part of the whole number of members, such act, in order to be valid, must be

Sect. 14.—Statutory powers and duties: Sub-sect. 5, B., C., D. & E.; sub-sects. 6 & 7, A. & B.]

WHITAKER (1829), 9 B. & C. 648; 7 L. J. O. S. K. B. 332; 109 E. R. 241.

*Annotations:—*Refd. Wilkinson v. Mallin (1822), 2 Tyr. 544; Marryatt v. Broderick (1837), 6 L. J. Ex. 113; Fitzgerald's Case (1869), L. R. 5 Exch. 21; R. v. Leeds JJ., Ex p. Binns (1906), 95 L. T. 916.

1426. Delegation — Whether delegation permitted.]—Where powers & duties were conferred by Act of Parliament affecting the rights & interests of the public, these powers & duties could be exercised only by the persons or bodies on whom they were specially conferred. They could not be delegated nor transferred (CHITTY, J.).—OMNIBUS CONVEYANCE CO., LTD. v. LIVERPOOL UNITED TRAMWAYS & OMNIBUS CO. (1882), 26 Sol. Jo. 580.

1427. — — —.]—It was suggested on behalf of plffs. that this would be a delegation of their statutory powers, & that the law does not permit such delegation; but we are of opinion that this argument cannot be supported. It is not delegation on the part of a local authority to arrange that some other person shall perform the ministerial acts necessary to carry out such works as in the exercise of their powers they have determined shall be done, otherwise it would be impossible for such an authority to employ a contractor (COZENS-HARDY, M.R.).—CORSELLIS v. LONDON COUNTY COUNCIL, [1908] 1 Ch. 13; 77 L. J. Ch. 120; 98 L. T. 475; 71 J. P. 561; 24 T. L. R. 80; 6 L. G. R. 78, C. A.

1428. — — —.]—It is well determined that a statutory co., with powers & obligations, cannot delegate those statutory powers (WARRINGTON, J.).—TICEHURST & DISTRICT WATER & GAS CO., LTD. v. GAS & WATERWORKS SUPPLY & CONSTRUCTION CO., LTD. (1911), 55 Sol. Jo. 459.

1429. — — — Power delegated to committee—Whether duties may be apportioned.]—Where a board constituted by an Act of Parliament are authorised by it to delegate any of their powers to a committee, the powers so conferred upon the committee must be exercised by them acting in concert; & it is not competent to the committee to apportion amongst themselves the duties so delegated to them; & one of them acting alone, pursuant to such apportionment, cannot justify his acts under the Act of Parliament.—COOK v. WARD (1877), 2 C. P. D. 255; 46 L. J. Q. B. 554; 36 L. T. 893; 25 W. R. 593, C. A.

*Annotation:—*Distd. Agnew v. Manchester Corpn. (1902), 67 J. P. 174.

1430. — — — What amounts to delegation—Arrangement for performance by other persons—Of ministerial acts.]—CORSELLIS v. LONDON COUNTY COUNCIL, No. 1427, *ante*.

C. Time for Exercise.

1431. Time fixed—Necessity for strict compliance.]—FARRELL v. TOMLINSON, No. 1284, *ante*.

1432. — — — Whether applicable to non-statutory powers.]—In an Act of Parliament authorising a co. to construct a railway a sect. which provides that if the railway be not completed within five years from the passing of the Act, then, on the expiration of that period, the powers by the Act given to the co. for making & completing the railway are to cease, only applies to powers which the co. could not exercise except by virtue of the Act.

done by all the members of the body — GREEN v. R. (1891), 17 V. L. R. 329.—AUS.

PART IV. SECT. 14, SUB-SECT. 5.—E.

1437 i. Presumption against extension

*of powers.]—*When the Legislature gives a co. express power to do a certain thing in a special way it is to be taken *prima facie* to prohibit by implication any deviation from the power so given.—MCGREGOR v. ST. CROIX LUMBER CO.

(N. S.) (1912), 12 E. L. R. 199.—CAN.

*e. Right of indemnity given by Act—Whether extending to excessive use of powers given.]—*STUBBS v. MCSWEENEY (1897), 18 N. S. W. L. R. (L.) 50.—AUS.

—GREAT WESTERN RY. CO. v. MIDLAND RY. CO., [1908] 2 Ch. 644; 77 L. J. Ch. 820; 99 L. T. 676; *affd. sub nom.* MIDLAND RY. CO. v. GREAT WESTERN RY. CO., [1909] A. C. 445, H. L.

*Annotation:—*Refd. Met. Ry. v. L. C. C. (1913), 82 L. J. K. B. 542.

1433. — — — Exercise after time fixed—By order of court.]—R. v. NORWICH CORPN., No. 1398, *ante*.

1434. Time not fixed—Whether limitation presumed.]—Where an Act of Parliament creates a co. for the execution of certain works, but does not specify any time for their completion, no limitation will be presumed, & the works may be completed at any period.—THICKNESSE v. LANCASTER CANAL CO. (1838), 4 M. & W. 472; 1 Horn & H. 365; 8 L. J. Ex. 49; 3 Jur. 11; 150 E. R. 1515.

*Annotations:—*Refd. Bostock v. Sidebottom (1852), 18 Q. B. 813; Scott v. Ebury (1867), L. R. 2 C. P. 255. *Mentd.* Hedges v. Met. Ry. (1860), 28 Beav. 109.

D. Interference by Court.

1435. Whether court may interfere—Power liable to abuse.]—We have no power to limit a power given by the legislature, even if we thought it liable to be abused, & to be exercised arbitrarily (LORD CAMPBELL, C.J.).—HENRY v. NEWCASTLE TRINITY HOUSE BOARD (1858), 8 E. & B. 723; 27 L. J. M. C. 57; 22 J. P. 515; 4 Jur. N. S. 685; 120 E. R. 269; *sub nom.* R. v. HENRY, 30 L. T. O. S. 256; *sub nom.* HENRY v. TRINITY HOUSE (MASTER PILOTS & BRETHREN), 6 W. R. 232, D. C.

1436. — — — Power used for non-statutory purposes.]—CLANRICARDE (MARQUESS) v. CONGESTED DISTRICTS BOARD FOR IRELAND, No. 1413, *ante*.

—Discretionary power given to court.]—See No. 1403, *ante*.

E. Excessive Exercise.

1437. Presumption against extension of powers.]—The ct. will not take into consideration the possibility of a public co. hereafter obtaining extended Parliamentary powers.—GREAT WESTERN RY. CO. v. METROPOLITAN RY. CO. (1863), 1 New Rep. 551; 32 L. J. Ch. 382; 9 Jur. N. S. 562; 11 W. R. 481; *on appeal*, 2 New Rep. 209, L. JJ.

1438. Acts outside powers ultra vires—Acts within powers valid if separable.]—The agreement was admitted to be in other respects within the contractual power conferred by the statute, & even if it did contain stipulations in excess of that power it would nevertheless be valid provided those *ultra vires* provisions were separable from the rest of the agreement (*per* CUR.).—SOUTH EASTERN RY. CO. v. LONDON CHATHAM & DOVER RY. CO. (1888), 4 T. L. R. 545, H. L.; *affg.* S. C. *sub nom.* LONDON, CHATHAM & DOVER RY. CO. v. SOUTH EASTERN RY. CO. (1886), 2 T. L. R. 865, C. A.

1439. — — —.]—A.-G. v. PONTYPRIDD URBAN COUNCIL, No. 1408, *ante*.

1440. Power to do act otherwise unlawful—Effect of excess — Abuse treated as wrong ab initio.]—Where a person is authorised by statute or by the common law to do what, apart from such authority, would be unlawful, *e.g.* to commit a trespass, & the authority is conferred for some distinct & definite purpose, & is abused by being used for some other & different purpose, the person abusing it is treated as a wrong doer from the first, & not only as a wrong doer in respect of what can be proved to have been an excess of his authority (LORD LINDLEY).—WESTMINSTER CORPN. v.

LONDON & NORTH WESTERN RY. CO., [1905] A. C. 426; 74 L. J. Ch. 629; 93 L. T. 143; 69 J. P. 425; 3 L. G. R. 1120, H. L.; *revsg.* S. O. *sub nom.* LONDON & NORTH WESTERN RY. CO. v. WESTMINSTER CORPN., [1904] 1 Ch. 759, C. A.

Annotations:—*Refd.* R. v. Brighton Corpn., *Ex p.* Shoosmith (1907), 96 L. T. 762; *Conron v. L. C. C.*, [1922] 2 Ch. 283.

1441. Statute imposing duties—Doctrine of ultra vires—Immaterial for whose benefit obligations imposed.—Where the statute does not confirm a scheduled contract, but contains an express enactment imposing certain obligations upon the co. it is not, in my opinion, necessary for the purpose of the doctrine of *ultra vires* to consider whether they are imposed for the benefit of the public or a class of the public or for a private individual owning a particular estate. The effect of the statutory obligations upon the powers of the co. must in each case be the same (COZENS-HARDY, L.J.).—CORBETT v. SOUTH EASTERN & CHATHAM RAILWAYS MANAGING COMMITTEE, [1906] 2 Ch. 12; 75 L. J. Ch. 489; 94 L. T. 748; 22 T. L. R. 550, C. A. *Annotation*:—*Refd.* A.-G. v. N. E. Ry., [1915] 1 Ch. 905.

Whether injunction granted.—*See* Nos. 1782, 1784, *post*.

SUB-SECT. 6.—INTERFERENCE WITH PRIVATE RIGHTS.

Effect of statutes on existing rights generally.—*See* Sect. 7, sub-sect. 4, *ante*.

1442. Power must be clearly expressed.—SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO., No. 95, *ante*.

1443. Interference with private enterprise or adventure—Must be limited to protection of public interests.—WANDSWORTH BOARD OF WORKS v. UNITED TELEPHONE CO., No. 206, *ante*.

SUB-SECT. 7.—LIABILITY.

A. In General.

1444. Erroneous exercise — Whether liability exists—Act not ministerial—Necessity for malice.—PARTRIDGE v. GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION OF UNITED KINGDOM, No. 1401, *ante*.

Negligence.—*See, generally*, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 38–41, Nos. 225–243; & TITLES *passim*.

Nuisance.—*See, generally*, NUISANCE, Vol. XXXVI., p. 166, No. 77; PUBLIC AUTHORITIES.

PART IV. SECT. 14, SUB-SECT. 6.

1442 i. Power must be clearly expressed.—Unless there is a clear declaration in the Act itself to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights.—*Re* RODEN & TORONTO CORPN. (1898), 25 A. R. 12.—CAN.

1442 ii. —.]—Statutes which encroach upon the rights of the subject in respect of his private property, or which enable corps. to take his property without his consent, must be construed with the greatest strictness.—SMITH v. PORTAGE LA PRAIRIE PUBLIC PARKS BOARD (1905), 15 Man. L. R. 249; 1 W. L. R. 237.—CAN.

1442 iii. —.]—In interpreting an Act of Parliament imposing a public burden, the words thereof should be construed favourably to the subject, & the burden ought not to be imposed unless the language of the Legislature be clear & unambiguous.—*Re* BERESFORD'S SUCCESSION ACCOUNT (1856),

28 L. T. (O. S.) 89.—IR.

f. No compensation provided for Act—Plaintiff without remedy.—LEIGHTON v. BRITISH COLUMBIA ELECTRIC RY. CO. (1914), 20 B. C. R. 183; 29 W. L. R. 303; 1 W. W. R. 1472; 18 D. L. R. 505.—CAN.

g. Statutory powers vague—Subsequent Act giving same powers more precisely—Effect of.—Where statutory powers affecting private property have been conferred in vague & general terms, a subsequent amending statute purporting to confer the same or similar powers in more precise language, & in a more complete shape, must be considered as superseding the original provisions, as well where the amending Act restricts as where it extends those provisions.—SELWYN COUNTY COUNCIL v. SHEATE (1888), 1 N. Z. L. R. 730.—N.Z.

PART IV. SECT. 14, SUB-SECT. 7.—B.

1445 i. Whether action lies.—MUNICIPAL TRAMWAYS TRUST v. STEPHENS (1912), 15 C. L. R. 104.—AUS.

Vol. XXXVIII., pp. 41–50, Nos. 244–291; & TITLES *passim*.

Employers' liability—Acts of contractors.—*See* MASTER & SERVANT, Vol. XXXIV., pp. 165, 166, Nos. 1279–1291.

— **Defence of common employment.**—*See* MASTER & SERVANT, Vol. XXXIV., pp. 218, 219, Nos. 1814–1818.

B. Breach of Statutory Duty.

1445. Whether action lies.—If the law casts any public duty upon a person, which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures.—FERGUSON v. KINNOULL (EARL) (1842), 9 Cl. & Fin. 251; 4 State Tr. N. S. 785; 8 E. R. 412, H. L. *Annotations*:—*Refd.* Heriot's Hospital, Trustees v. Ross (1846), 12 Cl. & Fin. 507; Rogers v. Rajendro Dutt (1860), 8 Moo. Ind. App. 103; Sinclair v. Broughton & Government of India (1882), 47 L. T. 170; Allen v. Flood, [1898] A. C. 1; Everett v. Griffiths, [1921] 1 A. C. 631. *Mentd.* A.-G. v. Murdoch (1850), 14 Jur. 588.

1446. —.]—If it could have been established that deft. was liable in consequence of a breach of duty imposed on him by the Act of Parliament, so as to make him responsible for the same, the declaration would then have been, I think, well founded (WILLIAMS, J.).—GENERAL STEAM NAVIGATION CO. v. MORRISON (1853), 13 C. B. 581; 1 C. L. R. 103; 22 L. J. C. P. 178; 21 L. T. O. S. 76; 17 Jur. 673; 1 W. R. 330; 138 E. R. 1327.

1447. Application of doctrine of contributory negligence.—Although there may be cases, even in actions for neglect of duty, in which the question, whether pltf. contributed to the loss or injury by his own negligence, may not properly arise on the general issue, yet it may arise even in actions for breach of a statutable regulation, where any duty has been cast upon pltf. either by the statute, or through his own position or conduct, the neglect of which has so far contributed to the injury that it has not been caused entirely by the wrongful act or neglect of defts.—ELLIS v. LONDON & SOUTH WESTERN RY. CO. (1857), 2 H. & N. 424; 26 L. J. Ex. 349; 29 L. T. O. S. 389; 21 J. P. 791; 3 Jur. N. S. 1008; 5 W. R. 682; 157 E. R. 175.

Annotations:—*Refd.* Wyatt v. G. W. Ry. (1865), 13 W. R. 837; Sneyby v. L. & Y. Ry. (1874), L. R. 9 Q. B. 263.

Application of "volenti non fit injuria."—*See* NEGLIGENCE, Vol. XXXVI., pp. 97, 98, Nos. 650–652.

Liability for non-compliance with provisions for safety of mines.—*See* MINES, Vol. XXXIV., pp. 738–741, Nos. 1153–1173.

1445 ii. —.]—Where a statutory duty is imposed, neglect of the duty gives the party damaged thereby a right of action, unless the person damaged is excluded from a particular class of persons who are alone intended to be benefited by the statute.—WINTERBURN v. EDMONTON YUKON & PACIFIC RY. CO. (1908), 1 Alta. L. R. 298; 8 W. L. R. 975; 9 Can. Ry. Cas. 7.—CAN.

1445 iii. —.]—Where a work is constructed by a public body under the authority of a statute which gives a right to compensation for any injury done, the full extent of the injury thereby caused to private individuals is recoverable as compensation under the statute, notwithstanding that there may have been negligence in the execution of the work; & the fact that there has been such negligence does not give rise to an action for damages unless it is established that the public body has acted in excess of its statutory powers.—GREY COUNTY (CHAIRMAN, ETC.) v. FRANKPITT (1899), 18 N. Z. L. R. 111.—N.Z.

Sect. 14.—Statutory powers and duties: Sub-sect. 7, B. & C.; sub-sect. 8. Part. V. Sects. 1 & 2: Sub-sect. 1.]

Liability of public authorities for non-feasance.]

—See PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 32-38, Nos. 192-224.

Liability of public authorities for mis-feasance.]—

See PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 38-50, Nos. 225-291.

C. Exemption from Liability.

1448. Penalty imposed by statute for breach of duty—Exemption from performance before Act passed—Whether exemption continues.]—If a statute enacts that certain persons shall either perform certain specified duties, or in lieu thereof, pay certain penalties, I do not see how such persons can be excused from the performance of those duties or from the payment of those penalties, because they were exempted, before the Act passed from the performance of the duties (LORD DENMAN, C.J.).—*R. v. SIVITER* (1835), 1 Har. & W. 376; 5 Nev. & M. K. B. 125; 3 Nev. & M. M. C. 206; 4 L. J. M. C. 108.

1449. Act authorised by statute.]—Where authority is given by legislature to do an act parties injured by the doing of it have no legal remedy (WILDE, C.J.).—*PILGRIM v. SOUTHAMPTON & DORCHESTER RY. CO.* (1849), 7 C. B. 205; 18 L. J. C. P. 139; 13 Jur. 515; 137 E. R. 83.

1450. —.]—*ROBERTS v. CHARING CROSS, EUSTON & HAMPSTEAD RY. CO.*, No. 1423, *ante*.

1451. — Entry on land.]—Where the legislature has imposed on any persons duties the discharge of which requires entry on lands, these duties are imposed irrespective of the ownership

of the lands in question, & acts done in due discharge of such duties do not constitute a trespass. —*WEST HARTLEPOOL CORPN. v. ROBINSON* (1897), 75 L. T. 677; 61 J. P. 200; 45 W. R. 312; 13 T. L. R. 182; 41 Sol. Jo. 257; *affd.*, 77 L. T. 387, C. A.

Annotation:—Mentd. Re Stoker & Morpeth Corpn. (1914), 84 L. J. K. B. 1169.

1452. — Damage necessary result of exercising power.]—*JORDSON v. SUTTON, SOUTHCOATES & DRYPOOL GAS CO.*, No. 1411, *ante*.

1453. Bonâ fide exercise.]—*LEWIS v. WESTON-SUPER-MARE LOCAL BOARD*, No. 1416, *ante*.

1454. Dispensing power in respect of part of statute—Whether applicable to other provisions.]—Where in each of several provisions in a general Act of Parliament dealing with railways a certain precaution is imposed for the prevention of accidents, & in one provision a limited dispensing power is given to omit such precaution, the dispensing power must be confined to the particular provision in which it occurs, & cannot be extended so as to exonerate a co. from liability for an accident arising from the absence of such precaution under one of the other provisions.—*GRAND TRUNK RY. CO. OF CANADA v. WASHINGTON*, [1899] A. C. 275; 68 L. J. P. C. 37; 80 L. T. 301, P. C.

Exemption of public authorities.]—See PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 22-32, Nos. 122-191.

Statutory protection generally.]—See PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 101-136.

SUB-SECT. 8.—REMEDIES.

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Part V.—Criminal and Penal Statutes.

SECT. 1.—IN GENERAL.

1455. Nature of penal Act.]—ANON. (1508), Keil. 95; 72 E. R. 260.

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SUB-SECT. 1.—IN GENERAL.

1456. Strict construction.]—ANON. (1508), Keil. 95; 72 E. R. 260.

PART IV. SECT. 14, SUB-SECT. 7.—C.

1449 i. Act authorised by statute.]—MCDONELL v. ONTARIO, SIMCOE & HURON RAILROAD UNION CO. (1854), 11 U. C. R. 271.—CAN.

1449 ii. —.]—If any public or private body charged with the execution of a statute honestly intends to put the law in motion & really & not unreasonably believes in the existence of facts, which, if existent, would justify such action, & acts accordingly, such conduct will be in pursuance of the statute & will be protected.—*DHONDU DAGDU v. SECRETARY OF STATE FOR INDIA* (1912), 1 L. R. 37 Bom. 101.—IND.

1449 iii. —.]—If a public body acting in the execution of a public trust & for the public benefit, do an act which they are authorised by law to do, & the act, though done in a proper manner, causes special injury to a particular person, that person has no remedy, unless one is given by Statute.—*JOHANNESBURG MARKET CONCESSION & BUILDING CO., LTD. v. RAND PLAGUE COMMITTEE*, [1905] T. S. 406.—S. AF.

1449 iv. —.]—If a municipal corpn. "acting in the execution of a public

trust & for the public benefit, do an act which they are authorised by law to do, & do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy, unless a remedy is provided by the statute." But "such powers are at all times to be exercised *bonâ fide* & with judgment & discretion."—*PENINSULA ABATTOIRS, LTD. v. CAPE TOWN CORPN.*, [1915] App. D. at p. 679.—S. AF.

1449 v. —.]—The general rule that statutory authority to construct a work excuses from liability for damages thereby caused to third persons is subject to the proviso that the work be not negligently executed or maintained.—*NEW HERIOT GOLD MINING CO., LTD. v. UNION GOVERNMENT*, [1916] App. D. 415.—S. AF.

PART V. SECT. 2, SUB-SECT. 1.

1456 i. Strict construction.]—*Re SPARK* (1844), Ros. & Eq. Jud. 1.—AUS.

1456 ii. —.]—The rule that a penal

1457. —.]—*COURTEEN'S CASE* (1618), 1 Hob. 270; 80 E. R. 416.

Annotations:—Refd. R. v. Tucker (1693), 12 Mod. Rep. 51; *Scott v. Schawrtz* (1739), 2 Com. 677.

1458. —.]—For all statutes that give costs are to be taken strictly, as being a kind of penalty (*per CUR.*).—*CONE v. BOWLES* (1691), 1 Salk. 205; 91 E. R. 182; *sub nom. COAN v. BOWLES*, Carth. 179.

Annotations:—Refd. Dikken v. Cooke (1735), 1 Stra. 1005; *R. v. Glastonbury* (1736), Lee temp. Hard. 355; *Murray*

statute shall be construed strictly does not imply that the narrowest meaning of which they are susceptible, must be given to its words. The rule of interpretation & construction really is that such statutes are to be taken as not including anything which is not within their letter & spirit, which is not comprised in their words & which is manifestly not intended by the Legislature.—*O'GRADY v. WISEMAN* (1900), Q. R. 9 K. B. 169.—CAN.

1456 iii. —.]—*R. v. WILNEFF* (N.S.) (1906), 1 E. L. R. 267.—CAN.

1456 iv. —.]—*PATRIQUIN v. COVERT* (1907), 42 N. S. R. 66.—CAN.

1456 v. —.]—*Re EDMONTON HIDE & FUR CO. (Alta.)*, [1919] 3 W. W. R. 53; 48 D. L. R. 181.—CAN.

1456 vi. —.]—*JUGGOMOHUN BUKSHIEE v. ROY MOTHERANATH CHOWDHRY, ROY KISTONATH CHOWDRY & ROY PREONATH CHOWDRY* (1867), 7 W. R. P. C. 18; 11 Moo. Ind. App. 223.—IND.

1456 vii. —.]—*Re WAIRAU ELECTION PETITION* (1912), 31 N. Z. L. R. 321.—N.Z.

- v. Nichols* (1830), 8 Bing. 530; *R. v. York City JJ.* (1834), 1 Ad. & El. 828.
- 1459.** —. —.]—*JENKINS v. HATTON* (1659), 2 Sid. 129; 82 E. R. 1294.
- 1460.** —. —.]—*R. v. PECKHAM* (1697), as reported in Comb. 439; 90 E. R. 577.
Annotation :—*Mentd. R. v. Cleg* (1720), 1 Stra. 475.
- 1461.** —. —.]—This being in the nature of a penal statute, must be construed strictly.—*KENT v. WHITBY* (1738), 3 Bro. Parl. Cas. 487; 1 E. R. 1451, H. L.
- 1462.** —. —.]—*HOOKE v. WILKS* (1740), 2 Stra. 1126; 93 E. R. 1077.
Annotations :—*Mentd. R. v. Mytton* (1785), 4 Doug. K. B. 333; *Grant v. Hulton* (1817), 1 B. & Ald. 134.
- 1463.** —. —.]—*COOK v. SHONE* (1710), Barnes, 12; 94 E. R. 783.
Annotation :—*Mentd. Lewis v. Shelley* (1816), 2 Marsh. 426.
- 1464.** —. —.]—Every law made introducing a capital punishment must be construed strictly.—*R. v. HARVEY* (1747), 1 Wils. 164; 1 Win. Bl. 20; 95 E. R. 551; *sub nom. HARVEY'S CASE*, Post. 51.
- 1465.** —. —.]—Penal laws are not to be construed according to rules of equity (LORD HARDWICKE, C.).—*HARRISON v. SOUTHCOTE & MORELAND* (1751), 1 Atk. 528; 2 Ves. Sen. 389; 26 E. R. 333, L. C.
Annotations :—*Mentd. A.-G. v. Duplessis* (1752), Park. 144; *Mackreth v. Symmons* (1808), 15 Ves. 329; *U. S. A. v. McRae* (1867), L. R. 4 Eq. 327; *Derby Corp'n. v. Derbyshire County Council* (1897), 77 L. T. 107; *Re A Debtor*, [1910] 2 K. B. 59.
- 1466.** —. —.]—*MITCHELL'S CASE* (1751), Post. 119; 2 East, P. C. 936; 168 E. R. 59.
Annotations :—*Mentd. R. v. Williams* (1775), 1 Leach, 114; *R. v. Ellor* (1784), 1 Leach, 323; *R. v. Clinch* (1790), 1 Leach, 540; *R. v. Baker* (1829), 1 Mood. C. C. 231; *R. v. Cullen* (1831), 5 C. & P. 116; *R. v. Newton* (1838), 2 Mood. C. C. 59.
- 1467.** —. —.]—Distinction between statutes which grant a revenue to the King, & statutes or clauses of statutes which inflict a forfeiture or penalty. The former . . . are to be favourably & beneficially construed for the Crown but the latter are of strict construction & are not to be extended (PARKER, C.B.).—*CAMPLIN v. BULLMAN* (1761), Park. 198; 145 E. R. 755.
- 1468.** —. —.]—*COLE'S CASE* (1801), 2 East, P. C. 767.
Annotations :—*Refd. A.-G. v. King* (1817), 5 Price, 195. *Mentd. R. v. Wiley* (1850), 4 Cox, C. C. 412.
- 1469.** —. —.]—This is a penal statute, & is to be construed strictly (LORD ELLENBOROUGH).—*LLOYD v. ROSBER* (1810), 2 Camp. 453; 170 E. R. 1216.
Annotation :—*Mentd. Sullivan v. Bishop* (1826), 2 C. & P. 359.
- 1470.** —. —.]—This is a penal statute & must be construed strictly (RICHARDS, C.B.).—*A.-G. v. KING* (1817), 5 Price, 195; 146 E. R. 579.
Annotations :—*Mentd. A.-G. v. Paul* (1718), Bunb. 37; *R. v. Whittaker* (1823), 1 Hag. Adm. 145.
- 1471.** —. —.]—It is a clear & fundamental rule in construing statutes against frauds, that they are to be liberally & beneficially expounded (PARK, J.).—*GORTON v. CHAMPNEYS, COVENTRY v. CHAMPNEYS* (1823), 1 Bing. 287; 8 Moore, C. P. 302; 1 L. T. O. S. C. P. 109; 130 E. R. 116.
Annotations :—*Mentd. Calton v. Porter* (1824), 2 Bing. 370; *Henry v. Taylor* (1825), 10 Moore, C. P. 588; *Chappell v. Silverschildt* (1826), 12 Moore, C. P. 113; *Finley v. Gardner* (1827), 6 B. & C. 165; *Flight v. Greenway* (1827), 5 L. J. O. S. K. B. 137; *Barber v. Thomas* (1849), 7 C. B. 612; *Aberdeen v. Jerdan* (1850), 15 Q. B. 990.
- 1472.** —. —.]—*HUNTINGTOWER (LORD) v. GARDINER, SAME v. IRELAND*, No. 1533, *post*.
- 1473.** —. —.]—*ANON.* (1825), No. 510, *ante*.
- 1474.** —. —.]—*R. v. CADMAN* (1825), 1 Mood. C. C. 114.
Annotation :—*Mentd. R. v. Harley* (1830), 4 C. & P. 369.
- 1475.** —. —.]—*FLETCHER v. SONDES (LORD)*, No. 836, *ante*.
- 1476.** —. —.]—It is a penal Act & therefore is not to be construed so as to give it an operation extending beyond the clear & necessary import of its words (HOLROYD, J.).—*R. v. WHITNASH (INHABITANTS)* (1827), 7 B. & C. 596; 1 Man. & Ry. K. B. 452; 1 Man. & Ry. M. C. 177; 6 L. J. O. S. M. C. 26; 108 E. R. 815.
Annotations :—*Mentd. Begbie v. Levi* (1830), 1 Cr. & J. 180; *Peate v. Dickens* (1834), 3 Dowl. 171; *Wolton v. Gavin* (1850), 20 L. J. Q. B. 73.
- 1477.** —. —.]—An Act of Parliament which puts the liberty of the subject in danger, ought to receive a strict construction (BEST, C.J.).—*BUTLER v. TURLEY* (1827), 2 C. & P. 585; Mood. & M. 54; 172 E. R. 266.
Annotation :—*Mentd. Gardner v. Mansbridge* (1887), 19 Q. B. D. 217.
- 1478.** —. —.]—The statute though in some respects remedial, is in others capitally penal . . . the statute therefore must be construed strictly (BAYLEY, J.).—*ELSMORE v. ST. BRIAVELLS HUNDRED* (1828), 8 B. & C. 461; 2 Man. & Ry. K. B. 514; 1 Man. & Ry. M. C. 468; 6 L. J. O. S. K. B. 372; 108 E. R. 1114.
Annotations :—*Mentd. R. v. Newill* (1836), 1 Mood. C. C. 458; *Daniel v. Coulsting* (1845), Bar. & Arn. 380.
- 1479.** —. —.]—I think that, as this is a case of felony, the Act of Parliament must be construed strictly (LITLEDAL, J.).—*R. v. MITCHELL* (1829), 4 C. & P. 251; 172 E. R. 692.
- 1480.** —. —.]—The statute is of a penal character, & the ct. cannot extend its words for the purpose of assisting pltf. (POLLOCK, C.B.).—*Re CLEMENTS, Ex p. BRUNSWICK (DUKE)* (1849), 3 Exch. 829; 18 L. J. Ex. 304; 151 E. R. 1081.
- 1481.** —. —.]—*BLANFORD v. MORRISON*, No. 1525, *post*.
- 1482.** —. —.]—*BOWDITCH v. BALCHIN* (1850), 5 Exch. 378; 4 New Mag. Cas. 118; 19 L. J. Ex. 337; 15 L. T. O. S. 232; 14 J. P. 449; 155 E. R. 165.
- 1483.** —. —.]—*RYDER v. MILLS*, No. 169, *ante*.
- 1484.** —. —.]—*STEPHENSON v. HIGGINSON*, No. 330, *ante*.
- 1485.** —. —.]—22 Geo. 2, c. 46, s. 11, being a penal act, must be construed strictly.—*GORDON v. DALZELL* (1852), 15 Beav. 351; 21 L. J. Ch. 206; 18 L. T. O. S. 250; 16 Jur. 186; 51 E. R. 573.
- 1486.** —. —.]—This clause is drawn with very great inaccuracy. There can be no doubt whom it intended to subject to the penalty, & that the penal clause was made to be applied to both the preceding provisos; but this can only be done by introducing antecedents which alter the direct meaning of the words as they at present stand; & I have never yet heard that this could be done in order to bring persons within the meaning of a penal clause; but setting this aside, we are not at liberty to alter the sense of an Act of Parliament by introducing words (COLERIDGE, J.).—*COE v. LAWRENCE* (1853), 1 E. & B. 516; 22 L. J. Q. B. 140; 20 L. T. O. S. 222; 17 J. P. 342; 1 W. R. 146; 118 E. R. 529.
Annotation :—*Mentd. Re Fox* (1858), 22 J. P. 656.
- 1487.** —. —.]—The provision being a penal one must receive a strict construction (LORD CAMPBELL, C.J.).—*JEFFREYS v. HIGGINS* (1853), 1 C. L. R. 351; 21 L. T. O. S. 73; 17 J. P. 695; 1 W. R. 304.
- 1488.** —. —.]—Sect. 256 is a highly penal one, & is to be construed strictly.—*Re MANICO, Ex p. MANICO* (1853), 3 De G. M. & G. 502; 22 L. J. Bey. 41; 20 L. T. O. S. 300; 17 Jur. 359; 1 W. R. 135; 43 E. R. 197, L. J.
- Annotation* :—*Distd. Re Coleman, Ex p. Coleman* (1858), 3 De G. & J. 43.

Sect. 2.—Construction : Sub-sects. 1, 2 & 3.]

1489. —.]—*R. v. REID*, No. 839, *ante*.

1490. —.]—Merchant Seamen's Act being a criminal Act, the word "deserted" will be construed strictly.—*EDWARD v. TREVELLICK* (1854), 4 E. & B. 59; 2 C. L. R. 1605; 24 L. J. Q. B. 9; 23 L. T. O. S. 208; 18 J. P. 680; 1 Jur. N. S. 110; 2 W. R. 586; 119 E. R. 23.

1491. —.]—It would be too much to take away vested rights by putting a forced construction upon a penal sect. (*per CUR.*).—*R. v. PHARMACEUTICAL SOCIETY REGISTRAR* (1855), 5 E. & B. 160; 25 L. T. O. S. 270; 3 W. R. 485; 119 E. R. 441, Ex. Ch.

1492. —.]—Penal statutes should be construed according to what appears to be their true meaning (*POLLOCK, C.B.*).—*MYERS v. BAKER* (1858), 3 H. & N. 802; 28 L. J. Ex. 90; 7 W. R. 66; 157 E. R. 691.

1493. —.]—The statute is penal not remedial . . . I would point out this that the statute not being remedial but penal we are bound to construe it most strictly (*POLLOCK, C.B.*).—*WOODALL v. VOIGHT* (1860), 6 H. & N. 153; 30 L. J. Ex. 31; 3 L. T. 334; 6 Jur. N. S. 1162; 9 W. R. 57; 158 E. R. 57.

1494. —.]—*KENNARD v. FUTVOYE* (1860), 2 Giff. 81; 29 L. J. Ch. 553; 2 L. T. 30; 6 Jur. N. S. 312; 66 E. R. 35.

1495. —.]—In construing a penal Act of Parliament we must take great care not to extend the enactment beyond what the legislature has clearly meant & adequately expressed (*POLLOCK, C.B.*).—*TAYLOR v. ORAM* (1862), 1 H. & C. 370; 31 L. J. M. C. 252; 7 L. T. 68; 8 Jur. N. S. 748; 158 E. R. 928.

Annotation:—Mentd. *Howes v. Inland Revenue Board* (1876), 1 Ex. D. 385.

1496. —.]—*NICHOLSON v. FIELDS*, No. 188, *ante*.

1497. —.]—*PARRY v. CROYDON COMMERCIAL GAS CO.*, No. 1539, *post*.

1498. —.]—*A.-G. v. SILLEM*, No. 130, *ante*.

1499. —.]—*DYKE v. ELLIOTT, THE GAUNTLET*, No. 1526, *post*.

1500. —.]—(1) The law does not allow us to introduce words in order to explain the meaning of an Act of Parliament (*CLEASBY, B.*).

(2) This being a penal statute we must look not only, on the one side, at the mischief intended to be remedied, but also on the other side, we must consider that persons are not to be made subject to penalties unless the offence charged is clearly brought within the purview of the statute (*AMPHLETT, B.*).—*LEWIS v. CARR* (1876), as reported in 34 L. T. 390.

Annotations:—Mentd. *Fletcher v. Hudson* (1881), 7 Q. B. D. 611; *Pridmore v. Hay* (1890), 54 J. P. Jo. 697; *Cox v. Truscott* (1905), 69 J. P. 174; *R. v. Rowlands*, [1906] 2 K. B. 292.

1501. —.]—This is a *casus omissus*, which we cannot supply in an enactment creating an offence (*CLEASBY, B.*).—*BROADHEAD v. HOLDSWORTH* (1877), 2 Ex. D. 321; 46 L. J. M. C. 172; 36 L. T. 320; 41 J. P. 327; 25 W. R. 306.

1502. —.]—In construing a statute . . . by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the sect. (*FIELD, J.*).—*GRAFF v. EVANS* (1882), as reported in 8 Q. B. D. 373; 46 L. T. 347; 30 W. R. 380.

Annotations:—Mentd. *Newell v. Hemingway* (1888), 58 L. J. M. C. 46; *Bowyer v. Percy Supper Club* (1893), 69 L. T. 447; *Ranken v. Hunt* (1894), 10 R. 249; *Woodley v. Simmonds* (1896), 60 J. P. 160; *I. R. Comrs. v. Tod*, [1898] A. C. 399; *Davies v. Burnett*, [1902] 1 K. B. 666;

Humphrey v. Tudgay, [1915] 1 K. B. 119; *Motford v. Edwards*, [1915] 1 K. B. 172; *A.-G. v. Swan*, [1922] 1 K. B. 682.

1503. —.]—This is a penal statute & should therefore be construed strictly (*LOPES, L.J.*).—*SMITH v. WOOD* (1889), 24 Q. B. D. 23; 59 L. J. Q. B. 5; 61 L. T. 870; 54 J. P. 324; 38 W. R. 138; 6 T. L. R. 51, C. A.

Annotation:—Mentd. *Houghton v. Fear* (1913), 109 L. T. 177.

1504. —.]—Strictness of statement is still valuable, especially in a case where the result may be highly penal (*LORD COLERIDGE, C.J.*).—*COTTERILL v. LEMPRIERE* (1890), 24 Q. B. D. 634; 62 L. T. 695; 54 J. P. 583; 6 T. L. R. 262; 17 Cox, C. C. 97.

Annotations:—Refd. *Pointon v. Cox* (1926), 136 L. T. 506. *Mentd.* *Ex p. Norman* (1915), 114 L. T. 232; *R. v. Jones, Ex p. Thomas*, [1921] 1 K. B. 632.

1505. —.]—Although the practice is to tax, as a matter of course, the costs of deft. who has been acquitted by a petty jury upon an indictment for libel preferred at the instance of a private prosecutor, 6 & 7 Vict. c. 96, s. 8, makes no provision for cases in which no true bill is found by a grand jury. Upon application by deft. the bill against whom had been ignored, for a direction that his costs be taxed:—*Held*: this was a *casus omissus* in the drafting of the Act, & the ct. had no jurisdiction to make an order in such a case.—*R. v. MURRY* (1893), 57 J. P. 136.

1506. —.]—The Act imposes penalties & therefore must be construed & applied strictly (*LORD ESHER, M.R.*).—*REID v. WILSON & WARD, REID v. WILSON & KING*, [1895] 1 Q. B. 315; 64 L. J. M. C. 60; 71 L. T. 739; 59 J. P. 516; 43 W. R. 161; 11 T. L. R. 88; 39 Sol. Jo. 94; 18 Cox, C. C. 56, C. A.

1507. —.]—I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language (*WRIGHT, J.*).—*LONDON COUNTY COUNCIL v. AYLESBURY DAIRY CO., LTD.*, [1898] 1 Q. B. 106; 67 L. J. Q. B. 24; 77 L. T. 440; 61 J. P. 759, D. C.

Annotations:—Refd. *R. v. Norman*, [1924] 2 K. B. 315. *Mentd.* *Rea v. L. C. C.*, [1911] 1 K. B. 740.

1508. —.]—The Licensing Act ought to be strictly enforced & carried out, no doubt, because it was a penal Act, but nevertheless the ct. must take care not to strain the words of the sect. beyond the principle of the decisions upon them (*LORD ALVERSTONE, C.J.*).—*LOCKWOOD v. COOPER* (1903), 72 L. J. K. B. 690; 89 L. T. 306; 67 J. P. 307; 52 W. R. 48; 19 T. L. R. 610; 47 Sol. Jo. 672; 20 Cox, C. C. 539, D. C.

Annotations:—Mentd. *Morris v. Godfrey* (1912), 106 L. T. 890; *Welton v. Ruffles*, [1920] 1 K. B. 226.

1509. —.]—Unquestionably when one is construing a penal statute the first thing is to construe it according to the ordinary rules of grammar (*LORD COLERIDGE, J.*).

You find the forfeiture imposed in terms only on one [class], the second class being left entirely in the air & that in manifestly absurd because it gives no effect at all to the middle part of the sect. (*ROWLATT, J.*).—*A.-G. v. BEAUCHAMP*, [1920] 1 K. B. 650; 89 L. J. K. B. 219; 122 L. T. 527; 84 J. P. 41; 36 T. L. R. 174; 26 Cox, C. C. 563, D. C.

1510. *Whether words supplied.*—Applts. were owners of a coal-mine in which serious personal injury arose from explosion. They did not give notice to the inspector were convicted for not doing so under 18 & 19 Vict. c. 108, s. 9:—*Held*:

words had been omitted which were necessary to create the offence which applts. were supposed to have committed, & as those words could only be supplied by the legislature, applts. were not liable to the penalty.—*UNDERHILL v. LONGRIDGE* (1859), 29 L. J. M. C. 65; 24 J. P. 148; 6 Jur. N. S. 221.

Annotations:—*Apld.* L. C. C. v. Aylesbury, Dairy Co., [1898] 1 Q. B. 106. *N.F.* A.-G. v. Beauchamp, [1920] 1 K. B. 650.

1511. ———. *Strict construction leading to absurdity or repugnance.*—*WILLIAMS v. EVANS*, No. 284, *ante*.

1512. ———. ———. *A.-G. v. BEAUCHAMP*, No. 1509, *ante*.

Construction leading to absurdity or repugnance generally.—*See* Part III., Sect. 2, sub-sect. 2, C., *ante*.

SUB-SECT. 2.—STATUTE CAPABLE OF TWO CONSTRUCTIONS.

1513. *Adoption of more lenient construction.*—*NICHOLSON v. FIELDS*, No. 188, *ante*.

1514. ———. *PARRY v. CROYDON COMMERCIAL GAS CO.*, No. 1539, *post*.

1515. ———. *By Public Health Act, 1875 (c. 55), s. 156, it is an offence to bring forward or build any addition to a house in a street beyond the front of the house or building on either side without the consent of the urban authority; & "any person offending against this enactment shall be liable to a penalty not exceeding 40s. for every day during which the offence is continued" after written notice in this behalf from the urban authority:—Held: an offence to which the penalty was applicable continued so long as the addition to the house was maintained after written notice from the urban authority, notwithstanding that the addition was completed before the notice was given.*

I agree that, as the section imposes a penalty for a criminal offence, applt. is entitled to the benefit of any doubt which may arise on the construction of it (*HUDDLESTON, B.*).—*RUMBALL v. SCHMIDT* (1882), 8 Q. B. D. 603; 46 L. T. 661; 46 J. P. 567; 30 W. R. 949, D. C.

Annotations:—*Refd.* *Reay v. Gateshead Corpn.* (1886), 55 L. T. 92; *Blackpool Corpn. v. Johnson*, [1902] 1 K. B. 646; *Mullis v. Hubbard*, [1903] 2 Ch. 431.

1516. ———. *If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sects. (LORD ESHER, M.R.).—TUCK & SONS v. PRIESTER* (1887), 19 Q. B. D. 629; 56 L. J. Q. B. 553; 52 J. P. 213; 36 W. R. 93; 3 T. L. R. 826, C. A.

Annotations:—*Consd.* *Hildesheimer v. Faulkner*, [1901] 2 Ch. 552; *A.-G. v. Brown*, [1920] 1 K. B. 773. *Apld.* *Remington v. Larchin*, [1921] 3 K. B. 404; *Nichol v. Fearby*, *Nichol v. Robinson*, [1923] 1 K. B. 480. *Consd.* *Lapish v. Braithwaite*, [1925] 1 K. B. 474. *Refd.* *Graves v. Gorrie*, [1903] A. C. 496; *Forbes v. Samuel*, [1913] 3 K. B. 706; *Harrison v. Wythemoor Colliery Co.*, [1922] 2 K. B. 674. *Mentd.* *Troitzsch v. Rees* (1887), 3 T. L. R. 773; *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345; *Fishburn v.*

Hollinghead, [1891] 2 Ch. 371; *Robb v. Green* (1895), 64 L. J. Q. B. 593; *Nicholls v. Parker* (1901), 17 T. L. R. 482; *Bowden v. Amalgamated Pictorials*, [1914] 1 Ch. 386; *Barker Motion Photography v. Hulton* (1912), 22 T. L. R. 496; *Amber Size & Chemical Co. v. Menzel*, [1913] 2 Ch. 239; *Alpertou Rubber Co. v. Manning* (1917), 86 L. J. Ch. 377.

1517. ———. *There is the rule of construction that if a statute, which so affects a man's status as to be in effect a penal enactment, is capable of two constructions, that one should be adopted which is most favourable to the person affected (LORD ESHER, M.R.).—Re NORTH, Ex p. HASLUCK*, [1895] 2 Q. B. 264; 64 L. J. Q. B. 694; 59 J. P. 724; 39 Sol. Jo. 560; 2 Mans. 326; 14 R. 436, C. A.

Annotations:—*Consd.* *R. v. Norman*, [1924] 1 K. B. 315. *Refd.* *Goldsmiths' Co. v. West Metropolitan Ry.*, [1904] 1 K. B. 1; *Mason v. Bolton's Library*, [1913] 1 K. B. 83.

1518. ———. *Deft. who was a tenant for a term of three years from Mar. 1919, of a dwelling-house within the Act was, in May, 1920, desirous of giving up his tenancy, & in that month he agreed with pltf. that upon payment by the latter to him of a premium he would surrender his tenancy & the landlord would grant pltf. a new tenancy for three years at a slightly increased rent. The landlord did not know that pltf. had agreed to pay deft. a premium. Pltf. paid deft. the premium, & the landlord granted pltf. a new tenancy for three years. After Rent & Mortgage Interest Restrictions Act, 1920 (c. 17) came into operation the pltf. sued to recover back the premium:—Held: Rent & Mortgage Interest Restrictions Act, 1920 (c. 17), s. 8 (1), was reasonably capable of two constructions; the sect. being a penal one, the ct. should give it the more lenient construction avoiding the imposition of a penalty.—REMINGTON v. LARCHIN*, [1921] 3 K. B. 404; 90 L. J. K. B. 1248; 125 L. T. 719; 85 J. P. 221; 37 T. L. R. 839; 19 L. G. R. 528; *sub nom.* *REMINGTON v. LARCHIN*, 65 Sol. Jo. 662, C. A.

Annotation:—*Refd.* *Harrison v. Wythemoor Colliery Co.*, [1922] 2 K. B. 674.

1519. ———. *Penal section qualified by proviso.*—*Sects. . . . which may be justly called penal, should be strictly construed; but a proviso, which has the effect of saving parties from penal enactments, should be liberally construed (POLLOCK, C.B.).—HUTCHINSON v. MANCHESTER, BURY & ROSSENDALE RY. CO.* (1846), 15 M. & W. 314; 15 L. J. Ex. 293; 10 Jur. 361; 153 E. R. 869; *sub nom.* *HUTCHINSON v. EAST LANCASHIRE RY. CO.*, 3 Ry. & Can. Cas. 748.

1520. ———. *Civil or penal consequences of offence.*—*DICKENSON v. FLETCHER*, No. 1551, *post*.

SUB-SECT. 3.—OTHER CASES.

1521. *Departure from strict construction—Intention of legislature.*—It is likely that a hundred years ago such an objection might have succeeded. Statutes were then required to be perfectly precise, & resort was not had to a reasonable construction of the Act, & thereby criminals were often allowed to escape. This is not the present

PART V. SECT. 2, SUB-SECT. 2.

1513 i. *Adoption of more lenient construction.*—*MCDONELL v. SMITH* (1859), 17 U. C. R. 310.—CAN.

1513 ii. ———. *PARADIS v. NATIONAL BREWERIES CO.*, [1924] 1 D. L. R. 1082; 30 R. de L. 429.—CAN.

1513 iii. ———. *R. v. CRAWFORD* (N. B.), [1927] 2 D. L. R. 565; 47 Can. Crim. Cas. 134.—CAN.

1513 iv. ———. *Where two interpretations of a penal clause are possible*

& the intention & scope of the statute are in favour of the less stringent interpretation, that interpretation will be adopted in the absence of express provision to the contrary.—LALLO BAUMANN v. R. (1910), L. L. R. 111.—S. AF.

PART V. SECT. 2, SUB-SECT. 3.

1521 i. *Departure from strict construction—Intention of legislature.*—*In construing a penal statute, the rule*

to be followed is that by which that sense of the words is to be adopted which best harmonises with the context & promotes in the fullest manner the policy & object of the legislature. The paramount object in construing penal as well as other statutes, is to ascertain the legislative intent; & the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention.—MCGRE-

Sect. 2.—Construction: Sub-sect. 3. Sect. 3: Sub-sect. 1.]

mode of construing Acts of Parliament. They are construed now with reference to the true meaning & real intention of the legislature (POLLOCK, C.B.).—*R. v. LYONS* (1858), Bell, C. C. 38; 28 L. J. M. C. 33; 32 L. T. O. S. 150; 22 J. P. 758; 5 Jur. N. S. 23; 7 W. R. 58; 8 Cox, C. C. 84; 169 E. R. 1158, C. C. R.

Annotation:—Mentd. R. v. Child (1871), 40 L. J. M. C. 127.

1522. ———.]—There is a very old rule in the construction of statutes, that a remedial law shall be construed liberally, but a penal law strictly; & occasions sometimes arise where this rule is applicable, & may govern the construction. But whether the statute be remedial or penal, it is the duty of the ct. to ascertain its true construction, according to the language used, & with reference to the subject about which it is used, & to give effect to that which they discover to be the plain meaning of the legislature (POLLOCK, C.B.).—*ARCHER v. JAMES* (1862), 2 B. & S. 67; 31 L. J. Q. B. 153; 6 L. T. 167; 8 Jur. N. S. 166; 10 W. R. 489; 121 E. R. 998, Ex. Ch.

Annotations:—Mentd. Moorhouse v. Lee (1864), 4 F. & F. 354; *Cutts v. Ward* (1867), L. R. 2 Q. B. 357; *Redgrave v. Kelly* (1889), 37 W. R. 643; *Hewlett v. Allen*, [1892] 1 Q. B. 662; *Hughes v. Bonella* (1894), 10 T. L. R. 197; *Abram Coal Co. v. Southern* (1903), 19 T. L. R. 579; *Williams v. North's Navigation Collieries* (1889), Ltd., [1906] A. C. 136; *Hart v. Riversdale Mill Co.*, [1928] 1 K. B. 176.

1523. ———.]—*STEPHENSON v. HIGGINSON*, No. 330, *ante*.

1524. ——— **Where necessary implication.]—Exp.** FRANCIS, [1903] 1 K. B. 275; 72 L. J. K. B. 120; 88 L. T. 176; 67 J. P. 153; 19 T. L. R. 146; 20 Cox, C. C. 381; *sub nom. Re FRANCIS*, 51 W. R. 267; 47 Sol. Jo. 205, D. C.

Annotation:—Mentd. Re Francis' Appln. (1903), 88 L. T. 806.

1525. Words to be given ordinary meaning.]—This being a penal statute, we must take care not to extend its meaning, but must construe the words according to their fair & ordinary meaning, unless that would lead to some extravagant or absurd result (PARKE, B.).—*BLANFORD v. MORRISON* (1850), 15 Q. B. 724; 19 L. J. Q. B. 533; 16 L. T. O. S. 264; 14 Jur. 1130; 117 E. R. 633, Ex. Ch.

Annotation:—Reid. Reed v. Ingham (1854), 3 E. & B. 889.

1526. ——— **Court not to make or find ambiguity unnecessarily.]—**It was much pressed in the ct. below, & again before their lordships, that the statute being a penal, or, as it was phrased, a highly penal one, it was to be construed strictly. It appears to their lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt all penal statutes are to

be construed strictly, that is to say, the ct. must see that the thing charged as an offence is within the plain meaning of the words used, & must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included & would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words & within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, & the ct. is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument (*per* CUR.).—*DYKE v. ELLIOTT, THE GAUNTLET* (1872), L. R. 4 P. C. 184; 8 Moo. P. C. C. N. S. 128; 11 L. J. Adm. 65; 26 L. T. 45; 20 W. R. 497; 1 Asp. M. L. C. 211; 17 E. R. 373, P. C.

Annotation:—Mentd. Palmer v. Hutchinson (1881), 6 App. Cas. 619.

1527. Construction in ordinary legal sense.]—In a statute of this kind, the word must be taken to be used in its ordinary legal sense (COCKBURN, C.J.).—*R. v. HASSALL* (1861), L. & Ca. 56; 30 L. J. M. C. 175; 4 L. T. 561; 25 J. P. 613; 7 Jur. N. S. 1064; 9 W. R. 708; 8 Cox, C. C. 191; 169 E. R. 1302, C. C. R.

Annotations:—Mentd. R. v. Tonkinson (1881), 41 L. T. 821; *R. v. De Banks* (1884), 13 Q. B. D. 29; *R. v. Ashwell* (1885), 16 Q. B. D. 190; *R. v. Holloway, Ex p. George* (1897), 66 L. J. Q. B. 830; *Moss v. Hancock*, [1899] 1 Q. B. 111.

SECT. 3.—OPERATION.

SUB-SECT. 1.—IN GENERAL.

Contracts made void or illegal by statute.]—See CONTRACT, Vol. XII., pp. 269–274.

Act penalised rendered illegal.]—See CONTRACT, Vol. XII., pp. 272–274, Nos. 2223–2236.

1528. Penalty for omission—Legal compulsion to do act omitted.]—*REDPATH v. ALLAN, THE HIBERNIAN*, No. 714, *ante*.

1529. Whether evidence of mens rea necessary.]—Although *prima facie* & as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, & a statute may relate to such a subject-matter & may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which

GOR v. CANADIAN CONSOLIDATED MINES, LTD. (No. 2) (1907), 12 B. C. R. 116; 2 M. M. Cas. 428.—CAN.

1521 ii. ———.]—*WHIMSTER v. DRAJONI, WHIMSTER v. MILLS, WHIMSTER v. NORTHERN CLUB & CAFE CO.* (B. C.), [1920] 2 W. W. R. 185; 51 D. L. R. 503; 33 Can. Crim. Cas. 39.—CAN.

1521 iii. ———.]—While restrictive & penal statutes & statutes in derogation of common law rights are strictly construed, such construction is not to be applied in a manner at variance with the plain language & intention of the Legislature.—*WOODFORD v. R.*, [1909] E. D. C. 7.—S. AF.

h. Liberal construction.]—A penal statute is to be construed according to its spirit & the rule of natural justice, not according to its very letter.—*R. v. MACKINTOSH* (1831), 1 O. S. 531.—CAN.

k. ———.]—*R. v. PAXTON* (circa 1871–79), H. E. C. 304.—CAN.

l. ———.]—*NORTH ONTARIO ELECTION PETITION* (1875), H. E. C. 304.—CAN.

m. ———.]—*R. v. BHISTABIN MADANNA* (1876), I. L. R. 1 Bom. 308.—IND.

n. ———.]—*Subject to intention of legislature.]—O'MEALEY v. SWARTZ* (Sask.), [1918] 3 W. W. R. 98.—CAN.

o. ———.]—The rule of law in *penalibus causis benignius interpretandum est*, imports that where the language of a penal enactment is obscure or ambiguous the ct. should give the benefit of the doubt in favour of deft. It cannot be extended to vary the obvious intention of the statute.—*MOSS v. Sissons & MCKENZIE*, [1907] E. D. C. 156.—S. AF.

1525 i. Words to be given ordinary

*meaning.]—*A statute being restrictive of the common law & of a penal character must receive a restrictive construction & on no account should be construed to mean anything other than the plain ordinary meaning the words would convey.—*SMITH v. McEACHERN* (1873), 9 N. S. R. (3 G. & O.) 35, 279.—CAN.

1525 ii. ———.]—*KINGSTON ELECTION PETITION* (1874), H. E. C. 625.—CAN.

1525 iii. ———.]—*ROYAL ELECTRIC CO. OF CANADA v. EDISON ELECTRIC LIGHT CO.* (1889), 2 Exch. C. R. 576.—CAN.

PART V. SECT. 3, SUB-SECT. 1.

1529 i. Whether evidence of mens rea necessary.]—The question whether or not the common law doctrine of *mens rea* is excluded by a particular statute is to be determined by considering the scope & object of the statute & the

is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, & a variety of other matters necessary for the general welfare, health, or convenience, & such bye-laws are enforced by the sanction of penalties, & the breach of them constitutes an offence & is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had *bonâ fide* made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, & in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, & that if he fails to do so he does it at his peril.

Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, & the various circumstances that may make the one construction or the other reasonable or unreasonable (WILLS, J.).—*R. v. TOLSON* (1889), 23 Q. B. D. 168; 58 L. J. M. C. 97; 60 L. T. 899; 54 J. P. 4, 20; 37 W. R. 716; 5 T. L. R. 465; 16 Cox, C. C. 629, C. C. R.

Annotations:—*Consd.* *R. v. Wheat, R. v. Stocks*, [1921] 2 K. B. 119. *Refd.* *Blaker v. Tillstone* (1894), 70 L. T. 31; *Sherras v. De Rutzen* (1895), 59 J. P. 440; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Pearks' Dairies v. Tottenham Food Control Committee* (1918), 88 L. J. K. B. 623; *R. v. Denyer*, [1926] 2 K. B. 258. *Mentd.* *R. v. Bayley* (1908), 1 Cr. App. Rep. 86.

—*See, also*, CRIMINAL LAW, Vol. XIV., pp. 33–36, Nos. 41–82.

1530. Exclusion of other than prescribed remedy.]

—Where the legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued (LORD ESHER, M.R.).—*R. v. ESSEX COUNTY COURT JUDGE* (1887), 18 Q. B. D. 704; 56 L. J. Q. B. 315; 57 L. T. 613; 51 J. P. 549; *sub nom.* *R. v. CHILMSFORD COUNTY COURT JUDGE*, 35 W. R. 511; 3 T. L. R. 578, C. A.

Annotations:—*Consd.* *Boynnton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213. *Mentd.* *Watson v. White*, [1896] 2 Q. B. 9.

1531. —. —.] — (1) Before referring to the statutes it is desirable that I should state the principle which should govern a case of this description, & it is nowhere given better, I think, than in *Hawkins' Pleas of the Crown*, Bk. 2, c. 25, s. 4. The passage is as follows: It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties & security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for this contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet, if the party offending have been fined to the King in the action brought by the party, as it is said that he may in every action for doing a thing prohibited by statute,

it seems questionable whether he may be afterwards indicted, because that would be to make him liable to a second fine for the same offence. . . . Also where a statute makes a new offence which was no way prohibited by the common law, & appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, etc., without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because the mentioning the other methods of proceeding seems impliedly to exclude that of indictment. Yet it has been adjudged that, if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorises a proceeding by way of indictment. Also where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law; & if the indictment for such offence conclude *contra formam statuti*, & cannot be made good as an indictment upon the statute, it seems to be now settled that it may be maintained as an indictment at common law.

This is a full statement of the principle which must guide me as regards the decision of this case. The inquiry to which I have to address myself is—first, whether the offence charged is a statutory offence simply; secondly, whether, if it be so, the statute creating the offence has prescribed a particular remedy in such terms as to exclude either expressly or by implication the remedy by indictment (CHARLES, J.).

(2) I have now examined all the authorities that have been cited, & I repeat that they appear to me, when properly understood, to support the conclusion at which I have arrived, that upon the true construction of this statute creating, or recreating, a duty, & describing a particular penalty for a wilful neglect of that duty, the remedy by indictment is excluded (CHARLES, J.).—*R. v. HALL*, [1891] 1 Q. B. 747; 60 L. J. M. C. 124; 64 L. T. 394; 17 Cox, C. C. 278.

Annotations:—*As to* (1) *Consd.* *Boynnton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213; *R. v. Kakelo*, [1923] 2 K. B. 793. *As to* (2) *Appld.* *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 61.

1532. Whether retrospective.] — BRASON v. DEAN, No. 1140, *ante*.

1533. —.]—The term “remedial” is applicable to those Acts only where a remedy is given to the party injured; the term “penal” is applied where the remedy given is to be construed strictly & not beyond the terms. This is a penal statute & is to be construed literally & strictly. Whether it was the intention of the legislature that the statute should have a retrospective . . . operation, it is unnecessary to consider, because, upon the face of the Act there is nothing to warrant us in giving it a retrospective construction (HOLROYD, J.).—*HUNTINGTOWER (LORD) v. GARDINER, SAME v. IRELAND* (1823), 1 B. & C. 297; 2 Dow. & Ry. K. B. 450; 1 L. J. O. S. K. B. 120; 107 E. R. 111.

Annotations:—*Mentd.* *Sheppard v. Hall* (1832), 3 B. & Ad. 433; *R. v. Thwaites* (1853), 22 L. J. Q. B. 238; *Cooper v. Slade* (1858), 6 H. L. Cas. 746.

various circumstances which would make the application of the doctrine reasonable or unreasonable as well as the language of the statute.—*R. v. ERSON*, [1914] V. L. R. 144.—AUS.

1529 ii. —.]—*R. v. EWART* (1905), 25 N. Z. L. R. 709.—N.Z.

1532 i. *Whether retrospective.*]—*MAJOR v. McCRAVEY (B. C.)* (1898), 29 S. C. R. 182.—CAN.

1532 ii. —.]—*HOWELL LITHOGRA-*

PHIC CO., LTD. v. BREPHOUR (1899), 30 O. R. 204.—CAN.

1532 iii. —.]—An accused cannot by the provisions of a later statute, except by the most express terms, be made criminally liable for an act which was not criminal when done.—*R. v. HARPER* (1893), 12 N. Z. L. R. 413.—N.Z.

1532 iv. —.]—*Re SPARROW* (1908), 28 N. Z. L. R. 143.—N.Z.

1532 v. —.]—*SHANAHAN v. COULSON, SHANAHAN v. SANDERS* (1913), 32 N. Z. L. R. 905.—N.Z.

p. *Statute made penal under general & special provision.*]—There is no rule providing that an act which is made penal under a general provision in a statute may not also be made penal under a special provision in the same statute.—*MACPHERSON v. NICHOL* (1906), 25 N. Z. L. R. 273.—N.Z.

Sect. 3.—Operation: Sub-sects. 1, 2, 3, 4 & 5.]

1534. —.].—A criminal offence ought not to be created retrospectively (DENMAN, J.).—*R. v. GRIFFITHS*, [1891] 2 Q. B. 145; 60 L. J. M. C. 93; 56 J. P. 87; 39 W. R. 719; 7 T. L. R. 478, C. C. R.

*Annotations:—**Apld. Re Athlumney, Ex p. Wilson*, [1898] 2 Q. B. 547. *Mentd. R. v. Chandra Dharma, R. v. Hutchinson, R. v. Slater, R. v. Court* (1905), 69 J. P.

1535. —.].—*R. v. CHANDRA DHARMA*, No. 1158, *ante*.

1536. —.].—*R. v. AUSTIN*, No. 1167, *ante*.

1537. Substitution of presumption for evidence.]—The provisions of this Act are highly penal. They substitute, as is the modern fashion, presumption for evidence (MATHEW, J.).—*R. v. KENT JJ.* (1889), 24 Q. B. D. 181; 59 L. J. M. C. 51; 54 J. P. 453.

1538. Penalty imposed must be as prescribed.]—*POTTER'S CASE* (1622), Palm. 344; 81 E. R. 1115.

1539. Two penalties provided by Act—Not cumulative.]—Croydon Improvement Act inflicts a penalty of £200 on any gas or other co. for suffering any impure matter to flow into any stream, etc., to be sued for by any common informer. Gasworks Clauses Act, 1847 (c. 15), s. 21, imposes the like penalty of £200 for the same offence; such penalty, sect. 22, to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled from any such act:—*Held*: in the case of a Croydon gas co., with whose private Act Gasworks Clauses Act, 1847 (c. 15), was incorporated the two penalties were not cumulative but that the latter was given by way of substitution for the former.

In construing a penal statute of any kind, we are bound to take care that the party is brought strictly within it & to give no effect to it beyond what it is clear that the Legislature intended. . . . In the imposition of a tax or a duty, & still more of a penalty, if there be any fair & reasonable doubt, we are so to construe the statute as to give the party sought to be charged the benefit of the doubt (POLLOCK, C.B.).—*PARRY v. CROYDON COMMERCIAL GAS CO.* (1863), 15 C. B. N. S. 568; 3 New Rep. 212; 9 L. T. 694; 28 J. P. 86; 10 Jur. N. S. 172; 12 W. R. 212; 143 E. R. 908, Ex. Ch.

1540. —.].—*Infliction of lighter penalty.]*—If a statute provides two degrees of punishment & it is doubtful which is the proper punishment for an offence, the ct. will apply the lighter.—*R. v. TURNER*, [1904] 1 K. B. 181; 73 L. J. K. B. 46; 89 L. T. 676; 68 J. P. 15; 52 W. R. 214; 20 T. L. R. 67; 48 Sol. Jo. 85; 20 Cox, C. C. 590, C. C. R.

1541. Power to dispense with Penal Act—Prerogative of Crown.]—*CASE OF DISPENSATIONS* (1601), Jenk. 307; 145 E. R. 221; *sub nom.* PENAL STATUTES' CASE, 7 Co. Rep. 36.

*Annotations:—**Refd. Colt & Glover v. Coventry & Lichfield (Bp.)* (1616), Hob. 140; *R. v. Hampden* (1637), 3 State Tr. 826; *Thomas v. Sorrell* (1673), Freem. K. B. 85.

1542. Excuses for non-compliance with Act—Whether limited to those specified in Act.]—*R. v. BELL* (1753), Fost. App. 430; 1 East, P. C. 169; 168 E. R. 97.

*Annotation:—**Refd. R. v. Jarvis* (1757), 1 East, 643, n.

Operation outside the realm.]—*See CRIMINAL LAW*, Vol. XIV., pp. 133, 134, Nos. 1056, 1059, 1065.

SUB-SECT. 2.—APPLICATION OF ACT TO OFFENCE COMMITTED.

1543. Necessity for.]—*HUNTINGTOWER (LORD) v. GARDINER, SAME v. IRELAND*, No. 1533, *ante*.

1544. —.].—Distress for Rent Act, 1738 (c. 19), is remedial; but is penal also. It is remedial inasmuch as it extends the remedy which the landlord previously had against his tenant; but it is so far penal, that the landlord who seeks to fix upon a third person the penal consequences of sect. 3, must bring the case by strict & clear & satisfactory evidence, within the letter & meaning of that enactment (BAYLEY, J.).—*BROOKE v. NOAKES* (1828), 8 B. & C. 537; 2 Man. & Ry. K. B. 570; 6 L. J. O. S. K. B. 376; 108 E. R. 1142.

1545. —.].—*A.-G. v. SILLEM*, No. 130, *ante*.

1546. —.].—It is a sound rule of construction that when any penalty or disability is imposed by statute on any of Her Majesty's subjects, the ct. before which any charge is preferred must be able to see clearly what the conduct is which will render a person liable to the penalty so imposed (CAVE, J.).—*CRANE v. LAWRENCE* (1890), 25 Q. B. D. 152; 59 L. J. M. C. 110; 63 L. T. 197; 54 J. P. 471; 38 W. R. 620; 6 T. L. R. 370; 17 Cox, C. C. 135, D. C.

*Annotation:—**Mentd. Wheat v. Brown*, [1892] 1 Q. B. 418.

1547. —.].—The whole sect. [Public Authorities Protection Act, 1893 (c. 61), s. 1] is of a penal nature. . . . It must, therefore, not be extended to any case not exactly covered by its language (FARWELL, J.).—*SMITH v. NORTHLEACH RURAL COUNCIL*, [1902] 1 Ch. 197; 71 L. J. Ch. 8; 85 L. T. 449; 66 J. P. 88; 18 T. L. R. 30.

*Annotations:—**Consd. Myers v. Bradford Corpn.* (1913), 110 L. T. 254. *Mentd. Gilbert v. Gosport & Alverstoke U. C.*, [1916] 2 Ch. 587.

1548. —.].—I think we ought to approach this question bearing in mind the drastic nature of the power & privileges conferred upon public authorities by the [private] Act & the penal nature of the sect. & I wish to quote what FARWELL, J. said with regard to the Act & the way one ought to approach it in the case of *Smith v. Northleach Rural Council*, No. 1547, *ante* (LUSH, J.).—*MYERS v. BRADFORD CORPN.* (1913), 110 L. T. 254; 78 J. P. 177; 12 L. G. R. 148, D. C.; *on appeal*, [1915] 1 K. B. 417, C. A.; *sub nom.* BRADFORD CORPN. v. MYERS, [1916] 1 A. C. 242, H. L.

*Annotations:—**Mentd. Clayton v. Pontypridd U. D. C.*, [1918] 1 K. B. 219; *Newell v. Starkie* (1919), 89 L. J. P. C. 1; *The Danube II*, [1921] P. 183; *Edwards v. Metropolitan Water Board*, [1922] 1 K. B. 291; *Harnett v. Fisher*, [1927] 1 A. C. 573; *Scammell v. Attlee* (1928), 45 T. L. R. 75.

1549. How ascertained.]—The true way of testing such a case as this is not to first argue what crimes or wrongs it is supposed were intended to be reached by the statute & then to endeavour to make the facts of the case fit the supposed intention of the statute, but first to understand exactly what the facts are & then see if the statute as drawn was intended to apply, & does in fact apply to those facts (GRANTHAM, J.).—*R. v. DENNIS*, [1894] 2 Q. B. 458; 63 L. J. M. C. 153; 71 L. T. 436; 58 J. P. 622; 42 W. R. 586; 18 Cox, C. C. 21; 10 R. 316, C. C. R.

*Annotations:—**Mentd. Billing v. Prebble* (1896), 66 L. J. Q. B. 180; *Grivell v. Malpas*, [1906] 2 K. B. 32; *Hewett v. Hattersley*, [1912] 3 K. B. 35; *R. v. Ascanio, Puck & Pulce* (1912), 76 J. P. 487.

PART V. SECT. 3, SUB-SECT. 2.

1543 i. Necessity for.]—*ROYAL ELECTRIC CO. OF CANADA v. EDISON ELECTRIC LIGHT CO.* (1889), 2 Exch. C. R. 576.—CAN.

SUB-SECT. 3.—PENALTY MUST BE CLEARLY IMPOSED.

1550. General rule.]—The form which the legislature enacts for penalties where it is intended that there shall be a penalty for each & every violation of an Act of Parliament, is to be found in the cases of which the Excise Acts present a very familiar example, where, for instance, a penalty is directed to be imposed & forfeited for each & every room that is not entered, & each & every tub & so on. In these cases the words "for each & every offence" are always to be found, as far as I recollect in every Act of Parliament, where cumulative penalties can be claimed for every violation of the law (POLLOCK, C.B.).—*A.-G. v. M'LEAN* (1863), 1 H. & C. 750; 1 New Rep. 290; 32 L. J. Ex. 101; 8 L. T. 113; 27 J. P. 407; 158 E. R. 1085; *sub nom.* *R. v. M'LEAN*, 9 Jur. N. S. 338; 11 W. R. 292.

Annotation:—Reid. Milnes v. Bale, Milnes v. Lea (1875), L. R. 10 C. P. 591.

1551. —.]—(1) When the words of a statute are equally applicable to penal or civil consequences, the ct. will construe the statute in favour of the latter.

(2) Where two statutes dealing with the same subject-matter use different language, it is an acknowledged rule of construction that one may be looked at as a guide to the construction of the other. If one uses distinct language, imposing a penalty under certain circumstances, & the other does not, it is always an argument that the legislature did not intend to impose a penalty in the latter, for where they did so intend, they plainly said so (BRETT, J.).—*DICKENSON v. FLETCHER* (1873), L. R. 9 C. P. 1; 43 L. J. M. C. 25; 29 L. T. 540; 38 J. P. 88.

1552. —.]—In order to warrant us in inflicting this penalty, the Act of Parliament should be clear & beyond all doubt (POLLOCK, C.B.).—*EASTON v. ALCE* (1861), 7 H. & N. 452; 31 L. J. Ex. 115; 5 L. T. 323; 26 J. P. 280; 8 Jur. N. S. 156; 10 W. R. 110; 158 E. R. 549.

1553. —.]—We must act on the general rule, that when the legislature impose a penalty the words imposing it must be clear & distinct (BLACKBURN, J.).—*WILLIS v. THORP* (1875), L. R. 10 Q. B. 383; 33 L. T. 11; 23 W. R. 730.

Annotation:—Mentd. Beetham v. Crewdson (1890), 55 J. P. 55.

1554. —.]—I attach great importance to the rule that unless penalties are imposed in clear terms they are not enforceable (LORD LOREBURN).—*A.-G. v. TILL*, [1910] A. C. 50; 79 L. J. K. B. 141; 101 L. T. 819; 26 T. L. R. 134; 5 Tax Cas. 440, H. L.

Annotation:—Mentd. Edinburgh Life Assco. v. Lord Advocate, [1910] A. C. 143.

SUB-SECT. 4.—REPEAL OF PENAL ACT.

1555. Effect of.]—*R. v. SWAN*, No. 2027, *post*.

1556. —.]—Bankruptcy Law Consolidation Act, 1849 (c. 106), s. 1, & sched. A repealed Bankruptcy Act, 1842 (c. 122), without making any reservation of offences committed under Bankruptcy Act, 1842 (c. 122); offences therefore under Bankruptcy Act, 1842 (c. 122), committed

before Oct. 11, 1849, on which day Bankruptcy Law Consolidation Act, 1849 (c. 106), came into operation, are not punishable by indictment commenced after that day.—*R. v. NAIRNE* (1850), 14 J. P. 162; 4 Cox, C. C. 115.

Annotation:—Distd. R. v. Smith (1862), 5 L. T. 761.

1557. —.]—*BENNETT v. TATTON*, No. 2029, *post*.

By alteration of penalties.]—See Part IX., Sect. 1, sub-sect. 2, E., *post*.

SUB-SECT. 5.—EXEMPTION FROM OPERATION.

1558. By exception in enacting clause—Duty of plaintiff to deny exemption.]—For it is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law it must appear in the charge that deft. does not fall within any of them (LORD MANSFIELD, C.J.).—*R. v. JARVIS* (1756), 1 East, 643, n.; 1 Burr. 148; 102 E. R. 249.

Annotations:—Consd. R. v. Stone (1801), 1 East, 639; *The Adelaide* (1829), 2 Hag. Adm. 230; *R. v. James*, [1902] 1 K. B. 540; *R. v. Audley*, [1907] 1 K. B. 383. *Reid. Cooper v. Dodd* (1850), 2 Rob. Eccl. 270; *Re Porham* (1859), 5 Jur. N. S. 1212.

1559. —.]—*THIBAUT v. GIBSON*, No. 1798, *post*.

1560. —.]—It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same sect. of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception (*per* CUR.).—*R. v. JAMES*, [1902] 1 K. B. 540; 71 L. J. K. B. 211; 86 L. T. 202; 66 J. P. 217; 50 W. R. 286; 18 T. L. R. 284; 46 Sol. Jo. 247; 20 Cox, C. C. 156, C. C. R.

Annotations:—Consd. R. v. Audley, [1907] 1 K. B. 383. *Reid. R. v. King* (1914), 110 L. T. 783. *Mentd. R. v. Payne*, [1906] 1 K. B. 97; *R. v. Creamer*, [1919] 1 K. B. 564.

1561. —.]—I will merely refer to the passages from the judgments in *R. v. Jarvis*, No. 1558, *ante*, quoted in *R. v. James*, No. 1560, *ante*, & in *R. v. James*, No. 1560, *ante*, having reviewed all the authorities, we pointed out that: "It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception." In other words, we decided that . . . the same rule applies even where the exception comes by way of proviso in the same sect. which creates the offence (LORD ALVERSTONE, C.J.).—*R. v. AUDLEY*, [1907] 1 K. B. 383; 76 L. J. K. B. 270; 96 L. T. 160; 71 J. P. 101; 23 T. L. R. 211; 51 Sol. Jo. 146; 21 Cox, C. C. 374, C. C. R.

1562. By proviso—Duty of defendant to plead.]—*R. v. JARVIS*, No. 1558, *ante*.

1563. —.]—*THIBAUT v. GIBSON*, No. 1798, *post*.

1564. —.]—*R. v. JAMES*, No. 1560, *ante*.

1565. —.]—*R. v. AUDLEY*, No. 1561, *ante*.

PART V. SECT. 3, SUB-SECT. 4.

1555 i. Effect of.]—*R. v. DURNION* (1887), 14 O. R. 672.—CAN.

q. — Clause in repealing statute saving proceedings commenced.]—*R. v. KERR & WILSON* (1876), 26 C. P. 214.—CAN.

PART V. SECT. 3, SUB-SECT. 5.

1558 i. By exception in enacting clause—Duty of plaintiff to deny exemption.]—*R. v. DIBBLEE, Ex p. MCINTYRE* (1909), 39 N. B. R. 361; 16 Can. Crim. Cas. 38.—CAN.

1558 ii. —.]—Where a statute has provided that certain acts shall

constitute a crime, subject to certain exceptions or provisos the indictment of a person for committing such a crime must show negatively that the party or the matter pleaded does not come within the meaning of such exception or provisos.—*R. v. SMITH* (1883), 2 S. C. 257.—S. AF.

Part VI.—Fiscal and Revenue Statutes.

SECT. 1.—IN GENERAL.

1566. Duty must be clearly imposed.]—A statute which imposes a tax or duty must be clear & express; and any ambiguity will entitle the subject to be exempt from the tax or duty.—*KINGSTON-UPON-HULL DOCK CO. v. LA MARCHE* (1828), 8 B. & C. 42; 108 E. R. 958; *sub nom. HULL DOCK CO. v. LA MARCHE*, 2 Man. & Ry. K. B. 107; 6 L. J. O. S. K. B. 216.

Annotations:—Refd. Priestley v. Foulds (1840), 2 Scott, N. R. 205; *North & South Shields Ferry Co. v. Barker* (1848), 2 Exch. 136.

1567 —.]—As this statute does impose a tax the usual rule of construction must be applied to it which is adopted in similar cases & the subject must not be charged unless the intention to charge clearly & distinctly appear (*PARKE, J.*).—*BUSSEY v. STOREY* (1832), 4 B. & Ad. 98; 1 Nev. & M. K. B. 639; 1 Nev. & M. M. C. 522; 2 L. J. K. B. 166; 110 E. R. 392.

Annotations:—Refd. Pope v. Langworthy (1833), 5 B. & Ad. 464; *Phipson v. Harvett* (1834), 1 Cr. M. & R. 473; *R. v. Worcestershire JJ.* (1853), 21 L. T. O. S. 154.

1568. —.]—If you call upon the subject to pay a tax, you must show a clear public liability, & if there is any doubt, it is the duty of the court not to impose it (*POLLOCK, C.B.*).—*BADDELEY v. GINGELI* (1847), 1 Exch. 319; 2 New Mag. Cas. 294; 17 L. J. Ex. 63; 10 L. T. O. S. 114; 11 J. P. Jo. 838; 154 E. R. 136.

Annotations:—Refd. Elliott v. South Devon Ry. (1848), 2 Exch. 725; *London School Board v. St. Mary, Islington* (1875), 1 Q. B. D. 65; *Wakefield L. B. v. Lee* (1876), 1 Ex. D. 336; *Lightbound v. Higher Bebbington L. B.* (1885), 16 Q. B. D. 577.

1569. —.]—In the construction of revenue Acts, a duty cannot be imposed upon the subject except by clear words. The meaning of the Legislature must be distinctly made out from the terms of the statute (*POLLOCK, C.B.*).—*CHANDOS (MARQUIS) v. INLAND REVENUE COMRS.* (1851), 6 Exch. 464; 20 L. J. Ex. 269; 17 L. T. O. S. 128; 155 E. R. 624.

Annotations:—Mentd. Mortimore v. I. R. Comrs. (1864), 2 H. & C. 838; *Eglinton Trustees v. I. R. Comrs.* (1865), 3 H. & C. 871; *Christie v. I. R. Comrs.* (1866), 15 L. T. 282; *Re De Lancey's Succession* (1869), 21 L. T. 58; *Truman, Hanbury, Buxton v. I. R. Comrs.*, [1912] 3 K. B. 377.

1570. —.]—*STEVENSON v. CHARLESWORTH* (1853), 22 L. T. O. S. 98; *sub nom. STEPHENSON v. CHARLESWORTH*, 17 J. P. Jo. 741.

1571. —.]—It is a well established rule that the subject is not to be taxed without clear words for that purpose & also that every Act of Parliament must be read according to the natural construction of its words (*PARKE, B.*).—*Re MICKLETHWAIT* (1855), 11 Exch. 452; 25 L. J. Ex. 19; 156 E. R. 908.

Annotations:—Expld. Foley v. Fletcher (1858), 3 H. & N. 769. The latter is the main rule, the other subordinate (*BRAMWELL, B.*). *Consd. A. v. Sibthorp* (1858), 3 H. & N. 424; *Braybrooke v. A.-G.* (1861), 9 H. L. Cas. 150. *Refd. Le Marchant v. I. R. Comrs.* (1875), 33 L. T. 50; *Tennant v. Smith*, [1892] A. C. 150; *A.-G. v. Beech*, [1898] 2 Q. B. 147; *A.-G. v. Selborne*, [1902] 1 K. B. 388; *Drummond v. Collins* (1915), 6 Tax Cas. 525; *Ormond Investment Co. v. Betts*, [1928] A. C. 143. *Mentd. Re De Lancey's Succession* (1869), 21 L. T. 58; *Re Higgins, Day v. Turnell* (1885), 31 Ch. D. 142; *A.-G. v. Montefiore* (1888), 21 Q. B. D. 461.

1572. —.]—Whoever seeks to impose a tax or

penalty must establish the right (*BRAMWELL, B.*).—*FOLEY (LADY) v. FLETCHER* (1858), 3 H. & N. 769; 28 L. J. Ex. 100; 33 L. T. O. S. 11; 5 Jur. N. S. 342; 157 E. R. 678.

Annotations:—Refd. Direct United States Cable Co. v. Anglo-American Telegraph Co. (1877), 2 App. Cas. 394. *Mentd. Horton v. Sayer* (1859), 29 L. J. Ex. 28; *City of London Contract Corp. v. Styles* (1887), 2 Tax Cas. 239; *Clerical Medical & General Life Assco. Soc. v. Carter* (1888), 21 Q. B. D. 339; *Psalms & Hymns (Baptist) Trustees v. Whitwell* (1890), 7 T. L. R. 164; *Secretary of State in Council of India v. Scobel*, [1903] A. C. 209; *Chadwick v. Pearl Life Insce.*, [1905] 2 K. B. 507; *Delage v. Nugget Polish Co.* (1905), 92 L. T. 682; *East Indian Ry. v. Secretary of State for India* (1905), 92 L. T. 495; *Surbiton U. D. C. v. Callender's Cable & Construction Co.* (1910), 8 L. G. R. 244; *Massy v. I. R. Comrs.* (1915), [1919] 2 K. B. 354, n.; *Howe v. I. R. Comrs.*, [1919] 2 K. B. 336; *Jones v. I. R. Comrs.*, [1920] 1 K. B. 711; *R. v. Income Tax Special Comrs., Ex p. Shaftesbury Homes & Arethusa Training Ship*, [1922] 2 K. B. 729.

1573. —.]—No proposition is better established than that a tax cannot be imposed on a subject unless by clear words (*LORD WENSLEYDALE*).—*BRAYBROOKE (LORD) v. A.-G.* (1861), 9 H. L. Cas. 150; 31 L. J. Ex. 177; 4 L. T. 218; 7 Jur. N. S. 741; 9 W. R. 601; 11 E. R. 685, II. L.; *affq. S. O. sub nom. A.-G. v. BRAYBROOKE (LORD)* (1860), 5 H. & N. 488.

Annotations:—Refd. A.-G. v. Abdy (1862), 1 H. & C. 266; *A.-G. v. Oxford Worcester & Wolverhampton Ry., Sheriff & Adcock* (1862), 7 H. & N. 840; *A.-G. v. Upton* (1866), L. R. 1 Exch. 224; *R. v. Cowley's Succession* (1866), 12 Jur. N. S. 607; *Le Marchant v. I. R. Comrs.* (1875), L. R. 10 Exch. 292; *A.-G. v. Selborne*, [1902] 1 K. B. 388; *Lord Advocate v. Moray*, [1905] A. C. 531. *Mentd. A.-G. v. Deane* (1861), 5 L. T. 122; *Re Barker* (1861), 7 H. & N. 109; *Re Peyton* (1861), 7 H. & N. 265; *A.-G. v. Floyer* (1862), 9 H. L. Cas. 478; *A.-G. v. Gardner* (1863), 1 H. & C. 639; *A.-G. v. Lilford* (1864), 3 H. & C. 239; *A.-G. v. Cecil* (1870), L. R. 5 Exch. 263; *I. R. Comrs. v. Harrison* (1874), L. R. 7 H. L. 1; *Charlton v. A.-G.* (1879), 4 App. Cas. 427; *A.-G. v. Dowling* (1880), 6 Q. B. D. 177; *A.-G. v. Mitchell* (1881), 44 L. T. 580; *A.-G. v. Maule* (1886), 56 L. T. 611; *A.-G. v. Chapman*, [1891] 2 Q. B. 526; *A.-G. v. Dodington*, [1897] 1 Q. B. 722; *Wolverton v. A.-G.*, [1898] A. C. 535; *Cowley v. I. R. Comrs.*, [1899] A. C. 198; *A.-G. v. Northumberland*, [1904] 1 K. B. 762; *Parr v. A.-G.*, [1926] A. C. 239.

1574. —.]—*A.-G. v. WYNDHAM* (1862), 1 H. & C. 563; 1 New Rep. 100; 32 L. J. Ex. 1; 7 L. T. 386; 8 Jur. N. S. 1182; 11 W. R. 185; 158 E. R. 1008.

1575. —.]—Whenever it is sought to impose a rate, the burden lies on those seeking to enforce it to show that the words used by the Legislature are clear & unambiguous in order to charge the subject. An Act of the Legislature imposed a rate on lands " & other real estate: "—*Held*: although these words were large enough to include a rentcharge in lieu of tithes, they would not necessarily do so if it appeared from the general wording of the Act that it was not intended to apply to incorporeal rights.—*INGRAM v. DRINKWATER* (1875), 44 L. J. P. C. 83; 32 L. T. 746, P. C.

1576. —.]—The intention to impose a charge upon the subject must be shown by clear & unambiguous language.—*ORIENTAL BANK CORPN. v. WRIGHT* (1880), 5 App. Cas. 842; 50 L. J. P. C. 1; 43 L. T. 177, P. C.

Annotation:—Refd. Brunton v. Stamp Duties Comr., [1913] A. C. 747.

1577. —.]—You must see whether a tax is expressly imposed (*LORD HALSBURY, C.*).—*TENNANT v. SMITH*, [1892] A. C. 150; 61 L. J.

PART VI. SECT. 1.

1566 i. Duty must be clearly imposed.]—If by a statute it is intended to impose a tax upon the subject, its construction must be clear beyond all

reasonable doubt.—*R. v. MALLOW UNION GUARDIANS* (1860), 12 I. C. L. R. 35.—*IR.*

1566 ii. —.]—*SHAW v. RUDDIN* (1858), 9 I. C. L. R. 214.—*IR.*

1566 iii. —.]—*Re STUDDERT*, [1900] 2 I. L. 400.—*IR.*

1566 iv. —.]—*IR.* (1890), 7 Nfld. L. R. 472.—*NFLD.*

1588 i. *Construction on ordinary or natural meaning.*—*Re* TRANSFER TO PALMER (1903), 23 N. Z. L. R. 1013.—N.Z.

Sect. 2.—Construction.

in the affirmative; or, if a vendor were to contract to deliver coals of any description named by the purchaser, would he be called upon to deliver patent fuel? We apprehend he could not. Why should we give a different meaning to the same word in different sects. for the purpose of extending the operation of a clause imposing a tax? We think therefore that we ought to construe the word according to its ordinary meaning which will make the different parts of the Act consistent with each other (TALFOURD, J.).—LONDON CORPN. v. PARKINSON (1850), 10 C. B. 228; 4 New Mag. Cas. 153; 15 L. T. O. S. 365; 138 E. R. 93.

Annotations:—**Reid**. A.-G. v. Barry (1859), 4 H. & N. 470; Fullwood v. Akerman (1862), 11 C. B. N. S. 737.

1589. —.—.]—This is a taxing Act, & it is essential to see that the tax is expressly imposed, that the subject is not taxed without clear words, & that the natural construction is given to the words used (LORD ASHBOURNE).—A.-G. v. BEECH, [1899] A. C. 53; 68 L. J. Q. B. 130; 79 L. T. 565; 63 J. P. 116; 47 W. R. 257; 15 T. L. R. 85; 43 Sol. Jo. 94, H. L.; *affg.*, [1898] 2 Q. B. 147, C. A.

Annotations:—**Mentd.** A.-G. v. Grov, [1898] 2 Q. B. 531; Cowley v. J. R. Comrs., [1899] A. C. 198; A.-G. v. De Préville, [1900] 1 Q. B. 223; I. R. Comrs. v. Priestley, [1901] A. C. 208; A.-G. v. Montagu, [1903] 1 K. B. 483; Evans v. Evans, [1904] P. 274; A.-G. v. Richmond (No. 2) (1908), 78 L. J. K. B. 1; A.-G. v. Milne, [1914] A. C. 765; A.-G. v. Lane Fox, [1924] 2 K. B. 498.

1590. —.—.]—The Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; & if there is a case which is not covered by the statute so interpreted that can only be cured by legislation & not by an attempt to construe the statute benevolently in favour of the Crown (COLLINS, M.R.).—A.-G. v. SELBORNE (EARL), [1902] 1 K. B. 388; 71 L. J. K. B. 289; 85 L. T. 714; 66 J. P. 132; 50 W. R. 210; 18 T. L. R. 111; 46 Sol. Jo. 103, C. A.

Annotations:—**Appld.** A.-G. v. Milne, [1914] A. C. 765. **Mentd.** *Re* Walpole's Marriage Settlement, Thomson v. Walpole, [1903] 1 Ch. 928; Tremayne v. Rashleigh, [1908] 1 Ch. 681; Northumberland v. I. R. Comrs., [1911] 2 K. B. 343; *Re* Bath's Settlement, Thynne v. Stewart (1914), 111 L. T. 153; *Re* Rush, Warre v. Rush, [1922] 1 Ch. 302.

1591. —.—.]—This vehicle falls within the exact language of the Act of Parliament [Finance Act, 1926 (c. 22)], & that being so, it is not proper for your lordships to speculate on the reasons which induced Parliament to use that language (LORD HAILSHAM, C.).—TILLING-STEVENS MOTORS, LTD. v. KENT COUNTY COUNCIL (1929), 45 T. L. R. 249, H. L.

1592. Whether strict construction—In favour of Crown.—CAMPLIN v. BULLMAN, No. 1467, *ante*.

1593. —.—.]—A.-G. v. SELBORNE (EARL), No. 1590, *ante*.

1592 i. Whether strict construction—In favour of Crown.—Statutes imposing taxes should be construed strictly against the Crown.—*Re* HENTY'S ESTATE (1878), 4 V. L. R. 54.—AUS.

1595 i. —.—.]—*In favour of subject.*—SECRETARY OF STATE FOR INDIA IN COUNCIL v. LALDAS NARANDAS (1909), 1 L. L. R. 31 Bom. 239.—IND.

1595 ii. —.—.]—A fiscal enactment should be construed strictly & in favour of the subject.—SALT COMR. (SECRETARY), ARKARI & SEPARATE REVENUE, REVENUE BOARD, MADRAS v. ORR (1913), 1 L. L. R. 38 Mad. 646.—IND.

r. —.—.]—*(Construction of special exemption.)*—Where the construction of a statutory provision conferring the privilege of exemption from taxation is doubtful, the ct. should reject that

construction which would imply the extension of the class exempted if the language reasonably admits of another interpretation.—SWINBURNE v. FEDERAL TAXATION COMR. (1920), 27 C. L. R. 377.—AUS.

t. —.—.]—HALIFAX CORPN. v. SISTERS OF CHARITY (1904), 40 N. S. R. 481.—CAN.

strict construction of taxing statutes is not the one applicable, where the provision in question is one exempting from the general imposition, & in that case the rule of construction is rather against the one claiming the exemption.—R. & ALBERTA PROVINCIAL TREASURER v. CANADIAN NORTHERN RY. CO. & CANADIAN NATIONAL RY. CO., [1921] 1 W. W. R. 1178; 16 Alta. L. R. 220; 58 D. L. R. 624.—CAN.

1594. —.—.]—A.-G. v. PEEK, No. 1609, *post*.

1595. —.—.]—*In favour of subject.*—The revenue & navigation laws are to be construed & applied with great exactness, they are framed for the security of great national interests; & the effect of such laws, founded on great purposes of public policy, must not be weakened by a minute tenderness to particular hardships. . . . At the same time they are not subject to all considerations of rational equity (SIR WILLIAM SCOTT).—THE BETTY CATHCART (1799), 1 Ch. Rob. 220; 165 E. R. 156.

Annotation:—**Mentd.** *Idle v. Royal Exchange Assce.* (1819), 3 Moore, C. P. 115.

1596. —.—.]—KINGSTON-UPON-HULL DOCK CO. v. LA MARCHE, No. 1566, *ante*.

1597. —.—.]—The Stamp Act is to be construed strictly (PARKE, B.).—HARRIS v. BIRCH (1842), 1 Dowl. N. S. 899; 9 M. & W. 591; 11 L. J. Ex. 219; 152 E. R. 249.

Annotations:—**Mentd.** *Re* Attenborough & I. R. Comrs. (1855), 11 Exch. 461; Sewell v. Burdick (1884), 10 App. Cas. 74.

1598. —.—.]—Statutes imposing a tax must be strictly construed (WILDE, C.J.).—DAVIES v. HEATH (1846), 8 L. T. O. S. 91.

1599. —.—.]—BADDELEY v. GINGELL, No. 1568, *ante*.

1600. —.—.]—It was unquestionable that, as a general principle, where Acts of Parliament imposed fiscal duties on the subject, they must be construed reasonably; & if they were ambiguous, the subject was entitled to the benefit of the doubt, not merely where the ingenuity of counsel was able to show that the language might have been more clear to show the intention of the legislature, but where the judicial mind entertained a reasonable doubt as to such intention, & retained it after a careful examination & consideration. In such a case the ct. was bound to give the subject the benefit of the doubt, although the inclination of opinion might be contrary to such interpretation (KINDERSLEY, V.-C.).—WILCOX v. SMITH (1857), 4 Drew. 40; 26 L. J. Ch. 596; 3 Jur. N. S. 604; 5 W. R. 667; 62 E. R. 16; *sub nom.* WILCOX v. SMITH, WILCOX v. BROWN, 29 L. T. O. S. 235.

Annotations:—**Mentd.** A.-G. v. Middleton (1858), 3 H. & N. 125; A.-G. v. Deane (1861), 5 L. T. 122; *Re* Cooper & Allen's Contract for Sale to Harlech (1876), 4 Ch. D. 802; A.-G. v. Noyes (1881), 8 Q. B. D. 125.

1601. —.—.]—NICHOLSON v. FIELDS, No. 188, *ante*.

1602. —.—.]—PARRY v. CROYDON COMMERCIAL GAS CO., No. 1539, *ante*.

1603. —.—.]—If there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute (LORD CAIRNS).

b. —.—.]—An act imposing duties is to receive a strict, & not a liberal interpretation so far as the imposition of duty is concerned.—DAVIES v. HERBERT (1885), 11 V. L. R. 386.—AUS.

c. —.—.]—A taxing statute receives strict construction & full effect is given to imperative language.—STERLING v. CUMBERLAND SCHOOL SECTION NO. 2 TRUSTEES (1915), 49 N. S. R. 125.—CAN.

d. —.—.]—A taxing act is subject to strict construction, particularly if vested rights are interfered with, but effect must be given to the express words of the statute.—MORTGAGE CORPN. OF NOVA SCOTIA v. WALSH, [1925] 1 D. L. R. 665; 57 N. S. R. 547.—CAN.

e. Construction as penal statute.—A.-G. v. PATTERSON (1827), 1 N. B. R. (Chp.) 16.—CAN.

—PARTINGTON v. A.-G. (1869), L. R. 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370, H. L.; *affg.* S. C. *sub nom.* A.-G. v. PARTINGTON (1864), 3 H. & C. 193, Ex. Ch.

Annotations:—*Apld.* A.-G. v. Solborne, [1902] 1 K. B. 388; Northumberland v. I. R. Comrs., [1911] 2 K. B. 343; Dyson v. A.-G., [1912] 1 Ch. 158; A.-G. v. Milne, [1914] A. C. 765; Drummond v. Collins (1915), 84 L. J. K. B. 1690; Ormond Investment Co. v. Betts, [1928] A. C. 143. *Refd.* Colquhoun v. Brooks (1888), 21 Q. B. D. 52; A.-G. v. De Préville, [1900] 1 Q. B. 223; I. R. Comrs. v. Sheffield & South Yorkshire Navigation Co., [1916] 1 K. B. 882; *Re* Abergavenny, Nevill v. I. R. Comrs., [1923] 2 K. B. 18. *Mentd.* Lord v. Colvin (1867), L. R. 3 Eq. 737; Fleet v. Perrins (1869), 9 B. & S. 575; *In the Goods of Harding* (1872), L. R. 2 P. & D. 394; Smart v. Tranter (1888), 40 Ch. D. 165; Trevor v. Hutchins, [1896] 1 Ch. 844.

1604. ———.]—Taxing Acts must be construed strictly.—COX v. RABBITS (1878), 3 App. Cas. 473; 47 L. J. Q. B. 385; 38 L. T. 430; 42 J. P. 676; 26 W. R. 483, H. L.; *affg.* S. C. *sub nom.* RABBITS v. COX (1877), 3 Q. B. D. 307, C. A.

Annotations:—*Refd.* Associated Newspapers v. City of London Corpn., [1916] 2 A. C. 429. *Mentd.* St. Thomas', St. Bartholomew's & Bridewell Hospitals v. Hudgell, [1901] 1 K. B. 364; Westminster Corpn. v. Johnson, Same v. Fuller, [1904] 2 K. B. 737.

1605. ———.]—The cases which have decided that taxing Acts are to be construed with strictness . . . probably meant little more than this, that, inasmuch as there was not any *a priori* liability in a subject to pay any particular tax nor any antecedent relationship between the taxpayer & the taxing authority no reasoning founded upon any supposed relationship of the taxpayer & the taxing authority could be brought to bear upon the construction of the Act (LORD CAIRNS, C.).—PRYCE v. MONMOUTHSHIRE CANAL & RY. COS. (1879), 4 App. Cas. 197; 49 L. J. Q. B. 130; 40 L. T. 630; 43 J. P. 524; 27 W. R. 666, H. L.

Annotations:—*Apld.* Tennant v. Swansea Harbour Trustees (1886), 3 T. L. R. 128. *Refd.* McDougall & Bonthron v. London & India Docks Co., Page & East v. Same, [1908] 2 K. B. 175. *Mentd.* G. W. Ry. v. Ry. Comrs. (1881), 7 Q. B. D. 182; R. v. Ry. Comrs. & Distington Iron Co. (1889), 22 Q. B. D. 642.

1606. ———.]—[This] is a taxing Act &, being so, must in my opinion be construed strictly, & the *onus* lies upon the Crown to show that the persons whom it is sought to tax fall clearly within its operation (LORD ALVERSTONE, C.J.).—WHITELEY v. BURNS, [1908] 1 K. B. 705; 77 L. J. K. B. 467; 98 L. T. 836; 72 J. P. 127; 21 T. L. R. 319; 52 Sol. Jo. 264, D. C.

Annotations:—*Refd.* Whiteley v. R. (1909), 101 L. T. 741; Marchant v. L. C. C., [1910] 2 K. B. 379; L. C. C. v. Perry, [1915] 2 K. B. 193.

1607. ———.]—In construing a taxing Act, the presumption is that the legislature has granted precisely that tax to the Crown which it has described, & no other, & there is no presumption of any desire to extend it (HAMILTON, J.).—A.-G. v. SECCOMBE, [1911] 2 K. B. 688; 80 L. J. K. B. 913; 105 L. T. 18.

Annotation:—*Refd.* A.-G. v. Sandwich, [1922] 2 K. B. 500.

1608. ———.]—This statute is not merely a taxing Act, but is a taxing Act coupled with duties to supply information of a most onerous character, & entailing great expenditure of time & trouble, & in many cases of money also, with heavy penalties attached. To such an Act of all others the statement of LORD CAIRNS in *Partington v. A.-G.*, No. 1603, *ante*, applies (FARWELL, L.J.).—

1. Construction as creating forfeiture.]—COTTER v. SUTHERLAND, STEVENS v. JACQUES (1868), 18 C. P. 357.—CAN.

2. Construction with reference to fiscal policy at time of passing Act.]—In construing a revenue Act regard

should be had to the general fiscal policy of the country at the time the Act was passed. When that is a matter of history, reference must be had to the sources of such history, which are not only to be found in the

DYSON v. A.-G., [1912] 1 Ch. 158; 81 L. J. K. B. 217; 105 L. T. 753; 28 T. L. R. 72, C. A.

Annotations:—*Refd.* Burghes v. A.-G., [1912] 1 Ch. 173. *Mentd.* Galloway v. Hallé Concerts Soc., [1915] 2 Ch. 233; A.-G. v. Foran, [1916] 2 A. C. 128; Gresham Life Assco. Soc. v. A.-G., [1916] 1 Ch. 228; Hosier v. Derby, [1918] 2 K. B. 671; Bombay & Persia Steam Navigation Co. v. MacLay, [1920] 3 K. B. 402; Smeeton v. A.-G., [1920] 1 Ch. 85; Whitney v. I. R. Comrs., [1926] A. C. 37; Wigg v. A.-G. for Irish Free State, [1927] A. C. 674; Grant v. Knaresborough U. C., [1928] 1 Ch. 310.

1609. ———.]—The principle has often been laid down that taxing Acts are to be construed strictly. Where the Legislature has given the Crown revenue, that revenue must be exacted, however burdensome; but where the Legislature has not clearly given the Crown the revenue, the Act cannot be strained or supplemented by any implications to effect that object (HAMILTON, J.).—A.-G. v. PEEK, [1912] 2 K. B. 192; 81 L. J. K. B. 574; 106 L. T. 630; *affd.* on other grounds, [1913] 2 K. B. 487, C. A.

1610. ———.] — LUMSDEN v. INLAND REVENUE COMRS., No. 238, *ante*.

1611. ———.]—ORMOND INVESTMENT CO. v. BETTS, No. 1584, *ante*.

1612. ———. In favour of foreigner.]—(1) We are entitled & indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature & which may serve to show that the particular provision ought not to be construed as it would be if considered alone & apart from the rest of the Act (LORD HERSCHELL).

(2) At the same time, I am far more denying that if it can be shown that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in this country it would afford a reason for adopting some other interpretation if it were possible consistently with the ordinary canons of construction (LORD HERSCHELL).—COLQUHOUN v. BROOKS (1889), 14 App. Cas. 493; 59 L. J. Q. B. 53; 61 L. T. 518; 54 J. P. 277; 38 W. R. 289; 5 T. L. R. 728; 2 Tax Cas. 490, H. L.

Annotations:—*As to* (1) *Apld.* Garbutt v. Durham Joint Committee, [1904] 2 K. B. 514. *Refd.* Drummond v. Collins, [1915] A. C. 1011; Wankie Colliery Co. v. I. R. Comrs., [1921] 3 K. B. 311. *Generally, Refd.* Lowe v. Dorling, [1906] 2 K. B. 772; Gregg v. Richards, [1926] Ch. 521. *Mentd.* London Bank of Mexico & South America v. Apthorpe, [1891] 2 Q. B. 378; Bartholomay Brewing Co. (of Rochester) v. Wyatt, Nobel Dynamite Trust Co. v. Wyatt, [1893] 2 Q. B. 499; San Paulo Brazilian Ry. v. Carter, [1896] A. C. 31; Apthorpe v. Schoenhofen Brewing Co. (1899), 80 L. T. 395; L. C. C. v. A.-G., [1901] A. C. 26; R. v. Clerkenwell General Comrs. of Taxes, [1901] 2 K. B. 879; Kodak v. Clark (1903), 4 Tax Cas. 549; De Beers Consolidated Mines v. Howe (1905), 21 T. L. R. 460; Gramophone & Typewriter v. Stanley, [1908] 2 K. B. 89; American Thread Co. v. Joyce (1912), 106 L. T. 171; Liverpool & London & Globe Insee. v. Bennett, Brice v. Ocean Accident & Guarantee Corpn., Brice v. Northern Assce., [1912] 2 K. B. 41; Mitchell v. Egyptian Hotels, [1915] A. C. 1022; Kensington Income Tax Comrs. v. Aramayo, [1916] 1 A. C. 215; Brooke v. I. R. Comrs., [1918] 1 K. B. 257; Greenwood v. Smidh (1921), 91 L. J. K. B. 349; I. R. Comrs. v. Sansom, [1921] 2 K. B. 492; Singer v. Williams, [1921] 1 A. C. 41; Williams v. Singer, Pool v. Royal Exchange Assce., [1921] 1 A. C. 65; Bradbury v. English Sewing Cotton Co. (1923), 8 Tax Cas. 481; Alianza Co. v. I. R. Comrs., [1925] A. C. 614; Foulsham v. Pickles, [1925] A. C. 458; Swedish Central Ry. v. Thompson, [1925] A. C. 495; Whelan v. Henning, [1925] 1 K. B. 387; Whitney v. I. R. Comrs., [1926] A. C. 37; Shee v. Baker, [1927] 1 K. B. 109; I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford, [1928] 1 K. B. 118.

Acts of Parliament, but in the proceedings of Parliament, & in the debates & discussions which take place there & elsewhere.—TORONTO RY. CO. v. R. (1894), 4 Exch. C. R. 262.—CAN.

SECT. 3.—OPERATION.

1613. Whether Act may be retrospective.]—Where, by an Act, a duty is imposed with a retrospective date, depending on a fact which has taken place, &, which is provided for by the alternative expressions of "shall be," or "shall have been found," it seems that the duty attaches from such retrospective date.—*HUME v. HAIG* (1799), 8 Bro. Parl. Cas. 196; 3 E. R. 531, H. L.

1614. Act operates regardless of private arrangements.]—We have nothing to do with the intention of the settlor. The Acts imposing the tax break through all private arrangements.—*A.-G. v. SHIELD* (1858), 3 H. & N. 834; 28 L. J. Ex. 49; 23 J. P. 216; 157 E. R. 705.

*Annotations:—**Reid. Festing v. Taylor* (1862), 3 B. & S. 217. *Mentd. Brooke v. Price*, [1916] 2 Ch. 345.

Part VII.—Local, Personal and Private Statutes.

SECT. 1.—IN GENERAL.

Application for private Act—Power of court to prevent.]—*See* INJUNCTION, Vol. XXVIII., pp. 486–488, Nos. 911–920.

1615. Objects of statute—Necessity for clear statement.]—*DOE d. BYWATER v. BRANDLING*, No. 610, *ante*.

1616. Interference with rights or imposition of obligations—Must be clearly stated.]—If a public co. or any individuals obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to show that it does it with sufficient clearness (*MELLISH, L.J.*).—*CLOWES v. STAFFORDSHIRE POTTERIES WATERWORKS CO.* (1872), 8 Ch. App. 125; 42 L. J. Ch. 107; 27 L. T. 521; 36 J. P. 760; 21 W. R. 32, L. JJ.

*Annotations:—**Reid. Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614. *Mentd. Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Hill v. Metropolitan Asylum District Managers* (1879), 4 Q. B. D. 433; *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; *Truman v. L. B. & S. C. Ry.* (1883), 25 Ch. D. 423; *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

1617. ———.]—. . . we are dealing, now, not with a public but a private Act of Parliament, & I have always understood, with reference to private Acts as contradistinguished from public Acts of Parliament, that if a charge is imposed upon the person of an individual it must be so imposed in clear & express terms & not left to implication (*LORD FITZGERALD*).—*SCOTTISH DRAINAGE & IMPROVEMENT CO. v. CAMPBELL* (1889), as reported in 14 App. Cas. 139, H. L.

1618. Whether impeachable—Allegation of fraud.]—It is something new to impeach an Act of Parliament by a plea stating that it was obtained by fraud (*CRESSWELL, J.*).—*STEAD v. CAREY* (1845), as reported in 1 C. B. 496; 135 E. R. 634.

*Annotation:—**Mentd. Dawson v. Paver* (1847), 5 Hare, 415.

1619. ———.]—The ninth plea, that the Act was obtained by the fraud of plffs. we think

cannot be allowed (*PATTESON, J.*).—*WATERFORD, ETC., RY. CO. v. LOGAN* (1850), 14 Q. B. 672; 14 L. T. O. S. 416; 14 Jur. 346; 117 E. R. 259.

1620. ——— Absence of interested parties.]—*SHREWSBURY (EARL) v. SCOTT*, No. 50, *ante*.

What are Local, Personal or Private Acts.]—*See* Part II., Sect. 1, sub-sect. 1, C. & D., *ante*.

SECT. 2.—NATURE.

1621. Private Acts—Whether contract between parties affected.]—Where a canal is made pursuant to Act of Parliament, the right of the proprietors to toll is derived entirely from the Act; & is to be considered as if there was a bargain between them & the public, the terms of which are expressed in the statute; & the rule of construction is, that any ambiguity in the terms of the contract must operate against the co. of adventurers, & in favour of the public.—*STOURBRIDGE CANAL CO. v. WHEELLEY* (1831), 2 B. & Ad. 792; 109 E. R. 1336.

*Annotations:—**Appld. South Staffordshire Waterworks Co. v. Barrow* (1897), 61 J. P. 661. *Reid. Priestley v. Foulds* (1840), 2 Man. & G. 175. *Mentd. Tamar Manure Navigation Co. of Proprietors v. Wagstaffe* (1863), 4 B. & S. 288.

1622. ———.]—When I look upon these Acts of Parliament I regard them all in the light of contracts made by the legislature, on behalf of every person interested in anything to be done under them (*LORD ELDON*).—*BLAKEMORE v. GLAMORGANSHIRE CANAL NAVIGATION* (1824), 1 My. & K. 162; 39 E. R. 643, L. C.; *subsequent proceedings* (1832), 1 My. & K. 154, L. C.

*Annotations:—**Consd. R. v. Edge Lane* (1836), 4 Ad. & El. 723. *Appld. Lee v. Milner* (1837), 2 Y. & C. Ex. 611. *Consd. Lee v. Milner* (1837), 2 M. & W. 824; *York & North Midland Ry. v. R.* (1853), 1 E. & B. 858. *Appld. Bostock v. North Staffordshire Ry.* (1856), 3 Sm. & G. 283. *Consd. Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212; *Norton v. L. & N. W. Ry.* (1878), 9 Ch. D. 623; *Devonport Corpn. v. Plymouth, Devonport & District Tram. Co.* (1884), 52 L. T. 161. *Reid. R. v. Eastern Counties Ry.* (1839), 10 Ad. & El. 531; *Roberts v. Roberts* (1862),

PART VI. SECT. 3.

1613 i. Whether Act may be retrospective.]—*DOE d. MOUNTCASHEL (EARL) v. GROVER* (1847), 4 U. C. R. 23.—*CAN.*

1613 ii. ———.]—Legislation affecting the method of levying a tax is legislation affecting procedure & has a retroactive effect.—*MURNE v. MORRISON* (1882), 1 B. C. R., pt. 2, 120.—*CAN.*

h. Mandatory or directory.]—Speaking generally, the provisions of statutes relating to assessment & taxation are to be treated rather as mandatory so far as they relate to the imposition of the tax, & rather as directory so far as they relate to the realisation.—*CLIVE SCHOOL DISTRICT v. NORTHERN CROWN BANK (Alta.)*, [1917] 2 W. W. R. 549.—*CAN.*

k. Effect of proviso co-extensive with & repugnant to enactment.]—Where in a fiscal Act of Parliament, there is a saving co-extensive with & therefore repugnant to the enactment, the enactment must prevail. The rule of law that an exception must be part of the thing only & not of all, applies as well to Acts of Parliament as to deeds.—*CLELLAND v. KER* (1843), 11 E. R. 35; *Drury temp. Sug.* 227.—*IR.*

PART VII. SECT. 1.

1. Application for private Act—Necessity for notice.]—The ct. will not enforce a clause in a Private Act in regard to which no notice was given in applying therefor, in conformity to the law of Parliament.—*DONALD v. ANDERSTON MAGS* (1832), 11 Sh. (Ct. of Sess.)

119.—*SCOT.*

m. ———.]—*THRESHIE v. GORDON* (1841), 3 Dunl. (Ct. of Sess.) 450; 16 Fac. Coll. 413.—*SCOT.*

PART VII. SECT. 2.

1621 i. Private Acts—Whether contract between parties affected.]—Railway Acts & those of that description which are obtained on the application of their promoters, are treated as contracts between the incorporators & the public.—*Re NEW BRUNSWICK & CANADA RY. CO., Ex p. A.-G. OF NEW BRUNSWICK* (1878), 17 N. B. R. (1 P. & B.) 667.—*CAN.*

1621 ii. ———.]—*BLANTYRE v. CALEDONIAN & DUMBARTONSHIRE JUNCTION RY. CO.* (1858), 16 Dunl. (Ct. of Sess.) 90; 26 Sc. Jur. 52.—*SCOT.*

3 B. & S. 183; *Baxendale v. G. W. Ry.* (1863), 14 C. B. N. S. 1; *Cubitt v. Maxce* (1873), L. R. 8 C. P. 704; *R. v. French* (1878), 3 Q. B. D. 187; *R. v. G. W. Ry.* (1893), 9 R. L. **Mentd.** *Duncan v. Findlater* (1839), MacL. & Rob. 911; *Dawson v. Paver* (1847), 5 Hare, 415; *East Lancashire Ry. v. Hattersley* (1849), 8 Hare, 72; *Lumley v. Wagner* (1852), 1 De G. M. & G. 604; *Cardiff Corpn. v. Cardiff Waterworks Co.* (1859), 33 L. T. O. S. 104.

1623. ———.]—These Acts of Parliament have been called parliamentary bargains made with each of the landowners (**ALDERSON, B.**).—*LEE v. MILNER* (1837), 2 Y. & C. Ex. 611; 160 E. R. 540.

Annotations:—**Consd.** *York & North Midland Ry. v. R.* (1853), 1 E. & B. 858. **Refd.** *Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212. **Mentd.** *Cohen v. Wilkinson* (1849), 12 Beav. 138; *Cardiff Corpn. v. Cardiff Waterworks Co.* (1859), 33 L. T. O. S. 104.

1624. ———.]—I must say, that according to the received opinion of private Acts of Parliament, between parties they are considered more in the nature of the contracts than anything else (**LORD ABINGER, C.B.**).—*PENNEY v. GREAT WESTERN RY. CO.* (1838), 1 Horn & H. 247; 7 L. J. Ex. 257.

1625. ———.]—This statute must not be dealt with, when we are talking of intentions, exactly as if it were a public general Act, but rather as the mode of carrying into effect a bargain between certain individuals & the public (*per CUR.*).—*R. v. LONDON & SOUTH WESTERN RY. CO.* (1842), 1 Q. B. 558; 2 Ry. & Can. Cas. 629; 11 L. J. M. C. 93; 6 Jur. 686; 113 E. R. 1246; *sub nom. R. v. SOUTH WESTERN RY. CO.*, 2 Gal. & Dav. 49; 6 J. P. 393.

Annotations:—**Mentd.** *R. v. Grand Junction Ry.* (1844), 4 Q. B. 18; *R. v. G. W. Ry.* (1846), 6 Q. B. 179; *R. v. Mile End Old Town Overseers* (1847), 10 Q. B. 208; *R. v. L. B. & S. C. Ry.*, *R. v. S. E. Ry.*, *R. v. Mid. Ry.* (1851), 15 J. P. 240; *S. E. Ry. v. Dorking Overseers* (1854), 3 E. & B. 191; *Medland & Brown v. Paine* (1858), 4 Jur. N. S. 1283; *G. E. Ry. v. Haughley* (1866), L. R. 1 Q. B. 666; *Mersey Docks & Harbour Board v. Birkenhead Assmt. Com.*, [1900] 1 Q. B. 143; *Metropolitan Water Board v. Kingston Union Assmt. Com.*, [1925] 2 K. B. 509.

1626. ———.]—Where the fee simple in land is vested compulsorily by Act of Parliament in a public co., the rights thereby conferred are qualified & restricted by the terms of the legislative contract.—*BOSTOCK v. NORTH STAFFORDSHIRE RY. CO.* (1856), 3 Sm. & G. 283; 25 L. J. Ch. 325; 27 L. T. O. S. 33; 20 J. P. 390; 2 Jur. N. S. 248; 4 W. R. 336; 65 E. R. 661.

Annotations:—**Apld.** *Mullner v. Mid. Ry.* (1879), 11 Ch. D. 611. **Refd.** *Astley v. M. S. & L. Ry.* (1858), 27 L. J. Ch. 299; *Grand Junction Canal Co. v. Petty* (1888), 57 L. J. Q. B. 572.

1627. ———.]—The private Act of Parliament is really no more than an agreement between the parties to it sanctioned by the legislature; & in order to construe that agreement, we may look at the surrounding circumstances at the date of it (**LORD WENSLEYDALE**).—*ROWBOTHAM v. WILSON* (1860), 8 H. L. Cas. 348; 30 L. J. Q. B. 49; 2 L. T. 642; 24 J. P. 579; 6 Jur. N. S. 965; 11 E. R. 463, H. L.; *affg.* (1857), 8 E. & B. 123, Ex. Ch.

Annotations:—**Refd.** *Bell v. Love* (1883), 10 Q. B. D. 547; *Butterley Co. v. New Hucknall Colliery Co.*, [1910] A. C. 381; *Thomson v. St. Catharine's College, Cambridge & Mappins Masbro' Old Brewery, St. Catharine's College, Cambridge v. Rosse* (1918), 118 L. T. 758. **Mentd.** *Dugdale v. Robertson* (1857), 3 K. & J. 695; *Bonomi v. Backhouse* (1859), E. B. & E. 646; *Brown v. Robins* (1859), 4 H. & N. 186; *Scots Mines Co. v. Ledhills Mines* (1859), 34 L. T. O. S. 34; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Blackett v. Bradley* (1862), 1 B. & S. 940; *Shafto v. Johnson* (1863), 8 B. & S. 252, n.; *Murchie v. Black* (1865), 19 C. B. N. S. 190; *Proud v. Bates* (1865), 6 New Rep. 92; *Richards v. Harper* (1865), 4 H. & C. 55; *Williams v. Bagnall* (1866), 15 W. R. 272; *Woodall v. Hingley* (1866), 14 L. T. 167; *Richards v. Jenkins* (1868), 18 L. T. 437; *Hammersmith, etc., Ry. v. Brand* (1869), L. R. 4 H. L. 171; *Buccleuch v. Wakefield* (1870), L. R. 4 H. L. 377; *Eadon v. Jeffcock* (1872), L. R. 7 Exch. 379; *Hext v. Gill* (1872), 7 Ch. App. 699; *Smith v. Darby* (1872), L. R. 7 Q. B. 716; *Aspden v. Seddon* (1875), 10

Ch. App. 394; *Hall v. Byron* (1876), 4 Ch. D. 667; *Ramsay v. Blair* (1876), 1 App. Cas. 701; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Jones v. Tapling* (1882), 8 Jur. N. S. 333; *Dixon v. White* (1883), 8 App. Cas. 833; *Pountney v. Clayton* (1883), 11 Q. B. D. 820; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *N. B. Ry. v. Park Yard Co.*, [1898] A. C. 643; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416; *Sitwell v. Londesborough*, [1905] 1 Ch. 460; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co.*, [1906] A. C. 305; *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488; *Westhoughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159; *Davies v. Powell Duffryn Steam Coal Co.* (No. 2) (1921), 91 L. J. Ch. 40; *Consett Industrial & Provident Soc. v. Consett Iron Co.*, [1922] 2 Ch. 135; *Consett Waterworks Co. v. Ritson*, [1922] 2 Ch. 187, n.

1628. ———.]—Thames Conservancy Act is of a public nature & affects public interests, & cannot be looked upon, as some private acts are, in the light of a mere private agreement or contract between individuals.—*BROWN v. LONDON CORPN.* (1863), 13 C. B. N. S. 828; 31 L. J. C. P. 280; 8 Jur. N. S. 1103; 10 W. R. 522; 143 E. R. 327, Ex. Ch.

1629. ———.]—(1) A clause in a private Act of Parliament, in terms imposing a duty not relating to the public interest does not invalidate a previous agreement not to exact its performance, made in view of the passing of the Act by the person to whom the duty would otherwise, by the terms of the Act, be due, with the persons subjected to it, or with other persons on their behalf.

(2) A private Act of Parliament is in the nature of an agreement between the parties (**POLLOCK, C.B.**).—*SAVIN v. HOYLAKES RY. CO.* (1865), L. R. 1 Exch. 9; 4 H. & C. 67; 35 L. J. Ex. 52; 13 L. T. 374; 11 Jur. N. S. 934; 14 W. R. 109.

Annotations:—**Refd.** *Corbett v. S. E. & C. Ry.'s Managing Committee*, [1905] 2 Ch. 280. **Mentd.** *Re Brampton & Longtown Ry.*, *Shaw's Claim* (1875), 10 Ch. App. 177.

1630. ———.]—*LONDON & SOUTH WESTERN RY. CO. v. FLOWER*, No. 1709, *post*.

1631. ———.]—*ATTON v. STEPHEN*, No. 1382, *ante*.

1632. ———.]—A private Act of Parliament enabling bodies to make a road of any kind is not a kind of compact, & if they do not make the whole the consideration does not fail, & they have power to use any part which they have made as they like.—*SWANSEA IMPROVEMENTS & TRAMWAYS CO. v. SWANSEA & MUMBLES RY. CO., LTD.* (1880), 3 Ry. & Can. Tr. Cas. 339.

1633. ———.]—Such statutory provisions as those of sect. 43, occurring in a local & personal Act, must be regarded as a contract between the parties (**LORD WATSON**).—*ROTHES (COUNTESS) v. KIRKCALDY WATERWORKS COMRS.* (1882), 7 App. Cas. 694, H. L.

Annotations:—**Refd.** *Davis v. Taff Vale Ry.*, [1895] A. C. 542; *Re Manchester & Milford Ry.*, [1897] 1 Ch. 276; *Crosfield v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123; *Witham Outfall Board v. Boston Corpn.* (1926), 136 L. T. 756. **Mentd.** *City of London Electric Lighting Co. v. London Corpn.* (1901), 65 J. P. 563.

1634. ———.]—It is true that this is a case of statutory obligation, not properly of contract; although **LORD ELDON** & other great judges regarded Acts of Parliament of this class, giving powers to promoters or undertakers who solicit them, & who are to receive remuneration in money for what under those powers they supply, as parliamentary contracts with the public, or at least with that portion of the public which might be directly interested in them. But I fail to see why it should be less necessary or reasonable, unless the words of the statutes exclude it, to regard the fitness of the thing supplied for the purpose of the statutory obligation as an element of that obligation itself, than it is to do so when the obligation results properly from contract (**LORD SELBORNE**).—*MILNES v. HUDDERSFIELD*

Sect. 2.—Nature. Sect. 3: Sub-sects. 1 & 2.]

CORPN. (1886), 11 App. Cas. 511; 56 L. J. Q. B. 1; 55 L. T. 617; 50 J. P. 676; 34 W. R. 761; 2 T. L. R. 821, H. L.

Annotations:—Mentd. Clegg, Parkinson v. Earby Gas Co., [1898] 1 Q. B. 592; Gale v. Rhymney & Aber Valleys Gas & Water Co. (1903), 67 J. P. 430; Simpson v. South Oxfordshire Water & Gas Co., [1908] 1 K. B. 917; Whittington Gas Light & Coke Co. v. Chesterfield Gas & Water Board, [1914] 1 Ch. 270.

1635. ———.]—HERRON v. RATHMINES & RATHGAR IMPROVEMENT COMRS., No. 134, *ante*.

1636. ———.]—(1) Where the provisions of a private Act are not limited to the interests of the parties mutually obliged, but impose an obligation in favour of third parties who are sufficiently designated, the obligation so imposed operates as a direct enactment of the legislature in favour of such parties.

(2) In cases where the provisions of a local & personal Act directly impose mutual obligations upon two persons or cos., such provisions may . . . be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement (LORD WATSON).

Ever since it has become the practice for promoters of undertakings of a public nature to apply to Parliament for exceptional powers & privileges, the Acts of Parliament by which those powers & privileges are granted have been regarded as parliamentary contracts, as bargains between the promoters on the one hand & Parliament on the other (LORD MACNAGHTEN).—DAVIS & SONS v. TAFF VALE RY. CO., [1895] A. C. 542; 64 L. J. Q. B. 488; 72 L. T. 632; 44 W. R. 172; 11 T. L. R. 400; 11 R. 189, H. L.; *reversq.* S. C. *sub nom.* TAFF VALE RY. CO. v. DAVIS & SONS, [1894] 1 Q. B. 43, C. A.

Annotations:—As to (1) Refd. Corbett v. S. E. & C. Rys. Managing Committee, [1906] 2 Ch. 12; A.-G. v. N. E. Ry., [1915] 1 Ch. 905. *As to (2) Consd.* Crossfield v. Manchester Ship Canal Co., [1904] 2 Ch. 123. *Generally, Mentd.* Crossfield v. Manchester Ship Canal Co. (1905), 22 T. L. R. 192; Ward v. Mid. Ry. (1916), 86 L. J. K. B. 161.

1637. ———.]—It will be observed that although it is rights of the traders & others carrying on business which are affected, it is the corpn. & co. who make the agreement; & this may be very important when one comes to consider whether, upon a breach of this agreement confirmed by statute affecting the rights of traders & others, an action based on the breach may be brought by the injured person, as is the case when an individual is injured by the breach of a statute passed for his benefit, provided such a remedy comes within the purview of the Legislature in the particular statute, which it is especially likely to do in a case in which the Act is not an Act of public & general policy, but is rather in the nature of a private legislative bargain between certain persons likely to be affected by the work authorised by a special Act & a body of undertakers as to the manner in which they will keep up certain public works (VAUGHAN WILLIAMS, L.J.).—CROSSFIELD (JOSEPH) & SONS, LTD. v. MANCHESTER SHIP CANAL CO., [1904] 2 Ch. 123; 90 L. T. 557; 68 J. P. 421; 52 W. R. 635, C. A.; *on appeal*, [1905] A. C. 421, H. L.

Annotations:—Mentd. Corbett v. S. E. & C. Rys. Managing Committee, [1906] 2 Ch. 12; Norwich Corpn. v. Norwich Electric Tram. Co., [1906] 2 K. B. 119; Audenshaw U. D. C. v. Manchester Corpn. (1907), 71 J. P. 342; A.-G. v. N. E. Ry., [1915] 1 Ch. 905.

1638. ———.]—Where some of the provisions of an order of the Light Railway Comrs., modified & confirmed by the Board of Trade, were clearly for the benefit of the public, the fact

that the same were stated to be inserted for the protection of the undertakers did not justify their being treated as a mere contract which the parties thereto could release or vary.—A.-G. v. NORTH EASTERN RY. CO., [1915] 1 Ch. 905; 84 L. J. Ch. 657; 113 L. T. 25; 79 J. P. 500; 13 L. G. R. 1130, C. A.

1639. ———.]—Where declared public Act.]—An Act of Parliament for the formation of a railway, containing a declaration, that it is to be judicially taken notice of as a public Act, cannot be treated or construed as a private assurance.—HARGREAVES v. LANCASTER & PRESTON JUNCTION RY. CO. (1838), 1 Ry. & Can. Cas. 416.

SECT. 3.—CONSTRUCTION.

SUB-SECT. 1.—IN GENERAL.

1640. Liberal construction — Act for public benefit.]—The Act of Parliament relating to the New River Water co. ought to have a liberal construction, so as the town in general may be served with water.—NEW RIVER CO. v. GRAVES (1701), 2 Vern. 431; 23 E. R. 877.

1641. ———.]—University statute.]—The ct. ought not to place a more liberal construction on university statutes than on others.—*Re* TRINITY COLLEGE, CAMBRIDGE, *Ex p.* EDLESTON (1851), 3 D. G. M. & G. 742; 23 L. T. O. S. 41; 2 W. R. 317; 43 E. R. 292, L. C.

1642. According to common law principles.]—In the construction of private Acts of Parliament we are to go on principles of common law, applied to the subject (*per* CUR.).—ETON COLLEGE (PROVOST, ETC.) v. WINCHESTER (BP.) (1774), Lofft, 401; 3 Wils. 483; 98 E. R. 715.

Annotations:—Consd. Shrewsbury v. Scott (1859), 6 C. B. N. S. 1. *Refd.* R. v. Taunton Market Trustees (1845), 1 New Sess. Cas. 543. *Mentd.* Doe d. Knight v. Spencer (1818), 2 Exch. 752.

1643. Construction as in ordinary Acts.]—ABLER v. PRITCHARD (1866), L. R. 1 C. P. 210; Har. & Ruth. 274; 35 L. J. M. C. 101; 30 J. P. 168; 12 Jur. N. S. 211; 14 W. R. 331; *sub nom.* ABLERT v. PRITCHARD, 14 L. T. 16.

1644. According to balance of convenience.]—Thus & all other railways made under Acts of Parliament are made, not only, perhaps I may say not principally, for the private benefit of the shareholders, but for the public benefit as furnishing lines of traffic which, from the time when the railway is made, the public have a right to use. You must, therefore, consider that in any provisions such as those now to be construed in such Acts the public interest & the private interest are impartially & justly regarded upon the one side & upon the other; & if upon words or expressions at all ambiguous it would seem that the balance of hardship or inconvenience would be strongly against the public on the one construction, or strongly against a private person on another construction, it is I think consistent with all sound principles to pay regard to that balance of inconvenience in determining such a doubtful question of construction (LORD SELBORNE, C.).—DIXON v. CALEDONIAN & GLASGOW & SOUTH WESTERN RY. COS. (1880), 5 App. Cas. 820; 43 L. T. 513; 45 J. P. 108; 29 W. R. 249, H. L.

Annotations:—Refd. Ruabon Brick & Terra Cotta Co. v. G. W. Ry., [1893] 1 Ch. 427. *Mentd.* Mid. Ry. v. Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Pountney v. Clayton (1883), 11 Q. B. D. 820; Mid. Ry. & Kettering, Thrapston & Huntingdon Rty. v. Robinson (1889), 15 App. Cas. 19; N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116; Howley Park Coal & Cannel Co. v. L. & N. W. Ry., [1913] A. C. 11.

1645. According to requirements of particular undertaking.]—Acts of Parliament, giving railway

cos. power to build bridges, must be expounded with reference to the peculiar mode of construction of bridges in railways.—*PRIESTLEY v. MANCHESTER & LEEDS RY. CO.* (1840), 4 Y. & C. Ex. 63; 2 Ry. & Can. Cas. 134; 160 E. R. 921.

1646. What may be considered—Intention of legislature.]—*DOE d. BYWATER v. BRANDLING*, No. 610, *ante*.

1647. ———.]—The ct. knows nothing of the intention of an Act of Parliament, except from the words in which it is expressed, applied to the facts existing at the time.—*LOGAN v. COURTTOWN (EARL)* (1850), 13 Beav. 22; 20 L. J. Ch. 347; 17 L. T. O. S. 306; 51 E. R. 9.

1648. — Preliminary negotiations.]—*BRAMSTON v. COLCHESTER CORPN.*, No. 395, *ante*.

1649. — Surrounding circumstances.]—*ROWBOTHAM v. WILSON*, No. 1627, *ante*.

SUB-SECT. 2.—STRICT CONSTRUCTION.

1650. General rule.]—Where by statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued; & appear to be so upon the face of their proceedings.—*R. v. CROKE* (1774), 1 Cowp. 26; 98 E. R. 948.

*Annotations:—***Consd.** *Taylor v. Cleinson* (1841), 11 Cl. & Fin. 610. **Refd.** *R. v. Wiltshire JJ.* (1841), 5 J. P. 148; *Ex p. Kinning* (1847), 4 C. B. 507.

1651. ———.]—A private Act of Parliament must be construed strictly, & cannot be carried any further than the words import (*HOLROYD, J.*).—*GUTHRIE v. FISK* (1824), 3 B. & C. 178; 5 Dow. & Ry. K. B. 24; 107 E. R. 700.

*Annotations:—***Refd.** *Williams v. Beaumont* (1833), 10 Bing. 260; *Re Hall, Ex p. Hall* (1838), 8 L. J. Bey. 5; *Williams v. Harding* (1866), L. R. 1 H. L. 9; *Re Winterbottom, Ex p. Winterbottom* (1886), 18 Q. B. D. 446; *Re Nance, Ex p. Ashmead*, [1893] 1 Q. B. 590. **Mentd.** *Hope v. Meek* (1855), 10 Exch. 829; *Re Muirhead, Ex p. Muirhead* (1876), 24 W. R. 351.

1652. ———.]—*SCALES v. PICKERING*, No. 1243, *ante*.

1653. ———.]—The Act which incorporates a co., prescribes its duties & declares its rights; & all persons becoming shareholders are liable as such to no obligations beyond those which are there indicated.—*CALEDONIAN & DUMBARTONSHIRE JUNCTION CO. v. HELENSBURGH MAGISTRATES* (1856), 2 Macq. 391; 27 L. T. O. S. 241; 2 Jur. N. S. 695; 4 W. R. 671, H. L.

*Annotations:—***Apld.** *Leominster Canal Navigation Co. v. Shrewsbury & Hertford Ry.* (1857), 3 K. & J. 654. **Consd.** *Shrewsbury & Birmingham Ry. v. N. W. Ry.* (1857), 6 H. L. Cas. 113. **Apld.** *Mann v. Edinburgh Northern Tram. Co.*, [1893] A. C. 69. **Refd.** *Shrewsbury v. North Staffordshire Ry.* (1865), L. R. 1 Eq. 593. **Mentd.** *Bedford & Cambridge Ry. v. Stanley* (1862), 32 L. J. Ch. 60.

1654. ———.]—*HUGHES v. CHESTER & HOLYHEAD RY. CO.*, No. 488, *ante*.

1655. ———.]—Acts giving cos. compulsory powers are to be construed strictly.—*SIMPSON v. SOUTH STAFFORDSHIRE WATERWORKS CO.* (1865), 4 De G. J. & Sm. 679; 6 New Rep. 184; 34 L. J. Ch. 380; 12 L. T. 360; 11 Jur. N. S. 453; 13 W. R. 729; 46 E. R. 1082, L. C.

*Annotations:—***Consd.** *Morris v. Tottenham & Forest Gate Ry.*, [1892] 2 Ch. 47. **Mentd.** *Re Huddersfield Corpn. & Jacomb* (1874), L. R. 17 Eq. 476.

1656. ———.]—A private Act of Parliament only

excludes the provisions of public Acts where the private Act is so worded as to do so expressly or by necessary implication. Even so, the private Act will be construed strictly & exemption from complying with one of the conditions of a public statute . . . not imply exemption from all.—*Re VERRALL, NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY v. A.-G.*, [1916] 1 Ch. 100; 85 L. J. Ch. 115; 113 L. T. 1208; 80 J. P. 89; 60 Sol. Jo. 141; 14 L. G. R. 171.

*Annotations:—***Refd.** *General Medical Council v. I. R. Comrs., English Branch Council of General Medical Council v. I. R. Comrs.* (1928), 139 L. T. 225. **Mentd.** *I. R. Comrs. v. Yorkshire Agricultural Soc.*, [1928] 1 K. B. 611.

1657. As against promoters.]—*SCALES v. PICKERING*, No. 1243, *ante*.

1658. ———.]—*SMITH v. BELL*, No. 690, *ante*.

1659. ———.]—Acts of Parliament which confer privileges upon a co., & profess to give the public certain advantages in return, are to be construed strictly against the co., & liberally in favour of the public.—*PARKER v. GREAT WESTERN RY. CO.* (1844), 7 Man. & G. 253; 7 Scott, N. R. 835; 3 Ry. & Can. Cas. 563; 13 L. J. C. P. 105; 2 L. T. O. S. 420; 8 Jur. 194; 135 E. R. 107.

*Annotations:—***Consd.** *G. W. Ry. v. Sutton* (1869), L. R. 4 H. L. 226; *Metropolitan Water Board v. New River Co.* (1904), 20 T. L. R. 687. **Refd.** *Crouch v. G. N. Ry.* (1856), 11 Exch. 742. **Mentd.** *Close v. Phipps* (1844), 7 Man. & G. 586; *Wakefield v. Newbon* (1844), 6 Q. B. 276; *Guliver v. Cosens* (1845), 1 C. B. 788; *Pickford v. Grand Junction Ry.* (1845), 6 L. T. O. S. 213; *Valpy v. Manley* (1845), 1 C. B. 594; *Kearns v. Durell* (1848), 6 C. B. 596; *Devaux v. Conolly* (1849), 8 C. B. 640; *Higgs v. Scott* (1849), 7 C. B. 63; *Pallister v. Gravesend Corpn.* (1850), 15 L. T. O. S. 253; *Edwards v. G. W. Ry.* (1851), 11 C. B. 588; *Parker v. Bristol & Exeter Ry.* (1851), 20 L. J. Ex. 112; *Parker v. G. W. Ry.* (1851), 11 C. B. 545; *Crouch v. L. & N. W. Ry.* (1854), 2 C. L. R. 188; *Flinnie v. G. & S. W. Ry.* (1855), 2 Macq. 177; *Baxendale v. Eastern Counties Ry.* (1858), 4 C. B. N. S. 63; *Garton v. Bristol & Exeter Ry.* (1861), 1 B. & S. 112; *Branley v. S. E. Ry.* (1862), 12 C. B. N. S. 63; *Baxendale v. G. W. Ry.* (1863), 14 C. B. N. S. 1; *Davison v. Fernandes* (1889), 6 T. L. R. 73; *Maskell v. Horner*, [1915] 3 K. B. 106; *Sharp & Knight v. Chant* (1916), 33 T. L. R. 68; *Brocklebank v. R.*, [1924] 1 K. B. 647.

1660. ———.]—The powers given by an Act of Parliament extend no further than expressly stated in the Act, except where they are necessarily & properly acquired for the purposes which the Act has sanctioned. . . . It has nowhere been stated that railway cos. have power to enter into transactions of all sorts & to any extent. . . . They have not a right to enter into new trades & new businesses not pointed out by the Act . . . that they have a right to pledge the funds of the co. without any limit, for the encouragement of other transactions, however various & extensive, provided only they profess that the object of the liability occasioned to their own shareholders by such encouragement, is to increase the traffic upon the railway, and thereby the profit to the shareholders. . . . There is no authority for anything of that kind (*LORD LANGDALE, M.R.*).—*COLMAN v. EASTERN COUNTIES RY. CO.* (1846), 10 Beav. 1; 4 Ry. & Can. Cas. 513; 16 L. J. Ch. 73; 8 L. T. O. S. 530; 11 Jur. 74; 50 E. R. 481.

*Annotations:—***Consd.** *East Anglian Ry. v. Eastern Counties Ry.* (1851), 11 C. B. 775; *Bostock v. North Staffordshire Ry.* (1855), 4 E. & B. 798; *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251. **Refd.** *Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397; *Caledonian &*

PART VII. SECT. 3, SUB-SECT. 2.

1650 i. General rule.]—*PINSENT v. PROWSE* (1881), 11 Nfld. L. R. 342.—**NFLD.**

1650 ii. ———.]—A deed made between two public bodies & incorporated in a local Act of Parliament, where interests outside those of the contracting parties

are concerned, should be narrowly scrutinised & strictly construed.—*MIRAMAR CORPN. v. R.* (1909), 28 N. Z. L. R. 727.—**N.Z.**

1657 i. As against promoters.]—In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which

they allege to be in their favour because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it.—*GREEN v. BRITISH COLUMBIA ELECTRIC RY. CO.* (1906), 3 W. L. R. 347.—**CAN.**

Sect. 3.—Construction : Sub-sects. 2 & 3.]

Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241; Shrewsbury & Birmingham Ry. v. N. W. Ry. (1857), 6 H. L. Cas. 113; A.-G. v. G. N. Ry. (1860), 1 Drew. & Sm. 154; South Wales Ry. v. Redmond (1861), 10 C. B. N. S. 675; Maunsell v. Mid. G. W. (Ireland) Ry. (1863), 1 Hem. & M. 130; Riche v. Ashbury Ry. Carriage Co. (1874), L. R. 10 Exch. 224; Norton v. L. & N. W. Ry. (1878), 9 Ch. D. 623; A.-G. v. G. E. Ry. (1879), 11 Ch. D. 449; A.-G. v. L. C. C., [1901] 1 Ch. 781; A.-G. v. Mersey Ry., [1907] 1 Ch. 81. **Mentd.** Forrest v. M. S. & L. Ry. (1861), 4 De G. F. & J. 126; Filder v. L. B. & S. C. Ry., Barchard v. Brighton, Uckfield & Tunbridge Wells Ry. (1863), 1 Hom. & M. 489; Seaton v. Grant (1867), 36 L. J. Ch. 638; Bloxam v. Met. Ry. (1868), 3 Ch. App. 343, n.; Jackson v. N. E. Ry. (1877), 37 L. T. 664.

1661. —. —.]—Acts of Parliament authorising the construction of public undertakings are to be construed strictly with reference to the rights of those who are empowered to make them.—**EVERSFIELD v. MID-SUSSEX RY. CO.** (1858), 3 De G. & J. 286; 28 L. J. Ch. 107; 32 L. T. O. S. 202; 5 Jur. N. S. 776; 7 W. R. 102; 44 E. R. 1278, L. J. J.

Annotations.—**Consd.** Dodd v. Salisbury & Yeovil Ry. (1858), 1 Giff. 158; Quinton v. Bristol Corpn. (1874), L. R. 17 Eq. 524; Conron v. L. C. C., [1922] 2 Ch. 283. **Refd.** Wilkinson v. Hull, etc., Ry. & Dock Co. (1882), 20 Ch. D. 323.

1662. —. —.]—The jurisdiction of the ct. arises with reference to the obligations of cos. to abide by the direction of the Acts of Parliament under which they are constituted, & the right of the ct. to confine them by injunction within the limits of those duties.—**BAXENDALE v. WEST MIDLAND RY. CO.** (1862), 7 L. T. 297; 8 Jur. N. S. 1163, L. C.

1663. —. —.]—A private Act of Parliament will be construed more strictly than a public one as regards provisions made by it for the benefit of the persons who obtained it, but, when once the true construction is ascertained, the effect of a private Act is the same as that of a public Act. The special Act which authorised the making of a railway by the C. co., provided that the L. co. should have the right to run their traffic over a part of the line, on payment of a fixed annual rent to the C. co. The rent was much less than the actual value of the traffic passed over that part of the line by the L. co.:—**Held:** the C. co. could not be rated for poor rate in respect of that traffic at a higher sum than the fixed rent.—**ALTRINCHAM UNION ASSESSMENT COMMITTEE v. CHESHIRE LINES COMMITTEE** (1885), 15 Q. B. D. 597; 50 J. P. 85, C. A.

Annotations.—**Appld.** Stewart v. River Thames Conservators, [1908] 1 K. B. 893. **Refd.** Dowsbury & Heckmondwike Waterworks Board v. Penistone Assmt. Com. (1885), 16 Q. B. D. 585; London & India Docks v. Poplar Union (1900), 83 L. T. 371; Poplar Assmt. Com. v. Roberts, [1922] 2 A. C. 93.

1664. —. —.]—It seems to me that the language of such a sect. of a private Act conferring powers is to be treated as the language of the promoters who asked the legislature for such powers that when a doubt arises as to the construction of that language the maxim ordinarily inapplicable to the interpretation of statutes *verba chartarum fortius accipiuntur contra proferentem*, or *proferentes* in this case, or that words are to be understood more strongly against him who uses them, is justly applied. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment

grants & against those who claim to exercise them (**VAUGHAN WILLIAMS, L.J.**).—**A.-G. v. BARNET DISTRICT GAS & WATER CO.** (1909), 101 L. T. 651; 74 J. P. 1; 8 L. G. R. 15, C. A.; *on appeal* (1910), 102 L. T. 546, H. L.

1665. —. —.]—**Unless strict construction defeats object of Act.**—**RIVER WEAR COMRS. v. ADAMSON**, No. 105, *ante*.

1666. Acts for public improvements by corporation.—(1) Where persons have special powers conferred on them by Parliament for effecting a particular purpose they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a co. authorised, making due compensation, to take compulsorily the lands of any person for a definite object may be restrained by injunction from any attempt to take them for another object.

(2) Where the legislature has conceded power to a body of adventurers for a certain purpose, as for example the formation of a railway, such a body must show some ground for the concession, & the legislature has no concern with its means for obtaining the funds to carry its declared objects into effect, & in order to effect them it must not exceed the limits of its powers. But the case is different where an existing public body, such as the corpn. of a city, is entrusted by the legislature with the duty of making public improvements in its city, & the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict & restrictive construction.

(3) Where the promoters of a bill giving discretionary powers over property conditionally agree that if the bill passes they will dispose of the property to be acquired in a particular way, this anticipation of the possession of their powers does not deprive them of discretion to exercise those powers when obtained.—**GALLOWAY v. LONDON CORPN.** (1866), L. R. 1 H. L. 34; *sub nom.* **GALLOWAY v. LONDON CORPN. & METROPOLITAN RY. CO.** **LONDON CORPN. v. GALLOWAY**, 35 L. J. Ch. 477; 14 L. T. 865; 30 J. P. 580; 12 Jur. N. S. 747, H. L.

Annotations.—**As to (1) Appld.** Carington v. Wycombe Ry. (1868), 3 Ch. App. 377. **Consd.** Gard v. City of London Sewers Comrs. (1885), 28 Ch. D. 486; Lewis v. Westonsuper-Mare L. B. (1888), 10 Ch. D. 55; L. & N. W. Ry. v. Westminster Corpn., [1901] 1 Ch. 759; Conron v. L. C. C., [1922] 2 Ch. 283. **Refd.** Bristol Grdns. v. Bristol Corpn. (1887), 18 Q. B. D. 549; Donaldson v. South Shields Corpn. (1899), 68 L. J. Ch. 162; East Fremantle Corpn. v. Annals, [1902] A. C. 213; Roberts v. Charing Cross, Euston & Hampstead Ry. (1903), 87 L. T. 732; Howard-Flanders v. Maldon Corpn. (1926), 135 L. T. 6. **As to (2) Consd.** Quinton v. Bristol Corpn. (1874), 43 L. J. Ch. 783. **Generally, Refd.** Kent Coast Ry. v. L. C. & D. Ry. (1868), 3 Ch. App. 656; L. C. & D. Ry. v. London Corpn. (1868), 19 L. T. 250; Baker v. Portsmouth Corpn. (1878), 3 Ex. D. 157; L. B. & S. C. Ry. v. St. Giles, Camberwell (1879), 4 Ex. D. 239; Robinson v. Barton-Eccles L. B. (1883), 8 App. Cas. 798; Goldberg v. Liverpool Corpn. (1900), 82 L. T. 362. **Mentd.** James v. Lovel (1887), 56 L. T. 739.

SUB-SECT. 3.—CONSTRUCTION IN FAVOUR OF PUBLIC OR PERSON ADVERSELY AFFECTED.

1667. Construction in favour of public—Where meaning doubtful.—**STOURBRIDGE CANAL CO. v. WHEELLEY**, No. 1621, *ante*.

PART VII. SECT. 3, SUB-SECT. 3.

1667 i. Construction in favour of public—Where meaning doubtful.—The language of private Acts is considered as the language of the promoters, & where doubts arise as to the construction of that language, the benefit of the doubt is to be given to those who

might be prejudiced by the exercise of the powers given by the Act.—**Re NEW BRUNSWICK & CANADA RY. CO., Ex p. A.-G. OF NEW BRUNSWICK** (1878), 17 N. B. R. (1 P. & B.) 667.—**CAN.**

1667 ii. —. —.]—Where any doubt arises under any private Act of

Parliament the benefit of the doubt should be given against the forfeiture of existing rights or compulsory alienation of property whether belonging to the Crown or to private individuals.—**EAST LONDON MUNICIPALITY v. COLONIAL GOVERNMENT** (1885), 3 S. C. 313.—**S. AF.**

1668. ———.]—Clauses in Acts empowering cos. to levy a charge upon the public, as in Railway Acts for example, must, where the meaning is doubtful, be construed favourably for the public.—*STOCKTON & DARLINGTON RY. CO. v. BARRETT* (1844), 11 Cl. & Fin. 590; 7 Man. & G. 870; 8 Scott, N. R. 641; 8 E. R. 1225, H. L.; *affg.* (1842), 3 Man. & G. 956, Ex. Ch.; *affg.* S. C. *sub nom.* *BARRETT v. STOCKTON & DARLINGTON RY. CO.* (1840), 2 Man. & G. 134.

Annotations :—*Apld.* *Pryce v. Monmouth Canal & Ry.* (1879), 4 App. Cas. 197; *McDougall & Bonthron v. London & India Docks Co., Page & East v. London & India Docks Co.*, [1908] 2 K. B. 175. *Refd.* *Newmarket Ry. v. Foster* (1854), 11 C. L. R. 1617; *Medway Navigation v. Brook* (1876), 33 L. T. 843; *Bristol Grdns. v. Bristol Waterworks Co.*, [1912] 1 Ch. 816. *Mentd.* *Gulliver v. Cosens* (1815), 1 C. B. 788.

1669. ———.]—*SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.*, No. 892, *ante*.

1670. ———.]—If a statute, which authorises a water co. to charge its consumers with a water rate, is ambiguous with regard to the amount of rate to be charged or the mode of assessing it, it must be construed in favour of the consumer & against the water co.—*SOUTH STAFFORDSHIRE WATERWORKS CO. v. BARROW* (1897), 61 J. P. 661; 13 T. L. R. 549, C. A.

Annotation :—*Mentd.* *Woking Water & Gas Co. v. Parker*, [1916] 1 K. B. 473.

1671. ———.]—This [a private Act] is an Act of Parliament passed for the benefit & profit of the undertakers; & the rule of construction applicable to such cases [is] in favour of the public (*MAULE, J.*).—*PRIESTLEY v. FOULDS* (1840), 2 Man. & G. 175; 2 Ry. & Can. Cas. 422; 2 Scott, N. R. 205; 133 E. R. 710.

1672. ———.]—*PARKER v. GREAT WESTERN RY. CO.*, No. 1659, *ante*.

1673. ———.]—In a proceeding against B. & C. to have it declared, that they had been trespassers on the lands of A. it was pleaded to the effect that B. & C. had a right of way over these lands as inhabitants of a neighbouring town & as two of the public. To this it was replied, that upon the true construction of an Act of Parliament, local & personal, the right of way, if any such had existed which was denied, had been thereby extinguished :—*Held* : such an Act of Parliament is not to be construed strictly as against the public, who were, in fact, no parties to the passing of the Act; & the provisions of such Act & the works which had been constructed thereunder, were not inconsistent with the existence of a public footpath over these lands.—*CAMPBELL v. LANG* (1853), 1 Eq. Rep. 98; 1 Macq. 451; 21 L. T. O. S. 119; 1 W. R. 538, H. L.

Annotations :—*Mentd.* *R. v. Thomas* (1857), 3 Jur. N. S. 713; *Bourke v. Davis* (1889), 44 Ch. D. 110, A.-G. v. *Antrobus*, [1905] 2 Ch. 188.

1674. ———.]—The cts. in construing private statutes, acted on a presumption that persons should not without compensation be prejudiced in matters which they could lawfully do unless that intention was clearly expressed . . . clear & unequivocal words were necessary to derogate from common right to deprive persons of the power to do what they were doing for profit at the passing of the Act without anyone having the power of preventing them (*SCRUTTON, L.J.*).—*BOURNEMOUTH-SWANAGE MOTOR ROAD & FERRY CO. v. HARVEY & SONS* (1928), 45 T. L. R. 189, C. A.

1675. Construction in favour of party adversely affected.]—Where the words of a railway co.'s Act are capable of two interpretations, but the general intent of the Legislature is complete indemnification to the party whose land is taken

by the co., the ct. will incline to that construction of the words which will make them consistent with the general intent.—*Ex p. ETON COLLEGE* (1850), 20 L. J. Ch. 1; 16 L. T. O. S. 121; 15 Jur. 45, L. C.

Annotations :—*Mentd.* *L. & Y. Ry. v. Evans* (1851), 15 Beav. 322; *Re Holden's Estate* (1855), 25 L. J. Ch. 382, n.; *Re Neachell's Trusts* (1855), 25 L. J. Ch. 382, n.; *Re Ellison's Estate* (1856), 8 De G. M. & G. 62, St. Thomas' Hospital v. *Charing Cross Ry.* (1861), 7 Jur. N. S. 256.

1676. ———.]—I feel that the Act [Land Clauses Consolidation Act, 1845 (c. 18)] is to be construed in this sense liberally; that persons are not to be deprived without adequate compensation of that which they are in actual occupation of or of that which is necessary for the enjoyment of their property as a residence (*WOOD, V.-C.*).—*STEELE v. MIDLAND RY. CO.* (1866), 1 Ch. App. 275; 13 L. T. 794; *on appeal*, 1 Ch. App. at p. 288, L. J.J.

Annotations :—*Refd.* *Kerford v. Seacombe, Hoylake & Deeside Ry.* (1888), 57 L. J. Ch. 270. *Mentd.* *Smith v. Ridgway* (1866), L. R. 1 Exch. 331; *Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238; *Benington v. Metropolitan Board of Works* (1886), 54 L. T. 837; *Wright v. Wallasey L. B.* (1887), 18 Q. B. D. 783; *Allhusen v. Ealing & South Harrow Ry.* (1898), 78 L. T. 285; *Re Willis, Spencer v. Willis*, [1911] 2 Ch. 563.

1677. ———.]—In construing a private Act of Parliament the ct. will consider on whose application it was obtained, & will not hold that it authorises the persons who obtained it to interfere with the rights of others without making compensation unless it contains provisions to that effect in clear & distinct terms.—*A.-G. v. LEEDS CORPN.* (1870), 5 Ch. App. 587, n.; 39 L. J. Ch. 254; 22 L. T. 330; 18 W. R. 517; *on appeal*, 5 Ch. App. 583, L. C. & L. J.

Annotations :—*Refd.* *A.-G. v. G. E. Ry.* (1872), 7 Ch. App. 478, n. *Mentd.* *A.-G. v. Birmingham B. C.* (1871), 24 L. T. 224; *A.-G. v. Cockermouth L. B.* (1874), L. R. 18 Eq. 172; *Smith v. Smith* (1875), L. R. 20 Eq. 500; *Lea Conservancy Board v. Hertford Corpn.* (1884), Cab. & El. 299; *Shelfer v. London City Electric Lighting Co.*, *Meux's Brewery Co. v. London City Electric Lighting Co.*, [1895] 1 Ch. 287; *Jordeson v. Sutton Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217.

1678. ———.]—I agree that we ought to construe this Act [private Act] of Parliament strictly, even supposing the true construction of the Act does an injustice to the parties. But one may well approach the construction of an Act of this kind in the belief that it was not intended to confiscate pl'ts.' right, for this would be a simple case of confiscation, & we ought not to suppose that this was intended, or was even sought for by the co. (*BRAMWELL, J.A.*).—*WELLS v. LONDON, TILBURY & SOUTHBEND RY. CO.* (1877), 5 Ch. D. 126; 37 L. T. 302; 41 J. P. 452; 25 W. R. 325, L. J. & J.J. A.

1679. ———.]—It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it (*BRETT, M.R.*).—*A.-G. v. HORNER* (1884), 14 Q. B. D. 245; 54 L. J. Q. B. 227; 49 J. P. 326; 33 W. R. 93, C. A.; *on appeal* (1885), 11 App. Cas. 66, H. L.

Annotations :—*Consd.* *Lonsdale v. Lowther*, [1900] 2 Ch. 687; *Gingell & Foskett v. Stepney B. C.*, [1908] 1 K. B. 115; *A.-G. v. Exeter Corpn.*, [1911] 1 K. B. 1092; *Central Control Board (Liquor Traffic) v. Cannon Brewery Co.*, [1919] A. C. 744; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854. *Apld.* *Re Ellis & Ruislip-Northwood U. D. C.*, [1920] 1 K. B. 343. *Refd.* *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. *Mentd.* *Williams v. Wednesday Churchwardens & Overseers & West Bromwich Union Assmt. Com.* (1890), Ryde Rat. App. (1886-90), 327; *Simpson v. Godmanchester Corpn.* (1895), 64 L. J. Ch. 837; *A.-G. v. Simpson*, [1901] 2 Ch. 671; *Newcastle v. Workson U. C.*, [1902] 2 Ch. 145; *Horner v. Stepney Assmt. Com.* (1908), 6 L. G. R. 651; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Selby v. Whitbread*, [1917] 1 K. B. 736; *Layzell v. Thompson* (1926), 91 J. P. 89.

Sect. 3.—Construction: Sub-sect. 3. Sects. 4, 5 & 6: Sub-sect. 1.]

1680. ———.]—LONDON & NORTH WESTERN RY. CO. *v.* EVANS, No. 222, *ante*.

1681. ———.]—A.-G. *v.* BARNET DISTRICT GAS & WATER CO., No. 1664, *ante*.

SECT. 4.—ON WHOM BINDING.

1682. Whether on strangers.]—BOSWEL'S CASE (1583), cited in 8 Co. Rep. at p. 138a; 77 E. R. 683.

1683. ———.]—22 Edw. 4, c. 7, which under certain circumstances authorises the proprietors of grounds in forests, after a felling, to inclose them, without the King's licence, for seven years, to preserve the springing wood, extends to the said grantee. But does not extend to the wood of any subject, in which another has a right of common. The commoners, as appears by the preamble, are not any of the parties between whom the Act was made, & therefore their right is not taken away by it.—**BARRINGTON'S CASE** (1610), 8 Co. Rep. 136 b; 77 E. R. 681; *sub nom.* CHALK & PETER'S CASE, Godb. 167; 2 Brownl. 322; *affd. on appeal*, 1 Roll. Rep. 137.

*Annotations:—***Apld.** Lucy *v.* Levington (1671), 1 Vent. 175; Dikken *v.* Anglesea (1834), 4 Tyr. 926; Dawson *v.* Paver (1847), 5 Hare, 415. **Consd.** Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1. **Apld.** Nicholls *v.* Mitford (1882), 20 Ch. D. 380; Western Counties Ry. *v.* Windsor & Annapolis Ry. (1882), 7 App. Cas. 178. **Refd.** Brewster *v.* Ketchin (1697), 1 Ld. Raym. 317; Riddell *v.* White (1794), 1 Anst. 281; Bailey *v.* Stephens (1862), 12 C. B. N. S. 91; Shuttleworth *v.* Le Fleming (1865), 19 C. B. N. S. 687; *Re* Wilton's S. E., [1907] 1 Ch. 50. **Mentd.** Liford's Case (1615), 11 Co. Rep. 46 b.

1684. ———.]—Every man is so far party to a private Act of Parliament, as not to gainsay it, but not so as to give up his interest; it is the great question in *Barrington's Case*, No. 1683, *ante*, the matter of the Act there decides it to be between the foresters, & the proprietors of the soil; & there it shall not extend to the commoners, to take away their common. Suppose an Act says, whereas there is a controversy concerning land between A. & B. it is enacted, that A. shall enjoy it, this does not bind others, though there be no saving, because it was only intended to end the difference between them two (HALE, C.J.).—**LUCY v. LEVINGTON** (1671), as reported in 1 Vent. 175; 2 Keb. 831; 86 E. R. 119.

*Annotations:—***Consd.** Riddell *v.* White (1794), 1 Anst. 281. **Distd.** Stead *v.* Carey (1845), 1 C. B. 496. **Apld.** Dawson *v.* Paver (1817), 5 Hare, 415. **Consd.** *Re* Wilton's S. E., [1907] 1 Ch. 50. **Mentd.** Kingston *v.* Nottle (1813), 1 M. & S. 355; King *v.* Jones (1814), 1 Marsh. 107; Knights *v.* Quarles (1820), 4 Moore, C. P. 532; Orme *v.* Broughton (1834), 10 Bing. 533; Raymond *v.* Fitch (1835), 2 Cr. M. & R. 588; Doe d. Anglesea *v.* Rugeley (1844), 6 Q. B. 107.

1685. ———.]—**RIDDELL v. WHITE**, No. 694, *ante*.

1686. ———.]—(1) An Act of Parliament private in its nature, is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed & taken to be a public Act, & shall be judicially taken notice of with out being specially pleaded."

(2) A canal Act is not rendered a public Act by containing provisions empowering the co. to regulate & take tonnage rates & tolls from persons using the canal.—**BRETT v. BEALES** (1829), Mood.

PART VII. SECT. 4.

1682 i. Whether on strangers.]—The rule in respect to private Acts of Parliament is, that the interests of persons not expressly named in them are not

affected by the provisions thereof.—*Re* GOODHUE, TOVEY *v.* GOODHUE, GOODHUE *v.* TOVEY (1872), 19 Gr. 366.—**CAN.**

1682 ii. ———.]—Parties not affected

& M. 416, N. P.; *subsequent proceedings* (1830), 10 B. & C. 508.

*Annotations:—**As to* (1) **Refd.** Beaumont *v.* Mountain (1834), 10 Bing. 404; Beaufort *v.* Smith (1849), 4 Exch. 450; York & North Midland Ry. *v.* R. (1853), 22 L. J. Q. B. 225. *As to* (2) **Refd.** Brecon Markets Co. *v.* Neath & Brecon (1872), L. R. 7 C. P. 555. **Generally, Refd.** Woodward *v.* Cotton (1834), 1 Cr. M. & R. 44. **Mentd.** Plm *v.* Currell (1840), 6 M. & W. 234.

1687. ———.]—This Act is to be construed, as all other private Acts ought to be, as if it were a private agreement (BAYLEY, J.).—**R. v. NENE OUTFALL COMRS.** (1829), 9 B. & C. 875; 4 Man. & Ry. K. B. 646; 8 L. J. O. S. K. B. 1; 109 E. R. 325.

*Annotations:—***Refd.** Bird *v.* G. E. Ry. (1865), 19 C. B. N. S. 268. **Mentd.** R. *v.* Thames & Isis Navigation Comrs. (1836), 5 Ad. & El. 804.

1688. ———.]—The recitals in a private Act of Parliament do not bind third parties.—**TAYLOR v. PARRY** (1840), 1 Man. & G. 604; 1 Scott, N. R. 576; 9 L. J. C. P. 298; 4 Jur. 967; 133 E. R. 474.

*Annotations:—***Mentd.** Fishmongers' Co. *v.* Dinsdale (1852), 22 L. J. C. P. 44; Holmes *v.* Powell (1856), 8 De G. M. & G. 572; Humphrey *v.* Nowland (1862), 15 Moo. P. C. C. 343.

1689. ———.]—Public Acts bind all the Queen's subjects, but private Acts do not bind strangers, unless by express words or necessary implication the intention of the Legislature to affect the right of strangers is apparent in the Act; & whether an Act is public or private does not depend upon any technical considerations, such as having a clause or declaration that the Act shall be deemed a public Act, but upon the nature & substance of the case.—**DAWSON v. PAVER** (1847), 5 Hare, 415; 16 L. J. Ch. 274; 8 L. T. O. S. 493; 11 Jur. 766; 67 E. R. 974.

*Annotations:—***Refd.** Goldsmid *v.* Tunbridge Wells Improvement Comrs. (1865), 14 W. R. 92; *Re* Wilton's S. E., [1907] 1 Ch. 50. **Mentd.** East Lancashire Ry. *v.* Hattersley (1849), 8 Hare, 72; Lond *v.* Murray (1851), 17 L. T. O. S. 248; Lingwood *v.* Stowmarket Co. (1865), L. R. 1 Eq. 77.

1690. ———.]—A recital in an Act will not bind those who are not within its enacting part (LORD CAMPBELL, C.).—**EDINBURGH & GLASGOW RY. CO. v. LINLITHGOW MAGISTRATES** (1859), 3 Macq. 691; 34 L. T. O. S. 26, H. L.

1691. ———.]—**SHREWSBURY (EARL) v. SCOTT**, No. 50, *ante*.

1692. ———.]—**DAVIS & SONS v. TAFF VALE RY. CO.**, No. 1636, *ante*.

1693. ———.]—A mere recital in a local & personal Act of Parliament though admissible against person claiming under the Act, is not conclusive (COZENS-HARDY, J.).—**MERTTENS v. HILL**, as reported in, [1901] 1 Ch. 842; 70 L. J. Ch. 489; 17 T. L. R. 289.

1694. ——— **Crown.]—**The cts. will take every means of defeating an attempt by a private Act to affect the rights either of the Crown or of other persons who have not been brought in (LORD LORE-BURN, C.).—**GREAT NORTHERN, PICCADILLY & BROMPTON RY. CO. v. A.-G.**, [1909] A. C. 1; 78 L. J. K. B. 185; 98 L. T. 731, H. L.; *revg.* S. C. *sub nom.* A.-G. *v.* GREAT NORTHERN, PICCADILLY & BROMPTON RY. CO. (1906), 50 Sol. Jo. 669.

1695. Party interested in subject-matter—With-out notice of passing of Act.]—A party interested in the subject-matter of a private Act of Parliament will have his rights affected by its provisions, though it may have been introduced & passed without notice duly given to him.

with notice of a private Act of Parliament, will not be held to be bound thereby.—**KINGSTOWN COMRS. v. KIRWAN** (1837), Craw. & D. Abr. C. 38.

All that a ct. of justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses & received the royal assent, no ct. of justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses (LORD CAMPBELL).—EDINBURGH & DALKEITH RY. CO. v. WAUCHOPE (1842), 8 Cl. & Fin. 710; 3 Ry. & Can. Cas. 232; 8 E. R. 279, H. L.

Annotations:—**Consd.** Shrewsbury v. Scott (1859), 6 C. B. N. S. 1. **Refd.** Lang v. Purves (1862), 15 Moo. P. C. C. 389.

SECT. 5.—SAVING CLAUSES.

1696. Mode of construction—Strict.]—Where an Act confers upon a landowner a private right creating a burden upon a railway, & restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly.—TURNER v. LONDON & SOUTH WESTERN RY. CO. (1874), L. R. 17 Eq. 561; 43 L. J. Ch. 430.

Annotations:—**Mentd.** *Re* Wilks, Child v. Bulmer, [1891] 3 Ch. 59; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554.

1697. ———.]—CORBETT v. SOUTH EASTERN & CHATHAM RAILWAYS MANAGING COMMITTEE, No. 1441, *ante*.

1698. ——— **Wide—Clause in nature of compromise.]**—I cannot help thinking that, when you get an Act passed through Parliament as a local & personal Act, capable of being opposed in Parliament by anyone having interests affected by it, you ought to treat a clause like sect. 212 as something in the nature of a compromise agreement by which opposition is bought off. I think, therefore, rather a wide construction ought to be given it. At any rate, in the present instance, I do not see any sufficient ground for narrowing it at all below its width according to the natural meaning of the words (WRIGHT, J.).—TANNER v. OLDMAN, [1896] 1 Q. B. 60; 65 L. J. M. C. 10; 73 L. T. 404; 44 W. R. 63; 12 T. L. R. 13; 40 Sol. Jo. 12; 15 R. 603; 59 J. P. Jo. 693, D. C.

Annotation:—**Refd.** Withington U. D. C. v. Moore (1896), 60 J. P. 408.

SECT. 6.—OPERATION.

SUB-SECT. 1.—IN GENERAL.

1699. Effect same as public Act—Once line construction ascertained.]—ALTRINCHAM UNION ASSESSMENT COMMITTEE v. CHESHIRE LINES COMMITTEE, No. 1663, *ante*.

1700. Exclusion of public Acts.]—*Re* VERRALL, NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY v. A.-G., No. 1656, *ante*.

1701. Failure to complete object of Act—Intervention of court to protect interests affected.]—AGAR v. REGENT'S CANAL CO. (1815), as cited in 1 Swan. at p. 250; 36 E. R. 377, L. C.

Annotations:—**Consd.** King's Lynn Corpn. v. Pemberton (1818), 1 Swan. 241; River Dun Navigation Co. v. North Midland Ry. (1838), 1 Ry. & Can. Cas. 135. **Expld.** Salmon v. Randall (1838), 3 My. & Cr. 439. **Apld.** Cohen v. Wilkinson (1849), 12 Beav. 125. **Refd.** Cohen v. Wilkinson (1849), 12 Beav. 138; York & Midland Ry. v. R. (1853), 17 Jur. 690. **Mentd.** Shand v. Henderson (1814), 2 Dow. 519; Barker v. North Staffordshire Ry. (1848), 5 Ry. & Can. Cas. 401.

1702. ———.]—Where Acts of Parliament impose certain severe burdens on individuals, by

interfering with their private rights—private property, for the purpose of obtaining some great public good, if the ct. sees that the undertaking cannot be completed, & therefore that the public cannot derive that benefit which was to be the equivalent for the sacrifice made by the individual, the ct. will protect the individual from being compelled to make that sacrifice, under the circumstances, & until it appears that the public will derive the proposed benefit from it (LORD COTTENHAM, C.).—SALMON v. RANDALL (1838), 3 My. & Cr. 439; 40 E. R. 996, L. C.; *reversg.* S. C. *sub nom.* SALMON v. CAMBRIDGE PAVING & LIGHTING COMRS., 2 J. P. 455.

Annotations:—**Refd.** Cohen v. Wilkinson (1849), 12 Beav. 125; Cohen v. Wilkinson (1849), 12 Beav. 138; Haynes v. Haynes (1861), 1 Drew. & Sm. 426. **Mentd.** Salisbury v. G. N. Ry. (1852), 21 L. J. Q. B. 185.

1703. Donee of statutory & common law power—Whether common law power abridged—Exercise deemed to be under common law rights.]—If an Act of Parliament, by general words, purports to confer a power upon several donees, one of whom possesses the same power more amply at common law as incident to his estate, the statute shall not be intended to apply to him, so as by implication to abridge his power; & acts of his, therefore, which the statute would have authorised, will be referred to his common law right.—*Ex p.* CLAYTON (1830), 1 Russ. & M. 369; 39 E. R. 143, L. C.

1704. Legal proceedings arising from operation of Act—Time for instituting—Party acting *malâ fide*.]—The effect of a clause in a local Act, limiting the time for bringing actions for anything done in pursuance of the Act, is not altered by the circumstances of the persons who have done the act complained of having proceeded *malâ fide*.—OAKLEY (LORD) v. KENSINGTON CANAL CO. (1833), 5 B. & Ad. 138; 2 L. J. K. B. 208; 110 E. R. 743.

Annotations:—**Refd.** R. v. Eastern Counties Ry. (1841), 2 Ry. & Can. Cas. 736. **Mentd.** Whitehouse v. Fellowes (1861), 4 L. T. 177.

1705. Act containing declaration that Act public—Whether notice to public of scope of Act.]—A local Act of Parliament, though containing a clause, making it a public Act, is not public notice of its powers over land therein mentioned.—BALLARD v. WAY (1836), 1 M. & W. 520; 2 Gale, 61, Tyr. & Gr. 851; 5 L. J. Ex. 207; 150 E. R. 540.

1706. General legal duties & liabilities—Whether affected by private Act—Where not specifically excluded.]—(1) The Crown not being named in 43 Eliz., c. 2, is not bound by its enactments.

(2) The effect of the statutes applicable to the Liverpool Docks is not such as to exempt them from the payment of poor rate. There are no negative words prohibiting the application of the rates to payment of the poor rate. . . . Enactments directing that the money shall be applied to certain purposes & no others are directory only (BLACKBURN, J.).

(3) Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, & the Legislature on a subsequent Act *in pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before; & unless there is something to rebut that presumption, the Act should be so construed (BLACKBURN, J.).

(4) As LORD CAMPBELL said in *R. v. Haughton (Inhabitants)*, No. 114, *ante*, a mere recital in an

PART VII. SECT. 6, SUB-SECT. 1.

n. **Enforcement of Act—Special remedy provided—Whether other remedies excluded.]**—HILL v. O'CONNOR (1852), 4 Ir. Jur.

that, in the absence of something to show a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, & that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things (OPINION OF THE JUDGES).—MERSEY DOCKS & HARBOUR BOARD *v.* GIBBS, MERSEY DOCKS & HARBOUR BOARD *v.* PENHALLOW (1866), L. R. 1 H. L. 93 ; 11 H. L. Cas. 686 ; 35 L. J. Ex. 225 ; 14 L. T. 677 ; 30 J. P. 467 ; 12 Jur. N. S. 571 ; 14 W. R. 872 ; 2 Mar. L. C. 353 ; 11 E. R. 1500, H. L. ; *affg.* S. C. *sub nom.* GIBBS *v.* LIVERPOOL DOCK TRUSTEES (1858), 3 H. & N. 164, Ex. Ch.

Annotations :—**Apld.** *Coe v. Wise* (1866), L. R. 1 Q. B. 711. **Consd.** *Foreman v. Canterbury Corpn.* (1871), L. R. 6 Q. B. 214. **Apld.** *Winch v. Thames Conservators* (1874), L. R. 9 C. P. 378 ; *Fleming v. Manchester Corpn.* (1881), 44 L. T. 517 ; *Dormont v. Furness Ry.* (1883), 11 Q. B. D. 496. **Distd.** *Gibraltar Sanitary Comrs. v. Orfila* (1890), 15 App. Cas. 400. **Consd.** *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426. **Apld.** *Hackney Corpn. v. Lee Conservancy Board*, [1904] 2 K. B. 541. **Consd.** *Liebig's Extract of Meat Co. v. Mersey Docks & Harbour Board & Nelson*, [1918] 2 K. B. 381. **Refd.** *Ruck v. Williams* (1858), 3 H. & N. 308 ; *Ohrby v. Ryde Comrs.* (1864), 5 B. & S. 743 ; *Goslin v. Agricultural Hall Co.* (1876), 1 C. P. D. 482 ; *Holborn Union Grdns. v. St. Leonard's, Shoreditch Vestry* (1876), 2 Q. B. D. 145 ; *Lowther v. Curwen* (1887), 58 L. T. 168 ; *R. v. Selby Dam Drainage Comrs.*, [1892] 1 Q. B. 318 ; *Crossfield v. Manchester Ship Canal Co.* (1903), 19 T. L. R. 398 ; *Queens of the River S.S. Co. v. Easton, Gibb & River Thames Conservators* (1907), 96 L. T. 901 ; *Tozeland v. West Ham Union*, [1907] 1 K. B. 920 ; *Papworth v. Battersea Corpn.*, [1914] 2 K. B. 89 ; *The Ella*, [1915] P. 111 ; *Boynton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213 ; *Deo Conservancy Board v. McConnell*, [1928] 2 K. B. 159. **Mentd.** *Southampton & Itchin Bridge Co. v. Southampton L. B.* (1858), 8 E. & B. 801 ; *Walker v. Goe* (1859), 4 H. & N. 350 ; *Metcalfe v. Hetherington* (1860), 5 H. & N. 719 ; *Holliday v. St. Leonard's Shoreditch Vestry* (1861), 11 C. B. N. S. 192 ; *Whitehouse v. Fellowes* (1861), 10 C. B. N. S. 765 ; *Thompson v. N. E. Ry.* (1862), 2 B. & S. 119 ; *Brownlow v. Metropolitan Board of Works* (1863), 13 C. B. N. S. 768 ; *Waller v. S. E. Ry.* (1863), 32 L. J. Ex. 205 ; *Stiles v. Cardiff Steam Navigation Co.* (1864), 33 L. J. Q. B. 310 ; *Worral Waterworks Co. v. Lloyd* (1866), L. R. 1 C. P. 719 ; *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146 ; *Birch v. Marylebone Vestry* (1869), 17 W. R. 1014 ; *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125 ; *White v. Hindley L. B.* (1875), L. R. 10 Q. B. 219 ; *A.-G. & Domes v. Basingsloke Corpn.* (1876), 21 W. R. 817 ; *Harris v. G. W. Ry.* (1876), 1 Q. B. D. 515 ; *Weir v. Barnett* (1877), 3 Ex. D. 32 ; *Forbes v. Lee Conservancy Board* (1879), 4 Ex. D. 116 ; *Hill v. Metropolitan Asylum District Managers* (1879), 4 Q. B. D. 433 ; *R. v. Williams* (1884), 9 App. Cas. 418 ; *Tucker v. Axbidge Highway Board* (1888), 53 J. P. 87 ; *The Moorcock* (1889), 14 P. D. 64 ; *Jersey v. Uxbridge R. S. A.*, [1891] 3 Ch. 183 ; *The Bearn*, [1906] P. 48 ; *Bede S.S. Co. v. River Wear Comrs.*, [1907] 1 K. B. 310 ; *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K. B. 820 ; *McClelland v. Manchester Corpn.*, [1912] 1 K. B. 118 ; *Pyman S.S. Co. v. Hull & Barnsley Ry.*, [1911] 2 K. B. 788 ; *Hayward v. Drury Lane Theatre & Moss' Empires*, [1917] 2 K. B. 890 ; *Baker v. James*, [1921] 2 K. B. 674 ; *The Devon* (1923), 130 L. T. 448 ; *Sutcliffe v. Clients Investment Co.*, [1924] 2 K. B. 746 ; *British Petroleum Co. v. A.-G. for Ceylon*, [1926] A. C. 147 ; *Silverman v. Imperial London Hotels* (1927), 137 L. T. 57.

1708. Act vesting lands in trustees for sale—
On assumption that lands comprised in settlement—
Whether lands brought within settlement by Act.]—
A private Act of Parliament vesting lands in
trustees on trust to sell, proceeding on the sup-
position that the lands are comprised in a settle-
ment, does not bring the lands within that settle-
ment if they really were not in it previously.—
HOWARD v. SHREWSBURY (EARL) (1874), L. R. 17
Eq. 378 ; 43 L. J. Ch. 495 ; 29 L. T. 802 ; 22 W. R.
290.

Annotations :—*Refd.* *Crompton v. Jarratt* (1885), 30 Ch. D. 298; *Re Durham, Grey v. Durham* (1887), 57 L. T. 164. **Mentd.** *Wall v. Stanwick* (1887), 34 Ch. D. 763; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34; *Garner v. Wingrove*, [1905] 2 Ch. 233.

1709. Enforcement of Act—On notice of necessity for performance of statutory duties.]—(1)

Where a person is bound by a private Act to so certain acts whenever necessary, & the necessity is within the knowledge of the person for whose benefit the acts are to be done, & cannot be ascertained by the person who is to do them, the obligation to do the acts exists only after notice.

(2) The Act is not a contract between the parties, but it is next door to it (BRETT, J.).—LONDON & SOUTH WESTERN RY. CO. v. FLOWER (1875), 1 C. P. D. 77; 45 L. J. Q. B. 54; 33 L. T. 687.

Annotations:—As to (1) *Distd.* Ross v. Price (1876), 45 L. J. Q. B. 777. *Refd.* Hugall v. M'Lean (1886), 53 L. T. 94; Murphy v. Hurly, [1922] 1 A. C. 369. *Generally, Mentd.* Manchester Bonded Warehouse Co. v. Carr (1880), 5 C. P. D. 507.

1710. Finality of enforcement.—When powers to make certain works are granted by Act of Parliament they can only be exercised once & for all, & the grantees have no power afterwards to enlarge such works (*per* CUR.).—TAYLOR v. ST. HELENS CORPN. (1877), 6 Ch. D. 264; 46 L. J. Ch. 857; 37 L. T. 253; 25 W. R. 885, C. A.

1711. — Not distinguishable from public Act.—The provisions of the private Act . . . are as enforceable as similar provisions in a public Act would be (KENNEDY, L.J.).—MACCLESFIELD CORPN. v. GREAT CENTRAL RY. CO. (1911), as reported in 80 L. J. K. B. 884; 104 L. T. 728; 75 J. P. 369; 9 L. G. R. 682, C. A.

Annotations:—*Mentd.* Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G., [1915] A. C. 654; A.-G. v. G. N. Ry., [1916] 2 A. C. 356.

Time for exercise of statutory powers—Acquisition of land.—See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 164, 169–172, Nos. 424–427, 474–493.

SUB-SECT. 2.—EFFECT ON PRIVATE AGREEMENTS.

1712. Whether applicable to agreements subsequent to Act.—A local Act of Parliament empowered trustees to build a church & to make rates on all houses in the parish, one half on the landlords the other half on the tenants. It was also enacted that the tenants should first pay the whole rate & deduct moiety out of the rent, & that every landlord should allow of such deduction “notwithstanding any agreement to the contrary.” After the passing of this Act, certain premises in the parish were leased, the tenant covenanting to pay all rates & taxes. The landlord having refused to deduct half the church rate from the rent, on the ground that the Act extended only to agreements in existence at the time of its passing, *pltf.* served him with a plaint from the county ct. The ct. refused a writ of prohibition, “the title to any corporeal or incorporeal hereditaments” within County Courts Act, 1846 (c. 95), s. 58, not being in question; & *semble*, the local Act did not apply to agreements entered into subsequently to the time of its passing.—*Re* KNIGHT, GWYNNE v. KNIGHT (1848), 1 Exch. 802; Cox, M. & H. 47; 17 L. J. Ex. 168; 10 L. T. O. S. 377; 12 Jur. 101; 154 E. R. 341; *sub nom.* GIORGIONE v. KNIGHT, 12 J. P. 506.

Annotations:—*Consd.* Wooler v. North Eastern Breweries, [1910] 1 K. B. 217; R. v. Customs & Excise Comrs., [1928] A. C. 402.

1713. Act granting mortgaging powers—Whether affecting right of action on bond—Made in pursuance of Act.—Private Act of Parliament granting mortgaging powers to a co., will not take away *prima facie* right of action on a bond made in pursuance of Act, unless there be in the Act words to that effect.—BOLCKOW v. HERNE BAY PIER CO. (1852), 1 E. & B. 74; 7 Ry. & Can. Cas. 231; 22 L. J. Q. B. 33; 20 L. T. O. S. 79; 17 Jur. 260;

118 E. R. 364; *sub nom.* BALKOW v. HERNE BAY PIER CO., 1 W. R. 34.

Annotation:—*Mentd.* G. S. & W. Ry. v. Corry & Turquand (1867), 15 W. R. 650.

1714. Anticipatory agreement—To waive statutory duty of promoters.—SAVIN v. HOYLAKE RY. CO., No. 1629, *ante*.

1715. — To limit exercise of discretionary powers.—GALLOWAY v. LONDON CORPN., No. 1666, *ante*.

1716. Agreement confirmed by Act—Powers under agreement exceeding statutory powers—Necessity for statutory reference to additional powers.—Under a settlement dated July 7, 1888, P. P. C. was in 1900 tenant for life in possession of a settled estate in the Isle of Thanet & was then a bachelor, & G. P. C. was then tenant for life in remainder. By an agreement dated Apr. 20, 1900, & made between P. P. C. & G. P. C. of the one part & the W. & B. Water Co. of the other part the co. was authorised to make an adit or tunnel under the settled estate, to be completed by Dec. 31, 1914, or such later date as the grantors should appoint, & it was agreed that upon completion the grantors should by deed grant to the co. the right in perpetuity to maintain & use the adit & that the co. should pay to the grantors in perpetuity a rent of 1s. a yard *per annum* & should supply a certain quantity of water free to farms on the estate. The grantors were defined as P. P. C. & G. P. C. & their successors in title under the settlement. By the W. & B. Water Act 1900, the co. was (*inter alia*) authorised to make the said adit, & by sect. 42 the said agreement was confirmed & made binding on the parties thereto & was set out in a schedule to the Act, but the settlement was not otherwise referred to nor any special powers conferred upon the grantors. The adit was not completed by the agreed date, which had been extended to June 30, 1915. It was now proposed that the completion should be postponed till Dec. 31, 1930, & that the co. should in consideration of the extension of time pay an increased rental & supply an increased amount of free water to the estate. P. P. C. was now married & had three daughters:—*Held*: though when an agreement confirmed by a private Act confers powers on a grantor outside any statutory powers special reference to such powers ought to be made in the Act, the confirmation of the agreement sufficiently expressed the intention of Parliament to confer such powers, & P. P. C. & G. P. C. jointly could further extend the time for completion of the works & grant a perpetual easement in consideration of a perpetual rentcharge which could be increased beyond the amount specified in the agreement.—WESTGATE & BIRCHINGTON WATER CO. v. POWELL-COTTON (1915), 85 L. J. Ch. 459; 113 L. T. 689.

1717. — Effect of confirmation.—The provisions of a confirmatory statute are to be regarded as an explanation & identification of the agreement confirmed by it, rather than as the creation of actual & independent rights.—TORONTO CORPN. v. TORONTO RY. CO., [1916] 2 A. C. 542; 85 L. J. P. C. 205; 115 L. T. 461, P. C.

1718. Effect on ordinary legal incidents of agreement.—It was said that the law is different when a compulsory sale is made under an Act of Parliament, in which case it was argued that the purchaser takes nothing but what the Act of Parliament gives in terms. It is extremely difficult to understand what difference there can be for this purpose, between the effect of a conveyance when the contract is entered into under the authority of an Act of Parliament & when it is made by private bargain. In either case the conveyance

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must pass the property described in the deed with its legal incidents. There may, indeed, be, either in the conveyance or in the Act of Parliament, provisions which exclude from the conveyance of the land its ordinary legal incidents, but unless something to this effect can be shown, the ordinary legal incidents will attach to the land (**LORD KINGS-DOWN**).—**ELLIOT v. NORTH EASTERN RY. CO.** (1863), 10 H. L. Cas. 333; 2 New Rep. 87; 32 L. J. Ch. 402; 8 L. T. 337; 27 J. P. 564; 9 Jur. N. S. 555; 11 E. R. 1055, H. L.; *varying* S. C. *sub nom.* **NORTH EASTERN RY. CO. v. ELLIOTT** (1860), 2 De G. F. & J. 423, L. C.

Annotations:—**Refd.** **Popplewell v. Hodgkinson** (1869), L. R.

4 Exch. 248; **L. & N. W. Ry. v. Evans**, [1893] 1 Ch. 16; **R. v. L. & N. W. Ry.**, [1899] 1 Q. B. 921; **Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.** (1901), 85 L. T. 53; **L. & N. W. Ry. v. Walker**, [1903] A. C. 289; **Manchester Corp'n. v. New Moss Colliery**, [1906] 1 Ch. 278. **Mentd.** **Stourbridge Navigation Co. v. Dudley** (1860), 3 E. & E. 409; **N. E. Ry. v. Crosland** (1862), 32 L. J. Ch. 353; **Goold v. Great Western Deep Coal Co.**, **Great Western Deep Coal Co. v. Goold** (1865), 6 New Rep. 86; **G. W. Ry. v. Bennett** (1867), L. R. 2 H. L. 27; **Mid. Ry. v. Checkley** (1867), L. R. 4 Eq. 19; **Richards v. Jenkins** (1868), 18 L. T. 437; **Colbeck v. Girdlers' Co.** (1876), 45 L. J. Q. B. 225; **Mid. Ry. v. Haunchwood Brick & Tile Co.** (1882), 20 Ch. D. 552; **Pountney v. Clayton** (1882), 47 L. T. 731; **Aldin v. Latimer Clark, Muirhead**, [1894] 2 Ch. 437; **Bradford Corp'n. v. Pickles** (1894), 64 L. J. Ch. 101; **Grosvenor Hotel Co. v. Hamilton**, [1894] 2 Q. B. 836; **L. & N. W. Ry. v. Howley Park Coal & Cannel Co.**, [1911] 1 Ch. 97.

—[.]—**See, also, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 158–163, Nos. 382–412.**

Part VIII.—Enforcement.

SECT. 1.—IN GENERAL.

1719. Statute providing alternative remedies—One impossible to follow—Other remedy must be pursued.]—**ARUNDEL'S CASE** (1647), Sty. 26; 82 E. R. 503.

Annotation:—**Mentd.** **R. v. Haddock** (1737), Andr. 137.

1720. Jurisdiction of court—Known rules & principles only applicable.]—Cts. of law & equity can only enforce the rights of parties under Acts of Parliament by the application of their known rules & principles; if they are inadequate to the purpose, the legislature alone can supply the defect.—**WEALE v. WEST MIDDLESEX WATERWORKS CO.** (1820), 1 Jac. & W. 358; 37 E. R. 412, L. C.

Annotations:—**Consd.** **Ellis v. Bedford**, [1899] 1 Ch. 494. **Refd.** **Simpson v. Scottish Union Inseo.** (1863), 1 Hem. & M. 618.

1721. — Different jurisdiction given by different statutes.]—One Act giving final jurisdiction, & another Act giving jurisdiction subject to appeal, the ct. cannot proceed on both Acts.—**Re BEDFORD CHARITY (MASTERS, GOVERNORS & TRUSTEES)** (1819), 2 Swan. 470; 36 E. R. 696, L. C.

Annotations:—**Refd.** **Re Woodburn's Will** (1857), 1 De G. & J. 333. **Mentd.** **Bowman v. Secular Soc.**, [1917] A. C. 406.

1722. — Where no procedure prescribed—Powers of court in which proceedings deemed to be taken.]—Everything that the statute requires must be done; but when it refers generally to powers to enforce obedience, & does not prescribe any procedure, those powers generally referred to would be the powers of the ct. in which the proceedings are deemed to be taken (**LORD SELBORNE, C.**).—**GREEN v. PENZANCE (LORD)** (1881), 6 App. Cas. 657; 45 L. T. 353; 46 J. P. 115; 30 W. R. 218; *sub nom.* **Re GREEN**, 51 L. J. Q. B. 25, H. L.; *affg.* S. C. *sub nom.* **Ex p. GREEN**, 7 Q. B. D. 273, C. A.

Annotations:—**Refd.** **Enraght v. Penzance** (1882), 7 App. Cas. 210; **Noble v. Ahler** (1886), 11 P. D. 158. **Mentd.** **The Tynwald**, [1895] P. 142; **Sweet v. Ely, (Bp)** (1902), 86 L. T. 679.

1723. — To protect right of property.]—If I find that the statute enacts, either by way of new creation or by way of restatement of an ancient right, a right of property, that at once gives rise to the jurisdiction of the ct. to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of

this ct. to protect the rights of property, unless the Act in terms says so (**FARWELL, J.**).—**STEVENS v. CHOWN, STEVENS v. CLARK**, [1901] 1 Ch. 894; 70 L. J. Ch. 571; 84 L. T. 796; 65 J. P. 470; 49 W. R. 460; 17 T. L. R. 313.

Annotations:—**Apld.** **Fraser v. Fear** (1912), 107 L. T. 423. **Refd.** **Yorkshire Miners' Assocn. v. Howdon**, [1905] A. C. 256; **A.-G. v. De Winton**, [1906] 2 Ch. 106; **Panagotis v. S.S. Pontiac** [1912] 1 K. B. 74.

1724. — Where particular tribunal prescribed—Inferior court—New offence.]—If jurisdiction once given to an inferior ct. of common law to try a new offence created by statute, the proceedings may be removed by *habeas corpus cum causa*, or *certiorari*, unless expressly taken away. *Secus*: where the statute creating the offence, prescribes a special jurisdiction not known to the common law.—**HARTLEY v. HOOKER** (1777), 2 Cowp. 523; 98 E. R. 1221.

Annotations:—**Apld.** **R. v. Wadley** (1816), 4 M. & S. 508.

1725. — — — — —.]—Admitting this to be a new offence created by the statute still the ct. which is prescribed to take cognisance of it is a ct. proceeding according to the course of the common law, whence it follows that the common law consequences attach upon it one of which is that the indictment may be removed by *certiorari into this ct.* (**LE BIANC, J.**).—**R. v. WADLEY** (1816), 4 M. & S. 508; 105 E. R. 922.

Annotation:—**Refd.** **Ex p. Napton Overseers** (1856), 20 J. P. 581.

1726. — — — — — Court of summary jurisdiction.]—Where a statute gives a right to recover expenses in a ct. of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Ct. for a declaration that appct. has a right to recover the expenses in a ct. of summary jurisdiction; he can only take proceedings in the latter ct.—**BARRACLOUGH v. BROWN**, [1897] A. C. 615; 66 L. J. Q. B. 672; 76 L. T. 797; 62 J. P. 275; 13 T. L. R. 527; 8 Asp. M. L. C. 290; 2 Com. Cas. 249, H. L.

Annotations:—**Consd.** **Barwick v. S. E. & C. Rys.**, [1921] 1 K. B. 187; **Dec Conservancy Board v. McConnell**, [1928] 2 K. B. 159. **Refd.** **Howard Smith v. Wilson**, [1896] A. C. 579; **A.-G. v. Merthyr Tydfil Union**, [1900] 1 Ch. 518; **Devonport Corp'n. v. Tozer** (1903), 67 J. P. 269; **R. v. Philbrick, Ex p. Edwards** (1905), 53 W. R. 527; **De Gasquet James v. Mecklenburg-Schwerin**, [1914] P. 53; **Guaranty Trust Co. of New York v. Hannay**, [1915] 2 K. B. 536; **Simmonds v. Newport Abercarn Black Vein Steam Coal Co.**, [1921] 1 K. B. 616; **Everett v. Griffiths**, [1924] 1 K. B. 941; **Whitney v. I. R. Comrs.**, [1926] A. C. 37;

PART VIII. SECT. 1.

o. Who may enforce statute.]—Unless

otherwise provided any person interested in the performance of a duty created by Act of Parliament may lay

information for an offence created by the breach of such duty.—**DUNSTAN v. NEEMS**, [1914] V. L. R. 364.—**AUS.**

Wigg v. A.-G. of Irish Free State (1927), 96 L. J. P. C. 88. **Mentd.** *The Veritas*, [1901] P. 304; *Lucy v. Dorling* (1905), 49 Sol. Jo. 582; *The Wallsend* [1907] P. 302; *Boston Corp'n. v. Fenwick* (1923), 129 L. T. 766; *Sheppy Glue & Chemical Works v. Medway River Conservators* (1926), 24 L. G. R. 457.

1727. ——— **Reference to arbitration.]—**The Manchester Ship Canal Act, 1885, s. 88, enacted that certain provisions for the protection of the corp'n. of Warrington & traders unless otherwise agreed on by the corp'n. & the Ship Canal co. should have effect, & by sub-sect. 22 that any difference arising between the co. & the corp'n. as to the meaning of the sect. or anything to be done or not to be done thereunder should be determined by an engineer to be appointed, unless otherwise agreed on, by the Board of Trade, whose decision should be final & binding on both parties.

By sect. 202, any question arising between the co. & any person touching anything to be done or not to be done or any money to be paid under the provisions of the Act should be determined by arbn. in manner provided by Railways Clauses Consolidation Act, 1845 (c. 20). An action having been brought by the corp'n. & trades against the co. to enforce the statutory obligations:—**Held**: upon a preliminary objection as to competency, as to the corp'n. the action must be dismissed, the jurisdiction of the ct. being ousted by the special provisions, but the traders were entitled to proceed with the action & have the merits of their case determined.—**CROSFIELD (JOSEPH) & SONS, LTD. v. MANCHESTER SHIP CANAL CO.**, [1905] A. C. 421; 74 L. J. Ch. 637; 93 L. T. 141; 69 J. P. 441; 54 W. R. 172; 21 T. L. R. 689, H. L.

Annotations.—**Apld.** *Norwich Corp'n. v. Norwich Electric Tram. Co.*, [1906] 2 K. B. 119. **Refd.** *Corbett v. S. E. & C. Rys. Managing Committee*, [1906] 2 Ch. 12; *A.-G. v. N. E. Ry.*, [1915] 1 Ch. 905. **Mentd.** *Audenshaw U. D. C. v. Manchester Corp'n.* (1907), 71 J. P. 342.

1728. ——— **By appointing a special tribunal to deal with disputes of this kind the sect. has to that extent ousted the jurisdiction of the High Ct. (VAUGHAN WILLIAMS, L.J.).—****NORWICH CORPN. v. NORWICH ELECTRIC TRAMWAYS CO., LTD.**, [1906] 2 K. B. 119; 75 L. J. K. B. 636; 95 L. T. 12; 70 J. P. 401; 54 W. R. 572; 22 T. L. R. 553; 50 Sol. Jo. 499; 4 L. G. R. 1114, C. A.

Annotations.—**Refd.** *Taylor v. National Amalgamated Approved Soc.*, [1914] 2 K. B. 352; *West Suffolk County Council v. Olorenshaw*, [1918] 2 K. B. 687; *Smyth v. Wiles*, [1921] 2 K. B. 66.

——— **Power to grant injunction.]—***See* INJUNCTION, Vol. XXVIII., pp. 370, 371, Nos. 50–55.

——— **Where particular remedy prescribed.]—***See* Sect. 2, Sect. 3, sub-sect. 1, *post*.

——— **Ouster of.]—***See* COURTS, Vol. XVI., pp. 113–115, Nos. 137–148.

Actions by & against aliens.]—*See, generally*, ALIENS, Vol. II., pp. 130–132, Nos. 61–81.

PART VIII. SECT. 2.

1729 i. Particular remedy prescribed by statute—Injured party may proceed under statute or at common law.]—Where a statute provides special machinery for punishing an offence which is also a common law crime, the Crown may proceed either under the common law or under the statute.—**R. v. JOLOSA**, [1903] T. S. 694.—**S. AF.**

p. — Whether new remedy cumulative or substitutional.]—**R. v. PARKER** (1865), 2 W. W. & A'B. 1.—**AUS.**

q. — — —.]—**BRONTE HARBOUR CO. v. WHITE** (1873), 23 C. P. 164.—**CAN.**

r. — — —.]—**COOKBURN & SONS v. IMPERIAL LUMBER CO. (Ont.)** (1899),

30 S. C. R. 80; 19 C. L. T. 374.—**CAN.**

t. — — —.]—**CAMPBELL v. PUGSLEY (N. B.)** (1912), 11 E. L. R. 561; 7 D. L. R. 177.—**CAN.**

a. — — —.]—**R. v. MARAIS** (1889), S. C. 367.—**S. AF.**

b. — — —.]—Where a statute does not create a new duty but merely provides a penalty for breach of an existing duty, it would require very clear & express language to justify the conclusion that the Legislature intended to substitute the new remedy, whether it be of a civil or criminal nature, for the existing remedy.—**CAPE CENTRAL RYS. (IN LIQUIDATION) v. NOTHLING** (1890), 8 S. C. 25.—**S. AF.**

SECT. 2.—STATUTES AFFIRMING PRE-EXISTING OBLIGATION.

1729. Particular remedy prescribed by statute—Injured party may proceed under statute or at common law.]—Where the offence was antecedently punishable by a common law proceeding & a statute prescribes a particular remedy by a summary proceeding; there, either method may be pursued, & the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute; because there the sanction is cumulative & does not exclude the common law punishment (**LORD MANSFIELD**).—**R. v. ROBINSON** (1759), 2 Burr. 799; 2 Keny. 513; 97 E. R. 568.

Annotations.—**Apld.** *R. v. Balme* (1777), 2 Cowp. 648. **Consd.** *R. v. Harris* (1791), 4 Term. Rep. 202. **Apld.** *R. v. Carlile* (1819), 8 B. & Ald. 161. **Distd.** *Lichfield Corp'n. v. Simpson* (1845), 6 L. T. O. S. 122. **Apld.** *R. v. Lovibond* (1871), 44 L. T. 357; *R. v. Hall*, [1891] 1 Q. B. 747. **Refd.** *R. v. Bristow* (1795), 6 Term Rep. 168; *R. v. Crossley* (1839), 2 Per. & Dav. 319. **Mentd.** *Fitzjohn v. Mackinder* (1861), 9 C. B. N. S. 505; *Scott v. Scott*, [1913] A. C. 417.

1730. ——— **—.]—**An Act of Parliament giving a summary remedy to persons against defaulters, though in terms apparently prescribing such remedy, is cumulative, & does not take away the previous right to sue by action at law.—**SHARP v. WARREN** (1818), 6 Price, 131; 146 E. R. 763.

Annotation.—**Refd.** *Eastern Archipelago Co. v. R.* (1853), 1 E. & B. 856.

1731. ——— **—.]—**The conservators of the river Tone, in Somerset, were empowered by special Acts to levy duties upon goods in barges navigating the river, & “in case of non-payment the boats, etc. to be stopped till duty paid.” A railway co., as successor to such conservators, brought an action of debt at common law to recover unpaid duties:—**Held**: they were entitled to do so on the ground that the remedy of the detention of boats & barges given by the Act must be taken as a cumulative, & not an exclusive remedy.—**GREAT WESTERN RY. CO. v. SHARMAN** (1892), 61 L. J. Q. B. 600; 40 W. R. 643; 36 Sol. Jo. 541, D. C.

1732. ——— **Unless common law remedy expressly excluded.]—****WOLVERHAMPTON NEW WATERWORKS CO. v. HAWKESFORD**, No. 1768, *post*.

1733. ——— **—.]—****STEVENS v. CHOWN, STEVENS v. CLARK**, No. 1723, *ante*.

Particular instances.]—*See* TITLES *passim*.

SECT. 3.—STATUTES CREATING NEW OBLIGATION.

SUB-SECT. 1.—PARTICULAR REMEDY PRESCRIBED.

1734. Method prescribed must be followed.]—Where a statute creates a new offence & appoints a mode of punishment that mode must be pursued.

PART VIII. SECT. 3, SUB-SECT. 1.

1734 i. Method prescribed must be followed.]—Where an Act of Parliament creates a liability not existing at common law, & provides a particular remedy for enforcing it, that remedy must be pursued.—**WAYERLEY BOROUGH v. JAMES** (1890), 11 N. S. W. L. R. (L.) 450.—**AUS.**

1734 ii. —.]—**WALKER v. WHITE FEATHER MAIN REEF (1906), LTD.** (1909), 12 W. A. L. R. 25.—**AUS.**

1734 iii. —.]—**MCKENZIE v. MCKAY** (1858), 3 N. S. R. (2 Thom.) 321.—**CAN.**

1734 iv. —.]—**MURRAY v. DAWSON** (1867), 17 C. P. 588.—**CAN.**

1734 v. —.]—Where new rights are given by a statute with specific

Sect. 3.—Statutes creating new obligation: Subsect. 1.]

—CASTLE'S CASE (1622), Cro. Jac. 644; 79 E. R. 555.

*Annotations:—*N.F. R. v. Crofton (1670), 1 Sid. 439. *Folld.* Anon. (1703), 6 Mod. Rep. 86. *Distd.* R. v. Davis (1754), Dunning 55; R. v. Robinson (1759), 2 Burr. 799. *Consd.* R. v. Buchanan (1846), 8 Q. B. 883. *Refd.* R. v. Hall, [1891] 1 Q. B. 747.

1735. —.]—R. v. PENSAX (1728), 1 Barn. K. B. 127; 94 E. R. 88.

1736. —.]—It is a rule that upon a new statute which prescribes a particular remedy; no remedy can be taken but the particular remedy prescribed by the statute (DENISON, J.).—STEVENS v. EVANS (1761), 2 Burr. 1152; 1 Wm. Bl. 284; 97 E. R. 761.

*Annotations:—*Consd. Underhill v. Ellicombe (1825), M'Cle. & Yo. 450. *Apld.* Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K. B. 539. *Refd.* Danby v. Watson (1877), 46 L. J. M. C. 179. *Mentd.* Jones v. Bubb (1868), 1 Hop. & Colt. 128.

1737. —.]—Where an Act creates an obligation, & enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner (LORD TENTERDEN, C.J.).—DOE d. ROCHESTER (BP.) v. BRIDGES (1831), 1 B. & Ad. 847; 9 L. J. O. S. K. B. 113; 109 E. R. 1001.

*Annotations:—*Apld. Stevens v. Jeacocke (1848), 11 Q. B. 731. *Distd.* Couch v. Steel (1854), 3 E. & B. 402. *Apprvd.* Lamplugh v. Norton (1889), 22 Q. B. D. 152. *Apld.* Clegg, Parkinson v. Earby Gas Co., [1896] 1 Q. B. 592, Pasmore v. Oswaldtwistle U. C., [1898] A. C. 387. *Consd.* Johnston & Toronto Type Foundry Co. v. Consumers' Gas Co. of Toronto, [1898] A. C. 447; Devonport Corp. v. Tozer (1903), 67 J. P. 269. *Apld.* Hulme v. Ferranti, [1918] 2 K. B. 426. *Consd.* R. v. Poplar B. C. (No. 1), [1922] 1 K. B. 72. *Refd.* Waghorn v. Collison (1922), 127 L. T. 8; Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832; Everett v. Griffiths, [1924] 1 K. B. 941. *Mentd.* Doe d. Egremont v. Forwood (1842), 3 Q. B. 627; Doe d. Egremont v. Courtenay (1848), 11 Q. B. 702; Doe d. Biddulph v. Poole (1818), 11 Q. B. 713.

1738. —.]—Wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment. I quite agree that, where, in the clause containing the prohibition, a particular mode of enforcing the prohibition is prescribed, & the offence is new, that mode only can be pursued. The case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment. But, where there is a distinct absolute prohibition, the act is indictable (LORD DENMAN, C.J.).—R. v. BUCHANAN (1846), 8 Q. B. 883; 15 L. J. Q. B. 227; 7 L. T. O. S. 83; 10 J. P. 615; 10 Jur. 736; 2 Cox, C. C. 36; 115 E. R. 1107.

*Annotations:—*Distd. R. v. Hall, [1891] 1 Q. B. 747. *Consd.*

remedies for their enforcement, the remedy is confined to those specifically given.—*Re* SIMS v. KELLY (1890), 20 O. R. 291.—CAN.

1734 vi. —.]—HAYES v. THOMPSON (1902), 22 C. L. T. 422; 9 B. C. R. 249.—CAN.

1734 vii. —.]—ROSE v. ST. JOHN CORPN. (1905), 37 N. B. R. 58.—CAN.

1734 viii. —.]—SHUTTLEWORTH v. SEYMOUR (Sask.) (1914), 28 W. L. R. 282.—CAN.

1734 ix. —.]—CLOWES v. EDMONTON SCHOOL BOARD (1915), 32 W. L. R. 733; 9 W. W. R. 372; 25 D. L. R. 449; 9 Alta. L. R. 106.—CAN.

1734 x. —.]—RAMACHANDRA v. SECRETARY OF STATE FOR INDIA IN COUNCIL (1888), 1 L. R. 12 Mad. 105.—IND.

1734 xi. —.]—CHUNILAL VIRCHAND v. AHMEDABAD MUNICIPALITY (1911), 1 L. R. 36 Bom. 47.—IND.

1734 xii. —.]—When a statute, in giving a new right, prescribes the mode of enforcing it, no other remedy can

be pursued.—BROOK v. HORNER (1847), 11 L. Eq. R. 214.—IR.

1734 xiii. —.]—HANDLEY v. MOF-FAT (1872), 21 W. R. 231.—IR.

1734 xiv. —.]—The rule that where a statute creates an obligation, & supplies a remedy for its enforcement, that remedy alone must be followed, is subject to this qualification, that the remedy supplied must cover the whole right given.—STUBBS v. MARTIN, [1895] 2 L. R. 70.—IR.

1734 xv. —.]—LAWLER v. M'KENNA (1905), 39 I. L. T. 159.—IR.

1734 xvi. —.]—LYNCH v. TRAINOR & AYLWARD (1893), 7 Nfld. L. R. 744.—NFLD.

1734 xvii. —.]—WOODFORD v. BLACKWOOD (1901), 9 Nfld. L. R. 27.—NFLD.

1734 xviii. —.]—LE BON'S BAY ROAD DISTRICT (INHABITANTS) v. OLD-RIDGE (1898), 17 N. Z. L. R. 321.—N.Z.

1734 xix. —.]—PALMERSTON NORTH CORPN. v. FITT (1901), 20 N. Z. L. R. 396.—N.Z.

Stevens v. Chown, Stevens v. Clark, [1901] 1 Ch. 894. *Refd.* Osborne v. Milman (1886), 17 Q. B. D. 514.

1739. —.]—Where a statute confers a right & annexes certain penalties for its infringement, an action for damages will not lie against a party infringing the right by the party aggrieved.—STEVENS v. JEACOCKE (1848), 11 Q. B. 731; 17 L. J. Q. B. 163; 11 L. T. O. S. 101; 12 Jur. 477; 116 E. R. 647.

*Annotations:—*Distd. Couch v. Steel (1854), 3 E. & B. 402; Atkinson v. Newcastle & Gateshead Water Co. (1871), 20 W. R. 35. (See (1877), 2 Ex. D. 441); Gorris v. Scott (1874), L. R. 9 Exch. 125. *Consd.* Great Northern Fishing Co. v. Edgehill (1883), 11 Q. B. D. 225. *Apld.* Clegg, Parkinson v. Earby Gas Co., [1896] 1 Q. B. 592; Peebles v. Oswaldtwistle U. D., [1897] 1 Q. B. 625. *Refd.* Marshall v. Nicholls (1852), 18 Q. B. 882; Cleave v. Harwar, Wilde v. Stanner (1857), 1 H. & N. 873; St. Pancras Vestry v. Batterbury (1857), 2 C. B. N. S. 477; Baxendale v. Eastern Counties Ry. (1858), 4 C. B. N. S. 63; Melliss v. Shirley & Freemantle L. B. of Health (1885), 54 L. J. Q. B. 408. *Mid. Ry. v. Edmonton Union* (1894), 72 L. T. 206; Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720.

1739a. —.]—If the statute [7 & 8 Vict. c. 112] had prescribed a particular mode by which a person sustaining actual damage by reason of a breach of the duty imposed by the statute was to recover compensation, undoubtedly that mode only could be adopted; 7 & 8 Vict. c. 112, has made no provision for compensation to a person sustaining special damage by reason of a breach of the duty prescribed by the Act; nor are there any words taking away the right which the injured party would have at common law to maintain an action for special damage arising from the breach of a public duty; the penalty given by the statute being applicable only to the public wrong, & not to private damage (LORD CAMPBELL, C.J.).—COUCH v. STEEL (1854), 3 E. & B. 402; 2 C. L. R. 940; 23 L. J. Q. B. 121; 22 L. T. O. S. 271; 18 Jur. 515; 2 W. R. 170; 118 E. R. 1193.

*Annotations:—*Distd. Atkinson v. Newcastle & Gateshead Waterworks Co. (1877), 2 Ex. D. 441. *Consd.* R. v. Hall, [1891] 1 Q. B. 747. *Distd.* Cowley v. Newmarket L. B. [1892] A. C. 345. *Consd.* Pictou Municipality v. Gildbert, [1893] A. C. 524; Saunders v. Holborn District Board of Works, [1895] 1 Q. B. 64; Dawson v. Bingley U. C., [1911] 2 K. B. 149; Neville v. London Express Newspaper, [1919] A. C. 368; R. v. Marshland, Smeeth & Fen District Comrs., [1920] 1 K. B. 155. *Refd.* Casswell v. Worth (1856), 25 L. J. Q. B. 121; Brecon Corp. v. Edwards (1862), 6 L. T. 293; Young v. Davis (1862), 7 H. & N. 760; Wilson v. Merry (1868), L. R. 1 Sc. & Div. 326; Jones v. Stanstead, Shefford & Chamblay Rty. (1872), 8 Moo. P. C. C. N. S. 312; Pickering v. James (1873), L. R. 8 C. P. 489; Gorris v. Scott (1874), 43 L. J. Ex. 92; Thorley v. Glossop (1876), 34 L. T. 169; Thompson v. Brighton Corp., Oliver v. Horsham L. B., [1894] 1 Q. B. 332; Macguire v. Liverpool Corp. (1905), 92 L. T. 374; Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720; Simmonds v. Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616. *Mentd.* A. G. v. Radloff (1854), 10 Exch. 81; Bartonshill Coal Co. v. Reid,

1734 xx. —.]—Where a penalty is fixed by an Act of Parliament to an act or omission, such penalty is in general the only punishment or loss which can be incurred by the party guilty of such act or omission, but this general rule is subject to the exception that the proceedings prescribed by the statute must be co-extensive, with the right created. In order to ascertain whether such is the case, the whole scope & purview of the statute must be looked at.—BAILLIE & CO. v. REESE (1906), 26 N. Z. L. R. 451.—N.Z.

1734 xxi. —.]—FAIRBAIRN, WRIGHT & CO. v. LEVIN & CO. (1914), 34 N. Z. L. R. 1.—N.Z.

1734 xxii. —.]—DOUGLAS (LORD) v. DUNDEE & NEWTYLE RY. CO. (1827), 6 Sh. (Ct. of Sess.) 329.—SCOT.

1734 xxiii. —.]—CAPE CENTRAL RY. (IN LIQUIDATION) v. NOTHING (1890), 8 S. C. 25.—S. AF.

1734 xxiv. —.]—MADRASSA ANJUMAN ISLAMIA v. JOHANNESBURG MUNICIPALITY, [1917] App. D. 718.—S. AF.

Same v. M'Guire (1858), 22 J. P. 560; Robertson v. Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598; Melliss v. Shirley & Freemantle L. B. of Health (1885), 54 L. J. Q. B. 408.

1740. —.—.]—Where a pecuniary obligation is created by a statute, & a remedy expressly given for enforcing it, that remedy must be adopted.—ST. PANCRAS VESTRY v. BATTERBURY (1857), 2 C. B. N. S. 477; 26 L. J. C. P. 243; 29 L. T. O. S. 198; 21 J. P. 424; 3 Jur. N. S. 1106; 140 E. R. 502.

Annotations:—**Expld.** Crystal Palace Gas Co. v. Idris (1900), 82 L. T. 200. **Consd.** Horner v. Franklin, [1905] 1 K. B. 479. **Refd.** New River Co. v. Mather (1875), L. R. 10 C. P. 442; Blackburn Corpn. v. Sanderson, [1902] 1 K. B. 794.

1741. —.—.]—ST. PANCRAS VESTRY v. MORGAN (1857), 21 J. P. Jo. 260.

1742. —.—.]—The case comes under the general rule, that where there is a new obligation imposed by statute, & a remedy for enforcing it, that remedy must be followed (HILL, J.).—BLACKBURN CORPN. v. PARKINSON (1858), as reported in 28 L. J. M. C. 7; 5 Jur. N. S. 572; 7 W. R. 11.

Annotation:—**Mentd.** Derby Corpn. v. Grudgings (1894), 10 R. 565.

1743. —.—.]—WOLVERHAMPTON NEW WATERWORKS CO. v. HAWKESFORD, No. 1768, *post*.

1744. —.—.]—Wherever an Act of Parliament imposes a new obligation, & in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence (BRETT, M.R.).—A.-G. v. BRADLAUGH (1885), 14 Q. B. D. 667; 54 L. J. Q. B. 205; 52 L. T. 589; 33 W. R. 673, C. A.

Annotations:—**Mentd.** Dixon v. Board of Trade (1886), 3 T. L. R. 35; R. v. Hausmann (1909), 73 J. P. 516; *Re* Clifford & O'Sullivan, [1921] 2 A. C. 570.

1745. —.—.]—Where a statute creates a new offence by prohibiting & making unlawful anything which was lawful before, & appoints a special remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued, & no other.—R. v. LOVIBOND (1871), 24 L. T. 357; 38 J. P. 20; 19 W. R. 753.

1746. —.—.]—(1) Where a right is conferred by a statute, & a remedy for the violation of that right is enacted by the same statute, that is the only remedy & you can have no other (BRAMWELL, B.).

(2) We are bound to hold this to be a case in which a private right is given to plffs., & that private right having been infringed by deft., & there being no statutory provision for a remedy to plffs., they are entitled to have recourse to the common law (BRAMWELL, B.).

(3) Past damage has accrued. It appears to me to follow that plffs. ought to have, & are able to maintain their right of action (AMPHLETT, B.).—ROSS v. RUGGE-PRICE (1876), 1 Ex. D. 269; 45 L. J. Q. B. 777; 34 L. T. 535; 24 W. R. 786.

Annotations:—*As to* (2) **Apld.** Pulsford v. Devonish, [1903] 2 Ch. 625. *As to* (3) **Apprvd.** Brain v. Thomas (1881), 50 L. J. Q. B. 662.

1747. —.—.]—As a general rule, where a penalty is affixed by an Act of Parliament to an act or omission, such penalty is the only punishment or loss incurred by the party guilty of such act or omission.—*Re* INTERNATIONAL PULP & PAPER CO., KNOWLES' MORTGAGE (1877), 6 Ch. D. 556; 46 L. J. Ch. 625; 37 L. T. 351; 25 W. R. 822.

Annotations:—**Refd.** *Re* Great Western Forest of Dean Coal Consumers Co., Carter's Case (1886), 31 Ch. D. 496; Wright v. Horton (1887), 12 App. Cas. 371.

1748. —.—.]—(1) Where a statute creates an offence, & defines particular remedies against the person committing that offence, *prima facie* the party injured can avail himself of the remedies so defined & no other (LORD SELBORNE, C.).

(2) If the person injured has a right to require

the duty imposed by the rules to be enforced by injunction, on the ground that a wrong has already been done to him by not obeying the rules, there is no reason why he should be precluded from recovering damages in respect of the past, where actual damage has been sustained (LORD SELBORNE, C.).—BRAIN v. THOMAS (1881), 50 L. J. Q. B. 662, C. A.

Annotation:—*As to* (2) **Refd.** Fraser v. Fear (1912), 107 L. T. 423.

1749. —.—.]—It is an old & well known rule of construing statutes, that when a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, & no other can be supposed to exist (BRETT, M.R.).—BAILEY v. BAILEY (1884), 13 Q. B. D. 855; 53 L. J. Q. B. 583, C. A.

Annotations:—**Apld.** *Re* Otway, *Ex p.* Otway (1888), 58 L. T. 885; Robins v. Robins, [1907] 2 K. B. 13. **Consd.** Ivimey v. Ivimey, [1908] 1 K. B. 260. **Refd.** Chalk, Webb v. Tennent (1887), 57 L. T. 598; Westmoreland Green & Blue Slate Co. v. Feilden, [1891] 3 Ch. 15; Norton v. Gregory (1895), 73 L. T. 10; Seldon v. Wilde, [1910] 2 K. B. 9. **Mentd.** Linton v. Linton (1885), 15 Q. B. D. 239; Watkins v. Watkins (1896), 12 T. L. R. 165; Leavis v. Leavis, [1921] P. 299; Beatty v. Beatty, [1924] 1 K. B. 807.

1750. —.—.]—R. v. ESSEX COUNTY COURT JUDGE, No. 1530, *ante*.

1751. —.—.]—PIETERMARITZBURG CORPN. v. NATAL LAND & COLONIZATION CO., No. 291, *ante*.

1752. —.—.]—HANLEY & BUCKNALL COAL CO., LTD. v. NORTH STAFFORDSHIRE RY. CO. (1891), 64 L. T. 656; 7 T. L. R. 489.

1753. —.—.]—R. v. HALL, No. 1531, *ante*.

1754. —.—.]—As we held the other day in the Ct. of Appeal, where an offence is created by Act of Parliament, it is a misdemeanour to commit that offence. Although doing the act is not a common law misdemeanour, it is a misdemeanour for disobedience to an Act of Parliament. But where the Act of Parliament which creates that offence enacts a particular remedy, that is the only remedy or process which can be used for the purpose of punishing that offence (LORD ESHER, M.R.).—*Re* WEARE, [1893] 2 Q. B. 439; 62 L. J. Q. B. 596; 58 J. P. 6; *sub nom.* *Re* A SOLICITOR, *Ex p.* INCORPORATED LAW SOCIETY, 69 L. T. 148, 522, C. A.

Annotations:—**Refd.** R. v. Incorporated Law Soc., [1895] 2 Q. B. 456; *Re* Solicitor, *Ex p.* Law Soc. (No. 25) (1911), 27 T. L. R. 535.

1755. —.—.]—(1) When a statute creates a new offence & prescribes a penalty recoverable in a ct. of summary jurisdiction, it is not open to bring an offender before a civil ct. & claim a declaration & interdict with the result that if he offends again he will be liable, not to a fine, but to imprisonment for contempt of ct.

(2) The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule, if validly made, is precisely the same, that every person must conform himself to its provisions, & if in such case a penalty may be imposed, the penalty is imposed equally for a breach of the rule. But there is this difference between a rule & an enactment, that whereas, apart from such provision as we are considering, you may canvass a rule & determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament (LORD HERSHELL, C.).—PATENT AGENTS INSTITUTE v. LOCKWOOD, [1894] A. C. 347; 63 L. J. P. C. 74; 71 L. T. 205; 10 T. L. R. 527; 6 R. 219, H. L.

Annotations:—*As to* (1) **Expld.** Stevens v. Chown, Stevens v. Clark, [1901] 1 Ch. 894. **Apld.** Devonport Corpn. v. Tozer, [1902] 2 Ch. 182. **Distd.** Simmonds v. Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616. **Refd.** Barwick v. S. E. & C. R. Cos., [1920] 2 K. B. 387.

Sect. 3.—Statutes creating new obligation: Sub-sects. 1 & 2. Sects. 4 & 5: Sub-sect. 1, A. & B.]

As to (2) Apld. Brightman v. Tate (1919), 35 T. L. R. 209. *Consd.* Tattersall v. Sladen, [1928] 1 Ch. 318. *Refd.* *Re* London & General Bank (1894), 38 Sol. Jo. 682; Baker v. Williams, [1898] 1 Q. B. 23; Starey v. Graham, [1899] 1 Q. B. 406; R. v. Electricity Comrs., *Ex p.* London Electricity Joint Committee Co. (1920), Ltd., [1924] 1 K. B. 171.

1756. —. —.]—When a penalty is imposed by statute on a local authority for breach of a duty thereby created, they are not also liable to an action unless the statute so indicates.—*SAUNDERS v. HOLBORN DISTRICT BOARD OF WORKS*, [1895] 1 Q. B. 64; 64 L. J. Q. B. 101; 71 L. T. 519; 59 J. P. 453; 43 W. R. 26; 11 T. L. R. ; 39 Sol. Jo. 11; 15 R. 25, D. C.

Annotations:—Apld. Maguire v. Liverpool Corpn., [1905] 1 K. B. 767; Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K. B. 639. *Refd.* R. v. Marshland, Smeth & Fen District Comrs., [1920] 1 K. B. 155.

1757. —. —.]—The duty [on defts.] is imposed by statute alone. If, then, the Act creating the duty gives a remedy for that default that is the only remedy (*LORD ESHER, M.R.*).—*ROBINSON v. WORKINGTON CORPN.*, [1897] 1 Q. B. 619; 66 L. J. Q. B. 388; 75 L. T. 674; 61 J. P. 164; 45 W. R. 453; 13 T. L. R. 148, C. A.

Annotations:—Folld. Peebles v. Oswaldtwistle U. D. C., [1897] 1 Q. B. 625. *Apld.* Jones v. Barking U. D. C. (1898), 15 T. L. R. 92. *Consd.* Baron v. Portslade-by-Sea U. C. (1899), 68 L. J. Q. B. 949. *Folld.* Hesketh v. Birmingham Corpn., [1924] 1 K. B. 260. *Refd.* R. v. St. Giles, Camberwell Vestry (1897), 61 J. P. 217; Harrington v. Derby Corpn., [1905] 1 Ch. 205; Dawson v. Bingley U. D. C. (1916), 27 T. L. R. 46.

1758. —. —.]—The principle that when a specific remedy is given by a statute it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute is one which is very familiar & which runs through the law (*LORD HALSBURY, C.*).—*PASMORE v. OSWALDTWISTLE URBAN DISTRICT COUNCIL*, [1898] A. C. 387; 67 L. J. Q. B. 635; 78 L. T. 569; 62 J. P. 628; 14 T. L. R. 368, H. L.; *affg.* S. C. *sub nom.* PEEBLES v. OSWALDTWISTLE URBAN DISTRICT COUNCIL, [1897] 1 Q. B. 625, C. A.

Annotations:—Apld. Jones v. Barking U. D. C. (1898), 15 T. L. R. 92. *Consd.* Baron v. Portslade-by-Sea U. C. (1899), 68 L. J. Q. B. 949. *Distd.* R. v. Stepney Corpn., [1902] 1 K. B. 317. *Apld.* Devonport Corpn. v. Tozer, [1902] 2 Ch. 182. *Hulme v. Ferranti*, [1918] 2 K. B. 426; R. v. Poplar B. C. (No. 1), [1922] 1 K. B. 72; Waghorn v. Collison (1922), 127 L. T. 8. *Consd.* Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832. *Refd.* St. Mary Islington Vestry v. Hornsey U. D. C. (1899), 80 L. T. 746; Haedicke v. Friern Barnet U. C., [1904] 2 K. B. 807; Harrington v. Derby Corpn., [1905] 1 Ch. 205; Brook v. Meltham U. C., [1908] 2 K. B. 780; Waltham Holy Cross U. D. C. v. Lee Conservancy Board (1910), 103 L. T. 192; Turner v. Kingsbury Collieries, [1921] 3 K. B. 169; Clarke v. Epsom R. D. C. (1928), 45 T. L. R. 106. *Mentd.* Eastwood v. Honley U. C., [1900] 1 Ch. 781; Southall Norwood U. D. C. v. Middlesex County Council (1901), 83 L. T. 742; West Riding of Yorkshire Rivers Board v. Gaunt (1902), 67 J. P. 183; West Riding of Yorkshire Rivers Board v. Preston (1904), 92 L. T. 24; West Riding Rivers Board v. Butlerworth & Roberts (1907), 98 L. T. 47.

1759. —. —.]—*GROVES v. WIMBORNE (LORD)*, No. 1858, *post*.

1760. —. —.]—Where an enactment & a penalty for breach of it are contained in the same clause, the penalty is the only remedy for the breach (*CHANNELL, J.*).—*ROWLANDS v. MILLER*, [1899] 1 Q. B. 735; 68 L. J. Q. B. 338; 80 L. T. 290; 63 J. P. 407; 47 W. R. 687; 15 T. L. R. 216; 43 Sol. Jo. 398; 8 Asp. M. L. C. 508; 4 Com. Cas. 133, D. C.

PART VIII. SECT. 3, SUB-SECT. 2.

1768 i. General rule—Action lies at common law.]—IMPERIAL VARNISH & COLOUR CO. v. TORONTO CORPN., [1927] 2 D. L. R. 860; 60 O. L. R. 240.—*CAN.*

1768 ii. —. —.]—The authorities show that a person for whose benefit a statute requires an act to be done or forborne, though no action be given in terms by the statute, shall, for omission or commission to his injury,

1761. —. —.]—If there is one special machinery applied by a statute it has the effect . . . of ousting any other remedy. You must seek your remedy where the statute has given it to you & not elsewhere (*COLLINS, M.R.*).—*MELTHAM SPINNING CO., LTD. v. HUDDERSFIELD CORPN.* (1903), 89 L. T. 403; 67 J. P. 445; 2 L. G. R. 32, C. A.

1762. Whether indictment lies.]—If a statute create a new offence, & inflict a penalty to be recovered by “bill, plaint, or information,” yet an indictment will lie, except there be the negative words, “& not otherwise.”—CROFTON’S CASE (1670), 1 Mod. Rep. 34; 1 Vent. 63; 86 E. R. 710; *sub nom.* R. v. CROFTON, 1 Sid. 439.

Annotations:—Overd. R. v. Manning (1729), Fitz. G. 47. *N.F.* R. v. Wright (1758), 1 Burr. 543. *Dbtd.* R. v. Buchanan (1846), 8 Q. B. 883. *Refd.* Anon. (1697), 3 Salk. 25; R. v. Mallard (1728), 1 Barn. K. B. 108; Anon. (1729), 1 Barn. K. B. 209; R. v. Bright (1758), 2 Keny. 274.

1763. —. —.]—If a statute create a new offence, & prescribe a particular mode of punishment, that mode of punishment alone must be pursued, & not the common law method by indictment.—*R. v. MARRIOT* (1692), 4 Mod. Rep. 144; Carth. 263; 1 Show. 398; 87 E. R. 312.

Annotations:—Apld. Anon. (1729), 1 Barn. K. B. 209. *Refd.* R. v. Pierson (1738), Andr. 310; R. v. Ossulston (1739), 2 Stra. 1107.

1764. —. —.]—Where a statute gives a penalty to the Crown against a subject for doing such a thing that does not *ex consequenti* make the party’s act indictable.—*R. v. MANNING* (1729), Fitz-G. 47; 94 E. R. 647; *sub nom.* R. v. MALLARD, 1 Barn. K. B. 108; 2 Stra. 828; Sess. Cas. K. B. 128.

Annotation:—Mentd. Bradlaugh v. Clarke (1883), 8 App. Cas. 351.

1765. —. —.]—When a statute prescribes a particular method of recovering a penalty how far the party cannot proceed by way of indictment.—*ANON.* (1729), 1 Barn. K. B. 209; 94 E. R. 143.

1766. —. —.]—Where an Act of Parliament prescribes a particular remedy for an offence an indictment will not lie.—*R. v. WRIGHT* (1758), 1 Burr. 543; 97 E. R. 441; *sub nom.* R. v. BRIGHT, 2 Keny. 274.

Annotations:—Consd. Forster v. Taylor (1834), 5 B. & Ad. 887; R. v. Buchanan (1846), 8 Q. B. 883; R. v. Hall, [1891] 1 Q. B. 747. *Apld.* Mullis v. Hubbard, [1903] 2 Ch. 431. *Refd.* R. v. Lovibond (1871), 24 L. T. 357; Lowe v. Dorling, [1906] 2 K. B. 772.

1767. —. —.]—*R. v. HALL*, No. 1531, *ante*. **Whether right to injunction ousted.]—See INJUNCTION**, Vol. XXVIII., pp. 367–371, Nos. 36–55.

Particular instances.]—See TITLES passim.

SUB-SECT. 2.—NO PARTICULAR REMEDY PRESCRIBED.

1768. General rule—Action lies at common law.]—There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, & that liability is affirmed by a statute which gives a special & peculiar form of remedy different from a remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statu-

have an action by the common law.—*WARD v. FREEMAN* (1852), 2 I. C. L. R. 460, 499.—*IR.*

1768 iii. —. —.]—*HANDLEY v. MOFFAT* (1872), 21 W. R. 231.—*IR.*
o. Enforcement by best means avail-

tory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special & particular remedy for enforcing it. The remedy provided by the statute must be followed, & it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted & adhered to (WILLES, J.).—*WOLVERHAMPTON NEW WATERWORKS CO. v. HAWKESFORD* (1859), 6 C. B. N. S. 336; 28 L. J. C. P. 242; 33 L. T. O. S. 366; 5 Jur. N. S. 1104; 7 W. R. 464; 141 E. R. 283.

Annotations:—*Apld.* Vallance v. Falle (1881), 53 L. J. Q. B. 459. *Consd.* Abergavenny Improvement Comrs. v. Straker (1889), 42 Ch. D. 83. *Apld.* Stevens v. Chown, Stevens v. Clark, [1901] 1 Ch. 894. *Consd.* Devonport Corp'n v. Tozer, [1902] 2 Ch. 182. *Distd.* A.-G. v. Ashborne Recreation Ground Co., [1903] 1 Ch. 101. *Apld.* Whittaker v. L. C. C., [1915] 2 K. B. 676. *Consd.* Neville v. London "Express" Newspaper, [1919] A. C. 368. *Distd.* Aramayo Francke Mines v. Public Trustee, [1922] 2 A. C. 406; Witham Outfall Board v. Boston Corp'n. (1926), 136 L. T. 756. *Refd.* Woolley & Woolley v. Broad (1892), 66 L. T. 680. *Mentd.* Re Electric Telegraph Co. of Ireland, Bunn's Case (1860), 2 De G. F. & J. 275; Portal v. Emmens (1876), 1 C. P. D. 201.

1769. ———. ———.]—*ROSS v. RUGGE-PRICE*, No. 1716, *ante*.

1770. ———. ———.] It appears to me to be none the less a debt because no particular mode of enforcing the payment is given by the statute. When there is a statutory obligation to pay money, & no other remedy is expressly given, there would be a remedy by action (LORD COLERIDGE, C.J.).—*BOOTH v. TRAIL* (1883), 12 Q. B. D. 8; 53 L. J. Q. B. 24; 49 L. T. 471; *sub nom.* *Re HAYSON*, *BOOTH v. TRAIL*, 32 W. R. 122, D. C.

1771. ———. ———.] The only peculiarity of the case is that the remedy created by the statute is not co-extensive in point of time with the duty, for the Act permits the destruction of the remedy before the duty has been performed. . . . The principles applicable to such a duty . . . are well settled & rest on the well-founded assumption that the legislature does not intend its enactment to be *brutum fulmen*: if, therefore, a statute creates such a duty but no remedy, an action at common law will lie for breach of such duty (FARWELL, J.).—*PULSFORD v. DEVENISH*, [1903] 2 Ch. 625; 73 L. J. Ch. 35; 52 W. R. 73; 19 T. L. R. 688; 11 Mans. 393.

Annotations:—*Apld.* Argylls v. Coxeter (1913), 29 T. L. R. 355. *Consd.* Woods v. Wmskill, [1913] 2 Ch. 303.

1772. ———. ———.]—Now the general law as to the remedy of a person who has been injured by the infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the right or obligation follows as an incident (KENNEDY, L.J.).—*DAWSON & CO. v. BINGLEY URBAN COUNCIL*, [1911] 2 K. B. 149; 80 L. J. K. B. 842; 104 L. T. 659; 75 J. P. 289; 27 T. L. R. 308; 55 Sol. Jo. 346; 9 L. G. R. 502, C. A.

Annotations:—*Consd.* Fraser v. Fear (1912), 107 L. T. 423; Ryall v. Kidwell, [1913] 3 K. B. 123. *Apld.* Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832. *Mentd.* McClelland v. Manchester Corp'n., [1912] 1 K. B. 118.

Particular instances.]—See *TITLES passim*.

able.]—Where a statute requires something to be done, without clearly indicating the means, the best available means will be held legal.—*BURROUGHS v. BARRON* (1885), 30 L. C. J. 80.—CAN.

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SECT. 4.—FOREIGN STATUTES.

Whether enforceable.]—See *CONFLICT OF LAWS*, Vol. XI., pp. 306–309, 455, 456, 474, Nos. 3–17, 1117–1122, 1289, 1290.

SECT. 5.—PARTICULAR REMEDIES.

SUB-SECT. 1.—PUBLIC REMEDIES.

A. Indictment.

See, generally, *CRIMINAL LAW*, Vol. XIV., pp. 202 *et seq.*

1773. **Whether indictment lies—Non-observance of private Act—Non-feasance.**]—*R. v. PAWLYN* (1664), 1 Sid. 208; 82 E. R. 1060.

1774. ———. **Act forbidden on public grounds.**]—*R. v. BUCHANAN*, No. 1738, *ante*.

1775. ———. ———.]—*R. v. HALL*, No. 1531, *ante*.

1776. ———. ———.]—In my opinion this is one of those cases in which the principle applies, that, where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take the proceedings provided by the statute (WILLES, J.).—*CLEGG, PARKINSON & CO. v. FARBY GAS CO.*, [1896] 1 Q. B. 592; 65 L. J. Q. B. 339; 44 W. R. 606; 12 T. L. R. 241.

Annotations:—*Consd.* Bourne & Hollingsworth v. Marylebone B. C. (1908), 72 J. P. 129. *Refd.* Scammell v. Attlee (1928), 45 T. L. R. 75.

1777. ———. **Misdemeanour.**]—*Re WEARE*, No. 1751, *ante*.

— **Particular remedy prescribed by statute.**]—See Sect. 3, sub-sect. 1, *ante*.

B. Injunction.

See, generally, *INJUNCTION*, Vol. XXVIII., pp. 355 *et seq.*

1778. **Discretion of court—Exercise of statutory power by public bodies.**]—I should myself hesitate to lay down as an absolute rule that, in every case where a public body having statutory powers are doing something which is *ultra vires* by reason of the fact that they have not complied with some condition or term subject to which the statute granted their powers to them, the Att.-Gen. is entitled to an injunction *ex debito justitiae*, & the ct. has no discretion in the matter (VAUGHAN WILLIAMS, L.J.).

I never heard of such a thing as that persons who are indictable as being guilty of a misdemeanour in breaking a statutory obligation should put forward by way of defence that it was more for the public benefit that they should disobey than that they should obey the statute (A. L. SMITH, L.J.).—*A.-G. v. LONDON & NORTH WESTERN RY. CO.*, [1900] 1 Q. B. 78; 69 L. J. Q. B. 26; 81 L. T. 619; 63 J. P. 772; 16 T. L. R. 30, C. A.

Annotations:—*Refd.* Islington Vestry v. Hornsey U. C., [1900] 1 Ch. 695; *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; *Bickmore v. Dimmer*, [1903] 1 Ch. 158; *A.-G. v. Dorchester Corp'n* (1905), 93 L. T. 290; *A.-G. v. Birmingham, Tame & Rea District Drainage Board*, [1910] 1 Ch. 48; *A.-G. v. Long Eaton U. C.*, [1914] 2 Ch. 251.

1779. ———. ———.]—Observations on imputing laches to the A.-G. & the relators in an action for injunction where the latter are a local authority.

The ct. no doubt has a discretion in the case of A.-G. actions as well as other actions (FARWELL, J.).—*A.-G. v. WIMBLEDON HOUSE*

PART VIII. SECT. 5, SUB-SECT. 1.—A.

d. Whether indictment lies—Under statute or under regulations made thereunder.]—Where a sect. of a statute provides for a certain crime & regula-

tions, duly made under that sect., also provide for the same offence, the Crown may indict under that sect. or under the regulations.—*R. v. WANG YUNG SHAN*, [1905] T. S. 397.—S. AF.

Sect. 5.—Particular remedies: Sub-sect. 1, B., C. & D. (a), (b) & (c) i., ii. & iii.]

ESTATE CO., LTD., [1904] 2 Ch. 34; 73 L. J. Ch. 593; 91 L. T. 163; 68 J. P. 341; 20 T. L. R. 489; 2 L. G. R. 826.

*Annotations:—*Consd. A.-G. v. Birmingham, Tame & Rea District Drainage Board, [1910] 1 Ch. 48. *Refd.* A.-G. v. Donby, [1925] Ch. 596.

1780. ———.]—The ct. has a discretion as to granting a mandatory injunction in such a case, & having regard to the length of time which had elapsed without objection or complaint, no such injunction ought to be granted.—A.-G. v. GRAND JUNCTION CANAL CO., [1909] 2 Ch. 505; 78 L. J. Ch. 681; 101 L. T. 150; 73 J. P. 421; 25 T. L. R. 720; 7 L. G. R. 1014.

*Annotation:—*Refd. A.-G. & Godstone R. D. C. v. Warren Smith (1912), 76 J. P. 253.

———.]—A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD, No. 1878, *post*.

1782. When granted—Construction doubtful.]—Where a co. is acting clearly beyond the powers of an Act of Parliament, the ct. will not hesitate to restrain them by injunction, & to keep them within the bounds prescribed by their Act of Parliament. In a case of doubtful construction, the ct. may interfere, taking care that the parties have their legal rights decided in a ct. of law. Then the ct. either tells them to ascertain their legal rights, & abstains from interfering, or it interferes by injunction in the meantime, according to the circumstances of the case, & the degree of doubt that may exist on the question of law, & also the comparative injury which may be inflicted on one side or the other, if the injunction be granted or refused. . . . Another ingredient which is not to be lost sight of is, the conduct of the parties themselves (LORD COTTENHAM, C.).—BROCKLEBANK v. WHITEHAVEN JUNCTION RY. CO. (1847), 15 Sim. 632; 5 Ry. & Can. Cas. 373; 16 L. J. Ch. 471; 9 L. T. O. S. 470; 60 E. R. 765, L. C.

*Annotations:—*Refd. Kinnersly v. North Staffordshire Ry. (1849), 6 Ry. & Can. Cas. 662; R. v. Birmingham & Oxford Junction Ry. (1850), 15 Q. B. 634; Doe d. Armitstead v. North Staffordshire Ry. (1851), 16 Q. B. 526; Webster v. S. E. Ry. (1851), 6 Ry. & Can. Cas. 698; Salisbury v. G. N. Ry. (1852), 17 Q. B. 840; Sparrow v. Oxford, Worcester & Wolverhampton Ry. (1852), 7 Ry. & Can. Cas. 92. *Mentd.* Dakin v. L. & N. W. Ry. (1850), 14 L. T. O. S. 503.

1783. ——— Powers exceeded.]—BROCKLEBANK v. WHITEHAVEN JUNCTION RY. CO., No. 1782, *ante*.

1784. ——— No irreparable injury.]—DOVER HARBOUR (WARDEN, ETC.) v. SOUTH EASTERN RY. CO., No. 1409, *ante*.

1785. ——— Exercise *malâ fide*.]—STOCKTON & DARLINGTON RY. CO. v. BROWN, No. 1402, *ante*.

1786. ——— Infringement of legal right—Damages not adequate remedy.]—JORDISON v. SUTTON, SOUTHCOATES & DRYPOOL GAS CO., No. 1411, *ante*.

Whether proof of injury to public necessary.]—See CROWN PRACTICE, Vol. XVI., p. 487, Nos. 3687-3690.

Effect of delay.]—See CROWN PRACTICE, Vol. XVI., pp. 485, 486, Nos. 3674-3679.

Particular remedy prescribed by statute.]—See INJUNCTION, Vol. XXVIII., pp. 367-371, Nos. 36-55.

C. Mandamus.

See CROWN PRACTICE, Vol. XVI., pp. 316-318, Nos. 1292-1303.

PART VIII. SECT. 5, SUB-SECT. 1.

—D. (a).

*e. Power of court—To relieve.]—*The power given to the ct. to relieve against penalties does not authorise it to relieve against statutory penalties. — R. & ALBERTA PROVINCIAL TREASURER v. CANADIAN NORTHERN RY. CO. & CANADIAN NATIONAL RY. CO., [1921] 1 W. W. R. 1178; 16 Alta. L. R. 220; 58 D. L. R. 624.—CAN.

*f. ——— To inflict penalty—Penalty not provided for—Intention of legislature considered.]—*Where the legislature has in

the public interest expressly provided for an act in a manner which renders it clear that the intention was to constitute an offence, the ct. has power to inflict a penalty where the statute has failed to provide one.—R. v. FORBES, [1917] T. P. D. 52.—S. AF.

D. Penalty.

(a) In General.

1787. What is penalty—Accumulated damages to party aggrieved.]—WOODGATE v. KNATCHBULL, No. 1823, *post*.

1788. Whether more than one penalty recoverable—Offence committed by several persons.]—Respectively forfeit in statute, makes the forfeiture several upon each offender.—R. v. KING (1712), 1 Salk. 182; 91 E. R. 166.

*Annotations:—*Refd. R. v. Venables (1725), 2 Ld. Raym. 1405; Hardyman v. Whitaker (1748), 2 East, 573, n.; R. v. Wilkes (1770), 4 Burr. 2527.

1789. ———.]—HARDYMAN v. WHITAKER (1749), 2 East, 573, n.; 102 E. R. 489, N. P.

*Annotations:—*Distd. R. v. Clark (1777), 2 Cowp. 610. *Fold.* R. v. Bleasdale (1792), 4 Term Rep. 809. *Apld.* Del Campo & Martinez v. R. (1837), 2 Moo. P. C. C. 15. *Refd.* Barnard v. Gostling (1802), 2 East, 569.

1790. ———.]—Where an offence created, or made penal, by statute, is in its nature single, one single penalty only can be recovered, though several join in committing it. But if the offence is in its nature, several, each offender is separately liable to the penalty.—R. v. CLARK (1777), 2 Cowp. 610; 98 E. R. 1267.

*Annotations:—*Consd. Del Campo & Martinez v. R. (1837), 2 Moo. P. C. C. 15; R. v. Dean (1843), 12 M. & W. 39. *Apld.* R. v. Littlechild, R. v. Hoslop (1871), L. R. 6 Q. B. 293. *Refd.* Bradlaugh v. Clarke (1883), 8 App. Cas. 354. *Mentd.* R. v. Mordecai Hymen (1798), 7 Term Rep. 536.

1791. ———.]—Two persons cannot be convicted in separate penalties under 5 Ann. c. 14, s. 4, for using a greyhound to destroy game.—R. v. BLEASDALE (1792), 4 Term Rep. 809; Nolan, 139; 100 E. R. 1314.

*Annotation:—*Refd. R. v. Dean (1843), 12 M. & W. 39.

1792. ———.]—BARNARD v. GOSTLING (1805), 1 Bos. & P. N. R. 245; 127 E. R. 454, Ex. Ch.; *affg.* (1802), 2 East, 569.

*Annotations:—*Apld. Del Campo & Martinez v. R. (1837), 2 Moo. P. C. C. 15. *Refd.* Davis v. Edmonson (1803), 3 Bos. & P. 382.

Penalties in respect of particular offences.]—See TITLES *passim*.

(b) To Whom Payable.

1793. General rule—Crown—Unless contrary intention appears.]—ANON. (1587), Moore, K. B. 238; 72 E. R. 553.

*Annotations:—*Consd. Bradlaugh v. Clarke (1883), 8 App. Cas. 354. *Refd.* Woodward v. Fox (1691), 2 Vent. 267.

1794. ———.]—BRADLAUGH v. CLARKE, No. 412, *ante*.

1795. Moiety given to treasurer of county, riding, or division.]—Where the moiety of a penalty is given by a statute to the treasurer of a county, riding, or division, the word division must be taken in its legal & not in its popular sense, & cannot be applied to the different parts of a county in which the magistrates act under one general commission, but for the convenience of the county adjourn the quarter-sessions from one part of it to another, & appoint a separate treasurer for each.—EVANS v. STEVENS (1791), 4 Term Rep. 459; 100 E. R. 1118.

*Annotation:—*Refd. R. v. Myers (1795), 6 Term Rep. 237.

1796. Moiety given to poor of parish.]—In an action on a penal statute, one half of the penalty to the informer, the other half to the poor of the parish; &, after verdict for the pltf., alleged for error, that although there are two parishes of St. James in the county of Middlesex, that of

Clerkenwell & that of Westminster, the record had not distinguished which of them, but only designated "the Parish of St. James in the County of Middlesex":—*Held*: well enough, at least after verdict, as the right parish might recover its moiety of the penalty, by showing that it was the parish in which the offence had been committed.—*TAYLOR v. WILLANS* (1827), 1 Dow & Cl. 19; 1 Bli. N. S. 415; 1 E. R. 432, II. L.

Annotation:—*Mentd.* *R. v. Carlile* (1831), 2 B. & Ad. 362.

Penalties recoverable under summary jurisdiction.—*See* MAGISTRATES, Vol. XXXIII., pp. 459, 460, Nos. 1716–1726.

(c) *Action for Penalty.*

i. *In General.*

1797. Form of action—Where no particular penalty specified—Prohibitory statute.—An action on a prohibitory statute where no particular penalty is specified, must be by *qui tam*.—*WATERHOUSE (LADY) v. BAWDE* (1606), Cro. Jac. 133; 79 E. R. 116.

Annotations:—*Refd.* *Myddelton v. Wynn* (1716), Willes, 597.

Mentd. *Higginson v. Martin* (1677), Freem. K. B. 322.

1798. What must be pleaded—Where particular exemptions from liability.—It is a well-established principle, that, in all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause which gives the penalty, exempting certain cases from its operation, the declaration or information must show that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act, it is not necessary to notice it in the declaration or information, but it is a matter which deft. must allege as a ground of defence. The same rule applies with increased force & efficacy to the case where penalties are given by one statute, & particular cases are, by a subsequent statute, exempted from its operation (*LORD ABINGER, C.B.*).—*THIBAUT v. GIBSON* (1843), 12 M. & W. 88; 1 Dow. & L. 253; 13 L. J. Ex. 2; 7 Jur. 1043; 152 E. R. 1122.

Annotations:—*Consd.* *R. v. James*, [1902] 1 K. B. 540.

Refd. *Pilkington v. Cooke* (1847), 16 M. & W. 615; *Washbourn v. Burrows* (1847), 1 Exch. 107; *Palk v. Force* (1818), 12 Q. B. 666; *Clack v. Sainsbury* (1851), 11 C. B. 695; *Grizewood v. Blane* (1851), 11 C. B. 526; *Nixon v. Phillips* (1852), 7 Exch. 188; *Flanank v. Simpson* (1866), L. R. 1 A. & E. 276; *R. v. Audley*, [1907] 1 K. B. 383.

1799. Proof of liability—Penalty imposed in respect of particular commodity.—If a statute imposes a penalty for neglects relative to a particular species of any commodity, a justification under the Act for raising the penalty must show that the commodity in respect of which the neglect was committed was of that particular species.—*CHAUNCEY v. WINDE* (1701), 1 Ld. Raym. 700; 91 E. R. 1366; *sub nom.* *CHANCEY v. WIN*, 12 Mod. Rep. 580; *sub nom.* *CHANCE v. WEEDEN*, 2 Salk. 628.

Annotations:—*Mentd.* *Cooper v. Monke* (1737), Willes, 52; *Piggott v. Kemp* (1832), 1 Cr. & M. 197; *Bardons v. Selby* (1833), 9 Bing. 756.

1800. Admissibility of previous conviction of act of forfeiture—Penalty subsequently imposed by statute.—*Qu.*: if an existing statute imposes a penalty upon an act, which was before subject only to forfeiture, whether the recorded conviction of the act of forfeiture may be invoked for the purpose of enforcing the penalty.—*R. v. WHITTAKER* (1823), 1 Hag. Adm. 145; 166 E. R. 52.

1801. — Must be established with reasonable certainty.—In an action upon a penal statute, unless the legislature expressly directs that certain proof shall be sufficient, it is not sufficient to give evidence which is consistent with the guilt of the person charged, but you must go further & prove that deft. has in mind the penalty with reasonable certainty (*POLLOCK, C.B.*).—*DYER v. BEST* (1866), as reported in 4 H. & C. 189; 35 L. J. Ex. 105; 13 L. T. 753; 30 J. P. 151.

Annotations:—*Mentd.* *Lewla v. Davis* (1875), L. R. 10 Exch. 86; *Robinson v. Currey* (1881), 7 Q. B. D. 465; *Forbes v. Samuel* (1913), 109 L. T. 599.

1802. Defence to action—Previous judgment in favour of third party—Effect of collusion.—Defts. pleaded in bar to an action to recover a penalty for breach of 21 Geo. 3, c. 49, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced in the name of R., with his consent, while pltf.'s action was pending, & was carried through to judgment by the intervention of a solr. employed by defts. & without the interference of R. it was commenced for the protection of defts. from any action brought or to be brought in respect of the penalty claimed in it; & also for the purpose of taking the Home Secretary's opinion whether he would remit the penalty:—*Held*: the judgment recovered was no bar to an action for the same offence by a different pltf.—*GIRDLESTONE v. BRIGHTON AQUARIUM CO.* (1879), 4 Ex. D. 107; 48 L. J. Q. B. 373; 40 L. T. 473; 43 J. P. 428; 27 W. R. 523, C. A.

Annotations:—*Consd.* *Forbes v. Samuel*, [1913] 3 K. B. 706.

Refd. *Todd v. Robinson* (1881), 50 L. T. 298.

Within what time action must be commenced.—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 529, 530, Nos. 1837–1844.

Latin informations.—*See* CROWN PRACTICE, Vol. XVI., pp. 216–219, Nos. 27–35, 43–63, 69–75.

ii. *Who may Bring Action.*

1803. No mode of recovery prescribed—Party aggrieved.—If a statute prohibits the doing of a thing under a penalty to be paid to the party aggrieved, or without saying to whom it shall be paid, & does not prescribe any mode of recovery, debt lies for the party aggrieved.—*UNDERHILL v. ELLICOMBE* (1825), M'Cle. & Yo. 450; 118 E. R. 489.

Annotations:—*Consd.* *Conch v. Steel* (1851), 3 B. & B. 402. *Refd.* *Heudebourek v. Langton* (1829), 3 C. & P. 566; *Addison v. Round* (1836), 4 Ad. & El. 799; *Stevens v. Jencko* (1848), 11 Q. B. 731; *Kilham v. Collier* (1851), 21 L. J. Q. B. 65; *Cleeve v. Harwar*, *Wilde v. Stanner* (1857), 1 H. & N. 873.

Under summary jurisdiction.—*See* MAGISTRATES, Vol. XXXIII., pp. 324, 325, Nos. 389–391.

Necessity for consent of Attorney-General.—*See* ACTION, Vol. I., pp. 51, 52, Nos. 413–418.

Under particular statutes.—*See* TITLES *passim*.

iii. *Place of Trial.*

See R. S. C., Ord. 36, r. 10.

1804. Whether local venue abolished.—*Semble*: R. S. C., Ord. 36, r. 1, abolishing local venues has the effect of repealing 21 Jac. 1, c. 4, ss. 1–3.—*FORBES v. SAMUEL*, [1913] 3 K. B. 706; 82 L. J. K. B. 1135; 109 L. T. 599; 29 T. L. R. 544.

Annotations:—*Refd.* *Burnett v. Samuel* (1913), 109 L. T. 630; *Bird v. Samuel* (1914), 30 T. L. R. 323; *Tranton v. Astor* (1917), 33 T. L. R. 383; *Nichol v. Fearby*, *Nichol v. Robinson*, [1923] 1 K. B. 480.

g. Crown.—*A.-G. v. SMITH* (1892), 13 N. S. W. L. R. (L.) 293; 9 N. S. W. W. N. 67.—*AUS.*

h. —.—*MCDONALD v. ROBERTSON* (circa 1904), 22 C. L. T. 430.—*CAN.*

PART VIII. SECT. 5, SUB-SECT. 1.
—D. (c) ii.

1803 i. No mode of recovery prescribed—Party aggrieved.—Where a statute

gives a penalty to a particular party, it must be construed to give him a right to sue for it, although no such right is given in express terms.—*Ex p. PEARCE* (1844), 1 Legge, 189.—*AUS.*

Sect. 5.—Particular remedies: Sub-sect. 1, D. (c) iv. & v., & E.; sub-sect. 2, A.]

iv. Practice.

1805. Whether leave granted to amend pleading—Effect of delay.]—The ct. will grant leave to amend in penal actions, even after the time limited for bringing a new action; provided pltf. has not been guilty of any unnecessary delay in prosecuting his suit, & the amendment prayed for does not introduce any new substantive cause of action.—*MADDOCK v. HAMMET* (1796), 7 Term Rep. 55; 101 E. R. 851.

1806. ———.]—The ct. will not permit any amendments to be made in a penal action, where pltf. has been guilty of delay in carrying on the suit.—*RANKIN v. MARSH* (1798), 8 Term Rep. 30; 101 E. R. 1249.

1807. ———.]—The statute has limited the time within which a penal action shall be commenced; clearly intending also, that such an action shall be prosecuted without delay. I think a party who, after he has commenced such an action, has been guilty of any delay, is not entitled to any indulgence. Here the action was commenced in Sept. 1828, & pltf. did not declare till Trinity term, 1829, & then did not proceed to trial at the next assizes. The time which has elapsed is so great that I think this rule ought to be discharged (*LORD TENTERDEN, C.J.*).—*WOOD v. GRIMWOOD* (1830), 10 B. & C. 689; 5 Man. & Ry. K. B. 584; 109 E. R. 606.

1808. ———.]—The ct. will allow amendments as well in penal as in civil actions, unless delay is caused thereby.—*JONES v. EDWARDS* (1838), 3 M. & W. 218; 6 Dowl. 369; 1 Horn & H. 44; 7 L. J. Ex. 70; 2 Jur. 207; 150 E. R. 1123.

1809. Notice to produce papers—Sufficiency of notice to agent.]—It is not necessary in penal actions to give notice to deft. himself to produce papers, etc. Notice to his agent or attorney is sufficient.—*CATES v. WINTER* (1789), 3 Term Rep. 306; 100 E. R. 590.

Production of documents generally.]—See *DISCOVERY*, Vol. XVIII., pp. 95 *et seq.*

1810. Application for judgment—As in non-suit.]—*SUGAR v. WEBSTER* (1743), Barnes, 315; 94 E. R. 933.

1811. Whether new trial granted.]—A new trial is never granted in actions upon penal laws.—*FONEREAU v. —* (1770), 3 Wils. 59; 95 E. R. 932.

*Annotations:—*Consd. *Brook v. Middleton* (1808), 10 East, 268. Refd. *Gregory v. Tuffs* (1834), 4 Tyr. 820; *Hall v. Green* (1853), 11 Exch. 247.

1812. Mistake or misdirection.]—This ct. will grant a new trial in a penal action on account of a mistake or misdirection of the judge. If any matter be disclosed to an attorney in the cause, he cannot be permitted to give it in evidence, either in that or any other action. It is the privilege of the client & not of the attorney; but such privilege is confined to counsel, solrs. & attorneys, when acting in their respective characters.—*WILSON v. RASTALL* (1792), 4 Term Rep. 753; 100 E. R. 1283.

*Annotations:—*Appld. *Gregory v. Tuffs* (1834), 4 Tyr. 820. Refd. *Brook v. Middleton* (1808), 10 East, 268; *Gainsford v. Grammar* (1809), 2 Camp. 9; *Cromack v. Heathcote* (1820), 11 Brod. & Bing. 4; *Falmouth v. Moss* (1822), 11 Price, 455; *Greenhough v. Gaskell* (1833), Coop. temp. Brough, 96; *Doe d. Strode v. Seaton* (1834), 4 L. J. K. B. 13; *Preston v. Collins* (1838), 2 Jur. 329; *R. v. Tilney & Tuffs* (1848), 12 J. P. 645; *Calley v. Richards* (1854), 19 Beav. 401; *Pearce v. Foster* (1885), 15 Q. B. D. 114. Mentd. *Sharp v. Wakefield*, [1891] A. C. 173; *R. v. West Riding (Yorks) County Council* (1896), 60 J. P. 550.

1813. ———.]—A misapprehension of the law by the jury, whether occasioned by their own mistake, or the misdirection of the judge, is good ground for granting a new trial in a penal action,

where the verdict has passed for the deft., if the ct. are satisfied that the verdict proceeded entirely on such misapprehension.—*GREGORY v. TUFFS* (1834), 1 Cr. M. & R. 310; 2 Dowl. 711; 4 Tyr. 820; 3 L. J. Ex. 295; 149 E. R. 1098.

*Annotations:—*Appld. *A.-G. v. Rogers* (1843), 8 J. P. 249. Refd. *R. v. Chalkcombe* (1841), 6 Jur. 481.

1814. ——— Verdict contrary to direction of judge.]—The ct. has full power to grant a new trial at the instance of the Crown when the verdict has passed for deft. in an information for penalties or in a penal action if it appears that the jury have acted in wilful contravention of the law as laid down to them by the judge at *Nisi Prius* on admitted facts in the same way that it would have done if the judge had erroneously directed them.—*A.-G. v. ROGERS* (1843), 2 Dowl. N. S. 1037; 11 M. & W. 670; 12 L. J. Ex. 395; 8 J. P. 249; 7 Jur. 704; 152 E. R. 974.

*Annotations:—*Refd. *Gough v. Hardman* (1860), 6 Jur. N. S. 402; *A.-G. v. Sillem* (1863), 2 H. & C. 431.

1815. ——— Verdict against evidence.]—It is a settled rule, that when deft. in a penal action obtains a verdict, a new trial will not be granted on the ground that it was against evidence.—*GOUGH v. HARDMAN* (1860), 6 Jur. N. S. 402.

1816. Whether leave to compound granted—After verdict.]—The ct. will give leave to compound in a penal action after verdict.—*MAUGHAN v. WALKER* (1793), 5 Term Rep. 98; 101 E. R. 58.

1817. ———.]—The ct. will not give leave to compound in a penal action, after verdict, unless deft. can show circumstances which entitle him to such an indulgence.—*CROWDER v. WAGSTAFF* (1797), 1 Bos. & P. 18; 126 E. R. 753.

1818. ——— Where part of penalty goes to Crown.]—The ct. will not grant permission to compound a penal action in which part of the penalty goes to the King, unless the consent of the Crown is previously signified, whether a verdict has passed for pltf. or not.—*HOWARD v. SOWERBY* (1808), 1 Taunt. 103; 127 E. R. 770.

1819. Whether proceedings stayed—Suggestion of new statute relieving defendant.]—In a *qui tam* action for penalties, the ct. refused to stay the proceedings or to give deft. further time to plead, upon a suggestion by affidavit, that an Act of parliament was likely to be passed, the effect of which would be to relieve deft. from the penalties.—*GRANT v. RIDLEY* (1843), 5 Man. & G. 201; 6 Scott, N. R. 176; 12 L. J. C. P. 151; 7 Jur. 883; 134 E. R. 537.

1820. Whether proceedings set aside—Action commenced without leave of court—Necessity for leave imposed by subsequent statute.]—A statute having authorised penal actions to be brought for certain omissions, a subsequent statute declared as to part of these omissions, that no action should be commenced, or, if commenced, should be prosecuted or carried on, without the leave of a judge.

An action having been commenced for all the omissions, mentioned in the first statute, before the passing of the second statute, but having been proceeded with afterwards:—*Held*: the subsequent proceedings must be set aside, as being in part for omissions mentioned in the second statute.—*GRANT v. BROWNE* (1843), 6 Man. & G. 774; 7 Scott, N. R. 508; 13 L. J. C. P. 23; 8 Jur. 177; 134 E. R. 1104.

Discovery of documents.]—See *DISCOVERY*, Vol. XVIII., p. 52, Nos. 90–94.

v. Costs.

1821. Whether costs allowed—General rule.]—Where a statute gives a penalty to the party grieved to be recovered by action, bill, plaint, etc.,

... he shall have costs against deft. . . . but in a *tam quam* or other popular action . . . he shall not have costs against deft. (*per cur.*).—**CUTLERS' CO. IN YORKSHIRE v. RUSLIN** (1692), *Skin.* 363; 90 E. R. 161; *sub nom.* **CUTLERS' CO. IN HIGHAMSHIRE v. BUSKIN**, 12 Mod. Rep. 46; *sub nom.* **CUTLERS' CO. IN HALLAMSHIRE v. HURSLEY**, Comb. 224.

Annotations:—**Folld.** *Plymouth Corp'n. v. Collings* (1692), *Carth.* 230. **Consd.** *Plymouth Corp'n. v. Werring* (1744), *Willes*, 440; *College of Physicians v. Harrison* (1829), 9 B. & C. 524.

1822. ———. ———.]—**PLYMOUTH CORPN. v. COLLINGS** (1692), *Carth.* 230; 90 E. R. 738.

1823. ———. ———.]—It has been held in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action; for in penal actions no costs are allowed, but if the action be brought by the party grieved, he is entitled to costs (**ASHHURST, J.**).—**WOODGATE v. KNATCHBULL** (1787), 2 Term Rep. 148; 100 E. R. 80.

Annotations:—**Refd.** *The Rendsberg* (1805), 6 Ch. Rob. 142; *Dow v. Parsons* (1819), 1 Chit. 295; *Buckle v. Bewes* (1825), 4 B. & C. 154; *Lee v. Dangar*, Grant, [1892] 1 Q. B. 231; *Shopee v. Nathan*, [1892] 1 Q. B. 215; *Woolford's Estate Trustee v. Levy*, [1892] 1 Q. B. 772. **Mentd.** *Sturmy v. Middlesex Sheriff* (1809), 11 East, 25; *Thomas v. Pearse* (1818), 5 Price, 578; *R. v. Jones* (1830), 1 Gr. & J. 140; *Grainger v. Hill* (1838), 7 L. J. C. P. 85; *Berton v. Lawrence* (1850), 5 Exch. 816; *Hardcastle v. Bielby*, [1892] 1 Q. B. 709.

1824. ———. ———.]—Penalty given to party aggrieved.]—**CUTLERS' CO. IN YORKSHIRE v. RUSLIN**, No. 1821, *ante*.

1825. ———. ———.]—Where the statute gives a certain penalty to the party grieved, he shall recover costs; otherwise of informer.—**SHORE v. MADISTEN** (1697), 1 Salk. 206; 91 E. R. 183.

1826. ———. ———.]—Where a penalty is given by a statute, even subsequent to the Statute of Gloucester, to the party grieved he is entitled to costs if he succeed.—**PLYMOUTH CORPN. v. WERRING** (1744), *Willes*, 440; 125 E. R. 1257.

Annotation:—**Consd.** *College of Physicians v. Harrison* (1829), 9 B. & C. 524.

1827. ———. ———.]—**WOODGATE v. KNATCHBULL**, No. 1823, *ante*.

1828. ———. ———.]—Action by informer.]—**SHORE v. MADISTEN**, No. 1825, *ante*.

1829. ———. ———.]—Where a statute imposes a certain penalty, to be recovered by action, & vests the right of action in a particular person, or collection of persons, the withholding of the penalty is an injury which gives a right to costs of suit as well as to the penalty. *Aliter*, where the penalty, or the persons who are to sue for it, be uncertain.—**COLLEGE OF PHYSICIANS v. HARRISON** (1829), 9 B. & C. 524; 4 Man. & Ry. K. B. 404; 7 L. J. O. S. K. B. 249; 109 E. R. 196.

1830. ———. ———.]—Moiety of penalty & costs given to poor of parish—Costs of appeal.]—Where an informer sues upon a penal statute, which gives the penalty with costs, half to the informer, & half to the poor of the parish in which the offence is committed, he cannot deduct from the moiety payable to the parish a contribution for costs incurred in maintaining the judgment in a ct. of error, which ct. had refused to allow the costs of affirmance.—**WILLAN v. TAYLOR** (1827), 7 B. & C. 111; 5 L. J. O. S. K. B. 319; 108 E. R. 667.

1831. ———. ———.]—Right of action vested in particular person or body.]—**COLLEGE OF PHYSICIANS v. HARRISON**, No. 1829, *ante*.

1832. ———. ———.]—Penalty uncertain.]—**COLLEGE OF PHYSICIANS v. HARRISON**, No. 1829, *ante*.

E. Prohibition.

See CROWN PRACTICE, Vol. XVI., pp. 379, 381, Nos. 2166–2168, 2187–2189.

SUB-SECT. 2.—PRIVATE REMEDIES.

A. In General.

1833. Whether action lies — General rule.]—Wherever a statute gives a right to one person to have an act fulfilled by another, & that other does not fulfil it, a cause of action arises (**ERLE, C.J.**).—**FOTHERBY v. METROPOLITAN RY. CO.** (1866), L. R. 2 C. P. 188; 36 L. J. C. P. 88; *sub nom.* **FETHERBY v. METROPOLITAN RY. CO.**, 15 W. R. 112.

Annotation:—**Consd.** *Morgan v. Met. Ry.* (1868), L. R. 4 C. P. 97.

1834. ———. ———.]—Sum given by statute—No remedy provided—Action for debt.]—**WALDEN v. VESKY** (1625), *Palm.* 399; *Noy.* 75; 81 E. R. 1142; *sub nom.* **WALDEN v. URSY**, Lat. 51.

Annotation:—**Mentd.** *Hescott's Case* (1693), 1 Salk. 330.

1835. ———. ———.]—Particular remedy prescribed by statute—Penalty.]—Where an Act of Parliament prescribes a particular remedy for an offence, it does not necessarily take away the parties' remedy by action.—**WARD v. BIRD** (1790), 2 Chit. 582.

Annotation:—**Mentd.** *Shaw v. Poynter* (1831), 1 Ad. & El. 312.

1836. ———. ———.]—**SAUNDERS v. HOLBORN DISTRICT BOARD OF WORKS**, No. 1756, *ante*.

1837. ———. ———.]—Effect of remission of penalty.]—**WATKINS v. NAVAL COLLIERY CO.** (1897), LTD., No. 698, *ante*.

———. ———.]—Statute affirming pre-existing obligation.]—See Sect. 2, *ante*.

———. ———.]—Statute creating new obligation.]—See Sect. 3, sub-sect. 1, *ante*.

———. ———.]—Particular instances.]—See TITLES *passim*.

1838. Within what time action must be brought — Time limited by statute — When cause of action a single act.]—Where a statute limits the period within which an action is to be brought for an act done or committed, if the cause of action be a single act, or one which amounts to a trespass, except it be a continuing trespass, the action must be brought within the prescribed period after the actual doing of the thing complained of: but, if the cause of action be, not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when pltf. sustained the injury.—**WHITEHOUSE v. FELLOWES** (1861), 10 C. B. N. S. 765; 30 L. J. C. P. 305; 4 L. T. 177; 26 J. P. 40; 9 W. R. 557; 112 E. R. 651.

Annotations:—**Refd.** *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93; *Colley v. L. & N. W. Ry.* (1880), 5 Ex. D. 277; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *Greenwill v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Turner v. Mid. Ry.* (1911), 104 L. T. 317; *R. v. Marshland Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155. **Mentd.** *Holliday v. St. Leonard, Shoreditch* (1861), 11 C. B. N. S. 192; *Clothier v. Webster* (1862), 12 C. B. N. S. 790; *Brownlow v. Metropolitan Board of Works & Aird* (1864), 16 C. B. N. S. 546; *Coe v. Wise* (1864), 5 B. & S. 440; *Ohrby v. Ryde Comrs.* (1864), 33 L. J. Q. B. 296; *Parsons v. St. Mathew, Bethnal Green* (1867), L. R. 3 C. P. 56; *Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256; *Hall v. Norfolk*, [1900] 2 Ch. 493.

1839. ———. ———.]—Where cause of action resulting damage only.]—**WHITEHOUSE v. FELLOWES**, No. 1838, *ante*.

———. ———.]—See, generally, LIMITATION OF ACTIONS, Vol. XXXII., pp. 315 *et seq.*

1840. Who may bring action — Person for whose benefit statute enacted.]—Pltf., in satisfaction of a debt due to him, received a cheque drawn on the Union Bank, & payable to him or order. He indorsed his name on the cheque, & crossed it with the name of his bankers, "The London & County Banking co." The cheque was stolen from his servant while taking it to the London & County Bank. The thief sold the cheque to one

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T. who transferred it for full value to a customer of the London & Westminster Bank. The transferee paid it into the last mentioned bank, & it was presented by them to the Union Bank, who paid it. Plaintiff then brought an action against the Union Bank, treating himself as the owner of the cheque, & debts, as having wrongfully converted it, & also claiming the amount of it on the ground that debts, had infringed, to his loss, 21 & 22 Vict. c. 79, which provides that the crossing shall be a material part of a cheque, & that a cheque crossed with the name of a particular banker shall not be paid to any one but such banker:—*Held*: the statutory provision relied on was enacted directly for the benefit of the drawer, & no action lies for infringing the provisions of a statute except by the person for whose direct benefit they were enacted.—*SMITH v. UNION BANK OF LONDON* (1875), 1 Q. B. D. 31; 45 L. J. Q. B. 149; 33 L. T. 557; 21 W. R. 194, C. A.

Annotations:—*Refd.* *Re Plumbly, Ex p. Grant* (1880), 13 Ch. D. 667. *Mentd.* *National Bank v. Silke* (1890), 63 L. T. 787.

1841. Individual customer of company—Breach of private Act.]—Where by an Act extending the powers of resp. co. certain duties & obligations were imposed on it for the benefit of its customers with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default & no right of action given to persons aggrieved, provision however being made for its accounts being audited by direction of the mayor of the corpn. with whose consent the co. was originally established:—*Held*: no individual customer had a right of action against the co. for non-compliance with the provisions of the Act. Such a right arises where given by the Act, & especially so where the Act as in this case is in the nature of a private Legislative bargain, & not one of public & general policy.—*JOHNSTON & TORONTO TYPE FOUNDRY CO. v. TORONTO CONSUMER'S GAS CO.*, [1898] A. C. 447; 67 L. J. P. C. 33; 78 L. T. 270, P. C.

1842. —Members of statutory class—To maintain preferential rights.]—Where certain preferential rights are alleged to have been conferred by statute upon an indefinite class, who claim such rights not as members of the general public but as a sect. of & adverse to the general public then the members of such a statutory class possess a common interest & common rights, & some members of the class can properly bring an action on behalf of themselves & all other members of the class to maintain such statutory interest & rights.—*ELLIS v. BEDFORD (DUKE)*, [1899] 1 Ch. 494; 68 L. J. Ch. 289; 80 L. T. 332; 47 W. R. 385; 15 T. L. R. 202; 43 Sol. Jo. 258, C. A.; *affd. sub nom. BEDFORD (DUKE) v. ELLIS*, [1901] A. C. 1, H. L.

Annotations:—*Refd.* *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Wets v. Sackville*, [1903] 2 Ch. 378; *Crosfield v. Manchester Ship Canal Co.* (1904), 90 L. T. 557; *Chapman v. Michaelson*, [1909] 1 Ch. 238; *Markt v. Knight S.S. Co., Sale & Frazer v. Knight S.S. Co.*, [1910] 2 K. B. 1021; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *Mercantile Marine Service Assocn. v. Toms*, [1916] 2 K. B. 243; *Hardie & Lane v. Chiltern*, [1928] 1 K. B. 663. *Mentd.* *Janson v. Property Insee.* (1913), 30 T. L. R. 49; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Churchill*

v. Whetnall, Aberconway v. Whetnall (1918), 119 L. T. 34; *Esquimalt & Nanaimo Ry. v. Wilson*, [1920] A. C. 358.

1843. Against whom action may be brought—Individual doing prohibited act—Particular act affecting public.]—Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act (*POLLOCK, C.B.*).—*CHAMBERLAINE v. CHESTER & BIRKENHEAD RY. CO.* (1848), 1 Exch. 870; 18 L. J. Ex. 494; 11 L. T. O. S. 270; 154 E. R. 371.

1844. Costs.]—In proceedings under statutes it is the settled rule of the ct. that no costs can be awarded, except such as are authorised by the particular Act.—*Re ST. DUNSTON IN THE WEST CHARITY SCHOOLS* (1871), L. R. 12 Eq. 537; 24 L. T. 613; 19 W. R. 887.

Annotation:—*Apld. Re Stanley of Alderley's Estates* (1872), 26 L. T. 822.

1845. —.]—The ct. held that the costs were not provided for by the special Acts, & refused to direct the navigation trustees to pay them.—*Re STANLEY OF ALDERLEY'S (LORD) ESTATE* (1872), L. R. 14 Eq. 227; 26 L. T. 822.

B. Action for Debt.

1846. General rule.]—There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money an action will lie for its recovery unless the Act contains some provision to the contrary (*PARKE, B.*).—*SHEPHERD v. HILLS* (1855), 11 Exch. 55; 25 L. J. Ex. 6; 156 E. R. 743.

Annotations:—*Consd.* *Cohen v. Hall*, [1922] 2 K. B. 37. *Refd.* *St. Pancras Vestry v. Batterbury* (1857), 2 Q. B. N. S. 477; *Lamplough v. Norton* (1889), 58 L. J. Q. B. 279; *Aylott v. West Ham Corpn.*, [1927] 1 Ch. 30. *Mentd.* *Lowe v. Dorling*, [1906] 2 K. B. 772; *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101.

1847. —.]—Where a statute gave a right to a sum of money & provided no means of recovering it the remedy was by action (*per CUR.*).—*RICHARDSON v. WILLIS* (1873), L. R. 8 Exch. 69; 42 L. J. Ex. 68; 28 L. T. 71; 12 Cox, C. C. 351.

Annotation:—*Refd.* *Re Hayson, Booth v. Trall, Sunderland Corpn. Garnishees* (1883), 49 L. T. 471.

1848. —.]—The statute provides in the plainest terms that money paid under circumstances such as exist in the present case "shall be deemed & taken to be a debt due & owing. That being so there is no necessity for any promise to pay in order to render the money recoverable. The action under the sect. is to recover a statutory debt (*LORD STERNDALE, M.R.*).—*COHEN v. HALL*, [1922] 2 K. B. 37; 91 L. J. K. B. 497; 127 L. T. 130; 38 T. L. R. 429; 66 Sol. Jo. 349, C. A.

Annotations:—*Refd.* *Bowling v. Camp*, (1922), 128 L. T. 342; *Henshall v. Porter*, [1923] 2 K. B. 193.

C. Action for Damages.

See, generally, DAMAGES, Vol. XVII., pp. 76 et seq.

1849. Whether action lies—Damages given by statute to party aggrieved.]—Where damages are given by statute to the party grieved, they cannot be recovered on an indictment unless that mode be expressly pointed out; but must be sued for by action on the statute.—*BUMPSTED'S CASE* (1636), Cro. Car. 448; 79 E. R. 990.

Annotations:—*Mentd.* *R. v. Sadler* (1663), 1 Sid. 99; *R. v. Parsons* (1675), Froom. K. B. 396.

PART VIII. SECT. 5, SUB-SECT. 2. —B.

1846 f. General rule.]—Where an Act of Parliament casts upon a party an

obligation to pay a specific sum of money to particular persons, an action of debt may be maintained for the amount; & that although a different

remedy may be provided by the Act.—*EASTERN JUDICIAL DISTRICT BOARD v. WINNIPEG CORPN.* (1886), 3 Man. L. R. 537.—**CAN.**

1850. — Depends on scope & object of statute.]—Where an Act of Parliament imposes a statutory duty, an action does not necessarily lie for the breach of such duty at the suit of any person injured by such breach. Whether such a right of action exists depends upon the general scope & object of the particular statute.—*ATKINSON v. NEWCASTLE WATERWORKS CO.* (1877), 2 Ex. D. 441; 46 L. J. Ex. 775; 36 L. T. 761; 42 J. P. 183; 25 W. R. 794, C. A.; *revsg.* (1871), L. R. 6 Exch. 404.

Annotations:—*Distd.* *Handley v. Moffat* (1872), 21 W. R. 231. *Consd.* *Great Northern Fishing Co. v. Edgehill* (1883), 11 Q. B. D. 225; *McColla v. Clacton-on-Sea Gas & Water Co.* (1889), 5 T. L. R. 690. *Appld.* *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 61. *Consd.* *Clegg, Parkinson v. Earby Gas Co.*, [1896] 1 Q. B. 592; *Goodson v. Sunbury Gas Consumers' Co.* (1896), 75 L. T. 251. *Appld.* *Groves v. Wimborne*, [1898] 2 Q. B. 402. *Consd.* *Hartley v. Rochdale Corp.*, [1908] 2 K. B. 594; *Dawson v. Bingley U. C.*, [1911] 2 K. B. 149; *Butler (or Black) v. Fife Coal Co.*, [1912] A. C. 119; *Price v. Webb*, [1913] 2 K. B. 367; *Neville v. London "Express" Newspaper*, [1919] A. C. 368; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832; *Scammell v. Attlee* (1928), 45 T. L. R. 75. *Reid.* *Cornell v. Hay* (1873), L. R. 8 C. P. 328; *Pickering v. James* (1873), L. R. 8 C. P. 489; *Gorris v. Scott* (1874), L. R. 9 Exch. 125; *Ross v. Rugge-Price* (1876), 1 Ex. D. 269; *Thorley v. Glossop* (1876), 34 L. T. 169; *Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256; *Vallance v. Falle* (1884), 13 Q. B. D. 109; *Molliss v. Shirley & Freemantle L. B. of Health* (1885), 54 L. J. Q. B. 408; *R. v. Hall*, [1891] 1 Q. B. 747; *Cowley v. Newmarket L. B.*, [1892] A. C. 315; *Barry Ry. v. Taff Vale Ry.* (1894), 64 L. J. Ch. 230; *Patent Agents Institute v. Lockwood*, [1894] A. C. 347; *Johnston & Toronto Type Foundry Co. v. Toronto Consumers' Gas Co.*, [1898] A. C. 447; *Gale v. Rhymer & Aber Valleys Gas & Water Co.* (1903), 89 L. T. 399; *Simpson v. South Oxfordshire Water & Gas Co.*, [1908] 1 K. B. 917; *R. v. Marshland Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155.

1851. — Breach of duty necessarily attended with damage.]—Where an Act of Parliament creates a duty, the breach of which in any case is attended with damage, that breach of duty is the foundation of an action (*LORD DENMAN, C.J.*).—*LICHFIELD CORPN. v. SIMPSON* (1845), 8 Q. B. 65; 6 L. T. O. S. 122; 10 J. P. 120; 115 E. R. 798.

Annotations:—*Consd.* *Marshall v. Nicholls* (1852), 18 Q. B. 882. *Reid.* *Wiley v. Crawford* (1860), 1 B. & S. 253; *Great Northern Fishing Co. v. Edgehill* (1883), 11 Q. B. D. 225.

1852. — Specific duty created by statute.]—Where a co. or party is commanded by statute to do a specific act, any person specially damaged by the statute being disobeyed has a right of action against the parties disobeying.—*CALEDONIAN RY. CO. v. COLT* (1860), 3 L. T. 252; 7 Jur. N. S. 475, H. L.

1853. — Duty created with particular object—Damage suffered not contemplated by statute.]—When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind is not entitled to maintain an action in respect of such loss.—

GORRIS v. SCOTT (1874), L. R. 9 Exch. 125; 43 L. J. Ex. 92; 30 L. T. 431; 22 W. R. 575; 2 Asp. M. L. C. 282, Ex. Ch.

Annotations:—*Appld.* *Ross v. Rugge-Price* (1876), 1 Ex. D. 269. *Consd.* *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720. *Reid.* *Groves v. Wimborne*, [1898] 2 Q. B. 402; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832.

1854. — For past damage.]—*ROSS v. RUGGE-PRICE*, No. 1746, *ante*.

1855. — — — — —.]—*BRAIN v. THOMAS*, No. 1748, *ante*.

1856. — Statute passed for benefit of general public.]—A man may be morally, & under the terms of an Act of Parliament, legally culpable, & yet his conduct may not give any right of action to a private individual who suffers injury thereby.

A breach of a statutory duty may not constitute the foundation for a private right of action.—*WARD v. HOBBS* (1878), 4 App. Cas. 13; 48 L. J. Q. B. 281; 40 L. T. 73; 43 J. P. 252; 27 W. R. 114, H. L.

Annotations:—*Reid.* *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539. *Mentd.* *Peters v. Planner* (1895), 11 T. L. R. 169; *Sarson v. Roberts* (1895), 43 W. R. 690; *Dunn v. Currie* (1902), 71 L. J. K. B. 963; *Clarke v. Army & Navy Co-op. Soc.*, [1903] 1 K. B. 155.

1857. — Duty created for protection of individual—Necessity for proof of actual damage—Whether Attorney-General need be joined.]—Where an Act of Parliament contains a provision for the special protection or benefit of an individual he may enforce his rights thereunder by an action, without either joining the A.-G. as a party or showing that he has sustained any particular damage.—*DEVONPORT CORPN. v. PLYMOUTH, DEVONPORT & DISTRICT TRAMWAYS CO.* (1884), 52 L. T. 161; 49 J. P. 405, C. A.

1858. — — — — — What may be taken into consideration—Particular remedy provided by statute.]—Where an absolute duty is imposed upon a person by statute it is not necessary, in order to make him liable for breach of that duty, to show negligence. Whether there be negligence or not, he is responsible *quacunqve via* for non-performance of the duty. As authority for that the case of *Gray v. Pullen* (1864), 5 B. & S. 970, may be referred to, where it was held in the Exch. Ch. by the whole ct. that the breach of a statutory duty such as that now in question of itself gives a right of action to a person thereby injured, unless the case can be brought within some known exception to that rule. An exception to the rule is where, a new duty or right being created by statute, a new remedy is given by the statute to a person injured by a violation of it, & upon the purview of the whole Act it appears that the remedy so given is intended to be a substitute for the right of action which would otherwise exist (*RIGBY, L.J.*).

Where a statute provides for the performance by certain persons of a particular duty, & some

PART VIII. SECT. 5, SUB-SECT. 2.

1852 i. Whether action lies—Specific duty created by statute.]—A statute which empowers a public authority to do specified acts, & whilst taking away the right of action of a person injured by such acts lawfully done gives compensation by arbn. is not, unless a contrary intention appears, to be construed as including compensation for injuries caused by the neglect or omission of the authority: as to these the person injured still has his remedy by action.—*Re BLAND BROTHERS & INGLEWOOD BOROUGH COUNCIL'S ARBITRATION*, [1918] V. L. R. 467.—*AUS.*

1852 ii. — — — — —.]—Where a statute

provides for the performance of a particular duty, & some one of a class of persons for whose benefit & protection the duty is imposed, is injured by the failure of the person required to do so to perform it, an action, *prima facie*, & if there is nothing to the contrary, is maintainable by such person; but where the particular course of conduct is imperative, & the non-performance is, in the general interest, punishable by penalty, an action will not lie.—*TOMPKINS v. BROCKVILLE RINK CO.* (1899), 31 O. R. 124.—*CAN.*

1852 iii. — — — — —.]—Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire

escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty.—*LOVE v. NEW FAIRVIEW CORPN., LTD.* (1904), 10 B. C. R. 330; 24 C. L. T. 259.—*CAN.*

1852 iv. — — — — —.]—Where a statute or statutory bye-law enacts for the benefit of the public that a certain thing shall be done, any one of the public has, in the absence of any indication in the statute or bye-law to the contrary, a civil remedy for any special damages sustained by him by reason of non-compliance with the enactment.—*CAPE CENTRAL RYS. (IN LIQUIDATION) v. NOTHLING* (1890), 8 S. C. 25.—*S. AF.*

Sect. 5.—Particular remedies: Sub-sect. 2, C. & D. Sects. 6 & 7: Sub-sects. 1, 2 & 3.]

one belonging to a class of persons for whose benefit & protection the statute imposes the duty is injured by failure to perform it, *prima facie*, &, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty. I have equally no doubt that, where in a statute of this kind a remedy is provided in cases of non-performance of the statutory duty, that is a matter to be taken into consideration for the purpose of determining whether an action will lie for injury caused by non-performance of that duty, or whether the Legislature intended that there should be no other remedy than the statutory remedy; but it is by no means conclusive or the only matter to be taken into consideration for that purpose. If it be found that the remedy so provided by the statute is to enure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration in dealing with the question whether the Legislature intended the statutory remedy to be the only remedy. But again, the fact that the Legislature has provided that that remedy shall enure, or under some circumstances shall enure, for the benefit of the person injured, is not conclusive of the question, &, although it may be a cogent & weighty consideration, other matters also have to be considered (VAUGHAN WILLIAMS, L.J.).—GROVES v. WIMBORNE (LORD), [1898] 2 Q. B. 402; 67 L. J. Q. B. 862; 79 L. T. 284; 47 W. R. 87, C. A.

Annotations:—Consd. Watkins v. Naval Colliery Co. (1897), Ltd., [1911] 2 K. B. 162; Butler (or Black) v. Fife Coal Co., [1912] A. C. 149; Woods v. Winskill, [1913] 2 Ch. 303. **Appld.** R. v. Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155. **Consd.** Scammell v. Attlee (1928), 45 T. L. R. 75. **Refd.** Crossfield v. Manchester Ship Canal Co. (1904), 73 L. J. Ch. 345; David v. Britannic Merthyr Coal Co., [1909] 2 K. B. 146; Jones v. Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Simmonds v. Newport Abercarn Black Vein Steam Coal Co., [1920] 3 K. B. 131; Fowler v. Kibble, [1922] 1 Ch. 487; Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832; Dew v. United British S.S. Co. (1928), 139 L. T. 628. **Mentd.** Gibson v. Dunkerley, Lees & Sykes, Third Parties (1910), 102 L. T. 587; Pursell v. Clement Talbot (1911), 111 L. T. 827.

— **Particular instances.**—See TITLES *passim*.

D. Injunction.

See, generally, INJUNCTION, Vol. XXVIII., pp. 355 *et seq.*

SECT. 6.—TRANSACTIONS FORBIDDEN BY STATUTE.

1859. Voidness by statute—Whether distinguishable from voidness at common law.]—I think there is no difference between things made void by Act of Parliament & things void by the common law. . . . There has been a distinction mentioned between a bond being void by statute, & at common law, & it is said that in the first case, if it be bad, or void in any part, it is void *in toto*; but that at common law it may be void in part, & good in part, but this proves nothing in the present case; the judges formerly thought an Act of Parliament might be eluded if they did not make the whole void, if part was void; it is said the statute is like a tyrant, where he comes he makes all void, but the common law is like a

nursing father, makes only void that part where the fault is, & preserves the rest (WILMOT, C.J.).—COLLINS v. BLANTERN (1767), 2 Wils. 341; 95 E. R. 847.

Annotations:—Consd. Gas Light & Coke Co. v. Turner (1839), 5 Bing. N. C. 666. **Refd.** Master v. Miller (1791), 4 Term Rep. 320; Kerrison v. Cole (1807), 8 East, 231; Morgan v. Horsman (1810), 3 Taunt. 241; Fletcher v. Sondes (1827), 1 Bl. N. S. 144; Hill v. Manchester & Salford Waterworks Co. (1831), 2 B. & Ad. 544; Pickering v. Ilfracombe Ry. (1868), L. R. 3 C. P. 235; Re Coltman, Coltman v. Coltman (1881), 45 L. T. 392; Barclay v. Pearson, [1893] 2 Ch. 154. **Mentd.** Pole v. Harrobin (1782), 9 East, 415, n.; Drage v. Ibberson (1798), 1 Esp. 643; Edgecombe v. Roda (1804), 5 East, 294; Paxton v. Popham (1808), 9 East, 408; Greville v. Atkins, etc. (1829), 4 Man. & Ry. K. B. 372; Edwards v. Brown (1831), 1 Cr. & J. 307; Prole v. Wiggins (1836), 3 Bing. N. C. 230; Kirwan v. Goodman (1841), 9 Dowl. 330; Ward v. Lloyd (1843), 6 Man. & G. 785; Keir v. Leeman (1846), 9 Q. B. 371; Higgins v. Pitt (1849), 4 Exch. 312; Benyon v. Nettlefold (1850), 3 Mac. & G. 94; Reynell v. Sprye (1852), 1 De G. M. & G. 660; Royal British Bank v. Turquand (1855), 5 E. & B. 248; Meyers v. Sarl (1860), 9 W. R. 96; Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540; Taylor v. Chester (1869), L. R. 4 Q. B. 309; Waugh v. Morris (1873), 42 L. J. Q. B. 57; Rawlings v. Coal Consumers' Assocn. (1874), 43 L. J. M. C. 111; Hegarty v. Shine (1878), 14 Cox, C. C. 124; Rourke v. Mealy (1879), 41 L. T. 168; Yorkshire Ry. Wagon Co. v. MacLure & Cornwall Minerals Ry. (1881), 45 L. T. 747; Reichel v. Oxford (Bp.) (1887), 35 Ch. D. 48; Kearley v. Thomson (1890), 24 Q. B. D. 742; Hermann v. Charlesworth (1905), 74 L. J. K. B. 620; Re Robinson's Settlement, Gant v. Hobbs (1912), 106 L. T. 443; Re Worthington, *Ex p.* Pathé Freres, [1914] 2 K. B. 299.

1860. Statutes denying legal effect to instruments—Distinguished from statutes declaring instruments void to all intents.]—Distinction between Acts of Parliament, denying legal effect to instruments, as the Act for enrolling bargains & sales, & the Registry Act, & Acts, declaring instruments void to all intents; as the annuity & the Ship Registry Acts. Notwithstanding the former, the party is bound in equity by the contract.—DAVIS v. STRATHMORE (EARL) (1810), 16 Ves. 419; 33 E. R. 1043.

Annotations:—Consd. Greaves v. Toffield (1880), 14 Ch. D. 563. **Refd.** Tunstall v. Trappes (1829), 3 Sim. 286; Skeels v. Shearly (1836), 8 Sim. 153; Willis v. Brown (1839), 10 Sim. 127; Benham v. Keane (1861), 3 De G. F. & J. 318. **Re** Monolithic Building Co., Tacon v. Monolithic Building Co., [1915] 1 Ch. 643.

1861. Action on illegal transaction—Duty of court to take objection.]—If the ct. is satisfied that a transaction is illegal or unenforceable by statute, it must take the objection itself although the parties may not wish to raise the point.—SOCIÉTÉ DES HÔTELS RÉUNIS (SOCIÉTÉ ANONYME) v. HAWKER (1913), 29 T. L. R. 578; *on appeal* (1914), 30 T. L. R. 423, C. A.

Contracts rendered illegal by statute.]—See CONTRACT, Vol. XII., pp. 269-274, Nos. 2200-2244.

— **Conflict of laws.]—**See CONFLICT OF LAWS, Vol. XI., pp. 401-406, Nos. 724-752.

— **Particular instances.]—**See TITLES *passim*.

SECT. 7.—EXCUSES FOR NON-OBSERVANCE OF STATUTES.

SUB-SECT. 1.—IGNORANTIA JURIS NON EXCUSAT.

1862. Application of principle—General rule.]—Note, an Act of Parliament has every man's consent as well to come, as present, & so he is here an author of his own hurt, & also he must hold it as the Act gives it, having power to bind every

PART VIII. SECT. 6.

1859 i. Voidness by statute—Whether distinguishable from voidness at common law.]—Where a statute prohibits under

a penalty, any person from to pay certain expenses, an agreement to pay such expenses is invalid, & no action is maintainable upon it, although the statute does not expressly pro-

hibit the other party to the agreement from receiving such expenses, or impose a penalty upon him for so doing.—O'BRIEN v. DILLON (1858), 9 I. C. L. R. 318; 11 Ir. Jur. 43.—IR.

man's right; either finally or *sub modo*, as here it is for the first taker; & therefore are savings or strangers rights in Acts of Parliament.—**DUNCOMBE v. WINGFIELD** (1618), Hob. 254; 80 E. R. 400.

Annotations:—**Refd.** *Re Airey, Airey v. Stapleton*, [1897] 1 Ch. 164. **Mentd.** *Wakeman v. Blackwell* (1676), 1 Mod. Rep. 218; *King v. Dillston* (1688), 1 Show. 83; *Symonds v. Cudmore* (1691), 12 Mod. Rep. 32; *Lodge v. Jennings* (1714-27), Gilb. Ch. 255; *Witham v. Lewis* (1744), 1 Wils. 48; *Goodright d'Roche v. Harwood* (1773), Loft. 282; *Corner v. Shew* (1838), 2 Jur. 761; *Woodroffe v. Doe d. Daniell* (1846), 15 M. & W. 769.

1863. ———.]—(1) If a discretionary power was meant to be given, the power would have been expressed in the clearest language.

(2) Every man is presumed to know the law & perhaps more emphatically the statute law of the realm (**LORD CHELMSFORD**).—**CARTER v. McLAREN** (1871), L. R. 2 Sc. & Div. 120.

1864. ——— **Public statute.**]—This Act is a public Act accessible to all, & supposed to be known to all (**JERVIS, C.J.**).—**EAST ANGLIAN RY. CO. v. EASTERN COUNTIES RY. CO.** (1851), 11 C. B. 775; 7 Ry. & Can. Cas. 150; 21 L. J. C. P. 23; 18 L. T. O. S. 138; 16 Jur. 249; 138 E. R. 680.

Annotations:—**Apld.** *McGregor v. Dover & Deal Ry. Co.* (1852), 7 Ry. & Can. Cas. 227. **Refd.** *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356; *Ashbury Ry. Carriage & Iron Co. v. Riche* (1875), L. R. 7 H. L. 653; *A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449. **Mentd.** *South Yorkshire Ry. & River Dun Co. v. G. N. Ry.* (1853), Exch. 55; *Bostock v. North Staffordshire Ry.* (1855), E. & B. 798; *Norwich Corpn. v. Norfolk Ry.* (1855), E. & B. 397; *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; *Shrewsbury & Birmingham Ry. v. N. W. Ry.* (1857), 6 H. L. Cas. 113; *Buteman Ashton-under-Lyne Corpn.* (1858), 3 H. & N. 323; *Rogers v. Oxford, Worcester & Wolverhampton Ry.* (1858), 2 De G. & J. 662; *L. B. & S. C. Ry. v. L. & S. W. Ry.* (1859), 4 De G. & J. 362; *Hammersmith & City Ry. v. Brand* (1869), L. R. 4 H. L. 171; *Driver v. Kingston Highway Board* (1871), 24 L. T. 480; *Evershed v. L. & N. W. Ry.* (1877), 3 Q. B. D. 134.

1865. ——— **Private statute.**]—Where a co. is created by Act of Parliament, having privileges & rights granted to them, & liabilities & duties imposed upon them, in respect of their incorporation, parties dealing with them must be taken to be cognisant of the provisions of the Act of Parliament granting those privileges & rights & imposing those duties & liabilities, although it be a private Act (**ERLE, C.J.**).—**CAHILL v. LONDON & NORTH WESTERN RY. CO.** (1861), 10 C. B. N. S. 154; 30 L. J. C. P. 289; 4 L. T. 246; 7 Jur. N. S. 1164; 9 W. R. 653; 142 E. R. 409; *affd.* (1862), 13 C. B. N. S. 818, Ex. Ch.

Annotations:—**Refd.** *Phelps v. L. & N. W. Ry.* (1865), 12 L. T. 496; *Austin v. G. W. Ry.* (1867), 8 B. & S. 327; *Macrow v. G. W. Ry.* (1871), L. R. 6 Q. B. 612; *Wilkinson v. L. & Y. Ry.*, [1907] 2 K. B. 222.

1866. ——— **Persons of humble station.**]—I do not see how the law is to be administered so as to be acceptable to reasonable persons unless allowance is made for the want of knowledge on the part of persons in humble life (**LAW, J.**).—**HOOK v. HOOK & BROWN**, [1917] P. 56; 86 L. J. P. 41; 116 L. T. 383; 33 T. L. R. 181; 61 Sol. Jo. 284.

1867. ——— **Statute making continuous proceeding unlawful—Whether reasonable time to be allowed for discontinuance.**]—Before a continuous Act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance (**BAGGALLAY, J.**).—**BURNS v. NOWELL** (1880), 5 Q. B. D. 444; 49 L. J. Q. B. 468; 43

L. T. 342; 44 J. P. 828; 29 W. R. 39; 4 Asp. M. L. C. 323, C. A.

—— **Particular instances.**]—*See* **TITLES** *passim*.

SUB-SECT. 2.—ACT OF GOD.

1868. General rule—Performance excused.]—

We are of opinion that, as the duty of applt. to give such notice was cast upon him by the law, not by his own voluntary contract, he is excused from performing that duty by its becoming impossible by the act of God (**PATTESON, J.**).—**R. v. LEICESTERSHIRE JJ.** (1850), 15 Q. B. 88; 4 New Mag. Cas. 83; 4 New Sess. Cas. 124; 19 L. J. M. C. 209; 15 L. T. O. S. 132; 14 J. P. 542; 14 Jur. 550; 117 E. R. 301.

Annotations:—**Apld.** *Marsland v. Taggart*, [1928] 1 K. B. 447. **Mentd.** *Tipperary Case* (1875), 3 O'M. & H. 19.

1869. ———.]—The only question is, whether there is any impediment to the recovery of the debt for which he is constituted a creditor by reason of there being a non-compliance with this provision & if that compliance is shown to have been rendered impossible, not by his neglect, or in consequence of his own act, but by the act of God, it would be impossible, consistently with the established principles of law, to hold that he has lost his right through a provisionary or directory clause which it was impossible for him to comply with (**LORD WESTBURY, C.**).—**CAMPBELL v. DALHOUSIE (EARL)** (1868), L. R. 1 Sc. & Div. 259; 22 L. T. 879, H. L.

1870. ———.]—**RIVER WEAR COMRS. v. ADAMSON**, No. 105, *ante*.

Application of rule.]—*See* **TITLES** *passim*.

SUB-SECT. 3.—WAIVER.

1871. Waiver by party benefiting.]—A party who has a benefit given him by statute, may waive it if he thinks fit (**ALDERSON, B.**).—**GRAHAM v. INGLEBY** (1848), 1 Exch. 651; 3 New Pract. Cas. 53; 10 L. T. O. S. 307; 154 E. R. 277.

Annotation:—**Apld.** *Park Gate Iron Co. v. Coates* (1870), L. R. 5 C. P. 634.

1872. ———.]—It is not a matter with which the public are concerned. If this be so, it falls within the rule that either party may waive provisions which are for his own benefit (**BOVILL, C.J.**).—**PARK GATE IRON CO., LTD. v. COATES** (1870), L. R. 5 C. P. 634; 39 L. J. C. P. 317; 22 L. T. 658; *sub nom.* **COATES v. PARKGATE IRON CO.**, 18 W. R. 928.

Annotations:—**Mentd.** *Frances v. Dowdeswell* (1874), L. R. 9 C. P. 423; *R. v. London JJ, Ex p. East London Waterworks Co.* (1897), 66 L. J. Q. B. 262.

1873. ———.]—A statute or charter having the force of a statute may be waived by the party for whose benefit it was enacted so as to render the acts of persons disregarding it legal.—**GOLDSMID v. GREAT EASTERN RY. CO.** (1883), 25 Ch. D. 511; 53 L. J. Ch. 371; 49 L. T. 717; 32 W. R. 341, C. A.; *on appeal* **GREAT EASTERN RY. CO. v. GOLDSMID** (1884), 9 App. Cas. 927, H. L.

Annotations:—**Refd.** *Toronto Corpn. v. Russell*, [1908] A. C. 493. **Mentd.** *A.-G. v. Horner* (1884), 14 Q. B. D. 215; *Abergavenny Improvement Comrs. v. Straker* (1889), 42 Ch. D. 83; *Birmingham Corpn. v. Foster* (1894), 70 L. T. 371; *Hampstead Corpn. v. Mid. Ry.*, [1904] 2 K. B. 802; *Wilcox v. Steel*, [1904] 1 Ch. 212; *Stepney B. C. v. Gingell & Fokett* (1909), 100 L. T. 629; *Haynes v. Ford*, [1911] 1 Ch. 375; *A.-G. v. Horner*, [1913] 2 Ch. 140; *Hammerton v. Dysart*, [1916] 1 A. C. 57; *Selby*

PART VIII. SECT. 7, SUB-SECT. 1.

1867 i. Application of principle —

Statute making continuous proceeding unlawful—Whether reasonable time to be allowed for discontinuance.]—**R. v.**

LEVINE, [1927] 1 D. L. R. 740; 46 Can. Crim. Cas. 342; 36 Man. L. R. 95; [1926] 3 W. W. R. 550.—**CAN.**

Sect. 7.—Excuses for non-observance of statutes: Sub-sects. 3 & 4. Part IX. Sect. 1: Sub-sects. 1 & 2, A., B. & C.]

v. Whitbread, [1917] 1 K. B. 736; *Morpeth Corp'n. v. Northumberland Farmers' Auction Mart Co.*, [1921] 2 Ch. 154; *Dewhurst v. Salford Grdns.*, [1925] Ch. 655.

1874. —[These being things entirely for his own benefit, he can undoubtedly waive the notice (LORD ATKINSON).—*TORONTO CORPN. v. RUSSELL*, [1908] A. C. 493; 78 L. J. P. C. 1; 99 L. T. 738; 24 T. L. R. 908, P. C.]

1875. —**Unless expressly forbidden by statute.**—In all the cases referred to in argument, in which the Legislature has intended to enact that a person shall not be allowed to contract himself out of an Act of Parliament, very express words have been used. As a general rule the entire freedom of contract has been preserved (FIELD, J.).—*GRIFFITHS v. DUDLEY (EARL)* (1882), 9 Q. B. D. 357; 51 L. J. Q. B. 543; 47 L. T. 10; 46 J. P. 711.

Annotations:—**Mentd.** *Davidson v. Hill*, [1901] 1 K. B. 606; *Williams v. Mersey Docks & Harbour Board* (1905), 74 L. J. K. B. 481; *Miller v. Grand Trunk Ry. of Canada*, [1906] A. C. 187; *British Columbia Electric Ry. v. Gentile*, [1914] A. C. 1034; *Haydock v. Goodier*, [1921] 2 K. B. 384; *Nunan v. Southern Ry.*, [1923] 2 K. B. 703; *Russell v. Rudd*, [1923] A. C. 309; *Dewhurst v. Salford Grdns.*, [1925] Ch. 655.

1876. —[Parliament would legislate to little purpose if the objects of its case might supplement or undo the work of legislation by making a definition clause of their own. People cannot escape from the obligation of a statute by putting a private interpretation upon its language (LORD MACNAGHTEN).—*NETHERSEAL COLLIERY CO. v. BOURNE* (1889), 14 App. Cas. 228; 59 L. J. Q. B. 66; 61 L. T. 125; 54 J. P. 84, H. L.; *affg. S. C. sub nom. BOURNE v. NETHERSEAL COLLIERY CO.* (1888), 20 Q. B. D. 606, C. A.]

Annotations:—**Mentd.** *Brace v. Abercrom Colliery Co.*, *Huggins v. London & South Wales Colliery Co.*, [1891] 2 Q. B. 699; *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q. B. 700; *Humble v. Humphreys* (1901), 85 L. T. 563; *Coltress Iron Co. v. Dobbin*, [1920] A. C. 916.

1877. Estoppel—Inapplicable to statutes.—The doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract *inter partes*, & it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament (BACON, V.-C.).—*Re STAPLEFORD COLLIERY CO., BARROW'S CASE* (1880), 14 Ch. D. 432; 49 L. J. Ch. 498; 41 L. T. 755; 28 W. R. 270.

Annotations:—**Refd.** *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Weston v. Fairbridge*, [1923] 1 K. B. 667. **Mentd.** *Ledbrook v. Passman* (1888), 57 L. J. Ch. 855; *Re London Celluloid Co.* (1888), 39 Ch. D. 190; *Re Railway Time Tables Publishing Co.*, *Ex p. Sandys* (1889), 42 Ch. D. 98; *Wallis v. Hands* (1893), 68 L. T. 428; *R. v. S. E. Ry. Co.* (1910), 74 J. P. 137; *Gordon v. Holland* (1913), 82 L. J. P. C. 81.

SUB-SECT. 4.—OTHER CASES.

1878. Dispensation by court.—(1) A ct. of law has no power to grant a dispensation from obedience to an Act of Parliament & ought not to substitute, for an injunction to obey a statute, an undertaking by parties merely to do their best to obey.

(2) In an action by the A.-G. complaining of a breach of a public statute by a public body the ct. is not bound, on proof of the breach, to grant an injunction, but may allow defts. a reasonable time within which to comply with the statute.—*A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD*, [1912] A. C. 788; 82 L. J. Ch. 45; 107 L. T. 353; 76 J. P. 481; 11 L. G. R. 194, H. L.]

Annotations:—**Mentd.** *A.-G. v. Kerr & Ball* (1914), 79 J. P. 51; *Countess Warwick S.S. Co. v. Le Nickel Soc. Anon.*, *Anglo-Northern Trading Co. v. Emlyn, Jones & Williams* (1917), 87 L. J. K. B. 309; *Metropolitan Water Board v. Dick Kerr*, [1917] 2 K. B. 1; *Robinson v. R.*, [1921] 3 K. B. 183.

Part IX.—Repeal.

SECT. 1.—HOW ARISING.

SUB-SECT. 1.—IN GENERAL.

1879. Express language.—Act of Uniformity, 1558 (c. 2), s. 25, must be read together with the order made thereunder by the Advertisements of the Queen in 1566, & the law so understood acted upon & enforced from 1566 to 1662, excepting a brief interval, cannot be repealed without a distinct & repealing enactment or an enactment inconsistent & irreconcilable therewith.—*RIDS-DALE v. CLIFTON* (1877), 2 P. D. 276; 46 L. J. P. C. 27; 36 L. T. 865, P. C.; *varying S. C. sub nom. CLIFTON v. RIDSDALE* (1876), 1 P. D. 316.

Annotations:—**Refd.** *St. John the Baptist, Timberhill v. Sams*, [1895] P. 71; *Gore-Booth v. Manchester (Bp.)*, [1920] 2 K. B. 412. **Mentd.** *Combe v. Edwards* (1877), 2 P. D. 351; *Howard v. Bodington* (1877), 1 P. D. 203; *Hudson v. Tooth* (1877), 2 P. D. 125; *Hughes v. Edwards* (1877), 2 P. D. 361; *Serjeant v. Dale* (1879), 43 J. P. 220; *Re St. Lawrence, Pittington* (1880), 5 P. D. 131; *Combe v. De la Bere* (1881), 1 P. D. 157; *Heywood v.*

Manchester (Bp.) (1884), 12 Q. B. D. 401; *The Vora Cruz (No. 2)* (1884), 9 P. D. 96; *R. v. London (Bp.)* (1889), 23 Q. B. D. 414; *Allcroft v. London (Bp.) & St. Paul's, Lighton v. London (Bp.) & St. Paul's* (1891), 61 L. J. Q. B. 62; *Tooth v. Power*, [1891] A. C. 284; *Read v. Lincoln (Bp.)*, [1892] A. C. 644; *St. John Pendlebury v. St. John Pendlebury*, [1895] P. 178; *Barsham, Suffolk v. Barsham, Suffolk*, [1896] P. 256; *Great Bardfield v. All Having Interest*, [1897] P. 185; *Richmond & St. Matthias, Richmond v. All Persons Having Interest*, [1897] P. 70; *Re Robinson, Wright v. Tugwell*, [1897] 1 Ch. 85; *Re St. Mark's, Marylebone Road, St. Mark's v. St. Mark's*, [1898] P. 114; *Re St. Anselm, Pinner*, [1901] P. 202; *Davey v. Hinde*, [1903] P. 221; *Paignton v. All Having Interest*, [1905] P. 111; *Re Christ Church, Ealing*, [1906] P. 289; *Markham v. Shirebrook*, [1906] P. 239; *St. John the Evangelist, Clevedon v. All Having Interest*, [1909] P. 6; *St. Paul, Bow Common v. St. Paul, Bow Common*, [1909] P. 245; *St. Paul, Bow Common* (1912), 28 T. L. R. 584; *Fowke v. Berlington*, [1914] 2 Ch. 308; *Re St. Paul's, Carlisle*, [1919] P. 134; *Re Tenbury Parish Church* (1919), 36 T. L. R. 188; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733; *Vincent v. St. Magnus the Martyr, etc.*, [1925] P. 1; *Capel St. Mary, Suffolk v. Packard*, [1927] P. 289; *Re Article X of Articles of Agreement for Treaty between Great Britain & Ireland* (1928), 45 T. L. R. 57.

PART VIII. SECT. 7, SUB-SECT. 3.

1875 i. Waiver by party benefiting—Unless expressly forbidden by statute.—*DELAOUR v. MURPHY* (1848), 13 L. L. R. 195; 1 Ir. Jur. 46.—**IR.**

PART VIII. SECT. 7, SUB-SECT. 4.

k. Lapse of time.—*MIDLOTHIAN COUNTY COUNCIL v. PUMPHREYSTON OIL*

Co., Ltd., MIDLOTHIAN COUNTY COUNCIL v. OAKBANK OIL CO., LTD. (1904), 6 F. (Ct. of Sess.) 387.—**SCOT.**

l. Desuetude.—*M'ARA v. EDINBURGH MAGISTRATES*, [1913] S. C. 1059; 50 Sc. L. R. 829; [1913] 1 S. L. T. 110.—**SCOT.**

PART IX. SECT. 1, SUB-SECT. 1.

1879 i. Express language.—29 & 30

Vict. c. 51, s. 217, has not been repealed, though marked effete in the schedule prefixed to & not re-enacted in 36 Vict. c. 48 (O.).—**SCOTTISH AMERICAN INVESTMENT CO. v. ELORA VILLAGE CORPN.** (1881), 6 A. R. 628.—**CAN.**

m. Statutes inconsistent with rules.—*Re COLENUTT & NORTH COLCHESTER TOWNSHIP* (1889) 13 P. R. 253.—**CAN.**

1880. —.]—The provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act, either from the express language used being addressed to that particular point, or from implication or reference from the language used (NORTH, J.).—*Re WILLIAMS, JONES v. WILLIAMS* (1887), 36 Ch. D. 573; 57 L. J. Ch. 264; 57 L. T. 756; 36 W. R. 34.

1881. Effect of Statute Law Revision Act.]—A Statute Law Revision Act does not alter the law, but simply strikes out certain enactments which have become unnecessary (JOYCE, J.).—*ROBINS v. ROBINS*, [1907] 2 K. B. 13; 76 L. J. K. B. 649; 96 L. T. 787; 23 T. L. R. 428.

Annotation:—Mentd. Beatty v. Beatty, [1924] 1 K. B. 807.

Repeal of Implication.]—*See* Sub-sect. 2, *post*.

SUB-SECT. 2.—REPEAL BY IMPLICATION.

A. In General.

1882. Possibility of.]—*RIDSDALE v. CLIFTON*, No. 1879, *ante*.

1883. —.]—*Re WILLIAMS, JONES v. WILLIAMS*, No. 1880, *ante*.

1884. —.]—There is no doubt that a repeal by implication is just as effective as by express words (LORD COLERIDGE, C.J.).

The general rule is that when you have an Act of Parliament enacting particular provisions & in a subsequent Act there are provisions which are inconsistent with the provisions of the first Act both enactments cannot stand together. The enactment in the second Act stands & repeals the enactment in the first Act. Of course from the necessity of the case, it is an implied & not an express repeal (CAVE, J.).—*SUMMERS v. HOLBORN DISTRICT BOARD OF WORKS*, [1893] 1 Q. B. 612; 62 L. J. M. C. 81; 68 L. T. 226; 57 J. P. 326; 41 W. R. 445; 9 T. L. R. 274; 37 Sol. Jo. 270; 5 R. 284, D. C.

Annotations:—Refd. Wyatt v. Genis, [1893] 2 Q. B. 225; *Keep v. St. Mary's Newington Vestry*, *Austin v. St. Mary's Newington Vestry*, [1894] 2 Q. B. 521. *Mentd.* Baker v. Bradley (1910), 103 L. T. 253.

1885. Presumption against.]—THE INDIA, No. 2007, *post*.

1886. —.]—We ought always to be most careful on holding an Act of Parliament to be repealed by implication (KEATING, J.).—*CHORLTON v. TONGE OVERSEERS* (1871), L. R. 7 C. P. 178; 1 Hop. & Colt. 632; 41 L. J. C. P. 33; 26 L. T. 25; 20 W. R. 338.

Annotation:—Mentd. Hall v. Jones (1914), 84 L. J. K. B. 973.

B. Intention to Repeal.

1887. Necessity for.]—Whether a subsequent statute affirmative is a repeal of a former statute made concerning the same matter is a large field to walk in, & no way pertinent to this case, for all those statutes depend upon the penning; & the intent of the makers must be collected out of the words, how far they meant to repeal or confirm; & therefore leaving that consideration, I shall rather betake myself to that which is more pertinent to our purposes; which is, that statutes introductive of a new law penned in the affirmative, do always repeal former statutes concerning the same matter as implying a negative; & if this be a new estate in this office created by this Act of Parliament, as plainly it is, it being different

from that which was the former estate by the statute of Henry VIII., I take it this statute introducing a new law, being in the affirmative, does plainly imply a negative (EYRES, J.).—*HARCOURT v. FOX* (1693), as reported in 1 Show. 506; 89 E. R. 720; *on appeal*, *sub nom.* *FOX v. HARCOURT*, Show. Parl. Cas. 158, H. L.

Annotations:—Mentd. Saunders v. Owen (1698), 12 Mod. Rep. 199; *Harding v. Pollock* (1829), 11 Bing. 25; *Leconfield v. Thornely*, [1926] A. C. 10.

1888. —.]—*MIDDLETON v. CROFTS*, No. 10, *ante*.

1889. —.]—There are several cases . . . to show, that where the intention of the legislature was apparent, that the subsequent Act should not have such an operation, there, even though the words of such statute, taken strictly & grammatically, would repeal a former Act, the cts. of law, judging for the benefit of the subject, have held, that they ought not to receive such a construction (LORD KENYON, C.J.).—*WILLIAMS v. PRITCHARD* (1790), 4 Term Rep. 2; 100 E. R. 862.

Annotations:—Apld. R. v. Poor Law Comrs., *Re St. Pancras Parish* (1837), 6 Ad. & El. 1; R. v. Poor Law Comrs., *Re Whitechapel Union* (1837), 6 Ad. & El. 34; *Slon College v. London Corp.*, [1900] 1 Q. B. 581. *Mentd.* *Re Stewart v. Jones* (1852), 22 L. J. Q. B. 1; *Pontefract Assmt. Com. v. Hartley*, *Same v. Pontefract Park Trustees* (1897), 77 L. T. 565; *Slon College v. London Corp.*, [1901] 1 K. B. 617; *Netherlands Steamboat Co. v. City of London Corp.* (1904), 68 J. P. 377; *Stewart v. Thames Conservators*, [1908] 1 K. B. 893; *Associated Newspapers v. City of London Corp.*, [1914] 2 K. B. 603; *Associated Newspapers v. City of London Corp.*, [1916] 2 A. C. 429; *Pole-Carew v. Craddock*, [1920] 3 K. B. 109.

1890. —.]—THE MARY, No. 155, *ante*.

1891. —.]—R. v. POOR LAW COMRS., *Re St. PANCRAS PARISH*, No. 659, *ante*.

1892. —.]—The language of this sect. is as general as possible, making no exception of any kind as to parishes or places already under unions, or under the regulation of local Acts or otherwise, & it must therefore be so interpreted, unless it shall appear, from other parts of the Act, that its operation was meant to be qualified, or that, by giving the full meaning & effect to the words, it should be found to have the effect of repealing, or be inconsistent or interfere with, some prior Act of Parliament connected with the same subject, when, taking the whole of this Act & other Acts together, it was not so meant (LORD DENMAN, C.J.).—R. v. POOR LAW COMRS., *Re WHITECHAPEL UNION* (1837), 6 Ad. & El. 34; 2 Nev. & P. K. B. 8; Nev. & P. M. C. 303; Will. Woll. & Dav. 440; 6 L. J. M. C. 114; 1 J. P. 195; 1 Jur. 428; 112 E. R. 13.

Annotations:—Mentd. R. v. Poor Law Comrs., *Re Holborn Union* (1838), 6 Ad. & El. 56; R. v. St. James Parish, Westminster (1859), 33 L. T. O. S. 346.

1893. —.]—This ct. cannot, & will not, do by implication that which ought to be done by an express act of the legislature (DENMAN, C.J.).—R. v. LUMSDAINE (1839), 10 Ad. & El. 157; 1 Will. Woll. & H. 587; 18 L. J. M. C. 69; 3 J. P. 288; 3 Jur. 360; 113 E. R. 60.

Annotations:—Refd. North Manchester Overseers v. Winstanley, [1908] 1 K. B. 835. *Mentd.* R. v. Capel (1840), 12 Ad. & El. 382; *Medland & Brown v. Paine* (1858), 4 Jur. N. S. 1283.

1894. —.]—EAST LONDON RY. CO. v. THAMES CONSERVATORS, No. 703, *ante*.

C. Inconsistency between Statutes.

1895. Later statute repeals earlier.]—*MIDDLETON v. CROFTS*, No. 10, *ante*.

PART IX. SECT. 1, SUB-SECT. 2.—A.

*n. General rule.]—*Acts to repeal by implication earlier Acts, must be inconsistent, must deal with the same subject-matter & must be co-exten-

sive.—R. v. PARKER (1865), 2 W. W. & A. B. 1.—AUS.

1892 i. Possibility of.]—*Re MACDOUGALL'S ESTATE*, [1927] 3 D. L. R. 464; [1927] 1 W. W. R. 612; 21 Sask. L. R. 397.—CAN.

PART IX. SECT. 1, SUB-SECT. 2.—C.

1895 i. Later statute repeals earlier.]—*BENNETT v. MINISTER FOR PUBLIC WORKS* (1908), 7 C. L. R. 372.—AUS.

1895 ii. —.]—An affirmative statute

Sect. 1.—How arising : Sub-sect. 2, C.]

1896. —.—.]—Where two Acts of Parliament, which passed during the same session & were to come into operation the same day, are repugnant to each other, that which last received the Royal Assent must prevail, & be considered *pro tanto* a repeal of the other.—*R. v. MIDDLESEX JJ.* (1831), 2 B. & Ad. 818; 1 Dowl. 116; 1 L. J. M. C. 5; 109 E. R. 1347.

Annotation:—Apld. British Columbia Electric Ry. v. Stewart, Polnt Grey Corpn. v. Stewart (1913), 83 L. J. P. C. 53.

1897. —.—.]—I admit we should reconcile the two statutes if it be possible; but if both contain affirmative enactments which are inconsistent, they cannot exist together, & the later must *pro tanto* repeal the former (TINDAL, C.J.).

When we find the Legislature using inconsistent language in two Acts of Parliament, we are bound to give an interpretation which is consistent with the later statute (PARK, J.).—*PAGET v. FOLEY* (1836), 2 Bing. N. C. 679; 2 Hodg. 32; 3 Scott, 120; 5 L. J. C. P. 258; 132 E. R. 261.

Annotations:—Refd. Sims v. Thomas, Strachan v. Thomas (1840), 12 Ad. & El. 536; Du Vigier v. Lee (1843), 2 Hare, 326. *Mentd.* Doe d. Angell v. Angell (1846), 9 Q. B. 328; Hunter v. Nockolds (1849-50), 1 H. & Tw. 644; Balnes v. Lumley (1868), 16 W. R. 674; Howitt v. Harrington, [1893] 2 Ch. 497; Jones v. Withers (1896), 74 L. T. 572.

1898. —.—.]—*R. v. POOR LAW COMRS., Re WHITECHAPEL UNION*, No. 1892, *ante*.

1899. —.—.]—While we hold that a positive enactment is not to be repealed by inference, we must also act on the maxim *leges posteriores priores contrarias abrogant*, wherever it comes into operation (LORD DENMAN, C.J.).—*R. v. ST. EDMUND'S, SALISBURY (INHABITANTS)* (1841), 2 Q. B. 72; 1 Gal. & Dav. 137; 10 L. J. M. C. 138; 5 J. P. 483; 5 Jur. 1106; 114 E. R. 30.

Annotations:—Mentd. R. v. Suffolk JJ., R. v. Shropshire JJ., R. v. Lancashire JJ. (1841), 2 Q. B. 85; R. v. Hayward (1862), 31 L. J. M. C. 177.

1900. —.—.]—As the appeal given by the former statute is not taken away expressly, nor by necessary implication, it may still exist concurrently with that given by the latter, & in this case, the objection would not prevail (DENMAN, C.J.).—*R. v. HAINES* (1845), 2 New Sess. Cas. 121; 14 L. J. M. C. 167; 5 L. T. O. S. 410; 9 J. P. 788.

1901. —.—.]—We find here a subsequent statute with express provisions inconsistent with the previous one, 8 & 9 Vict. c. 21, incorporating County Rates Act, 1815 (c. 51), provides that the action shall be brought within three months, & must be taken to repeal Limitations of Action & Costs Act, 1842 (c. 97), (WILDE, C.J.).—*BODEN v. SMITH* (1849), 18 L. J. C. P. 121; 12 L. T. O. S. 377; 13 J. P. 153; 13 Jur. 428.

Annotations:—Consd. R. v. Smith (1873), L. R. 8 Q. B. 146. *Refd.* Jenkins v. G. C. Ry., [1912] 1 K. B. 1.

is a repeal of a precedent affirmative statute where its matter necessarily implies a negative, & the repugnancy such that the two Acts cannot be reconciled.—*Ex p. BYRNE* (1874), 15 N. B. R. (2 Pug) 125.—**CAN.**

1895 iii. —.—.]—*CANADIAN PACIFIC Ry. Co. v. EDMONDS* (1886), 1 B. C. R. pt. 2, 295.—**CAN.**

1895 iv. —.—.]—*MURPHY v. MCKINNON* (1889), 21 N. S. R. (9 R. & G.) 307.—**CAN.**

1895 v. —.—.]—Where two Acts are inconsistent or repugnant the later will be read as having impliedly repealed the former.—*UNITED STATES SAVING & LOAN Co. v. RUTLEDGE (Y. T.)* (1905), 2 W. L. R. 471.—**CAN.**

1895 vi. —.—.]—*MEIDRUM v. BLACK* (1916), 31 W. L. R. 314; 10 W. W. R. 519; 27 D. L. R. 193; 22 B. C. R.

571.—**CAN.**

1895 vii. —.—.]—Neither sect. 13 nor sect. 14 of Interpretation Act, R. S. A., 1922 (c. 1), applies to cases where the legislature has expressly stated that both an old & a new statute shall remain in force & that the only result of the new statute is that its provisions shall override those of the old Act where there is repugnancy.—*R. v. STANLEY (Alta.)*, [1925] 1 W. W. R. 33; 44 Can. Crim. Cas. 366.—**CAN.**

1895 viii. —.—.]—Statutes are not to be held to be repealed by implication, unless the repugnancy between the new provision & a former statute be plain & unavoidable.—*SITAPATHI NAYUDU v. R.* (1882), 1 L. R. 6 Mad. 32.—**IND.**

1895 ix. —.—.]—If there is a clear inconsistency between two statutes the

1902. —.—.]—*SHREWSBURY (EARL) v. SCOTT*, No. 50, *ante*.

1903. —.—.]—Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the Legislature co-exist, the earlier must necessarily be repealed by the later statute.—*DAW v. METROPOLITAN BOARD OF WORKS* (1862), 12 C. B. N. S. 161; 31 L. J. C. P. 223; 6 L. T. 353; 26 J. P. 807; 142 E. R. 1104; *sub nom.* *DOW v. METROPOLITAN BOARD OF WORKS*, 8 Jur. N. S. 1040.

1904. —.—.]—Although the clauses relating to the rates chargeable for gas in [an] earlier Act are not repealed in express terms, yet where they are inconsistent with the provision of a later Act, that is sufficient to effect a repeal (POLLOCK, C.B.).—*GREAT CENTRAL GAS CONSUMERS Co. v. CLARKE* (1862), 13 C. B. N. S. 838; 32 L. J. C. P. 41; 11 W. R. 123; 143 E. R. 331; *sub nom.* *CLARKE v. GREAT CENTRAL GAS CONSUMERS' Co.*, 1 New Rep. 127, Ex. Ch.

Annotation:—Refd. Thorpe v. Adams (1870), 40 L. J. M. C. 52.

1905. —.—.]—*THE INDIA*, No. 2007, *post*.

1906. —.—.]—One statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it; but then the inconsistency must be so great that they cannot both be to their full extent obeyed (GROVE, J.).—*HILL v. HALL* (1876), 1 Ex. D. 411; 45 L. J. M. C. 153; 35 L. T. 860; 41 J. P. 183.

Annotations:—Distd. *Ex p. London Corpn.* (1883), 25 Ch. D. 384. *Apld.* Flannagan v. Shaw, [1920] 3 K. B. 96. *Refd.* Gard v. Sewers Comrs. (1883), 49 L. T. 325.

1907. —.—.]—Where two statutes are inconsistent with each other, the latter operates as a repeal, or at least as an alteration of the earlier & must be taken to be the governing statute, unless an express statement is therein inserted that the governing statute, unless an express statement is therein inserted that the former Act shall not be interfered with (BRAMWELL, B.).—*BURY v. CHERRYHOLM* (1876), 1 Ex. D. 457; 35 L. T. 403; 41 J. P. 21.

1908. —.—.]—When there is no repeal by affirmative words, in a subsequent Act, of the provisions of previous Acts, the subsequent Act does not operate to repeal those provisions unless it is inconsistent with them (GROVE, J.).—*PARSONS v. TINLING* (1877), 2 C. P. D. 119; 46 L. J. Q. B. 230; 35 L. T. 851; 41 J. P. 311; 25 W. R. 255.

Annotations:—Refd. Bowey v. Bell (1877), 36 L. T. 550; Bowey v. Bell, Brooks v. Israel, North v. Bilton, Siddons v. Lawrence (1878), 4 Q. B. D. 95; Garnett v. Bradley (1878), 3 App. Cas. 914; Clark v. Wallond (1883), 52 L. J. Q. B. 321. *Mentd.* Green v. Wright (1877), 2 C. P. D. 354; Devonshire v. Hematite Steel Co. (1877), 36 L. T. 355; Myers v. Defries (1880), 49 L. J. Q. B. 266; *Re Woods Estate, Ex p. Works & Buildings Comrs.* (1886), 31 Ch. D. 607.

former must be regarded as having been repealed by implication.—*R. v. TOMMY* (1889), 5 H. C. 382.—**S. AF.**

1895 x. —.—.]—The test whether there has been a repeal by implication is "are the provisions of the later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together? If so, *leges posteriores priores contrarias abrogant*."—*MOWBRAY MUNICIPALITY v. VERSFELD*, [1910] C. P. D. 217.—**S. AF.**

1895 xi. —.—.]—If the provisions of a later Act are so directly in conflict with those of an earlier one that the two cannot exist, together, then such latter portions, to the extent of the repugnance, must be deemed to have been impliedly repealed.—*CHOTABHAI v. UNION GOVERNMENT*, [1911] App. D. 13.—**S. AF.**

1909. —.]—It is a canon of construction that no statute is to be construed so as to repeal another statute, unless such construction is absolutely necessary, because the two cannot stand together (DENMAN, J.).—*TENTERDEN GUARDIANS v. ST. MARY ISLINGTON GUARDIANS* (1878), 47 L. J. M. C. 81; 38 L. T. 485; 42 J. P. 247.

Annotation :—*Refd.* *R. v. Portsea Grdns.* (1881), 7 Q. B. D. 384.

1910. —.]—It does not repeal it by implication, because the two may be read together, & some application may be made of the words in the later Act consistently with the existence of the words in the earlier Act (BRETT, L.J.).—*A.-G. v. MOORE* (1878), 3 Ex. D. 276; 38 L. T. 251; 26 W. R. 366, C. A.

Annotations :—*Refd.* *R. v. Titterton*, [1895] 2 Q. B. 61; *Nichol v. Fearby*, *Nichol v. Robinson*, [1923] 1 K. B. 480. *Mentd.* *Hulgh v. West* (1893), 62 L. J. Q. B. 532.

1911. —.]—It is a well settled doctrine that an express provision is an Act of Parliament like this [Dispatch of Business, Court of Chancery, Act 1856 (c. 134)] is not repealed by general words in a subsequent statute which does not refer to it unless the two statutes are necessarily inconsistent with one another (KAY, J.).—*Ex p. LONDON CORPN.* (1883), 25 Ch. D. 384; 53 L. J. Ch. 6; 49 L. T. 437; 32 W. R. 87.

1912. —.]—When the second Act was passed reciting the first & saying that it was not repealing it, if it enacted a rule that was contrary to it it had really the effect of repealing it, & it was the same thing as if it had been repealed (LORD BLACKBURN).—*DOBBS v. GRAND JUNCTION WATERWORKS CO.* (1883), 9 App. Cas. 49; 53 L. J. Q. B. 50; 49 L. T. 541; 48 J. P. 5; 32 W. R. 433, II. L.

Annotations :—*Mentd.* *Smith v. Birmingham Corpn.* (1883), 11 Q. B. D. 195; *Bristol Waterworks Co. v. Uren*, *Uren v. Bristol Waterworks Co.* (1885), 15 Q. B. D. 637; *Hayward v. East London Waterworks Co.* (1885), 49 J. P. 452; *Henderson v. Folkestone Waterworks Co.* (1885), 1 T. L. R. 329; *West Middlesex Waterworks Co. v. Coleman*, *Coleman v. West Middlesex Waterworks Co.* (1885), 11 Q. B. D. 529; *Stevens v. Bishop* (1887), 19 Q. B. D. 442; *Smith v. Birmingham Overseers* (1888), 22 Q. B. D. 211; *Stevens v. Barnet Gas & Water Co.* (1888), 57 L. J. M. C. 82; *Rose v. Watson*, [1894] 2 Q. B. 90; *South Staffordshire Waterworks Co. v. Barrow* (1897), 61 J. P. 661; *Walker v. Brisley*, *Grinter v. Fleming* (1900), 69 L. J. Q. B. 875; *Northampton Corpn. v. Ellen* (1904), 90 L. T. 71; *Metropolitan Water Board v. Streotton* (1910), 102 L. T. 220; *Woking Gas & Water Co. v. Parker* (1915), 80 J. P. 188.

1913. —.]—When the repeal is not express the burden is on those who assert that there is an implied repeal to show that the two statutes cannot stand consistently, the one with the other (CHITTY, J.).—*LYBBE v. HARR* (1883), 29 Ch. D. 8; 52 L. T. 634; *affd.* (1885), 29 Ch. D. p. 17; 54 L. J. Ch. 860; 1 T. L. R. 235, C. A.

Annotations :—*Mentd.* *Clegg v. Hands* (1890), 44 Ch. D. 503; *Chapman v. Smith*, [1907] 2 Ch. 97.

1914. —.]—Where the provisions in two Acts of Parliament are clearly inconsistent, then there is of necessity an implied repeal of the inconsistent provisions of the earlier Act (FIELD, J.).—*R. v. INLAND REVENUE COMRS.* (1888), 21 Q. B. D. 569; 52 J. P. 390; 36 W. R. 696; *sub nom.* *R. v. INLAND REVENUE COMRS., Re EMPIRE THEATRE*, 57 L. J. M. C. 92; 59 L. T. 378; 4 T. L. R. 519, D. C.

1915. —.]—*KUTNER v. PHILLIPS*, No. 1950, *post*.

1916. —.]—The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent with or repugnant to the provisions of an earlier Act that the two cannot stand together (A. L. SMITH, J.).—*WEST HAM (CHURCH-WARDENS, ETC.) v. FOURTH CITY MUTUAL BUILDING SOCIETY*, [1892] 1 Q. B. 654; 61 L. J. M. C. 128;

66 L. T. 350; 56 J. P. 438; 40 W. R. 446; 8 T. L. R. 302, D. C.

Annotations :—*Refd.* *White & Hales v. Islington Corpn.*, [1909] 1 K. B. 133; *R. v. Roberts*, [1914] 1 K. B. 369. *Mentd.* *Fourth City Mutual Bldg. Soc. v. East Ham*, [1892] 1 Q. B. 661; *Davis v. Wallis*, [1908] 2 K. B. 134; *Crow v. Hilleary*, [1913] 1 K. B. 385.

1917. —.]—*SUMMERS v. HOLBORN DISTRICT BOARD OF WORKS*, No. 1884, *ante*.

1918. —.]—The Act of 1812 [Copyright Act, 1812 (c. 45)] did two things. It established a new copyright law, & it wiped out all the old statutes relating to copyright. For the sake of clearness will use the phrase "it had an enacting part, & it had a repealing part." The enacting part must have full force given to it whatever be the pre-existing statutes. If its provisions are contrary to those of the Act of Anne, those provisions, being in a later Act, override & *pro tanto* extinguish the provisions of the earlier statutes (FLETCHER-MOULTON, L.J.).—*MACMILLAN & CO. v. DENT*, [1907] 1 Ch. 107; 76 L. J. Ch. 136; 95 L. T. 730; 23 T. L. R. 45, C. A.

1919. —.]—Where two statutes passed in the same year appear to be repugnant, that which was passed latest must prevail.—*BRITISH COLUMBIA ELECTRIC RY. CO., LTD. v. STEWART*, [1913] A. C. 816; 83 L. J. P. C. 53; 109 L. T. 771, P. C.

1920. —.]—Supposing that that Act [special Act] had run to grant an annuity free of income tax, the A.-G. admits that it would have directly contradicted the Act of 1842, [Income Tax Act, 1842 (c. 35)] & that according to the ordinary principles of construction the later Act would prevail. I take those principles to be as stated in the last edition of *Maxwell on Statutes*, which says, at p. 253, "The law will not allow the revocation or alteration of a statute by construction if the words may have their proper operation without it; but it is impossible to reconcile contradictions, & if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later (SCRUTTON, J.).—*ARGYLL (DUKE) v. INLAND REVENUE COMRS.* (1913), 109 L. T. 893; 7 Tax Cas. 225.

Annotation :—*Mentd.* *Polo-Carew v. Craddock*, [1920] 3 K. B. 109.

1921. —.]—There cannot be a repeal by implication unless the two statutes are obviously inconsistent (SHEARMAN, J.).—*FOX v. PETT*, [1918] 2 K. B. 196; 87 L. J. K. B. 929; 119 L. T. 187; 82 J. P. 252; 16 L. G. R. 674, D. C.

1922. —.]—The earlier enactment not being inconsistent with the later was not repealed or suspended thereby.—*FLANNAGAN v. SHAW*, [1920] 3 K. B. 96; 89 L. J. K. B. 168; 122 L. T. 177; 84 J. P. 45; 36 T. L. R. 34; 61 Sol. Jo. 51; 18 L. G. R. 29, C. A.

Annotations :—*Appld.* *The Danube II*, [1921] P. 183; *Wallwork v. Fielding*, [1922] 2 K. B. 66. *Refd.* *Hunt v. Bliss* (1919), 89 L. J. K. B. 174. *Mentd.* *Davies v. Bristow*, *Penrhos College v. Butler*, [1920] 3 K. B. 428; *Barton v. Flucham*, [1921] 2 K. B. 291; *Northcott v. Roche* (1921), 37 T. L. R. 364.

1923. —.]—In order that a subsequent statute not expressly repealing a previous Act or the provisions of a previous statute may operate by implication as a repeal it must be found that the provisions of the subsequent statute are so inconsistent with those of the previous one that the two cannot stand together (WARRINGTON, L.J.).—*WALLWORK v. FIELDING*, [1922] 2 K. B. 66; 91 L. J. K. B. 568; 127 L. T. 131; 86 J. P. 133; 38 T. L. R. 441; 66 Sol. Jo. 366; 20 L. G. R. 618, C. A.

Inconsistency between general & special statutes.—*See* Sub-sect. 2, F. (b) iv., *post*.

Application of rule.—*See* TITLES *passim*.

Sect. 1.—How arising: Sub-sect. 2, P. (b) i. & ii.]

1942. ———.]—A later statute in the affirmative shall not take away a former Act; & *eo potius* if the former be particular & the later general.—GREGORY'S CASE (1596), 6 Co. Rep. 19 b; 77 E. R. 282; *sub nom.* GREGORY v. BLASHFIELD, Moore, K. B. 599.

*Annotations:—*Consd. Kutner v. Phillips, [1891] 2 Q. B. 267. *Refd.* Foster's Case (1615), 11 Co. Rep. 56b. *Mentd.* Barnabee v. Goodale (1600), Cro. Eliz. 737; Gold v. Death (1615), Cro. Jac. 381; Farrington v. Keymer (1628), Cro. Car. 112; Green v. Guy (1628), Cro. Car. 146; R. v. Gluff (1696), 12 Mod. Rep. 104; Saville v. Saville (1719), 11 Mod. Rep. 327; Garland v. Barton (1737), Andr. 27; Farren v. Williams (1776), 1 Cowp. 369.

1943. ———.]—Whenever the legislature has, by a Special Act, conferred powers upon a corpⁿ or body of comrs., for an object of public benefit, those powers are not affected by a subsequent statute giving to other persons, for another public purpose, inconsistent powers, in terms which, from their generality, would seem to overrule the powers given by the former Act.—LONDON & BLACKWALL RY. CO. v. LIMEHOUSE DISTRICT BOARD OF WORKS (1856), 3 K. & J. 123; 26 L. J. Ch. 164; 28 L. T. O. S. 140; 20 J. P. 789; 5 W. R. 64; 69 E. R. 1048.

*Annotations:—*Apld. Daw v. Metropolitan Board of Works (1862), 12 C. B. N. S. 161; L. & S. W. Ry. v. Myers (1881), 45 J. P. 731. *Consd.* C. & S. L. Ry. v. L. C. C., [1891] 2 Q. B. 513. *Apld.* Ashton-under-Lyne Corpⁿ. v. Pugh, [1898] 1 Q. B. 45. *Consd.* L. & N. W. Ry. v. Runcorn R. C., [1898] 1 Ch. 34. *Distd.* Uckfield R. C. v. Crowborough District Water Co., [1899] 2 Q. B. 664. *Refd.* Hornsey District Council v. Smith, [1897] 1 Ch. 843; Grand Junction Waterworks Co. v. Hampton U. C. (1898), 67 L. J. Q. B. 903; L. C. C. v. Wandsworth & Putney Gas Co. (1900), 82 L. T. 562.

1944. ———.]—R. v. CHAMPNEYS, No. 1961, *post*.

1945. ———.]—Where there is a statute giving powers to a particular body you shall construe a subsequent statute as not embracing under general provisions that which would detract & take away from the special powers given before. As when you have a particular statute applicable to merchants or a particular class & then a general law which would embrace those persons, taken as part of the public generally, there being a specific law as to those particular persons answering a certain description, you will not apply subsequent legislation to them, unless from the nature of the subsequent legislation they fairly come within the scope of the object & purpose of the Act of Parliament (HALL, V.-C.).—LUCKRAFT v. PRIDHAM (1877), 6 Ch. D. 205; 46 L. J. Ch. 744; 36 L. T. 501; 42 J. P. 86; 25 W. R. 747; *on appeal*, 6 Ch. D. at p. 213, C. A.

*Annotations:—*Consd. *Re* Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G., [1916] 1 Ch. 100. *Mentd.* Webster v. Southey (1887), 36 Ch. D. 9.

1946. ———.]—There is a well-known rule which says that, though a subsequent law abrogates a prior inconsistent law, that is not so where the prior law is not one of general application (LL, J.A.).—*Re* TURNER, *Ex p.* ATTWATER (1876), 5 Ch. D. 27; 46 L. J. Bcy. 41; 35 L. T. 682; 25 W. R. 206, C. A.

*Annotation:—*Refd. *Re* Cross, *Ex p.* Payne (1879), 11 Ch. D. 539.

1947. ———.]—Every Act of Parliament although it may be a general public Act must be taken *sat mod*, as not cutting down existing rights which have been established before it passed, unless those existing rights have been expressly mentioned in the statute in question (POLLOCK, B.).—LONDON & SOUTH WESTERN RY. CO. v. MYERS (1881), 45 J. P. 731, D. C.

later law does not abrogate an earlier special one by mere implication.—

R. v. TOMMY (1889), 5 H. C. 382.—S. AF.

1948. ———.]—ESDAILE v. PAYNE, No. 1970, *post*.

1949. ———.]—*Re* SMITH'S ESTATE, CLEMENTS v. WARD, No. 1963, *post*.

1950. ———.]—Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together. . . . Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied & special acts are not repealed by general Acts unless there is some express reference to the preceding legislation or unless there is a necessary inconsistency in the two Acts standing together (A. L. SMITH, J.).—KUTNER v. PHILLIPS, [1891] 2 Q. B. 267; 60 L. J. Q. B. 505; 61 L. T. 628; 56 J. P. 54; 39 W. R. 526; 7 T. L. R. 441, D. C.

*Annotations:—*Consd. Felton v. Bower, [1900] 1 Q. B. 598. *Apld.* Flannagan v. Shaw, [1920] 3 K. B. 96; The Danube II., [1921] P. 183; Wallwork v. Fielding, [1922] 2 K. B. 66. *Refd.* R. v. Hunton, *Ex p.* Glamorganshire County Council (1904), 2 L. G. R. 917.

1951. ———.]—It would, I think be contrary to all the recognised principles of interpretation to treat the special provisions of the earlier Act as repealed by the general provisions of the later Act incorporated with it. It is to be observed that it is not merely that the two Acts are to be read as one; but the earlier Act, the Act of 1868, is to be read as if it incorporated the later Act of 1888. It would be doing violence to the rules of construction to hold that the provisions of an Act which specially provides for the trial of Admty. causes by a judge, or by a judge assisted by assessors, are to be overruled, & in many cases, rendered nugatory, by a general enactment, contained in the same Act, providing for the trial of "actions" by a judge & jury (BRUCE, J.).—THE TYNWALD, [1895] P. 142; 64 L. J. P. 1; 43 W. R. 509; 11 T. L. R. 91; *sub nom.* KELLY & HARDY v. ISLE OF MAN STEAM PACKET CO., LTD., THE TYNWALD, 71 L. T. 731; 7 Asp. M. L. C. 539; 11 R. 690, D. C.

*Annotation:—*Mentd. The Theodora, [1897] P. 279.

1952. ———.]—According to the maxim *Generalia specialibus non derogant*, the presumption is that where special statutory provision has been made for a specified class of cases, a subsequent general enactment is not intended to interfere with such provision.—BARKER v. EDGER, [1898] A. C. 748; 67 L. J. P. C. 115; 70 L. T. 151, P. C.

*Annotations:—*Consd. Blackpool Corpⁿ. v. Starr Estate Co., [1922] 1 A. C. 27. *Refd.* A.-G. v. Exeter Corpⁿ. (1911), 80 L. J. K. B. 636; Luxardo v. Public Trustee (1924), 93 L. J. Ch. 425.

1953. ———.]—The Public Health Act is a general Act, & mere general provisions therein contained, according to the well-known rule, must not be taken as repealing the special provisions of a local Act (RIGBY, L.J.).—ASHTON-UNDER-LYNE CORPN. v. PUGH, [1898] 1 Q. B. 45; 67 L. J. Q. B. 32; 77 L. T. 583; 61 J. P. 788; 46 W. R. 100, C. A.

*Annotations:—*Apld. Lodge v. Huddersfield Corpⁿ, [1898] 1 Q. B. 847. *Mentd.* Crump v. Chorley Corpⁿ. (1908), 98 L. T. 805.

1954. ———.]—Private Acts conferring special rights & imposing special obligations for special purposes are not overruled by general legislation, the application of which might interfere with the rights granted & the obligations imposed by the private Acts.—ESQUIMALT WATERWORKS CO. v. VICTORIA CITY CORPN., [1907] A. C.

1941 xiii. . . . PANDOO v. R. (1917), 38 N. L. R. 331.—S. AF.

499; 76 L. J. P. C. 75; 97 L. T. 492; 23 T. L. R. 762, P. C.

1955. ———.]—In this case the later Act has a general provision applicable to all sorts of people of a two years' limitation & there was a previous act with a special provision applicable to public authorities only of six months' limitation. I see no reason why the two should not stand together & I see no plain words in the second Act showing that Parliament intended to repeal the first Act (SCRUTTON, L.J.).—THE DANUBE II., [1921] P. 183; 90 L. J. P. 314; 125 L. T. 156; 37 T. L. R. 421; 65 Sol. Jo. 396; 15 Asp. M. L. C. 187, C. A.

Annotation:—**Mentd.** The Wilhelmina, [1923] P. 112.

1956. ———.]—It is a sound principal of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law expressed in general terms & by the apparent generality of its language applicable to & covering a number of cases of which the particular law is but one (*per* CUR.).—NICOLLE v. NICOLLE, [1922] 1 A. C. 284; 126 L. T. 777; 38 T. L. R. 346, P. C.

1957. ———.]—Where effective construction avoids necessity for repeal.]—The law will not allow the exposition to revoke or alter, by construction of general words, any particular statute, where the words may have their proper operation without it (BRIDGMAN, J.).—LYN v. WYN (1662), as reported in O. Bridg. 122; 124 E. R. 502.

Annotations:—**Appld.** Thames Conservators v. Hall (1868), L. R. 3 C. P. 415. **Consd.** Garnett v. Bradley (1878), 26 W. R. 698. **Refd.** Thorpe v. Adams (1871), L. R. 6 C. P. 125; Dodds v. Shepherd (1876), 1 Ex. D. 75; *Re* Smith's Estate, Clements v. Ward (1887), 35 Ch. D. 589. **Mentd.** Doe d. Gill v. Pearson (1805), 2 Smith, K. B. 295; Vivian v. Blomberg (1836), 3 Bing. N. C. 311; Irving v. Cuthbertson (1860), 6 Jur. N. S. 1211.

1958. ———.]—A general enactment in a later statute does not repeal a particular enactment in an earlier statute, unless the intention to do so is manifest, or the implication irresistible.—THAMES CONSERVATORS v. HALL (1868), L. R. 3 C. P. 415; 37 L. J. C. P. 163; 18 L. T. 361; 16 W. R. 971; 3 Mar. L. C. 73.

Annotations:—**Consd.** Dodds v. Shepherd (1876), 1 Ex. D. 75. **Distd.** Parsons v. Tinning (1877), 2 C. P. D. 119. **Consd.** *Re* Williams, Jones v. Williams (1887), 36 Ch. D. 573. **Refd.** Garnett v. Bradley (1877), 46 L. J. Q. B. 545, R. v. Briggs (1883), 47 J. P. 615.

1959. ———.]—If anything be certain it is this that where there are general words in a later Act capable of reasonable & sensible application without extending them to subjects specially dealt with by earlier legislation you are not to hold that earlier & special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so (LORD SELBORNE, C.).—SEWARD v. VERA CRUZ, THE VERA CRUZ (1884), 10 App. Cas. 59; 54 L. J. P. 9; 52 L. T. 474; 49 J. P. 324; 33 W. R. 477; 15 Asp. M. L. C. 386, H. L.

Annotations:—**Consd.** Whitechapel Board of Works v. Crow (1901), 84 L. T. 595; Cavendish v. Strutt, [1904] 1 Ch. 524; Headland v. Coster, [1905] 1 K. B. 219; British Corpn. v. Canning (1906), 95 L. T. 183. **Appld.** British Assocn. of Glass Bottle Manufacturers v. Nettlefold (1911), 27 T. L. R. 527; Flannagan v. Shaw, [1920] 3 K. B. 96. **Consd.** Nicolle v. Nicolle, [1922] 1 A. C. 284; Parry v. Harding, [1925] 1 K. B. 111. **Refd.** The Tynwald, [1895] P. 142; Adam v. British & Foreign S.S. Co., [1898] 2 Q. B. 430; L. G. Board v. South Stoneham Union (1908), 7 L. G. R. 167; Date v. Gas Coal

Collieries, [1915] 2 K. B. 454; Starr Estate Co. v. Blackpool Corpn. (1920), 19 L. G. R. 9; Harper v. Hedges, [1923] 2 K. B. 314. **Mentd.** The Englishman & The Australia, [1894] P. 239; The Theta, [1894] P. 280; Davidsson v. Hill, [1901] 2 K. B. 606; The Swift, [1901] P. 168; Williams v. Mersey Docks & Harbour Board, [1905] 1 K. B. 804; The Circe, [1906] P. 1; Clark v. London General Omnibus Co., [1906] 2 K. B. 648; Jackson v. Watson, [1909] 2 K. B. 193; British Columbia Electric Ry. v. Gentile, [1914] A. C. 1034; Hobson v. Long, [1914] 3 K. B. 1245; Admiralty Comrs. v. S.S. America, [1917] A. C. 38; McColl v. Canadian Pacific Ry., [1923] A. C. 126; Nunan v. Southern Ry., [1924] 1 K. B. 223; The Mollere, [1925] P. 27; Venn v. Tedesco, [1926] 2 K. B. 227.

Express reference to special statute.]—See Subsect. 2, F. (b) ii, *post*.

Intention to repeal clearly indicated.]—See Subsect. 2, F. (b) iii, *post*.

Repeal implied.]—See Subsect. 2, *ante*.

Inconsistency between statutes.]—See Subsect. 2, F. (b) iv., *post*.

ii. Express Reference to Special Statute.

1960. General rule.]—The rule of construction, that a general Act of Parliament does not repeal or affect a prior special Act of Parliament without express words of reference applies to the Church Building Acts.—FITZGERALD v. CHAMPNEYS (1861), 2 John. & H. 31 30 L. J. Ch. 777; 5 L. T. 233 7 Jur. N. S. 1006, 9 W. R. 850; 70 E. R. 958.

Annotations:—**Appld.** Thorpe v. Adams (1871), L. R. 6 C. P. 125. **Consd.** *Re* Smith's Estate, Clements v. Ward (1887), 35 Ch. D. 589. **Refd.** Garnett v. Bradley (1878), 3 App. Cas. 944; Baird v. Tunbridge Wells Corpn., [1894] 2 Q. B. 867; Hornsey District Council v. Smith, [1897] 1 Ch. 843; L. G. Board v. South Stoneham Union (1908), 7 L. G. R. 167; Jenkins v. G. C. Ry., [1912] 1 K. B. 1. **Mentd.** Tuckness v. Alexander (1863), 2 Drew. & Sm. 614; Stewart v. West Derby Burial Board (1886), 34 Ch. D. 314.

1961. ———.]—It is a general rule of construction that statutes be not construed to repeal previous particular enactments, unless it is so expressly provided, or follows by necessary implication (BOVILL, C.J.).—R. v. CHAMPNEYS (1871), L. R. 6 C. P. 384; 40 L. J. C. P. 95; 24 L. T. 181; 19 W. R. 386.

1962. ———.]—The general principle to be applied to the construction of Acts of Parliament is, that a general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject or unless the two Acts are necessarily inconsistent.—THORPE v. ADAMS (1871), L. R. 6 C. P. 125; 40 L. J. M. C. 52; 23 L. T. 810; 35 J. P. 199; 19 W. R. 352.

Annotations:—**Appld.** Ashton-under-Lyne Corpn. v. Pugh [1898] 1 Q. B. 45; R. v. Hutton, *Ex p.* Glamorganshire County Council (1904), 2 L. G. R. 917. **Refd.** R. v. Champneys (1871), L. R. 6 C. P. 384; Anthony v. Brecon Markets Co. (1872), 26 L. T. 979, *Ex p.* London (1883), 25 Ch. D. 384; Gard v. London City Sewers Comrs. (1885), 28 Ch. D. 486; Kutner v. Phillips, [1891] 2 Q. B. 267; Baird v. Tunbridge Wells Corpn., [1894] 2 Q. B. 867; Hornsey District Council v. Smith, [1897] 1 Ch. 843; Flannagan v. Shaw (1919), 84 J. P. 45. **Mentd.** Jonas v. St. Dunstan Overseers (1908), 98 L. T. 691.

1963. ———.]—Where an Act of Parliament dealing in a special way with a particular subject matter is followed by a general Act dealing in a general way with the subject of the previous legislation, general words in the general Act are not to be held as repealing the prior special legislation, unless the general Act contains some reference to the special legislation, or unless the general Act cannot be given effect to without

PART IX. SECT. 1, SUB-SECT. 2.

—F. (b) ii.

1960 i. General rule.]—The mere recital in a subsequent statute of an intention to repeal a former specific statute will not operate to repeal the former statute. In order to accomplish

such a repeal there must be a clause to that effect in the later statute.—MAHONY v. WRIGHT (1859), 10 L. C. L. R. 420.—IR.

p. Intention of legislature considered.]—Though in a consolidation or compilation Act no other effect should gene-

rally be given to a new amendment than to alter the sects. to which it generally refers, such a rule ought not to be used to defeat the intention of the legislature.—WAKANUI ROAD DISTRICT (INHABITANTS) v. HAMPSTEAD TOWN BOARD (1907), 27 N. Z. L. R. 469.—N.Z.

Sect. 1.—How arising: Sub-sect. 2, F. (b) ii., iii. & iv., G. (a) & (b).]

such a repeal.—*Re SMITH'S ESTATE, CLEMENTS v. WARD* (1887), 35 Ch. D. 589; 56 L. J. Ch. 726; 56 L. T. 850; 51 J. P. 692; 35 W. R. 514; 3 T. L. R. 567.

Annotations:—Distd. Re Drummond & Davie's Contract, [1891] 1 Ch. 524; *Re Douglas, Douglas v. Simpson*, [1905] 1 Ch. 279.

1964. —.]—*KUTNER v. PHILLIPS*, No. 1950, *ante*.

1965. —.]—It is familiar law that special Acts are not repealed by general Acts unless there is some express reference to the previous legislation upon the subject, or unless there is a necessary inconsistency in the two Acts standing together (*A. L. SMITH, L.J.*).—*HORNSEY DISTRICT COUNCIL v. SMITH*, [1897] 1 Ch. 843; 60 L. J. Ch. 476; 76 L. T. 431; 45 W. R. 581; 13 T. L. R. 322; 41 Sol. Jo. 423, C. A.

Annotations:—Mentd. L. C. C. v. Wandsworth B. C., [1903] 1 K. B. 797; *Hackney Corp'n. v. Lee Conservancy Board*, [1904] 2 K. B. 541; *Hampstead Corp'n. v. Mid. Ry.* (1905), 92 L. T. 252.

iii. Intention to Repeal Clearly Indicated.

1966. General rule.]—The general rule is that an express enactment shall not be overruled by a general enactment without words showing an intention to repeal or override it (*LORD CAMPBELL, C.J.*).—*R. v. LILLS* (1852), as reported in 19 L. T. O. S. 201; *sub nom. R. v. SILL*, 16 J. P. 407.

Annotation:—Mentd. R. v. Brixton Prison, Ex p. Stallmann, [1912] 3 K. B. 424.

1967. —.]—*THAMES CONSERVATORS v. HALL*, No. 1958, *ante*.

1968. —.]—(1) The Act of 1875 [Jud. Act, 1875 (c. 77)] provided . . . that the orders contained in the Schedule should be considered part of the Act . . . & it did make them part of the Act, & the Orders contained in that Schedule are so much part of the Act, & of the rule of the Legislature in the passing of the Act, as any section in the Act itself (*LORD BLACKBURN*).

(2) Where there has been a particular rule established either by custom or by statute, where there is some particular law standing, & a subsequent enactment has general words which would repeal that particular law or particular custom, if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together; the first, the particular law, standing as an exceptional proviso upon the general law (*LORD BLACKBURN*).—*GARNETT v. BRADLEY* (1878), 3 App. Cas. 944; 48 L. J. Q. B. 186; 39 L. T. 261; 43 J. P. 20; 26 W. R. 698, H. L.

Annotations:—As to (2) Consd. Clarke v. Roche (1877), 36 L. T. 727. *Apld. Monmouth Corp'n. & Monmouth Overseers, etc.* (1878), 38 L. T. 612. *Consd. Stokes v. Stokes* (1887), 19 Q. B. D. 419. *Reid. The Ganges* (1880), 5 P. D. 247; *Pellias v. Neptune Marine Insce.* (1880), 28 W. R. 405; *Snelling v. Pulling* (1885), 52 L. T. 335; *Re Williams, Jones v. Williams* (1887), 36 Ch. D. 578; *Re Jones* (1889), 59 L. J. Ch. 157; *Rockett v. Clippingdale*, [1891] 2 Q. B. 293; *R. v. Speyer*, [1916] 2 K. B. 858. *Generally, Mentd. Bowey v. Bell, Brooks v. Israel, North v. Bilton, Siddons v. Lawrence* (1878), 4 Q. B. D. 95; *King v. Hawksworth* (1879), 48 L. J. Q. B. 484; *Ex p. Mercers' Co.* (1879), 10 Ch. D. 481; *Barton v. Titmarsh* (1880), 49 L. J. Q. B. 573; *Marsden v. L. & Y. Ry.* (1880), 42 L. T. 630; *Myers v. Dofries* (1880), 5 Ex. D. 180; *Tenant v. Ellis* (1880), 11 Q. B. D. 46; *Re Morris, Ex p. Streeter* (1881), 19 Ch. D. 216; *Turner v. Bridgett & Wright* (1882), 51 L. J. Q. B. 377; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Re Knight's Will* (1884), 26 Ch. D. 82; *Hasker v. Wood* (1885), 54 L. J. Q. B. 419; *Parnell v. Mort, Liddell* (1885), 33 W. R. 481; *Re Mills' Estate, Ex p. Works & Public Buildings Comrs.*

(1886), 34 Ch. D. 24; *Goldhill v. Clarke* (1892), 68 L. T. 414; *Re Fisher* (1894), 63 L. J. Ch. 235; *R. v. London C. C. J.J.*, [1894] 1 Q. B. 453; *The Dragoman* (1895), 11 T. L. R. 428; *R. v. London J.J.*, [1895] 1 Q. B. 616; *Sion College v. London Corp'n.*, [1900] 2 Q. B. 581; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Reid, Hewitt v. Joseph*, [1918] A. C. 717; *Campbell v. Pollak*, [1927] A. C. 732.

1969. —.]—*SEWARD v. VERA CRUZ, THE VERA CRUZ*, No. 1959, *ante*.

1970. —.]—One objection raised to the operation of the Act upon this case is, that it is a general Act, & that, as a rule, general Acts do not amount to a repeal of special Acts. That is a proposition which is, I think, of general application, though it is, of course, subject to a variety of considerations. You have to ascertain whether, upon a fair consideration of the two statutes taken together, it might not be inferred, & properly inferred, that the intention was that the later Act should repeal or modify the former one. The *prima facie* view is, that the general Act does not repeal the special Act unless there is something in the general Act which would lead to the fair inference that such would be the proper view to be taken of it (*BAGGALLAY, L.J.*).—*ESDAILE v. PAYNE* (1885), 52 L. T. 530; 33 W. R. 864, C. A.; *on appeal, sub nom. PAYNE v. ESDAILE* (1888), 13 App. Cas. 613, H. L.

Annotations:—Mentd. Esdalle v. City of London Union Assmt. Com. (1887), 18 Q. B. D. 590; *Jones v. Withers* (1896), 74 L. T. 572; *Re Hodgson's S. E., Altamont v. Forsyth* (1912), 106 L. T. 456; *Busby v. Avgherino*, [1928] A. C. 290.

1971. —.]—There is no difference of opinion between the parties as to the principle of law that has to be applied in determining whether or not an Act of Parliament can or does override some of the sects. or provisions contained in a previous Act of Parliament. The judgment of *LORD SELBORNE* in *Seward v. Vera Cruz*, No. 1959, *ante*, has always been accepted as the ruling authority on that question (*GRANTHAM, J.*).—*WHITECHAPEL BOARD OF WORKS v. CROW* (1901), 84 L. T. 595; 65 J. P. 549; 17 T. L. R. 463; 19 Cox, C. C. 700, D. C.

Annotations:—Mentd. Charing Cross & Strand Electricity Supply Corp'n. v. Woodthorpe (1903), 88 L. T. 772; *County of London Electric Supply Co. v. Perkins* (1908), 98 L. T. 870; *Moran v. Marsland*, [1909] 1 K. B. 744.

1972. —.]—*R. v. SALISBURY (BP.)*, No. 863, *ante*.

1973. —.]—In the case of *Seward v. Vera Cruz*, No. 1959, *ante*, there is a very clear statement by *LORD SELBORNE* of the principle which governs the question of repeal by implication (*COLLINS, M.R.*).—*HEADLAND v. COSTER*, [1905] 1 K. B. 219; 74 L. J. K. B. 210; 92 L. T. 98; 69 J. P. 90; 21 T. L. R. 123; 49 Sol. Jo. 133; 3 L. G. R. 174, C. A.; *affd. sub nom. COSTER v. HEADLAND*, [1906] A. C. 286, H. L.

Annotations:—Apld. R. v. Smith, Ex p. Porter, [1927] 1 K. B. 478. *Reid. Scott v. Denton*, [1907] 1 K. B. 456. *Mentd. R. v. Philbrick, Ex p. Edwards*, [1905] 2 K. B. 108; *R. v. London County J.J., Ex p. St. Georges, Strand & Westminster Unions Assmt. Com. & Westminster City Council Assmt. Com.* (1907), 97 L. T. 217; *Walker v. Retter*, [1911] 1 K. B. 1103.

1974. —.]—Wherever Parliament in an earlier statute has directed its attention to an individual case & has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared (*LORD HALDANE, C.*).—*BLACKPOOL CORPN. v. STARR ESTATE CO.*, [1922] 1 A. C. 27; 91 L. J. K. B. 202; 126 L. T. 258; 86 J. P. 25; 38 T. L. R. 79; 66 Sol. Jo. (W. R.) 17; 19 L. G. R. 721, H. L.; *affg.*

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1999 i. — *Intention of legislature to be considered.*]—McKINNON v. McDougall (1907), 3 E. L. R. 573.—CAN

2005. —.].—An Act of Parliament cannot be repealed by non-user (*per CUR.*).—*WHITE v. BOOT* (1788), 2 Term Rep. 274; 100 E. R. 149.

Annotations:—**Mentd.** *Leigh v. Kent* (1789), 3 Term Rep. 362; *Forbes v. Samuel*, [1913] 3 K. B. 706.

2006. —.].—Though, where the words of an Act of Parliament are plain, it cannot be repealed by non-user, yet where there has been a series of practice, without any exception, it goes a great way to explain them where there is any ambiguity (LORD KENYON, C.J.).—*LEIGH v. KENT* (1789), 3 Term Rep. 362; 100 E. R. 621.

Annotations:—**Mentd.** *Stewart v. Lawton* (1823), 1 Bing. 374; *Spencer v. Swannell* (1838), 7 L. J. Ex. 73; *Forbes v. Samuel*, [1913] 3 K. B. 706.

2007. —.].—Though a statute does not lose its force by non-user alone, & the presumption is against a repeal of it by implication, a subsequent statute, though not expressly referring to it, will be taken to have repealed it, when its continuance would be inconsistent with the state of things introduced by the later statute.—*THE INDIA* (1861), *Brown & Lush*, 221; 3 New Rep. 442; 33 L. J. P. M. & A. 193; 12 L. T. 316; 2 Mar. L. C. 193.

2008. —.].—It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a Statute, but contemporaneous & continuous usage is of the greatest efficacy in law, for determining the true construction of obscurely framed documents (LORD HATHERLEY, C.).—*HEBBERT v. PURCHAS* (1871), L. R. 3 P. C. 605; 7 Moo. P. C. C. N. S. 468; 41 L. J. P. C. 33; 35 J. P. 452; 19 W. R. 898; 17 E. R. 177.

Annotations:—**Refd.** *Lord Advocate v. Walker Trustees*, [1912] A. C. 95; *Bourne v. Keane*, [1919] A. C. 815; *Rhonda's Claim*, [1922] 2 A. C. 339. **Mentd.** *Boyd v. Phillpotts* (1874), L. R. 1 A. & E. 297; *Martin v. Macdonochie* (1874), L. R. 4 A. & E. 279; *Hudson v. Tooth* (1877), 2 P. D. 125; *Ridsdale v. Clifton* (1877), 2 P. D. 276; *Sergeant v. Dale* (1879), 43 J. P. 220; *Hewwood v. Manchester (Bp.)* (1881), 12 Q. B. D. 404; *Venkata Narasimha Appa Row v. Court of Wards, Venkata Ramalakshmi Garu v. Gopala Appa Row, Ex p. Rajah Gopala Appa Row* (1886), 11 App. Cas. 660; *Read v. Lincoln (Bp.)*, [1892] A. C. 644; *Re Robinson, Wright v. Tugwell*, [1897] 1 Ch. 85; *Gore-Booth v. Manchester (Bp.)*, [1920] 2 K. B. 412; *Capel St. Mary, Suffolk v. Packard*, [1927] P. 289.

J. Other Cases.

2009. Recital.—The bare recital in a statute is not sufficient to repeal the positive provisions of a former statute, without a clause of repeal (ASHURST, J.).—*DORR v. GRAY* (1788), 2 Term Rep. 358; 100 E. R. 193.

Annotations:—**Mentd.** *Stafford v. Hamston* (1821), 2 Brod. & Bing. 691; *Russell v. Ledsam* (1815), 14 M. & W. 574; *R. v. Williams* (1850), 11 J. P. 75; *Ex p. Lloyd* (1851), 1 Sim. N. S. 218; *Edwards v. Hodges* (1855), 15 C. B. 477; *Ormond Investment Co. v. Betts*, [1928] A. C. 143.

2010. Schedule.—*ALLEN v. FLICKER*, No. 85, *ante*.

2011. Omission of words.—(1) Where in such a case of two Acts being so directed to be read together you find important words in one of them omitted, in the other the words so omitted are impliedly repealed (BRETT, J.).

(2) It is a well-known rule in the construction of statutes that, if a substantive enactment in a former Act is repealed, that which comes by way of proviso upon it is impliedly repealed also

(BOVILL, C.J.).—*HORSNAIL v. BRUCE* (1873), L. R. 8 C. P. 378; 42 L. J. C. P. 140; 28 L. T. 705; 37 J. P. 518; 21 W. R. 597.

Annotations:—**Mentd.** *Evans v. Wills* (1876), 1 C. P. D. 229; *R. v. Stonor* (1888), 57 L. J. Q. B. 510; *Church's Trustee v. Hibbard*, [1902] 2 Ch. 781.

2012. Injustice in enforcement.—It has been argued that these Acts are to be deemed obsolete inasmuch as then enforcement to-day would, as it is alleged, lead to manifest injustice & absurdity. Inasmuch, however, as both the Acts have received comparatively recent recognition & application, while injustice has been guarded against by limitation the right to prosecute for offences under them to the A.-G., I find it difficult to say that such of their provisions as have not already been repealed are not still available for the protection of the community against the evils at which they were aimed (NEVILLE, J.).—*LUBY v. WARWICKSHIRE MINERS' ASSOCN.*, [1912] 2 Ch. 371; 81 L. J. Ch. 741; 107 L. T. 452; 28 T. L. R. 509.

2013. Rule of court.—*PERRY v. LONDON GENERAL OMNIBUS CO.*, No. 2136, *post*.

2014. Repeal of proviso.—By repeal of enactment to which proviso attached.—*HORSNAIL v. BRUCE*, No. 2011, *ante*.

2015. Repeal of bye-law.—By repeal of statute under which made.—When a bye-law is made under an Act of Parliament the repeal of the Act, abrogates the bye-law, unless the bye-law is preserved by the repealing Act by means of a saving clause or otherwise.—*WATSON v. WINCH*, [1916] 1 K. B. 688; 85 L. J. K. B. 537; 114 L. T. 1209; 80 J. P. 119; 32 T. L. R. 244; 14 L. G. R. 486, D. C.

SECT. 2.—EFFECT.

SUB-SECT. 1.—IN GENERAL.

See Interpretation Act, 1889 (c. 63), s. 38.

2016. Position as if Act had never existed.—No proceedings can be pursued under a repealed Act of Parliament, though begun before the repeal; unless by special exception.—*MILLER'S CASE* (1764), 1 Wm. Bl. 451; 96 E. R. 259.

2017. —.].—When an Act of Parliament is repealed, it is the same thing as if it had never existed, except with reference to such parts as are saved by the repealing statute (LORD TENTERDEN, C.J.).—*SURTEES v. ELLISON, HEWSON v. HEARD* (1829), 9 B. & C. 750; 4 Man. & Ry. K. B. 586; 7 L. J. O. S. K. B. 335; 109 E. R. 278.

Annotations:—**Apld.** *Barrow v. Ainaud* (1816), 8 Q. B. 595; *Rimini v. Van Praagh* (1872), L. R. 8 Q. B. 1; *A.-G. v. Lamplough* (1878), 3 Ex. D. 214. **Consd.** *Watson v. Winch*, [1916] 1 K. B. 688. **Refd.** *R. v. Denton* (1852), 18 Q. B. 761; *Re Mexican & South American Co. Grise-wood & Smith's Case, De Pass's Case* (1859), 4 De G. & J. 544; *Butcher v. Henderson* (1868), L. R. 3 Q. B. 335; *Spencer v. Hooton, Spencer v. Newton & Pycroft, Briggs v. G. N. Ry., Parkinson v. Wigan Coal & Iron Co., Harrison v. Wigan Coal & Iron Co.* (1920), 37 T. L. R. 280. **Mentd.** *Clark v. Mullick* (1840), 3 Moo. P. C. C. 252.

2018. —.].—*KAY v. GOODWIN*, No. 2044, *post*.

2019. —.].—A difference exists between temporary & repealed statutes in this, that the latter, except so far as they relate to transactions

PART IX. SECT. 2, SUB-SECT. 1.

2016 i. Position as if Act had never existed.—*BRYANT v. HILL* (1863), 23 U. C. R. 96.—**CAN.**

2016 ii. —.].—*TRUMBELL v. TAYLOR* (No. 2) (1895), 3 Terr. L. R. 313.—**CAN.**

2016 iii. —.].—The repeal of a statute merely declaring the common law does not repeal the common law, at any rate in a case where the common law involved is the prerogative of the Crown & by the repealing Act no mention is made of the Crown or its

prerogative.—*KENNEDY v. INMAN*, [1920] 1 W. W. R. 533; 51 D. L. R. 155; 15 Alta. L. R. 196.—**CAN.**

2016 iv. —.].—*VAJECHAND v. NANDRAM* (1907), I. L. R. 31 Bom. 545.—**IND.**

2016 v. —.].—The general rule of law is that when a statute is absolutely repealed it is to be treated as if it had not been passed.—*TRAILL v. McALLISTER* (1890), 25 L. R. Ir. 521.—**IR.**

2016 vi. —.].—*Seem*: a mere

affirmative statute does not take away the common law, & if the statute were temporary, on its expiration the common law would be in as full force as before its enactment.—*HARRAHAN v. BARRON & DOODY* (1849), 3 Nfld. L. R. 102.—**NFLD.**

q. Effect of revision of the statutes.—The effect of the revision of the Statutes of Canada, brought into force by Royal Proclamation, Mar. 1, 1887, though in form repealing the Acts consolidated, is really to preserve them

Sect. 2.—Effect: Sub-sects. 1, 2 & 3.]

already completed under them, become as if they never had existed; but, with respect to the former, the extent of the restrictions imposed by them becomes a matter of construction, & it becomes necessary to determine which of their provisions are to be considered limited to the duration of the temporary law, & which are not to be so considered (PARKE, B.).—STEAVENSON v. OLIVER (1841), 8 M. & W. 234; 10 L. J. Ex. 338; 5 Jur. 1064; 151 E. R. 1024.

Annotations:—Reid. Spencer v. Hooton, Spencer v. Newton & Pycroft, Briggs v. G. N. Ry., Parkinson v. Wigan Coal & Iron Co., Harrison v. Wigan Coal & Iron Co. (1920), 37 T. L. R. 280; R. v. Ellis, *Ex p.* Amalgamated Engineering Union (1921), 125 L. T. 397. **Mentd.** Chappell v. Davidson (1856), 18 C. B. 194.

2020. —.—[When an Act of Parliament is repealed, the law is as if it had never passed (PARKE, B.).—SIMPSON v. READY (1843), as reported in 11 M. & W. 344; 152 E. R. 836.

Annotation:—Reid. Butcher v. Henderson (1868), L. R. 3 Q. B. 335.

2021. —.—[It is contended] that the duty itself had ceased to be payable by the repeal of the Act imposing it, on the principle laid down by LORD TENTERDEN in *Surtees v. Ellison*, No. 2017, *ante*, "It has been long established, that, when an Act of Parliament is repealed it must be considered, except as to transactions past & closed, as if it never had existed. That is the general rule, & we must not destroy that by indulging in conjectures as to the intention of the legislature" (*per* CUR.).—BARROW v. ARNAUD (1846), 8 Q. B. 604; 10 Jur. 319; 115 E. R. 1004, Ex. Ch.

2022. —.—[After a statute has been repealed it cannot be acted upon in respect of a proceeding under it, commenced before its repeal, & in this respect there is no valid distinction between matters of form & substance.—R. v. DENTON (INHABITANTS) (1852), Dears. C. C. 3; 18 Q. B. 761; 21 L. J. M. C. 207; 19 L. T. O. S. 216; 16 J. P. 471; 17 Jur. 453; 118 E. R. 287.

Annotation:—Reid. R. v. McLain, R. v. Barr (1922), 91 L. J. K. B. 562.

2023. —.—[When an Act of Parliament, or part of an Act of Parliament, is repealed, it must be considered as if it had never existed, except as to transactions passed & closed.—*Re* MEXICAN & SOUTH AMERICAN CO., GRISEWOOD & SMITH'S CASE, DE PASS'S CASE (1859), 4 De G. & J. 544; 28 L. J. Ch. 769; 33 L. T. O. S. 322; 5 Jur. N. S. 1191; 7 W. R. 681; 45 E. R. 211, L. JJ.

Annotations:—**Mentd.** *Re* Royal British Bank, Mixer's Case (1859), 4 De G. & J. 575; *Re* Athenæum Life Assce. Soc., Chinnock's Case (1860), John. 714; *Re* Mexican & South American Co., Costello's Case (1860), 2 De G. F. & J. 302; *Re* Esqair Mwyn Mining Co., Alexander's Case (1861), 3 L. T. 883; *Re* Phoenix Life Assce. Co., *Ex p.* Hatton (1862), 31 L. J. Ch. 340; *Re* Consols Insee. Asscn., Benham's Case (1865), 11 Jur. N. S. 381; National & Provincial Marine Insee. Co., *Ex p.* Parkor (1867), 2 Ch. App. 685; *Re* Smith, Knight, Weston's Case (1868), L. R. 11 Eq. 238; Spackman v. Evans (1868), 19 L. T. 151; *Re* Asiatic Banking Co., *Ex p.* Collum (1869), 21 L. T. 350; *Re* Bank of Hindustan, China & Japan, *Ex p.* Kintrea (1869), 5 Ch. App. 95; *Re* Consols Insee. Asscn., Glanville's Case (1870), L. R. 10 Eq. 479; *Re* Smith, Knight, Battie's Case (1870), 39 L. J. Ch. 391; *Re* European Bank, Master's Case (1871), 7 Ch. App. 294, n.; *Re* Great Wheal Busy Mining Co., King's Case (1871), 40 L. J. Ch. 361; R.

in unbroken continuity.—FRONTENAC LICENSE COMRS. v. FRONTENAC COUNTY CORPN. (1887), 14 O. R. 741; 4 Cart. 683.—CAN.

r. Time for completion of work altered by new statute.]—Where a time limit for the completion of a work is enacted by a sect. of a statute, & by an amending Act the term of years prescribed for the completion of the work is extended by a sect. which

expressly replaces the sect. of the original Act, the term fixed by the substituted sect. runs from the coming into force of the original Act, & not of the amending Act.—MONTREAL PARK & ISLAND RY. CO. v. CHATEAU-GUAY & NORTHERN RY. CO. (1903), 13 B. C. R. 256.—CAN.

t. Repeal of section bringing Act into force after Act in force—No effect.]—*Re* SUTTON (Ont.), [1924] 4 D. L. R.

v. Lambourn Valley Ry. (1888), 11 Q. B. D. 463; *Re* Discoverers Finance Corpn., [1908] 1 Ch. 141; *Re* Discoverers Finance Corpn., Lindlar's Case, [1910] 1 Ch. 312.

2024. —.—[The proviso in sect. 8 [of a private Act] is absolutely repealed by sect. 32 of the private Act, & the effect of that repeal we apprehend to be, that, for all matters occurring subsequent to the repeal, the private Act must be read as if there never had been any such proviso (POLLOCK, C.B.).—SHREWSBURY (EARL) v. SCOTT (1860), 6 C. B. N. S. 221; 29 L. J. C. P. 190; 141 E. R. 437; *sub nom.* HOPE-SCOTT v. SHREWSBURY (EARL), 6 Jur. N. S. 472, Ex. Ch.; *affg.* (1859), 6 C. B. N. S. 1.

Annotations:—**Mentd.** Lang v. Purves (1862), 15 Moo. P. C. C. 389; Ormond Investment Co. v. Betts, [1928] A. C. 143.

2025. —.—[The maxim alike of law & justice is, *nova constitutio futuris formam imponere debet, non præteritis* & therefore, though when a statute is repealed it is, as to new matters, as though it had never existed, yet as to transactions already completed under it, they still have full effect (*per* CUR.).—BUTCHER v. HENDERSON (1868), L. R. 3 Q. B. 335; 9 B. & S. 403; 37 L. J. Q. B. 133; 16 W. R. 855.

Annotations:—Reid. Mount v. Taylor (1868), L. R. 3 C. P. 645; Levi v. Sanderson (1869), L. R. 4 Q. B. 330; Mirfin v. Attwood (1869), L. R. 4 Q. B. 333.

2026. —.—[LEMM v. MITCHELL, No. 2047, *post*.

2027. — Penal statute.]—Where a statute creating an offence is repealed a person cannot be afterwards proceeded against for any offence within it committed whilst it was in operation even although the repealing statute re-enacts the penal clauses of the statute repealed.—R. v. SWAN (1849), 14 J. P. 161; 4 Cox, C. C. 108.

Annotation:—**Mentd.** R. v. Smith (1862), Le. & Ca. 131.

2028. —.—[R. v. NAIRNE (1850), as reported in 4 Cox, C. C. 115.

Annotation:—Reid. R. v. Smith (1862), 9 Cox, C. C. 110.

2029. —.—[In my opinion the justices came to a wrong conclusion, & I think that they were misled by following the well known common law principle stated in the fourth edition of *Maxwell on the Interpretation of Statutes*, at p. 623, to this effect, that "Where an Act expired or was repealed, it was formerly considered, in the absence of provision to the contrary, as if it had never existed, except as to matters & transactions past & closed. Where, therefore, a penal law was broken, the offender could not be punished under it, if it expired before he was convicted, although the prosecution was begun while the Act was in force." That was undoubtedly the common law principle (AVORY, J.).—BENNETT v. TATTON (1918), 88 L. J. K. B. 313; 118 L. T. 788; 82 J. P. 303; 34 T. L. R. 591; 16 L. G. R. 786, D. C.

Annotation:—**Follid.** R. v. Ellis, *Ex p.* Amalgamated Engineering Union (1921), 125 L. T. 397.

2030. —.—[We are bound by the decision of this ct. in the case of *Bennett v. Tatton*, No. 2029, *ante*, in which this ct. adopted the rule laid down in *Maxwell on the Interpretation of Statutes*, 6th ed., p. 728, namely "Where an Act expired or was repealed, it was formerly regarded,

315; 5 C. B. R. 75.—CAN.

a. Repealing Act preserving old procedure in cases wherein new Act does not provide remedy.]—HATFIELD & SCOT CO., LTD. v. QUEBEC POTATO PRODUCTS CO., LTD. (N. B.), [1925] 3 D. L. R. 1184.—CAN.

b. Old section of Act operative until new section operative.]—R. v. REID (Ont.) (1927), 47 Can. Crim. Cas. 202.—CAN.

in the absence of provision to the contrary, as having never existed, except as to matters & transactions past & closed. Where, therefore, a penal law was broken, the offender could not be punished under it, if it expired before he was convicted, although the prosecution was begun while the Act was still in force" (AVORY, J.).—*R. v. ELLIS, Ex p. AMALGAMATED ENGINEERING UNION* (1921), 125 L. T. 397, D. C.

2031. — Matters of procedure.]—Where an Act creating an offence is kept in force, & the sect. providing procedure is only repealed, & other procedure is provided by the repealing Act, although an offence is committed while the repealed sect. is in force, if proceedings are not taken until after the repeal takes effect, they are governed by the requirements of the repealing Act.

The general rule is that enactments altering procedure have a retrospective effect unless a contrary intention appears from the enactment (RIDLEY, J.).—*BATT v. MATTINSON* (1900), 82 L. T. 800; 64 J. P. 615; 16 T. L. R. 398; 19 Cox, C. C. 532, D. C.

Annotation :—*Mentd. Grimble v. Preston*, [1914] 1 K. B. 270.

2032. Repealed statute effective as declaration of law.]—*NEWCASTLE (DUKE) v. MORRIS*, No. 866, *ante*.

2033. Effect of saving clause.]—*SURTEES v. ELLISON, HEWSON v. HEARD*, No. 2017 *ante*.

2034. —.]—*HOUGH v. WINDUS*, No. 1188, *ante*.

2035. —.]—There were one or two other cases cited which have an important application to the present case, that is to say, cases where you find in an Act a repealing clause followed by a saving clause. There you have to see how far the two enactments can co-exist. It seems to me that the principle laid down in those cases is applicable to the present case. That principle is this: Where you have a repeal & you have also a saving clause, you have to consider whether the substituted enactment contains anything incompatible with the previously existing enactment. The question is, aye or no, is there incompatibility between the two. In those cases the judges, in holding that there was a saving clause large enough to annul the repeal said that you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed; & that, if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as *pro tanto* wiped out (COLLINS, M.R.).—*Re R.*, [1906] 1 Ch. 730; 75 L. J. Ch. 421; 94 L. T. 494; 54 W. R. 578, C. A.

Annotation :—*Distd. Evans v. Morgan*, [1928] 2 K. B. 527.

Effect of repeal by temporary statute.]—*See* Nos. 1340, 1341, *ante*.

Effect of repeal of temporary statute.]—*See* Nos. 1342, 1343, *ante*.

Application of rule.]—*See* TITLES *passim*.

PART IX. SECT. 2, SUB-SECT. 2.

2036 i. Unaffected by repeal.]—*Re LONDON UNITED PRESBYTERIAN CONGREGATION* (1873), 11 P. R. 129.—CAN.

2036 ii. —.]—*BANK OF OTTAWA v. MCMORROW* (1883), 4 O. R. 345.—CAN.

2036 iii. —.]—*TRAILL v. McALLISTER* (1890), 25 L. R. Ir. 524.—IR.

2036 iv. —.]—Things validly done under any law retain their validity notwithstanding the subsequent repeal of such law.—*COLONIAL GOVERNMENT v. STANDARD BANK* (1892), 9 S. C. 253; 2 O. T. R. 196.—S. AF.

PART IX. SECT. 2, SUB-SECT. 3.

2044 i. Unaffected by repeal.]—The repeal of Insolvent Act does not affect any insolvent whose estate has vested in the assignee prior to the repeal.—*COOPER v. KIRKPATRICK* (1880), 8 P. R. 248.—CAN.

2044 ii. —.]—*MORRIS TOWNSHIP CORPN. v. HURON COUNTY CORPN.* (1896), 27 O. R. 341.—CAN.

2044 iii. —.]—*Re DREWRY, DREWRY v. DREWRY* (Alta.), [1917] 3 W. W. R. 85; 36 D. L. R. 197.—CAN.

SUB-SECT. 2.—TRANSACTIONS PAST AND CLOSED.

See Interpretation Act, 1889 (c. 63), s. 38.

2036. Unaffected by repeal.]—*STEAVENSON v. OLIVER*, No. 2019, *ante*.

2037. —.]—*BARROW v. ARNAUD*, No. 2021, *ante*.

2038. —.]—*Re MEXICAN & SOUTH AMERICAN CO., GRISEWOOD & SMITH'S CASE, DE PASS'S CASE*, No. 2023, *ante*.

2039. —.]—*BUTCHER v. HENDERSON*, No. 2025, *ante*.

2040. —.]—*BENNETT v. TATTON*, No. 2029, *ante*.

2041. —.]—*R. v. ELLIS, Ex p. AMALGAMATED ENGINEERING UNION*, No. 2030, *ante*.

2042. —.]—Assuming that the effect of the Order in Council of Dec. 13, 1921, was to repeal Grand Juries (Suspension) Act, 1917, the rule that that statute must be treated as if it had never existed did not apply to transactions which were passed & concluded (LORD TREVETHIN, C.J.).—*R. v. McLAIN, R. v. BARR* (1922), 91 L. J. K. B. 562; 126 L. T. 642; 86 J. P. 135; 38 T. L. R. 393; 66 Sol. Jo. 474; 27 Cox, C. C. 185; 16 Cr. App. Rep. 109, C. C. A.

2043. Extent of preservation.]—A proviso in a repealing statute, that the repealed statutes shall be repealed, "except as to acts done under them," will operate to preserve to parties sued for acts alleged to have been done under colour of the powers of the repealed statutes, a protection which those statutes conferred upon persons sued for such acts, at all events, if the action is brought before the repealing statute passes.—*FOSTER v. PRITCHARD & WHITROE* (1857), 2 H. & N. 151; 26 L. J. Ex. 215; 157 E. R. 63; *sub nom.* *FOSTER v. RICHARDS*, 29 L. T. O. S. 128; 5 W. R. 610.

SUB-SECT. 3.—VESTED RIGHTS.

See Interpretation Act, 1889 (c. 63), s. 38.

2044. Unaffected by repeal.]—I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed; & it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, & concluded whilst it was an existing law (TINDAL, C.J.).—*KAY v. GOODWIN* (1830), 6 Bing. 576; 130 E. R. 1403; *sub nom.* *KEY v. GOODWIN*, 4 Moo. & P. 341; 8 L. J. O. S. C. P. 212.

Annotations :—*Consd. A.-G. v. Lamplough* (1878), 3 Ex. D. 214. *Apld. Lemm. v. Mitchell*, [1912] A. C. 400. *Refd. Re Amon, Ex p. Lowe* (1832), 1 L. J. Bcy. 54; *Edwards v. Sherren* (1843), 11 M. & W. 595; *Shrewsbury v. Scott* (1860), 29 L. J. C. P. 190; *Mirfin v. Attwood* (1869), 9 B. & S. 414. *Mentd. Halesowen Ry. v. G. W. Ry. & Mid. Ry.* (1883), 4 Ry. & Can. Tr. Cas. 224.

2045. —.]—The repeal of a statute does not, without express words, take away the power of the cts. to make an order to which a right has already vested under the repealed statute.—*RESTALL v. LONDON & SOUTH WESTERN RY. CO.* (1868), L. R.

2044 iv. —.]—*CHADWICK v. McCRIE*, [1924] 4 D. L. R. 1107; 56 O. L. R. 143.—CAN.

2044 v. —.]—*HOSIE v. KILDARE COUNTY COUNCIL*, [1928] I. R. 47.—IR.

2044 vi. —.]—No repealing statute operates retrospectively unless so stated therein, nor interferes with rights which have vested under the repealed statute unless so stated either expressly or by necessary implication.—*Re DAYA RATANJEE* (1913), 34 N. L. R. 467.—S. AF.

Sect. 2.—Effect: Sub-sect. 3. Sects. 3 & 4. Part X. ct. 1: Sub-sects. 1 & 2.]

3 Exch. 141; 37 L. J. Ex. 89; 18 L. T. 331; 16 W. R. 872.

*Annotations:—*Refd. *Butcher v. Henderson* (1868), L. R. 3 Q. B. 335; *Ings v. L. & S. W. Ry.* (1868), 38 L. J. C. P. 8; *Mount v. Taylor* (1868), 37 L. J. C. P. 325; *Oldreive v. Puckeridge* (1868), 37 L. J. Ex. 90; *Levi v. Sanderson* (1869), L. R. 4 Q. B. 330; *Mirfin v. Attwood* (1869), L. R. 4 Q. B. 333.

2046. ———.]—*Private Street Works Act, 1892* (c. 57), s. 25, does not affect the validity or effect of the notice given while *Public Health Act, 1875* (c. 55), s. 150, is in force in the district though after the adoption of the Act of 1892 no fresh notice could be given under s. 150 & if there would otherwise have been any doubt on the point, it is removed by *Interpretation Act, 1889* (c. 63), s. 38 (2), which saves everything duly done under a repealed enactment before its repeal & every right obligation or liability acquired, accrued or incurred under it before the repeal.—*Heston & Isleworth Urban Council v. Groult*, [1897] 2 Ch. 306; 66 L. J. Ch. 647; 77 L. T. 118; 45 W. R. 697; 13 T. L. R. 504; 41 Sol. Jo. 639, C. A.

2047. ———.]—This language [of Ord. 20 of 1908] is only an expansion, in rather emphatic terms, of the statement of principle affirmed by *Tindal, C.J.*, [in *Kay v. Goodwin*, No. 2044, ante] & is subject to the same qualification or exception as he expressed, namely, that it must not be taken to deprive persons of vested rights acquired by them in actions duly determined under the repealed law.

It would require language much more explicit than that which is to be found in the Ordinance of 1908, to justify a court of law in holding that a legislative body intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given & still subsisting (*per cur.*).—*Leemm v. Mitchell*, [1912] A. C. 400; 81 L. J. P. C. 173; 106 L. T. 359; 28 T. L. R. 282, P. C.

2048. ———.]—It is obvious that [*Interpretation Act, 1889* (c. 63), s. 38] was not intended to preserve the abstract rights conferred by the repealed Act. . . . It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute (*Atkin, L.J.*).—*Hamilton Gell v. White*, [1922] 2 K. B. 422; 91 L. J. K. B. 875; 127 L. T. 728; 38 T. L. R. 829, C. A.

*Annotation:—*Refd. *Briggs v. Dryden*, *Talbot v. Vickers*, [1925] 2 K. B. 667.

Effect of statutes on existing rights.]—See Part IV., Sect. 6, ante.

SECT. 3.—REVIVER OF REPEALED STATUTES.

See *Interpretation Act, 1889* (c. 63), s. 11 (1).

2049. Whether express enactment necessary—
Repeal of condition limiting force of statute.]—It can-

not be supposed that it is contrary to the intention of the legislature to restore to a statute its original force without condition, where all that it has done has been to repeal the condition; & it can make no difference that other qualifications are introduced, which are not applicable to all the cases to which the repealed condition attached (*HANNEN, J.*).—*MIRFIN v. ATTWOOD* (1869), L. R. 4 Q. B. 333; 9 B. & S. 414; 38 L. J. Q. B. 181; 20 L. T. 778; 17 W. R. 820.

*Annotation:—*Refd. *Levi v. Sanderson* (1869), L. R. 4 Q. B. 330.

SECT. 4.—RE-ENACTMENT.

See *Interpretation Act, 1889* (c. 63), s. 38 (1).

2050. Construction—Intention indicated in re-enacting Act.]—*WHITTAKER v. LOWE* (1865), L. R. 1 Exch. 74; 4 H. & C. 109; 35 L. J. Ex. 44; 12 Jur. N. S. 375; 14 W. R. 197, Ex. Ch.

*Annotation:—*Mentd. *Re Stark* (1866), 1 Ch. App. 150.

2051. ———.]—**Extension of operation not presumed.]—***BROWN v. MCLACHLAN*, No. 806, ante.

2052. ———.]—**Reference to repealed Act construed as reference to re-enacting Act.]—**We have in the *Workmen's Compensation Act, 1897* (c. 37), references to the provisions of the *Factory & Workshop Act, 1895* (c. 37), & those references, unless the contrary intention appears, must now be construed as references to the provisions re-enacted by *Factory & Workshops Act, 1901* (c. 63), that is, re-enacted with or without modification (*STIRLING, L.J.*).—*STEVENS v. GENERAL STEAM NAVIGATION CO.*, [1903] 1 K. B. 890; 72 L. J. K. B. 417; 88 L. T. 542; 67 J. P. 415; 51 W. R. 578; 19 T. L. R. 418; 47 Sol. Jo. 469; 5 W. C. C. 95, C. A.

2053. Effect—Inconsistent enactment in Act subsequent to repealed Act.]—A sect. of a statute, which merely re-enacts a provision in a previous statute, will not be construed as virtually repealing an inconsistent enactment in an Act made subsequently to the first, but before the last Act.—*MORISSE v. ROYAL BRITISH BANK* (1856), 1 C. B. N. S. 67; 26 L. J. C. P. 62; 3 Jur. N. S. 137; 140 E. R. 27; *sub nom.* *MORRIS v. ROYAL BRITISH BANK*, 28 L. T. O. S. 124; 5 W. R. 138.

*Annotations:—*Refd. *Julius v. Oxford* (Bp.) (1880), 5 App. Cas. 214. Mentd. *Edwards v. Kilkenny & Great South-Western Ry.*, *Re Butterworth* (1857), 26 L. J. C. P. 224; *Scott v. Uxbridge & Rickmansworth Rly.* (1866), L. R. 1 C. P. 596; *Shrimpton v. Sidmouth Rly.* (1867), L. R. 3 C. P. 80.

2054. ———.]—The twelve months' limitation was first introduced in 5 & 6 Vict. c. 122, s. 10, whilst 6 Geo. 4, c. 16, s. 5, was in force, obviously without any intention of altering the construction of that sect.; & there is no ground for supposing that the re-enactment of the same two acts in the consolidating Act of 12 & 13 Vict. c. 106, could make the one affect the construction of the other, any more than when they formed parts

PART IX. SECT. 3.

c. General rule.]—The repeal of a statute repealing another statute does not revive the repealed statute.—*DEPUTY LEGAL REMEMBRANCER v. AHMED ALI* (1897), L. R. 25 Calc. 333; 2 C. W. N. 11.—IND.

d. Application of revivor section of Interpretation Act.]—Under *Nova Scotia Temperance Act, Part I*, s. 3, the city of Halifax was excepted from the operation of the Act until after a day to be fixed & appointed by proclamation of the Governor-in-Council, to be issued upon the happening of a contingency specified. By

later legislation, Act of 1916, c. 22, the sect. of the original Act excepting the City of Halifax was repealed & it was enacted that Part I of the Act should apply to every part of the province in which the *Canada Temperance Act* was not in force.—*Held*: Part II of the Act having been always in force, to be resorted to whenever Part I became operative, the words of *Interpretation Act* to the effect that the repeal of any enactment should not revive any Act or provision of law repealed by such enactment, had no application.—*Re BRADBURY* (1916), 50 N. S. R. 298 27 Can. Crim. Cas. 68.—CAN.

e. Repealed Act does not revive without express words.]—Where an Act repeals a previous Act, or a certain provision thereof & the repealing enactment is subsequently repealed by another Act:—*Held*: the last repeal did not since 1850, revive the Act or provision before repealed, unless there are words reviving them.—*Re JEWIA NATHOO* (1917), L. R. 44 Calc. 489; 20 C. W. N. 1327.—IND.

PART IX. SECT. 4.

1. Construction—Presumption that if words changed law changed.]—Where the legislature has changed the lan-

Sect. 1.—Proof: Sub-sects. 2 & 3. Sect. 2. Part XI.]

2068. ———.]—*HOLIDAY v. PITT* (1734), Cunn. 16; *Lee temp. Hard.* 37; 2 *Stra.* 985; 94 *E. R.* 1033; *sub nom.* *HOLLIDAY v. PITT*, Fortes. Rep. 342; *sub nom.* *HOLLOWDAY v. PIT*, 2 *Barn. K. B.* 448; *sub nom.* *PITT'S CASE*, 7 *Mod. Rep.* 225; *Ridg. temp. H.* 91; 2 *Com.* 444.

Annotations:—Refd. *Crosby, Brass's Case* (1771), 3 *Wils.* 188. *Mentd.* *Chester v. Upsdale* (1750), 1 *Wils.* 278; *Bartlett v. Hebbes* (1794), 5 *Term Rep.* 686; *Luntley v. Battino* (1818), 2 *B. & Ald.* 234; *Cecil v. Butcher* (1821), 2 *Jac. & W.* 565; *Strong v. Dickenson* (1836), 1 *M. & W.* 488; *Magnay v. Burt* (1843), 1 *L. T. O. S.* 206; *Webb v. Taylor* (1843), 8 *Jur.* 39; *Childers v. Childers* (1857), 3 *K. & J.* 310.

2069. ———.]—23 *Hen. 6, c. 9*, relating to bail bonds is a public Act; therefore the ct. will take notice of it though it be not pleaded.—*SAMUEL v. EVANS* (1788), 2 *Term Rep.* 569; 100 *E. R.* 306.

2070. ———.]—23 *Hen. 6, c. 9*, being a public Act, need not be specially pleaded.—*LOVELL v. PLOMER* (1812), 15 *East*, 320; 104 *E. R.* 865.

2071. ———.]—That part of Stat. Frauds which directs certain agreements to be in writing, will be taken notice of by the ct. in the trial of an issue out of the Ct. of Ch.—*BURNAND v. NEROT* (1824), 1 *C. & P.* 578; 171 *E. R.* 1324.

2072. ———.]—A local Act, with a clause declaring it to be a public Act, & that it shall be taken notice of as such without being specifically pleaded, need not be proved either to have been examined with the Parliament roll, or to have been printed by the King's Printer.—*WOODWARD v. COTTON* (1834), 1 *Cr. M. & R.* 44; 4 *Tyr.* 689; 3 *L. J. Ex.* 300; 149 *E. R.* 986.

2073. ———.]—Where an Act for conducting a private concern is declared to be public Act, & is required to be judicially taken notice of as such by all judges, without being specially pleaded, it is unnecessary at a trial to prove it by an examined copy of the original.—*BEAUMONT v. MOUNTAIN* (1834), 10 *Bing.* 404; 4 *Moo. & S.* 177; 3 *L. J. C. P.* 118; 131 *E. R.* 961.

Annotation:—Refd. *Woodward v. Cotton* (1834), 1 *Cr. M. & R.* 44.

2074. ———.]—If the counsel for a party rely on an Act of Parliament, & cite it as an Act to be judicially noticed, the opposite party has no right to insist that the counsel citing it should produce a copy of it printed by the Queen's Printer.—*FORMAN v. DAWES* (1841), *Car. & M.* 127.

2075. ———.]—In causes of collision, the party intending to take the benefit of the statute 6 *Geo. 4, c. 125*, should state such intention in the pleadings, but the omission to do so will not deprive him of the exemption from liability conferred by the statute; the Act being a public Act, which the ct. is bound to take notice of without its being specially pleaded.—*THE CANADIAN* (1842), 1 *Wm. Rob.* 343; 166 *E. R.* 601.

2076. ———.]—*HILLIARD v. WEBSTER* (1844), 6 *Man. & G.* 983; 7 *Scott, N. R.* 903; 2 *L. T. O. S.* 348; 8 *Jur.* 425; 134 *E. R.* 1190.

Annotation:—Refd. *Spooner v. Juddow* (1850), 5 *Moo. P. C. C.* 257.

2077. ———.]—I am bound to take notice of the statutes of the realm, but not of college statutes (*LORD COTTENHAM, C.*).—*Re UNIVERSITY COLLEGE, OXFORD* (1847), 10 *L. T. O. S.* 85, *L. C.*

2078. ———.]—When a local & personal Act contains a clause enacting that it shall be taken to be a public Act, it need not be particularly brought to the notice of the ct. in a rule for leave to enter a suggestion; they will take judicial notice of it.—*HENDREY v. EDEN* (1850), *Rob. L. & W.* 202.

2079. ———.]—*AITON v. STEPHEN*, No. 1382, *ante*.

2080. ———.]—A judge being bound to take judicial notice of all Acts of Parliament, is not at liberty to assume the existence of an Act which is necessary to give validity to a right which is admitted in the pleadings before him.—*CHILTON v. LONDON CORPN.* (1878), 7 *Ch. D.* 735; 47 *L. J. Ch.* 433; 38 *L. T.* 498; 26 *W. R.* 474.

Annotations:—Mentd. *Rivers v. Adams* (1878), 3 *Ex. D.* 361; *De La Warr v. Miles* (1881), 17 *Ch. D.* 535; *Goodman v. Saltash Corpn.* (1882), 7 *App. Cas.* 633; *Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 *L. T.* 174; *Hough v. Clark & Hall* (1907), 23 *T. L. R.* 682.

2081. ———.]—*Railway Acts.*—In an argument on demurrer, sects. of Railway Acts, though declared to be public Acts, cannot be referred to unless they are stated in the bill.—*BAILEY v. BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO.* (1850), 12 *Beav.* 433; 6 *Ry. & Can. Cas.* 256; 19 *L. J. Ch.* 377; 15 *L. T. O. S.* 293; 14 *Jur.* 119; 50 *E. R.* 1127.

Annotation:—Mentd. *Alexander v. Automatic Telephone Co.* (1899), 68 *L. J. Ch.* 514.

SUB-SECT. 3.—PRIVATE ACTS.

now, Interpretation Act, 1889 (c. 63), s. 9, & generally, EVIDENCE, Vol. XXII., pp. 142–160, Nos. 1173–1364.

2082. Judicial notice—Necessity for pleading.]—*ALBANY v. ST. ASAPH (Bp.)* (1588), *Cro. Eliz.* 119; 78 *E. R.* 376; *sub nom.* *ALBANY & ST. ASAPH'S (Bp.) CASE*, 1 *Leon.* 31.

Annotations:—Mentd. *Helo v. Exeter (Bp.)* (1690), 2 *Salk.* 539; *Abergavenny v. Llandaff (Bp.)* (1888), 20 *Q. B. D.* 460.

2083. ———.]—A sheriff cannot take advantage of 23 *Hen. 6, c. 10*, without pleading it specially; for it is a private Act.—*LANGTON v. GARDINER* (1596), *Cro. Eliz.* 460; 78 *E. R.* 713.

Annotation:—Expld. *Parker v. Welby* (1670), 1 *Mod. Rep.* 57.

2084. ———.]—23 *Hen. 6, c. 9*, of sheriffs' bonds is only a private statute, of which the ct. will not take notice unless it be pleaded.—*BENSON v. WELBY* (1670), 2 *Saund.* 154; 2 *Keb.* 670; 85 *E. R.* 891; *sub nom.* *PARKER v. WELBY*, 2 *Keb.* 657; 1 *Mod. Rep.* 57; 1 *Sid.* 139; 1 *Vent.* 85.

Annotations:—Refd. *Samuel v. Evans* (1788), 2 *Term Rep.* 569. *Mentd.* *Bullythorp v. Turner* (1744), *Willes*, 475.

2085. ———.]—The cts. cannot take notice officially of the wording of a private Act of Parliament.—*PLATT v. HILL* (1698), 1 *Ld. Raym.* 381; 3 *Salk.* 330; *Holt, K. B.* 662; 91 *E. R.* 1152.

2086. ———.]—The cts. cannot take notice judicially of a private statute.—*PITTS v. POLEHAMPTON* (1698), 1 *Ld. Raym.* 390; 91 *E. R.* 1158; *sub nom.* *WITTS v. POLEHAMPTON*, 3 *Salk.* 305.

Annotations:—Mentd. *Lambert v. Taylor* (1825), 4 *B. & C.* 138; *Gwynne v. Burnell* (1840), 5 *Bing. N. C.* 453.

2087. ———.]—*ADCOCK v. GILL* (1752), *Say.* 60; 96 *E. R.* 803.

2088. ———.]—The ct. cannot now take notice of any other part of this Act of Parliament than that which is set out in this plea; for it is not a public Act (*BULLER, J.*).—*KIRK v. NOWILL* (1786), 1 *Term Rep.* 118; 99 *E. R.* 1006.

Annotations:—Mentd. *Le Bret v. Papillon* (1804), 4 *East*, 502; *Clement v. Lewis* (1822), 3 *Brod. & Bing.* 297.

2089. ———.]—Where copies of a private Act of Parliament, printed by the Queen's Printer, are made evidence, a deft.'s counsel at *nisi prius* cannot make an objection grounded on that Act a ground of an application for a non-suit, if the Act has not been given in evidence on the part of pltf. because it is not an Act to be "judicially noticed," & is only before the ct. when given in evidence.—*GRESWOLDE v. KEMP* (1842), *Car. & M.* 635.

Annotation:—Mentd. *Wright v. Willcox* (1850), 1 *C. B.* 650.

SECT. 2.—CITATION.

See Interpretation Act, 1889 (c. 63), s. 35; Short Titles Act, 1896 (c. 14).

2090. Act passed in session held in two regnal years.]—An Act of Parliament passed in session held partly in one year & partly in the following year of a King's reign, should be described as "an Act passed in the session of Parliament held in the — years of the reign" & not merely as an Act passed in those years.—*R. v. FAIRBROTHER, ETC.*, MIDDLESEX JJ. (1839), 3 J. P. 723.

2091. —.]—Where a statute is passed in a session of Parliament which commenced in one year of a reign but is continued into another, it is incorrect to describe the statute as passed in both years, but it may be described as a statute passed in a session of Parliament held in both years.—*GIBBS v. PIKE* (1841), 8 M. & W. 223; 9 Dowl. 731; 10 L. J. Ex. 309; 151 E. R. 1019.

2092. Statute of 29 Eliz.—To be cited as of 28 Eliz.]—There is no Parliament roll for the 29th of Elizabeth, & statutes passed in that year have relation to the first day of the session which commenced in the 28th year of her reign, & must be so pleaded.—*RUMSEY v. TUFNELL* (1824), 2 Bing. 255; 9 Moore, C. P. 425; 3 L. J. O. S. C. P. 259; 130 E. R. 304.

2093. Statutes of 2 Jac. 1—To be cited as of 1 Jac. 1.]—The statute written in the statute book under the year *secundo* (*vulgo primo*) Jac. 1, c. 15, must be pleaded as of the first year.—*BRYANT v. WITHERS* (1813), 2 M. & S. 123; 2 Rose, 8; 105 E. R. 328.

*Annotations:—***Apld.** *Rumsey v. Tuffnell* (1824), 9 Moore, C. P. 425. **Refd.** *R. v. Biers* (1834), 1 Ad. & El. 327. **Mentd.** *Re Barrow & Gedder, Ex p. Christy* (1832), 2 Deac. & Ch. 155; *Re Keasley, Ex p. Pennell* (1841), 2 Mont. D. & De G. 273; *Re King & Beesley, Ex p. King & Beesley*, [1895] 1 Q. B. 189.

Part XI.—Codifying and Consolidating Statutes.

2094. Codifying statutes—Object.]—I think the proper course is in the first instance to examine the language of the statute & to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, & not to start with inquiring how the law previously stood, & then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, & the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, & that an appeal to earlier decisions can only be justified on some special ground (LORD HERSHELL).

It seems to me that, construing the statute by adding to it words which are neither found therein

nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, & I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code, another law prevailed (LORD HALSBURY).—*BANK OF ENGLAND v. VAGLIANO BROTHERS*, [1891] A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 7 T. L. R. 333; *sub nom. VAGLIANO v. BANK OF ENGLAND*, 55 J. P. 676, H. L.

*Annotations:—***Apld.** *Robinson v. Canadian Pacific Ry.* [1892] A. C. 481; *MacConnell v. Prill*, [1916] 2 Ch. 57. **Consd.** *Re English Bank of River Plate, Ex p. Bank of Brazil*, [1893] 2 Ch. 438. **Distd.** *Re Budgett, Cooper v. Adams*, [1894] 2 Ch. 557. **Apld.** *Thames Conservators v. Smeed, Dean*, [1897] 2 Q. B. 331; *Preist v. Last* (1903), 89 L. T. 33; *Hall v. Hayman*, [1912] 2 K. B. 5. **Consd.** *Wumble v. Rosenberg*, [1913] 3 K. B. 743. **Apld.** *Sanday v. British & Foreign Marine Insco.*, [1915] 2 K. B. 781. **Consd.** *Despatie v. Tremblay*, [1921] 1 A. C. 702; *Samuel v. Dumas*, [1924] A. C. 431; *Ouellette v. Canadian Pacific Ry.*, [1925] A. C. 569. **Refd.** *MacLaren v. A.-G. for Quebec*, [1914] A. C. 258; *Quebec Ry. Light, Heat & Power Co. v. Vandry*, [1920] A. C. 662; *McDonald v. Nash*, [1924] A. C. 625. **Mentd.** *Scholfield v. Londesborough*, [1896] A. C. 511; *Clutton v. Attenborough*, [1897] A. C. 90; *Jenkins v. Coomber* (1898), 47 W. R. 48; *Vinden v. Hughes*, [1905] 1 K. B. 795; *Lewes Sanitary Steam Laundry Co. v. Barclay* (1906), 95 L. T. 444; *North & South Wales Bank v. Macbeth*, *North & South Wales Bank v. Irvine*, [1908] A. C. 137; *Holland v. Manchester & Liverpool District Banking Co.* (1909), 14 Com. Cas. 241; *Kepitigalla Rubber Estates v. National Bank of India*, [1909] 2 K. B. 1010; *R. v. Kennaway* (1916), 86 L. J. K. B. 300; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Auchteroni v. Midland Bank*, [1928] 2 K. B. 294; *Gilbert v. Gilbert & Boucher*, [1928] P. 1; *Tilling-Stevens Motors v. Kent County Council & Transport Minister* (1928), 139 L. T. 265.

2095. —.]—A code must be construed according to the natural meaning of the language used, & not on the presumption that it was intended to leave the existing law unaltered.—*NORENDRA NATH SIRCAR v. KAMALBASINI DAS* (1896), L. R. 23 Ind. App. 18, P. C.

2096. — Construction—No reference to be made to previous law—Except on special grounds.]—*BANK OF ENGLAND v. VAGLIANO BROTHERS*, No. 2094, *ante*.

PART XI.

2094 i. Codifying statutes—Object.]—The essence of a Code is to be exhaustive in the matters in respect of which it declares the law.—*KARI SINGH v. R.*

(1912), L. L. R. 40 Calo. 433.—IND.

2096 i. — Construction—No reference to be made to previous law—Except on special grounds.]—Crimes Act, 1908, is a code, & should be constructed

according to its ordinary meaning, & the history of prior legislation should not be looked at to ascertain that meaning unless such meaning is ambiguous or doubtful.—*R. v. HARE* (1910), 29 N. Z. L. R. 641.—N.Z.

2097. ————.]—An appeal to earlier law & decisions for the purpose of interpreting the provisions of a statutory code can only be justified on some special ground such as the doubtful import or previously acquired technical meaning of the language used therein.—**ROBINSON v. CANADIAN PACIFIC RY. CO.**, [1892] A. C. 481; 61 L. J. P. C. 79; 67 L. T. 505; 8 T. L. R. 722, P. C.

Annotations:—**Refd.** *Miller v. Grand Trunk Ry.*, [1906] A. C. 187; *Sanday v. British & Foreign Marine Insee.*, [1915] 2 K. B. 781; *Canadian Pacific Ry. v. Parent*, [1917] A. C. 195.

2098. ————.]—The Act which we have to construe is a consolidating & amending Act; the general objects of such Acts is to present the whole body of the statutory law on the subject in a complete form, repealing the former statutes. The principle of interpretation of a codifying Act is laid down by LORD HERSCHELL in the *Bank of England v. Vagliano*, No. 2094, *ante*, a statute codifying the law is to be interpreted as it stands, & recourse is not to be had to the former law, except upon some special ground, such, for instance, as an ambiguous provision.—**THAMES CONSERVATORS v. SMEED, DEAN & CO.**, [1897] 2 Q. B. 334; 66 L. J. Q. B. 716; 77 L. T. 325; 61 J. P. 612; 45 W. R. 691; 13 T. L. R. 521; 41 Sol. Jo. 675, C. A.

2099. ————.]—Where any difficulty arises in construing the Act, it is legitimate to consider the previous decisions which it codified, as a clue to the meaning & application of the enactment (**HAMILTON, L.J.**).—**WIMBLE, SONS & CO. v. ROSENBERG & SONS**, [1913] 3 K. B. 743; 82 L. J. K. B. 1251; 109 L. T. 294; 29 T. L. R. 752; 57 Sol. Jo. 784; 12 Asp. M. L. C. 373; 18 Com. Cas. 65, 302, C. A.

Annotations:—**Mentd.** *Northern Steel & Hardware Co. v. Batt (London)* (1917), 33 T. L. R. 516; *Colley v. Overseas Exporters*, [1921] 3 K. B. 302.

2100. ————.]—(1) Nor can the history of the Quebec Code be altogether banished from the recollection of those who administer its provisions, & it is true that under certain conditions it is legitimate to refer to the prior cases which it was intended to codify. A construction of articles which have long been before the cts., differing from that hitherto accepted, will always, even in a tribunal not bound by prior decisions, be adopted with caution.

Still, the first step, the indispensable starting-point, is to take the Code itself & to examine its words, & to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources. Of course it must not be forgotten what the enactment is, namely, a Code of systematised principles, & rules, not a body of administrative directions or an institutional exposition. Of course also the Code, or at least the cognate articles, should be read as a whole, forming a connected scheme; they are not a series of detached enactments. Of course, again, there is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the legislature. Whether particular words are plain or not is rarely susceptible of such argument. They must be read & passed upon. The conclusion must largely depend on the impression formed by the mind that has to decide (*per CUR.*).

(2) The usual rule . . . namely that effect must be given if possible to all the words used, for the

legislature is deemed not to waste its words or to say anything in vain (*per CUR.*).—**QUEBEC RAILWAY LIGHT, HEAT & POWER CO. v. VANDRY**, [1920] A. C. 662; 89 L. J. P. C. 99; 123 L. T. 1; 36 T. L. R. 296, P. C.

Annotation:—*As to* (1) **Consd.** *Montreal City v. Watt & Scott*, [1922] 1 A. C.

2101. ————.]—(1) It seems to me that when you have to construe a technical expression introduced into the legal vocabulary by a series of statutes forming one code, you naturally turn to the code for light & help, & the key to the true meaning of the expression will, I think, be found in the latest development of legislation rather than in its earliest effort (**LORD MACNAGHTEN**).

(2) The principle that in statutes words are to be taken in their legal sense has . . . a special cogency when the words in question represent only legal conceptions. The popular use of such words does not represent the primary meaning of the words, but some half understanding of them (**LORD ROBERTSON**).—**LORD ADVOCATE v. STEWART**, [1902] A. C. 344; 71 L. J. P. C. 66; 86 L. T. 603; 50 W. R. 673; 18 T. L. R. 618, H. L.

2102. ————.]—The object & intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at & must govern the rights of the parties, even though the section may to some extent have altered the prior common law (**COZENS-HARDY, M.R.**).—**BRISTOL TRAMWAYS, ETC., CARRIAGE CO., LTD. v. FIAT MOTORS, LTD.**, [1910] 2 K. B. 831; 79 L. J. K. B. 1107; 103 L. T. 443; 26 T. L. R. 629, C. A.

Annotations:—**Refd.** *Sanday v. British & Foreign Marine Insee.*, [1915] 2 K. B. 781; *Manchester Liners v. Rea*, [1922] 2 A. C. 74. **Mentd.** *Niblett v. Confectioners' Materials Co.*, [1921] 3 K. B. 387; *Sumner, Permain v. Webb* (1921), 91 L. J. K. B. 228; *Morelli v. Fitch & Gibbons*, [1928] 2 K. B. 636.

2103. ————.]—As regards the whole subject of an "extraordinary resolution," the Act of 1908 differs materially from the Companies Act, 1862 (s. 9), & its definition of that term is general; & having regard to the plain words of its enactments in this respect, those enactments must, according to the principles laid down by LORD HERSCHELL in *Bank of England v. Vagliano Bros.*, No. 2094, *ante*, although forming part of a consolidation statute, be construed apart from the provisions of the Act of 1862 for which they are substituted & the decisions thereon.—**MACCONNELL v. PRILL (E.) & CO., LTD.**, [1916] 2 Ch. 57; 85 L. J. Ch. 674; 115 L. T. 71; 32 T. L. R. 509; 60 Sol. Jo. 556.

Annotation:—**Consd.** *Gilbert v. Gilbert & Boucher*, [1928] P. 1.

2104. Consolidating statutes—Object.—**THAMES CONSERVATORS v. SMEED, DEAN & CO.**, No. 2098, *ante*.

2105. ————.]—(1) Where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act (**LORD ALVERSTONE, C.J.**).

(2) When this class of legislation is being dealt with, legislation by which statutes are from time to time amended & incorporated, & a general enactment as to a penalty is found in an amending & incorporating statute, the scope of that enactment is not to deal with particular sections of the particular amending & incorporating statute in which there is no penalty, but it is for the purpose of providing by general legislation that obedience to all the series of statutes & regulations made thereunder shall be enforced by the penalty

(LORD ALVERSTONE C.J.).—WILLINGALE v. NORRIS, [1909] 1 K. B. 57; 78 L. J. K. B. 69; 99 L. T. 830; 72 J. P. 495; 25 T. L. R. 19; 7 L. G. R. 76; 21 Cox, C. C. 737, D. C.

Annotation.—As to (2) *Consd.* Hart v. Hudson, [1928] 2 K. B. 629.

2106. ———.]—The very object of consolidation is to collect the statutory law bearing upon a particular subject, & to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed (*per* CUR.).—ADMINISTRATOR-GENERAL OF BENGAL v. PREM LAL MULLICK (1895), 1 L. R. 22 Ind. App. 107, P. C.

2107. ——— Construction—Reference may be made to previous law.]—This is, undoubtedly, a singular & very inartificial manner of re-enacting, by way of consolidation, the powers contained in & conferred by the repealed Acts, but the preamble shows that it was the intention of the Legislature (subject to such amendments as were thought requisite) to do so, & it is not otherwise done. The words “in terms of the recited Acts” cannot, indeed, amount to a re-enactment of all that had been repealed (LORD SELBOURNE, C.).—BLANTYRE (LORD) v. CLYDE NAVIGATION TRUSTEES (1881), 6 App. Cas. 273, H. L.

Annotation.—*Reid*. Lea Conservancy Board v. Button (1881), 45 L. T. 385.

2108. ———.]—MITCHELL v. SIMPSON, No. 798, *ante*.

2109. ———.]—I have here to deal, not with an Act of Parliament codifying the law, but with an Act to amend & to consolidate the law, & therefore . . . I think it is legitimate in the interpretation of the sects. in this amending & consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature (CHITTY, J.).—*Re* BUDGETT, COOPER v. ADAMS, [1894] 2 Ch. 557; 63 L. J. Ch. 847; 71 L. T. 72; 12 W. R. 551; 38 Sol. Jo. 530; 1 Mans. 230; 8 R. 424.

2110. ———.]—It is not a sound canon of construction to hold that a Consolidation Act re-enacts by implication the provisions of former Acts which have been repealed.—SYDNEY MUNICIPAL COUNCIL v. BOURKE, [1895] A. C. 433; 64

L. J. P. C. 140; 72 L. T. 605; 59 J. P. 659; 11 T. L. R. 403; 11 R. 482, P. C.

Annotations.—*Reid*. Maguire v. Liverpool Corpn. (1905), 92 L. T. 374. *Mentd.* Brabant v. King, [1895] A. C. 632; Lambert v. Lowestoft Corpn., [1901] 1 K. B. 590.

2111. ———.]—The contention is, & to that extent I think it is well founded, that in a consolidation Act, where there are ambiguous expressions, regard may be had to the previous Act of Parliament *in pari materia* for the purpose of interpreting those ambiguous expressions (LORD ALVERSTONE, C.J.).—R. v. ABRAHAM, [1904] 2 K. B. 859; 73 L. J. K. B. 972; 68 J. P. 546; *sub nom.* BOARD OF TRADE SOLICITOR v. ABRAHAM, 91 L. T. 493; 20 T. L. R. 684; 10 Asp. M. L. C. 5; 20 Cox, C. C. 715, D. C.

2112. ———.]—(1) It is no doubt a general rule of construction of statutes that the Crown is not bound by a statute unless it is named; but the Crown need not be named expressly it may be named by implication. If it is quite clear from the provisions of the statute in question that it was intended that the Crown should be bound then the absence of any express mention of the Crown will not have the effect of preventing it from being bound (BRAY, J.).

(2) The effect of an Act being a consolidating Act is that if the same words are found in the consolidating Act as were in the original Act & if an interpretation has been placed on those words in the original Act then the same interpretation must be placed on the words in the consolidating Act (BRAY, J.).—STEWART v. RIVER THAMES CONSERVATORS, [1908] 1 K. B. 893; 77 L. J. K. B. 396; 98 L. T. 900; 72 J. P. 181; 24 T. L. R. 333; 5 Tax Cas. 297.

Annotations.—*Generally*, *Reid*. Argyll v. I. R. Comrs. (1913), 7 Tax Cas. 225; Associated Newspapers v. London Corpn., [1916] 2 A. C. 429; Pole-Carew v. Craddock, [1919] 2 K. B. 393; *Re* Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury, [1924] 1 Ch. 315.

2113. ———.]—The presumption with which one starts is that a consolidating act is not intended to alter the law (SCRUTTON, L.J.).—GILBERT v. GILBERT & BOUCHER, [1928] P. 1; 96 L. J. P. 137; 137 L. T. 619; 43 T. L. R. 589; 71 Sol. Jo. 582, C. A.

2107 i. *Consolidating statutes—Construction—Reference may be made to previous law.*—If a Consolidating Act as to such matters is on its face doubtful or difficult of interpretation, the Act in force before the Consolidating Act, & purporting to be consolidated by it, may be called in aid to clear up the doubt or remove the difficulty.—BICKFORD SMITH & Co. v. MUSGROVE (1891), 17 V. L. R. 295.—AUS.

2107 ii. ———.]—In interpreting a Consolidating Statute, all those considerations which have to be omitted in regard to a code are to guide the ct. in its construction of a Consolidating Act. The previous state of the law must be ascertained & the various sects. of the repealed Acts must be compared carefully with those sects. in the Consolidating Act which purport to re-enact them. The form only of the repealed Acts is altered, but in substance does not at any time cease to be in force, the repeal of the former Act & the re-enactment of its substance occurring simultaneously. It may be that in altering the form, an alteration of the law may be inadvertently effected by omission or by reason of the wording of the substituted sects., but so far as the title of this Act throws light on the intention of the legislature it is one to consolidate only & not to consolidate & amend.—R. v. WHITE (1899), 20 N. S. W. L. R. (L.) 12.—AUS.

2107 iii. ———.]—In construing a consolidating Act, the titles & preambles of the Acts repealed may be looked to.—R. v. GOVERNOR (1900), 21 N. S. W. L. R. (L.) 278; 17 N. S. W. W. N. 185.—AUS.

2107 iv. ———.]—In dealing with a consolidating statute the ct. will consider the pre-existing law & if the statute is one affecting the liberty of the subject will not construe it as amending the statute consolidated or as altering the common law unless the intention of the legislature to make such a change in the law is shown by clear words.—NOJAN v. CLIFFORD (1901), 1 C. L. R. 429.—AUS.

2107 v. ———.]—The construction of a consolidating statute depends on its language as applied to the subject-matter considered as at the date of its enactment.—MAYBURY v. PLOWMAN (1913), 16 C. L. R. 468.—AUS.

2107 vi. ———.]—In construing the consolidated statutes, the ct. may refer to the original enactments in order to assist in arriving at a right conclusion.—WHELAN v. R. (1868), 28 U. C. R. 108.—CAN.

2107 vii. ———.]—FRONTENAC LICENSE COMRS. v. FRONTENAC COUNTY CORPN. (1887), 14 O. R. 741.—CAN.

2107 viii. ———.]—The Revised Statutes of Canada do not operate

as new laws, but as a substitution & consolidation of the Acts thereby repealed, therefore those statutes do not affect the operation of Canada Temperance Act where it had been previously adopted.—*Ex p.* DONAGHUE (1887), 26 N. B. R. 361.—CAN.

2107 ix. ———.]—When the words of a consolidating statute are clear their effect cannot be cut down by a comparison with the language of earlier statutes.—BALASUBRAHMANYA (HETTI) v. SWARNAMMAL (1913), 1 L. R. 38 Mad. 199.—IND.

2107 x. ———.]—In a consolidation Act a sect. adopted from an amending Act will be held to control a sect. adopted from the former principal Act.—McLAREN v. WALKER (1883), 2 N. Z. L. R. 150 (S. C.).—N.Z.

2107 xi. ———.]—Where an Act of Parliament professes to be a consolidation of former Acts, the latter may be looked at to assist in the construction of the former.—WALKER v. McLAREN (1884), 2 N. Z. L. R. C. A. 262.—N.Z.

2107 xii. ———.]—A consolidation Act must be construed according to its own language. If, however, its language is ambiguous or doubtful then the enactments consolidated may be usefully consulted.—PUBLIC TRUSTEE v. SHEATH, [1918] N. Z. L. R. 129.—N.Z.

Part XII.—Statutory Rules and Orders.

SECT. 1.—IN GENERAL.

Regulations for defence of the realm.]—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 545, 546, Nos. 489–490.

2114. Nature & effect.]—The rules made in pursuance of the Act, &, when allowed by His Majesty in Council, declared to have the same force & effect as the Act, must, when made, be construed with reference to the provisions of the Act itself.—*RICHARDS v. A.-G. of JAMAICA* (1848), 6 Moo. P. C. C. 381; 13 Jur. 197; 13 E. R. 730, P. C.

Annotations:—Mentd. *Haynes v. Haynes* (1861), 1 Drow. & Sm. 426; *Frewen v. Frewen* (1875), 10 Ch. App. 611, n.; *Re Price*, [1928] 1 Ch. 579.

2115. —.]—An order made under a power given in a statute is the same thing as if the statute enacted what the order directs or forbids; the statute delegates to others, here the commissioners, the power to say what shall or shall not be done (*LUSH, J.*).—*R. v. WALKER* (1875), L. R. 10 Q. B. 355; 44 L. J. M. C. 169.

Annotations:—Apld. *Willingale v. Norris*, [1909] 1 K. B. 57. *Mentd.* *Lascelles v. Onslow* (1877), 41 J. P. 436; *Wiffen v. Bailey & Romford U. D. C.* (1911), 78 J. P. 189.

2116. —.]—I . . . think . . . these documents were drawn up in proper form, having been drawn up in the form given in the rules & orders made by virtue of the statute. I am of opinion that the rules & orders have statutory authority, for not only is the authority given to certain persons by statute to draw them up, but it is provided that they shall be laid before Parliament for a certain time, & if not objected to they are then to be binding. Wherever that provision is introduced into an Act of Parliament it seems to me that the rules & orders, if not objected to by Parliament, become part of the statute (*BRETT, L.J.*).—*DALE'S CASE, ENRAGHT'S CASE* (1881), 6 Q. B. D. 376; *sub nom. Re DALE, R. v. PENZANCE* (LORD), *Re ENRAGHT*, 50 L. J. Q. B. 234; *sub nom. SERJEANT v. DALE, Ex p. DALE, PERKINS v ENRAGHT, Ex p. ENRAGHT*, 43 L. T. 769; 45 J. P. 284, C. A.; *on appeal, sub nom. ENRAGHT v. PENZANCE* (LORD) (1882), 7 App. Cas. 240, H. L.

Annotations:—Mentd. *Green v. Penzance* (1881), 6 App. Cas. 657; *Combe v. De la Bere* (1882), 22 Ch. D. 316; *R. v. Southampton J.J., Ex p. Cardy* (1906), 94 L. T. 437; *Re Hardy's Crown Brewery & St. Philip's Tavern Manchester* (1910), 103 L. T. 520; *Colchester Brewing Co. v. Tending Licensing J.J.*, [1916] 2 K. B. 126.

2117. —.]—It is within the competence of the legislature to delegate its authority; & when once that delegated authority has been properly exercised by the agent to whom it is entrusted, the sanction is that of the legislature itself, just as much as if it had been expressed in the first instance in an Act of Parliament (*KEKEWICH, J.*).—*NATIONAL TELEPHONE Co. v. BAKER*, [1893] 2 Ch. 186; 62 L. J. Ch. 699; 68 L. T. 283; 57 J. P. 373; 9 T. L. R. 246; 3 R. 318.

Annotations:—Mentd. *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Eastern & South African Telegraph Co. v. Cape Town Tram. Co.'s*, [1902] A. C. 381; *West v. Bristol Tram. Co.*, [1908] 2 K. B. 16, n.; *Hoare v. McAlpine*, [1923] 1 Ch. 167.

2118. —.]—*PATENT AGENTS INSTITUTE v. LOCKWOOD*, No. 1755, *ante*.

2119. —.]—Where an Act of Parliament declares that orders made under it are to have effect "as if enacted by this Act" orders so made & the Act itself are to be read as one statute & so construed.—*BAKER v. WILLIAMS*, [1898] 1 Q. B. 23; 66 L. J. Q. B. 880; 77 L. T. 495; 62 J. P. 21; 46 W. R. 64; 14 T. L. R. 12; 42 Sol. Jo. 13; 19 Cox, C. C. 81 D. C.

2120. —.]—You have a subsequent provisional order, that has the effect of an Act of Parliament. . . . If the provisions of that order had been inconsistent with the provisions of the other Act being in substance in relation to a special matter, that would have had the effect of supplying *pro tanto* as far as regards this subject-matter the provisions of the general Act (*CHANNELL, J.*).—*CHARING CROSS & STRAND ELECTRICITY SUPPLY CORPN. v. WOODTHORPE* (1903), 88 L. T. 772; 67 J. P. 286; 1 L. G. R. 551, D. C.

Annotations:—Mentd. *Surrey Commercial Dock Co. v. Bermondsey Corpn.*, [1904] 1 K. B. 474; *County of London Electric Supply Co. v. Perkins* (1908), 98 L. T. 870, *Moran v. Marsland*, [1909] 1 K. B. 711.

2121. —.]—*WILLINGALE v. NORRIS*, No. 2105, *ante*.

2122. —.]—The effect of Small Holdings Allotments Act, 1908 (c. 36), s. 39 (3), is that an order for the compulsory acquisition of land under that Act which has been confirmed by the Board of Agriculture & Fisheries is final & has the effect of an Act of Parliament.—*Ex p. RINGER* (1909), 73 J. P. 436; 25 T. L. R. 718; 53 Sol. Jo. 745; 7 L. G. R. 1041, D. C.

2123. —.]—(1) Under the powers given to the Local Government Board by Public Health Act, 1875 (55), s. 303 to make provisional orders repealing, altering, or amending local Acts, the board made an order which was confirmed by an Act of Parliament in 1893, an article of which, after repealing a sect. of a previous local Act dealing with nuisance arising from smoke:—*Held*: the order made by the board, having been confirmed by Parliament, was itself an independent Act of Parliament, & was not subject to or controlled by the exceptions in Public Health Act, 1875 (c. 55), s. 334, or by any similar exceptions in any of the previous local Acts.

(2) The provisions of a subsequent local Act may either expressly or impliedly repeal the provisions of a prior public general Act (*AVORY, J.*).—*BESSEMER & Co., LTD. v. GOULD* (1912), 107 L. T. 298; 76 J. P. 349; 10 L. G. R. 744; 23 Cox, C. C. 145; D. C.

2124. —.]—The rules are statutory rules, & have the force of statutory provisions (*LAWRENCE, J.*).—*Re MACARTNEY, BROOKHOUSE v. BARMAN* (1920), 36 T. L. R. 394; 64 Sol. Jo. 409.

2125. Time from which operative.]—*JOHNSON v. SARGANT & SONS*, No. 1004, *ante*.

Proof of.]—*See* EVIDENCE, Vol. XXII., pp. 325, 326, Nos. 3213–3222.

SECT. 2.—VALIDITY.

2126. When valid.]—Where a statute gave power to make regulations "for carrying it into

PART XII. SECT. 1.

2114 i. Nature & effect.]—A.-G. v. FOWLES (1871), 18 Gr. 433.—CAN.

2114 ii. —.]—Orders in Council passed in England under powers in an Imperial Statute are not in force

proprio vigore in a Colony, although the statute itself may be in force.—*REYNOLDS v. VAUGHAN* (1872), 1 B. C. R. 3.—CAN.

2114 iii. —.]—*Re R. v. SLINN* (1926), 47 Can. Crim. Cas. 77; 37 B. C. R.

2125.—CAN.

k. Regulations under Dominion Act—Supplementary to Provincial Act—Conflict between two pieces of legislation.]—R. v. EDWARDS (1919), 25 B. C. R. 492.—CAN.

full effect, so as to provide for all proceedings, matters, & things arising under & consistent with the provisions thereof, & not therein expressly provided for:”—*Held*: regulations admitted to be reasonable, & convenient, & not inconsistent with the Act, but which affected not only matters of form, but also matters of substance, were not *ultra vires*.—**BLACKWOOD v. LONDON CHARTERED BANK OF AUSTRALIA** (1874), L. R. 5 P. C. 92; 43 L. J. P. C. 25; 30 L. T. 45; 22 W. R. 419, P. C.

Annotations:—**Mentd.** *Taylor v. Russell*, [1892] A. C. 244; *London & County Banking Co. v. Goddard* (1897), 76 L. T. 277.

2127. — Rules made operative on ground of urgency.—By National Health Insurance (Collection of Contributions) Regulations, 1912, made on May 22, 1912, the Joint Committee of the several bodies of comrs. acting jointly with the Insurance Comrs. constituted under National Insurance Act, 1911 (c. 55), certified under Rules Publication Act, 1893 (c. 66), s. 2, that on account of urgency the following Regulations were to come into operation immediately, & in pursuance of the powers conferred on them by National Insurance Act, 1911 (c. 53), & the National Insurance (Joint Committee) Regulations, 1912, they made the said Regulations to come into operation forthwith as Provincial Regulations. National Insurance Act, 1911 (c. 55), came into force on July 15, 1912:—*Held*: assuming the Joint Committee & the Insurance Comrs. were not a Govt. department, & consequently were not a rule-making authority as defined by Rules Publication Act, 1893 (c. 53), & they, therefore, had no power by certifying urgency to bring the Regulations into operation on May 22, 1912, the Regulations had been duly made under the powers conferred by National Insurance Act, 1911 (c. 55), ss. 7, 65, & clause 5 (c) of the National Insurance (Joint Committee) Regulations, 1912, & were as from the date when the Act came into force valid & enforceable Regulations.—*R. v. BAGGALLAY, HURLOCK v. SHINN, R. v. HEDDERWICK, MORRIS v. ASHTON*, [1913] 1 K. B. 290; 82 L. J. K. B. 391; 108 L. T. 254; 77 J. P. 97; 29 T. L. R. 133; 11 L. G. R. 367; 6 B. W. C. C. N. 15; 23 Cox, C. C. 288, D. C.

Annotation:—**Mentd.** *Fishwick v. Gyani* (1925), 132 L. T. 761.

2128. — Inconsistent with principles of law.—Rules made under statutory authority although express may in my opinion be inoperative because they are *ultra vires* or inconsistent with the principles on which English law is based (**VAUGHAN WILLIAMS, L.J.**).—*R. v. LOCAL GOVERNMENT BOARD, Ex p. ARLIDGE*, [1914] 1 K. B. 160; 83 L. J. K. B. 86; 109 L. T. 651; 78 J. P. 25; 30 T. L. R. 6; 11 L. G. R. 1186, C. A.; *on appeal, sub nom. LOCAL GOVERNMENT BOARD v. ARLIDGE*, [1915] A. C. 120, H. L.

Annotations:—**Refd.** *R. v. Central Tribunal, Ex p. Parton* (1916), 86 L. J. K. B. 799. **Mentd.** *Hall v. Manchester Corp.*, (1915), 84 L. J. Ch. 732; *R. v. Amphlett*, [1915] 2 K. B. 223; *Cassel v. Inglis*, [1916] 2 Ch. 211; *Clements v. County of Devon Insee. Committee*, [1918] 1 K. B. 94; *De Verteull v. Knaggs*, [1918] A. C. 557; *R. v. London Appeal Tribunal, Ex p. Sparrow* (1918), 62 Sol. Jo. 383; *Dowling v. G. E. Ry.* (1919), 88 L. J. K. B. 380; *R. v.*

Housing Appeal Tribunal, [1920] 3 K. B. 334; *Everett v. Griffiths*, [1921] 1 A. C. 631; *Wilson v. Esquimalt & Nanaimo Ry.*, [1922] 1 A. C. 202.

2129. — Ultra vires.—*R. v. LOCAL GOVERNMENT BOARD, Ex p. ARLIDGE*, No. 2128, *ante*.

— **Regulations applicable to royal parks.**—*See OPEN SPACES*, Vol. XXXVI., p. 252, Nos. 44-46.

— **Rules of Court.**—*See Sect. 4, post*.

SECT. 3.—CONSTRUCTION.

Sea Regulations.—*See SHIPPING*, Vol. XLI., p. 706, Nos. 5411-5413.

2130. Mode of construction—Canons applicable to written instruments—Where no special interpretation by usage.—Something has been said about the practice having put an interpretation upon the rule; & if there had been a long enough time & parties had been acting upon a uniform notion of the practice, I should have been excessively reluctant to reverse it . . . but certainly it has not been shown that there was any practice, any *contemporanea expositio* of these rules, which would be admissible to lead us to a construction of them. I therefore come back to saying that looking at the construction of the rules according to the ordinary canons of construction applied to written instruments, I think that the Ct. of Appeal have put the right construction upon them (**LORD BLACKBURN**).—*DANFORD v. McANULTY* (1883), 8 App. Cas. 456; 52 L. J. Q. B. 652; 49 L. T. 207; 31 W. R. 817, H. L.

2131. — Ordinary meaning of English language.—*R. S. C. 50, r. 8*, must be construed according to the ordinary meaning of the English language unless there is something in the context which shows that it ought not to be so construed (**LORD ESHER, M.R.**).—*GEBRUDER NAF v. PLOTON* (1890), 25 Q. B. D. 13; 59 L. J. Q. B. 371; 63 L. T. 328; 38 W. R. 566, C. A.

2132. — Not in contravention of statute.—The Act of Parliament is plain & the rule must be interpreted so as to be reconciled with it or if it cannot be reconciled the rule must give way to the plain terms of the Act (**JAMES, L.J.**).—*Re DAVIS, Ex p. DAVIS* (1872), 7 Ch. App. 526; 41 L. J. Bey. 69; 27 L. T. 53; 20 W. R. 791, L. J. *Annotation*.—**Mentd.** *Re Whitnall, Ex p. Whitnall* (1882), 20 Ch. D. 438.

2133. — — — — —.—*SCHNEIDER v. BATT*, No. 2141, *post*.

2134. — — — — —.—If there were any inconsistency between Jud. Act, 1873 (c. 66), s. 49, & *R. S. C.*, Ord. 1, r. 2, the rule must give way to the statute (**LINDLEY, J.**).—*HARTMONT v. FOSTER* (1881), 8 Q. B. D. 82; 51 L. J. Q. B. 12; 45 L. T. 429; 30 W. R. 129, C. A.

Annotation:—**Mentd.** *Field v. Rivington* (1889), 5 T. L. R. 642.

2135. — — — — —.—*RICHARDS v. A.-G. OF JAMAICA*, No. 2114, *ante*.

2136. — — — — —.—A rule of ct. made under statutory power should not, if another construc-

Comrs., [1915] S. C. 504; 52 Sc. L. R. 378; [1915] 1 S. L. T. 217.—**SCOT.**

PART XII. SECT. 3.

2132 i. Mode of construction—Not in contravention of statute.—*TONNER v. BAIRD (W.) & Co., LTD., GALLACHER v. BAIRD (W.) & Co., LTD.*, [1927] S. C. 870.—**SCOT.**

1 Effect of Acts Shortening Act on Orders in Council.—*TERRY v.* (1854), 2 Legge, 819.—**AUS.**

PART XII. SECT. 2.

2128 i. When valid.—A statute required that regulations made under it should be published in the Gazette & laid before Parliament within fourteen days of their approval, or if Parliament was not then sitting within ten days of the commencement of the next session & after such approval & publication as aforesaid should have the force of law. The regulations were made in 1905 & duly gazetted, but

never laid before Parliament:—*Held*: the laying of the regulations before Parliament was part of the publication & was essential to give them permanent validity, & the condition of laying them before Parliament was a matter of substance & therefore mandatory & consequently a conviction for breach of the regulation was bad.—*BAIN v. THORNE* (1916), 12 Tas. L. R. 57.—**AUS.**

2128 ii. — — — — —.—*GLASGOW INSURANCE COMMITTEE v. SCOTCH INSURANCE*

Sect. 3.—Construction. Sect. 4. Part XIII.]

tion of it is possible, be construed as repealing or limiting the provisions of an Act of Parliament.—

PERRY v. LONDON GENERAL OMNIBUS CO., [1916] 2 K. B. 335; 85 L. J. K. B. 1609; 115 L. T. 101; 32 T. L. R. 583, C. A.

Annotation:—*Mentd.* Cook v. Imperial Tobacco Co., [1922] 2 K. B. 158.

SECT. 4.—RULES OF COURT.

Construction of Judicature Acts.]—See COURTS, Vol. XVI., pp. 171 *et seq.*

2137. Rules of Supreme Court—Repeal by Inconsistent Act.]—In this case the rule of ct. is overridden by the statute. *Leges posteriores priores contrarias abrogant* (TINDAL, C.J.).—HARRIS v. ROBINSON (1846), 2 C. B. 908; 7 L. T. O. S. 140; 135 E. R. 1203.

2138. ———.]—Here the time for doing the Act in question has been fixed by Act of Parliament. The provision of the Act of Parliament, that it shall be done within the time so fixed, is express. No exception is made by the legislature for the case which has occurred. A general order of the Ct. of Ch. cannot vary the express provisions of an Act of Parliament, & I apprehend that when the time for doing an act or taking a proceeding is expressly fixed by Act of Parliament, no general order of this ct. can enable the act or proceeding to be done or taken after the expiration of the time so fixed by Act of Parliament (PAGE WOOD, V.-C.).—FLOWER v. BRIGHT (1862), 2 John. & H. 590; 10 W. R. 558; 70 E. R. 1194.

2139. ——— Whether authority statutory.]—GARNETT v. BRADLEY, No. 1968, *ante*.

2140. ———.]—The orders under Jud. Act, which have the effect of an Act of Parliament, have no doubt varied the law (COTTON, L.J.).—*Re* YOUNG, *Ex p.* YOUNG (1881), 19 Ch. D. 124; 51 L. J. Ch. 141; 45 L. T. 493; 30 W. R. 330, C. A.

Annotations:—*Reid.* Jackson v. Litchfield (1882), 8 Q. B. D. 474; Worcester Banking Co. v. Thomas (1887), 3 T. L. R. 708; Shepherd v. Hirsch, Pritchard (1890), 45 Ch. D. 231; *Re* Wenham, *Ex p.* Battams, [1900] 2 Q. B. 698. *Mentd.* Davis v. Morris (1883), 10 Q. B. D. 436; Munster v. Ralston (1883), 11 Q. B. D. 435; Ellis v. Wadson, [1899] 1 Q. B. 711.

2141. ———.]—It has been argued that the Rules of Ct. cannot limit the operation of Jud. Act, 1873 (c. 66), s. 24 (3); but the rules have received a parliamentary sanction. It may be granted that the rules ought not to be construed so as to contravene the provisions of the statute; but it is to be recollected that Sect. 21, sub-sect. 3, is permissive & not obligatory (BRAMWELL, L.J.).—SCHNEIDER v. BATT (1881), 8 Q. B. D. 701; 50 L. J. Q. B. 525; 45 L. T. 371; 30 W. R. 420, C. A. Annotation:—*Reid.* Baxter v. France (No. 2), [1895] 1 Q. B. 591.

2142. ———.]—Jud. Acts gave the judges powers to make rules having a statutable force. . . . Though the judges had no power to make rules altering any statute, they had power to make rules dealing with any principle of law which affected rules of procedure & practice (BRETT, M.R.).—SNELLING v. PULLING (1885), 29 Ch. D. 85; 52 L. T. 335, C. A.

Annotation:—*Reid.* *Re* Mills' Estate (1886), 55 L. T. 465.

2143. ———.]— . . . The rules which have the force of statutory authority (COZENS-HARDY, L.J.).—MCHEANE v. GYLES, [1902] 1 Ch. 287; 71 L. J. Ch. 183; 86 L. T. 1; 50 W. R. 376, C. A.

Annotations:—*Mentd.* Barclays Bank v. Tom, [1923] 1 K. B. 221; Akt. Ocean v. Harding, [1928] 2 K. B. 371.

2144. ———.]—The rules of ct. are to be regarded as having the force of a statute which by Jud. Act, 1875 (c. 66), s. 10, & the similar sections of later Acts they presumably have (BANKES, L.J.).—SMYTHE v. WILES, [1921] 2 K. B. 66; 90 L. J. K. B. 1278; 124 L. T. 688; 37 T. L. R. 256; 65 Sol. Jo. 258, C. A.

Annotations:—*Mentd.* Davey v. Robinson, [1923] 1 K. B. 563; Shrager v. Dighton, [1924] 1 K. B. 274; Hunter v. Städtische Hochseefischerei Gemeinnützige Gesellschaft, [1925] 2 K. B. 493; Pringle v. Hales, [1925] 1 K. B. 573.

2145. ———.]—The rules which are made & which are known to us in the Annual Practice are made under the statutory authority of Judicature Acts & have the force of statutory enactments & to say that the procedure under Mercantile Law Amendments Act, 1856 (c. 96), s. 5, is released from & not restricted by Common Law Procedure Act, 1852 (c. 76), does not get rid of the authority so attached to the rules of the ct. made under a later statutory authority, namely Judicature Acts, & we find that this rule 23 under R. S. C., Ord. 42, stands based upon statutory authority of recent date & later than Mercantile Law Amendment Act, 1856 (c. 96) (POLLOCK, M.R.).—KAYLEY v. HOTHERSALL, [1925] 1 K. B. 607; 94 L. J. K. B. 348; 132 L. T. 468; 69 Sol. Jo. 310, C. A.

2146. ———.]—The appeal is made a rehearing by rules which have the force of statute (LORD SUMNER.).—S.S. HONTESTROOM v. S.S. SAGAPORACK, S.S. HONTESTROOM v. S.S. DURHAM CASTLE, [1927] A. C. 37; 95 L. J. P. 153; 136 L. T. 33; 17 Asp. M. L. C. 123; *nom.* THE SAGAPORACK, THE HONTESTROOM, 42 T. L. R. 741, H. L.

Annotation:—*Mentd.* The Backworth, [1927] P. 256.

2147. ——— Whether ultra vires the Judicature Acts.]—In an action by the G. Banking co. against P. to recover £320 upon a guarantee given by him to plff. co. for the accommodation of C., a married woman, deft. served C. with the usual third-party notice, & thirteen days afterwards, having heard nothing from C., paid into ct. £291 10s., which was accepted by plff. co. in full satisfaction of their claim. Deft. then took out a summons for directions under R. S. C., Ord. 16, r. 52, on which, C. declining to disclose any defence, a judge at chambers entered judgment in favour of deft. against C., ordering an inquiry as to her separate estate & declaring it chargeable with the payment of the sum paid into ct. by deft.:—*Held*: R. S. C., Ord. 16, r. 2, was not *ultra vires* with respect to Jud. Act, 1873 (c. 66), s. 24 (3), as taking away from the third party any rights in respect of her defence which she would have had if she had been duly sued in the ordinary way by deft. the rule simply providing a different procedure from the usual delivery of pleadings.—GLOUCESTERSHIRE BANKING CO. v. PHILLIPPS (1884), 12 Q. B. D. 533; 53 L. J. Q. B. 493; 50 L. T. 360; 32 W. R. 522, D. C.

Annotation:—*Mentd.* Bursill v. Tanner (1881), 50 L. T. 589.

2148. ——— Do not alter rights of parties.]—The orders & rules under Jud. Act, 1873 (c. 66), & Jud. Act, 1875 (c. 77), are matters of procedure & are not intended to alter the law or the rights of the parties (BRAMWELL, L.J.).—PELLAS v. NEPTUNE MARINE INSURANCE CO. (1879), 5 C. P. D. 34; 49 L. J. Q. B. 153; 42 L. T. 35; 28 W. R. 405; 4 Asp. M. L. C. 213, C. A.

Annotations:—*Mentd.* Gray v. Webb (1882), 21 Ch. D. 802; Baker v. Adam (1910), 102 L. T. 248; Pickersgill v. London & Provincial Marine & General Insce., [1912] 3 K. B. 614; Ellis v. Torrington (1919), 89 L. J. K. B.

PART XII. SECT. 4.

m. Rules of Supreme Court—Whether retroactive.]—BANK OF BRITISH COLUMBIA v. TRAPP (1904), 7 B. C. R. 354.—CAN.

2149. —.]—Jud. Acts & Rules are not the foundation of these garnishee proceedings, which had their origin in C. L. P. Act, 1854 (c. 125). The new rules cannot take away the rights given under that Act by implication, &, if they seemed to do so expressly, they would, I think, be *ultra vires* (MANISTY, J.).—GOODMAN v. ROBINSON (1880), as reported in 55 L. T. 811; 35 W. R. 274; 3 T. L. R. 212, D. C.

Annotations:—**Mentd.** Forster v. Baker, [1910] 2 K. B. 636; *Re* Freshwater, Yarmouth & Newport Ry. (1913), 29 T. L. R. 568.

2150. ——— Whether operative to repeal provisions of earlier statutes—Giving special costs in particular cases.]—Pltfs. sued deft. under 3 & 4 Will. 4, c. 15, s. 2, to recover penalties for infringements of their dramatic copyright in a stage play; deft. paid into ct. £8, the amount of four penalties of 40s. each, & the amount so paid in was taken out by pltfs. in satisfaction. Upon taxation of costs, a master decided that pltfs. had recovered less than £10, in an action of tort within County Cts. Act, 1888 (c. 43), s. 116, & were, therefore, not entitled to any costs:—*Held*: assuming there was no distinction between an indemnity under Limitations of Actions & Costs Act, 1842 (c. 97),

s. 2, & costs in the ordinary sense, the R. S. C. did not operate to repeal the provisions of special statutes giving special costs in particular cases, & pltfs. were, therefore, entitled to have their costs taxed.—REEVE v. GIBSON, [1891] 1 Q. B. 652; 60 L. J. Q. B. 451; 64 L. T. 141; 39 W. R. 420; 7 T. L. R. 285, C. A.

2151. ———.]—KAYLEY v. HOTHERSALL, No. 2145, *ante*.

—.]—*See, also*, COURTS, Vol. XVI., pp. 187–189, Nos. 931–949.

— Construction of rules.]—*See* Nos. 2130–2136, *ante*.

2152. County Court Rules—Statutory authority.]—The answer . . . depends upon the construction of County Courts Act, 1888 (c. 43), ss. 118, 119, & the rules governing the scales of costs given in the Appendix to the County Ct. Rules, 1889. Those rules . . . have, I assume, a statutory force (LORD ESHER, M.R.).—*Re* LANGLOIS & BIDEN, [1891] 1 Q. B. 349; 60 L. J. Q. B. 123; 63 L. T. 816; 39 W. R. 181; 7 T. L. R. 148, C. A.

Annotation:—**Mentd.** *Re* Briggs, [1903] 2 K. B. 156.

—.]—*See, also*, COUNTY COURTS, Vol. XIII., p. 556, Nos. 1131–1138.

Part XIII.—Bye-Laws.

See CORPORATIONS, Vol. XIII., pp. 325–338; PUBLIC HEALTH, Vol. XXXVIII., pp. 155–167, Nos. 49–124.

Effect of repeal of statute.]—*See* No. 2015, *ante*.

STATUTES OF LIMITATION

See LIMITATION OF ACTIONS.

STATUTORY COMPANIES

See COMPANIES.

STEALING.

See CRIMINAL LAW AND PROCEDURE.

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STOCK EXCHANGE.

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Part I.—Definitions.

1. Broker — Whether payment or receipt of money incidental to character of broker.]—Declaration on a bill of exchange by drawer against acceptor. Plea, to the whole declaration, that deft. retained pltf. to act as his broker in the city of London, & as such broker to enter into contracts in the city of London for deft. in the purchase of stock & shares, & to pay in & about completing such contracts & purchases certain moneys that in pursuance of such retainer, pltf. did, as such broker, in the city of London, enter into certain contracts for the purchase of shares, & did, by virtue of such retainer as such broker, & as incidental thereto, pay for deft. in & about completing such contracts & purchases, certain moneys; that pltf. was not at the time of the retainer & employment, & making such contracts & purchasing such shares, or paying such moneys, a broker duly licenced within the city of London; & that the bill was accepted by deft. & received by pltf. on account of money due from deft. to pltf., for his having as such broker entered into the contracts, & paid such moneys, etc. :—*Held*: ill, on general demurrer, the payment of money not being incidental to the character of a broker, & the plea being an answer only to so much of pltf.'s demand as consisted of a remuneration for his services as broker.—*PIDGEOON v. BURSLEM*

(1849), 3 Exch. 465; 18 L. J. Ex. 193; 154 E. R. 927.

Annotations —*Apld.* *Jessopp v. Lutwyche* (1854), 10 Exch. 614. *Consd.* *Smith v. Lindo* (1858), 5 C. B. N. S. 587.

2. — — —.]—The dealing in or buying & selling for reward of shares in English or foreign joint-stock banks or cos., or the debt, stock, or securities of foreign govts., is an acting & assuming to act as a broker, within 57 Geo. 3, c. 60.—*SCOTT v. JACKSON* (1865), 19 C. B. N. S. 134; 144 E. R. 737.

3. — — —.]—A witness stated that he took one S. to an office in the city of London used by deft., & that upon that occasion four memoranda were made by deft. each of the sale by S. of £1,000 stock to a person whose name did not transpire; that nothing was handed over at the time; & that he did not see any money pass :—*Held*: evidence for the jury of an acting by deft. as a broker, within 6 Anne, c. 16, & 57 Geo. 3, c. 60.—*SCOTT v. NORTH* (1867), L. R. 2 C. P. 270; 15 L. T. 508.

—*See, generally*, AGENCY, Vol. I., p. 279, Nos. 108–115.

4. Cover.]—*STUBBS v. SLATER*, No. 113, *post*.

Continuation.]—*See* Part IV., Sect. 3, sub-sect. 1, *post*.

Contango.]—*See* No. 271, *post*.

Dealing in shares in joint stock companies—Whether trading within bankruptcy laws.]—*See* BANKRUPTCY, Vol. IV., p. 20, No. 118.

Part II.—Constitution.

SECT. 1.—IN GENERAL.

See Deed of Settlement, 1886.

5. A voluntary association—Regulated by a deed of settlement.]—*WEINBERGER v. INGLIS*, No. 12, *post*.

6. Rights of proprietors — Registration — As having equitable interest in land.]—Claimant was one of 1040 proprietors of the London Stock Exchange, which was freehold property. The property was held by trustees, in whom were vested large powers of management under a deed of settlement. The deed provided that each share should be transmissible as personal estate. The profits of the undertaking, which were derived almost entirely from fees paid for admission to the Exchange & charges made for the use of desks & other accommodation, & from dividends & interest on securities, were distributed by the trustees as they thought proper from time to time among the proprietors. Claimant contended that as a proprietor he was entitled to be placed upon the register as having an equitable interest in the land & rents & profits of the Stock Exchange :—*Held*: by the deed of settlement the proprietors had vested the freehold in the trustees free from any equitable interest of the proprietors in the land; they were only entitled to the profits of the undertaking; & the claim must be disallowed.—*WATSON v. BLACK* (1885), 16 Q. B. D. 270; *Colt*. 418; 55 L. J. Q. B. 31; 31 W. R. 274; *sub nom.* *WATSON v. BLACK*, *FRISBY v. BLACK*, 4 L. T. 17 2 T. L. R. 26, D. C.

7. — Profits of undertaking.]—*WATSON v. BLACK*, No. 6, *ante*.

8. Telegraph supplying news to non-member—Prohibition by stock exchange of such supply—Discontinuance by company—Liability for breach of duty.]—Defts. were a co., incorporated under Companies Act, 1862 (c. 89), & licenced by the Postmaster-General under Telegraph Act, 1869 (c. 112), s. 5, to establish telegraphs within the limits of their districts, which included the London Stock Exchange, for the purpose of simultaneously transmitting news to their subscribers. This news consisted, amongst other things, of current fluctuations of prices on the Stock Exchange, & was by the permission of the Stock Exchange collected there by deft.'s agents & distributed from deft.'s offices to the offices of their subscribers by means of tape recording instruments supplied by defts. Pltf. was not a member of the Stock Exchange & was in the habit of advertising for business. Defts. had entered into three separate contracts with pltf. for which they undertook to supply him with three of their instruments. By the rules of the Stock Exchange its members were not allowed to advertise, & the Stock Exchange having required defts. to cease supplying outside brokers who advertised with the special information collected in the building, defts. disconnected the three instruments from the supply of that class of news :—*Held*: the licence of defts. was neither a monopoly at common law nor part of the monopoly conferred on the Postmaster-General by Telegraph Act, 1869 (c. 112), & therefore there was no duty imposed by the licence for the non-performance of which pltf. could sue defts.—*COCHRANE v. EXCHANGE TELE-*

PART I.

a. "Marking up."]—*JARVIS v. CONNELL* (1919), 44 O. L. R. 264; 15 O. W. N. 203.—CAN.

Sect. 1.—In general. Sects. 2 & 3. Part III. Sect. 1.]

GRAPH CO., LTD. (1896), 65 L. J. Ch. 334; 12 T. L. R. 197; 40 Sol. Jo. 275.

SECT. 2.—MEMBERSHIP OF STOCK EXCHANGE.

See Stock Exchange Rules, 1911, rr. 21–50.

9. Expulsion of member—Whether court will interfere—Injunction.]—BROWN v. STOCK EXCHANGE COMMITTEE (1892), 36 Sol. Jo. 752.

10. Refusal of Committee to re-elect member—Whether committee must give reasons for decision—Discretion exercised bonâ fide.]—A member of the Stock Exchange is elected for one year only & comes up annually for re-election under r. 21, which provides that the Committee shall on the first Monday in Mar. proceed to re-elect such members & admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on Mar. 25 then instant. R. 35 provides that a member intending to object to the re-election of a member, the admission of a candidate, or the readmission of a defaulter shall communicate the grounds of his objection to the Committee by letter previously to the re-election or ballot:—*Held*: a committee who in the bonâ fide exercise of their discretion under r. 21, do not deem an applicant eligible for re-election are not bound to give any reasons for their decision & *semble*: even if an individual objection were lodged under r. 35 they would not be bound to acquaint applt. with the particulars of that objection so as to enable him to answer it.—CASSEL v. INGLIS, [1916] 2 Ch. 211; 85 L. J. Ch. 569; 114 L. T. 935; 32 T. L. R. 555.

Annotations:—*Distd.* Weinberger v. Inglis (No. 2), [1918] 1 Ch. 517. *Refd.* *Re Halstead, Ex p. Richardson*, [1917] 1 K. B. 695; Weinberger v. Inglis, [1918] 1 Ch. 133.

11. ——— Individual objection to re-election.]—CASSEL v. INGLIS, No. 10, *ante*.

12. ——— Grounds for refusal—Enemy birth.]—The proprietors of the Stock Exchange are a voluntary assocn. regulated by a deed of settlement, & the members are the persons from time to time admitted to attend, & in their own right to transact business at, the Stock Exchange in accordance with the deed. The deed of settlement vested the building in trustees & managers, to be used as a market for stocks & shares, & provided that a committee for general purposes should be annually elected by the members, & that the committee should admit such persons as they should “think proper” to frequent the Stock Exchange for transacting therein the business of a stockbroker or jobber for the term of one year, on payment of the entrance fee, if any, & annual subscription fixed by the trustees & managers; & it empowered the committee to make rules not inconsistent with the provisions of the deed respecting, (*inter alia*), the admission, expulsion & suspension of members. By rule 21 (1) of the Rules of the Stock Exchange made under this power, “the committee shall on the first Monday in Mar.

proceed to re-elect such members . . . as they shall deem eligible to be members of the Stock Exchange, for one year, commencing on Mar. 25, then instant.”

In Mar. 1917, pltf. a naturalised British subject of German birth, who had been a member of the Stock Exchange since 1895, applied for re-election. Certain members, who had formed an organisation called the Stock Exchange Anti-German Union, lodged an objection under rule 35 against re-election of pltf., on the ground of enemy birth. At the invitation of the Committee pltf. showed cause against the objection by letter & at an interview, & he stated numerous facts in proof of his loyalty with a view to displacing the objection. The committee, however, refused his application. Of 107 members of enemy birth 50 were re-elected & 57 were rejected. Pltf. brought an action to impugn the decision of the committee on the ground that it was arbitrary & capricious & based on irrelevant considerations. The committee by their defence alleged that they did not re-elect pltf. because they did not deem him eligible to be a member of the Stock Exchange for the year in question & for no other reason:—*Held*: assuming that the committee owed any duty to the members as regards re-election, (1) the proper inference from the facts was that the refusal of the committee had proceeded solely on the ground of enemy birth, as to which the pltf. had been heard; (2) they had bonâ fide exercised the discretion conferred upon them by the deed of settlement & the rules, & were not shown to have acted arbitrarily or capriciously; & the ct. had no jurisdiction to interfere with their decision.—WEINBERGER v. INGLIS, [1919] A. C. 606; 88 L. J. Ch. 287; 121 L. T. 65; 35 T. L. R. 399; 63 Sol. Jo. 461, H. L.

13. ——— Whether court will interfere—Committee acting bonâ fide.]—WEINBERGER v. INGLIS, No. 12, *ante*.

14. Re-election an administrative act.]—The duty of the committee with regard to re-electing members is an ordinary act of management & administration involving an exercise of discretion, but it is not a judicial or quasi-judicial act, & if the committee act with perfect honesty & good faith their decision cannot be questioned.—WEINBERGER v. INGLIS (No. 2), [1918] 1 Ch. 517; 87 L. J. Ch. 345; 118 L. T. 769; 34 T. L. R. 337; 62 Sol. Jo. 450, C. A.; *affd.*, [1919] A. C. 606, H. L.

SECT. 3.—THE COMMITTEE AND ITS POWERS.

See Deed of Settlement, 1886, Sect. xii, clause 95; Stock Exchange Rules, 1911, rr. 5, 19–50.

15. As to rules & regulations—Dispensation with strict enforcement—Alteration of date for completion.]—(1 The Committee of the London Stock Exchange has jurisdiction under rule 19 of the Rules & Regulations of the Stock Exchange to pass a resolution that the buying in of shares in a security shall be suspended, inasmuch as the rule contemplates that the Committee have it in their power to alter the dates when a particular thing

PART II. SECT. 2.

b. Sale of seat on Stock Exchange—Whether sale may be ordered under writ of sequestration.]—LONDON & CANADIAN LOAN & AGENCY CO. v. MORPHY (1885), 10 O. R. 86; *affd.* (1888), 14 A. R. 577.—CAN.

c. ——— Whether Stock Exchange members have prior right to proceeds of sale—On insolvency of member.]—CLARKSON v. TORONTO STOCK EXCHANGE (1887), 13 O. R. 213.—CAN.

d. Whether rules intra vires.]—Bye-laws which give the governing committee of a stock exchange the right to sell a member's seat at the board, for cause of insolvency, are reasonable & intra vires.—MCIVER v. MONTREAL STOCK EXCHANGE (1888), M. L. R. 4 S. C. 112.—CAN.

e. Expulsion of member—“On bankruptcy or insolvency”—Whether “compounding” within rules.]—TEMPLE v. TORONTO STOCK EXCHANGE (1885),

8 O. R. 705.—CAN.

f. ——— Right of member to be heard before expulsion.]—MAHOMED KALIMUDDIN v. STEWART (1920), 1 L. R. 47 Cal. 623.—IND.

PART II. SECT. 3.

g. Whether court may intervene in decision of member of stock exchange when rules intra vires.]—MCIVER v. LA BOURSE DE COMMERCE DE MONTREAL (1888), 17 R. L. O. S. 696.—CAN.

may be done. But the Committee has no jurisdiction to pass a resolution "that when the buying in of any security is suspended by order of the committee the clause in the rules relating to the release of intermediaries shall remain inoperative until such suspension is removed," inasmuch as such a resolution amounts to the entire alteration of the contract by placing upon the buyer of shares the obligation of waiting, possibly for ever, leaving to the vendors the right to tender their shares when they please.

(2) Where there is a sale of shares prompt & proper delivery is essential.—*UNION CORPN., LTD. v. CHARRINGTON & BRODRICK* (1902), 19 T. L. R. 129; 8 Com. Cas. 99.

Annotations:—As to (1) Folld. Benjamin v. Barnett (1903) 19 T. L. R. 564; *Barnard v. Foster*, [1915] 114 L. T. 36..

16. ———.—[Rule 20 of the Rules of the London Stock Exchange, which provides that the Stock Exchange Committee, on complying with certain formalities, "may dispense with the strict enforcement of any of the rules or regulations," does not empower the Committee to make any rule or regulation altering the date for the completion of a contract.—*BARNARD v. FOSTER*, [1915] 2 K. B. 288; 84 L. J. K. B. 1244; 31 T. L. R. 307; 21 Com. Cas. 123; *on appeal, sub nom. FOSTER v. BARNARD*, [1916] 2 A. C. 154.

17. ———.—[Whether resolution may alter contract between parties.]—*UNION CORPN., LTD. v. CHARRINGTON & BRODRICK*, No. 15, *ante*.

18. ———.—(1) Where a client who is not a member of the Stock Exchange instructs a broker who is a member of the Stock Exchange to purchase shares for him, & the broker accordingly purchases them & receives them from the seller within the time allowed by the rules of the Stock Exchange & pays for them, although it is the broker's duty to tender the shares to the client within a reasonable time, it is no answer to his claim for an indemnity for the client to say that the shares were not delivered in time, although that might be a good ground for a counterclaim.

(2) Where, under such circumstances, the broker tenders to the client a portion only of the total number of shares comprised in the contract note,

the client is bound to accept delivery of the portion so tendered or to indemnify the broker against the price he has paid for them, although there is no valid tender by the broker of the remainder of the shares.

(3) But where the seller does not tender the shares to the broker within the time allowed by the rules of the Stock Exchange, & the client gives notice to the broker that he will not accept delivery after such time has elapsed; if the broker does then accept them & pays the seller he will not be entitled to be indemnified by the client in respect of the sum he has paid for the shares. Nor will a resolution of the Stock Exchange that the broker is to pay the jobber for the shares when delivered be binding on the client or, *semble*, on the broker, inasmuch as the committee cannot by passing a resolution make valid a contract which has been broken.

(4) Whereas the printed rules & regulations of the Committee of the Stock Exchange are binding on a person who instructs a broker to deal with him on the market, he is not bound by a custom, as such, not forming part of those printed rules & regulations, in the absence of a special contract, without evidence, from the course of his dealings or other evidence, of his being acquainted with such a custom. No custom & certainly not one that is unreasonable, is binding upon a person merely because he instructs a broker on the Stock Exchange to enter into transactions with him. With regard to the written rules & regulations it is different. It is like a notice on any other contract. There are the existing rules for actual inspection, & if a person does not choose to look at them so much the worse for him if it turns out he loses by it (*KENNEDY, J.*).—*BENJAMIN v. BARNETT* (1903), 19 T. L. R. 564; 8 Com. Cas. 244.

Annotation:—As to (3) Apld. Barnard v. Foster, [1915] 2 K. B. 288.

— See, generally, Part IV., Sect. 1, *post*.

Re-election.—See Nos. 10–14, *ante*.

Expulsion.—See No. 9, *ante*.

Publication of official lists.—See Stock Exchange Rules, 1911, rr. 151–158.

Part III.—Relation between Parties to Stock Exchange Transactions.

SECT. 1.—IN GENERAL.

19. London broker & country broker—Authority of London broker to exercise discretion—Whether liable for naming country broker as transferee.]—Pltf., through his London broker, sold, on May 11, 1866, 11 Overend & Gurney shares for the account day, on May 15, to P. & co., brokers on the Stock Exchange, who had previously, on Apr. 27, been instructed by M., deft., a country broker, to purchase for him 1,000 O. & G. shares for the same account day, of which 1,000 shares the 11 shares in question formed part. O. & G. having stopped payment on May 10, M., deft., who had purchased the above 1,000 shares for S., a customer, finding that S. was insolvent, & could & would pay nothing, wrote as follows to his brokers, P. & co., "Our client cannot meet his engagements as regards the 1,000 Overends, & we, unfortunately, cannot meet them; therefore we authorise you to do whatever you think best"; & at a personal

interview on the same day M. prohibited P. & co. from using or in any way recognising the name of S. in the transaction. On the same day, May 14, P. & co. accordingly gave to pltf.'s broker the name of deft. M. as the ultimate purchaser & transferee, which was accepted, & the transfer to him was duly prepared & executed. In an action by pltf. against deft. upon a contract of indemnity against future calls on the said 11 shares:—*Held*: deft.'s letter to P. & co. gave them a general & unlimited authority to exercise their discretion in the matter, & inasmuch as, if any name were given at all, it must be either their own name or that of M., they were warranted by the terms of their authority in passing the name of deft.—*STREET v. MORGAN* (1869), 21 L. T. 432.

Annotations:—Refd. Davis v. Haycock (1869), L. R. 4 Exch. 373; *Bowring v. Shepherd* (1871), L. R. 6 Q. B. 309.

20. ———.—Advice given by London broker—Liability for loss due to acting on advice.]—Pltf.,

Sect. 1.—In general. Sect. 2: Sub-sect. 1.]

who were London stockbrokers, acted as agents for defts., who were country stockbrokers, in the purchase of shares which were to be taken up or carried over by defts. Shortly thereafter, pltfs. strongly advised defts. to sell all the shares as they had confidential information that a heavy fall in price was likely to take place immediately. Defts. without consulting their clients agreed to the shares being sold. The shares did not fall in price but rose rapidly, & defts. alleged that they had to make good for their clients a sum of £890 by buying back shares. In an action by pltfs. for balance of an account in connection with the shares, defts. counterclaimed for damages for breach of duty by pltfs.:—*Held*: as defts. were under no obligation to sell the shares without consulting their clients, the loss resulting from the repurchase arose from their own act, & therefore that the counterclaim failed. *Semble*: there was no obligation on the part of pltfs. to investigate the accuracy of the information imparted to defts. as to the likelihood of a fall in the shares.—*SCHWEDER (P. E.) & Co. v. WALTON & HEMINGWAY (1910), 27 T. L. R. 89.*

21. Brokers & jobbers—Principals towards each other.]—(1) Deft. employed a broker to purchase for him certain shares on the Stock Exchange, & afterwards directed him to carry over the shares to the next account. The broker, in accordance with the regulations of the Stock Exchange, purchased the shares in his own name from pltfs., who were jobbers on the Stock Exchange, & afterwards carried over with them the same shares. Deft.'s name was not disclosed. Before the next settling day the broker was declared a defaulter on the Stock Exchange, & in accordance with the rules of that body his contract with pltfs. was closed at a fixed price by the official assignee of the Stock Exchange. Pltfs. having ascertained that the broker was acting for deft. in this transaction called upon him to take up the shares. He declined to accept any responsibility for them; & pltfs., on the settling day, tendered the shares to deft., & on his refusing to accept them, sold them for the best price then obtainable. In an action to recover from deft. the difference between the price at which the shares had been carried over & that at which they had been sold:—*Held*: deft. was liable as principal on the contract made for him by his broker with pltfs., & the privity of contract between pltfs. & deft. was not affected by the rules of the Stock Exchange as to the compulsory closing of the transactions of a defaulting broker.

(2) There is no established usage under which the client of a broker on the Stock Exchange who has become a defaulter, & whose transactions have been closed at prices fixed by the official assignee, can claim the right to close at the price so fixed a transaction entered into for him by the broker with another member of the Stock Exchange.

(3) The transaction between the principal & the brokers was on the Stock Exchange, & the agreement between them was that the dealings should be carried on according to the usages & rules of the Stock Exchange. In my opinion, the meaning of that is that a client agrees with his broker that the dealings between them are to be carried on under the rules of the Stock Exchange so far as they are applicable to outsiders, & not under the rules that are applicable only to the domestic forum of the Stock Exchange (*A. L. SMITH, M.R.*).

(4) They [brokers & jobbers] are principals towards each other (*COLLINS, L.J.*).

(5) Admitted that by the usage of the Stock Exchange a broker may properly execute the instructions of his client as to purchase or sale without creating privity of contract, that is to say, he might do this without rendering himself liable for breach of duty to his client, yet in my opinion that does not justify the inference that, if the broker does execute the instructions in such a form as would at common law create privity of contract between the client & the broker, we ought to hold, or it ought to be inferred, that that privity of contract must be held nevertheless not to exist for the purpose of contracts on the Stock Exchange. I do not think that is an inference which follows or one which we ought to draw (*ROMER, L.J.*).

(6) It is clear that where a client gives instructions to a broker on the Stock Exchange to carry over a contract, say a contract for purchase, as in this case, it is not the case of merely getting further time to continue the old contract; it is an instruction that the broker is to effect a new contract (*ROMER, L.J.*).

(7) Undoubtedly to my mind, when the practice on the Stock Exchange is considered & the manner in which the dealings in respect of shares are carried on there, it is clear that the broker had authority to buy the 640 shares from more than one jobber, & that if he did so, & it was proved that the shares he bought from the different jobbers for his client exactly amounted to 640, neither more nor less, certainly not more, then there can be no doubt that, the broker being authorised to execute the instructions of his client in that way, privity of contract would be established in respect of those shares as between the different jobbers & the client (*ROMER, L.J.*).

(8) If a usage has been clearly found & laid down as the custom in a particular trade or market, so that persons dealing in that trade or market contract on the basis of the custom, then the law supports that custom in subsequent cases (*A. L. SMITH, M.R.*).—*LEVITT v. HAMBLET, [1901] 2 K. B. 53; 70 L. J. K. B. 520; 84 L. T. 638; 17 T. L. R. 307; 6 Com. Cas. 79, C. A.*

Innotations.—As to (1) *Refd. Ponsolle v. Webber (1907), 98 L. T. 375.* As to (2) *Refd. Lomas v. Graves, [1901] 2 K. B. 557.* Generally, *Refd. Scott & Horton v. Godfrey, [1901] 2 K. B. 726.*

22. Sale of negotiable instrument—Infirmity of title—Broker without notice of infirmity—Whether holder for value.]—A broker who without notice of his principal's infirmity of title enters into a contract for the sale of a negotiable instrument becomes on the subsequent receipt of such instrument a holder for value, & his delivery of it to the jobber is not a conversion thereof.

Qu.: whether the broker, even if he were not a holder for value, would be liable.—*EDELSTEIN v. SCHULER & Co., [1902] 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204; 50 W. R. 493; 18 T. L. R. 597; 46 Sol. Jo. 500; 7 Com. Cas. 172.*

Annotations.—*Mentd. Webb, Hale v. Alexandria Water Co. (1905), 21 T. L. R. 572; Clayton v. Le Roy, [1911] 2 K. B. 1031.*

23. ——— Whether delivery to jobber a conversion.]—*EDELSTEIN v. SCHULER & Co., No. 22, ante.*

Sale of goodwill in broker's business.]—See *TRADE & TRADE UNIONS.*

Money deposited with broker as cover—By judgment debtor—Whether attachable by judgment creditor.]—See *EXECUTION, Vol. XXI., p. 623, No. 2099.*

SECT. 2.—BROKER AND CLIENT.

SUB-SECT. 1.—IN GENERAL.

24. Fiduciary relation — Agency — Client's right to follow money.]—C., a trustee, employed a broker, who had notice of the trust to sell out consols & invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the same amount for the settling day, & received the price of the consols in a cheque, which he paid into his account at his bankers. He stopped payment before the settling day, & went into liquidation. C. claimed so much of the broker's balance at his bankers as was attributable to the price of the consols. The registrar disallowed the claim, holding that the relation between broker & customer was similar to that between banker & customer, & that C. was only a general creditor:—*Held*: (1) as the price of the consols was known by the broker to be trust money, it could be followed, & the claim must therefore be allowed; (2) apart from the question of trust, the position of a broker is not that of a banker, but of an agent into whose hands money is put to be applied in a particular way, & money paid to him can therefore be followed by the customer.—*Re STRACHAN, Ex p. COOKE* (1876), 4 Ch. D. 123; 46 L. J. Bcy. 52; 35 L. T. 649; 41 J. P. 180 25 W. R. 171, C. A.

Annotations. - *Generally*, *Reid*, *Pearson v. Scott* (1878), 9 Ch. D. 198; *King v. Hutton* (1900), 83 L. T. 68. *Mentd.* *Birt v. Birt* (1877), 36 L. T. 913; *Re Pollard*, *Ex p. Dickin* (1878), 8 Ch. D. 377; *Re Smith*, *Fleming*, *Ex p. Kelly* (1879), 48 L. J. Bev. 65. *Re Hallett's Estate*, *Knatchbull v. Hallett* (1883), 13 Ch. D. 696; *Re Neek*, *Ex p. Broad* (1884), 32 W. R. 912; *Marten v. Rocke*, *Evton* (1885), 53 L. T. 946; *Re Hallett*, *Ex p. Trustee* (1894), 70 L. T. 361; *Wilson's & Furness-Leyland Line v. British & Continental Shipping Co.* (1907), 23 T. L. R. 397. *Sinclair v. Brougham*, [1914] A. C. 398, *Banque Belge v. Hambrouck*, [1921] 1 K. B. 321.

25. ———.]—The whole fund here consists of money not borrowed by debt. [the broker] from his clients, but received by him as agent for them, & therefore for the present purpose may be treated as trust money (LORD HALSBURY, C.).—*HANCOCK v. SMITH* (1889), 41 Ch. D. 156; 58 L. J. Ch. 725; 61 L. T. 341; 5 T. L. R. 459, C. A.

Annotations. — **Reid.** *Re Wreford, Carmichael v. Rudkin* (1897), 13 T. L. R. 153. **Mentid.** *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433; *Wilson's & Furness-Leyland Line v. British & Continental Shipping Co.* (1907), 23 T. L. R. 397.

Principal's right to follow property generally.]—See AGENCY, Vol. I., pp. 562-566, Nos. 2094-2119; MONEY & MONEY-LENDING, Vol. XXXV., pp. 167, 168, Nos. 2-10.

26. - — Purchase by agent of principal's property.]—A broker or agent being employed by a customer to sell foreign stock on a day specified by him in a letter of instructions, purchased the stock in the name of his partners, a firm in Paris, at the market price of the day. Being also employed to purchase foreign stock & bonds for his customers, according to his, the agent's, recommendation, he transmitted accounts of the transactions to his employer, with broker's notes, etc., as if he had purchased the stock of third persons. In fact, no stock or bonds were pur-

chased; no transfers were made; no broker's notes passed, but the sales were nominal of stock & bonds remaining in the hands of the agent & his partners, & not set apart nor appropriated to the customer. In order to effect these purchases, loans of money were made by the agent to the customer, upon agreement that the stock & bonds should remain as a deposit in the hands of the agent, to secure the repayment of money advanced.

The stock & bonds were afterwards sold at a loss under the advice of the agent.

In 1819 an account of these transactions were rendered, & settled between the customer & the agent, & great loss having been incurred upon the transactions, a large balance was paid by the customer to the agent.

Upon bill filed in 1824, all the transactions were set aside, & an account decreed against the agent.—**ROTHSCHILD v. BROOKMAN** (1831), 5 Bli. N. S. 165; 2 Dow. & Cl. 188; 5 E. R. 273, H. L.; *affg.* S. C. *sub nom.* **BROOKMAN v. ROTHSCCHILD** (1829), 3 Sim. 153.

Rep. 514. —**Apld.** *Maturin v. Tredinnick* (1863), 2 New
Consd. *Waddell v. Blockey* (1879), 4 Q. B. D.
 678. **Apld.** *King Viall & Benson v. Howell* (1910), 27
 T. L. R. 111; *Armstrong v. Jackson*, [1917] 2 K. B. 822.
Refd. *Bank of Bengal v. Macleod* (1849), 5 Moo. Ind. App. 1;
Tetley v. Shand (1871), 25 L. T. 658; *Robinson v. Mollett*
 (1875), L. R. 7 H. L. 802; *Re Cape Breton Co.* (1884),
 26 Ch. D. 221, *Ladywell Mining Co. v. Brookes*, *Ladywell*
Mining Co. v. Huggons (1887), 35 Ch. D. 400; *Guy*
v. Churchill & Son (1889), 60 L. T. 740; *Johnson v.*
Kearley, [1908] 2 K. B. 514, *Kuhlitz v. Lambert* (1913),
 108 L. T. 565, *Christoforides v. Terry*, [1921] A. C. 566.
Mentd. *Grand Junction Canal Co. v. Dimes* (1859), 2 H. &
 Tw. 92.

27. — *ERSKINE, OXENFORD & Co. v. SACHS*, No. 154, *post*.

— **Duty to account for profit.]** See Nos. 125, 143, 151, 184, 193, *post*.

— **Deposit of client's securities with bank.** —
See BANKERS & BANKING, Vol. III., pp. 271-274.
Nos. 841-855.

— — — Payment of client's money into bank current account—Notice—Retention against overdraft.]—*See BANKERS & BANKING*, Vol. III., p. 188, No. 380.

28. What constitutes agency—Client sending money for purchase of specific shares—Fraudulent conversion by broker.]—C., a stockbroker, had been in the habit of purchasing bonds for Mrs. S., & one day wrote to her that he has some Japanese bonds offered in a lot, & had secured them for her, & inclosing a contract note for £336. Mrs. S., in reply, said she was quite satisfied that he had brought them for her, & inclosed cheque for £336 in payment. C. had not in fact bought the bonds, but had merely agreed to buy them from a jobber, but never bought them :—*Held* : the sending of the money by Mrs. S. constituted C. an agent to apply the money for a specific purpose, & C. was rightly convicted under Larceny Act, 1861 (c. 96), s. 75.—*R. v. CHRISTIAN* (1873), L. R. 2 C. C. R. 94 ; 43 L. J. M. C. 1 ; 29 L. T. 654 ; 38 J. P. 133 ; 22 W. R. 132 ; 12 Cox, C. C. 502, C. C. R.

Annotation :—**Mentd.** R. v. Brownlow (1878), 43 J. P. 92.
29. — — — — —. — On Nov. 2, 1885, W. by letter instructed the prisoner a stockbroker, to buy

---.]-A broker who carries ~~securities~~ on margin for a customer has a right to pledge it for his own purposes to the extent of the amount he has advanced. If the broker pledges such stock as security for an amount greater than his advances, whereby he makes no profit & the client suffers no loss, he is not liable as for a conversion provided that on demand of his client he delivers to the

PART III. SECT. 2, SUB-SECT. 1.

h. Right of broker to deal on his own behalf.—Duty to account to client for profits.—A client instructed a sharebroker to buy a certain number of shares in a co. & “carry at 8 per cent.”:—*Held*: the sharebroker was not entitled to deal on his own behalf with the shares bought in pursuance of such instructions, & was bound to account to his client for any profits

made by such dealing.—THORNLEY v. TILLEY (1925), 36 C. L. R. 1; 42 N. S. W. W. N. 70; 31 Argus L. R. 291.—AUS.

k. Right of brokers to hypothecate shares of customer—*Shares hypothecated for greater sum than customers owed brokers.*]—**CONNIE v. SECURITIES HOLDING Co. & AMES & Co (Ont.) (1907), 38 S. C. R. 601; 27 C. L. T. 484.—CAN.**

Sect. 2.—Broker and client: Sub-sects. 1 & 2, A., B. & C.; sub-sect. 3, A. & B.]

for him on the following day certain stock at 90, to hold for a rise, the time to close to be left open, & inclosed a cheque for £21 5s. for cover & commission." On Nov. 3, the stock specified was at 91½, & the prisoner paid the cheque into his bank without purchasing, & subsequently spent the money for his own use, the balance standing to his credit at his bankers on Nov. 14 being only £8. Upon a case reserved at the trial of an indictment under Larceny Act, 1861 (c. 96), s. 75, which charged the prisoner for that he having been intrusted as a broker & agent with a security for the payment of money, with a direction in writing to apply it for a specific purpose, in violation of good faith, & contrary to the terms of such direction converted to his own use such security:—*Held*: the prisoner was merely the agent of W. to hold & apply the money for which the cheque was sent for a specific purpose, & he was rightly convicted under the circumstances of having converted the cheque to his own use, as charged in the indictment.—*R. v. CRONMIRE* (1886), 54 L. T. 580; 51 J. P. 104; 2 T. L. R. 464; 16 Cox, C. C. 42, C. C. R.

30. Position of broker not that of banker.]—STRACHAN, *Ex p. COOKE*, No. 24, *ante*.

SUB-SECT. 2.—AUTHORITY OF BROKER.

A. In General.

Authority of agents generally.]—See AGENCY, Vol. I., pp. 295-387.

31. Implied authority—To do everything necessary for completion of bargain.]—One who employs a broker to buy railway shares for him, impliedly authorises him to do all that is needful to complete the bargain. A. employed B., a broker & member of the Stock Exchange, to buy shares for him. At the time of the purchase, a call had been made, but was not then payable. The seller having paid the call, in order to enable her to make a transfer of the shares, B., who, by the rules of the Stock Exchange, was personally responsible for it, paid the money:—*Held*: B. was entitled to recover from A. the sum so paid, as money paid to his use.—*BAYLEY v. WILKINS* (1849), 7 C. B. 886; 18 L. J. C. P. 273; 13 L. T. O. S. 234; 13 Jur. 883; 137 E. R. 351.

Annotation:—Refd. Sweeting & Pearce (1861), 9 C. B. N. S. 531.

32. — To sell shares—On client failing to supply funds.]—In an action by stockbrokers against their principal to recover the balance of their account in respect of sales & purchases of shares for private speculations on his account:—*Held*: deflt. in giving authority to plffs. to do business on the Stock Exchange must be taken in the absence of evidence to the contrary to have employed them on the terms of the Stock Exchange

latter the number of shares ordered & which he has been carrying for him.—*CLARKE v. BAILLIE* (Ont.) (1911), 45 S. C. R. 50.—CAN.

*m. Necessity for broker to divulge his acting for both vendor & purchaser.]—*M'DEVITT v. CONNOLLY (1885), 15 L. R. Ir. 500.—IR.

PART III. SECT. 2, SUB-SECT. 2.

—B.

*n. Authority to sell—Revocation—Misrepresentation by broker.]—*A broker, employed by his principal to purchase certain shares in a mining co., informed him, contrary to the fact, that he had purchased such shares in

accordance with his instructions. He did not buy till 2 days later, & he then purchased for forward delivery. In an action by the broker to recover commission.—*Held*: the representation that he had bought put an end to his authority, & the principal was not bound by the subsequent purchase.—*SAMPER v. HADE* (1889), 10 N. S. W. L. R. (L.) 270; 6 N. S. W. W. N. 77.—AUS.

a. — A. authorised his broker to sell certain stock on the following day at the highest market price "if the market was languid, & not likely to go up." The broker sold at a premium of 17s. 6d. per share

& therefore, to have authorised the sale of his shares on failure to supply them with the requisite funds.—*FORGET v. BAXTER*, [1900] A. C. 467; 69 L. J. P. C. 101; 82 L. T. 510, P. C.

— To act in accordance with rules of Stock Exchange.]—See Part IV., Sect. 1, sub-sect. 1, *post*.

33. Liability for exceeding authority.]—Shortly after the appointment of a new trustee in place of a retiring trustee of a sum of War Stock inscribed in the names of the old trustees, the retiring trustee with the advice of her own independent solrs. joined with her two co-trustees, one of whom was a solr. acting for the trust, in executing a joint power of attorney authorising named brokers to sell & transfer all or any part of the stock & to receive the consideration money.

This sale & transfer power was signed in lieu of an ordinary transfer power in order that certain trust costs might be raised & paid before the fund was transferred to the new & continuing trustee.

The power of attorney was, with the solrs.' approval, handed to the solr.-trustee, who lodged it with the brokers. By his instructions they sold the whole fund, & without any authority from the retiring trustee, handed him the proceeds in cash & bearer bonds, which he forthwith misappropriated.

Qu.: whether the brokers were responsible for exceeding their authority under the power.—*Re MUNTON, MUNTON v. WEST*, [1927] 1 Ch. 262; 96 L. J. Ch. 151; 136 L. T. 661, C. A.

Pledging securities of client—For advances to broker.]—See BANKERS, Vol. III., pp. 271-273, Nos. 844-853.

— Deposit as agent—Notice to bank.]—See BANKERS, Vol. III., p. 286, No. 884.

Warranty of authority — Breach.] —See, generally, AGENCY, Vol. I., pp. 657-667, Nos. 2748-2805.

Authority to act in accordance with rules & customs of Stock Exchange.]—See Part IV., Sect. 1, *post*.

Broker acting without authority—Right to indemnity.]—See Sub-sect. 4, A. (d), *post*.

B. Duration of Authority.

34. Authority to sell—Ceases at end of current account.]—LAWFORD & Co. v. HARRIS (1896), 12 T. L. R. 275.

Authority to carry over.]—See Nos. 36, 37, *post*.

C. Authority to Carry Over.

35. When implied—Knowledge of client—Authority not revoked.]—CAMPBELL & Co. v. BRASS (1891), 7 T. L. R. 612.

36. How determined — Client's death.] —PHILLIPS v. JONES (1888), 4 T. L. R. 401.

Annotation:—Apld. Re Overweg, Haas v. Durant, [1900] 1 Ch. 209.

37. — — — Broker entitled to sell immediately.]

A stockbroker on the death of his client has

subject to his principal's approval, & advised his principal of this, but before receiving an answer he cancelled the bargain & sold to the purchaser at a premium of 20s. The stock rising in price immediately afterwards. A. refused to implement the sale by delivery of the scrip:—*Held*: the mandate to the broker was not exhausted by the first conditional sale, & as the second sale was made at about the highest market price of the day, A. was bound to have implemented it by delivery of the stock.—*DICKSON v. HENDERSON* (1849), 12 Dunl. (Cl. of Sess.) 306; 22 Sc. Jur. 67.—SCOT.

no authority, express or implied, to carry over shares purchased for his client to the next settling day, but should close the account.

(2) A carrying over or a continuation on the Stock Exchange is in form & in law both a sale & re-purchase, or a purchase & re-sale, as the case may be, & therefore if a broker, when under an obligation to close an account by selling his client's shares, prefers to carry over, he does so at his own risk, & is not entitled as against his client to treat the continuation as one transaction, but is responsible to his client as if there had been an immediate sale at the price named.—*Re OVERWEG, HAAS v. DURANT*, [1900] 1 Ch. 209; 69 L. J. Ch. 255; 81 L. T. 776; 16 T. L. R. 70.

38. Rights of broker—To recover differences.]—CAMPBELL & Co. v. BRASS (1891), 7 T. L. R. 612.

39. ——— No consideration for agreement to carry over.]—WOOLSTON v. BAINES, [1876] W. N. 74; Bitt. Prac. Cas. 135; 2 Char. Cham. Cas. 21.

40. Liability of broker—Carrying over when duty to close account.]—*Re OVERWEG, HAAS v. DURANT*, No. 37, *ante*.

Continuation, generally.]—See Part IV., Sect 3, *post*.

SUB-SECT. 3.—DUTIES OF BROKER.

A. In General.

41. Observance of usage—Sale of stock on credit—No special authority.]—An agent employed generally to do any act, is authorised to do it only in the usual way of business. Therefore as stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon a credit without a special authority, although acting *bonâ fide*, & with a view to the benefit of his principal.—*WILTSHIRE v. SIMS* (1808), 1 Camp. 258; 170 E. R. 949, N. P.

——— **Usages of Stock Exchange generally.]—**See Part IV., *post*.

42. Acceptance of order—Whether duty to procure securities absolute.]—A sharebroker employed to purchase shares or scrip of a railway co., does not thereby undertake to procure them absolutely & at all events, but only to use due & reasonable diligence to endeavour to do so.

A. employed B., a sharebroker at M., & lodged money in his hands, to procure for him fifty shares in a certain railway co. B., without disclosing the name of his principal, entered into a contract with H., another sharebroker, to purchase them for him. According to the usage of the Stock Exchange at M., there are two "settling days" in each month, on which all transactions between brokers, & between them & their principals, are to be settled, although in some instances settlement is not enforced by brokers on the prescribed days. H. did not perform his contract with B. by the next settling day; & B. having, after that day, refused to return A. his money:—*Held*: A. was entitled to recover it back from B. in an action for money had & received.—*FLETCHER v. MARSHALL* (1846), 15 M. & W. 755;

PART III. SECT. 2, SUB-SECT. 3.

—A.

p. Obligation of broker to communicate facts to customer.]—Where a stock broker sells shares on his own account & not in the ordinary course of business to a customer with whom he has had previous dealings as a broker, & who may therefore rely on his judgment, it is his duty to communicate the fact to the purchaser.—*SAWYER v. GRAY* (1872), 9 N. S. R. (3 G. & O.) 77.—CAN.

PART III. SECT. 2, SUB-SECT. 3.

—B.

50 i. Question of fact.]—HENDERSON & BOAL v. MARTIN (1912), 46 I. L. T. 13.—IR.

50 ii. ———.]—The prospectus was published of a co. proposed to be constituted for the formation of a railway; applications were made for shares, & letters allotting shares to applicants had been issued. While the co. was at this stage, & before the execution of the parliamentary contract or

5 Ry. & Can. Cas. 340; 10 Jur. 528; 153 E. R. 1055.

Annotation:—*Refd. Ellis v. Pond* (1897), 67 L. J. Q. B. 345.

43. Purchase for client—No duty to resell.]—THACKER v. HARDY, No. 432, *post*.

44. ——— No duty to carry over.]—(1) In an action for breach of duty in not selling shares H., an outside stockbroker, consented to judgment against him. A bkpcy. petition founded on the failure to satisfy this judgment was presented against H. but the registrar found that the transaction was a gambling transaction, that the judgment was founded on an illegal contract, & he refused to make a receiving order:—*Held*: on the facts the contract was not one of gaming & wagering.

(2) The broker was not obliged to carry over, but if he did not intend to do so he must give notice. Here the order was sent to carry over & no notice was given (LORD ESHER, M.R.).—*Re HEWETT, Ex p. PADDON* (1893), 9 T. L. R. 160, C. A.

45. ———.]—CULLUM v. HODGES, No. 162, *post*.

46. ——— Duty to tender shares within reasonable time.]—BENJAMIN v. BARNETT, No. 18, *ante*.

47. Sale for client—Shares in possession of client's bank—Duty to pay proceeds to bank directly.]—Where a stockbroker who is a member of the London Stock Exchange has sold shares for a client, & the shares are in the possession of the client's bank, there is no duty upon the broker himself to pay the bank the price at which the shares have been sold against delivery by the bank of the shares; nor is he under any obligation to ask the jobber who has bought the shares to make the payment for them direct to the bank.—*HAWKINS v. PEARSE* (1903), 9 Com. Cas. 87.

48. ——— No duty to require payment to bank by jobber.]—HAWKINS v. PEARSE, No. 47, *ante*.

49. Duty not to transact speculative business on behalf of clerk—Without knowledge of employers—Rule of Stock Exchange—Whether client has cause of action for breach of duty.]—VAN DIGGELEN v. COHEN, LAMING & Co. (1910), *Times*, Oct. 21.

B. Obedience to Instructions.

50. Question of fact.]—Declaration in *assumpsit* alleged that pltf. employed deft. to act as his agent & broker in & about the buying & selling divers shares in divers railway cos., & that deft. then promised to use due care & diligence in the business, & to obey the lawful & reasonable orders & directions of pltf. in regard to the buying & selling such shares, etc. It then alleged that deft. had in his possession & charge divers shares in certain railway cos., subject to the order & direction of pltf. as to the sale & disposition thereof & to the promise of deft. in that behalf; that pltf. had subsequently ordered deft. to sell the shares in one of those cos.; & charged, as a breach, the disobedience of that order. Deft. pleaded the general issue, & traversed the allega-

subscriber's agreement, a party instructed a broker to buy for him "forty shares" of the railway stock. The broker bought from an allottee a letter of allotment of forty shares, which he tendered to his constituent:—*Held*: the broker had acted in terms of his instructions, & had procured that which at the time was sold in the market as "shares," or as giving a title to "shares" of this railway, & therefore he was entitled to recover the price from his constituent.—*WILKIE (OR WILKSIE) & BROWN v. MICHIE*

Sect. 2.—Broker and client: Sub-sect. 3, B. & C. (a) & (b) i. & ii.]

tion of his having in his possession or charge as agent or broker of pltf., the shares mentioned in the declaration, subject to the order or direction of pltf., etc. It appeared in evidence, that, on September 30, 1845, deft. had been introduced to pltf. to act as his broker, who immediately gave him a written order to purchase shares in five different railway cos., & that deft. on the same day sent five advice notes of his having purchased them for Oct. 15, the next settling day at the Stock Exchange. On Oct. 6 pltf. ordered deft. to sell the shares in the co. mentioned in the declaration, who, however, took on himself the responsibility of deferring it until the market should rise. On Oct. 18 deft. delivered an account current, in which he debited pltf. with the shares in this co. as having been bought on Sept. 30 & sold on Oct. 13. No money had ever passed between the parties, & deft. had not the shares in his possession until some time after rendering the account current:—*Held*: (1) there was evidence from which the jury might infer the contract as stated in the declaration: (2) the second issue was not proved.—*MARSDEN v. NEWMARCH* (1846), 10 Jur. 759.

51. —.—.]—*ASTON v. KELSEY*, No. 93, *post*.

52. —.— *Whether proper securities bought.*—Deft., a sharebroker, bought for pltf. scrip certificates, which were sold in the share market, at a premium, as “Kentish Coast Railway scrip,” & were signed by the secretary of the railway co. The genuineness of this scrip was afterwards denied by the directors, who alleged that it was issued by the secretary without authority. In an action to recover back from deft. the price paid to him by pltf. for this scrip, & for his commission, on the ground of its not being genuine:—*Held*: the proper question for the jury was, whether what deft. intended to buy was that which was sold in the market as Kentish Coast Railway scrip.—*LAMERT v. HEATH* (1816), 15 M. & W. 486; 4 Ry. & Can. Cas. 302 7 L. T. O. S. 186; 10 Jur. 481; 153 E. R. 911 *sub nom.* *LAMBERT v. HEATH*, 15 L. J. Ex. 297 *subsequent proceedings*, 8 L. T. O. S. 279.

Annotations:—*Distd.* *Westropp v. Solomon* (1819), 8 C. B. 345. *Mentd.* *Aiken v. Short* (1856), 1 H. & N. 210. *Nicholson v. Ticketts* (1860), 2 E. & E. 497, *Josling v. Kingsford* (1863), 13 C. B. N. S. 447.

53. —.—.]—B. instructed C., a sharebroker, to purchase for him ten shares in the D. bank. The shares in this bank were £50 shares, on which £25 were paid; but pltf.’s manager admitted that, after the order was given to purchase, he had said that they were £25 shares, & deft. stated that it was upon the understanding that the shares were £25 that he had been induced to purchase ten shares instead of five. After the order was given the bank failed, & deft. repudiated the contract.

The jury found a verdict for pltf.s., the judge directing them that the question was whether the authority to buy the shares was coupled with a condition to buy £25 shares if they could be got, or to buy so many shares if they were £25 shares.

They who direct brokers to buy shares are bound by the rules of the Stock Exchange, under

which brokers are liable to each other & their employers to themselves.—*MORRICE v. HUNTER* (1866), 14 L. T. 897, N. P.

54. —.— *Purchase of letters of allotment—Whether execution of order to buy “shares.”*—Deft. gave pltf., a broker on the Stock Exchange, an order to purchase for him fifty shares in a foreign railway co. At that time no shares of the co. were in the market, the foreign govt. not having yet authorised its establishment; but letters of allotment for shares were then, according to the evidence of persons on the Stock Exchange, commonly bought & sold in the market as shares. Pltf. bought for deft. a letter of allotment for fifty shares:—*Held*: a jury might well find that this was a good execution of the order.—*MITCHELL v. NEWHALL* (1846), 15 M. & W. 308; 4 Ry. & Can. Cas. 300; 15 L. J. Ex. 292; 7 L. T. O. S. 88; 10 Jur. 318; 153 E. R. 867.

55. —.— *Whether broker acts as principal or agent—London broker acting for country broker.*—*BLAKER v. HAWES & BROWN*, No. 171, *post*.

56. *Failure to obey instructions—Liability in tort—Whether bankruptcy bars action.*—Bkptcy. & certificate are no bar to an action in tort against a broker for selling out pltf.’s stock contrary to orders.—*PARKER v. CROLE* (1828), 5 Bing. 63; 2 Moo. & P. 150; 6 L. J. O. S. C. P. 229; 130 E. R. 983.

57. —.— *Purchase at market price plus arbitrary addition—Right of indemnity against client.*—*JOHNSON v. KEARLEY*, No. 125, *post*.

C. The Contract.

(a) In General.

58. *Purchase of shares—No absolute undertaking to use reasonable diligence.*—*FLETCHER v. MARSHALL*, No. 42, *ante*.

59. *Contract binding in honour only—Client authorising making of such contract.*—Deft. employed pltf.s., who were stockbrokers on the Stock Exchange, to buy shares in a joint stock banking co. He had on many previous occasions employed pltf.s. to buy similar shares, & on none of those occasions did the contract or advice note forwarded to him specify the distinguishing numbers of the shares purchased. Pltf.s. purchased the shares from a jobber on the Stock Exchange in the usual way, & forwarded to deft. a contract note in the usual form, stating that the contract was made subject to the rules & regulations of the Stock Exchange. The contract was not made with reference to any distinguishing numbers of the shares, nor did the contract note specify any numbers. It is not the practice on the Stock Exchange to specify the numbers of the shares in dealing in bank shares. Deft. before the settling-day wrote to pltf.s. repudiating the contract, on the ground that the numbers of the shares were not specified pursuant to *Leemans Act*, 1857 (c. 29), s. 1. Notwithstanding such repudiation, pltf.s. completed the contract & paid for the shares. By the rules of the Stock Exchange the committee only recognise the members of the Stock Exchange as the parties to contracts, & if a member does not carry out a contract he may be declared a defaulter & expelled from the Stock Exchange, & “no application, which has for its object to annul any bargain on the Stock

(1819), 11 Dunl (Ct. of Sess.) 1131; 21 Sc. Jur. 436.—*SCOT*.

q. *Failure to obey instructions—Liability in tort.*—*SMITH v. FORBES* (1882), 32 C. P. 571.—*CAN*.

r. —.— *Alleged conversion of*

mining shares.—*LONG v. SMILEY* (1913), 24 O. W. R. 826; 4 O. W. N. 1452; 12 D. L. R. 61.—*CAN*.

t. —.—.]—On Oct. 14 a broker was authorised to buy shares, which he, on Oct. 15, intimated that he had

done:—*Held*: his constituent was not bound to take shares bought afterwards by the broker on Nov. 6.—*BLACK v. CULLEN* (1853), 15 Dunl. (Ct. of Sess.) 646; 25 Sc. Jur. 387; 2 Stuart, 370.—*SCOT*.

Exchange, shall be entertained by the committee unless upon an allegation of fraud or wilful misrepresentation." Pltfs. sued deft. to recover the price of the shares paid by them:—*Held*: pltfs. were entitled to recover.

They [the plaintiffs] receive a notice from deft. that he chooses to rely upon what has been referred to as Leeman's Act. . . . The effect is that such a contract would be binding in honour only & would not be enforceable by action in a Ct. of Law. Did the deft. authorise such a contract to be entered into. I am clearly of opinion that he did (MATTHEW, J.).—SEYMOUR *v.* BRIDGE (1885), 14 Q. B. D. 460; 51 L. J. Q. B. 347; 1 T. L. R. 236.

Annotations:—*Distd.* Perry *v.* Barnett (1885), 15 Q. B. D. 388. *Refd.* North *v.* Walthamstow U. D. C. (1898), 62 J. P. 836.

60. Order to apply for shares—Duty to forward money to company—& not to promoters—Liability to refund money to client.]—LEVESON-GOWER (LADY) *v.* MAY (1891), 7 T. L. R. 696.

Duty to make binding contract—Illegal transactions.]—See Part VII., Sect. 1, *post*.

(b) *Establishment of Privity.*

i. *In General.*

61. Contract made in name of broker—Whether bar to privity.]—A party who instructed a broker to buy shares for him, held liable to the party from whom the broker bought the shares, though the several contracts were made with the broker by name; & though, when applied to for his principal, he gave another name, as well as that of deft.—ASSER *v.* WALKER (1846), 7 L. T. O. S. 81.

62. Disclosure of principals other than parties concerned.]—ASSER *v.* WALKER, No. 61, *ante*.

63. Effect of custom.]—SCOTT & HORTON *v.* GODFREY, No. 69, *post*.

64. — — Privity arising at common law.]—LEVITT *v.* HAMBLET, No. 21, *ante*.

65. Privity between jobber & broker's customer.]—ANDERSON & CO. *v.* BEARD, No. 387, *post*.

ii. *Lumping and Dividing Orders.*

66. Lumping orders—Whether privity established—Order to buy & sell—Differences to be paid.]—Where a person desiring to speculate on the Stock Exchange has instructed a broker to buy & sell stocks for him with the intention that he should only receive or pay "differences," & has authorised the broker to pay any losses for him, the broker is entitled to recover any sums which he has so paid for the principal, even though he has not entered into separate contracts on his behalf, but has appropriated to him parts of larger amounts of stock which he, the broker, has bought as a principal with the view of dividing them among different clients for whom he has been instructed to buy.—*Re* ROGERS, *Ex p.* ROGERS (1880), 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29, C. A.

Annotations:—*Mentd.* *Re* Evans, *Ex p.* Evans (1883), 50 L. T. 158; *Re* Johnson, *Ex p.* Johnson (1883), 25 Ch. D. 112.

67. — — — — —.]—(1) Deft. employed a firm of brokers on the Stock Exchange to purchase for him shares in a certain undertaking, & instructed them to "carry over" 210 of these shares to the next account. The brokers, having orders

from other clients for shares in the same undertaking, purchased by a single contract in their own name 360 of these shares for the next account from pltfs. who were jobbers on the Stock Exchange, & they apportioned in their books 210 of these shares to deft. Before the next settling day the brokers were declared defaulters on the Stock Exchange, & in accordance with the rules of that body, their transaction, with pltfs. was closed by the official assignee, the price of the shares being fixed at the price then current, Pltfs., having ascertained that the brokers were acting for deft. as regarded the 210 shares, tendered those shares to him, & on his refusal to take them, sold them on the settling day & claimed from deft. the difference between the contract price & the selling price:—*Held*: since the brokers had lumped deft.'s order with the orders of other clients, & had contracted in a single transaction with pltfs. for the purchase of a larger number of shares than they were authorised to purchase for deft., no such contractual relation existed between pltfs. & deft. as would support the action.

(2) The object of the proceeding under this rule [rule 177] of the Stock Exchange, as I understand it, is what may properly be termed a domestic object. The purpose is to adjust the accounts of the members of the Stock Exchange *inter se*, dropping the defaulter, by reason of his default, out of the bargains in which he has been one of the contracting parties. The method employed is the creation of a fund in the hands of the official assignee. This fund is formed by the payment to him by members of the Stock Exchange of the difference in value of the stocks or shares in which they have dealt with the defaulter as determined by the prices fixed by the official assignee at the time of the default, when the change in price of any of such stocks or shares is against such members; & out of the fund members are entitled to claim payment for any such differences when in their favour. The defaulter does not by reason of his default acquire any right or claim to differences or damages in respect of differences in his favour between the contract price & the closing price, nor can he make any claim for himself to the moneys which are paid in respect of such differences to the official assignee by the members from whom such differences are due. What is effected is an artificial settlement of the defaulter's dealings with his fellow members, after which he & they are precluded *inter se* from claiming from each other the performance, or moneys in respect of the non-performance, of any contracts of purchase or sale which were existent & open at the time of the default. But the settlement is essentially a domestic settlement. According to the practice of the Stock Exchange the defaulting broker's client, if he is not himself in default to the broker, has the right either to have the transaction carried through between himself & the jobber with whom the broker has contracted in respect of shares in which he is interested, or to accept the assignee's closing, or to transfer the account in respect of his shares to another broker for the purpose of carrying out the bargain through him (KENNEDY, J.).—BECKHUSON & GIBBS *v.* HAM-

PART III. SECT. 2, SUB-SECT. 3.

—C. (b) i.

a. Employee of known broker signing bought & sold notes—Grounds for belief that employee agent of broker—Liability of broker on false bought & sold note.]—BOLTON *v.* MACDOUGALL (1911), Q. R. 20 K. B. 544.—CAN.

PART III. SECT. 2, SUB-SECT. 3.

—C. (b) ii.

b. Lumping orders—Whether privity established.]—A purchasing broker who lumps his order from different principals in one purchase does not bind any one of them to the contract,

& therefore can claim neither indemnity nor commission in respect of such purchase.—KEESING & WRIGHT *v.* ECCLES (1906), 25 N. Z. L. R. 914.—N.Z.

c. — — — — —.]—MAFFETT *v.* STEWART (1887), 14 R. (Ct. of Sess.) 506; 24 Sc. L. R. 402.—SCOT.

Sect. 2.—Broker and client: Sub-sect. 3, C. (b) ii.,

BIET, [1900] 2 Q. B. 18; 69 L. J. Q. B. 431; 82 L. T. 459; 16 T. L. R. 278; 5 Com. Cas. 217; *affd.*, [1901] 2 K. B. 73; 70 L. J. K. B. 600; 84 L. T. 617; 49 W. R. 481; 17 T. L. R. 429; 45 Sol. Jo. 447, C. A.

Annotations:—As to (1) Apld. Anderson v. Beard, [1900] 2 Q. B. 260. Consd. Cullum v. Hodges (1900), 17 T. L. R. 21. Dtd. Scott & Horton v. Godfrey, [1901] 2 K. B. 726. Rejd. Levitt v. Hamblet, [1901] 2 K. B. 53.

68. ———— *Some shares purchased for broker himself.*—MAY & HART v. ANGELI (1898), 14 T. L. R. 551, H. L.

Annotations:—Expld. Beckhussan & Gibbs v. Hamblet, [1900] 2 Q. B. 18. Consd. Re Woodd, Ex p. King (1900), 82 L. T. 504.

69. ———— *Deft. employed a broker to purchase for him 225 shares on the Stock Exchange, & afterwards directed him to carry them over to the next account. The broker, having instructions from other clients to carry over for them shares in the same undertaking, carried over by a single contract in his own name 925 of these shares with plffs., who were jobbers on the Stock Exchange, & apportioned 225 of the shares so carried over to deft., of the total number of shares 125 were carried over on the broker's own account. Before the next settling day the broker was declared a defaulter on the Stock Exchange & his transaction with plffs., was closed by the official assignee. Deft., when communicated with, declined to be further bound by the contract, contending that by reason of the broker's failure the transaction was closed for all purposes at the price current on the day of the failure. Plffs., thereupon sold the shares for the best price obtainable, & claimed to be entitled to recover from deft. the difference between the price at which the shares had been carried over & that at which they had been sold:—Held: apart from any usage of the Stock Exchange deft. was liable, it having been the intention of all parties that privity of contract should be created between plffs., & deft. & such privity having in the circumstances been created.*

There is an established & valid usage on the Stock Exchange under which a broker who is instructed by different clients to buy or carry over for them shares in the same undertaking can make one contract in his own name with a jobber for the total number of shares. It makes no difference that the broker includes in the same contract shares in which he is dealing in his own name. The jobber & each client of the broker become bound to each other to carry out that part of the contract which is applicable to the order of the particular client.—SCOTT & HORTON v. GODFREY, [1901] 2 K. B. 726; 70 L. J. K. B. 954; 85 L. T. 415; 50 W. R. 61; 17 T. L. R. 633; 45 Sol. Jo. 640; 6 Com. Cas. 226.

Annotation:—Apld. Consolidated Goldfields of South Africa v. Spiegel (1909), 100 L. T. 351.

70. ———— *Question of intention.*—SCOTT & HORTON v. GODFREY, No. 69, *ante*.

71. ———— *Where a broker is authorised by several clients to buy different parcels of shares, & he buys the total number of shares in one contract, it is a question of intention to be gathered from the evidence in each case whether privity of contract is established between the vendor & a particular purchaser.*

In 1899 defts. purchased through a broker on the Stock Exchange certain shares in a South African mining co. for special settlement. The share certificates of that co. were not ready for issue till Feb. 1907, & the special settlement was fixed for Mar. 25, 1907. Defts. contended that the contract was subject to an implied condition that the special settlement should take place within a reasonable time after the contract, & that as it did not take place within a reasonable time from the date of the contract they were not bound to take the shares:—*Held*: the contract was capable of being fulfilled as it stood, & it was not to be construed as subject to the suggested implied condition.

As between members of the Stock Exchange the practice is for a broker when authorised by several clients to buy different parcels of shares to lump them together, & to buy from the jobber the total number in one contract, & it has been held that when that is done the custom of the Stock Exchange operates to create separate contracts between each client & the jobber (BRAY, J.).—CONSOLIDATED GOLDFIELDS OF SOUTH AFRICA v. SPIEGEL (E.) & Co. (1909), 100 L. T. 351; 25 T. L. R. 275; 53 Sol. Jo. 215; 14 Com. Cas. 61.

72. ———— *Order to carry over.*—SCOTT & HORTON v. GODFREY, No. 69, *ante*.

73. *Dividing orders—Whether privity established—Broker authorised to divide order.*—LEVITT v. HAMBLET, No. 21, *ante*.

D. Price.

74. *Client placing limit on sale price—Whether broker may wait for better price.*—A commission to sell & transfer stock "when the funds should be at 85 per cent., or above that price" is a particular commission under which an agent is bound to sell when the funds reach 85; & has not a general authority to act for his employer, so that he may defer selling till the funds should reach a higher price than 85.

A mercantile house that has accepted such a commission, & had not sold when the funds reached 85, held therefore in equity, to have made the stock their own from that time, & ordered to account to their employer for the price of it, with interest; he, in return, accounting to them for the dividends he had subsequently received in ignorance of the fact of the funds having reached that price.—BERTRAM, ARMSTRONG & Co. v. GODFRAY (1830), 1 Knapp, 381; 12 E. R. 364, P. C.

Annotation:—Consd. Murtunjoy Chuckerbutty v. Cockrane (1865), 10 Moo. Ind. App. 229.

75. ———— *Failure to sell at limited price—Liability to account.*—BERTRAM, ARMSTRONG & Co. v. GODFRAY, No. 74, *ante*.

Whether broker may make profit on price.—See Nos. 184–188, *post*.

E. Carrying Over.

76. *Broker himself contangoing client's account—Whether breach of duty.*—PETRIE v. SUTHERLAND (1887), 3 T. L. R. 422.

77. *Order to carry over—Necessity for notice—Broker not intending to carry over.*—Re HEWETT, Ex p. PADDON, No. 44, *ante*.

78. *Duty to elect between carrying over & taking up.*—WHITLARK v. DAVIS (1894), 10 T. L. R. 425.

PART III. SECT. 2, SUB-SECT. 3.

—D.

d. *Client placing limit on price.*—CARRICKS & M'KIRDY v. SAUNDERS &

ALLAN (1850), 12 Dunl. (Ct. of Sess.) 812.—SCOT.

e. *Instructions to London broker to sell shares—Shares sold in London*

cum rights—Rights previously sold—Right of broker to recover sum for purchasing rights.—CANTY v. JOHANNESBURG BOARD OF EXECUTORS (1899), 10 O. R. 10.—S. AF.

Continuation, generally.]—See Part III., Sect. 3, post.

F. Discovery, Inspection, and Interrogatories.

See, generally. DISCOVERY, Vol. XVIII., pp. 38 et seq.

79. Whether bound to produce books—Applicant having no interest.]—(1) The ct. refused to entertain an application by deft. in an action on a bill of exchange, to compel pltf., a stockbroker, to produce his book, kept pursuant to 7 Geo. 2, c. 8, s. 9, in order to enable deft. to plead that the bill, which was an accommodation bill, had been indorsed over to pltf. by the drawer, for differences in stock-jobbing transactions; on the ground that deft. had no direct interest in the book. (2) *Seemle*: it is to the broker's principals that he is bound to produce the book. (3) *Seemle*: the ct. will not compel a party to produce a document, the production of which might subject him to penalties.—PRITCHETT v. SMART (1849), 7 C. B. 625; 6 Dow. & L. 702; 18 L. J. C. P. 211; 13 L. T. O. S. 95; 137 E. R. 247.

80. — Where production might incriminate broker.] The rule for a new trial in this case having been argued, the ct. were of opinion, that the broker was bound to produce his books, kept under 7 Geo. 2, c. 8, s. 9, though he might thereby criminate himself; but as he had no notice to produce his book kept under this statute, but only was commanded by his *subpœna duces tecum*, to produce his "contract book," the ct. made the rule absolute for the new trial, on payment of costs.—RAWLINGS v. HALL (1824), 1 C. & P. 335; 171 E. R. 1220.

Annotation — **Consd.** Pritchett v. Smart (1849), 7 C. B. 625.

81. — — —.]—Pltf. made a verbal agreement with defts., who were stockbrokers, for the allowance of a portion of the commission to be received from customers whom he should introduce; disputes arose, & pltf. filed his bill asking for discovery, for an account of all transactions, & for payment of such share of the commission as he should be declared entitled to. Defts. by their answer admitted that business had been done for pltf. & for other persons introduced by him; that part of it was real & that the other part was fictitious, & consisted of time bargains; that discovery would subject them to penalties under 7 Geo. 2, c. 8; they also claimed the benefit of Stat. Frauds. Exceptions were taken to the answer for insufficiency, & allowed by the master; defts. then excepted to the master's report:—*Held*: defts., admitting a verbal agreement, must answer the allegations in the bill relating to it, notwithstanding they suggested that some of the transactions inquired after were unlawful, & the discovery would subject them to penalties.—FISHER v. PRICE (1849), 11 Beav. 194; 18 L. J. Ch. 235; 13 L. T. O. S. 41; 50 E. R. 791.

82. — — —.]—PRITCHETT v. SMART, No. 79, ante.

83. — — —.] Where a clergyman employed persons to act for him as brokers in dealings of a stock-jobbing kind, & in a suit for an account sought a discovery of the dealings between them:—*Held*: they could not protect themselves by alleging that the discovery would subject them to

the penalties imposed by 57 Geo. 3, c. 40, on persons acting as brokers in the City of London without a licence, it not being stated that pltf. was aware of defts.' not being qualified. *Qu.*: whether it would have made any difference if he had been aware of this.—ROBINSON v. KITCHIN (1856), 8 De G. M. & G. 88; 25 L. J. Ch. 441; 26 L. T. O. S. 304; 2 Jur. N. S. 204; 4 W. R. 344; 44 E. R. 322, L. J.

84. — Sufficiency of grounds for production.]—In an action by a sharebroker in respect of the purchase of stock, in which the bill of particulars allowed several credits, deft. applied, under 14 & 15 Vict. c. 99, s. 6, for leave to inspect the books, documents, etc., in the possession of pltf., upon an affidavit of his attorney, which stated that, upon the purchase of the stock, pltf. received, as the deponent was informed & verily believed, divers bonds, representing the security for the stock, which securities remained in the hands of pltf., the particulars of which he neglected to furnish to deft., etc., & also divers books, papers, writings, entries, accounts, & other documents in relation to the stock, etc., & that it was material & necessary, in order to enable deft. to defend the action & to arrive at a just & proper conclusion as to the state of the accounts between him & pltf., that the deponent or deft. should inspect & take copies of all such bonds, books, etc., which the deponent verily believed were in the possession or under the control of pltf.; that pltf. had delivered to deft. two accounts relating to the matters in question; & that the deponent verily believed that neither the particulars of demand nor those accounts set forth the true state of the accounts between the parties, etc., & that the application was made *bonâ fide*, etc.:—*Held*: no ground was shown for an order to inspect under the statute.—SNEIDER v. MANGINO (1852), 7 Exch. 229; 21 L. J. Ex. 121; 16 Jur. 153; 155 E. R. 928.

Annotation:—**Refd.** Stone v. Strange (1865), 3 H. & C. 541.

85. Interrogatories—Allegation of fraud.]—Pltf. alleged that he had employed deft. as a stockbroker, but that deft. had in many of the transactions dealt with himself as principal, & had also charged pltf. with moneys not paid. Pltf. delivered interrogatories asking for the particulars of the dealings on behalf of pltf. & the names of the persons with whom deft. had dealt & the amounts paid. Deft. refused to answer on the ground that pltf. was not entitled to this information until after decrec:—*Held*: though there were no particulars of the frauds alleged, pltf. was entitled to discovery in order to enable him to give details of the frauds alleged.—LEITCH v. ABBOTT (1886), 31 Ch. D. 374; 55 L. J. Ch. 460; 54 L. T. 258; 50 J. P. 441; 34 W. R. 506, C. A.

Annotations:—**Appld.** Sachs v. Spellman (1887), 37 Ch. D. 295. **Refd.** Woolfe v. Automatic Picture Gallery (1902), 19 R. P. C. 161; *Re Debtor* (No. 7 of 1910), *Ex p.* Petitioning Creditors (1910), 79 L. J. K. B. 1065. **Mentd.** Zierenberg v. Labouchere, [1893] 2 Q. B. 183.

—*See, further*, DISCOVERY, Vol. XVIII., p. 220, Nos. 1688, 1689.

Agent's duty to keep & produce documents, generally.]—See AGENCY, Vol. I., pp. 437-439, Nos. 1275-1293.

PART III. SECT. 2, SUB-SECT. 3. —F.

1. Whether bound to produce books.]—CARNEGIE v. COX & WORTS (1886), 11 P. R. 311.—CAN.

g. Interrogatories — Allegation of conversion.]—FLANAGAN v. WILLIAMS

(1837), 2 Jo. Ex. Ir. 557.—IR.

h. — — —.]—In an action of damages for non-delivery of railway shares defender obtained a diligence to recover all documents tending to show the price of the stock at a certain date, & under this diligence he examined

the secretary of the railway co.:—*Held*: the secretary was bound to exhibit to the comr. the books of the railway co. in order that it might be judged whether they instructed the price or not.—GRAHAM v. SPROT (1847), 9 Dunl. (Ct. of Sess.) 545; 19 Sc. Jur. 221.—SCOT.

Sect. 2.—Broker and client: Sub-sect. 4, A. (a).]

SUB-SECT. 4.—RIGHTS OF BROKER.

A. Indemnity.

(a) In General.

86. Instructions carried out—According to rules of Stock Exchange.]—If A. employ B. as broker to buy shares in a joint-stock co., according to the rules of the Stock Exchange, for a certain account day, & B., in accordance with such rules, pay for & take a transfer of the shares on that day, A. is bound to repay B. the amount so paid, although, before such account day the said co. is being wound up within 25 & 26 Vict. c. 82, s. 153, which enacts that every transfer of shares shall then be void, unless the ct. otherwise order. —*CHAPMAN v. SHEPHERD, WHITEHEAD v. IZOD* (1867), L. R. 2 C. P. 228; 36 L. J. C. P. 113; 15 L. T. 477; 15 W. R. 314.

Annotations:—Consd. Biederman v. Stone (1867), 36 L. J. C. P. 198. *Apld.* Coles v. Bristowe (1868), L. R. 6 Eq. 149. *Refd.* Sheppard v. Murphy (1868), 16 W. R. 948.

87. ———.]—*SEYMOUR v. BRIDGE*, No. 59, *ante*.

88. ———.]—The effect of a principal's employing a broker to buy shares on the Stock Exchange was that the broker was authorised to buy the shares by making himself personally bound to pay for them; & if the principal failed to supply the purchase-money at the proper time & thus left his agent to suffer the consequences of his liability the principal was bound to indemnify him (*LORD FISHER, M.R.*).—*WALTER & GOULD v. KING* (1897), 13 T. L. R. 270, C. A.

Annotations:—Consd. Erskine, Oxenford v. Sachs, [1901] 2 K. B. 504; *Macoun v. Erskine, Oxenford*, [1901] 2 K. B. 493. *Apld.* *Re Finlay, Wilson v. Finlay*, [1913] 1 Ch. 247. *Refd.* *Christoforides v. Terry*, [1924] A. C. 566.

89. ———.] Rules not unreasonable or illegal.]—*DUNCAN v. HILL, SAME v. BEESON*, No. 130, *post*.

90. ———.]—A principal who employs a stockbroker to purchase bank shares for him is not bound by the custom of the Stock Exchange to disregard the provisions of Leeman's Act, 1867 (c. 29), s. 1, if he is in fact ignorant of the custom; for a custom must, in order to bind a person who is ignorant of it, be reasonable, & it must not change the character of the contract directed to be entered into.

Deft. directed pltf's., who were stockbrokers at Bristol, to buy for him on the London Stock Exchange certain bank shares. Pltf's. bought the shares through their London agents, & sent def't. the contract note, which, according to the usage & practice on the Stock Exchange, did not contain the numbers of the shares as required by Leeman's Act, 1867 (c. 29); & def't. refused for that reason to accept or pay for the shares. By the Rules of the Stock Exchange a member who does not fulfil his contracts is expelled, & no application to annul a contract is entertained unless fraud or misrepresentation is alleged. The London brokers accordingly paid for the shares, & the Bristol brokers repaid them, & sued def't. to recover the money thus paid. Def't. did not know of the custom to disregard the provisions of Leeman's Act, 1867 (c. 29), which makes a contract not made in accordance with it void:—*Held*: pltf's. were not entitled to recover the money paid, as def't. did not in fact know of the custom; knowledge of a custom which was not reasonable could not be imputed to him; & what he had authorised

pltf's. to do was to make a valid contract, & not one which could not be enforced in law.—*PERRY v. BARNETT* (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466; 53 L. T. 585; 1 T. L. R. 580, C. A.

91. ———.]—*HARKER v. EDWARDS*, No. 231, *post*.

92. ———.]—*SMITH v. REYNOLDS* No. 350, *post*.

93. ———.] Purchase by country broker through country & London agents.]—Pltf., a country stock & share broker was employed by def't. as his broker to make purchases of shares for him subject to the rules, regulations, & customs of the stock exchanges through which the transactions took place. Pltf. gave orders for the purchase of the shares to brokers on the London & Glasgow Stock Exchanges, who thereupon bought the shares from a jobber, & sent a bought note to pltf. charging 7s. 6d. "net" for the shares the price at which they bought from the jobber not being disclosed. Pltf. then sent a bought note to def't. charging him 7s. 6d. for the shares, without adding the word "net" plus a commission of 1½d. per share & 1s. for the stamp. The amount added by the London & Glasgow brokers for their remuneration did not exceed the usual commission payable in respect of such a purchase. In an action brought by pltf. against def't. for an amount alleged to be due to him in respect of the above-mentioned transactions:—*Held*: the contracts effected by pltf. were made through the London & Glasgow brokers as agents & were not made with them as principals, they were accordingly in accordance with the authority given to pltf. by def't., & pltf. was therefore entitled to be indemnified by def't. in respect of them.

The real question here . . . is a question of fact, merely, whether pltf. proved that he made contracts or caused contracts to be made on def't.'s behalf on the exchanges or whether he proved contracts of sale to himself by the London brokers. In the former case he is entitled to succeed; in the latter case he fails because he did not act according to def't.'s instructions, he did not carry out the mandate given to him (*BRAY, J.*).—*ASTON v. KELSEY*, [1913] 3 K. B. 314; 82 L. J. K. B. 817; 108 L. T. 750; 29 T. L. R. 530; 18 Com. Cas. 257, C. A.

Annotation:—Apld. *Blaker v. Hawes & Brown* (1913), 109 L. T. 320.

94. ———.]—*BLAKER v. HAWES & BROWN*, No. 171, *post*.

95. Right of broker not member of Stock Exchange.]—Pltf., an unlicensed broker, was employed by def't. to purchase certain scrip certificates of shares in a public co. on the London Stock Exchange. He bought the shares & paid the price to the seller, according to the usage of brokers on the Stock Exchange:—*Held*: pltf. was entitled to recover the money paid for the shares, but not for commission as a broker thereon.—*SMITH v. LINDO* (1858), 5 C. B. N. S. 587; 27 L. J. C. P. 335; 141 E. R. 237; *sub nom.* *LINDO v. SMITH*, 32 L. T. O. S. 62; 4 Jur. N. S. 974; 11 W. R. 748, Ex. Ch.

Annotation:—Apld. *Scott v. Jackson* (1865), 19 C. B. N. S. 134.

96. Transaction ultra vires the client—Purchase by company of own shares.]—Unless the memorandum & articles of assocn. of a co. contain in plain terms an express power enabling the co. to purchase their own shares, such purchase is

PART III. SECT. 2, SUB-SECT. 4.
—A. (a).

k. Instructions carried out.]—Where a broker enters into a transaction

on the Stock Exchange for the purchase or sale of goods in behalf of a customer, & the transaction takes place in the ordinary course of business, the broker's sole interest being his

commission, he is entitled to recover from the customer the amount of the loss resulting from the operation.—*MORRIS v. BRAULT* (1903), Q. R. 24, S. C. 167.—*CAN.*

ultra vires, although the co. may be empowered to deal in shares of joint stock cos. generally. Where, therefore, the broker of a banking co., acting under the instructions of the directors, bought shares in the co., on behalf of the co. & was credited with the price paid by him for the shares in his banking account kept with the co., & the co. was afterwards wound up:—*Held*: the broker was not entitled to prove against the co. for so much of the balance due to him as represented the price of the shares. *Semble*: if the price of the shares had been actually paid to the broker by the directors, he would have been liable to refund it.—*Re LONDON, HAMBURG & CONTINENTAL EXCHANGE BANK, ZULUETA'S CLAIM* (1870), 5 Ch. App. 444; 39 L. J. Ch. 598; 18 W. R. 778, L. J.

Annotations:—*Mentd. Re Marseilles Extension Ry., Ex p. Crédit Foncier & Mobilier of England* (1871), 7 Ch. App. 161; *Parker v. Lewis* (1873), 28 L. T. 91.

97. Contracts not recognised by Stock Exchange.—Although the subject-matter of a contract is not recognised by the Stock Exchange Committee, & could not be enforced by them against the members, yet if a man authorise his brokers to deal in that subject-matter as agents for himself as an undisclosed principal, & they in consequence acting upon that authority pay in accordance with the contract, he must indemnify them.

Bargains in prospective dividends are transactions which by the rules of the Stock Exchange, the committee will not recognise nor enforce. Another rule says that every bargain must be fulfilled by the members in accordance with the rules, regulations, & usages of the Stock Exchange. It was proved that there is a usage by which brokers are bound to pay to each other the differences arising upon dealings in prospective dividends.

A. instructed his brokers to sell his prospective dividends on certain railway stock, & they sent him a sold note, stating that it had been sold by his order, & subject to the rules & regulations of the Stock Exchange, payable on declaration of dividend, & they subsequently paid, in accordance with the usage, to the jobbers to whom they had sold it, the difference which became due to them when the dividend was declared at a higher figure than the sold price:—*Held*: A. could not refuse to indemnify his brokers, on the ground that their payment to the jobbers was voluntary & could not have been enforced, because the usages of the Stock Exchange were incorporated into the contract, & so the brokers were bound to pay.—*MARTEN v. GIBBON* (1875), 32 L. T. 229; *affd.*, 33 L. T. 561; 24 W. R. 87, C. A.

98. Client dealing in differences—Evidence of account delivered & admissions by client.—On July 29 *deft.* directed *pltf.*, who was a stockbroker, to buy him certain railway stock for the account of Aug. 14, but without any intention of taking a transfer thereof. The stock was bought by *pltf.*'s agent, & the bought notes sent to *deft.* On Aug. 13 he directed *pltf.* to sell all. The sale was effected through the same agent. On Aug. 14 *pltf.* delivered his account to *deft.*, who said that he would not pay; that he knew *pltf.* had no legal claim on him; but that he considered it a debt of honour which he would pay at a future time. In an action by *pltf.* for the differences on the price & his commission:—*Held*: (1) *pltf.* was entitled to recover; the contract did not come within Gaming Act, 1845 (c. 109), s. 18, & was not void; (2) the account delivered & the admission of *deft.* were evidence to support the account

stated.—*ASHTON v. DAKIN* (1859), 32 L. T. O. S. 300; 7 W. R. 384.

Annotation:—*As to* (1) *Consd. Thacker v. Hardy* (1878), 4 Q. B. D. 685.

99. — Knowledge of broker—Broker incurring liability to jobbers.—*COOPER v. NEAL* (1878), 48 L. J. Q. B. 292, n.; 39 L. T. 596, n.; 27 W. R. 159, n., C. A.

Annotation:—*Consd. Thacker v. Hardy* (1878), 4 Q. B. D. 685.

100. — Dealings by broker's clerk.

—Where a person speculates on the Stock Exchange, but the stockbroker through whom he speculates enters into *bond fide* contracts with a jobber in respect of which he is liable to the jobber, the stockbroker can sue the client for an indemnity, notwithstanding that the client merely intended to deal in differences, & this fact was known to the stockbroker.—*FRANKLIN (H. W.) & Co. v. DAWSON* (1913), 29 T. L. R. 479.

101. ——*Deft.*, with a view to making money by speculating on the Stock Exchange, requested a friend, who was a clerk & half-commission man employed by *pltf.* firm of stockbrokers, to buy & sell shares on his behalf but not to lose more than £50. *Pltf.* firm, acting through their clerk, accordingly acted as brokers for *deft.* When the sum of £50 had been lost *deft.* authorised his friend to continue speculating on his behalf, & eventually *pltf.* closed *deft.*'s account when he owed them £317 19s. 6d. In an action to recover this sum:—*Held*: the arrangement between *deft.* & half-commission man was a purely gambling transaction, but except so far as *pltf.* were affected by the knowledge of the half-commission man as their clerk & agent, there was no evidence that *pltf.* believed the transactions to be other than genuine investments on the part of *deft.* & as the contracts formed between the jobbers & *deft.* through the agency of *pltf.* were not in any sense wagering contracts *pltf.* were entitled to recover.—*WEDDLE, BECK & Co. v. HACKETT* (1928), 140 L. T. 303; 45 T. L. R. 67.

—*Compare* No. 423, *post*.

102. — No contract for client's benefit.—

(1) In an action by an outside broker against a client to recover the balance of account for stocks & shares alleged to have been bought & sold for him, it appeared as to part of such stocks & shares that the broker appropriated certain stocks that he already held to the client's account, without the latter's knowledge:—*Held*: there had been no contracts made by the broker with a third party for the client's benefit, & therefore the broker could not recover differences or commission in respect of such shares.

(2) Further, as to other stocks & shares, it appeared that the broker after buying them for the client resold them without the latter's knowledge, & subsequently bought them back again, but charged the client with the differences, as though such stocks had been kept open on his account:—*Held*: no real continuing contracts had been in existence for the benefit of the client, & consequently no real differences had arisen which the broker was entitled to recover from the client.—*SKELTON v. WOOD* (1894), 71 L. T. 616; 15 R. 130, D. C.

—*See, generally, Part VI., Part VII., Sect. 1, sub-sect. 2, post.*

103. Time bargains with jobbers.—*Pltf.*, a stockbroker, at *deft.*'s request, made time bargains for him in foreign stocks, & in the result was compelled, according to the usage of the Stock Exchange, to pay the differences. Before the settling day, *deft.* sent to *pltf.* to inform him that

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Sect. 2.—Broker and client: Sub-sect. 4, A. (a), (b), (c) & (d).]

he was unable to meet his engagements, & therefore was compelled to absent himself; & at a subsequent time he promised to pay the amount. The jury having found a verdict for pltf., the ct. refused to disturb it holding that the evidence warranted an inference that the payment was made at deft.'s request.—*PAWLE v. GUNN* (1838), 4 Bing. N. C. 445; 1 Arn. 200; 6 Scott, 286; 7 L. J. C. P. 206; 132 E. R. 859.

104. —.]—*COOPER v. NEAL* (1878), 48 L. J. Q. B. 292, n.; 39 L. T. 596, n.; 27 W. R. 159, n., C. A.

Annotation:—Expld. Thacker v. Hardy (1878), 4 Q. B. D. 685.

105. When right to sue arises—Not until liability incurred.]—*HALSTED v. FRIEDLANDER* (1904), *Times*, July 25.

106. Action for indemnity—Particulars of demand.]—In an action brought by a sworn broker for the price of scrip bought for the account for deft., the particulars of pltf.'s demand should state the names of the persons from whom, & the price at which the scrip was bought, & the date of the purchase within a few days.—*BERKLEY v. DE VERE* (1846), 15 L. J. Q. B. 323.

Indemnity by principal, generally.]—See AGENCY, Vol. I., pp. 528, 540, Nos. 1862–1943.

(b) Necessity for Delivery.

107. Necessity for delivery.]—Deft. opened a speculative account with a firm of stockbrokers & deposited with them as security for any debit balance which might from time to time be owing by him on that account the *indicia* of title to various bonds & shares, including certain rubber shares. In 1920 the firm sold the rubber shares without the knowledge or authority of deft., who was kept in ignorance of the sale till after the bkpcy. of the firm. On Feb. 16, 1922, a receiving order was made against the firm & they were adjudicated bkpt. In Feb. 1923, the trustee in bkpcy. of the firm rendered deft. a final account, which, after giving credit to deft. for the proceeds of the sale of the shares, showed a balance due from deft. In an action to recover that balance the trustee claimed that the rights of the parties ought to be adjusted under the mutual credits clause of Bkpcy. Act, 1914 (c. 59), as at the date of the receiving order:—*Held*: the brokers could not have maintained an action for their debt if they were not in a position to hand over the shares against payment, & the trustee in bkpcy. had no higher right.—*ELLIS & Co.'s TRUSTEE v. DIXON-JOHNSON*, [1925] A. C. 489; 94 L. J. Ch. 221; 133 L. T. 60; 41 T. L. R. 336; 69 Sol. Jo. 395, H. L.

108. No delivery till after action brought.]—In an action for shares sold, & money paid, the particulars of demand were for "50 shares in a railway co., at a certain sum per share, for commission & interest." The evidence was that deft. had ordered pltf., a sharebroker, to buy railway shares for him at a certain price, which pltf. had done. But the shares were not delivered till

after action brought. Pltf. had paid the broker, of whom he purchased the shares, & sought to recover the money so paid in this action:—*Held*: he could not recover for money paid under the above particulars; nor for the price of the shares upon the above evidence.—*HARDWICK v. LEA* (1847), 8 L. T. O. S. 387.

109. Tender of part.]—*BENJAMIN v. BARNETT*, No. 18, *ante*.

110. No delivery within time allowed by rules—Notice by client that delivery will not be accepted after time.]—*BENJAMIN v. BARNETT*, No. 18, *ante*.

(c) In respect of What Payments.

111. Payments to purchaser by broker—Client failing to complete contract—Sale of stock at future date.]—A broker who contracts with others for sale of stock at a future day by the authority of his principal, who afterwards refuses to make good the bargain, cannot by paying the difference to such third persons maintain an action on an implied *assumpsit* against his principal for the amount. If the principal were really possessed of the stock so bargained to be sold, such contract is not illegal within 7 Geo. 2, c. 8, against stock-jobbing, although the broker did not disclose the name of his principal at the time of the bargain made; & the purchaser may maintain an action for the difference against the principal.—*CHILD v. MORLEY* (1800), 8 Term Rep. 610; 101 E. R. 1574.

Annotations:—Appld. Young v. Cole (1837), 3 Bing. N. C. 724. *Refd. McCallan v. Mortimer* (1842), 11 L. J. Ex. 429; *Bayliffe v. Butterworth* (1847), 1 Exch. 425; *Sawyer v. Langford* (1848), 2 Car. & Kir. 697; *Bayley v. Wilkins* (1849), 7 C. B. 886; *Westropp v. Solomon* (1819), 8 C. B. 345.

Mistake in instructions.]—(1) A person employing a broker to sell shares, directed him, by mistake, to sell two hundred & fifty shares, meaning fifty. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder, on the next day, informed his broker of the mistake, & asked if the bargain could not be made void; the broker answered, "No"; & the shareholder then said he must leave the matter in his hands to do the best he could. By the rules of the Stock Exchange, brokers, on sales of this description, do not name any principal, & if the vendor is not prepared to complete his contract, the purchaser buys the requisite number of shares & the vendor is bound to make up the loss, if any, resulting from a difference in prices. The broker paid such difference, being unable to complete his contract & the purchaser having made good the shares at a loss:—*Held*: for the difference so advanced, the shareholder was liable to the broker in *assumpsit* for money paid.

(2) A person who employs a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules.—*SUTTON v. TATHAM* (1839), 10 Ad. & El. 27; 2 Per. & Dav. 308; 8 L. J. Q. B. 210; 113 E. R. 11.

Annotations:—As to (1) Consd. Dalls v. Lloyd (1848), 12 Q. B. 531. *As to (2) Consd. Bayliffe v. Butterworth* (1847), 1 Exch. 425; *Pollock v. Stables* (1848), 12 Q. B. 765. *Refd. Sweeting v. Pearce* (1859), 7 C. B. N. S. 449. *Generally,*

106 i. Action for indemnity—Particulars of demand.]—In *assumpsit* by a stock & sharebroker for work & labour in buying & selling railway & other shares, for defts., the ct. refused to compel pltf. to amend his particulars of demand by giving the names & addresses of the persons to & from whom the shares were respectively bought, or sold.—*BACON v. GREEN* (1816), 8 L. T. O. S. 323. —IR.

PART III. SECT. 2, SUB-SECT. 4. —A. (b).

1. Stockbroker—Liability of customer to indemnify broker—Stock Exchange rules—Validity of.]—*BLUMENTHAL v. BOND*, [1916] App. D. 29.—S. AF.

PART III. SECT. 2, SUB-SECT. 4. —A. (c).

m. Purchase for customers on margin.]

—*AMES & Co. v. CONMEE* (1905), 10 O. L. R. 159 6 O. W. R. 89.—CAN.

n. —.]—A stockbroker is entitled to indemnity for a loss sustained by him on a sale of shares on the failure of a customer for whom he has bought the shares on margin to maintain the margin, if the broker has been in a position to deliver to the customer on demand share certificates for the

Refd. *Westropp v. Solomon* (1849), 8 C. B. 345; *Brown v. Byrne* (1854), 2 C. L. R. 1599; *Lindo v. Smith* (1858), 32 L. T. O. S. 62.

113. ——— Purchase by another broker.]—Deft., who resided some distance from Liverpool, authorised pltf., a broker there, to sell for him twenty railway scrip shares. Pltf. sold them to C., another broker of Liverpool. The scrip shares were not delivered on the day, & C. bought twenty other scrip shares at the market price, & claimed the difference between the contract & the market price. Pltf. paid him the difference, & brought an action for money paid to recover this sum. It was proved to be the usage amongst brokers at Liverpool, to be responsible to each other upon these contracts, & there was evidence that deft. was cognisant of this usage:—**Held:** deft. was liable.

Semble: deft.'s knowledge of the usage was immaterial.—**BAYLIFFE v. BUTTERWORTH** (1847), 1 Exch. 425; 5 Ry. & Can. Cas. 283; 17 L. J. Ex. 78; 10 L. T. O. S. 167; 11 Jur. 1019; 151 E. R. 181.

Annotations:—Distd. *Pollock v. Stables* (1848), 12 Q. B. 765; *Simpson v. Rand* (1848), 17 L. J. Ex. 146. **Consd.** *Ireland v. Livingston* (1866), L. R. 1 Q. B. 99. **Refd.** *Sweeting v. Pearce* (1859), 7 C. B. N. S. 449.

114. ——— Repayment to purchaser—Shares not marketable.]—Pltf., a stockbroker, sold for deft. four Guatemala bonds, & paid him the amount: the bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable; whereupon pltf. took them back & reimbursed the purchaser:—**Held:** pltf. was entitled to recover from deft., in an action for money had & received, the amount he had paid to deft.—**YOUNG v. COLE** (1837), 3 Bing. N. C. 724; 3 Hodg. 126; 4 Scott. 489; 6 L. J. C. P. 201; 132 E. R. 589.

Annotations:—Refd. *Dawson v. Collis* (1851), 10 C. B. 523; *Gompert v. Bartlett* (1853), 2 R. & B. 849; *Gurney v. Womelsley* (1854), 21 L. J. Q. B. 46; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Pooley v. Brown* (1862), 11 C. B. N. S. 566; *Raphael v. Burt* (1884), Cab. & El. 325.

115. ——— Sale of forged certificates.]—**WESTROPP v. SOLOMON**, No. 232, *post*.

116. Payment in respect of illegal transaction.]—Where an assocn. calling themselves "The Equitable Loan Bank Co.," issued shares, transferable without restriction, & assumed to act as a corporate body without an Act of Parliament or a royal charter:—**Held:** they violated 5 Geo. 1, c. 18, ss. 18 & 19, & a broker could not maintain an action against his principal for the price of certain of such shares purchased at the request of the latter.—**JOSEPHUS v. PEBBER** (1825), 3 B. & C. 639; 1 C. & P. 507; 5 Dow. & Ry. K. B. 542; 3 L. J. O. S. K. B. 102; 107 E. R. 870.

Annotations:—Refd. *Jackson v. Cocker* (1841), 4 Beav. 59; *London Grand Junction Ry. v. Freeman* (1841), 2 Man. & G. 606.

117. Payments to vendor by broker.]—If a party authorises a broker to buy shares for him in a particular market, where the usage is that, when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may resell, & charge him with the difference; & the broker, acting under the authority, buys at such market in his own name; such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use; & it is

number of shares bought.—**McDOWGALL & COWANS v. RIORDON** (B. C.), [1917] 3 W. W. R. 1076; 24 B. C. R. 446; 38 D. L. R. 198.—**CAN.**

o. Advance made by broker to pay calls.]—A stockbroker purchased certain railway shares for his constituent, upon which there was an unpaid call, & notified the transaction to his constituent, who acquiesced in it, &

received delivery of the transfer, & retained the same. The purchaser having failed to pay the call, the broker advanced the amount & brought an action of relief.—**Held:** the circumstance of there being an unpaid call at the date of the purchase of the shares did not invalidate the transaction under 8 Viet. c. 17, s. 17; & the purchaser was bound to reimburse the

not necessary, in such action, to show that the principal knew of the custom.—**POLLOCK v. STABLES** (1848), 12 Q. B. 765; 5 Ry. & Can. Cas. 352; 17 L. J. Q. B. 352; 12 Jur. 1043; 116 E. R. 1057.

118. ———.]—Pltfs., stockbrokers, & members of the London Stock Exchange, on Aug. 28, 1856, at the request of deft., bought for him twenty shares in a joint-stock bank called the Royal British Bank, to be paid for on the "settlement day," which was on Sept. 15, & duly forwarded to him the usual broker's contract note. The bank stopped payment on Sept. 3 & ultimately became bkpt. On Sept. 11, deft. repudiated the transaction, & gave pltfs. notice not to pay the price on his account. Pltfs. having been compelled according to the rules of the Stock Exchange to pay for the shares on the settlement day, sent deft. the certificates & transfers, & upon his declining to accept them, sued him for money paid:—**Held:** they were entitled to recover.—**TAYLOR v. STRAY** (1857), 2 C. B. N. S. 175; 26 L. J. C. P. 185; 29 L. T. O. S. 95; 3 Jur. N. S. 540; 5 W. R. 528; 140 E. R. 380; *on appeal*, 2 C. B. N. S. p. 197, Ex. Ch.

Annotations:—Consd. *Smith v. Lindo* (1858), 5 C. B. N. S. 587. **Distd.** *Stray v. Russell* (1859), 1 E. & E. 888. **Appld.** *Chapman v. Shepherd*, *Whitehead v. Izod* (1867), L. R. 2 C. P. 228; *Coles v. Bristowe* (1868), L. R. 6 Eq. 119. **Refd.** *Cropper v. Cook* (1868), L. R. 3 C. P. 191; *Sheppard v. Murphy* (1868), 16 W. R. 948. **Mentd.** *Risbourg v. Brouckner* (1858), 6 W. R. 215; *Sweeting v. Pearce* (1859), 6 Jur. N. S. 753.

119. Calls paid on shares—According to usage of Stock Exchange.]—**BAYLEY v. WILKINS**, No. 31, *ante*.

120. Losses on dealings by client's clerk—In client's name—Knowledge of client—No communication to broker.]—Deft. held liable to share-brokers for losses on share transactions entered into with them in his name by his clerk; it appearing that he was aware of the clerk's dealings, & did not make any communication to pltfs.—**WEBB v. CHALLONER** (1860), 2 F. & F. 120, N. P.

121. Costs of defending action by seller.]—A. bought bank shares for B. "for the account," but before the settling day a petition was presented to wind up the bank, & B. thereupon declined to pay the value of the shares. A. resisted the claim of the selling broker, & had to pay the value of the shares & the costs of the action.

In an action by A. against B. to recover the amount:—**Held:** he could not recover the costs of the action.—**CLEGG v. TOWNSHEND** (1867), 16 L. T. 180, N. P.

(d) *Broker Acting Without Authority.*

122. Right to indemnity.]—A. employed B., a broker, to sell five shares in a railway. B. contracted to sell them to C., another broker. At the time of the employment of B. by A., & of the contract between B. & C., the shares were in course of registration, & consequently no transfer took place. After considerable delay, & after the shares had arisen in value, C. wrote to B., threatening him that if the shares were not transferred, he, C., should buy a like number of shares in the market, at the increased price, & charge B. with the difference of price. B. gave notice of this threat

advance made on his behalf by the broker.—**HOWDEN v. KENNEDY** (1855), 18 Dunl. (Ct. of Sess.) 246; 28 Sc. Jur. 40.—**SCOT.**

p. Difference between price of London registered shares & shares on "Colonial Register."]—**MACKENZIE v. BLAKENEY** (1879), 6 R. (Ct. of Sess.) 1329; 16 Sc. L. R. 770.—**SCOT.**

Sect. 2.—Broker and client: Sub-sect. 4, A. (d) & (e), & B.]

to A., who distinctly forbade him from paying any money on his account. C. afterwards fulfilled his threat, & B. paid him the difference between the contract price & the then market price of the shares. By a rule of the Stock Exchange, to which B. & C. belonged, B. was liable to make C. this payment. No deed of transfer of the shares was ever tendered by C. to B. for execution, nor was the purchase-money ever tendered:—*Held*: B. could not recover from A., as money paid to A.'s use, the money which B. had paid to C. as the difference between the prices of the shares at the two different times.

In order to maintain this action for money paid to the use of deft. at his request, it was necessary that pltf. should prove either an actual request on the part of deft., or that the money was paid in discharge of some liability, which pltf. had taken on himself, by deft.'s authority. No evidence was given of any actual request; it is, therefore, necessary to inquire whether pltf. paid to discharge some legal liability, & whether he incurred that liability by deft.'s authority. . . . He clearly had no authority to do so after deft.'s letter expressly desiring him not to pay any money in his name as his agent. . . . If the contract was for unregistered shares pltf. was not authorised to make it; & if for registered shares, C. not having tendered the transfer, was not in a situation to proceed against pltf., & consequently payment by him was in his own wrong, & did not give him a right of action against deft. for money paid to his use (*TINDALL, C.J.*).—*BOWLBY v. BELL* (1846), 3 C. B. 284; 4 Ry. & Can. Cas. 692; 16 L. J. C. P. 18; 7 L. T. O. S. 300; 10 Jur. 669; 136 E. R. 114.

Annotation:—*Consd.* Bayley v. Wilkins (1849), 7 C. B. 886.

123. —.]—Deft. gave pltf. the following order to buy certain Mexican Railway shares: You may buy 500 Mexican Rails at 102–103, 104–105, provided a recovery from the severe fall is pretty certain; but if Mexicans are going down do not buy at present." Pltf. having purchased the shares, deft. repudiated the purchase as not being in accordance with instructions:—*Held*: deft.'s order was not an authority to buy in a falling market, & as the market was falling, pltf. was not authorised to purchase the shares, & therefore could not recover the price paid for the same.—*TALLENTYRE v. AYRE* (1884), 1 T. L. R. 143, C. A.

124. —.]—*BENJAMIN v. BARNETT*, No. 18, *ante*.

125. —.]—Deft. on various occasions instructed pltf., a country stockbroker, to effect for her purchases & sales of stocks & shares in the usual way through brokers on the London Stock Exchange. On receipt of her instructions, pltf. effected various purchases & sales of stocks & shares in a manner of which the following transaction is an example. Deft. having instructed pltf. to buy certain American railway shares for her, pltf. gave an order for the purchase of the shares to a firm of brokers on the London Stock Exchange, between whom & himself there was an arrangement that in such cases they should deal at a "net" price for the shares, i.e., a price arrived at by adding to the purchase price such sum as the London brokers might fix as their remuneration for the transaction. The London brokers thereupon bought the shares from a jobber, & sent a bought note to pltf. charging "98½ net" for the shares, the price at which they bought from the jobber not being disclosed. Pltf. then sent a bought note to deft., charging her 98½ for the shares, without adding the word "net" plus a commission

of 7s. 6d. & 1s. for the stamp. It appeared that the amount added by the London brokers for their remuneration did not exceed the usual commission payable in respect of such a purchase. In an action brought by pltf. against deft. for a balance alleged to be due to him in respect of the above-mentioned transactions:—*Held*: the contracts effected by pltf. being contracts, not made through the London brokers as agents, but made with them as principals, were not in accordance with the authority given to pltf. by deft., & therefore he was not entitled to indemnity from deft. in respect of them; & consequently, the action was not maintainable.

The office of a broker is to make privity of contract between two principals, & this is utterly incompatible with making a contract at one price with the one & a corresponding contract at another price with the other & pocketing the difference, the amount of which is unknown to either (*FLETCHER MOULTON, L.J.*).—*JOHNSON v. KEARLEY*, [1908] 2 K. B. 514; 77 L. J. K. B. 904; 99 L. T. 506; 24 T. L. R. 720, C. A.

Annotations:—*Distd.* *Aston v. Kelsey*, [1913] 3 K. B. 314. *Consd.* *Blaker v. Hawes & Brown* (1913), 109 L. T. 320. *Refd.* *Platt v. Rowe & Mitchell* (1909), 26 T. L. R. 49.

126. — *Extent of deprivation of right—Part of transactions valid.*—A stockbroker who on behalf of a principal buys stock upon the Stock Exchange for the next settling day, & without authority from his principal, & contrary to the agreement between them, sells the stock before that day at a loss cannot claim indemnity from his principal.

Pltf., a stockbroker, having prior to Nov. 10 bought stock of a railway co. for deft. on the London Stock Exchange, it was agreed between them that pltf. should take part of the stock so purchased off the market by paying for it with money advanced by him for the purpose, which he accordingly did, & that he should hold that stock as security for his advance with interest, & should not sell the same before the account of Nov. 26. On Nov. 10 pltf. by deft.'s instructions carried over the residue of the stock till Nov. 26, & bought a further amount of stock for that day. On Nov. 19 pltf., without deft.'s authority, & contrary to his agreement, sold the whole amount of stock purchased at a loss in order to close the account between them. If the stock had been sold on Nov. 26, it would have realised a price higher than that at which pltf. sold, but lower than that at which he had bought it for deft. In an action by pltf. against deft. for indemnity in respect of the difference between the prices at which he had bought & sold the stock:—*Held*: (1) as to pltf.'s claim in respect of the stock paid for & taken off the market by pltf. as before mentioned, pltf. was entitled to recover as for money paid for deft. at his request, subject to deft.'s right to counterclaim damages for the loss occasioned by pltf.'s wrongfully selling the stock before Nov. 26; (2) as to pltf.'s claim in respect of the stock carried over & that which was purchased on Nov. 10 as before mentioned no action for indemnity was maintainable.

As to that part of the stock which pltf. had actually taken & paid for, his right to be recouped had actually attached & was not undone or divested by his subsequent breach of his contract to carry over . . . no subsequent default of the agent could annul his vested right of action in respect of them (*COLLINS, L.J.*).—*ELLIS v. POND*, [1898] 1 Q. B. 426; 67 L. J. Q. B. 345; 78 L. T. 125; 14 T. L. R. 152, C. A.

Annotations:—*Distd.* *Re Finlay, Wilson v. Finlay*, [1913] 1 Ch. 247. *Refd.* *Christoforides v. Terry*, [1924] A. C. 566.

(e) *Insolvency or Default of Broker or Client.*

127. Insolvency of client—Broker's right to prove.]—A broker, by order of a customer, purchased certain scrip shares in a projected co. provisionally registered, but the purchase-money not having been paid on the settling day, the broker sold them again at a loss. The customer having become bkpt. the broker applied to prove for the loss, but was refused by the comr. On application by petition to the Ct. of Review, petitioner was allowed to go before the comr. to establish his proof.—*Re CHARLES, Ex p. BARTON* (1846), De G. 316; 4 Ry. & Can. Cas. 371; 7 L. T. O. S. 143; 10 Jur. 442, Ct. of R.

128. ———.]—*LACEY v. HILL, CROWLEY'S CLAIM*, No. 153, *post*.

129. ——— Effect of closing account on indemnity.]

—*LACEY v. HILL, CROWLEY'S CLAIM*, No. 153, *post*.

130. Default of broker—Not due to contracts on client's behalf.]—Pltfs., brokers on the London Stock Exchange, bought for deft., who was not a member of the Stock Exchange, certain shares for the account of July 15, 1870, & on that day, by his instructions, carried them over to the account of July 29, & paid differences amounting to £1,688. Deft. & various others, principals of pltfs., not having paid the amount due from them in respect of contracts for July 15 pltfs. became defaulters, & on the 18th, in conformity with the Rules of the Stock Exchange, they were declared defaulters, & their transactions were closed, & accounts were made up at the prices current on that day. On the closing of the accounts a further sum became due from them in respect of differences upon the contracts carried over by them for deft. In an action to recover is sum & the £1,688 :—*Held* : deft. was not liable for anything beyond the £1,688, there being no implied promise by a principal to his agent to indemnify him for loss caused, not by reason of his having entered into the contracts which he was authorised to enter into by the principal, but by reason of his own insolvency.

It must be admitted that pltfs. were authorised by defts. to enter into contracts in their behalf according to the Rules of the Stock Exchange. It must be admitted that for any loss incurred by the agent by reason of his having entered into such contracts according to such rules, unless they be wholly unreasonable & where the loss is without any personal default of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect (*per CUR.*).—*DUNCAN v. HILL, DUNCAN v. BEESON* (1873), L. R. 8 Exch. 242; 42 L. J. Ex. 179; 29 L. T. 268; 21 W. R. 797, Ex. Ch.

Annotations :—*Apld.* *Thacker v. Hardy, Thacker v. Hardy, Thacker v. Wheatley* (1878), 48 L. J. Q. B. 289. *Distd.* *Hartas v. Ribbons* (1889), 22 Q. B. D. 254. *Consd.* *Ellis v. Pond*, [1898] 1 Q. B. 426. *Refd.* *Dent v. Nickalls* (1873), 29 L. T. 536; *Lacey v. Hill* (1873), 8 Ch. App. 921; *Beckhusen & Gibbs v. Hamblet*, [1900] 2 Q. B. 18; *Levitt v. Hamblet* (1901), 84 L. T. 638; *Christoforides v. Terry*, [1924] A. C. 566.

131. ——— Client treating agency as continuing.]—Deft. employed pltf., a broker on the Stock Exchange, to purchase shares, which he accordingly did. Before the settling day pltf. became a defaulter on the Stock Exchange through inability to meet his engagements, & in accordance with the rules of the Stock Exchange, the accounts which he had opened were closed as between himself & the jobbers at the then current prices as fixed by the official assignee of the Stock Exchange. The account in respect of the shares bought for deft. when closed, as above mentioned, showed a balance in favour of the jobbers against pltf. According

to the practice of the Stock Exchange such closing of the account does not affect the client if he, nevertheless, desires to have the contract completed, & is not in default to the defaulting broker; & the jobber in that case is bound to complete on the settling day. Pltf., on the same day when he was declared a defaulter & his accounts closed, subsequently informed deft. that he could either have the contract completed, as above-mentioned, or he might accept the official prices. Deft. said that he would do the latter—*Held* : deft., having ratified the closing of the account before the settling day, was liable to indemnify pltf. against the amount for which pltf. was liable to the jobbers on such closing.

Deft. might then have rejected pltf. as his agent altogether & have himself completed the contract with the jobbers or have had his account transferred to another broker (*LORD ESHER, M.R.*).—*HARTAS v. RIBBONS* (1889), 22 Q. B. D. 254; 58 L. J. Q. B. 187; 37 W. R. 278; 5 T. L. R. 200, C. A.

Annotations :—*Refd.* *Ellis v. Pond*, [1898] 1 Q. B. 426; *Beckhusen & Gibbs v. Hamblet*, [1900] 2 Q. B. 18.

132. ——— Accounts closed by official assignee—Differences due from client.]—*ALLEN v. WINGROVE* (1901), 17 T. L. R. 261.

133. Bankruptcy of broker—Rights of trustee in bankruptcy.]—*ELLIS & CO.'S TRUSTEE v. WATSHAM* (1923), 155 L. T. Jo. 363.

134. ——— No greater than those of broker.]—*ELLIS & CO.'S TRUSTEE v. DIXON-JOHNSON*, No. 107, *ante*.

B. Remuneration.

135. Commission—Whether recoverable by broker not member of Stock Exchange.]—*SMITH v. LINDO*, No. 95, *ante*.

136. ——— Agreement for dealing in differences.]—A sharebroker can maintain an action against his principal for commission upon pretended contracts made by the broker by way of gaming & wagering as to difference in the prices of railway shares, although such contracts may be void under Gaming Act, 1845 (c. 109) there being nothing illegal in such employment of the broker by his principal.—*INCHBALD v. COCKERILL* (1858), 31 L. T. O. S. 205; 4 Jur. N. S. 693.

137. ———.]—*ASHTON v. DAKIN*, No. 98, *ante*.

138. ———.]—*THACKER v. HARDY*, No. 432, *post*.

139. ——— No contracts for client's benefit.]—*SKELTON v. WOOD*, No. 102, *ante*.

140. ——— Where contract unstamped.]—A broker who has made purchases or sales on the Stock Exchange for his principal is not prevented from recovering commission on such purchases or sales by an omission on his part to transmit to his principal any stamped contract notes in conformity with the Customs & Inland Revenue Act, 1888 (c. 8), s. 17 (1).—*LEAROYD v. BRACKEN*, [1894] 1 Q. B. 114; 63 L. J. Q. B. 96; 69 L. T. 668; 42 W. R. 196; 10 T. L. R. 61; 9 R. 92, C. A.

Annotation :—*Mentd.* *Victorian Daylesford Syndicate v. Dott* (1905), 74 L. J. Ch. 673.

141. According to mutual agreement.]—An agent, *e.g.*, a stockbroker, may be remunerated in such manner as he & the principal mutually agree. It is perfectly legal to employ a stockbroker to buy or sell stocks or shares at a fixed price & to give him as his remuneration any advantage he may obtain in the price, whether the price be less or more, according as he is employed to buy or sell.—*PLATT v. ROWE (TRADING AS CHAPMAN & ROWE) & MITCHELL (C. M.) & CO.* (1909), 26 T. L. R. 49.

Sect. 2.—Broker and client: Sub-sect. 4, B. & C.
(a) i., ii. & iii., & (b).]

142. Employment to buy & sell at fixed price—Advantage obtained in price as remuneration.]—PLATT v. ROWE (TRADING AS CHAPMAN & ROWE) & MITCHELL (C. M.) & Co., No. 141, *ante*.

143. Reasonableness of remuneration.]—(1) In Nov. 1904, pltf. instructed brokers on the London Stock Exchange to buy certain mining shares for him, it being understood that the shares were not to be taken up on the setting day, but were to be carried over. No agreement was made as to the remuneration of the brokers for arranging the carry-over. The brokers bought the shares from a jobber, & in the bought notes sent by them to pltf. they charged an opening commission of 1s. per share. They arranged the carry over with the jobber, & the first continuation account sent by them to pltf. contained a charge of "8½d. net." The shares were carried over in this way every fortnight until Jan. 1906, the "net" rate varying with the market price of the shares. Pltf. having failed to pay the balance against him on the mid-Oct. 1905 carry over, they pressed for payment, & pltf. deposited with them as security a certificate for 390 gas shares & signed a blank transfer of the same. The fortnightly balances continued adverse to pltf. & were not paid by him, & after repeated applications to pltf. for payment, the brokers, in Jan. 1906, closed the account with a balance of £69 10s. against him, & sold the 390 shares for £162 10s.

Throughout the above transactions pltf. thought that the "net" rate charged for every carry over represented only the jobber's contango; but it included also, in fact, a charge by the brokers for arranging the carry over which they did not disclose to pltf. It appeared that the "net" rate was well known on the Stock Exchange to indicate that with the jobbers contango was included the broker's remuneration, & that the charge of the brokers, which amounted in the aggregate to £17 odd, was reasonable.

Pltf. brought an action against the brokers for an account & payment of the secret profit made by them in carrying over the mining shares & for damages for wrongful conversion of the gas shares. Defts. counterclaimed for payment of reasonable remuneration for carrying over the mining shares:—*Held*: defts., not having been guilty of any breach of duty as agents, were entitled to retain the £17 as reasonable remuneration.

(2) They obtained from him by way of security, or "cover" as it is technically called, 390 shares (COZENS-HARDY, M.R.).—STUBBS v. SLATER, [1910] 1 Ch. 632; 79 L. J. Ch. 420; 102 L. T. 444, C. A.

Annotations:—As to (1) *Reid*. Aston v. Kelsey, [1913] 3 K. B. 314; Blaker v. Hawes & Brown (1913), 109 L. T. 320; London County & Westminster Bank v. Tompkins, [1918] 1 K. B. 515; Ellis' Trustee v. Dixon-Johnson, [1924] 1 Ch. 342.

Agent's right to remuneration, generally.]—See AGENCY, Vol. I., pp. 488–528, Nos. 1664–1861.

C. Right to Close Account.

(a) When Right Arises.

i. Failure to Provide Funds.

144. Right of broker to close account.]—SAMUEL & ESCOMBE v. ROWE, No. 160, *post*.

PART III. SECT. 2, SUB-SECT. 4. —C. (a) i.

144 i. Right of broker to close account.]—Where a stockbroker has incurred personal responsibility by purchasing stock for a client on the faith of

representations made by him as to his means, which proved not to be correct, & the client has refused to give satisfactory explanations or references, the stockbroker is entitled to realise the stock held for his client, & close the account.—RISK v. AULD &

145. —.]—Defts., who were stockbrokers, by pltf.'s instructions effected on his behalf contracts on the Stock Exchange for the purchase of shares, upon which they incurred liability to a considerable amount. Pltf. not providing defts. with funds to meet that liability, defts. became entitled to close the account, which they did in respect of the various contracts in the following manner. They got a jobber in the market to make a price for the shares, & the jobber naming a fair market price, a bargain was made by defts. with the jobber for the sale of the shares to him at the price fixed & for the repurchase of the shares by them from him for the next account. Pltf. sued defts. for wrongfully selling the shares in contravention of an alleged agreement by them to keep the account open. Defts. counterclaimed the difference between the amount of the prices at which the shares were sold to the different jobbers as aforesaid & the amount of the prices at which they were purchased for pltf. The jury at the trial found that defts. had agreed to keep the account open only on condition that pltf. would provide them with money to meet the liability incurred, & that pltf. had not done so. Thereupon the judge gave judgment for defts. for the amount claimed by them on their counterclaim. On application to the Ct. of Appeal for judgment or a new trial, pltf. contended that the closing of the account was not valid, on the ground that the sale of the shares was a mere form, & defts., acting in a fiduciary capacity, were not entitled to purchase the shares on closing the account:—*Held*: defts. were entitled to retain their judgment.—MACOUN v. ERSKINE, OXENFORD & Co., [1901] 2 K. B. 493; 70 L. J. K. B. 973; 85 L. T. 372, C. A.

Annotations:—*Consd.* Erskine, Oxenford v. Sachs, [1901] 2 K. B. 504. *Appld.* *Re* Finlay, Wilson v. Finlay, [1913] 1 Ch. 565; Christoforides v. Terry, [1924] A. C. 566.

146. — Necessity for notice to client of balance due.]—In an action by stockbrokers, members of the London Stock Exchange, against their principal, it was proved that, according to the usage of the London Stock Exchange, it is competent to a broker, who has been instructed by his principal to carry over stock to the next settlement, to close his principal's account, if a balance of differences in the broker's favour has not been paid to him by his principal upon the pay day of the current settlement, provided that the broker has given his principal notice of the amount of the balance before the pay day, & that the principal has not placed at the broker's disposal funds or available, collateral security sufficient to cover the amount of the balance:—*Held*: this usage was reasonable.—DAVIS & Co. v. HOWARD (1890), 24 Q. B. D. 691; 59 L. J. Q. B. 133.

147. — — — —.]—DRUCE v. LEVY & Co. (1891), 7 T. L. R. 259.

ii. Exhaustion of Cover.

148. Option to close on exhaustion of cover—Rise of securities after exhaustion of cover—Before exercise of option—Effect on right to close.]—HOGAN v. SHAW (1889), 5 T. L. R. 613, C. A.

149. Agreement to give security with fixed limit—Account closed before limit reached.]—*Held*: on the facts, pltf., who had instructed defts., who were stockbrokers & members of the London

GUILD (1881), 8 R. (Ct. of Sess.) 729; 18 Sc. L. R. 520.—SCOT.

PART III. SECT. 2, SUB-SECT. 4. —C. (a) ii.

q. Option to close on exhaustion of cover—Whether notice to customer

Stock Exchange, to make a speculative sale of Consols, had not agreed to an arrangement on the terms of keeping debts secured in respect of the differences with a right on the part of debts. to close the account if he failed to do so, but that pltf. only agreed to give a certain security with a fixed cutting limit, & therefore pltf. was entitled to damages against debts. for closing the account when that limit had not been reached.—*SURMAN v. OXENFORD & Co.* (1916), 33 T. L. R. 78.

iii. *Death or Insolvency of Client.*

150. Death.]—*Re OVERWEG, HAAS v. DURANT*, No. 37, *ante*.

151. —.]—*Re FINLAY, WILSON (C. S.) & Co. v. FINLAY*, No. 197, *post*.

152. Insolvency.]—Stockbrokers who have with their own money purchased stock for a principal are, in the event of the death, bkpcy., or insolvency of the principal, justified in immediately selling the stock. Under such circumstances the stockbrokers have a claim against the estate of the principal for the balance due to them on the account, which balance is subject to deduction for any loss which may have been incurred by selling before the next settling day.—*LACEY v. HILL, SCRIMGEOUR'S CLAIM* (1873), 8 Ch. App. 921; *sub nom. LACEY v. HILL, LENNEY v. HILL, SCRIMGEOUR'S CLAIM*, 42 L. J. Ch. 657; 21 W. R. 857; *sub nom. LACY v. HILL, LENNEY v. HILL, SCRIMGEOUR'S CLAIM*, 29 L. T. 281, L. J.

Annotations.—*Refd. Lacey v. Hill, Crowley's Claim* (1874), 43 L. J. Ch. 551; *Pearson v. Scott* (1878), 38 L. T. 747; *Ellis v. Pond*, [1898] 1 Q. B. 426; *Re Finlay, Wilson v. Finlay*, [1913] 1 Ch. 565; *Barnard v. Foster*, [1915] 2 K. B. 288.

153. — Meaning of.]—By the usage of the London Stock Exchange stockbrokers who have entered into contracts for the purchase of stock are, in the event of the insolvency of their principal, justified in immediately selling the stock. A principal is insolvent within the meaning of this rule when he is unable to pay his debts in the ordinary course of business. In equity an agent is entitled to be indemnified against liability, as well as loss, incurred on behalf of the principal. Messrs. C., brokers on the London Stock Exchange, on behalf of Sir R. H., entered into contracts for the purchase of stocks to be completed on July 15, 1870. On July 12 they wrote to Sir R. H. to the effect that unless he paid them on July 15 a balance, which consisted of the difference between the contract price of the stock & the value thereof at the market price of the day, owing to them from him they would be defaulters; but that if such payment were made, they would sell or continue the stocks, as he thought fit. Sir R. H. promised to pay, & directed them to deal with the stocks as they thought best, & they sold part, & continued part. Sir R. H. did not pay on July 15,

but shot himself; on the next day a bank of which he was a partner stopped payment, & on July 19 he died. On July 16 Messrs. C. were, solely by reason of Sir R. H.'s failure to pay them, declared defaulters on the Stock Exchange, & ceased to be members of that body, & in accordance with the rules, all their transactions for Sir R. H. were closed, & all the stocks they had continued for Sir R. H. were sold at the price of the day. In consequence of the value of the stocks having fallen, the balance appearing to be due to them from Sir R. H. was thus largely increased. The stocks afterwards continued to fall in value. Messrs. C. afterwards paid 6s. 8d. in the pound on their Stock Exchange debts, & were re-admitted as members of the Stock Exchange:—*Held*: (1) the sale was justifiable, both under the usage of the Stock Exchange, which entitled a broker to sell upon his principal becoming insolvent, & also because the continuation was only effected on the representation of Sir R. H. that he would pay on July 15; (2) although Messrs. C. had not paid their debts in full, they were entitled to prove against Sir R. H.'s estate for the increased balance appearing due to them after the sales were effected.—*LACEY v. HILL, CROWLEY'S CLAIM* (1874), L. R. 18 Eq. 182; 43 L. J. Ch. 551; 22 W. R. 586; *sub nom. LACY v. HILL, CROWLEY'S CLAIM*, 30 L. T. 484.

Annotations.—*As to* (1) *Refd. Thacker v. Hardy* (1878), 39 L. T. 595. *As to* (2) *Consd. Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705. *Refd. Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370; *Re Paine, Ex p. Read* (1896), 66 L. J. Q. B. 71; *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Inco. Case*, [1914] 2 Ch. 617; *British Union & National Insee. v. Rawson*, [1916] 2 Ch. 476. *Generally, Refd. Ellis v. Pond*, [1898] 1 Q. B. 426. *Mentd. Wolmershausen v. Gullick*, [1893] 2 Ch. 511; *Williams, Torrey v. Knight, The Lord of the Isles*, [1894] P. 342.

(b) *Mode of Closing Account.*

154. Sale & repurchase by broker.]—Stockbrokers had on behalf of clients made a contract for the purchase of shares on the Stock Exchange. The clients having failed to provide the money for the price of the shares, the brokers, for the purpose of closing the clients' account, went into the market, & sold a like amount of shares to a jobber, & as part of the same transaction, repurchased the shares from him on their own account. By reason of the sale & repurchase being effected by one transaction, the brokers were enabled to repurchase the shares at a lower price than they would have had to pay if they had purchased them in the market in the ordinary way. The brokers in their account with the clients charged them commission on the shares to the jobber:—*Held*: the brokers having acted in a fiduciary capacity in the sale of the shares, & having, by reason of that sale & the repurchase being effected

necessary—No objection by customer to terms of option.]—VANDUSEN HARRINGTON CO. v. MORTON (1903), 21 C. L. T. Occ. N. 29; 15 Man. L. R. 222.—*CAN.*

r. —.]—*SUTHERLAND v. SECURITIES HOLDING CO. (Ont.)* (1906), 37 S. C. R. 694.—*CAN.*

t. —.]—A party who orders a purchase of stock through a broker under the rules of the Stock Exchange, implicitly consents to its resale without notice in case of his failure to maintain the margin agreed upon. Any agreement at variance with the rule must be expressly proved & will not be inferred from conduct in previous transactions.—*LAGUEUX v. NELLEAU* (1904), Q. R. 14 K. B. 219.—*CAN.*

a. —.]—There is no obligation on a broker, in the absence of the customer's orders, to sell shares during a falling market after he has demanded further margins & received no reply from his customer, & therefore if he does not sell the stock under such circumstances he has no responsibility for any loss that may arise to the customer.—*KERR v. MURTON* (1904), 24 C. L. T. Occ. N. 293; 7 O. L. R. 751; 3 O. W. R. 801.—*CAN.*

b. —.]—*GRAY v. BUCHAN* (1912), 23 O. W. R. 210; 4 O. W. N. 220; 6 D. L. R. 875.—*CAN.*

c. —.]—*POOTMANS v. REGINA GRAIN CO., LTD. (Sask.)*, [1918] 2 W. W. R. 1003; 42 D. L. R. 787.—*CAN.*

d. —.]—Deft. grain brokers

held to have been justified, under their contract with pltf. who had purchased oats through them, in closing out his contract of purchase when, by reason of the fall of the market, the margin advanced by him became so nearly exhausted as no longer to provide adequate security to the debts against their personal liability as brokers; & a conversation between pltf. & debts' agent held not to mean that the pltf. would be protected until he would have an opportunity to put up further margin on the following day.—*RUSSELL v. CANADA WEST GRAIN CO. (Sask.)*, [1925] 3 W. W. R. 508.—*CAN.*

e. Broker's duty & interest must not conflict.]—*COX v. SUTHERLAND* (1887), 24 C. L. J. N. S. 55; Cass. Dig. 2nd ed. 9.—*CAN.*

Sect. 2.—Broker and client: Sub-sect. 4, C. (b); sub-sects. 5, 6 & 7, A.]

as one transaction, obtained a profit for themselves, they were bound to account for that profit to their principals, the clients.—**ERSKINE, OXENFORD & CO. v. SACHS**, [1901] 2 K. B. 504; 70 L. J. K. B. 978; 85 L. T. 385; 17 T. L. R. 636, C. A.

Annotations:—Apld. Re Finlay, Wilson v. Finlay, [1913] 1 Ch. 247; **Christoforides v. Terry**, [1924] A. C. 566.

155. ———.]—MACOUN v. ERSKINE, OXENFORD & CO., No. 145, *ante*.

156. ———.]—Appl. employed a broker to make speculative purchases of cotton for him, & became heavily indebted to him owing to the fall of prices in the cotton market. The broker, as he was entitled to do by the terms of his agency, closed the account by selling the cotton which he had bought for applt. He sold (*inter alia*), two lots of foreign cotton to different jobbers at the respective market prices of the day & immediately bought back from the same jobbers at the same prices equivalent amounts of cotton of the same description. The broker having assigned his property for the benefit of his creditors, resp., as trustee of the deed of assignment, sued applt. to enforce the broker's claim to be indemnified. The trial judge found that there was a real sale & a real purchase of the cottons in question, & the Ct. of Appeal accepted this finding:—Held**: the simultaneous resale to the broker did not vitiate the sale by the broker & the account was effectually closed.—**CHRISTOFORIDES v. TERRY**, [1924] A. C. 566; 93 L. J. K. B. 481; 131 L. T. 84; 40 T. L. R. 485, H. L.**

157. Broker taking over shares at a valuation.]—Re FINLAY, WILSON (C. S.) & CO. v. FINLAY, No. 197, *post*.

158. Right of broker to indemnity for loss on sale & repurchase.]—WALTER & GOULD v. KING (1897), 13 T. L. R. 270, C. A.

Annotations:—Consd. Erskine, Oxenford v. Sachs, [1901] 2 K. B. 504. **Apld. Macoun v. Erskine, Oxenford**, [1901] 2 K. B. 493; **Re Finlay, Wilson v. Finlay**, [1913] 1 Ch. 247. **Refd. Christoforides v. Terry**, [1924] A. C. 566.

Right to indemnity generally.]—See Sub-sect. 4, A., *ante*.

159. Duty of broker to account for profit on sale & repurchase.]—ERSKINE, OXENFORD & CO. v. SACHS, No. 154, *ante*.

160. Whether broker entitled to close only part of account.]—(1) Where a customer fails to pay differences, the broker can close the account, but cannot close a portion of it only.

(2) The measure of damage is whatever loss debt has suffered by the misdeed. A man cannot inflate his damages by standing by & doing nothing. It is his duty to prevent as much of it as he can (**H. L. SMITH, J.**).—**SAMUEL & ESCOMBE v. ROWE** (1892), 8 T. L. R. 488.

Annotation:—As to (1) Distd. Cullum v. Hodges (1901), 18 T. L. R. 6.

161. ———.]—MORTEN v. HILTON (1908), *Bewes' Stock Exchange Law & Practice*, p. 87, n., H. L.

162. ——— Impossibility of carrying over whole account.]—A stockbroker was held justified in closing part only of an account as against a customer, & in carrying over the rest, where it was

impossible to carry over the whole of the account.—**CULLUM v. HODGES** (1901), 18 T. L. R. 6, C. A.

163. Time for closing account.]—MORTEN v. HILTON (1908), *Bewes' Stock Exchange Law & Practice*, p. 86, C. A.; *affd.*, *Bewes' Stock Exchange Law & Practice*, p. 87, n., H. L.

SUB-SECT. 5.—DUTIES OF CLIENT.

164. To provide funds.]—M'EWEN v. WOODS, No. 168, *post*.

165. ———.]—STOCK & SHARE AUCTION & ADVANCE CO. v. GALMOYE, No. 177, *post*.

166. To accept delivery—Whether of portion only.]—BENJAMIN v. BARNETT, No. 18, *ante*.

SUB-SECT. 6.—RIGHTS OF CLIENT.

167. To recover purchase-money—Non-delivery—Of shares—By given date.]—FLETCHER v. MARSHALL, No. 42, *ante*.

168. ——— Of scrip—Scrip called in.]—Pltf. employed debts. brokers, to buy for him thirty shares, scrip, in a railway co. for which an Act of Parliament had lately been obtained. Debts. purchased in their own names the practice of brokers being such; & pltf. paid them in price. The scrip was purchased "for account Aug. 29," but could not be then delivered, the scrip having in the meantime been called in by the directors to be registered in order that shares might be issued. Before the shares came out a call was made. These facts were known to pltf.; but he from time to time desired to have the scrip forwarded without further delay. The share certificates came out in Dec.; & then the selling brokers tendered the shares to debts. with a demand of £150 for the call. Pltf. on being applied to, refused to furnish the £150 denying his liability & claiming the shares without such payment; & on their being withheld he repudiated the contract & brought an action for money had & received:—Held**: the non-delivery of the scrip on Aug. 29 did not entitle him to recover his purchase-money.—**M'EWEN v. WOODS** (1847), 11 Q. B. 13; 5 Ry. & Can. Cas. 335; 17 L. J. Q. B. 206; 12 Jur. 329; 116 E. R. 379.**

169. ——— Transaction ultra vires the client.]—Re LONDON, HAMBURG & CONTINENTAL EXCHANGE BANK, ZULUETA'S CLAIM, No. 96, *ante*.

170. ——— Insolvency of broker—Rights as against owners of securities—Deposited with bank.]—(1) Stockbrokers had two accounts with their bankers, a current account & a loan account. The brokers became defaulters on the Stock Exchange on Jan. 13, & were on Jan. 24 adjudicated bkpts. At the time of their stoppage there was on the current account a balance of £1362 10s. to their credit, & a balance of £7500 was due from them to the bankers on the loan account. They had deposited with the bankers as security bonds & shares belonging to some of their clients. This deposit was made without the authority of the clients, but the bankers did not know that the securities were not the property of the brokers.

PART III. SECT. 2, SUB-SECT. 6.

f. To recover purchase-money of shares—Company not formed.]—Deft. sold to pltf. certain shares in a projected joint-stock railway co., for a sum exceeding the deposit originally paid by deft. The project was abandoned before any co. was regularly formed, either by deed or written agreement. Pltf., on the abandon-

ment of the project, having received back only the amount of the deposit originally paid by deft., brought an action against deft. for the recovery of the residue of the price of the shares:—Held: pltf. was entitled to recover from deft. the residue of the sum paid for the shares, in an action for money had & received.—MAGUIRE v. GODDARD (1840), 2 Jebb & S. 455;

3 L. L. R. 306; 1 Leg. Rep. 69.—**IR.**

g. To repudiate contract—Subject-matter of contract not existing at date of contract.]—A party gave an order to a broker to "buy for me forty shares of the Ayr & Galloway Ry.," a company which was not properly constituted till subsequent to the date of the order. The purchase having been intimated to & recognised by the mandant:—

The deposit was made to secure the general indebtedness of the brokers to the bankers, & not merely their indebtedness on the loan account. After the stoppage of the brokers the bankers realised the deposited securities, the proceeds of which were, together with interest until sale, more than sufficient to cover the balance due on the loan account, & there remained in their hands a sum exceeding the credit balance on the current account:—*Held*: the two accounts must be treated as one, & it was the duty of the bankers to apply the £1,362 10s. due from them on the current account in reduction of the £7,500 due to them on the loan account, & to use the deposited securities to satisfy only the difference between these two balances; therefore the sum remaining in the bankers' hands belonged to the owners of the deposited securities.

(2) Two days before the stoppage of the brokers a client had sent them a cheque to pay for some stock which they had purchased for him. This cheque was paid to their current account, & the amount of it formed part of the £1,362 10s. The purchase was not completed by the brokers:—*Held*: the client had no equity as against the owners of the deposited securities to be repaid the amount of his cheque out of the £1362 10s.—*MUTTON v. PEAT*, [1900] 2 Ch. 79; 69 L. J. Ch. 484; 82 L. T. 440; 48 W. R. 486; 44 Sol. Jo. 427, C. A.

171. — Purchase by country broker from London broker—London broker alleged to have acted as principal.—Where a country client has employed a country broker to purchase stocks & shares through a London broker, it is a question of fact in each case whether the London broker has acted as a broker & bought for his client, in which case he has complied with his mandate, though in accordance with the practice of the Stock Exchange, he sends forward to the country broker a "net price," which includes the price paid by him to the jobber plus his commission, or whether he has acted as a principal selling to his client, not at the jobber's price plus a regular or reasonable remuneration for himself, but at an arbitrary price obtained by adding an arbitrary sum to the jobber's price.

A country client instructed a country broker to buy certain shares for him, & the country broker instructed London brokers, members of the London Stock Exchange, who acted for them, to buy the shares, & they bought the shares from a jobber, adding to the price paid by them to the jobber their own commission, & returning it to the country broker as "net price." The country broker sent to the client a bought note stating the price, but omitting the word "net," & added his own commission; & this was the usual course of dealing in other purchases or sales of shares.

In an action by the country client to recover from the country broker the sums paid by him on the ground that the way in which the London brokers had returned "net prices" had made them vendors & not brokers, it was found as a

fact that the London brokers had acted as brokers & not as principals:—*Held*: upon the authority of *Aston v. Kelsey*, No. 93. *ante*, pltf. was not entitled to recover.—*BLAKER v. HAWES & BROWN* (1913), 109 L. T. 320; 29 T. L. R. 609.

172. To repudiate contract—Company not registered in England.—*HUNT, COX & CO. v. CHAMBERLAIN* (1896), 12 T. L. R. 186, C. A.

173. Recovery of guaranteed profit—Appropriation of stock not showing profit—Transfer to stock showing profit.—*DUTSON v. HUMBERT NEPHEW & CO.* (1909), *Times*, Feb. 1.

SUB-SECT. 7.—BROKER AS PRINCIPAL.

A. In General.

174. Rights of broker—To set up agency in defence to action.—A., a broker employed by B. to sell certain railway shares, agreed with C., D.'s broker, to sell him fifty shares, of which A. afterwards informed his clerk at his office, who made an entry in the book as of a sale from A. to C.; & a contract note, to the same effect, was sent to C. A. subsequently saw the entry in the book, & altered it by writing the name of B. as seller, & directed another note to be sent to C., with the name of B. as seller. A fresh note was accordingly sent the same evening or the next morning, but C. received them both together the next morning. C. did not return the first note, nor did A. request to have it returned. In an action brought by D. against A. for breach of the agreement, in not completing the sale, the judge who tried the cause left it to the jury to say whether the second note was a correction of a mistake in the first, & told the jury that if deft. entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely, & although known to be a broker, if he signed the contract in his own name, he was liable:—*Held*: (1) this was no misdirection, (2) evidence that it was the custom in Liverpool to send in brokers' notes without disclosing the principal's name, was properly rejected.—*MAGEE v. ATKINSON* (1837), 2 M. & W. 440; *Murp. & H.* 115; 6 L. J. Ex. 115; 150 E. R. 830.

Annotations:—As to (1) *Refd.* *Higgins v. Senior* (1841), 8 M. & W. 834; *Humble v. Hunter* (1818), 12 Q. B. 310; *Holding v. Elliott* (1860), 5 H. & N. 117. As to (2) *Refd.* *Johnston v. Osborne* (1840), 11 Ad. & El. 549; *Trueman v. Loder* (1840), 4 Jur. 931; *Spartan v. Benecke* (1850), 10 C. B. 212.

175. Signature of contract in own name—Broker liable—Although known to be broker.—*MAGEE v. ATKINSON*, No. 174, *ante*.

176. — — — — —.—If a broker sell stock, shares or debentures for an undisclosed principal, & sign the sold note as though he were the real principal himself, he is responsible for any loss sustained by the purchaser through the fraud of such undisclosed principal, although the purchaser may have been aware that he was buying of one who was dealing as a broker only.—*ROYAL*

Held: he could not afterwards repudiate the transaction, on the ground that his order had not been implemented, or that the subject-matter of the transaction did not truly exist at the date of the order, in respect of the parliamentary contract & subscribers' agreement not having been signed at that date by the broker.—*WILKIE (OR WILKIE) & BROWN v. MICHIE* (1849), 21 Sc. Jur. 436.—*SCOT*.

PART III. SECT. 2, SUB-SECT. 7.

—A.

h. General rule.—A broker, though

acting as such, will be liable on a contract as a principal unless it appears on the face of the contract not only that he is a broker, but that he was acting merely as a broker.—*HAMILTON v. HULL, FENWICK v. HULL* (1896), 19 N. Z. L. R. 49. —*N.Z.*

k. By rule of Stock Exchange brokers regarded as principals—Broker buying for undisclosed principal—Whether liable to indemnify seller against calls.—Pltf. employed his broker to sell certain shares. Defts., who were also brokers, acting for an undisclosed principal, bought these

shares on the Melbourne Stock Exchange by a verbal contract in accordance with the usage & rules of the Exchange. After the sale pltf. paid certain calls due on the shares, & brought an action against defts. to recover the amount so paid:—*Held*: although defts. had bought the shares acting as brokers & as agents for an undisclosed principal, they were personally liable to indemnify pltf. for his liability on the shares.—*WILCOX v. CLARKE & CO.* (1896), 21 V. L. R. 691.—*AUS.*

l. Forgery of share transfer —

Sect. 2.—Broker and client: Sub-sect. 7, A., B., C. & D.]

EXCHANGE ASSURANCE CO. v. MOORE (1863), 2 New Rep. 63; 5 L. T. 242; 11 W. R. 592.

177. Admissibility of evidence—As to real relation of parties.]—(1) The general rule of principal & agent applied that the principal must provide his agent with the money to be paid (LORD ESHER, M.R.).

(2) The first question was what was the contract, or whether plffs. contracted as agents or as sellers; & as to that, the offer in writing or the contract note could not be taken as conclusive, but the evidence of the parties must be considered (LORD ESHER, M.R.).—STOCK & SHARE AUCTION & ADVANCE CO. v. GALMOYE (1887), 3 T. L. R. 808, D. C.

Annotation:—As to (1) Rejd. Barnard v. Foster (1915), 114 L. T. 36.

178. — — —.]—Re WREFORD, CARMICHAEL v. RUDKIN (1897), 13 T. L. R. 153.

B. Custom to Treat Broker as Principal.

179. Whether admissible in evidence.]—MAGEE v. ATKINSON, No. 174, ante.

180. Whether custom of London Stock Exchange.]—Qu: whether a custom exists on the London Stock Exchange that a broker not disclosing the name of the principal dealt with renders himself personally liable.—WILBY v. STEPHENSON (1882), Cab. & El. 3.

181. — — —.]—GILL v. SHEPHERD & Co. (1902), 19 T. L. R. 17; 8 Com. Cas. 48.

182. Right of undisclosed principal to sue in own name.]—If a broker enter into a contract for an undisclosed principal, the latter may sue on such contract in his own name; & a rule of the exchange on which the contract was made, which declares that a contract, made by a broker for an undisclosed principal, shall be regarded as the contract of the broker only, does not control this right, even although the principal was cognisant of such rule.—HUMPHREY v. LUCAS (1845), 2 Car. & Kir. 152.

183. — — —.]—The rule of the Stock Exchange, by which brokers are treated as principals in respect of contracts, entered into by them, cannot affect the rights of third parties, so as to prevent an undisclosed principal from suing in his own name.—LANGTON v. WAITE (1868), L. R. 6 Eq. 165; 37 L. J. Ch. 345; 18 L. T. 80; 16 W. R. 508; *on appeal* (1869), 4 Ch. App. 402, L. JJ.

C. Broker Employed to Buy.

184. No right to make profit on price.]—A broker, instructed by a customer to purchase shares at a price, is not entitled to make a profit by purchasing at a lower price, & delivering to the customer at the price originally named.—THOMPSON v. MEADE (1891), 7 T. L. R. 698.

185. — — —.]—JOHNSON v. KEARLEY, No. 125, ante.

186. — — — Whether client may repudiate contract—Parties in pari delicto.]—B., being employed

by A., to purchase for him certain transferable shares in an unincorporated co., charged & received from him £25 beyond the market price of such shares at the time:—*Held:* an action would not lie to recover back this sum, the co. being within 6 Geo. 1, c. 18, & the parties *in pari delicto*.—BUCK v. BUCK (1808), 1 Camp. 547; 170 E. R. 1052, N. P.

187. — — —.]—Deft. discovered that plffs., who were stockbrokers, but not members of the Stock Exchange, besides charging commission had in their contract notes sent to him added something to the price at which they had really bought:—*Held:* he was entitled to repudiate such contracts.—STANGE & Co. v. LOWITZ (1898), 14 T. L. R. 468, C. A.

Annotations:—Folld. Nicholson v. Mansfield (1901), 17 T. L. R. 259. Consd. Johnson v. Kearley, [1908] 2 K. B. 82. Rejd. Johnson v. Kearley, [1908] 2 K. B. 514.

188. — — —.]—Pltf. employed defts., who were outside stockbrokers, to buy & sell & carry over stocks & shares on the London Stock Exchange. Defts., in the contract notes which they sent to pltf., besides charging commission, added something to the price at which the stocks were really bought or sold:—*Held:* pltf. was entitled to repudiate the contracts.—NICHOLSON v. MANSFIELD (J.) & Co. (1901), 17 T. L. R. 259.

Annotation:—Consd. Johnson v. Kearley, [1908] 2 K. B. 82.

189. No right to sell own securities—Transaction set aside.]—Where a person placed himself under the advice of a dealer in English & foreign funds, & the latter advised purchases & sales of stock, & it afterwards appeared that these purchases & sales were merely nominal transfers & re-transfers of the dealer's own stock, the difference being settled in account, it was held that the ct. of equity rightly interfered to compel an account between the parties, & to set aside the transactions that had taken place, on the ground that the dealer stood in a situation of advantage which equity will not allow to an agent in dealing with his principal.—ROTHSCHILD v. BROOKMAN (1831), 2 Dow. & Cl. 188; 5 Bl. N. S. 165; 6 E. R. 699, H. L.; *affg.* S. C. *sub nom.* BROOKMAN v. ROTHSCCHILD (1829), 3 Sim. 153; 7 L. J. O. S. Ch. 163.

Annotations:—Consd. Bank of Bengal v. Macleod (1849), 5 Moo. Ind. App. 1. Apld. Maturin v. Tredinnick (1863), 2 New Rep. 514; Tetley v. Shand (1871), 25 L. T. 658. Distd. Waddell v. Blockey (1879), 4 Q. B. D. 678. Consd. Ladywell Mining Co. v. Brookes, Ladywell Mining Co. v. Huggons (1887), 35 Ch. D. 400. Apld. King, Viall & Benson v. Howell (1910), 27 T. L. R. 114. Consd. Kuhlitz v. Lambert (1913), 108 L. T. 565; Armstrong v. Jackson, [1917] 2 K. B. 822. Rejd. Robinson v. Mollett (1875), L. R. 7 H. L. 802; Re Cape Breton Co. (1884), 26 Ch. D. 221; Guy v. Churchill & Sim (1886), 2 T. L. R. 855; Guy v. Churchill & Sim (1889), 60 L. T. 740; Johnson v. Kearley, [1908] 2 K. B. 514; Christoforides v. Terry, [1924] A. C. 566. Mentd. Grand Junction Canal Co. v. Dunes (1850), 2 H. & Tw. 92.

190. — — —.]—A. employed B., a stockbroker, to purchase some canal shares. B. apparently bought them from C., the ostensible owner, but who afterwards turned out to be a mere trustee for B. The ct. after a lapse of several years, & without entering into the question of the fairness of the price, held that the transaction was void on grounds of public policy, & set it aside with costs.—

(1924), 1 L. R. 51 Calc. 588.—IND.

PART III. SECT. 2, SUB-SECT. 7. —C.

q. Broker buying for undisclosed principal—Right to sue seller on failure to transfer.]—B., through his brokers, sold shares to G., G. being himself a broker, & acting for a principal, though at the time of the contract no principal was disclosed. In the "sold note" G. was named as purchaser:—*Held:* G. in his own name, could maintain an action against B. for the non-

*Whether broker personally liable.]—*COOPER v. GARDINER (1902), 2 S. R. N. S. W. 67; 19 N. S. W. W. N. 54.—AUS.

m. Refusal of vendor of shares to deliver shares—Whether brokers justified in buying in market to fulfil contract.]—SLIGO v. OSWIN (1904), 23 N. Z. L. R. 337.—N.Z.

PART III. SECT. 2, SUB-SECT. 7. —B.

n. Name of undisclosed principal not disclosed—Within time limited for

*settlement by custom of Ontario Stock Exchange—Liability of broker.]—*BOULTREE v. GZOWSKI (Ont.) (1898), 29 S. C. R. 54.—CAN.

o. — — —.]—FISHER v. PARK (1894), 13 N. Z. L. R. 682.—N.Z.

p. Whether custom of Calcutta Stock Exchange.]—There is no custom in the stock & share market in Calcutta that a broker should be treated as principal both by buyer & seller to whom he would be & whom he could hold liable under the contracts.—NANDA LAL ROY v. GUBUPADA HALDAR

GILLET v. PEPPERCORNE (1840), 3 Beav. 78; 49 E. R. 31.

Annotations:—*Appld.* Bank of Bengal v. Macleod (1849), 5 Moo. Ind. App. 1; Maturin v. Tredinnick (1863), 2 New Rep. 514. *Consd.* Armstrong v. Jackson, [1917] 2 K. B. 822.

191. ———.]—(1) Shares in several mines were advertised to be sold by C.; M. bought them, paying the price of the shares to T., who represented himself to be C.'s agent. The shares actually belonged to T.:—*Held*: the transaction was voidable.

(2) M. gave a commission to T. to buy other shares for him. T. sold his own shares to M.:—*Held*: this transaction was also voidable.—MATURIN v. TREDINNICK (1863), 2 New Rep. 514; 9 L. T. 82; 12 W. R. 740.

Annotation:—*Generally*. *Refd.* Re Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622.

192. ———.]—Where a broker, pretending to execute a mandate to buy, sells his own property, the sale may be rescinded, notwithstanding that the value of the things sold has decreased between the date of the sale & the date of the action for rescission.—ARMSTRONG v. JACKSON, [1917] 2 K. B. 822; 86 L. J. K. B. 1375; 117 L. T. 479; 33 T. L. R. 444; 61 Sol. Jo. 631.

Annotation:—*Mentd.* Collins v. Hopkins, [1923] 2 K. B. 617.

193. ——— Profit to be repaid.]—B. undertook to obtain shares for K. in a co. at the price of £3 per share, & subsequently shares were transferred to him, of which B. was the concealed owner, he having bought them two days previously at £2 per share. K. parted with most of such shares to other persons. On a bill filed by K. against B., praying that B. might be decreed to repay the difference between the price paid by B. & that paid by K. to B. for such shares, or, in the alternative that the transaction might be set aside:—*Held*: there was a fiduciary relation between B. & K., & B. must repay the profit made by him to K., & also pay the costs of the suit.—KIMBER v. BARBER (1872), 8 Ch. App. 56; 27 L. T. 526; 21 W. R. 65, L. C.

Annotation:—*Consd.* Morison v. Thompson (1874), L. R. 10 Q. B. 480.

194. ——— When not receiving remuneration.]—An agent instructed by his principal to buy shares cannot himself sell shares to the principal, notwithstanding that he may not be remunerated for the sale.—KING, VIAL & BENSON v. HOWELL (1910), 27 T. L. R. 114, C. A.

195. ——— Fraud—Statute of Limitations.]—Pltf. claimed to set aside certain transactions which he had entered into with deft. who was his stockbroker, with regard to certain shares, on the ground that deft. had fraudulently represented that he would act in pltf.'s interest with reference to the transactions, whereas he had in fact acted as principal, & had sold his own shares to pltf. The jury found that pltf. was induced to purchase the shares by the false & fraudulent representations of deft. The transactions took place between Nov. 1905, & Aug. 1906, but pltf. did not discover the fraud till July, 1912. The action was commenced in Nov. 1912:—*Held*: when once fraud is established the rights of the party

defrauded are not affected by Stat. Limitations so long as he remains, without any fault of his own, in ignorance of the fraud, & therefore pltf.'s claim was not barred by the statute.—OELKERS v. ELLIS, [1914] 2 K. B. 139; 83 L. J. K. B. 658; 110 L. T. 332.

Annotations:—*Consd.* Osgood v. Sunderland (1914), 111 L. T. 529. *Refd.* Armstrong v. Jackson, [1917] 2 K. B. 822.

D. Broker Employed to Sell.

196. Right to buy client's securities—At current market price—Transaction set aside.]—ROTHSCHILD v. BROOKMAN, No. 189, *ante*.

197. ——— Immediate market sale detrimental to client—Client not to be prejudiced.]—Where there is an open account between a broker & his client, the broker is entitled, on the death of the client, to close the account at once & to sell all shares in respect of which he has entered into contracts on behalf of the client. Although the broker cannot properly sell the shares to himself, yet, when the circumstances are such that an immediate sale upon the market would be detrimental to the interests of the client's estate, the broker may, if he pleases, take over the shares at a valuation based on the market prices of the day, provided that by so doing the estate of the client is not prejudiced.—*Re* FINLAY, WILSON (C. S.) & Co. v. FINLAY, [1913] 1 Ch. 565; 82 L. J. Ch. 295; 108 L. T. 699; 29 T. L. R. 436; 57 Sol. Jo. 444, C. A.

198. Right to make profit on price—Whether client may repudiate contract.]—NICHOLSON v. MANSFIELD (J.) & Co., No. 188, *ante*.

199. Sale to undisclosed principal—Principal disclaiming—Liability of broker for negligence.]—Pltfs., sharebrokers at Leeds, employed deft., a sharebroker at Manchester, to sell certain shares in a railway co. Deft. returned for answer that he had done so, inclosing a sold note, which stated the purchase to be for the settling day, Oct. 15. On Oct. 2, pltfs. requested the name of the purchaser immediately, as the shares were going up; to which deft. replied that the shares being sold for Oct. 15, the buyer refused to give the name until then, but if pltfs. had any reason to doubt the integrity of their principal, they might at once transfer the shares into the name of R. & he deft. would be at the expense of retransfer. After Oct. 14, the price of shares in the railway co. in question began to fall, & in reply to a demand from pltfs. on Oct. 21, deft. gave R. as the name of the purchaser. It appeared that in the bought note to R. no mention was made of the settling day, but that pltfs. had applied to him for payment, but he disclaimed all knowledge of them in the transaction, & referred them to deft. Pltfs. having sued deft. as the purchaser of these shares:—*Held*: the action was not maintainable, even assuming the variance between the bought & sold notes to be material; & *semble*: pltf.'s remedy, if any, was against deft. for negligence.—WHALLEY v. DAVISON (1846), 10 Jur. 573.

200. Full disclosure that brokers selling as principal—Assent of client.]—ELLIS & Co.'s TRUSTEE v. WATSHAM (1923), 155 L. T. Jo. 363.

transfer of the shares.—GARRETT v. BIRD (1872), 11 N. S. W. S. C. R. (L.) 97.—AUS.

r. Liability on contract.]—A stockbroker buying shares for a disclosed principal is not liable on the contract.—LANE v. MARTYN (1894), 15 N. S. W. L. R. (L.) 144; 10 N. S. W. W. N. 191.—AUS.

t. Admissibility of evidence — To contradict bought notes.]—JACKSON v.

ALLAN (1895), 11 Man. L. R. 36.—CAN.

a. No right to speculate with customer's money.]—DESLAURIERS v. FORGET (Que.) (1907), 4 E. L. R. 363.—CAN.

b. No right to sell own securities —No action lies against customer to recover loss sustained on securities.]—Where pltfs.' brokers were employed by deft. to purchase certain stock, & sold him stock owned by themselves

upon which they made a profit without first disclosing the fact, they could not recover from deft. a loss sustained upon such stock, although they claimed that the sales in question were permitted by the rules of the Exchange.—PLAYFAIR v. CORMACK (1913), 24 O. W. R. 988; 5 O. W. N. 35; 13 D. L. R. 816.—CAN.

c. ———.]—BLACK v. GEDDES (1914), 20 R. L. N. S. 474.—CAN.

SECT. 3.—CLIENT AND JOBBER.

201. Contract interpreted according to usage of Stock Exchange.]—GRISSELL *v.* BRISTOWE, No. 304, *post*.

202. —.]—Deft., through his brokers, purchased on the Stock Exchange of a jobber 100 shares in a joint stock co., limited, for May 15, 1866. On the same day, May 11, the brokers handed a ticket with deft.'s name as the buyer to the jobber. This ticket having been, according to the custom of the Stock Exchange, divided, a "split" for fifteen shares came through various hands to the broker of pltf. who was the registered holder of fifteen shares, & had, through his broker, sold fifteen shares to another jobber for delivery on the same May 15. On the receipt of deft.'s name pltf. executed a transfer of the shares to him, & pltf.'s broker handed the transfer & the certificates of the shares to deft.'s brokers, who accepted them on behalf of deft., & paid pltf.'s broker the price. Deft.'s brokers in handing in his name acted by the express authority of deft., & in accepting the transfer & paying the price they acted according to the custom of the Stock Exchange, though without any express authority of deft. The co. stopped payment on May 10, & on May 11 a petition was presented, & an order of the Ct. of Ch. for winding up the co. was afterwards made. On May 18 deft. refused to accept the shares, & pltf. was afterwards compelled to pay a call as the registered holder of the shares, upon which he brought an action against deft. for not indemnifying him against the calls:—*Held*: deft. was bound by the acceptance of the transfer by the brokers on his behalf & payment of the price; & a contract then arose between pltf. & deft., by which deft. was bound to indemnify pltf.

Where a contract for the purchase & sale of shares has been entered into between individuals through their respective brokers or with the intervention, as purchasers or sellers, of jobbers, members of the Stock Exchange, the lawful usages & rules of the Stock Exchange are incorporated into & become part & parcel of all such contracts, & the rights & liabilities of individuals, parties to any such contracts, are determined by the operation upon the contracts of these rules & usages (KELLY, C.B.).—BOWRING *v.* SHEPHERD (1871), L. R. 6 Q. B. 309; 40 L. J. Q. B. 129; 24 L. T. 721; 19 W. R. 852, Ex. Ch.

Annotation:—Apld. Platt *v.* Rowe & Mitchell (1909), 26 T. L. R. 49.

203. Privity of contract between client & jobber.]—RUSSELL BROTHERS *v.* BENDIGO GOLDFIELDS, LTD. (1896), *Times*, Nov. 28.

204. —.]—BELL *v.* PLUMBLY (1900), 16 T. L. R. 393.

205. — Right of client to sue jobber.]—In the case of transferring stocks, it is very often done by brokers without the principal's being so much as mentioned, & yet he may maintain an action against the person to whom the stock is transferred (LORD HARDWICKE, C.).—LISSET *v.* REAVE (1742), 2 Atk. 394; 26 E. R. 638.

206. — Specific performance.]—COLES *v.* BRISTOWE, No. 254, *post*.

207. — Right of jobber to sue client.]—*Indebitatus assumpsit* for stock sold & caused to be transferred by pltf. to deft., & by deft. duly accepted. Plea, that the stock alleged to be caused to be transferred was so caused to be transferred by virtue of an agreement with pltf. for the transfer of the same, in consideration of £4,531 5s. to be therefore paid to pltf. for the same; & that, at the time of making such agreement, pltf. was not actually possessed of or entitled to the

stock in his own right, etc.; by means whereof the said contract became & was null & void:—*Held*: on error brought upon the judgment of the Ct. of Exch., that the plea was no answer to the action.—M'CALLAN *v.* MORTIMER (1842), 9 M. & W. 636; 11 L. J. Ex. 429; 6 Jur. 196; Ex. Ch.: *affg.* S. C. *sub nom.* MORTIMER *v.* M'CALLAN (1840), 7 M. & W. 20.

Annotations:—Distd. Nicholson *v.* Gooch (1856), 5 E. & B. 999. *Consd.* Calder *v.* Dobell (1871), L. R. 6 C. P. 486. *Reid.* Grissell *v.* Bristowe (1868), L. R. 3 C. P. 112; Langton *v.* Waite (1868), L. R. 6 Eq. 165. *Mentd.* Cruicknell *v.* Trueman (1842), 9 M. & W. 684; Thomas *v.* Fredricks (1847), 10 Q. B. 775; R. *v.* Manwaring (1856), Dears. & B. 132; Owner *v.* Beehive Spinning Co., [1914] 1 K. B. 105.

208. —.]—RUSSELL BROTHERS *v.* BENDIGO GOLDFIELDS, LTD. (1896), *Times*, Nov. 28.

209. —.]—Default of broker.]—BELL *v.* PLUMBLY (1900), 16 T. L. R. 393.

210. —.]—STONEHAM & MESSENGER *v.* WYMAN, No. 392, *post*.

211. Jobber acting as principal—Right of client to direct closing of account.]—RIDSDALE *v.* UNIVERSAL STOCK EXCHANGE, LTD. (1895), 11 T. L. R. 318.

Discharge of jobber's liability.]—See Part IV., Sect. 7, sub-sect. 2, *post*.

Effect of default of broker.]—See Part VI., Sect. 1, 7

SECT. 4.—VENDOR AND PURCHASER.

212. Warranty of genuineness of documents.]—WESTROPP *v.* SOLOMON, No. 232, *post*.

213. —.]—SMITH *v.* REYNOLDS, No. 350, *post*. —.]—See Stock Exchange Rules, 1911, r. 112 (1).

214. Relief of vendor from subsequent liability—Duty of purchaser.]—WYNNE *v.* PRICE, No. 300, *post*.

Privity of contract.]—See COMPANIES, Vol. IX., pp. 329, 330, 350, Nos. 2074–2079, 2213.

Rights of parties inter se.]—See COMPANIES, Vol. IX., pp. 350–354, Nos. 2212–2236.

Right of seller to indemnity.]—See COMPANIES, Vol. IX., pp. 328–331, Nos. 2068–2088, Vol. X., pp. 956, 957, 1068, Nos. 6559, 7479.

Effect of winding up.]—See COMPANIES, Vol. IX., pp. 395–398, Nos. 2516–2543.

Commencement of liability—Release of intermediaries.]—See Part IV., Sect. 7, sub-sect. 2, *post*.

SECT. 5.—RUNNERS.

SUB-SECT. 1.—IN GENERAL.

215. Nature of contract—Employment.]—Pltfs., who were stockbrokers, entered into an oral agreement with deft. that he should introduce clients to them, & that pltfs. should transact business on the Stock Exchange for the clients thus introduced, upon the terms that, as between pltfs. & deft., deft. should receive half the commission earned by pltfs. in respect of any transactions by them for any clients introduced by deft., & that he should pay to pltfs. half of any loss which might be incurred by them in respect of such transactions. Pltfs. claimed to recover from deft. half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of one R., who had been introduced to them by deft.:—*Held*: deft. having an interest in the transactions, equally with pltfs. & the main object of the contract being to regulate the terms of deft.'s employment, the principle

of *Couturier v. Hastie* (1852), 8 Exch. 40, applied, & the contract was not within Stat. Frauds, s. 4, & the action was maintainable, though the contract was not in writing.—*SUTTON & Co. v. GREY*. [1894] 1 Q. B. 285; 63 L. J. Q. B. 633; 69 L. T. 673; 42 W. R. 195; 10 T. L. R. 96; 38 Sol. Jo. 77; 9 R. 106, C. A.

Annotations:—*Mentd. Guild v. Conrad* (1894), 42 W. R. 642; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778; *Davys v. Buswell*, [1913] 2 K. B. 47.

216. ———.]—Pltf. was a “half-commission man” & defts. were stockbrokers & members of the London Stock Exchange, & an agreement was made between the parties that pltf. should have a share of the commission on orders introduced by pltf. & executed by defts. Pltf. had a seat in defts.’ office, & was paid by commission, & not by salary, for helping to carry out the business in the office. Pltf., having left defts.’ service, brought an action against them to recover a share of the commission earned by them on transactions which they, as brokers, had entered into, after he had left their service, on behalf of persons whom he had introduced to them during that service:—*Held*: the agreement was one which gave rise to the relationship of employment, & as there was no evidence that the parties had agreed that commission was to be paid for an indefinite period after the employment should cease, pltf. was not entitled to commission on orders given after the termination of his employment, but where during his employment orders had been given to open & carry over stocks pltf. was entitled to commission on those transactions until they were closed.—*BICKLEY v. BROWNING, TODD & Co.* (1913), 30 T. L. R. 134.

217. ——— *Guarantee.*]—*SUTTON & Co. v. GREY*, No. 215, *ante*.

218. ——— *Partnership.*]—*SUTTON & Co. v. GREY*, No. 215, *ante*.

219. Authority to bind broker—Acceptance of orders by broker—Whether sufficient holding out.]—Defts., a firm of stockbrokers, had in their employ a clerk to whom they allowed commission upon orders introduced by him to them & accepted by them, but who was not authorised himself to accept orders on their behalf. On three occasions pltf. gave orders to the clerk for the purchase of shares by defts. on pltf.’s behalf, which orders were transmitted by the clerk to defts., who executed them & sent to pltf. bought notes in respect of the shares so purchased. No intimation was given by defts. to pltf. that they accepted the orders prior to their execution by defts. In payment of the price of the first two lots of shares purchased pltf. drew a cheque payable to defts.’

order which he gave to the clerk, who delivered it to defts. The third lot of shares was paid for by pltf. in a similar manner, with the exception that the cheque was drawn to the order of the clerk. Defts. received the cheques & credited pltf. with the amount of them. Orders for the purchase of other shares by defts. were subsequently given by pltf. to the clerk, who did not transmit them to defts., but made out & handed to pltf. bought notes purporting to show purchases of shares in pursuance of the orders, & to be signed by defts., which were forgeries. Pltf. gave him cheques for the supposed prices of the shares which he misapplied to his own use:—*Held*: upon the above-mentioned facts there was no evidence for a jury of a holding out by defts. to pltf. of the clerk as authorised to enter into contracts on their behalf, & therefore, defts. were not liable in respect of the orders subsequent to the first three.—*SPOONER v. BROWNING*, [1898] 1 Q. B. 528; 67 L. J. Q. B. 339; 78 L. T. 98; 46 W. R. 369; 14 T. L. R. 245, C. A.

SUB-SECT. 2.—RIGHT TO COMMISSION.

220. Charges over & above contango—Whether custom of Stock Exchange for runner to share.]—There is no custom of the Stock Exchange whereby a “half-commission man” can claim a half share of the small extra charge for expenses made by the broker over & above the ordinary continuation charge or contango which is receivable by the “jobber.”—*VON TAYSEN v. BAER, ELLISSEN & Co.* (1910), 56 Sol. Jo. 224.

221. Orders given after termination of employment.]—*BICKLEY v. BROWNING, TODD & Co.*, No. 216, *ante*.

222. Orders given to open & carry over—Commission until transactions closed.]—*BICKLEY v. BROWNING, TODD & Co.*, No. 216, *ante*.

223. Effect of closing of Stock Exchange.]—By an agreement between pltf. & defts. the latter agreed to pay to pltf. half commission on all business introduced by him, subject to a certain minimum. During the currency of the agreement the Stock Exchange was closed for some months owing to the war. In an action on the agreement pltf. contended that the agreement in effect entitled him to a salary, whether the Stock Exchange was closed or not:—*Held*: it was an implied term of the agreement that to entitle pltf. to remuneration the Stock Exchange should remain open, & pltf. was not entitled to recover.—*BERTHOUD v. SCHWEDER & Co.* (1915), 31 T. L. R. 404.

Part IV.—Course of Business.

SECT. 1.—RULES AND CUSTOMS.

SUB-SECT. 1.—RULES.

224. Whether binding on client—By virtue of employment of broker on Stock Exchange.]—*BAYLEY v. WILKINS*, No. 31, *ante*.

225. ———.]—*TAYLOR v. STRAY*, No. 118, *ante*.

PART IV. SECT. 1, SUB-SECT. 1.

224 i. Whether binding on client By virtue of employment of broker on Stock Exchange.]—*Held*: the copy of the rules of the Stock Exchange was

rightly received in evidence. Deft., having authorised pltf. to buy on the Stock Exchange, is bound by such rules.—*PALMER v. UPWARD* (1886), 7 N. S. W. L. R. 296; 3 N. S. W. W. N. 20.—*AUS.*

224 ii. ———.]—*McMAHON v. KIELY, SMITH & AMOS* (1918), 43 O. L. R. 294; 14 O. W. N. 315.—*CAN.*
224 iii. ———.]—*BRENNAN v. SUTHERLAND & Co.*, [1925] 2 D. L. R. 665.—*CAN.*

—*MORRICE v. HUNTER*, No.

53, *ante*.

227. ———.]—*HODGKINSON v. KELLY*, No. 313, *post*.

228. ———.]—*FORGET v. BAXTER*, No. 32, *ante*.

229. ———.] — Deft. instructed Stock

Sect. 1.—Rules and customs : Sub-sects. 1 & 2, A.

Exchange brokers to buy for him certain shares, & the brokers purchased a larger number of the shares from pltf's., who were an issuing house & who sold as principals. The brokers then allotted some of these shares to def't. in their books. The brokers had bought from pltf's. to greater advantage than they could have bought from a jobber & they had no interest in the sale of the shares except to earn a commission from their clients. The contract notes showed that the brokers had purchased from non-members of the Stock Exchange. In an action by pltf's. against def't. to recover the price of the shares:—*Held*: a general authority given to Stock Exchange brokers to buy shares was an authority to buy in accordance with the rules of the Stock Exchange & as the rules had been complied with pltf's., though non-members, were entitled to recover.—*UNION & RHODESIAN TRUST, LTD. v. NEVILLE* (1917), 33 T. L. R. 245.

230. ——— Effect of principal's ignorance of rules.]—*SUTTON v. TATHAM*, No. 112, *ante*.

231. ——— Where rules illegal or unreasonable.]—A person who employs a broker to sell shares on the Stock Exchange authorises such broker to make a contract of sale in accordance with the rules & regulations there in force, & undertakes to indemnify the broker against any liability incurred by him under those rules, unless the rules relied on by the broker are either illegal or unreasonable, & not known by the principal.—*HARKER v. EDWARDS* (1887), 57 L. J. Q. B. 147; 4 T. L. R. 92, (C. A.).

Annotation:—*Folld. Smith v. Reynolds* (1892), 66 L. T. 808.

232. ——— Rule made after particular transaction.]—On Mar. 10, 1847, A. employed B., a sharebroker & member of the London Stock Exchange, to sell for him certain documents which purported to be scrip or certificates, each for fifty shares, in a projected railway co. On Mar. 27 B. sold these certificates to C., & handed over the proceeds to A. The certificates being subsequently found to be forged, B. was, on May 11, called upon & obliged to pay, pursuant to a resolution of a committee of the Stock Exchange, to C. a certain agreed value as for genuine certificates of that co., & which considerably exceeded the price for which he had sold the spurious certificates.

In an action by B. against A. to recover the sum so paid by him to C., the declaration contained a special count averring a promise by A. that the certificates were genuine, & a count for money paid. Upon the latter count, A. paid into ct. the sum he had received on the original sale, with interest:—*Held*: (1) B. was not entitled to recover upon the special count, there being no promise, express or implied, that the certificates were genuine; & under the count for money paid, B. was only entitled to recover the amount actually paid by him to A.; (2) the resolution of the committee of the Stock Exchange, made after the transaction was completed, however it might bind the members of that body, could not affect A.—*WESTROPP v. SOLOMON* (1849), 8 C. B. 345; 19 L. J. C. P. 1; 13 Jur. 1104; 137 E. R. 542.

Annotations:—*Generally, Mentd. Jeffreys v. Fair* (1876), 36 L. T. 10; *Raphael v. Burt* (1884), Cab. & El. 325.

233. ———.]—*BENJAMIN v. BARNETT*, No. 18, *ante*.

234. ———.]—(1) Four exors. holding stock in their names directed their solr. to sell the stock. The solr., in the name of his firm, gave to a stockbroker whom the solr. had employed

in Stock Exchange speculations directions to sell the stock. The stock was sold by the broker, & the solr. returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four exors. The sale was completed, & the stockbroker sent to the solr. a cheque for part of the purchase-money for the shares, & carried the balance on the transaction to the credit of the solr. in the account between them, which account was afterwards settled by a payment made to the stockbroker:—*Held*: under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solr., & that, though the solr. had from the exors. authority to receive the purchase-money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the exors. for the balance.

(2) The sale was made subject to the Rules of the Stock Exchange, & the stockbroker alleged that by those rules the broker could recognise only the person employing him, & obey his directions as to the disposal of the proceeds of a sale:—*Held*: the Rules of the Stock Exchange applied only to the sale on the Stock Exchange, & not to subsequent transactions.

(3) What was the extent of S.'s agency for pltf's. It appears from the letter of June 28, that the transfers were sent by S. to [def't.] on that day, & that the receipts on those transfers were signed by pltf's. That would, in my judgment, import an authority in the person who was allowed to transmit these receipts himself to receive the money as money. Pltf's., in the statement of claim, say that as to such part as was paid in cash or in discharge of a call properly payable by pltf's., they are willing to accept such payments as payments made to themselves or on their account. That appears to be a distinct admission that S. was armed with authority from pltf's. to receive the purchase-money by an actual payment in cash, but no further (*FRY, J.*).—*PEARSON v. SCOTT* (1878), 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796; *sub nom. PIERSON v. SCOTT*, 47 L. J. Ch. 705.

Annotations:—*As to* (1) *Refd. Bradford v. Price* (1923), 92 L. J. K. B. 871. *As to* (2) *Refd. Blackburn v. Mason* (1893), 68 L. T. 510; *Anderson v. Sutherland* (1897), 13 T. L. R. 163. *Generally, Refd. Hine v. Steamship Insee. Syndicate, The Netherholme, Glen Holme & Rydal Holme* (1895), 72 L. T. 79. *Mentd. Papé v. Westcott*, [1894] 1 Q. B. 272; *Walker v. Barker* (1900), 16 T. L. R. 393.

235. ——— Printed rules & regulations.]—*BENJAMIN v. BARNETT*, No. 18, *ante*.

Indemnification of broker against loss.]—*See Nos. 86-94, ante*.

236. Whether binding on outsiders—Rule involving violation of law.]—(1) Differences are payable only by virtue of the Stock Exchange Rules (*JAMES, L.J.*).

(2) Either the rules of the Stock Exchange are binding on outsiders or they are not. If they are binding they are binding in their entirety. If they are not binding or are in any way a violation of the law of bkpcy.—what we call a fraud on the law of bkpcy.—they are utterly void & of no effect against the outside world (*JAMES L.J.*).—*Re PLUMBLY, Ex p. GRANT* (1880), 13 Ch. D. 667; 42 L. T. 387; 28 W. R. 755, C. A.

Annotations:—*As to* (2) *Appld. Levitt v. Hamblet*, [1901] 2 K. B. 53. *Refd. Beckhudson & Gibbs v. Hamblet*, [1900] 2 Q. B. 18. *Generally, Refd. King v. Hutton*, [1899] 2 Q. B. 555; *Anderson v. Beard*, [1900] 2 Q. B. 260; *Re Woodd, Ex p. King* (1900), 82 L. T. 504; *Ratcliff & Dealtry v. Mendelssohn*, [1902] 2 K. B. 653.

237. ———.]—*LEVITT v. HAMBLET*, No. 21, *ante*.

238. ——— Rule applicable to domestic forum.]—*LEVITT v. HAMBLET*, No. 21, *ante*.

On default of broker.]—See Nos. 393–395, post.

239. Power of Committee to alter rules.]—UNION CORPN., LTD. v. CHARRINGTON & BRODRICK, No. 15, ante.

240. —.]—BARNARD v. FOSTER, No. 16, ante.

SUB-SECT. 2.—CUSTOMS.

A. In General.

See, generally, CUSTOMS & USAGES, Vol. XVII., pp. 1 et seq.

241. Admissibility of evidence—Custom not to insert principal's name in contract note.]—MAGEE v. ATKINSON, No. 174, ante.

242. — Custom existing at place other than where contract made.]—JONES v. CLARK (1847), 8 L. T. O. S. 517.

— As to time of delivery.]—See Sect. 7, sub-sect. 4, post.

243. Existence of custom—Whether question for jury—Custom not universal.]—Pltf., through his broker, sold to deft., a stock jobber, a number of shares in a bank. On the same day the jobber gave to pltf.'s broker a ticket with the name of G. upon it, as the intended purchaser, & which name had been passed to him from another jobber in the usual manner according to the course of business on the Stock Exchange. Pltf. executed a transfer to G., whose name was registered as a shareholder. The bank being wound-up it was discovered that at the time G.'s name was passed to pltf. as the transferee of the shares he was an infant, & by order of the Ct. of Ch. pltf.'s name was placed upon the list of contributories in his stead. To an action brought by pltf. against deft. to indemnify him for the amount of calls paid, in consequence of being replaced on the list of contributories, deft. pleaded that he was discharged from his liability by the usages of the Stock Exchange. The jury found that it was not part of the usage of the Stock Exchange that, if there be several intermediate sales between the first seller & the last buyer, & the first seller receive the price of the shares & transfer them to the last buyer, the intermediate buyers are irresponsible when the name of the transferee which was passed was that of a person legally incapable of being registered: *Held*: (1) the judge was right in leaving the jury to say what was the usage of the Stock Exchange, for it is not so universal an usage as to be binding upon all persons dealing there; (2) the jobber, until he has passed to the purchaser the name of a person who is legally capable of contracting, & who has given authority for the use of his name as transferee, is not discharged, notwithstanding the rules & usages of Stock Exchange to the contrary. —DENT v. NICKALLS (1873), 29 L. T. 536; 22 W. R. 218; *affd.* (1874), 30 L. T. 644, Ex. Ch.

Annotation:—Generally, Mentd. Kellock v. Enthoven (1874), 43 L. J. Q. B. 90.

B. Whether Binding on Client.

244. Whether binding by virtue of employment.]—POLLOCK v. STABLES, No. 117, ante.

245. —.]—HAWKINS v. MALTBY, No. 329, post.

246. —.]—BOWRING v. SHEPHERD, No. 202, ante.

247. —.]—NICKALLS v. MERRY, No. 308, post.

248. —.]—LEVITT v. HAMBLET, No. 21, ante.

249. — Effect of client's ignorance of custom.]—BAYLIFFE v. BUTTERWORTH, No. 113, ante.

250. —.]—BLACKBURN v. MASON, No. 370, post.

251. —.]—BENJAMIN v. BARNETT, No. 18, ante.

252. — Custom disregarding provisions of Leeman's Act, 1867 (c. 29).]—SEYMOUR v. BRIDGE, No. 59, ante.

253. —.]—PERRY v. BARNETT, No. 90, ante.

254. — Effect of private instructions to broker.]—Pltf., a holder of 200 shares in a co., by his brokers, contracted on the Stock Exchange for the sale of that number of shares to the defts. who were jobbers, for a future day called settling day. Before the settling day the jobbers, on a day called the name day, in accordance with the custom of the Stock Exchange, gave to the vendor's broker the names of seventeen persons as ultimate purchasers, to whom the shares were to be transferred in different parcels. The brokers of the vendor accordingly prepared seventeen deeds of transfer, got them executed by the vendor, & on settling day handed them & the share certificates to the jobbers, who thereupon paid the price agreed upon. In the meantime the co. had stopped payment & was ordered to be wound up. The seventeen transferees, through their brokers, had paid their purchase-money to the jobbers, & had received but not executed the deeds of transfer, & pltf., whose name remained on the list of shareholders, was obliged to pay calls on those shares. Pltf. thereupon filed a bill against the jobbers, claiming indemnity against the calls:—*Held*: the contract between pltf. & the jobbers must be interpreted according to the rules of the Stock Exchange, & after the jobbers had paid to the vendor his purchase-money, & given the names of transferees to whom the vendor executed transfers, & after those transferees, through their brokers, had received the transfers & paid their purchase-money to the jobbers, the liability of the jobbers ceased, & the bill was dismissed.

No private instruction given to pltf.'s brokers could limit the general authority which by employing them as his brokers to sell on the Stock Exchange, he gave them to sell according to the custom of the Exchange (*per Cur.*).—COLES v. BRISTOWE (1868), 4 Ch. App. 3; 38 L. J. Ch. 81; 19 L. T. 403; 17 W. R. 105, L. C. & L. JJ.

Annotations:—Distd. Cruse v. Paine (1869), 4 Ch. App. 441. Apld. Hawkins v. Maltby (1869), 4 Ch. App. 200; Street v. Morgan (1869), 21 L. T. 432; Bowring v. Shephard (1871), L. R. 6 Q. B. 309. Consd. Maxted v. Paine (1871), L. R. 6 Exch. 132; Merry v. Nickalls (1872), 7 Ch. App. 733. Apld. Loring v. Davis (1886), 32 Ch. D. 625. Refd. Sheppard v. Murphy (1868), 16 W. R. 948; Re Asiatic Banking Corp., Royal Bank of India's Case (1869), 4 Ch. App. 252; Davis v. Haycock (1869), L. R. 4 Exch. 373; Allen v. Graves (1870), L. R. 6 Q. B. 478; Maynard v. Eaton (1873), 9 Ch. App. 416, n.; Nelson v. James (1882), 9 Q. B. D. 546.

PART IV. SECT. 1, SUB-SECT. 2.

—A.

d. Admissibility of evidence.]—Parole evidence of practice is not incompetent on the ground of the existence of printed rules, unless it be proved that these rules relate to the precise matter as to which the parole evidence is tendered.—RAIT v. PRIMROSE (1859), 21 Dunl. (Ct. of Sess.)

965; 31 Sc. Jur. 529.—SCOT.

PART IV. SECT. 1, SUB-SECT. 2.

—B.

249 i. Whether binding by virtue of employment—Effect of client's ignorance of custom.]—An alleged usage of the Stock Exchange, relied upon as authorising stockbrokers who are entitled to sell stocks or shares of a

customer for the realisation & payment of money due to them by such customer, for which there is an adequate demand, where a forced sale would lower the selling price:—*Held*: unreasonable, & incapable of being supported against a customer who was not proved to be acquainted with the existence of such alleged usage.—HAMILTON v. YOUNG (1881), 7 L. R. Ir. 289.—IR.

Sect. 1.—Rules and customs: Sub-sect. 2, B. Sect. 2: Sub-sects. 1 & 2. Sect. 3: Sub-sects. 1 & 2. Sect. 4.]

255. Custom not repugnant to law.]

RENNIE *v.* MORRIS, No. 303, *post*.

256. — Where custom unreasonable.] —

TAYLER *v.* GREAT INDIAN PENINSULA RY. CO. (1859), 4 De G. & J. 559; 28 L. J. Ch. 709; 33 L. T. O. S. 361; 5 Jur. N. S. 1087; 7 W. R. 637; 45 E. R. 217, L. J.

Annotations:—Distd. Hawkins *v.* Maltby (1867), 3 Ch. App. 188. *Refd.* *Ex p.* Swan (1859), 7 C. B. N. S. 400; Swan *v.* North British Australasian Co. (1863), 2 H. & C. 175; France *v.* Clark (1884), 26 Ch. D. 257; Soc. Générale de Paris *v.* Walker (1885), 11 App. Cas. 20. *Mentd.* Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292; *Re* Queensland Land & Coal Co., Davis *v.* Martin (1894), 71 L. T. 115.

257. — —.]—PERRY *v.* BARNETT, No. 90, *ante*.

—.]—BLACKBURN *v.* MASON, No.

370, *post*.

259. — —.]—BENJAMIN *v.* BARNETT, No. 18, *ante*.

260. — Custom changing character of contract.]—PERRY *v.* BARNETT, No. 90, *ante*.

SECT. 2.—THE CONTRACT.

SUB-SECT. 1.—IN GENERAL.

Nature of shares.]—See COMPANIES, Vol. IX., pp. 224, 225, Nos. 1433–1446; Vol. X., pp. 1102, 1103, Nos. 7732, 7736–7738.

Necessity for writing.]—See COMPANIES, Vol. IX., p. 349, Nos. 2205–2211; Vol. X., p. 1103, No. 7742.

— Transfer of debentures.]—See COMPANIES, Vol. X., p. 771, No. 4826.

Liability to stamp duty.]—See COMPANIES, Vol. IX., pp. 359, 404, Nos. 2280, 2281, 2586–2590; Vol. X., p. 1103, No. 7743; REVENUE, Vol. XXXIX., p. 277, No. 620.

Nature of scrip.]—See COMPANIES, Vol. IX., p. 291, No. 1802.

SUB-SECT. 2.—THE CONTRACT NOTE.

See Stamp Act, 1891 (c. 39), sched. I.; Finance (1909–10) Act, 1910 (c. 8), ss. 77 (1)–(4), 78 (1)–(5), 79 (1), (2).

261. Nature of.]—Brokers' notes are in fact not contracts, or evidence of contracts; they may be evidence that the broker has performed the transaction mentioned in the note: but they are clearly nothing more (*per* CUR.).—TOMKINS *v.* SAVORY (1829), 9 B. & C. 704; 4 Man. & Ry. K. B. 538; 7 L. J. O. S. K. B. 334; 109 E. R. 262.

262. Omission to charge for deposit in contract note—Broker not precluding from recovery.]—(1) Deft., a sharebroker, bought for pltf., also a sharebroker, shares in the S. S. Railway, & sent to him an account debiting him with only the premium, & not the deposit, though deft. had paid both. Afterwards deft. sold the same shares for pltf., & sent him an account crediting him with a sum made up of both premium & deposit. Pltf. bought & sold these shares for his own principals, & debited or credited them at the prices charged as above to himself on the purchase & sale by deft.: —*Held*: deft. was not precluded from charging pltf. with the deposit on the first transaction, but, upon pltf. bringing *assumpsit* for a balance, might set off such deposit. (2) Deft. bought also for pltf. shares in the T. & D. Railway, which then were only unissued scrip, so that no deposit was

payable. By the custom of the market, Liverpool, the price does or does not include the deposit according as the scrip has issued or not: & the published share lists show how this is. Deft., before the scrip issued, sent pltf. bought & sold notes, stating the price without the deposit: but he daily sent pltf. the share lists. After the scrip issued, deft. paid the deposit; but he still omitted, in accounts afterwards sent, to debit pltf. with the deposit. Pltf. had made these purchases for his own principals; & he debited them at a price not including the deposit; but whether the contract, as between him & the principals, was a time bargain, or shares were actually delivered, did not appear:—*Held*: deft. was not, upon either supposition, precluded from charging for the deposit, & setting it off, as in the former case.—DAILS *v.* LLOYD (1848), 12 Q. B. 531; 5 Ry. & Can. Cas. 572; 17 L. J. Q. B. 247; 11 L. T. O. S. 327; 12 Jur. 827; 116 E. R. 967.

Annotations:—Generally, Refd. Bayley *v.* Wilkins (1849), 7 C. B. 886. *Mentd.* Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477; Camillo Tank S.S. Co. *v.* Alexandria Engineering Works (1921), 38 T. L. R. 134.

Omission to forward stamped contract note—Right of broker to recover commission.]—See No. 140, *ante*.

Broker acting as principal.]—See Part III., Sect. 2, sub-sect. 7, *ante*.

SECT. 3.—CONTINUATION.

SUB-SECT. 1.—CONTINUATION ON STOCK EXCHANGE.

263. Nature & effect of continuation—Does not amount to loan.]—To “continue,” in Stock Exchange phraseology, is a technical term, which means to sell & to agree to rebuy the same amount of stock at a future day at the same price, & a sum for accommodation. Such a transaction is a sale & repurchase, not a loan, & is not a ground for an action by the purchaser of stock for an account of profits.—BONGIOVANNI *v.* SOCIÉTÉ GÉNÉRALE (1886), 54 L. T. 320; 2 T. L. R. 247, C. A.

Annotations:—Consd. Sachs *v.* Spielmann (1889), 5 T. L. R. 487; *Re* Overweg, Haas *v.* Durant, [1900] 1 Ch. 209. *Refd.* Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270.

264. — Sale & repurchase— At future date.]—BONGIOVANNI *v.* SOCIÉTÉ GÉNÉRALE, No. 263, *ante*.

265. — — — — —.]—Stockbrokers were employed by a client to make for him from time to time on the London Stock Exchange speculative purchases & sales of stock, shares, & bonds. The brokers furnished him with money to enable him to pay for the purchases, & he authorised them to hold the purchased stocks, shares, & bonds as security for their advances, & also to repledge them.

The brokers had a loan account with their bankers, with whom they deposited stock, shares, & bonds belonging to various clients *en bloc*, as security for the bankers' advances. The bank allowed the brokers to withdraw the deposited securities from time to time, as they required them, upon their depositing others of equal value. Ultimately, the brokers became defaulters on the Stock Exchange, & were adjudicated bkpts. At the date of the default there were in the hands of the bank various stocks & shares, & also some bonds payable to bearer, which the brokers had purchased for the client. The stocks & shares were transferable by deed in the ordinary way, & they had all been transferred to, & were regis-

tered in, the names of trustees for the bank. Some of the transfers were made by the client himself, some by the brokers, & some by third parties. Those which were made by the client were expressed to be for a nominal consideration; the others were expressed to be for full value. The bonds passed by delivery on the Stock Exchange, & were always there treated as negotiable.

The client claimed to be entitled to redeem the securities on paying to the bank the amount which was due from himself to the brokers; the bank claimed to hold the securities until payment of a larger amount which was due to them from the brokers. The client asserted that the authority which he had given to the brokers to repledge his securities authorised them to do so only for an amount not exceeding what was due from himself to them.

There was evidence that the majority of transactions on the Stock Exchange, when the purchaser of securities does not pay for them at once, is carried on upon a system as "contango," or "continuation," under which the person who provides the purchase-money becomes the owner of the purchased stock or shares, he entering into a contemporaneous contract with the purchaser to sell to him at a future day, generally the next "account day," on the Stock Exchange, an equal amount of similar stock or shares at the original price, increased by a charge called the "contango":—*Held*: upon the evidence, especially having regard to that relating to the "contango" system, there was nothing to lead the bank to suppose that the stocks & shares which were transferred to their trustees were not the brokers' own property; & the bank must therefore be treated as *bona fide* holders for value without notice, & their legal title could not be impeached; & consequently, the client could not redeem without paying the amount which was due from the brokers to the bank.

The arrangement is one by which the broker becomes, as between himself & his client, the owner of the shares in question although he is under a contract to provide an equal amount of similar shares at a future date (NORTH, J.).—BENTINCK v. LONDON JOINT STOCK BANK, [1893] 2 Ch. 120; 62 L. J. Ch. 358; 68 L. T. 315; 42 W. R. 140; 9 T. L. R. 262; 3 R. 120.

266. ————.]—*Re OVERWEG*, HAAS v. DURANT, No. 37, *ante*.

267. ———— At same price—With charge for accommodation.] — BONGIOVANNI v. No. 263, *ante*.

268. — Broker becomes owner—Sale by broker—Right to retain profits for own use.]—BONGIOVANNI v. SOCIÉTÉ GÉNÉRALE, No. 263, *ante*.

269. ———— Obligation to provide equal amount of similar shares at future date.]—BENTINCK v. LONDON JOINT STOCK BANK, No. 265, *ante*.

270. ———— New contract—Not merely getting further time.]—LEVITT v. HAMBLET, No. 21, *ante*.

Authority of broker to carry over.]—See Part III., Sect. 2, sub-sect. 2, C., *ante*.

SUB-SECT. 2.—CONTINUATION WITH AID OF A BANK.

271. Custom for brokers to mortgage securities to bank—Right to charge contango—Meaning of

contango.]—SACHS v. SPIELMANN (1889), 5 T. L. R. 487.

272. ———— Knowledge of custom imputed to client.]—SACHS v. SPIELMANN (1889), 5 T. L. R. 487.

273. ———— Right of bank to hold securities—Against general balance due from broker.]—BENTINCK v. LONDON JOINT STOCK BANK, No. 265, *ante*.

SECT. 4.—STOCK EXCHANGE LOANS.

See, now, Stock Exchange Rules, 1911, r. 172.

274. Return of securities by lender—Whether lender loses rights as pledgee—Payment by dishonoured cheque.]—Deft. employed a stockbroker to obtain a loan on the security of bonds, which were transferable by delivery. The broker, accordingly, borrowed a sum from pltf. but he wrongfully applied a part to his own use. The broker was unable to redeem the bonds, & deft. with knowledge of the circumstances, promised & agreed to call & give the broker his cheque for the deficiency on receiving back the bonds. The broker, acting on the faith of this promise, gave a crossed cheque to pltf., & redeemed the bonds. On the same day deft. by a trick, obtained possession of the bonds without giving his cheque; & the broker's crossed cheque was consequently returned, & he became a defaulter:—*Held*: deft. was responsible to pltf. for the fraud, & the bonds in his hands were still liable to repay pltf. his debt.—MOCATTA v. BELL (1857), 21 Beav. 585; 27 L. J. Ch. 237; 30 L. T. O. S. 239; 4 Jur. N. S. 77; 53 R. R. 483.

275. ————.]—A stockbroker, member of the London Stock Exchange, deposited bonds as a security for a loan with a stock & share dealer, a member of the London Stock Exchange. On the day on which such a loan is repayable, the practice is for the lender to send back the securities to the borrower in the morning, & for the borrower later in the day to send a good cheque to the lender for the amount of the loan, or else to return the securities, or other securities of equal value. The lender sent back the securities to the borrower on the morning on which the loan was repayable:—*Held*: this did not affect the lender's right to the securities, if the borrower did not give him a good cheque for the loan, or send him other securities of a value equal to that of the securities sent back.—BURRA v. RICARDO (1885), Cab. & El. 478; 1 T. L. R. 230.

Annotation:—*Expld.* Lloyd's Bank v. Swiss Bankverein, Union of London & Smith's Bank v. Swiss Bankverein (1913), 108 L. T. 143.

276. ———— Failure of borrower to give securities of equal value.]—BURRA v. RICARDO, No. 275, *ante*.

277. Default of borrower—Rule of Stock Exchange providing for realisation of securities—Payment of loan out of proceeds of sale—Extent of lender's rights against proceeds.]—BURRA v. RICARDO, No. 275, *ante*.

278. ———— Shares taken over at price fixed by official assignee—Rule not binding on outside principal.]—Brokers on the Stock Exchange acting for an undisclosed outside principal, pledged share certificates with a jobber on the exchange as security for a loan to be repaid the next settling day. The outside principal failed to put the brokers in funds to repay the loan, whereby the brokers made default & were hammered & the

PART IV. SECT. 4.

a. Right of lender to repledge.]—MARA v. COX (1884), 6 O. R. 359.—CAN.

Sect. 7.—Completion of contract: Sub-sects. 1 & 2, A. & B. (a).]

298. Sale for special settlement—Whether completion must be within reasonable time.]—CONSOLIDATED GOLDFIELDS OF SOUTH AFRICA v. SPIEGEL (E.) & Co., No. 71, ante.

SUB-SECT. 2.—RELEASE OF INTERMEDIARIES.

A. In General.

299. Right to name transferee—By “name day” —Validity of custom.]—GRISSELL v. BRISTOWE, No. 304, post.

300. Effect of failure to name transferee—Liability of intermediary—Broker known to be acting as agent.]—A shareholder in an incorporated railway co. instructed a stockbroker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B., another broker, who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; & the jobber granted the time on B. giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, & took the deed of assignment executed by the vendor. Upon a bill filed by the vendor:—*Held*: B. was bound to execute the assignment, to procure himself to be registered, & to pay the calls made since the execution of the assignment by the vendor, & to indemnify the vendor against future calls; & a decree was made to that effect.—*WYNNE v. PRICE* (1849), 3 De G. & Sm. 310; 5 Ry. & Can. Cas. 465; 12 L. T. O. S. 531; 13 Jur. 295; 64 E. R. 493.

Annotations.—*Apld.* Evans v. Wood (1867), L. R. 5 Eq. 9. *Refd.* Sayles v. Blane (1849), 14 Q. B. 205; *Re* Monmouthshire & Glamorganshire Joint-Stock Banking Co., *Ex p.* Cape's Exor. (1852), 22 L. J. Ch. 601; Walker v. Bartlett (1856), 18 C. B. 845; Coles v. Bristowe (1868), L. R. 6 Eq. 149.

301. ———.]—A jobber purchasing shares on the Stock Exchange for the next account must, on the next name day, give to his vendor the name of a third person, who must be a *bonâ fide* purchaser & legally bound to accept a transfer of the shares, or he will himself remain personally liable in respect of such shares, & be bound to indemnify his vendor from future calls upon them.

The “carrying over” of shares from the first to a future name day, without the authority or consent of the jobber's nominee or ultimate purchaser, puts an end to the latter's liability, who thereupon ceases to be the purchaser, or a person legally bound to take the shares or to take a transfer of them, & the jobber in such case does not come within the principle of the decisions in *Coles v. Bristowe*, No. 254, ante, & *Grissell v. Bristowe*, No. 304, post, but remains liable to the original vendor.—*MAXTED v. PAINE* (1869), L. R. 4 Exch. 81; *sub nom.* *MAXSTED v. PAINE*, 38 L. J. Ex. 41; 20 L. T. 34.

Annotations.—*Folld.* Maxsted v. Morris (1869), 21 L. T. 535. *Distd.* Crabb v. Miller (1871), 24 L. T. 219; Fenwick v. Buck (1871), 24 L. T. 274. *Apld.* Nickalls v. Merry (1875), L. R. 7 H. L. 530.

302. ———.]—NICKALLS v. MERRY, No. 308, post.

303. Effect of refusing information to seller.]—(1) R. through his brokers sold shares on the Stock Exchange to a jobber, who passed a name into which R. executed a transfer & the sale was settled. The transfer was never registered, the co. was wound up, & the name proved to be that of a minor. The jobber gave R. all the information

in his power, informing him to whom he resold the shares, & by what brokers the name was originally passed. On bill by R. against the jobber for indemnity against past and future calls:—*Held*: deft. was exonerated from all liability.

(2) *Semble*: the proper course for a vendor to pursue is, to make inquiries of all intermediate purchasers & brokers, & to sue the last principal or any intermediate person who refuses information.

(3) The customs & usages of the Stock Exchange when they do not contravene the laws of the realm, are to be observed & enforced in equity.—*RENNIE v. MORRIS* (1872), L. R. 13 Eq. 203; 41 L. J. Ch. 321; 25 L. T. 862; 20 W. R. 227.

Annotations.—*As to* (1) *Overd.* Nickalls v. Merry (1875), L. R. 7 H. L. 530. *Refd.* Maynard v. Eaton (1873), 9 Ch. App. 416, n.

B. Effect of Naming Transferee.

(a) In General.

See, generally, COMPANIES, Vol. IX., pp. 328–331, Nos. 2074–2087.

304. General rule—Intermediary released from liability.]—(1) The usage of the Stock Exchange is that in transactions between members of it there is an implied understanding that, on the purchase of stock or shares, the buying jobber shall be at liberty by a given day, called the “name day,” to substitute another person as buyer, & so relieve himself from further liability on the contract, provided such substituted person be one to whom the original seller cannot reasonably except, & that such person accept a transfer of the stock or shares, & pay to the original seller the price:—*Held*: a reasonable usage; as a usage founded on the general convenience of all persons engaged in a particular department of business, cannot, as regards such persons, be said to be unreasonable.

(2) *Pltf.*, the holder of shares in a co., through a broker, sold them to defts., jobbers on the Stock Exchange. After various sub-sales, the names of four persons were given to *pltf.*'s broker as the persons to whom the shares were to be transferred. *Pltf.*'s broker thereupon prepared four transfers to those persons, & *pltf.* executed them, & the broker delivered them with the shares to the brokers of the proposed transferees, who thereupon accepted the shares, & paid the price to *pltf.*'s broker. The transferees not having executed the transfers, or caused them to be registered, *pltf.* remained the registered holder of the shares, & was compelled to pay calls thereon. In an action against defts., claiming an indemnity against calls:—*Held*: the contract, as interpreted by the usage of the Stock Exchange, was, that defts., the first buyers, were to be at liberty to transfer the contract, with all its rights & obligations, to any sufficient buyers who would take it upon them with all its incidents; & as *pltf.* had transferred the shares to deft.'s nominees, & the latter had accepted & paid for them, though they had not executed or registered the transfers, defts. were released from all further liability on their contract to *pltf.*—*GRISSELL v. BRISTOWE* (1868), L. R. 4 C. P. 36; 38 L. J. C. P. 10; 19 L. T. 390; 17 W. R. 123, Ex. Ch.; *revsq.*, L. R. 3 C. P. 112.

Annotations.—*As to* (1) *Apld.* Duncan v. Hill (1871), L. R. 6 Exch. 255; Merry v. Nickalls (1872), 7 Ch. App. 733. *Refd.* Hodgkinson v. Kelly (1868), L. R. 6 Eq. 496; Dent v. Nickalls (1873), 29 L. T. 536. *As to* (2) *Apld.* Bowring v. Shepherd (1871), L. R. 6 Q. B. 309; Maxted v. Paine (1871), L. R. 6 Exch. 132. *Refd.* Sheppard v. Murphy (1868), 16 W. R. 1078; Davis v. Havecock (1869), L. R. 4 Exch. 373; Street v. Morgan (1869), 21 L. T. 432. *Generally, Consd.* Coles v. Bristowe (1869), 4 Ch. App. 3. *Refd.* Langton v. Waite (1868), L. R. 6 Eq. 165; Tonnington v. Lowe (1868), 19 L. T. 316; Allen v. Graves (1870), L. R. 5 Q. B. 478. *Mentd.* Dickenson v. Jardine (1868), L. R. 3 C. P. 639.

305. — Transfer accepted & price paid.]—COLES v. BRISTOWE, No. 254, *ante*.

306. — — — — —.]—A. having instructed his brokers, B. & co., to purchase shares in the O. Bank, received from them a bought note stating the purchase of shares from C., a jobber, but, according to the usual practice on the Stock Exchange, not specifying the registered numbers of the purchased shares. Between the date of purchase & the settling day the bank stopped payment & proceedings were taken to wind it up. A.'s solrs. thereupon wrote to B. & co. repudiating the contract for purchase contained in the bought note, on the ground that the contract was illegal & void, being in contravention of 30 & 31 Vict. c. 29, & giving notice that if they completed it it would be at their own risk. On the same day A. wrote a private letter to B. calling attention to the formal letter, " & I wish you clearly to understand that whatever position you may have to assume with regard to them (the shares) I consider myself fully bound to support you."—The name of A., as the purchaser of the shares, was returned to C. by B. & co., & on receiving a transfer & the share certificates the money was paid by them to the transferor's brokers. A. refused to execute the transfer, & returned it to B. & co., in whose possession it remained, without for some time any intimation to the vendor that A. repudiated the transaction :—*Held* : as the liability of C. (the jobber) in respect of the shares had ceased on the acceptance of the transfer by B. & co., it followed that A., though he had not executed the transfer, had in the circumstances, & by not definitely repudiating the authority given to B. & co. as his agents, become equitable owner of the shares, & bound to indemnify the vendor against all loss & liability in respect of them.—*LORING v. DAVIS* (1886), 32 Ch. D. 625; 55 L. J. Ch. 725; 54 L. T. 899; 34 W. R. 701; 2 T. L. R. 645.

Annotations :—*Appld.* Hardeen v. Behlhos, [1901] A. C. 118. *Consd.* Spencer v. Ashworth Partington (1925), 94 L. J. K. B. 447. *Mentd.* Weigall v. Runciman, (1916) 115 L. T. 61; Flinn v. Shelton Iron, Steel & Coal Co. (1921), 131 L. T. 213.

307. — — — — —.]—**Transferee must be able & willing to purchase.]—**A jobber, the moment he purchases shares, as between himself & the seller undertakes all the obligations of a purchaser; but by the custom of the Stock Exchange a jobber can get rid of his liability, as the decisions now stand, by giving another name. If he gives the name of an infant, he fails to comply with that requisition & himself remains liable (*MALINS V.-C.*).—*MAYNARD v. EATON* (1873), 9 Ch. App. 416, n.; 29 L. T. 637; 22 W. R. 252; *on appeal* (1874), 9 Ch. App. 414, C. A.

308. — — — — —.]—(1) A purchase or sale of shares made by one who is not a member of the Stock Exchange & made through a broker who is a member of that body, will be treated as made subject to the Rules of the Stock Exchange. The Rules of the Stock Exchange imply that the name of the person given as that of the ultimate purchaser of shares must be that of one able & willing to purchase & they are not satisfied if the names given is that of a non-existent person, a lunatic, an infant, a married woman, or a person who has not given authority for the use of his name.

(2) The period of ten days limited by the rules of the Stock Exchange, within which the seller may object to the name given, has application only to objections grounded on the pecuniary incapacity of the person named to perform the contract, not to his capacity & willingness to enter into it.

M. sold 50 shares in a co. through his broker a

member of the Stock Exchange to N. a stockjobber & also a member. On the settling day N. passed to M.'s broker the name of L., which he had received from some other broker, as the purchaser. M.'s broker made no objection to L. & prepared a transfer to L., which M. executed, & the price for the shares was paid. Two years afterwards the co. was ordered to be wound up; M. was placed on the list of contributories & ordered to pay certain calls in respect of the shares. It then appeared that the transfer had never been registered, & that L. was an infant :—*Held* : N. the jobber had not performed his contract inasmuch as he had not given to M. the name of a purchaser competent & willing to contract & he was liable to indemnify M. against the calls.—*NICKALLS v. MERRY* (1875), L. R. 7 H. L. 530; 45 L. J. Ch. 575; 32 L. T. 623; 23 W. R. 663, H. L.; *affg.* S. C. *sub nom.* *MERRY v. NICKALLS* (1872), 7 Ch. App. 733, C. A.

Annotations :—*As to* (1) *Appld.* Maynard v. Eaton (1873), 9 Ch. App. 416, n. *Generally, Consd.* Levitt v. Hamblet, [1901] 2 K. B. 53. *Appld.* Brown v. Black (1873), L. R. 15 Eq. 363; Dent v. Nickalls (1871), 30 L. T. 644; Heritage v. Paine (1876), 2 Ch. D. 594; Speight v. Gaunt (1883), 9 App. Cas. 1; Ellis v. Pond, [1898] 1 Q. B. 426; Oliver v. Bank of England, [1902] 1 Ch. 610; Yonge v. Toynbee, [1910] 1 K. B. 215. *Mentd.* Robinson v. Mollett (1875), L. R. 7 H. L. 802; Sheffield Corpn. v. Barclay, [1903] 2 K. B. 580.

309. Exception to rule—Sale with registration guaranteed—Transferee refusing to register.]—A firm of stock jobbers agreed on the Stock Exchange to buy 100 shares for a certain day, & on the sale note were the words "with registration guaranteed." The jobbers, before the day, gave the name of a transferee, who duly paid the purchase-money; the seller executed the deed of transfer, & delivered it to the transferee. The transferee never registered the transfer, & calls were made upon the seller, who filed a bill against the jobbers for indemnity, & had since died :—*Held* : the jobbers were liable to indemnify the estate of the seller.—*CRUSE v. PAINE* (1869), 4 Ch. App. 441; 38 L. J. Ch. 225; 17 W. R. 1033, L. C.

Annotations :—*Consd.* Bowring v. Shepherd (1871), L. R. 6 Q. B. 309; Maxted v. Paine (1871), L. R. 6 Exch. 132. *Appld.* Re Perkins, Poyser v. Beyfus, [1898] 2 Ch. 182. *Refd.* Davis v. Haycock (1869), L. R. 4 Exch. 373; Merry v. Nickalls (1872), 7 Ch. App. 733; Lacey v. Hill, Crowley's Claim (1874), L. R. 18 Eq. 182; Thacker v. Hardy, Thacker v. Hardy, Thacker v. Wheatley (1879), 48 L. J. Q. B. 289; Neilson v. James (1882), 9 Q. B. D. 546; Re Richardson, *Ex p.* St. Thomas's Hospital, [1911] 2 K. B. 705. *Mentd.* Re Blundell, Blundell v. Blundell (1888), 40 Ch. D. 370; Wolmershausen v. Gullick, [1893] 2 Ch. 514; Liverpool Mortgage Insee Case, [1914] 2 Ch. 617; British Union & National Insee. v. Rawson (1916), 85 L. J. Ch. 769.

310. — — — — —.]—**Shares carried over without authority.]—***MAXTED v. PAINE*, No. 301, *ante*.

311. — — — — —.]—**What amounts to ratification.]—**On June 14, 1866, pltf.'s broker sold for him to deft., a jobber on the Stock Exchange, twenty O. & G. shares. £15 paid up, at 16½ discount, & received from deft. a name ticket, in which the name of E. was inserted as the purchaser at one-eighth, & the consideration stated to be £2 10s., whereupon the transfer was completed, by inserting therein the consideration, £2 10s. & the name of E. as the purchaser, in accordance with the ticket, & was executed by pltf. & handed by his brokers to P. & co., the London brokers of E., but it was never executed by E., nor sent to him, nor was he aware that any transfer had been executed; & the shares remained on the register in pltf.'s name as holder. Previously to this, on Apr. 29, 1866, E. had, through M., a country broker, instructed P. & co. to purchase for him, which they accordingly did, 1000 O. & G. shares for the account day of May 15. This transaction was a mere speculation

Sect. 7.—Completion of contract: Sub-sects. 1 & 2, A. & B. (a).]

298. Sale for special settlement—Whether completion must be within reasonable time.]—CONSOLIDATED GOLDFIELDS OF SOUTH AFRICA v. SPIEGEL (E.) & Co., No. 71, ante.

SUB-SECT. 2.—RELEASE OF INTERMEDIARIES.

A. In General.

299. Right to name transferee—By “name day” —Validity of custom.]—GRISSELL v. BRISTOWE, No. 304, post.

300. Effect of failure to name transferee—Liability of intermediary—Broker known to be acting as agent.]—A shareholder in an incorporated railway co. instructed a stockbroker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B., another broker, who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; & the jobber granted the time on B. giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, & took the deed of assignment executed by the vendor. Upon a bill filed by the vendor:—*Held*: B. was bound to execute the assignment, to procure himself to be registered, & to pay the calls made since the execution of the assignment by the vendor, & to indemnify the vendor against future calls; & a decree was made to that effect.—*WYNNE v. PRICE* (1849), 3 De G. & Sm. 310; 5 Ry. & Can. Cas. 465; 12 L. T. O. S. 531; 13 Jur. 295; 64 E. R. 493.

Annotations:—*Apld.* *Evans v. Wood* (1867), L. R. 5 Eq. 9. *Refd.* *Sayles v. Blane* (1849), 14 Q. B. 205; *Re* Monmouthshire & Glamorganshire Joint-Stock Banking Co., *Ex p. Cape's Exor.* (1852), 22 L. J. Ch. 601; *Walker v. Bartlett* (1856), 18 C. B. 845; *Coles v. Bristowe* (1868), L. R. 6 Eq. 149.

301. ———.]—A jobber purchasing shares on the Stock Exchange for the next account must, on the next name day, give to his vendor the name of a third person, who must be a *bonâ fide* purchaser & legally bound to accept a transfer of the shares, or he will himself remain personally liable in respect of such shares, & be bound to indemnify his vendor from future calls upon them.

The “carrying over” of shares from the first to a future name day, without the authority or consent of the jobber’s nominee or ultimate purchaser, puts an end to the latter’s liability, who thereupon ceases to be the purchaser, or a person legally bound to take the shares or to take a transfer of them, & the jobber in such case does not come within the principle of the decisions in *Coles v. Bristowe*, No. 254, *ante*, & *Grissell v. Bristowe*, No. 304, *post*, but remains liable to the original vendor.—*MAXTED v. PAINE* (1869), L. R. 4 Exch. 81; *sub nom.* *MAXSTED v. PAINE*, 38 L. J. Ex. 41; 20 L. T. 34.

Annotations:—*Folld.* *Maxsted v. Morris* (1869), 21 L. T. 535. *Distd.* *Crabb v. Miller* (1871), 24 L. T. 219; *Fenwick v. Buck* (1871), 24 L. T. 274. *Apld.* *Nickalls v. Merry* (1875), L. R. 7 H. L. 530.

302. ———.]—*NICKALLS v. MERRY*, No. 308, *post*.

303. Effect of refusing information to seller.]—(1) R. through his brokers sold shares on the Stock Exchange to a jobber, who passed a name into which R. executed a transfer & the sale was settled. The transfer was never registered, the co. was wound up, & the name proved to be that of a minor. The jobber gave R. all the information

in his power, informing him to whom he resold the shares, & by what brokers the name was originally passed. On bill by R. against the jobber for indemnity against past and future calls:—*Held*: deft. was exonerated from all liability.

(2) *Semble*: the proper course for a vendor to pursue is, to make inquiries of all intermediate purchasers & brokers, & to sue the last principal or any intermediate person who refuses information.

(3) The customs & usages of the Stock Exchange when they do not contravene the laws of the realm, are to be observed & enforced in equity.—*RENNIE v. MORRIS* (1872), L. R. 13 Eq. 203; 41 L. J. Ch. 321; 25 L. T. 862; 20 W. R. 227.

Annotations:—*As to* (1) *Overd.* *Nickalls v. Merry* (1875), L. R. 7 H. L. 530. *Refd.* *Maynard v. Eaton* (1873), 9 Ch. App. 416, n.

B. Effect of Naming Transferee.

(a) In General.

See, generally, COMPANIES, Vol. IX., pp. 328–331, Nos. 2074–2087.

304. General rule—Intermediary released from liability.]—(1) The usage of the Stock Exchange is that in transactions between members of it there is an implied understanding that, on the purchase of stock or shares, the buying jobber shall be at liberty by a given day, called the “name day,” to substitute another person as buyer, & so relieve himself from further liability on the contract, provided such substituted person be one to whom the original seller cannot reasonably except, & that such person accept a transfer of the stock or shares, & pay to the original seller the price:—*Held*: a reasonable usage; as a usage founded on the general convenience of all persons engaged in a particular department of business, cannot, as regards such persons, be said to be unreasonable.

(2) Pltf., the holder of shares in a co., through a broker, sold them to defts., jobbers on the Stock Exchange. After various sub-sales, the names of four persons were given to pltf.’s broker as the persons to whom the shares were to be transferred. Pltf.’s broker thereupon prepared four transfers to those persons, & pltf. executed them, & the broker delivered them with the shares to the brokers of the proposed transferees, who thereupon accepted the shares, & paid the price to pltf.’s broker. The transferees not having executed the transfers, or caused them to be registered, pltf. remained the registered holder of the shares, & was compelled to pay calls thereon. In an action against defts., claiming an indemnity against calls:—*Held*: the contract, as interpreted by the usage of the Stock Exchange, was, that defts., the first buyers, were to be at liberty to transfer the contract, with all its rights & obligations, to any sufficient buyers who would take it upon them with all its incidents; & as pltf. had transferred the shares to deft.’s nominees, & the latter had accepted & paid for them, though they had not executed or registered the transfers, defts. were released from all further liability on their contract to pltf.—*GRISSELL v. BRISTOWE* (1868), L. R. 4 C. P. 36; 38 L. J. C. P. 10; 19 L. T. 390; 17 W. R. 123, Ex. Ch.; *revsq.*, L. R. 3 C. P. 112.

Annotations:—*As to* (1) *Apld.* *Duncan v. Hill* (1871), L. R. 6 Exch. 255; *Merry v. Nickalls* (1872), 7 Ch. App. 733. *Refd.* *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; *Dent v. Nickalls* (1873), 29 L. T. 536. *As to* (2) *Apld.* *Bowring v. Shepherd* (1871), L. R. 6 Q. B. 309; *Maxted v. Paine* (1871), L. R. 6 Exch. 132. *Refd.* *Sheppard v. Murphy* (1868), 16 W. R. 1078; *Davis v. Haycock* (1869), L. R. 4 Exch. 373; *Street v. Morgan* (1869), 21 L. T. 432. *Generally, Consd.* *Coles v. Bristowe* (1869), 4 Ch. App. 3. *Refd.* *Langton v. Walte* (1868), L. R. 6 Eq. 165; *Tonnington v. Lowe* (1868), 19 L. T. 316; *Allen v. Graves* (1870), L. R. 5 Q. B. 478. *Mentd.* *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639.

305. ——— Transfer accepted & price paid.]—
COLES v. BRISTOWE, No. 254, *ante*.

306. ———.]—A. having instructed his brokers, B. & co., to purchase shares in the O. Bank, received from them a bought note stating the purchase of shares from C., a jobber, but, according to the usual practice on the Stock Exchange, not specifying the registered numbers of the purchased shares. Between the date of purchase & the settling day the bank stopped payment & proceedings were taken to wind it up. A.'s solrs. thereupon wrote to B. & co. repudiating the contract for purchase contained in the bought note, on the ground that the contract was illegal & void, being in contravention of 30 & 31 Vict. c. 29, & giving notice that if they completed it it would be at their own risk. On the same day A. wrote a private letter to B. calling attention to the formal letter, " & I wish you clearly to understand that whatever position you may have to assume with regard to them (the shares) I consider myself fully bound to support you."—The name of A., as the purchaser of the shares, was returned to C. by B. & co., & on receiving a transfer & the share certificates the money was paid by them to the transferor's brokers. A. refused to execute the transfer, & returned it to B. & co., in whose possession it remained, without for some time any intimation to the vendor that A. repudiated the transaction:—*Held*: as the liability of C. (the jobber) in respect of the shares had ceased on the acceptance of the transfer by B. & co., it followed that A., though he had not executed the transfer, had in the circumstances, & by not definitely repudiating the authority given to B. & co. as his agents, become equitable owner of the shares, & bound to indemnify the vendor against all loss & liability in respect of them.—**LORING v. DAVIS** (1886), 32 Ch. D. 625; 55 L. J. Ch. 725; 54 L. T. 899; 34 W. R. 701; 2 T. L. R. 645.

Annotations:—**Apld.** Haroon v. Bellios, [1901] A. C. 118. **Consd.** Spencer v. Ashworth Partington (1925), 94 L. J. K. B. 447. **Mentd.** Weigall v. Runciman, (1916) 115 L. T. 61; Finn v. Shelton Iron, Steel & Coal Co. (1924), 131 L. T. 213.

307. ——— Transferee must be able & willing to purchase.]—A jobber, the moment he purchases shares, as between himself & the seller undertakes all the obligations of a purchaser; but by the custom of the Stock Exchange a jobber can get rid of his liability, as the decisions now stand, by giving another name. If he gives the name of an infant, he fails to comply with that requisition & himself remains liable (**MALINS V.-C.**).—**MAYNARD v. EATON** (1873), 9 Ch. App. 416, n.; 29 L. T. 637; 22 W. R. 252; *on appeal* (1871), 9 Ch. App. 414, C. A.

308. ———.]—(1) A purchase or sale of shares made by one who is not a member of the Stock Exchange & made through a broker who is a member of that body, will be treated as made subject to the Rules of the Stock Exchange. The Rules of the Stock Exchange imply that the name of the person given as that of the ultimate purchaser of shares must be that of one able & willing to purchase & they are not satisfied if the names given is that of a non-existent person, a lunatic, an infant, a married woman, or a person who has not given authority for the use of his name.

(2) The period of ten days limited by the rules of the Stock Exchange, within which the seller may object to the name given, has application only to objections grounded on the pecuniary incapacity of the person named to perform the contract, not to his capacity & willingness to enter into it.

M. sold 50 shares in a co. through his broker a

member of the Stock Exchange to N. a stockjobber & also a member. On the settling day N. passed to M.'s broker the name of L., which he had received from some other broker, as the purchaser. M.'s broker made no objection to L. & prepared a transfer to L., which M. executed, & the price for the shares was paid. Two years afterwards the co. was ordered to be wound up; M. was placed on the list of contributories & ordered to pay certain calls in respect of the shares. It then appeared that the transfer had never been registered, & that L. was an infant:—*Held*: N. the jobber had not performed his contract inasmuch as he had not given to M. the name of a purchaser competent & willing to contract & he was liable to indemnify M. against the calls.—**NICKALLS v. MERRY** (1875), L. R. 7 H. L. 530; 45 L. J. Ch. 575; 32 L. T. 623; 23 W. R. 663, II. L.; *affg.* S. C. *sub nom.* **MERRY v. NICKALLS** (1872), 7 Ch. App. 733, C. A.

Annotations:—*As to* (1) **Apld.** Maynard v. Eaton (1873), 9 Ch. App. 416, n. *Generally, Consd.* Levitt v. Hamblet, [1901] 2 K. B. 53. **Apld.** Brown v. Black (1873), L. R. 15 Eq. 363; *Dont v. Nickalls* (1874), 30 L. T. 611; *Heritage v. Paine* (1876), 2 Ch. D. 594; *Speight v. Gaunt* (1883), 9 App. Cas. 1; *Ellis v. Pond*, [1898] 1 Q. B. 426; *Oliver v. Bank of England*, [1902] 1 Ch. 610; *Yonge v. Toynbee*, [1910] 1 K. B. 215. **Mentd.** Robinson v. Mollett (1875), L. R. 7 H. L. 802; *Sheffield Corpn. v. Barclay*, [1903] 2 K. B. 580.

309. Exception to rule—Sale with registration guaranteed—Transferee refusing to register.]—A firm of stock jobbers agreed on the Stock Exchange to buy 100 shares for a certain day, & on the sale note were the words "with registration guaranteed." The jobbers, before the day, gave the name of a transferee, who duly paid the purchase-money; the seller executed the deed of transfer, & delivered it to the transferee. The transferee never registered the transfer, & calls were made upon the seller, who filed a bill against the jobbers for indemnity, & had since died:—*Held*: the jobbers were liable to indemnify the estate of the seller.—**CRUSE v. PAINE** (1869), 4 Ch. App. 411; 38 L. J. Ch. 225; 17 W. R. 1033, L. C.

Annotations:—**Consd.** Bowring v. Shepherd (1871), L. R. 6 Q. B. 309; *Maxted v. Paine* (1871), L. R. 8 Exch. 132. **Apld.** *Re Perkins*, *Poyser v. Boyfus*, [1898] 2 Ch. 182. **Refd.** *Davis v. Haycock* (1869), L. R. 4 Exch. 373; *Merry v. Nickalls* (1872), 7 Ch. App. 733; *Lacey v. Hill*, *Crowley's Claim* (1874), L. R. 18 Eq. 182; *Thacker v. Hardy*, *Thacker v. Hardy*, *Thacker v. Wheatley* (1879), 48 L. J. Q. B. 289; *Nelson v. James* (1882), 9 Q. B. D. 546; *Re Richardson*, *Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705. **Mentd.** *Re Blundell*, *Blundell v. Blundell* (1888), 40 Ch. D. 370; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Liverpool Mortgage Insee. Case*, [1914] 2 Ch. 617; *British Union & National Insee. v. Rawson* (1916), 85 L. J. Ch. 769.

310. ——— Shares carried over without authority.]—
MAXTED v. PAINE, No. 301, *ante*.

311. ——— What amounts to ratification.]—On June 14, 1866, pltf.'s broker sold for him to deft., a jobber on the Stock Exchange, twenty O. & G. shares. £15 paid up, at 16½ discount, & received from deft. a name ticket, in which the name of E. was inserted as the purchaser at one-eighth, & the consideration stated to be £2 10s., whereupon the transfer was completed, by inserting therein the consideration, £2 10s. & the name of E. as the purchaser, in accordance with the ticket, & was executed by pltf. & handed by his brokers to P. & co., the London brokers of E., but it was never executed by E., nor sent to him, nor was he aware that any transfer had been executed; & the shares remained on the register in pltf.'s name as holder. Previously to this, on Apr. 29, 1866, E. had, through M., a country broker, instructed P. & co. to purchase for him, which they accordingly did, 1000 O. & G. shares for the account day of May 15. This transaction was a mere speculation

Sect. 7.—Completion of contract: Sub-sect. 2, B. (a)

on the part of E., & he never intended to take a transfer to himself, as was known from the first to M., but not to P. & co. until after the purchase was made by them, & shortly before the account day of May 15; on May 10, O. & G. stopped payment & E. was applied to by M. for money to take up the shares, or to carry them over, but he did not pay or provide any money for that purpose, nor did he give authority to M. or to P. & co. to carry the shares over beyond May 15, nor was he consulted by them, nor did he do or say anything further in the matter. On May 14, M. wrote to P. & co. informing them that E. could not meet his engagements as regarded the shares, & that M. could not meet them either, & therefore authorising P. & co. to do "whatever they thought best." Thereupon P. & co. carried over the contract in respect of a portion of the 1000 shares to the then next account day on May 30, & again subsequently from that day to the account day of June 14, on which last mentioned day they gave E.'s name for twenty of these shares, by means of the before-mentioned name ticket which was then handed by debt. to pltf.'s brokers, as above-mentioned; M. being aware & approving of what P. & co. had so done. Two calls were made on the shares by the liquidators in Aug. & Oct. 1866, respectively, & were paid by pltf. In Oct. 1866, E. was declared bkpt., & pltf. proved for the amount of the first call, on which a dividend was declared, but was never received by him. P. & co. proved & received a dividend on the amount of the purchase-money of the 1000 shares, but both pltf. & debt. were, at the time of the bkpcy. proceedings, ignorant of the before-mentioned transactions between E., M., & P. & co.

In an action by pltf. to recover from debt., as on a contract of indemnity as purchaser of the shares, the amount paid by pltf. for the above-mentioned calls:—*Held*: the shares having been carried over from May 15, without any authority, express or implied, from E. for so doing, the contract was at an end & so far as E. was concerned on that day; & the contract of June 14, therefore, was not binding on him, & therefore debt. not having given to pltf. a contract binding on E. as the ultimate purchaser, had not discharged himself from the responsibility which, by the usage of the Stock Exchange, rests on the jobber, under such circumstances, as the purchaser, & so remained liable to indemnify pltf. against the calls, according to the rule laid down in *Maxsted v. Paine*, No. 301, *ante*; (2) neither the taking no notice by E. of M.'s application for money to take up or carry over the shares, nor the proceedings in bkpcy., amounted to a ratification by E. of the carrying over the share on May 15, & May 20, & the giving in his name on June 14, or by pltf. of the acceptance of such name as that of the actual purchaser; & no repudiation of the transfer on the part of E. was necessary.—*MAXSTED v. MORRIS* (1869), 21 L. T. 535.

312. — Name given without authority.]—*NICKALLS v. MERRY*, No. 308, *ante*.

— **Persons unable to purchase.]—***See Sub-sect. 2, B. (b), post.*

313. Implied undertaking by buyer or seller—To buy or sell from or to person named—Validity of custom.]—The question, then, is, what is the nature of the contract which a man enters into when he directs shares to be bought or sold through the instrumentality of the Stock Exchange? The answer, in my opinion, is a very plain & obvious one; he undertakes to buy & sell according to the

practice & usage of the Stock Exchange, assuming of course such practice & usage not to be illegal. That practice & usage may, I believe, be stated to be generally to this effect: The broker instructed to buy shares enters into a contract with a jobber, who undertakes to deliver on a particular day a certain number of shares at a specified price; the jobber then buys those shares at any price he pleases from another broker, who is instructed to sell shares, & this other broker contracts to deliver these on the day specified; when the day arrives the names of the seller & purchaser are exchanged, an instrument of transfer is presented to the person who instructed the broker to sell, he, executes the transfer to the person who instructed the broker to buy, who accepts the shares, & thereupon the transaction, as between the seller & the buyer, is complete (*LORD ROMILLY, M.R.*).—*HODGKINSON v. KELLY* (1868), L. R. 6 Eq. 496; 37 L. J. Ch. 837; 16 W. R. 1078.

*Annotations:—***Consd.** *Davis v. Haycock* (1869), L. R. 4 Exch. 373. **Refd.** *Fenwick v. Buck* (1871), 24 L. T. 274; *London Founders Assocn. & Palmer v. Clarke* (1887), 3 T. L. R. 709. **Mentd.** *Re Smith, Knight, Weston's Case* (1868), 4 Ch. App. 20.

314. Objection by seller—Time for making—Customary time.]—Pltf. having through his brokers on the Stock Exchange sold to debt., a jobber, ten shares in O., G. & co., Ltd., debt. on the "name-day" passed a ticket to pltf.'s brokers containing the name of G. as the ultimate buyer. No objection was made to the name, & pltf. executed a transfer to G. of the ten shares. It was afterwards discovered that the brokers named on the ticket as G.'s brokers had been instructed to buy by S., & had, in fact, bought a large number of shares for S. as undisclosed principal. The ten shares in question, the dealings not being for specific shares, were delivered to them as part of the shares so purchased; but the name of G. was passed in pursuance of S.'s instructions, & according to an arrangement by which G., who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers, as well as debt. were ignorant of this arrangement. Calls having been made on the shares which pltf. was compelled to pay, & which he was unable to recover from G., he brought this action to recover them from debt.:—*Held*: debt. had fulfilled his obligation by passing a name to which no objection was taken within the time limited by the usage, & in the absence of any fraud on his part, he could not be treated as ultimate buyer himself, or be made liable for the calls.—*MAXTED v. PAINE* (1871), L. R. 6 Exch. 132; 24 L. T. 149; *sub nom.* *MAXTED v. PAINE*, 40 L. J. Ex. 57; 19 W. R. 527, Ex Ch.; *affg.* (1869), L. R. 4 Exch. 203.

*Annotations:—***Consd.** *Duncan v. Hill* (1871), L. R. 6 Exch. 255. **Distd.** *Dent v. Nickalls* (1873), 22 W. R. 218. **Appld.** *Nickalls v. Merry* (1875), L. R. 7 H. L. 530. **Refd.** *Allen v. Graves* (1870), L. R. 5 Q. B. 478; *Kellock v. Enthoven* (1874), L. R. 9 Q. B. 241; *London Founders Assocn. & Palmer v. Clarke* (1887), 3 T. L. R. 709; *Ellis v. Pond*, [1898] 1 Q. B. 426; *Spencer v. Ashworth, Par- tington*, [1925] 1 K. B. 589.

315. — Application of Stock Exchange rule.]—*NICKALLS v. MERRY*, No. 308, *ante*.

(b) *Persons Able and Willing to Purchase.*

316. Infant.]—D. held shares in a joint-stock co., which he agreed, through his broker, to sell to pltf. N., a dealer on the Stock Exchange. N. in due time gave the name of G. E. as the transferee, & the shares were transferred to him. The co. was afterwards wound up; & as it appeared that G. E. was an infant, D. was placed on the list

as contributory in respect of these shares, & had paid £1,300, for calls on them. D. commenced an action against N. to recover the £1,300, & N. then filed the bill in this suit against D. & T. E. the father of G. H. alleging that T. E. was the real purchaser of the shares & liable for any loss, & praying that the action might be restrained, & that the questions might be decided in the suit:—*Held*: D. ought not to be deprived of the opportunity of establishing his claim & of recovering, if he could, against N. merely because another person might also be liable to pay the money, & might be the person who ultimately would have to pay.—*NICKALLS v. EATON* (1870), 23 L. T. 689; 19 W. R. 172, C. A.

317. —.]—*RENNIE v. MORRIS*, No. 303, *ante*.

318. —.]—C. & co. directed their brokers to purchase for them 200 shares in a co., & on the settling day forwarded to them the name of an infant transferee. Shortly afterwards the co. was ordered to be wound up, & upon the application of the infant, his name was removed from the list of contributories, & the names of the transferors substituted in its place. By a resolution of the Committee of the Stock Exchange, the broker was ordered to indemnify the transferors:—*Held*: C. & co., must indemnify the brokers.—*PEPPERCORNE v. CLENCH* (1872), 26 L. T. 656.

319. —.]—*MAYNARD v. EATON*, No. 307, *ante*.

320. —.]—*DENT v. NICKALLS*, No. 243, *ante*.

321. —.]—*NICKALLS v. MERRY*, No. 308, *ante*.

322. —.]—The owner of sixty £100 shares in a co., on each of which £10 had been paid up, sold them on the Stock Exchange to jobbers, who furnished the name of a purchaser to whom the shares were transferred, & in whose name they were registered. The co. was afterwards ordered to be wound up, when it turned out that the purchaser was an infant at the time of the transfer; & his name was thereupon removed from the list of contributories, & that of the vendor placed thereon. The vendor then filed his bill against the jobbers to compel them to indemnify him against all liability in respect of the shares, & to repay him all calls he might have to pay thereon, with costs. After defts. had put in their answer, an agreement was entered into between pltf. & the liquidator for a compromise of pltf.'s liability on the shares, amounting to £5,400, the terms of which were, in substance, that pltf. should pay the liquidator £2,000, transfer the shares to him, & authorise him to use his name in all proceedings against defts., & to retain all moneys recovered therein, which were to be applied in recouping pltf. the £2,000, & in satisfying all liability on the shares, in consideration whereof pltf. was, after all proceedings were over, to be released from all liability on the shares without further payment. Upon the hearing of the cause defts. did not dispute their liability to pltf. as vendor of the shares, but they contended that the release comprised in the agreement enured for their benefit, so as to make the £2,000 payable thereunder by pltf. the measure of their own liability either to pltf. or to the liquidator:—*Held*: the object & spirit of the agreement being to keep up & enforce the liability of defts., they could not set it up without giving effect to all its provisions, & consequently that it did not operate as a release in their favour, or relieve them in any degree from their liability to pay the full amount payable on the shares.—*HERITAGE v. PAINE* (1876), 2 Ch. D. 594; 45 L. J. Ch. 295; 34 L. T. 947.

Annotation:—*Mentd. Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705.

323. —.]—*WATSON v. MILLER*, [1876] W. N. 18.

324. —.]—*QUEENSLAND INVESTMENT & LAND CO., LTD. v. O'CONNELL & PALMER* (1896), 12 T. L. R. 502; 40 Sol. Jo. 621.

325. *Person domiciled abroad.*—A broker purchased on the Stock Exchange, from J.'s broker, certain not fully paid up shares in a joint-stock co., at a sum to be paid on the next settling day. The purchasing broker gave as his principal the name of G., a foreigner domiciled abroad; but J. refused to transfer the shares to G., on the ground that he was domiciled abroad, & had no property in this country to meet any liability which might accrue in respect of the shares:—*Held*: there was an implied contract between the brokers that the purchasing broker would furnish to the seller the name of a responsible transferee; a foreigner domiciled abroad was not such a responsible transferee & J. was not bound to execute a transfer of the shares to him.—*GOLDSCHMIDT v. JONES* (1870), 22 L. T. 220; 18 W. R. 513.

326. —.]—Pltf., through G. & B., stock-brokers, entered into a contract with M., a stock jobber, for the sale of 280 shares in a co., for the next account day, Apr. 27. The shares were £50 shares, on which £5 was paid, & a call of £5 was payable. As to 100 of the shares, M. arranged with deft. that he should take in 100 shares at £3 discount for M.; that is, on the name day, Apr. 26, M. would be entitled to receive from deft. a ticket containing the name & address of the person into whose name the shares should be transferred. M. was bound to deliver a similar ticket to G. & B. No such tickets were passed by deft. to M., nor by M. to G. & B.; but an informal memorandum was delivered by deft. to M., & by him to G. & B., & it was arranged between G. & B. & deft. that the delivery of the name should stand over until required by G. & B. On Apr. 27, pltf. executed, amongst others, a transfer for 100 shares, leaving the name of the transferee in blank, & transmitted it with the certificates to G. & B. On Apr. 30, G. & B. paid the call, & on that day deft. paid them the amount of the call, the difference between the £5 paid on the share & the £3 discount at which he had purchased & the stamp, & G. & B. settled with M.; G. & B. handed the certificates to deft., but retained the transfer. On May 3, certain stockbrokers agreed to take in for the deft. 100 shares, & gave him a ticket with the name of J., of Smyrna. Deft. delivered a ticket to G. & B. with J.'s name & initials, & no address, which they returned as imperfect. On May 11, the co. stopped payment, the transfer was never registered, & a call of £5 was made on pltf. as a contributory, which he paid, & sued deft. to recover back the amount:—*Held*: there was a contract between pltf. through G. & B. with deft., that when required deft. would deliver a name into which the shares might be transferred; as the name which deft. had offered to G. & B. was that of a foreigner residing abroad, he did not offer a person to whom no reasonable objection could be made; & deft. had not fulfilled the contract, & was liable to pltf. for the amount of call & interest as damages for the breach.—*ALLEN v. GRAVES* (1870), L. R. 5 Q. B. 478; 22 L. T. 677; *sub nom.* *ALLAN v. GRAVES*, 39 L. J. Q. B. 157; 18 W. R. 919.

Annotation:—*Reid. Maxted v. Paine* (1871), L. R. ■ Exch. 132.

327. *Non-existent person.*—*NICKALLS v. MERRY*, No. 308, *ante*.

328. *Lunatic.*—*NICKALLS v. MERRY*, No. 308, *ante*.

*Sect. 7.—Completion of contract: Sub-sects. 3 & 4.]***SUB-SECT. 3.—PREPARATION AND EXECUTION OF TRANSFER.**

Sec, generally, COMPANIES, Vol. IX., pp. 318 et seq.

329. Custom of Stock Exchange.]—Pltf., a holder of shares in a public co., agreed through his broker to sell them to a jobber for £202 10s. By the usage of the Stock Exchange, the transfer of the shares would not be made until a future day, & in the interval the shares might be again sold until a certain day, when the original buyer must name the person to whom the transfer was finally to be made. Accordingly, the shares were ultimately sold to deft. for £145, a call having been made in the meantime, & pltf. executed & gave to deft. a deed transferring the shares to him, the consideration named in which was £145, the difference being paid to pltf. by the jobber. Deft. never registered the transfer, & an order was made for winding up the co. Pltf. was compelled to pay calls upon the shares, & filed a bill for specific performance & repayment, alleging that there had been a purchase by deft. for £202 10s.:—*Held*: (1) the fact of the call having been made in the interval did not invalidate the contract.

(2) The usage upon the Stock Exchange, if not familiar to deft., was, at all events, familiar to his brokers, which is the same thing. He knew that shares frequently passed through several hands before they came into the possession of the actual purchaser to whom the transfer would be made, & he knew that the transfer would not be made by the person from whom he purchased, but by the holder of the shares. Therefore, deft. knowing this usage, & receiving & retaining the deed of transfer & certificates, acquiesces in the transaction, & becomes in fact the purchaser of the shares from the vendor who transferred them to him (LORD CHELMSFORD, C.).—*HAWKINS v. MALTRY* (1867), 3 Ch. App. 188; 37 L. J. Ch. 58; 17 L. T. 397; 16 W. R. 209, L. C.

Annotations:—As to (1) Reidd. Coles v. Bristowe (1868), L. R. 6 Eq. 149. *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496. *As to (2) Reidd. Grissell v. Bristowe* (1868), L. R. 3 C. P. 112; *Davis v. Haycock* (1869), L. R. 4 Exch. 373; *Maxted v. Paine* (1871), L. R. 6 Exch. 132.

330. Duty of purchaser—To prepare transfer.]—In an action for a breach of contract in refusing to accept, at the time appointed by the contract, & to pay for, certain shares in a water, gas, & market co., such shares being by the co.'s Act of Parliament made personal estate, & a form of transfer under seal being thereby given, it is sufficient to aver that pltf., the vendor, "had always been ready & willing to do all things, & that all things had happened, etc., necessary to entitle him to the performance by deft. of his agreement": & notice to deft. of pltf.'s readiness & willingness to transfer the shares is not necessary or a condition precedent to pltf.'s right to recover, it being on the contrary the duty of deft., the purchaser, to prepare & tender a transfer for execution by pltf.; & a plea of want of such notice is bad, & no defence to the action.—*COBBOLD v. PETO* (1872), 27 L. T. 130.

331. ———.]—On the purchase of shares in a co. the obligation to prepare a transfer is, as a general rule, on the purchaser.—*BIRKETT v. COWPER-COLES* (1919), 35 T. L. R. 298.

332. ——— To tender transfer.]—A railway Act, sect. 147, enacted that the shares shall to all

intents & purposes be deemed personal estate, & not of the nature of real property; sect. 148 enacted that the conveyance shall be in writing, & gave a short form of conveyance to be executed by the seller & purchaser:—*Held*: nevertheless, in order to enforce a contract for the transfer of shares, the purchaser must tender a conveyance to the vendor, as in the case of sales of real property.—*STEPHENS v. DE MEDINA* (1843), 4 Q. B. 422; 3 Gal. & Dav. 110; 3 Ry. & Can. Cas. 454; 12 L. J. Q. B. 120; 114 E. R. 957.

Annotations:—Apld. Bowlby v. Bell (1846), 3 C. B. 284. *Folld. Cobbold v. Peto* (1872), 27 L. T. 130. *Apld. Birkett v. Cowper-Coles* (1919), 35 T. L. R. 298.

333. ———.]—*BOWLBY v. BELL*, No. 122, ante.

334. ———.]—*COBBOLD v. PETO*, No. 330, ante.

335. ——— To execute transfer—Effect of forgery by broker.]—*DALTON v. MIDLAND COUNTIES RY. Co.* (1853), 1 C. L. R. 35, n.

336. Duty of seller—To execute transfer—Price stated in transfer differing from price received.]—Pltfs., as brokers for deft., on Oct. 2 sold to a jobber 100 shares in the General Credit co. for £5 a share, K., giving the name of S. as the ultimate purchaser, in whose name the usual transfer was made out. In that transfer the consideration money stated was the sum paid by S. being an increase of some £18 or £19 on the sum for which deft. had sold to K. This transfer was then, on the same day, executed by deft., & £495 being his full purchase-money, less £5, pltfs.' commission of £1 per cent., was paid to him by pltfs. Upon the executed transfer being sent to K. for delivery to S., K. discovered errors in the spelling of the names in the body of the document, for instance, deft.'s name was spelt "Eatan" instead of "Eaton," & the purchaser's name was spelt "Solomons" instead of "Salomons." K. thereupon corrected those errors, & at the same time filled in the date, which was in blank when executed by deft., by writing in "Sept. 30." Upon the transfer being then sent back to deft. for him to "initial" such corrections, he declined to do so, or to return the transfer, until pltfs. should pay him the difference between the price at which they sold the shares for him, & that at which they were bought by S. By reason of such refusal & the detention of the transfer, K. was compelled to buy in against pltfs., & the latter thereupon brought an action against deft. to recover the money paid by him to K. in consequence. At the trial deft. objected that he was not bound to re-execute the transfer, because he was thereby required to admit the receipt of a larger sum than he had actually received, & secondly, that the transfer was invalid by reason of the alterations in the names & date made by K. subsequently to its execution by deft., & that it was pltf.'s duty to tender a good deed to deft. stating the price actually paid to deft., & the increased price paid by the ultimate purchaser. A verdict was found for pltfs.:—*Held*: pltfs.' action for money paid was maintainable. Upon the execution of the transfer by deft. on Oct. 2 & the payment to him of his agreed purchase-money, the transaction was complete, & he had no longer any right to the transfer, & was not entitled to retain it on its being sent back to him to be initialled, nor to claim payment of the difference between the purchase-money received by him, & that which was paid by S. to K.

PART IV. SECT. 7, SUB-SECT. 3.

329 i Custom of Stock Exchange.]—By the custom of the London Stock Exchange, shares are to be transferred

not later than the tenth day after the settling day fixed on by the parties.—*SHEPPARD v. MURPHY* (1868), 16 W. R. 918.—*IR.*

f. Necessity for tender.]—*PAWLE*

v. READ (No. 2) (1870), 9 N. S. W. S. C. R. (L.) 103.—*AUS.*

g. Sufficiency of tender.]—*RAIT v. PRIMROSE* (1859), 21 Dunl. (Ct. of Sess.) 965; 31 Sc. Jur. 529.—*SCOT.*

Qu.: whether, if the objections which were taken at the trial & by the rule had been made by deft. at the time when the transfer was sent back to him they might not have prevailed. But *ct.* held that the questions therein involved did not arise in the present case.—*MEWBURN v. EATON* (1869), 20 L. T. 449.

337. ——— Validity of custom to sign for different consideration.]—Deft. having instructed pltf. to purchase certain railway shares on the Liverpool Stock Exchange, received a transfer note on the settling day for the purpose of transferring his shares to the purchaser. It is the custom on the Liverpool Stock Exchange for the original seller to transfer his shares not to the immediate purchaser, but to some sub-purchaser who may have purchased from some person other than the original purchaser; & it frequently happens that the sum in the transfer note is different to the sum which the original seller is to receive. To avoid difficulty, at the foot of the transfer note it is stated that the consideration money differs from that which the first seller is to receive owing to the sub-sale by the original buyer, but that the note is so regulated to fulfil the provisions of Stamp Act, 1815 (c. 184).

Deft. refused accordingly to sign the transfer because it stated that he had received a sum which was untrue:—*Held*: deft. was bound to sign the transfer deed; the footnote was to be read as part of the transfer, & was sufficiently explicit.

Semble: a custom to sign for a consideration different from that stated in the deed of transfer would be bad.—*CASE v. MCCLELLAN* (1871), 25 L. T. 753; 20 W. R. 113.

338. ——— To initial alterations in transfer—After execution.]—*MEWBURN v. EATON*, No. 336, *ante*.

339. Expenses of transfer—Fall on purchaser.]—*STEPHENS v. DE MEDINA*, No. 332, *ante*.

340. Proof of transfer—Admissibility of stock-broker's day book.]—During the trial of an action to establish pltf.'s right to be indemnified by the two defts., or one of them in respect of 200 shares transferred into pltf.'s name as trustee for defts. or one of them, pltf. desired to prove that the shares had been bought on the Stock Exchange for one of defts. through his brokers, G. & D. G. was dead, & pltf. tendered in evidence an entry in the day book of the firm of a purchase of 200 shares by G., for the particular deft.; & having proved that the entry was in the handwriting of G., that it was made by him in the ordinary course of business at the time of the purchase as a memorandum of the transaction, & that the ledger of the firm was made up from the day book, contended that it was admissible in evidence as a declaration made by a deceased person, first, because it was made against the pecuniary interest of the person making it; & secondly, because it had been made in the ordinary course of business:—*Held*: it was not admissible upon the first ground, because it might, according to the turn of the market, have been to the advantage of deceased; nor upon the second ground, because it was not made in the

performance of any duty.—*MASSEY v. ALLEN* (1879), 13 Ch. D. 558; 49 L. J. Ch. 76; 41 L. T. 788; 28 W. R. 212.

Annotations:—*Consd.* *Newbould v. Smith* (1885), 29 Ch. D. 882. *Reid.* *Tucker v. Oldbury U. C.*, [1912] 2 K. B. 317. *Mentd.* *Ward v. Pitt*, *Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 1 K. B. 130.

Mode of transfer & formalities.]—*See, generally*, *COMPANIES*, Vol. IX., pp. 359–364, Nos. 2284–2322.

—— **Statutory companies.]**—*See* *COMPANIES*, Vol. X., pp. 1140, 1141, Nos. 8055–8066.

—— **Cost book & Stannaries mining companies.]**—*See* *COMPANIES*, Vol. X., pp. 1103, 1104, Nos. 7742–7747.

SUB-SECT. 4.—DELIVERY.

341. Time for delivery—Prompt delivery essential.]

—Tender of stock must be on the very day.—*BULLOCK v. NOKE* (1721), 1 Stra. 579; 93 E. R. 712.

342. ———.]—*UNION CORPN., LTD. v. CHARRINGTON & BRODRICK*, No. 15, *ante*.

343. ——— Time fixed by Rules of Stock Exchange.]—*LONDON FOUNDERS ASSOCN. v. CLARKE*, No. 361, *post*.

344. ——— Liverpool Stock Exchange.]—In an action for the non-acceptance of railway shares, which by the contract, made at Liverpool through brokers, were to be delivered in a reasonable time, a written rule of the Liverpool Stock Exchange, stated to be acted upon by all the Liverpool brokers—"that the seller of shares was in all cases entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he was acquainted with the name of his transferee," was held admissible on an issue whether pltf. within a reasonable time was ready & willing & offered to transfer the shares; although it was not proved that either of the parties or their brokers, was a member of the Liverpool Stock Exchange.—*STEWART v. CAUTY* (1811), 8 M. & W. 160; 2 Ry. & Can. Cas. 616; 10 L. J. Ex. 348; 5 Jur. 411; 151 E. R. 992.

345. ——— Admissibility of evidence of usage.]—*FLETCHER v. MARSHALL*, No. 42, *ante*.

346. ——— Mining shares.]—Upon the sale, by one broker to another, of shares in a mine, they respectively signed, bought & sold notes, the former of which was as follows:—"Bought T. F. 250/5120ths shares in Wheal Charlotte, at £2 5s. 0d. per share, £562 10s. 0d. for payment, half in two months, & half in four months. In an action for not accepting the shares:—*Held*: evidence was admissible of a custom among brokers in mining shares, that in contracts relating to the sale & purchase of such shares, the delivery takes place at the time appointed for payment.—*FIELD v. LELEAN* (1861), 6 H. & N. 617; 30 L. J. Ex. 168; 4 L. T. 121; 7 Jur. N. S. 918; 9 W. R. 387; 158 E. R. 255, Ex. Ch.

347. ——— Unreasonable delay—Circumstances unknown to buyer.]—Where a contract for the sale of shares did not fix the time for the delivery

PART IV. SECT. 7, SUB-SECT. 4.

341 i. Time for delivery—Prompt delivery essential.]—Upon a sale of shares for future delivery, delivery & payment are concurrent conditions. The obligation of the seller is to deliver to the buyer or to a person known by the seller to be the buyer's agent, on demand, at or soon after the stipulated time, upon tender of the contract price.—*McLAUGHLIN v. DE*

LAURET (1910), 12 C. L. R. 1—*AUS.*

341 ii. ———.]—Delivery of stock & payment of the price are concurrent acts.—*CLARKSON v. SNIDER* (1885), 10 O. R. 561.—*CAN.*

343 i. ——— Time fixed by rules of Stock Exchange.]—*MORGAN v. BENNETT*, [1915] V. L. R. 53.—*AUS.*

h. Necessity for.]—A perfect sale of bank stock can be made through a broker by the consent alone of the

parties, without delivery & transfer in the books of the bank, & it is not necessary that the sale be made on the floor of the exchange.—*STACKHOUSE v. RYKERT* (1912), Q. R. 46 S. C. 291.—*CAN.*

k. Failure to deliver—Certificates transferred fraudulently by clerk of stockbrokers—Whether clerk agent of customer.]—*ROBB v. GOW* (1905), 8 F. (Ct. of Sess.) 90.—*SCOT.*

Sect. 7.—Completion of contract: Sub-sects. 4, 5, 6 & 7.]

of them:—*Held*: the time for delivery could not depend upon circumstances which were unknown to the buyer, & delay in tendering the shares arising from the seller having sent his certificate to England for subdivision, as this circumstance was unknown to the buyer, was unreasonable & justified the buyer in refusing to accept the shares, such delay was *mora*, assuming the law of *mora* to be applicable.—*DE WAAL v. ADLER* (1886), 12 App. Cas. 141; 56 L. J. P. C. 25; 3 T. L. R. 188, P. C.

348. — Delay by purchaser—Forfeiture of deposit.]—*SPRAGUE v. BOOTH*, No. 292, *ante*.

Time essence of contract.]—See Nos. 289-191, *ante*.

349. Duty of seller—To make good stock delivered.]—Tender of stock, *pltf.* must do everything in his power to make it good.—*CLARK v. TYSON* (1722), 1 Stra. 504; 93 E. R. 663.

350. — As to genuineness of documents delivered—Reasonableness of rule.]—A person who employs a broker to sell shares on the Stock Exchange is bound to indemnify the broker for any liability he may incur, in consequence of carrying out his principal's instructions, under any rules of the Stock Exchange, provided that such rules are reasonable.

A rule which provides that the seller of shares or stock is responsible for the genuineness & regularity of all documents delivered, & for such dividends as may be received until reasonable time has been allowed to the transferee to execute & duly lodge such documents for verification & registration: & that, when an official certificate of registration of such shares or stock has been issued, the committee of the Stock Exchange will not, unless bad faith is alleged against the seller, take cognisance of any subsequent dispute as to title, until the legal issue has been decided, [is] a reasonable rule.—*SMITH v. REYNOLDS* (1892), 66 L. T. 808; 8 T. L. R. 391, C. A.; *affd. sub nom. REYNOLDS v. SMITH* (1893), 9 T. L. R. 494, II. L.

SUB-SECT. 5.—PAYMENT.

351. Time for payment—Payment & transfer concurrent acts.]—On a covenant to transfer stock paying so much. *Qu.*: what is to be the first act.

The payment of the money is not a condition precedent, but a concurrent act; & if *deft.* had been there, *pltf.* must have laid down his money, though not so as to part with it till transfer (*PRATT, C.J.*).—*MERRIT v. RANE* (1721), 1 Stra. 458; 93 E. R. 633; *affd.*, 1 Stra. p. 461, H. L.

Annotation:—*Refd.* *Morton v. Lamb* (1797), 7 Term Rep. 125.

352. — —.]—If A. covenant to transfer stock on or before such a day, & B. covenant to pay a certain sum of money to A. for the stock on or before the said day, the transfer of the stock is not a condition precedent; & therefore a declaration in covenant by A. for non-payment of the money, stating that he was ready to transfer on the day, but that *deft.* refused to accept it, is good.—*BLACKWELL v. NASH* (1722), 8 Mod. Rep. 105; 1 Stra. 535; 88 E. R. 83; *affd.* (1724), 8 Mod. Rep. p. 106, Ex. Ch.

Annotations:—*Appld.* *Mordant v. Small* (1723), 8 Mod. Rep. 218. *Refd.* *Goodisson v. Nunn* (1792), 4 Term Rep. 761.

353. — —.]—If A. covenant to pay so much money on B. transferring so much stock to

him, or some other person, at the request of A. on or before such a day & at such a place, & to receive the stock at the said time & place; a declaration in covenant by B. must state a request to transfer; the fixed hours on which such transfers are made; & that he was at the place on the last instant of the time, ready to make the transfer.

There is no necessity to fill up the transfer (*FORTESCUE, J.*).—*MORDANT v. SMALL* (1724), 8 Mod. Rep. 218; 88 E. R. 156.

354. — —.]—*STRAY v. RUSSELL*, No. 360, *post*.

355. — —.]—*LONDON FOUNDERS ASSOCN. v. CLARKE*, No. 361, *post*.

356. Proof of tender of price—Tender to broker—Purchaser failing to object.]—In an action for non-delivery of shares sold by *deft.*'s broker, *deft.* pleaded that no tender of the price had been made, & issue was joined thereon. It appeared that *deft.* was informed that a tender of the price had been made to his broker; & *deft.* in reply without objecting that the broker was not his agent, said he would endeavour to make an arrangement for the delivery of the shares:—*Held*: this was sufficient evidence to prove the tender.

Qu.: whether a tender to a broker is good.—*JACKSON v. JACOB* (1837), 3 Bing. N. C. 869; 3 Hodg. 219; 5 Scott. 79; 6 L. J. C. P. 315; 1 Jur. 262; 132 E. R. 645.

357. Authority of broker to receive payment.]—G., a stockbroker, who was one of three trustees & acted as broker to the trust, proposed to his co-trustees to sell B. stock belonging to the trust & re-invest in N. E. stock. The three trustees then, on Jan. 27, 1882, executed a transfer of the B. stock for a nominal consideration to two persons who were officers of a bank of which G. was a customer. G. gave the transfer to the bank as security for a loan by them to him, & the transfer was registered. G. in Feb. 1882, paid off the loan, & Feb. 15 the bank transferred the stock to purchasers from G., & without giving any notice to G.'s co-trustees, allowed him to receive the purchase-money. He invested it in N. E. stock in his own name. In 1883 he sold the N. E. stock & misappropriated the proceeds. Shortly after the sale of the B. stock G. had given an account to his co-trustees showing the sale of B. stock & a re-investment in N. E. stock, & in 1881 he rendered another account in which he represented the N. E. stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures to the deed of transfer:—*Held*: the bank had occasioned the loss to the trust estate by allowing the purchase-money to come to the hands of G. who had no authority to receive it, & whom they had no sufficient reason for believing to have authority to receive it, & the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the N. E. stock was registered in the joint names of the trustees.

If he was authorised as a broker to sell, that must carry with it an authority to receive the purchase-money arising from the sale, since in the ordinary course it is paid to the broker (*COTTON, L.J.*).—*MAGNUS v. QUEENSLAND NATIONAL BANK* (1888), 37 Ch. D. 466; 57 L. J. Ch. 413; 58 L. T. 248; 52 J. P. 246; 36 W. R. 577; 4 T. L. R. 248, C. A.

Annotations:—*Mentd.* *Magnus v. National Bank of Scotland* (1888), 57 L. J. Ch. 902; *Thorne v. Heard*, [1894] 1 Ch. 599.

SUB-SECT. 6.—DIVIDENDS AND RIGHTS
ATTACHING TO SHARES.

358. Order to sell ex dividend—Sale cum dividend—Right of broker to recover dividend from client.]—DAVISON *v.* FERNANDES (1889), 6 T. L. R. 73.

359. Responsibility of seller—Until registration of transferee—Reasonableness of rule.]—SMITH *v.* REYNOLDS, No. 350, *ante*.

Rights of purchaser.]—See COMPANIES, Vol. IX., p. 351, Nos. 2223–2225.

SUB-SECT. 7.—REGISTRATION.

360. General rule—Seller does not guarantee purchaser's registration.]—(1) Here the purchase of shares in a joint stock banking co. was made at the request of pltf. by a broker on the Stock Exchange in London, & the contract must be considered as made with reference to all the established usages of the Stock Exchange. . . .

According to these usages, the price of the shares is payable on the one broker handing over to the other the transfers & certificates (CAMPBELL, C.J.).

(2) Looking at the subject-matter of the sale, shares in a bank, & the place in which the sale took place, the Stock Exchange, & having regard to the rules & practice of the Stock Exchange, I do not think that the vendor in such a case contracts that the directors shall accept the vendee or a proper person to be admitted a shareholder in the bank (HILL, J.).—STRAY *v.* RUSSELL (1859), 1 E. & E. 888; 28 L. J. Q. B. 279; 1 L. T. 162; 5 Jur. N. S. 1295; 7 W. R. 611; 120 E. R. 1141; *affd.* (1860), 1 E. & E. 916, Ex. Ch.

*Annotations:—*As to (1) *Refd.* Chapman *v.* Shepherd, Whitehead *v.* Izod (1867), L. R. 2 C. P. 228. As to (2) *Folld.* London Founders Asscn. *v.* Clarke (1888), 20 Q. B. D. 576. *Refd.* Hooper *v.* Herts, [1906] 1 Ch. 549. *Generally.* *Refd.* Coles *v.* Bristowe (1868), L. R. 6 Eq. 119; Sheppard *v.* Murphy (1868), 16 W. R. 918.

361. ———.]—(1) A contract for the sale of shares in a registered co. was made through brokers upon & subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange the transferee of the shares paid the price of them to the vendor upon delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the co., who were empowered by the arts. of asscn. in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the co. The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had & received to his use:—*Held*: the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the co. would register the transferee, & the action was not maintainable.

According to the rules & usages of the Stock Exchange, the name of the proposed transferee must be given on a certain day to enable the vendor to make out the transfer, & payment is to be made upon the transfer being executed & handed over. All this takes place before the purchaser applies to have his name entered on the register. The fact of the money passing before the application for registration, is strong to show that the obligation to procure the registration is no part of the contract which the vendor has entered into (FRY, L.J.).

(2) In my opinion, the duty of the vendor was

to hand over the securities at the time fixed by the rules of the Stock Exchange. He must execute a proper transfer (LOPES, L.J.).—LONDON FOUNDERS ASSOCN. *v.* CLARKE (1888), 20 Q. B. D. 576; 57 L. J. Q. B. 291; 59 L. T. 93; 36 W. R. 489; 4 T. L. R. 377, C. A.

*Annotations:—*As to (1) *Refd.* Benjamin *v.* Barnett (1903), 19 T. L. R. 564; Hooper *v.* Herts, [1906] 1 Ch. 549.

362. Purchaser to secure own registration.]—Deft., a stockbroker who had undertaken to sell shares of a joint-stock bank for pltf., a shareholder, sold them to a jobber on the Stock Exchange & sent an advice note of such sale to pltf., but in accordance with the custom of the Stock Exchange, the bought & sold notes between deft. & the jobber omitted to state the name of the registered proprietor of the shares as required by 30 & 31 Vict. c. 29, s. 1, by reason of which the contract for sale was void, & the bank having stopped, & an order for its winding-up having been made before the day on which the jobber was entitled to name the person willing to be the purchaser, the contract for sale was repudiated, & pltf. remained the holder of the shares.

All that pltf. had undertaken to do by the contract for sale was to deliver a duly executed transfer of the shares & it would be for the purchaser to get the transfer registered (CORTON, L.J.).—NEILSON *v.* JAMES (1882), 9 Q. B. D. 546; 51 L. J. Q. B. 369; 46 L. T. 791, C. A.

*Annotation:—**Refd.* Perry *v.* Barnett (1885), 15 Q. B. D. 388.

363. ———.]—Pltf. transferred shares of his in a registered co. to A. B. on an agreement between them that if A. B. was accepted as shareholder by the co. the shares should be taken by him at their market value in reduction of a debt due to him from pltf. The consideration was stated in the transfer to be only the sum of 5s., & the transfer was brought to the co. for registration without any notice of the said agreement between pltf. & A. B. The co. refused to register, on the ground that pltf. was indebted to them, but on its being established after an interval of eighteen months, that pltf. was not so indebted, the co. registered the transfer. In an action against the co. for wrongfully refusing to register, pltf. sought to recover as damages the loss in the market value of the shares between the time when the transfer was brought to the co. to be registered & the time when it was in fact registered:—*Held*: pltf. was entitled to recover only nominal damages, as the contract between pltf. & A. B. was a special one, of which the co. had had no notice, & the ordinary contract on the sale of registered shares was only that the seller should give to the purchaser a valid transfer & do all required to enable the purchaser to be registered as member in respect of such shares, the duty of the purchaser, which has not been altered by Companies Act, 1867 (c. 131), s. 26, being to get himself registered as such member.—SKINNER *v.* CITY OF LONDON MARINE INSURANCE CORPN. (1885), 14 Q. B. D. 882; 54 L. J. Q. B. 437; 53 L. T. 191; 33 W. R. 628; 1 T. L. R. 426, C. A.

364. Effect of official certificate of registration—Refusal of Stock Exchange Committee to decide disputes—Reasonableness of rule.]—SMITH *v.* REYNOLDS, No. 350, *ante*.

Duty of seller—Not to hinder registration.]—See COMPANIES, Vol. IX., p. 351, No. 2222.

Measure of damages for hindrance.]—See COMPANIES, Vol. IX., p. 358, No. 2275.

Sect. 7.—Completion of contract: Sub-sect. 7. Sect. 8. Part V. Sects. 1 & 2.]

—To do acts necessary to allow registration.]—See COMPANIES, Vol. IX., p. 351, No. 2220.

Failure of company before registration.]—See COMPANIES, Vol. IX., pp. 353, 354, 396, 397, Nos. 2235, 2236, 2526–2534.

Transfer of shares in statutory companies.]—See COMPANIES, Vol. X., p. 1142, Nos. 8072–8076.

SECT. 8.—DISPOSAL OF PROCEEDS OF SALE.

365. Right of broker to retain—In repayment of advance.]—To an action against acceptors of a bill of exchange for £419 2s. damages being laid at £500, defts. pleaded, first, as to £4 18s. parcel, etc., payment of £5 into ct., & secondly, “as to the residue of the sum mentioned in the declaration,” that plffs. were the brokers of C. I. H., & sold certain property for him for £415 12s. 6d., payable on a day which would arrive before the bill would become due, & that he applied to plffs. to advance him the amount, which they agreed to do, if C. I. H. would procure defts. to accept a bill for £419 2s. & that plffs. agreed to appropriate the purchase-money, when received by them, towards the payment of the bill; & that, thereupon, defts. for the accommodation of C. I. H., & without any consideration, accepted the bill, & plffs. advanced C. I. H. £415 12s. 6d. & afterwards & before the bill became due they received the purchase-money, viz., the £415 12s. 6d., which was sufficient to satisfy the residue of the sum in the declaration mentioned, & all damages, etc.:—*Held*: defts. were as between plffs. & themselves entitled to credit for the full sum of £415 12s. 6d. without reference to a claim which plffs. had on C. I. H. for a sum of £3 15s., which was admitted to be due by him to them by virtue of an agreement respecting the mode of paying the brokerage.—*HILLS v. MESNARD* (1847), 10 Q. B. 266; 16 L. J. Q. B. 306; 11 Jur. 796; 116 E. R. 103.

366. Payment to agent—Authority of agent to receive—Instructions for sale received from agent—Custom of Stock Exchange.]—PEARSON v. SCOTT. No. 234, *ante*.

367. ——— Receipts signed by principal received from agent.]—PEARSON v. SCOTT, No. 234, *ante*.

———.]—See, generally, AGENCY, Vol. I., pp. 361–370, Nos. 705–784.

368. ——— Duty to pay in cash.]—PEARSON v. SCOTT, No. 234, *ante*.

369. ——— What constitutes cash—Payment by cheque.]—C., living in Canada, sent through X., a country stockbroker in England, a power of

attorney for sale of “£1,000, Goschens standing in the name of C.” to defts. who were the London agents of X., with instructions to sell. Defts. sold the stock for £970, with which, less commission, they credited X. in his general account with them. The account between X. & defts. was ultimately balanced by subsequent entries, including two bills drawn by X. & accepted & paid by defts. but no payment expressly on account of the sale of Consols. The fact of the sale of the stock was not discovered by C. for several months, when X. was insolvent; & no part of the proceeds of sale was received by C.:—*Held*: defts. were not relieved by the transactions between them & X., or by the fact that C. was a foreign principal, from liability; & judgment given for the proceeds of the stock with interest at 4 per cent.

It was [the duty of] defts. to pay the amount less their commission, to plff. or to some person authorised by him to receive it, & if defts. paid to any such authorised person & if with that person they had other private dealings, they were bound, as between themselves & plff. to pay that authorised person in cash, & not in account between them. Of course, payment by cheque, duly cashed is payment in cash for this purpose (*ROMER, J.*).—*CROSSLEY v. MAGNIAC*, [1893] 1 Ch. 594; 67 L. T. 798; 41 W. R. 598; 9 T. L. R. 126; 3 R. 202.

370. ——— Right to settle in account—Reasonableness of custom.]—An alleged custom among stockbrokers that a member of the London Stock Exchange, who has sold shares on the instructions of a country broker, who is acting for an undisclosed principal, is entitled to set off against the price of the shares a debt due to him from the country broker in respect of previous Stock Exchange transactions, is unreasonable, & therefore will not bind the principal of the country broker, unless he is proved to have known of the alleged custom, & agreed to be bound by it.—*BLACKBURN v. MASON* (1893), 68 L. T. 510; 9 T. L. R. 286; 37 Sol. Jo. 283; 1 R. 297, C. A.

Annotations.—Refd. Crossley v. Magniac, [1893] 1 Ch. 594, *Anderson v. Sutherland* (1897), 13 T. L. R. 163.

371. ———.]—CROSSLEY v. MAGNIAC, No. 369, *ante*.

372. ———.]—A London broker, employed by a country broker to sell stock which he knows, or ought as a reasonable man to know, belongs to a client of the country broker, cannot discharge himself from liability to such client for the proceeds of the sale by settling the same in account with the country broker.—*ANDERSON v. SUTHERLAND, CRAIG v. SUTHERLAND* (1897), 13 T. L. R. 163; 41 Sol. Jo. 226; 2 Com. Cas. 65.

Effect of bankruptcy of broker.]—See BANKRUPTCY, Vol. V., pp. 647–649, Nos. 5800–5805.

PART IV. SECT. 8.

1 Duty of broker to account.]—CUTTEN v. BICKELL (1925), 57 O. L. R. 113.—CAN.

Part V.—Breach of Contract.

SECT. 1.—BETWEEN BROKER AND CLIENT.

373. Breach by broker—Measure of damages.]—L. ordered deft. to buy for him rupee paper; deft. sold rupee paper of his own to L., whilst he fraudulently led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held for many months what deft. had sold to him, & ultimately re-sold it at a loss of £43,000:—*Held*: the measure of damages was not the amount of the loss ultimately sustained by L., but the difference between the price which he paid for the rupee paper & the price which he would have received, if he had resold it in the market forthwith after purchasing it.—*WADDELL v. BLOCKEY* (1879), 4 Q. B. D. 678; 48 L. J. Q. B. 517; 41 L. T. 458; 27 W. R. 931, C. A.

Annotation:—*Mentd.* Cavendish-Bentlinek v. Fenn (1887), 57 L. T. 773.

374. ———.]—The measure of damages must be the difference between the sum realised by the sale of the stocks for which pltf. had been given credit & the value which the stocks had at the time when this action was brought (*BOWEN, L.J.*).—*MURRAY v. HEWITT* (1886), 2 T. L. R. 872.

375. ———.]—*SAMUEL & ESCOMBE v. ROWE*, No. 160, *ante*.

376. ———.]—Defts., who were stock-brokers, agreed with pltf. to carry over to the end of May account on the Stock Exchange certain stocks which they had purchased for him, & made the necessary arrangements with jobbers for that purpose. Before the settling day arrived they closed pltf.'s account without instructions by selling the stocks. Upon being informed of the closing of his account, pltf. gave defts. notice that he should insist on performance by them of their contract when the settling day arrived. At the time when defts. closed pltf.'s account the prices of the stocks were falling, but shortly afterwards they rose again, & they were higher at the end of May settlement, having been still higher during the interval between the closing of pltf.'s account & the end of May settlement. In an action brought by pltf. against defts. after the end of May settlement for non-performance of their contract to carry over the stocks, defts. contended that the damages ought to be assessed with reference to the prices of the stocks when defts. closed pltf.'s account, & that so assessed they would be nominal:—*Held*: defts.' contention was incorrect, & pltf. was entitled to insist on performance of defts.' contract at the end of May settlement, & to measure his damages with reference to the prices of the stock at that date.

Qu.: whether pltf. had a right to have the damages estimated with reference to the highest prices at which the stocks had stood in the interval between the closing of pltf.'s account & the end of May.—*MICHAEL v. HART & Co.*, [1902] 1 K. B. 482; 71 L. J. K. B. 265; 86 L. T. 474; 50 W. R. 308; 18 T. L. R. 254, C. A.; *sub nom.* *HART & Co. v. MICHAEL* (1903), 89 L. T. 422, H. L.

Annotations:—*Refd.* *Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579; *Ellis' Trustee v. Dixon-Johnson*, [1924] 2 Ch. 451.

PART V. SECT. 1.

373 1. Breach by broker—Measure of damages.]—*VANBUSKIRK v. SMITH* 1906, 1 E. L. R. 383.—*CAN.*

377. ——— Duty of client to minimise damages.]—*SAMUEL & ESCOMBE v. ROWE*, No. 160, *ante*.

——— **Loss of right to indemnity.]—***See* Part III., Sect. 2, sub-sect. 4, A. (d), *ante*.

378. Breach by client—Refusal to accept stock—Right of broker to sell—Sale forthwith.]—Pltf. tendered the stock, on the day agreed on for making the transfer, & deft. refused to accept it:—*Held*: pltf. need not wait till the end of that day, but may sell the stock to a third person immediately after the tender & refusal.—*DORRIENS v. HUTCHINSON* (1804), 1 Smith, K. B. 420.

379. ——— ——— ——— Recovery of any loss on sale.]—*HOPE (JOHN D.) & Co. v. GLENDINNING*, No. 286, *ante*.

380. ——— ——— ——— Proof of refusal to accept.]—In an action on the case for not accepting stock agreed to be transferred on request, an averment that pltf. was ready & willing to transfer, & requested deft. to accept the stock, which he refused, can only be satisfied by showing an actual tender & refusal, or that pltf. waited at the bank on the day when it was understood that the transfer was to be made, until the close of the transfer books, which was the latest time when the transfer could be made.—*BORDENAVE v. GREGORY* (1804), 5 East, 107; 1 Smith, K. B. 306; 102 E. R. 1009; *sub nom.* *BOURDENAVE v. GREGORY*, 5 Esp. at p. 117.

——— **Right of broker to close account.]—***See* Part III., Sect. 2, sub-sect. 4, C. (a), *ante*.

——— **Broker's right to indemnity.]—***See* Part III., Sect. 2, sub-sect. 4, A., *ante*.

SECT. 2.—BETWEEN PURCHASER AND SELLER.

See, generally, COMPANIES, Vol. IX., p. 356, Nos. 2249–2254.

381. Remedies—Action for money had & received.]—Action for money had & received will not lie for a transfer of stock.—*NIGHTINGAL v. DEVISME* (1770), 5 Burr. 2589; 2 Wm. Bl. 684; 98 E. R. 361.

382. ——— ———.]—Pltf. purchased stock which deft. agreed to transfer on a given day. In consequence of a rise, the loss on the sale amounted to £45, which deft. refused to pay. Pltf. afterwards paid that sum to another broker, by whom the transfer was made:—*Held*: pltf. could not recover in an action for money paid, but he should have declared specially on the contract with deft. as his claim was in the nature of unliquidated damages.—*LIGHTFOOT v. CREED* (1818), 8 Taunt. 268; 2 Moore, C. P. 255; 129 E. R. 386.

Annotation:—*Refd.* *Bayliffe v. Butterworth* (1847), 5 Ry. & Can. Cas. 283.

383. ——— ———.]—Plaintiff bought of defts. ten shares in the Royal British Bank, the deed of settlement of which required seven days' notice of intended transfers of shares, & the consent of the directors to such transfers. The sale & purchase was made on the Stock Exchange through brokers on Aug. 21; the "name day" was Aug. 28 & the "settling" day Aug. 29. On Aug. 28, pltf.'s name was accordingly given as

sold by auction:—*Held*: the seller's only rights were against the buyer upon the cheque & for the price.—*MANECKJI PESTONJI BHARUCHA v. WADJAL SARABHAI & Co.* (1926), 53 L. R. Ind. App. 92.—*IND.*

PART V. SECT. 2.

*m. Remedies.]—*By rule C. Bombay Stock Exchange, upon dishonour of a cheque for the price of shares sold they are to be returned to the seller, & if cash is not then paid, they are

Sect. 2.—Between purchaser and seller. Sect. 3. Part VI. Sects. 1 and 2.]

the buyer, & on Aug. 29 the vendor's broker sent to the bank for a deed of transfer & obtained a blank form, which was filled up & executed by defts. on Sept. 2. On Sept. 3 the bank stopped, & pltf. wrote to his brokers not to pay the purchase-money. On Sept. 4 the matter was brought before the Committee of the Stock Exchange, who decided that the money ought to be paid, & pltf.'s broker thereupon paid it, & threatened pltf. with legal proceedings for the amount, & thereby obtained the amount from him:—*Held*: pltf. was not entitled to recover the amount from defts. as money had & received on the ground of failure of consideration.—*REMFREY v. BUTLER* (1858), *E. B. & E.* 897; *31 L. T. O. S.* 356; 5

Jur. N. S. 1297, n.; *6 W. R.* 682; *120 E. R.* 744, *Ex. Ch.*

Annotation:—*Appld. Stray v. Russell* (1859), *1 E. & E.* 888.

—*See, also, COMPANIES, Vol. IX., p. 356, Nos. 2251, 2252.*

—*Damages.*—*See COMPANIES, Vol. IX., p. 358, Nos. 2268–2275.*

—*Specific performance.*—*See COMPANIES, Vol. IX., pp. 356–358, Nos. 2255–2267, Vol. X., p. 1140, No. 8051; SPECIFIC PERFORMANCE, pp. 445, 416, Nos. 164–173, ante.*

SECT. 3.—WRONGFUL DETENTION OF SECURITIES.

See TROVER.

Part VI.—Default and Bankruptcy.

SECT. 1.—DEFAULT OF BROKER.

See Stock Exchange Rules, 1911, rr. 159–178.

384. Account closed as between broker & jobber.]—*HARTAS v. RIBBONS*, No. 131, *ante.*

385. Whether transaction closed as between client & jobber—Right of client to elect.]—*HARTAS v. RIBBONS*, No. 131, *ante.*

386. ———.]—*BECKHUSON & GIBBS v. HAMBLET*, No. 67, *ante.*

387. ———.]—Where a customer instructs a stockbroker to purchase specific shares who in his turn purchases such specific shares from a dealer, privity of contract exists between the dealer & the customer, so that if the stockbroker fails, the dealer can maintain an action against the customer.

A stockbroker having failed, after entering into a contract with dealers for a customer to buy shares, & the account between him & the dealers being closed by the official assignee, the dealers gave the customer the option of taking up the shares direct, appointing another broker to carry out the transaction, or treating the transaction closed at "hammer" price. After delay the customer repudiated the transaction. The dealers thereupon sold the shares at a loss:—*Held*: the difference between the contract & sale price could be recovered by the dealers from the customer as damages.—*ANDERSON & Co. v. BEARD*, [1900] 2 *Q. B.* 260; *69 L. J. Q. B.* 610; *82 L. T.* 714; *16 T. L. R.* 367; *5 Com. Cas.* 261.

Annotation:—*Reid. Levitt v. Hamblet*, [1901] 2 *K. B.* 53.

388. ——— Jobber not compelled to accept nominee in place of client.]—Where a broker on the Stock Exchange has sold shares on behalf of a client to a jobber, & is, before completion, declared a defaulter, the client, if he elects to complete the transaction on his own account, is not entitled to require the jobber to pass a name to a person nominated by the client as an incident to "making down" the shares with the nominee, inasmuch as the effect of so making down the shares would be to release the client, & to substitute his nominee as a principal.—*CURRIE v. BOOTH BROTHERS* (1902), *7 Com. Cas.* 77, *C. A.*

389. Liability of client to jobber—Not limited by "hammer price"—Difference between contract price & selling price.]—*BECKHUSON & GIBBS v. HAMBLET*, No. 67, *ante.*

390. ———.]—*ANDERSON & Co. v. BEARD*, No. 387, *ante.*

391. ———.]—*LEVITT v. HAMBLET*, No. 21, *ante.*

392. ——— Liability for damages on failure to complete.]—Where a broker on the Stock Exchange has entered into a contract with a jobber on behalf of a customer in such circumstances as to create privity of contract between the jobber & the customer, & the broker is before completion declared a defaulter, & the jobber claims in the liquidation of the estate of the broker for the difference between the contract price & the hammer price, & is paid such difference in full, the jobber is nevertheless entitled, in the event of the customer failing to complete with him, to recover damages from the customer; but, in the event of the damages exceeding the sum received by the jobber from the broker's estate, the jobber is bound to account to the broker's estate for that sum.

If a jobber, who has been paid in full his differences up to the date of the broker's default, subsequently recovers from the broker's customer a larger sum, he is bound to account to the official assignee for an amount equal to that which he has already received (*MATHEW, J.*)—*STONEHAM & MESSENGER v. WYMAN* (1901), *17 T. L. R.* 562; *6 Com. Cas.* 174.

393. ——— Applicability of Stock Exchange Rules—Stock Exchange Rules, 1911, r. 134.]—R. 71 [now R. 134] of the Stock Exchange Rules applies to selling out or buying in only as between members of the Stock Exchange.—*SCOTT & HORTON v. ERNEST* (1900), *16 T. L. R.* 498; *44 Sol. Jo.* 611.

394. ———.]—*PONSOLLE v. WEBBER*, No. 278, *ante.*

395. ———.]—*BELL v. PLUMBLY* (1900), *16 T. L. R.* 393.

Notice of default—Coupled with Stock Exchange rules & application for membership—Whether amounting to deed of arrangement.]—*See BANKRUPTCY, Vol. V., p. 1073, No. 8781.*

396. Bond given by broker to secure performance of duties—Death of broker after default—Whether penalty assets for general creditors.]—A bond was given by a broker to the Corp'n. of London, to secure the due performance of his duties. He made default:—*Held*: on his death the corp'n. held the amount recovered on the bond as equitable assets, & in trust for the general body of his creditors, & not exclusively for those who had suffered by his defaults.—*NASH v. BRYANT* (1858),

25 Beav. 533; 53 E. R. 741; *sub nom.* NAISH v. BRYANT, 27 L. J. Ch. 748; 32 L. T. O. S. 83; 4 Jur. N. S. 550; 6 W. R. 573.

397. Right of client to transfer account—To other broker.]—HARTAS v. RIBBONS, No. 131, *ante*.

Privity between client & jobber.]—See Part III., Sect. 3, *ante*.

Effect on broker's right to indemnity.]—Part III., Sect. 2, sub-sect. 4, A.,

SECT. 2.—BANKRUPTCY OF BROKER.

398. Right of client to prove in bankruptcy—For differences.]—Where sharebrokers who had, by the direction of A. B. bought shares in a projected railway co., the consideration to be paid on delivery of scrip, & afterwards by A. B.'s direction, had sold the same shares at a higher price, to be paid on delivery of scrip, became bkpt., & the co. was amalgamated with another co., & the scrip in the amalgamated cos. was afterwards delivered, A. B. was not permitted to prove for the difference of the bought & sold prices against the estate of the bkpts.—*Re ROBINSON, Ex p. NORTON* (1847), De G. 504; 9 L. T. O. S. 374; 11 Jur. 699, Ct. of R.

—*Mentd.* *Stevenson v. Newnham* (1853), 13 C. B.

399. Whether order for discharge granted—Misappropriation of client's money.]—A broker who was a director of & broker to a co. which had been ordered to be wound up, received at a time when he was insolvent an order from a customer directed to him & to a partner whom he knew or believed to be dead, to buy a sum of S. stock. The broker contracted with L. for the stock, & received the price from the customer as for himself & his deceased partner. He did not pay L. for the stock, but allowed him interest for three months, & applied the money to his own purposes. Immediately before his adjudication of bkpcy., he sold a debenture of the co. to A. for the amount due upon it, without requiring any money for the four years' interest which was also due, & with the money paid L. part of the money the price of the stock; & gave him a bill for the remainder, & L. then transferred the stock to the customer. The broker had previously privately appropriated this debenture to the safety of the customer, & when he sold it had no authority from the customer for so doing. The broker became bkpt. upon a trader debtor summons, issued by the official manager of the co., & received from one of the cours. a first class certificate, with protection; but, upon appeal, the Lords Justices, for the above & other misconduct, discharged the order & suspended the certificate for five years, without protection for seven weeks, both from the date of the judgment.—*Re BOYD, Ex p. WRYGHT* (1856), 26 L. J. Bev. 33, L. J.

Annotations:—Mentd. *Re Simond, Ex p. Simond* (1857), 26 L. J. Bev. 49; *Re Matheson* (1862), 31 L. J. Bev. 23.

400. Property available for distribution among creditors—Shares purchased by broker for client.]—The bkpts. were stockbrokers who had been employed by appct. to buy certain specific shares for him, & had received payment for the same. These shares, with others, were deposited by the bkpts. with B. & co. as security for an advance. When the bkpcy became known B. & co. sold the shares, reimbursed themselves, & handed over the

balance to the trustee. Upon appcts. sending in a claim for the balance another claimant retired:—*Held*: the money might be paid over to appct. on the terms that his solr. would give a personal undertaking to repay so much as the ct. might order at any time within three years.—*Re BLAKEWAY & THOMAS, Ex p. RANKART* (1885), 52 L. T. 630.

401. ——— & pledged for purchase price—Marshalling.]—A. employed brokers to purchase securities for him, the arrangement being that on each occasion they advanced him part of the purchase price & he paid the margin in cash or in account. It was also part of the arrangement that the money so advanced should be obtained by the brokers from their bankers on deposit of A.'s securities so purchased. The brokers, however, pledged A.'s securities & their own with their bankers as cover for their current overdraft. On the bkpcy. of the brokers the bank paid themselves by selling A.'s securities & handed over the surplus securities in their hands to the trustee in bkpcy.:—*Held*: by analogy to the doctrine of marshalling A. was entitled to have the surplus securities in the hands of the trustee applied towards satisfaction of the balance due to him from the brokers on the account between them.—*Re BURGE, WOODALL & Co., Ex p. SKYRME*, [1912] 1 K. B. 393; 81 L. J. K. B. 721; 106 L. T. 47; 20 Mans. 11.

— **Money in hands of official assignee of Stock Exchange.]—**See BANKRUPTCY, Vol. V., pp. 647–649, Nos. 5800–5805.

402. In respect of what debts petition presented—Differences fixed by official assignee of Stock Exchange.]—The amount of the differences due by a defaulter on the London Stock Exchange, as fixed by the official assignee of that body under its rules, to a Stock Exchange creditor, is a "liquidated sum" within Bankruptcy Act, 1869 (c. 71), s. 6, & will support a bkpcy. petition by creditor against the defaulter.—*Re WARD, Ex p. WARD* (1882), 22 Ch. D. 132; 52 L. J. Ch. 73; 48 L. T. 332; 31 W. R. 112, C. A.

Annotation.—Reid. *Mendeisohn v. Ratchiff*, [1901] A. C. 456.

403. ——— Sum paid in consideration of future partnership with member—Money repayable if partnership not effected—Default of money before partnership effected.]—Under an agreement made in Jan. 1900, between M., a stockbroker, & T., with a view to T.'s ultimately becoming a member of the Stock Exchange & entering into partnership with M., T. paid £2,000 into M.'s banking account, subject to a condition that if T. should not, on or before Sept. 29, 1900, become a member of the Stock Exchange, or if, having become a member, he should not be at liberty to enter a partnership within that period by reason of his recommenders withholding their consent, then & in either of those cases T. should have the option of determining the agreement by notice, whereupon the £2,000 should be repaid by M.

On June 28 M. was "hammered" on the Stock Exchange, & on July 3 he told T. in conversation that "he was utterly penniless," that "he could not pay anybody," & that "he had lost everything." Thereupon T., without having given any notice purporting to determine the agreement, presented a bkpcy. petition against M. alleging that M. was indebted to him "in the sum

PART VI. SECT. 2.

n. *Stockbroker purchasing for other stockbroker—Right to prove in bankruptcy—*Where stockbrokers pur-

chase stock to a large amount for another stockbroker who afterwards becomes bkpt., & they are obliged to sell at a loss the stock so purchased, which was to have been settled for on

the account day, they will be allowed to prove for the difference on the bkpt.'s estate.—*Re BURKE* (1855), 26 L. T. O. S. 138.—IR.

Sect. 2.—Bankruptcy of broker. Sect. 3. Part VII.
Sect. 1: Sub-sects. 1 & 2.]

of £2,000 lent by him to M. pursuant to the agreement," & that the act of bkpcy. was that the debtor gave him "notice" on July 3 of having "suspended payment of his debts":—*Held*: the alleged debt of £2,000 was not "a liquidated sum, payable either immediately or at some certain future time," within Bankruptcy Act, 1883 (c. 52), s. 6 (1), (b), & was therefore not sufficient to support the petition, & on July 3, T.'s only remedy was in damages for breach of the agreement.—*Re MILLER*, [1901] 1 K. B. 51; 70 L. J. Q. B. 1; 83 L. T. 545; 17 T. L. R. 9; 8 Mans. 1; *sub nom. Re MILLER*, *Ex p. TALBOT*, 49 W. R. 65; *sub nom. Re MILLER*, *Ex p. DEBTOR*, 45 Sol. Jo. 44, C. A.
Annotation:—*Reid. Re Reis*, *Ex p. Clough* (1904), 91 L. T. 592.

SECT. 3.—LIQUIDATION OF DEFAULTER'S ESTATE.

See Stock Exchange Rules, 1911, ss. 159–178.

404. Purposes & effect of Stock Exchange practice.]—*BECKHUSON & GIBBS v. HAMBLET*, No. 67, *ante*.

405. Assets vest in official assignee.]—By the rules of the Stock Exchange, money payable by members of the House to a defaulter is to be paid to assignees appointed by the Exchange, & be distributed rateably amongst the House creditors of the defaulter.—*NICHOLSON v. GOOCH* (1856), 5 E. & B. 999; 25 L. J. Q. B. 137; 26 L. T. O. S. 258; 2 Jur. N. S. 303; 4 W. R. 285; 119 E. R. 752.

Annotations:—*Mentd. Rourke v. Short* (1856), 2 Jur. N. S. 352; *Monk v. Sharp* (1857), 2 H. & N. 540; *Paul v. Best* (1863), 3 B. & S. 537; *Topping v. Keyse* (1864), 16 C. B. N. S. 258.

406. —.]—(1) It is provided by the rules & regulations of the Stock Exchange that two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter on the Stock Exchange his books of account & a statement of the sums owing to & by him & to manage the estate in conformity with the rules, regulations, & usages of the Stock Exchange; & by rule 176 "the assignees shall collect & pay the assets to the credit of their joint account at a banker's, & shall distribute the same as soon as possible":—*Held*: the term "the assets" in the above-mentioned rule meant all the assets of the defaulter; & when the rule was brought into operation, the effect was to create an assignment of the assets of the defaulter to the official assignee.

(2) A member of the Stock Exchange was indebted to debts. He became a defaulter on the Stock Exchange, & the liquidation of his affairs was undertaken by pltf., as official assignee, under the above-mentioned rules. For the purposes of the liquidation he was authorised by pltf. to sell, & accordingly sold, certain shares standing in his name to debts., who were not members of the Stock Exchange, but who knew his position & that of pltf. as official assignee. Pltf. having sued debts. for the price of the shares:—*Held*: the action was maintainable, & debts. were not entitled to a set-off in respect of their debt.—*RICHARDSON v. STORMONT, TODD & CO.*, [1900] 1 Q. B. 701; 69 L. J. Q. B. 369; 82 L. T. 316; 48 W. R. 451; 16 T. L. R. 224; 5 Com. Cas. 134, C. A.

Annotations:—*As to* (1) *Appld. Lomas v. Graves*, [1904] 2 K. B. 557. *Reid. Re Halstead, Ex p. Richardson*, [1917] 1 K. B. 695.

407. — Validity of assignment against third

parties.]—The rules of the Stock Exchange operate to effect an assignment of all the assets of a member of the Stock Exchange declared a defaulter to the official assignee of the Stock Exchange; & that assignment, unless invalidated in bkpcy. proceedings against the defaulter, is valid as against persons who are not, as well as those who are, members of the Stock Exchange.—*LOMAS v. GRAVES & CO.*, [1904] 2 K. B. 557; 73 L. J. K. B. 803; 91 L. T. 616; 20 T. L. R. 657, C. A.

Annotation:—*Reid. Re Halstead, Ex p. Richardson*, [1917] 1 K. B. 695.

408. — Whether amounting to act of bankruptcy.]—(1) The rules of the Stock Exchange as to defaulting members of the body are the rules of a domestic forum, which have no influence on the rights of those who are not amenable, as members, to the jurisdiction of that body. They cannot, therefore, govern the rights of the general creditors of a defaulting member. C. was a member of the Stock Exchange; he became unable to meet his Stock Exchange engagements, & he gave notice thereof to the secretary. In such a circumstance the rules of the Stock Exchange prescribe the course to be followed. The defaulter ceases to be a member of the body. Two members of the body act as official assignees of the defaulter, a meeting of the creditors is called, the defaulter, as he is required to do, makes his statement, & the assembled creditors having decided what is to be done, these official assignees carry the decision into execution. The Committee of the Stock Exchange has the power to re-admit the defaulter or to refuse him re-admission. C. made his statement at the first meeting, declaring, at that time, that he had no debts outside the Stock Exchange. His Stock Exchange creditors then consented to accept a composition, & to provide for a part of it, he, at the demand of the official assignees, gave them a cheque for £5,000 then standing to his credit in the Bank of England. The official assignees obtained the money & apportioned it among his Stock Exchange creditors. He afterwards confessed to owing debts to a large amount to outside creditors, & was declared a bkpt. The trustee in bkpcy. on behalf of the general creditors, claimed from the official assignees of the Stock Exchange the £5,000:—*Held*: he was entitled to claim it; for what was done by C. amounted to a *cessio bonorum*, & constituted an act of bkpcy.

(2) The money was voluntarily paid with the view to give the Stock Exchange creditors an undue preference.

(3) In R. 167 of the Stock Exchange, that the assignees shall collect & pay "the assets" to their joint account at a banker's, the word "assets" means the whole of the defaulter's available property; & under r. 153 these assets are to be distributed exclusively to those creditors whose claims arise out of Stock Exchange transactions.—*TOMKINS v. SAFFERY* (1877), 3 App. Cas. 213; 47 L. J. Bcy. 11; 37 L. T. 758; 26 W. R. 62, H. L.; *affg. S. C. sub nom. Re COOKE, Ex p. SAFFERY* (1876), 4 Ch. D. 555, C. A.

Annotations:—*As to* (1) *Distd. Re Plumbly, Ex p. Grant* (1880), 13 Ch. D. 667. *Consd. Richardson v. Stormont, Todd*, [1900] 1 Q. B. 701; *Re Halstead, Ex p. Richardson*, [1917] 1 K. B. 695. *Reid. Pearson v. Scott* (1878), 9 Ch. D. 198; *Ratcliff & Dealtry v. Mendelssohn*, [1902] 2 K. B. 653; *Lomas v. Graves*, [1904] 2 K. B. 557. *As to* (3) *Consd. Richardson v. Stormont, Todd*, [1900] 1 Q. B. 701. *Reid. Lomas v. Graves*, [1904] 2 K. B. 557. *Generally, Mentd. Re Stewart, Ex p. Pottinger* (1878), 42 J. P. 743; *Re Sharp, Ex p. Gundry & Johnston* (1900), 83 L. T. 416.

409. — —.]—A firm of stockbrokers became defaulters on the Stock Exchange, &, in pursuance

of the rules of the Stock Exchange, the official assignee of the Stock Exchange collected their assets. The firm had previously lodged with a bank various stock & share certificates as security for a loan by the bank. The bank was aware of the assignment to the official assignee of the Stock Exchange:—*Held*: as the assignment in question constituted an available act of bkpey., the bank, on being tendered by the stockbroker & the official assignee payment in full of the amount due on the security, was not bound to deliver up the securities to them.—*PONSFORD, BAKER & CO. v. UNION OF LONDON & SMITH'S BANK, LTD.*, [1906] 2 Ch. 444; 75 L. J. Ch. 724; 95 L. T. 333; 22 T. L. R. 812; 13 Mans. 321, C. A.

Annotations:—*Mentd.* *McCarthy v. Capital & Counties Bank*, [1911] 2 K. B. 1088 *Re Debtor*

Whether available for distribution among general creditors.]—*See* *BANKRUPTCY*, Vol. V., pp. 647-649, Nos. 5800-5805.

410. Meaning of assets.]—*TOMKINS v. SAFFERY*, No. 408, *ante*.

411. ———.]—*RICHARDSON v. STORMONT, TODD & CO.*, No. 406, *ante*.

412. Application of assets—Rateable distribution among House creditors.]—*NICHOLSON v. GOOCH*, No. 405, *ante*.

413. ———.]—*TOMKINS v. SAFFERY*, No. 408, *ante*.

414. Right of creditor to sue defaulter for unpaid balance.]—*Re WARD, Ex p. WARD*, No. 402, *ante*.

415. ———. Duty to account for sums received in liquidation.]—(1) Where a member of the London Stock Exchange is declared a defaulter & his contracts are dealt with by the official assignee of the Stock Exchange, the proceedings in that liquidation are not an accord or satisfaction of the member's debts, & do not bar his creditors

from suing him at law for the balance of their claims after deducting the dividends received by them in that liquidation.

(2) A creditor who has obtained judgment in such an action can maintain a petition in bkpey. against the defaulter.—*MENDELSSOHN v. RATCLIFF* [1904] A. C. 456; 73 L. J. K. B. 1027; 91 L. T. 204; 53 W. R. 240; 20 T. L. R. 669, 670; 10 Com. Cas. 14, H. L.; *affq.* *S. C. sub nom. Re MENDELSSOHN, Ex p. MENDELSSOHN*, [1903] 1 K. B. 216, C. A. & *RATCLIFF & DEALTRY v. MENDELSSOHN*, [1902] 2 K. B. 653, C. A.

Annotation:—*Mentd.* *West Yorkshire Darracq Agency v. Coleridge*, [1911] 2 K. B. 326.

416. ———. Judgment sufficient to sustain petition in bankruptcy.]—*MENDELSSOHN v. RATCLIFF*, No. 415, *ante*.

417. ———. Damages recovered by jobber from client—Exceeding sum recovered by jobber from defaulter—Duty to account to defaulter's estate.]—*STONEHAM & MESSENGER v. WYMAN*, No. 392, *ante*.

418. Whether defaulter compellable to give security for costs.]—The fact that plff. is a defaulter on the Stock Exchange is not a sufficient reason for requiring him to give security for costs.—*HINDE v. HASKEW* (1884), 1 T. L. R. 94, D. C.

419. Action by official assignee—Right to sue in own name—Right of defendants to set-off.]—*RICHARDSON v. STORMONT, TODD & CO.*, No. 406, *ante*.

420. Differences fixed by official assignee—Whether sufficient to support bankruptcy petition.]—*Re WARD, Ex p. WARD*, No. 402, *ante*.

421. Application of Stock Exchange rules—Not binding on general creditors.]—*TOMKINS v. SAFFERY*, No. 408, *ante*.

Right of jobber to sue client.]—*See* Part III., Sect. 3, *ante*.

Part VII.—Illegality and Fraud.

SECT. 1.—GAMING AND WAGERING IN SECURITIES.

SUB-SECT. 1.—IN GENERAL.

See, generally, *GAMING & WAGERING*, Vol. XXV., pp. 394-421, Nos. 1-246.

422. Test of gaming contract—Must be reciprocal risk of loss.]—*HIRST v. WILLIAMS* (1895), 11 T. L. R. 491; *affd.*, 12 T. L. R. 128, C. A.

———.]—*See, also*, *GAMING & WAGERING*, Vol. XXV., pp. 396, 397, Nos. 13, 15.

423. Sale of undeclared dividend—Liability of broker to jobber.]—The printed rule of the Stock Exchange that the committee will not recognise bargains in prospective dividends being in practice treated by the committee not as forbidding such transactions, but only as declaring that the committee will not adjudicate on disputes arising out of them, the unwritten usage of the Stock Exchange that members deal with each other as principals

will be cognisable in cts. of law in respect to contracts between members of the Stock Exchange for the sale & purchase of such dividends

Hence, if a broker, employed to sell prospective dividends on shares by a person holding or whom he has no reason to believe does not hold such shares, sell to a jobber, he will be personally liable to the jobber, & may pay the amount for which he is liable, although forbidden to do so by his principal, & may recover from his principal the amount so paid.—*MARTEN v. GIBBON* (1875), 33 L. T. 561; 21 W. R. 87, C. A.

SUB-SECT. 2.—TRANSACTIONS IN DIFFERENCES.

424. Sanctioned by Stock Exchange Rules.]—*Re PLUMBLY, Ex p. GRANT*, No. 236, *ante*.

PART VII. SECT. 1, SUB-SECT. 1.

422 i. Test of gaming contract—Must be reciprocal risk of loss.]—Time bargains are not necessarily illegal, nor does the law refuse to enforce them if they are made for serious transactions intended to be fulfilled, although it may happen, contrary to the expectation of the parties, that they are not

really carried out as contemplated, but from unforeseen causes come to be settled by differences. But if, in contemplation of the parties, they are at their inception intended to be speculative transactions, to be settled by adjustment of prices according to the rise or fall of the market, & not by the delivery of the subjects bought or sold, they become gambling transactions.—

MACDOUGAL v. DEMERS (1886), M. L. R. 2 Q. B. 170; 9 L. N. 202; 30 L. C. J. 168.—CAN.

o. ———.]—Speculation does not necessarily involve a contract by way of wager, & to constitute such a contract a common intention to wager is essential.—*BIHATWANDAS PARASZAM v. BURJORJI KOTTONJI BOMANJI* (1917), 1 L. R. 42 Bom. 373, P. C.—IND.

H H H

Sect. 1.—Gaming and wagering in securities: Sub-sect. 2.]

425. Whether gaming contract—Transfer of stock not intended.]—CHOLMELEY v. LAWRENCE (1848), 11 L. T. O. S. 410.

426. ———.]—ASHTON v. DAKIN, No. 98, ante.

427. ———.]—REGGIO v. STEVEN & Co. (1888), 4 T. L. R. 326, D. C.; *previous proceedings, sub nom.* REGGIO v. FOSKETT & Co., 4 T. L. R. 240. *Annotation:—*Reid. *Re Cronmire, Ex p. Waud*, [1898] 2 Q. B. 383.

428. ———.]—EGLETON v. BARCLAY & Co. (1895), 11 T. L. R. 174, D. C.

429. ———.]—LIGHTBODY v. RAHBULA (1895), 12 T. L. R. 102.

430. ———.]—(1) Where both parties to contracts for the sale & purchase of stocks intend that no stocks shall be delivered & that "differences" only shall be accounted for, the mere fact that the contracts provide that either party may require completion of the purchase & delivery or receipt, as the case may be, of the stocks, does not prevent them from being contracts by way of gaming & wagering within Gaming Act, 1845 (c. 109), s. 18, & therefore void.

(2) In such transactions securities deposited by one of the parties with the other to secure the payment of "differences" are not deposited "to abide the event" within Gaming Act, 1845 (c. 109), s. 18, & are recoverable by action.—UNIVERSAL STOCK EXCHANGE v. STRACHAN, [1896] A. C. 166; 65 L. J. Q. B. 429; 74 L. T. 468; 44 W. R. 497; *sub nom.* STRACHAN v. UNIVERSAL STOCK EXCHANGE, 60 J. P. 468, H. L.; *affg.*, [1895] 2 Q. B. 329, C. A.

Annotations:—As to (1) Apld. Wood v. Fevez (1898), 14 T. L. R. 492. *Consd.* Crawley v. White (1898), 14 T. L. R. 247; *Re Gieve*, [1899] 1 Q. B. 794. *Apld.* Barnett v. Sanker (1925), 41 T. L. R. 660. *Reid.* Kong Yee Lone v. Lowjee Nanjee (1901), 17 T. L. R. 585; Ironmonger v. Dyne (1928), 44 T. L. R. 497; Weddle, Beck v. Hackett (1928), 45 T. L. R. 67. *As to (2) Consd.* *Re Duncan*, [1905] 1 Ch. 307. *Reid.* Strachan v. Universal Stock Exchange (1895), 65 L. J. Q. B. 178; *Re Cronmire, Ex p. Waud*, [1898] 2 Q. B. 383. *Generally, Reid.* Dowson v. Macfarlane, Cooke Claimant (1899), 81 L. T. 67.

431. ———.]—WOOD (TRADING AS STEPHENS & Co.) v. FEVEZ (1898), 14 T. L. R. 492.

432. ———.]—Purchase by broker—For disposal without acceptance by client.]—An agreement between stockbroker & principal that the broker shall buy & sell shares on the Stock Exchange for the principal, arranging, if possible, the purchases and sales in such a way that the principal is not to be called upon to pay more than differences is not an agreement by way of gaming & wagering within Gaming Act, 1845 (c. 109), s. 18, although

the broker knows that his principal is a mere speculator, & wholly unable to pay for the actual stocks bought, or to deliver those sold.

Deft. desiring to speculate on the Stock Exchange, employed pltf. a stockbroker, to buy & sell stocks & shares for him. Deft. did not expect or intend to have to accept actual delivery of what pltf. bought, or to deliver what pltf. sold for him, but knowingly ran the risk of so having to accept delivery or to deliver, in the hope & expectation that pltf. would be able to arrange his sales & purchases so as to render nothing but differences actually payable or receivable by deft. Pltf. accordingly made large purchases & sale of stock under contracts between himself & various stock jobbers.

Pltf. in making the contracts, knew that deft. would be wholly unable to pay for the stock purchased, or to deliver that sold. In an action by pltf. to recover commission & money paid by him for differences:—*Held*: pltf. was entitled to recover.

The broker might lawfully object that he was not bound to resell (BRAMWELL, L.J.).—THACKER v. HARDY (1878), 4 Q. B. D. 685; 39 L. T. 595; 43 J. P. 221; 27 W. R. 158; *sub nom.* THACKER v. HARDY, SAME v. WHEATLEY, 48 L. J. Q. B. 289, C. A.

Annotations:—Apld. *Re Rogers, Ex p. Rogers* (1880), 15 Ch. D. 207; *Reggio v. Steven* (1888), 4 T. L. R. 326. *Consd.* Forget v. Ostigny, [1895] A. C. 318. *Distd.* Strachan v. Universal Stock Exchange (1895), 64 L. J. Q. B. 723. *Apld.* Barnett v. Sanker (1925), 41 T. L. R. 660. *Reid.* Lilley v. Rankin (1886), 2 T. L. R. 785; *Carhill v. Carbolic Smoke Ball Co.* (1892), 67 L. T. 837; *Crawley v. White* (1898), 14 T. L. R. 247, *Re Gieve, Ex p. Trustee* (1899), 68 L. J. Q. B. 509; *Whitelaw v. McKinley, Alexander* (1910), 27 T. L. R. 49; *Richards v. Starek*, [1911] 1 K. B. 296; *Cooper v. Stubbs*, [1925] 2 K. B. 753; *Ironmonger v. Dyne* (1928), 44 T. L. R. 497; *Weddle, Beck v. Hackett* (1928), 45 T. L. R. 67.

433. ———.]—Question for jury.]—An agreement for the sale & purchasing of railway shares, amounting, in fact, to a bargaining for the payment of the difference, is a gambling transaction within Gaming Act, 1845 (c. 109), s. 18. It is right to leave it to the jury "did either party intend to buy or sell" & if the jury find that neither party did intend to buy or sell, that is finding that the transaction is gambling.—GRIZEWOOD v. BLANE (1852), 11 C. B. 538; 138 E. R. 578; *sub nom.* GRIZEWOOD v. BLAYNE, 19 L. T. O. S. 64; *previous proceedings* (1851), 11 C. B. 526.

Annotations:—Reid. Rourke v. Short (1856), 5 E. & B. 904; *Re Morgan* (1860), 2 De G. F. & J. 634; *Barry v. Croskey* (1861), 2 John. & H. 1; *Higginson v. Simpson* (1877), 2 C. P. D. 76; *Thacker v. Hardy* (1878), 4 Q. B. D. 685; *Carhill v. Carbolic Smoke Ball Co.* (1892), 67 L. T. 837; *Weddle, Beck v. Hackett* (1928), 45 T. L. R. 67.

434. ———.]—Option to demand delivery or acceptance.]—A contract on the "cover" system

which he neither possesses nor intends to take up, speculating on rises & falls in the market, & hoping to settle by payment of differences.—*Held*: such is not gaming & wagering in the sense of 8 & 9 Vict. c. 109, s. 18, & the broker is entitled to recover from his employer both advances made in the course of the transactions, & his ordinary commission & business charges.—FOULDS v. THOMSON (1857), 19 Durl. (Ct. of Sess.) 803; 29 Sc. Jur. 372.—SCOT.

425 vii. ———.]—MOLLISON v. NOLTHE (1889), 16 R. (Ct. of Sess.) 350; 26 Sc. L. R. 240.—SCOT.

425 ix. ———.]—UNIVERSAL STOCK EXCHANGE CO., LTD. v. HOWAT (1891), 19 R. (Ct. of Sess.) 128; 29 Sc. L. R. 119.—SCOT.

425 x. ———.]—The law of Natal does not render it illegal for any person or assocn. to buy & sell shares as a speculation.—LAUGHTON v. GRIFFIN, [1895] A. C. 104, P. C.—S. AF.

PART VII. SECT. 1, SUB-SECT. 2.

425 i. Whether gaming contract—Transfer of stock not intended.]—RUSSEL v. FENWICK (1889), 17 R. L. O. S. 675.—CAN.

425 ii. ———.]—A broker is not entitled to recover from a customer the amount of loss sustained on a purchase & resale of stock, where delivery of the shares was not made or contemplated, & the contract was merely a gaming contract.—BALDWIN v. TURNBULL (1893), Q. R. 5 S. C. 34.—CAN.

425 iii. ———.]—Held: as no stock was ever delivered or intended to be delivered, & as the intent was to make a profit from the fluctuations of the stock market, the transaction was illegal.—BRITISH COLUMBIA STOCK EXCHANGE, LTD. v. IRVING (1901), 1 B. C. R. 186.—CAN.

425 iv. ———.]—A contract does not fall under the head of gaming contract merely because it is entered

into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity, in the expectation that it will rise in value, & with the intention of realising a profit by its resale.—MORRIS v. BRAULT (1903), Q. R. 24 S. C. 167.—CAN.

425 v. ———.]—PEROSHA CURSETJI v. MANEKJI DOSSABHOY WATCHA (1898), 1 L. L. R. 22 Bom. 899.—IND.

425 vi. ———.]—A contract between stockbrokers & their customer that the brokers shall, at the customer's direction, buy shares & sell them, & the profits should belong to the customer—the brokers being personally liable to him for those profits—& that the losses should be borne by the customer—the stockbrokers personally (& not by way of indemnity) receiving those losses—is a wagering contract & void as such.—BYERS v. BEATTIE (1867), 16 W. R. 279.—IR.

425 vii. ———.]—Where a party employs a broker to buy & sell stocks

between two stock & share dealers for "differences" is a contract "by way of gaming or wagering" & therefore void under Gaming Act, 1845 (c. 109), s. 18, & it is none the less so where the contract gives the buyer or seller an option to demand delivery or acceptance, as the case may be of the stocks or shares the subject-matter of the contract.—*Re GIEVE*, [1899] 1 Q. B. 794; 43 Sol. Jo. 334; *sub nom. Re GIEVE, Ex p. TRUSTEE*, 68 L. J. Q. B. 509; 80 L. T. 438; 47 W. R. 441; 15 T. L. R. 251; 6 Mans. 136, C. A.

Annotation :—*Distd. Philp v. Bennett* (1901), 18 T. L. R. 129.

435. ——— **Contract involving transfer of stock or shares.**—*X.*, a member of the Stock Exchange, agreed to sell to *M.*, at a price then named, 100 shares in a foreign railway, *X.* then having that number of shares. The transaction was to be completed on the next settling day. The Rules of the Stock Exchange in such cases are similar to those in the case of loans on deposit. *M.* did not take up the shares on the day appointed, but the difference of the value was paid & the transaction carried on to the next settling day, as a purchase, at the market price of the then settling day, & so on from time to time. The shares remained with the vendor, but the dividends were accounted for to *M.* Some months after the original contract *X.* bought back 20 of the shares & accounted to *M.* for the price, & the contract was carried on for the remaining 80 only. On *M.*'s being declared a defaulter, *X.* took to the 80 shares, which were worth less than the price agreed upon in the last continuation of the contract, & sought to prove for the difference :—*Held* : looking at all the circumstances, & especially at the repurchase of part of the shares the transaction must be considered to have been a *bonâ fide* contract of sale, & not a scheme to cover a wagering bargain for payment of differences, & the proof, therefore, must be admitted.—*Re MORGAN, Ex p. PHILLIPS, Ex p. MARNHAM* (1860), 2 De G. F. & J. 634; 30 L. J. Bey. 1; 3 L. T. 516; 6 Jur. N. S. 1273; 9 W. R. 131; 45 E. R. 766, L. J. *Annotation* :—*Apld. Re Wilson* (1866), 14 L. T. 492.

436. ———.—*THACKER v. HARDY*, No. 432, *ante*.

437. ———.—*A* written contract was entered into by an "outside" stock jobber with his customer, that *bonâ fide* purchases & sale of stocks & shares should be made between them. No subsequent bargain was in fact come to between the parties that the purchases & sales should not be carried out, & merely the differences paid, but it was contemplated that this might be so, & in the actual dealings no delivery of stocks took place. The stock jobber did, however, offer to deliver certain shares & stock :—*Held* : although the parties may have contemplated that, as a whole, there would be a mere payment of differences between them, yet inasmuch as the actual contracts entered into involved the liability for the actual delivery of the stock dealt with, they were not gaming or wagering transactions within Gaming Act, 1845 (c. 109), s. 18.—*UNIVERSAL STOCK EXCHANGE v. STEVENS* (1892), 66 L. T. 612; 40 W. R. 494.

Annotations :—*Apld. Abbott v. Dawson* (1895), 11 T. L. R. 468. *Refd. Re Gieve*, [1899] 1 Q. B. 794.

435 i. ——— *Contract involving transfer of stock or shares* :—Quebec Civil Code, Art. 1927, does not differ substantially from Gaming Act, 1845 (c. 109), s. 18, & renders null & void all contracts by way of gaming & wagering. Contracts made by a broker employed to make actual contracts of purchase & sale, in each case completed by delivery & payment, on behalf of a

principal whose object was not investment but speculation, are not gaming contracts within the Code. —*FORGET v. OSTIGNY*, [1895] A. C. 318, P. C.—*CAN.*

435 ii. ———.—*Where a broker buys or sells stocks for a customer, on commission, & he has no interest in the contracts, he being entitled to the same commission whether the market rises or falls, the fact that the customer*

merely buys on margin for purposes of speculation does not bring the transaction between the broker & the customer within the prohibition of the law as to gaming contracts—*STEVENSON v. BRIMS* (1897), Q. R. 7 Q. B. 77.—*CAN.*

435 iii. ———.—*SHAW v. CALLEDONIAN RY. CO.* (1890), 17 R. (Ct. of Sess.) 416.—*SCOT.*

Times, Jan. 24, C. A.]—*SHAW v. BAYLEY* (1893),

439. ———.—*Re HEWETT, Ex p. PADDON*, No. 44, *ante*.

440. ———.—*WHITLARK v. DAVIS* (1894), 10 T. L. R. 425.

441. ———.—*HIRST v. WILLIAMS & PERRYMAN* (1895), 12 T. L. R. 128, C. A.

442. ———.—*FULLER v. PERRYMAN* (1895), 11 T. L. R. 350, C. A.

Annotation :—*Apld. Hirst v. Williams & Perryman* 12 T. L. R. 128.

443. ———.—*ABBOTT & CO. v. DAWSON* (1895), 11 T. L. R. 468.

444. ———.—*Re CRONMIRE, Ex p. WAUD*, No. 455, *post*.

445. ———.—*PHILL v. BENNETT & CO.* (1901), 18 T. L. R. 129.

446. ———.—*BUTTENLANDSCHE BANK-VEREENIGING v. HILDESHEIM* (1903), 19 T. L. R. 641; 47 Sol. Jo. 707, C. A.

447. ———.—**Between broker & jobber.**—*COOPER v. NEAL* (1878), 48 L. J. Q. B. 292, n.; 39 L. T. 596, n.; 27 W. R. 159, n., C. A.

Annotation :—*Apld. Thacker v. Hardy* (1878), 4 Q. B. D. 685.

448. ———.—**"Put & call" option.**—*SADD v. FOSTER* (1897), 13 T. L. R. 207, C. A.

449. ———.—**Invitation to subscribe to "trust."**—*Defts.* invited persons to contribute sums to a "trust," & with the sums so subscribed they were to operate in certain stocks for a period of ninety days; if at the end of that time a profit was made on the stocks the profit would be divided, less 10 per cent., among the subscribers; if no profit were made the subscribers would receive back their subscriptions in full. *Pltf.* subscribed £96 on these terms & was informed by *defts.* at the end of ninety days that no profit had been made, but that he would receive back the amount of his subscription by Aug. 31, 1910. Later, *pltf.* was asked by *defts.* to send an account of the amount due to him to *S.*, an accountant who was inquiring into the accounts & would deal with them. *Pltf.* applied to *S.* for the amount due; *S.* replied that it would take a considerable time to deal with the accounts & that he could not then comply with *pltf.*'s request. The money not having been paid, *pltf.* sued to recover the amount :—*Held* : (1) the contract entered into by *pltf.* was a wagering contract & therefore was not enforceable, & (2) there was no evidence of a fresh promise by *defts.* upon good consideration to repay the money. —*WHITELAW v. MCKINLEY, ALEXANDER & SONS* (1910), 27 T. L. R. 19.

450. ———.—*Deft.*, who was a dealer in stocks & shares, issued a circular which stated that upon payment of a subscription of £5 or some multiple thereof the subscriber would be entered in *deft.*'s three months' trust in respect of a certain number of shares in three named stocks, & the subscriber would then be entitled to the profit arising from the difference between the prices of the stocks on the opening day of the trust & the prices at the end of ninety days from that date, less 10 per cent., together with repay-

Sect. 1.—Gaming and wagering in securities: Sub-sects. 2, 3 & 4. Sects. 2 & 3: Sub-sects. 1 & 2.

ment of the subscription; & in the event of there being no such profit the subscriber would be entitled to the return of his subscription. Pltf. paid to deft. a subscription of £20 upon the terms of the circular, & at the end of the ninety days there accrued a profit upon the prices of the stocks. Pltf. also paid to deft. a subscription of £20 in respect of a similar trust, which resulted in a loss. Deft. repaid to pltf. the amount of his subscription in respect of the first-named trust. In an action to recover the amount of the profit less 10 per cent. in respect of the first-named trust & the £20 subscription in respect of the second trust:—*Held*: though the subscriber was, under the terms of the circular, in any event not to lose his subscription, yet, inasmuch as he would lose interest upon the amount of the subscription, there was a sufficient loss to make the contracts gaming or wagering contracts within Gaming Act, 1845 (c. 109), s. 18, & pltf. was not entitled to recover.—*RICHARDS v. STARCK*, [1911] 1 K. B. 296; 80 L. J. K. B. 213; 103 L. T. 813; 27 T. L. R. 29.

Annotation:—*Folld. Whitelaw v. McKimley, Alexander* (1910), 27 T. L. R. 49.

Broker's right to indemnity.—*See* Nos. 98-102, *ante*.

Broker's right to remuneration.—*See* Nos. 136-138, *ante*.

SUB-SECT. 3.—COVER DEPOSITED FOR GAMING ACCOUNTS.

See, generally, GAMING & WAGERING, Vol. XXV., pp. 402, 403-409, Nos. 66, 74-125.

451. Right of broker to appropriate.—*MUNDELLA & Co. v. SHAW* (1888), 4 T. L. R. 456, C. A.

452. Right of client to recover—On revocation before appropriation.—*REGGIO v. STEVEN & Co.* (1888), 4 T. L. R. 326, D. C.; *previous proceedings sub nom. REGGIO v. FOSKETT & Co.*, 4 T. L. R. 240.

Annotation:—*Expld. Re Cronmire, Ex p. Waud*, [1898] 2 Q. B. 383.

453. ——— Securities deposited as cover.—*UNIVERSAL STOCK EXCHANGE v. STRACHAN*, No. 430, *ante*.

454. ——— Deposit appropriated with knowledge of client.—In an action to recover back money deposited as cover for differences which might arise on gambling transactions in stocks & shares, it appeared that the money was treated by defts. to the knowledge of pltf. as appropriated to meet his losses to defts. & that the whole amount had been so appropriated before pltf. gave notice to terminate the gambling transaction:—*Held*: pltf. could not recover.—*STRACHAN v. UNIVERSAL STOCK EXCHANGE* (No. 2), [1895] 2 Q. B. 697; 65 L. J. Q. B. 178; 73 L. T. 492; 59 J. P. 789; 44 W. R. 90; 12 T. L. R. 38, C. A.

Annotations:—*Distd. Re Cronmire, Ex p. Waud*, [1898] 2 Q. B. 383. *Refd. Burge v. Ashley & Smith*, [1900] 1 Q. B. 744. *Mentd. Dowson v. Macfarlane* (1899), 81 L. T. 67.

455. ——— Unappropriated deposit.—(1) Gaming contracts between a stockbroker & his client for differences on the sale & purchase of stocks & shares resulted in a balance in favour of the client. It was agreed that the broker should

sell certain stock to the client which he would accept in payment of the balance due to him & in pursuance of this agreement a contract note was forwarded by the broker. The stock was not delivered & the client sought to prove in bkpcy. against the estate of the broker for damages for non-delivery of the stock:—*Held*: as the balance resulting from the gambling transactions could not have been recovered from the broker there was no consideration for the promise to deliver the stock, & no proof could be admitted in respect of the non-delivery.

(2) The client had deposited money with the broker as cover to secure him against loss on the gaming transactions which had resulted in a balance in favour of the client:—*Held*: the money deposited not having been used for the purpose for which it was deposited proof in respect of the amount was admissible.—*Re CRONMIRE, Ex p. WAUD*, [1898] 2 Q. B. 383; 67 L. J. Q. B. 620; 78 L. T. 483; 46 W. R. 679; 42 Sol. Jo. 468; 5 Mans. 30; *sub nom. Re CRONMIRE, Ex p. TRUSTEE*, 14 T. L. R. 377, C. A.

456. ————*Re DUNCAN (W. W.) & Co.* (1903), *Times*, Mar. 17, C. A.; *subsequent proceedings*, [1905] 1 Ch. 307.

457. ——— Appropriation without consent of client.—*MILES v. LOWENFIELD* (1901), *Times*, May 8, C. A.

SUB-SECT. 4.—PURCHASE OUT OF GAMING WINNINGS.

458. Contract not enforceable.—*Re CRONMIRE, Ex p. WAUD*, No. 455, *ante*.

SECT. 2.—LEEMAN'S ACT.

See COMPANIES, Vol. X., pp. 1067-1069, Nos. 7173-7179.

SECT. 3.—RIGGING THE MARKET.

SUB-SECT. 1.—IN GENERAL.

459. Action on market rigging contract—Not maintainable.—Pltf. brought an action against defts. who were stockbrokers, through whom he had purchased shares in a projected co., to obtain rescission of the contract for the purchase of such shares, & to recover back the purchase-money which he had paid in respect of them to defts., on the ground that defts., while acting as pltf.'s brokers, had delivered their own shares to him instead of purchasing them upon the Stock Exchange. At the trial it appeared upon pltf.'s own case that the money sought to be recovered has been paid by pltf. in pursuance of an agreement between him & one of defts. by which such deft. was with the money to purchase upon the Stock Exchange a number of shares in the projected co. at a premium with the sole object of inducing the public to believe that there was a real market for the shares & that they were at a real premium, which, in fact, as pltf. & defts. well knew, they were not:—*Held*: the action was based upon an illegal contract, & could not be maintained.—*SCOTT v. BROWN, DOERING, McNAB & Co., SLAUGHTER & MAY v. BROWN, DOERING, McNAB & Co.*, [1892] 2 Q. B. 724; 61 L. J. Q. B. 738; 67 L. T. 782; 57 J. P. 213; 41

PART VII. SECT. 1, SUB-SECT. 3.

p. Right of client to recover.—An action does not lie to recover from a broker a balance remaining in his

hands, of money which was deposited with him by pltf. as "margin" or security against loss on transactions in stocks which were being carried on

by the broker for pltf., & which were admittedly mere fictitious or gaming contracts.—*PERRODEAU v. JACKSON* (1893), Q. R. 3 S. C. 364.—**CAN.**

W. R. 116; 8 T. L. R. 755; 36 Sol. Jo. 698; 4 R. 42, C. A.

Exchange Committee
Jaquess v. Thomas,
[1900] 2 Q. B. 214; Gordon v. Metropolitan
Police Chief Comr., [1910] 2 K. B. 1080; *Re* Robinson's
Settlmt., Gant v. Hobbs, [1912] 1 Ch. 717; Kregor v.
Hollins (1913), 109 L. T. 225; North Western Salt Co. v.
Electrolytic Alkali Co., [1913] 3 K. B. 422; Wild v.
Simpson, [1919] 2 K. B. 544; Lipton v. Powell, [1921]
2 K. B. 51. *Mentd.* Willis v. Lovick, [1901] 2 K. B.
195; Farmers' Mart v. Milne, [1915] A. C. 106.

460. Question for jury.—In an action for money had & received by an allottee against a managing committeeman of a railway, it appeared that two days before the last day for paying deposits, & three before that on which pltf. paid his deposit, the shares of the co. were bought up in the market, by order of the committee, to a large extent, & that deft. drew cheques for such purchases after pltf. paid his deposits, & before he executed the deeds. It also appeared that of the £150,000 required by way of deposit, only £14,600 was paid in on Nov. 14:—*Held*: it was for the jury to say whether the shares had been bought with a view to rigging the market, & so to induce the allottees to register, or honestly to keep up their value, & whether the directors had done any act calculated to mislead pltf., or had suppressed information as to the position of the co. which ought to have been communicated to the shareholders before the deed was presented to him for his signature.—*LANDON v. BEIORLY* (1849), 10 L. T. O. S. 505, N. P.; *subsequent proceedings*, 13 L. T. O. S. 122.

Liability to criminal proceedings.—See CRIMINAL LAW, Vol. XV., pp. 764, 765, 980, 1016, 1017, Nos. 8203, 8206, 8208, 10974, 10976, 11416, 11418, 11419.

461. Liability to civil proceedings—Misrepresentation.—*SCOTT v. BROWN, DOERING, McNAB & Co., SLAUGHTER & MAY v. BROWN, DOERING, McNAB & Co.*, [1892] 2 Q. B. 724; 61 L. J. Q. B. 738; 67 L. T. 782; 57 J. P. 213; 41 W. R. 116; 8 T. L. R. 755; 4 R. 42, C. A.

Annotations · *Refd.* Brown v. Stock Exchange Committee (1892), 36 Sol. Jo. 752. *Mentd.* *Re* Thomas, Jaquess v. Thomas, [1894] 1 Q. B. 717; Gedge v. Royal Exchange Assce. Corp., [1900] 2 Q. B. 214; Willis v. Lovick, [1901] 2 K. B. 195; Gordon v. Metropolitan Police Chief Comr., [1910] 2 K. B. 1080; *Re* Robinson's Settlmt., Gant v. Hobbs, [1912] 1 Ch. 717; Kregor v. Hollins (1913), 109 L. T. 225; North Western Salt Co. v. Electrolytic Alkali Co., [1913] 3 K. B. 422; Farmers' Mart v. Milne, [1915] A. C. 106; Wild v. Simpson, [1919] 2 K. B. 544; Lipton v. Powell, [1921] 2 K. B. 51.

462. — — —.]—By his statement of claim pltf. alleged that defts., who were the promoters of a co., conspired to make & made false & fraudulent representations to the directors of the co. by which the bulk of the shares in the co. were allotted to the nominees of defts., instead of to the public as the directors were induced to believe, & also by false & fraudulent representations to the committee of the Stock Exchange obtained from them a settling day; & that the object of defts. was to gain control of the market in the shares of the co. & to cause a belief that allotment had been *bond fide* made to the public, & to induce the public to make contracts for selling such shares, & so to compel such members of the public as had entered into such contracts to purchase shares from defts. at such prices as defts. should choose to fix. Pltf. was one of the members of the public who was thus induced to make contracts for the sale of shares in the co., & in order to fulfil his contracts was compelled to purchase shares at a greatly enhanced price, &

suffered damage thereby:—*Held*: no cause of action was disclosed.

We know one right that a man has as against a stranger, which is this: That a stranger should not make a false statement to him with the intent that he should act upon it; & if he does act upon it & suffers damage, then the one having done that which the other had a right to insist that he should not do, he could maintain an action. Now, what other right is it alleged that pltf. had as against these defts? The first seems to be that he had a right, not that defts. should tell him the truth or should not tell him what was false, but that he had a right that deft. should not tell some one else an untruth. I protest that there is no such right that I know of known to the law of England. I have tried to put my views of the matter in broad language, & I say there is no such right that I know of in the law of England. Then pltf. says: "I have this further right, that the people who have nothing to do with me may not agree together to do something, & do that which results in an injury to me." I do not know of any such right. If by something which they do, which is no breach of any right which pltf. has, he has suffered damage it cannot be helped. There is no legal remedy for it, & there is no infringement of any legal right (*LORD ESHER, M.R.*).—*SALAMAN v. WARNER* (1891), as reported in 65 L. T. 132; 7 T. L. R. 484, C. A.

Annotations · *Refd.* Andrews v. Mockford, [1896] 1 Q. B. 372. *Mentd.* Jones v. Insule (1894), 61 L. T. 703; *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199; *Re* Gardner, Long v. Gardner (1894), 71 L. T. 412; *Re* Reeves, [1902] 1 Ch. 29; Bozson v. Altrincham U. C. (1903), 72 L. J. K. B. 271; Isaacs v. Salbstein, [1916] 2 K. B. 139; Cogstad v. Newsum, [1921] 2 A. C. 528.

463. — — —.]—In an action by pltf. to set aside & rescind contracts for the purchase by pltf. of shares on the ground that the market therein had been "rigged," he applied for an *interim* injunction to restrain defts. from enforcing or endeavouring to enforce such contracts.

The judge having granted an injunction until the trial of the action, the Ct. of Appeal refused to grant an injunction unless within a week pltf. gave security to certain of defts.—*ROBERTSON v. HEFFER* (1893), 9 T. L. R. 622, C. A.

— — —.]—See, also, COMPANIES, Vol. IX., pp. 468, 485, 486, 498, 503, Nos. 3058, 3185, 3187–3190, 3271, 3272, 3303; MISREPRESENTATION & FRAUD, Vol. XXXV., pp. 43, 57, 66, Nos. 375, 376, 519, 621.

SUB-SECT. 2.—LEGITIMATE MARKET MAKING.

464. "Pooling" agreement.—A "pooling" agreement *per se* was not illegal as being opposed to public policy, nor could it be said, in the absence of fraud, to be a contract *ultra vires* of a board of directors. Pltfs., therefore, were entitled to judgment on the claim & on the counter-claim, with costs (*MATHEW, J.*).—*SANDERSON & LEVI v. BRITISH WESTRALIAN MINES & SHARE CORPN., LTD. & LONDON & WESTRALIAN MINES FINANCE AGENCY, LTD.* (1898), 43 Sol. Jo. 45; *affd. sub nom.* *SANDERSON & LEVI v. BRITISH MERCANTILE MARINE & SHARE CO., LTD.* (1899), *Times*, July 19.

SECT. 4.—CORNERS.

465. Legitimate where not fraudulent.—*SALAMAN v. WARNER*, No. 462, *ante*.

STOCK MORTGAGES.

See MORTGAGE.

STOCKS AND SHARES.

See BANKERS AND BANKING ; CHOSES IN ACTION ; COMPANIES ; EXECUTION ; EXECUTORS AND ADMINISTRATORS ; LOCAL GOVERNMENT ; PERSONAL PROPERTY ; RAILWAYS AND CANALS ; REVENUE ; STOCK EXCHANGE.

STOLEN GOODS.

See CRIMINAL LAW AND PROCEDURE ; MARKETS AND FAIRS ; SALE OF GOODS ; TROVER AND DETINUE.

STONE.

See HIGHWAYS, STREETS, AND BRIDGES ; MINES, MINERALS, AND QUARRIES.

STOP ORDER.

See CHOSES IN ACTION ; EXECUTION.

STOPPAGE IN TRANSIT.

See AGENCY ; CARRIERS ; SALE OF GOODS ; SHIPPING AND NAVIGATION.

STOWAGE.

See SHIPPING AND NAVIGATION.

STRAITS SETTLEMENTS.

See DEPENDENCIES.

STRANDING.

See CONSTITUTIONAL LAW ; SHIPPING AND NAVIGATION.

STRAW.

See AGRICULTURE ; WEIGHTS AND MEASURES.

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STREAMS.

WATERS AND WATERCOURSES.

STREET AND AERIAL TRAFFIC.

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<i>Extraordinary Traffic</i>	<i>Sec</i>	HIGHWAYS.	<i>Rights of Way</i>	<i>Sec</i>	EASEMENTS.
<i>Footpaths</i>	„	HIGHWAYS.	<i>Riot</i>	„	CRIMINAL LAW.
<i>Highways</i>	„	HIGHWAYS.	<i>Tolls</i>	„	FERRIES; HIGH-
<i>Light Railways</i>	„	TRAMWAYS AND LIGHT RAILWAYS.		„	WAYS.
<i>Petroleum</i>	„	PUBLIC HEALTH.	<i>Tramways</i>	„	TRAMWAYS AND
<i>Police</i>	„	POLICE.		„	LIGHT RAILWAYS.

Part I.—Regulation of Traffic.

SECT. 1.—GENERAL REGULATION OF TRAFFIC.

See Town Police Clauses Act, 1847 (c. 89), ss. 21-23; Public Health Acts, 1875 (c. 55), s. 171; 1925 (c. 71), s. 68; Public Health Acts (Amendment) Act, 1907 (c. 53), ss. 78, 88; Highway Act, 1835 (c. 50), s. 78; Metropolitan Police Act, 1839 (c. 47), ss. 51-54, 59; Metropolitan Streets Acts, 1867 (c. 134), ss. 3, 4, 10-13, 22, 24; 1885 (c. 18), s. 2; Metropolitan Public Carriage Act, 1869 (c. 115), s. 14; Ministry of Transport Act, 1919 (c. 50); London Traffic Act, 1924 (c. 34); Statutory Rules & Orders, 1924, No. 1015; 1925, Nos. 179, 322, 549, 648, 805, 806, 892, 906, 907; 1927, Nos. 101, 351, 804, 1078.

1. "Driving" & "conducting" cattle—Cattle conveyed by van—Construction of local Act.]—A local Act for a parish, in which was a large cattle market, enacted, that it shall not be lawful for any drover or other person to conduct or drive through any of the streets in the parish any oxen, sheep, or other cattle, during Sunday:—*Held*: a person driving a van with horses, in which were calves being conveyed to the market, was not "driving" or "conducting" cattle within the statute.—*TRIGGS v. LESTER* (1866), L. R. 1 Q. B. 259; 13 L. T. 701; 30 J. P. 228; 14 W. R. 279.

2. Powers of Commissioners of Police—To give direction to constables—Metropolitan Police Act, 1839 (c. 47), s. 52.]—The Comrs. of Police gave directions, under above sect. to constables to turn empty cabs that were being driven at a walk out of the Strand into the side streets, in order to prevent obstruction. The driver of an empty cab, upon being directed by a constable, refused to turn out of the Strand, & an obstruction was caused thereby. Upon an information for a penalty against the cabdriver, under London Hackney Carriages Act, 1843 (c. 86), s. 33, for causing an obstruction in the Strand by wilful misbehaviour, the magistrate found that the cabdriver knew of the directions, & that the Strand on the day in question was liable to be obstructed, & that the directions were lawful & reasonable for preventing obstruction. He accordingly convicted the driver:—*Held*: in the circumstances the Comrs. had power to give the directions under sect. 52 of the Act of 1839, though no regulations were made & published under Metropolitan Streets Act, 1867 (c. 134), s. 11; & therefore, the driver was liable to be convicted for causing an obstruction by wilful misbehaviour.—*R. v. LUSHINGTON, Ex p. KEEN* (1899), 15 T. L. R. 388, D. C.

3. —To make orders for preventing obstruction—Whether confined to extraordinary occasions—Town Police Clauses Act, 1847 (c. 89).]—Under above Act, s. 21, which provides that "the Comrs. may from time to time make orders . . . for preventing obstruction of the streets within the limits of the special Act in all times of public processions, rejoicings, or illuminations, & in any case when the streets are thronged or liable to be obstructed," the powers of Comrs. are not confined to making orders dealing with extraordinary occasions of obstruction. Where particular streets are normally thronged so that their liability to obstruction is chronic they may make orders

for the prevention of obstruction in such streets applicable to every day of the week.—*TEALE v. WILLIAMS*, [1914] 3 K. B. 395; 83 L. J. K. B. 1413; 111 L. T. 285; 78 J. P. 383; 12 L. G. R. 958; 24 Cox C. C. 283, D. C.

4. Authorised regulation by constable—Disregard of constable's signals.]—Under Town Police Clauses Act, 1847 (c. 89), s. 21, which enabled the Comrs. to make orders for preventing obstruction of the streets & to give directions to the constables for keeping order & preventing any obstruction of the streets, & imposed a penalty "for every wilful breach of any such order," an urban authority made an order for regulating the traffic which, after reciting that certain scheduled streets were at certain times thronged & liable to be obstructed, provided that the constables stationed at certain crossings should direct the drivers of vehicular traffic approaching any of such crossings by word or signal to stop or to come on:—*Held*: the driver of a vehicle who disregarded the direction of the constable stationed at a crossing for the regulation of the traffic, & drove on in disobedience to the signal of the constable to stop, committed a breach of the order made by the authority, & was properly convicted of an offence under Town Police Clauses Act, 1847 (c. 89), s. 21.—*DUDDERIDGE v. RAWLINGS* (1912), 108 L. T. 802; 77 J. P. 167; 11 L. G. R. 513; 23 Cox C. C. 366, D. C.

5. Restricted streets in Metropolis—London Traffic Act, 1924 (c. 34)—Constitution of advisory committee—Whether additional members sit.]—On a reference to the advisory committee by the Minister of Transport of a question of declaring a street to be a restricted street under above Act, s. 7 (1), the additional members do not sit.—*MAY v. BEATTIE*, [1927] 2 K. B. 353; 96 L. J. K. B. 680; 137 L. T. 382; 91 J. P. 78; 43 T. L. R. 411; 25 L. G. R. 201, D. C.

SECT. 2.—THE RULE OF THE ROAD.

SUB-SECT. 1.—IN GENERAL.

6. Statement of rule.]—(1) There are three customary rules, or directions for driving, in meeting, each party shall bear to the left; in passing, the foremost person, bearing to the left, the other shall pass on the off side. But the driver of a carriage is not bound, under all circumstances, to pass another carriage on the off side; he may, if the street be very broad, go on the near side. In crossing, the driver should bear to the left hand, & pass behind the other carriage.

(2) In case for negligent driving, the law or usage of the road is not the criterion of the negligence. Therefore where deft.'s carriage was on the wrong side of the road, & in attempting to pass on the near, instead of the off side, pltf. sustained damages:—*Held*: it was for the jury to decide the question of negligence, without regard to the law of the road.—*WAYDE v. CARR (LADY)* (1823), 2 Dow. & Ry. K. B. 255; 1 L. J. O. S. K. B. 63.

7. Infringement of rule—Whether criterion of negligence.]—*ASTON v. HEAVEN*, No. 16. *post*.

PART I. SECT. 2, SUB-SECT. 1.

7 i. Infringement of rule—Whether criterion of negligence.]—The act of a deft. in driving to the left of the

centre line of a street is not negligence *per se*, even though the rule of the road in this country is to keep to the right.—*OSBORNE v. LANDIS* (Alta.)

(1916), 34 W. L. R. 118 10 W. W. R. 226.—*CAN.*

7 ii. — — — — —.]—The statutory rule of the road does not abrogate the

8. —.]—WAYDE v. CARR (LADY), No. 6, ante.

9. —.]—The mere fact of a man's driving on the wrong side of the road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot.

10. **Alternative courses available—Choice of hazardous course—Observance of rule of road no defence.**—If the driver of a carriage upon a public road may adopt either of two courses, one of which is safe, & the other hazardous, & he elects the latter, he is responsible for the mischief which ensues, & he cannot, in such case, insist upon the fact that he kept to his own side of the road. —MAYHEW v. BOYCE (1816), 1 Stark. 423; 171 E. R. 517, N. P.

11. **Regulation under local Act—Inflicting penalty for contravention—Notice essential to validity.**—A local statute provided that regulations might be made by the M. corpn. requiring the drivers of heavy & slow moving vehicles to keep their vehicles to a particular portion of the street, & that "any person who shall contravene any such regulation after warning" should be liable to a penalty:—*Held*: any regulations which inflicted a penalty for driving in the middle of the road in the absence of warning would be *ultra vires*, & there could be no penalty inflicted inless a person had so driven after he had been warned. —v. LIGGETT (1910), 103 L. T. 543;

74 J. P. 458; *sub nom.* LORD v. BARNSELY, CHORLTON v. LIGGETT, 8 L. G. R. 983, D. C.

12. **"Left or near side of the road"—Construction of bye-law.**—By a bye-law of the borough of P., "if any person shall drive any carriage within the said borough & shall not keep the same on the left or near side of the road in any street in passing along the same, except in cases in which he shall have occasion to pass any other carriage or of actual necessity or some sufficient reason for deviation therefrom" he was to be liable to a penalty.

A driver drove his lorry along a street in the borough so that the near wheels of the lorry were about 10 feet from the kerbstone, the off wheels being a few inches from the centre of the road, but never over the centre line of the road:—*Held*: the driver had not contravened the bye-law.—BOLTON v. EVERETT (1911), 105 L. T. 830; 75 J. P. 534; 9 L. G. R. 1050; 22 Cox C. C. 632, D. C.

SUB-SECT. 2.—TO WHAT TRAFFIC APPLICABLE.

13. **Carriages.**—TURLEY v. THOMAS, No. 30, post.

14. **Saddle horses.**—TURLEY v. THOMAS, No. 30, post.

15. **Pedestrian.**—COTTERILL v. STARKEY, No. 27, post.

principles of the common law which govern a person using a highway & impose upon him the obligation *suaviter tunc ut alium non laedas*. The rule does afford an evidential test as to the negligence of the one or the other driver which may be decisive in many cases in fixing responsibility, but it does not justify a driver in taking the risk of a collision which he might easily avoid under circumstances which would indicate to a man of ordinary prudence that an accident was likely to occur.—CARTER v. VADEBONCOEUR, [1922] 2 W. W. R. 105; 66 D. L. R. 118; 32 Man. L. R. 102.—CAN.

—.]—BURNETT v. [1911] S. C. 874, 51 S. L. R. 797; [1911] 2 S. L. T. 113.—SCOT.

a. —.]—Rule set up with object of preventing block in traffic.—A bye-law requiring a driver of a motor car to keep as close as possible to the curb when his car is travelling at the rate of a walk, held to have been passed with the view solely of preventing a blocking of traffic, & the breach thereof is, therefore, not in itself negligence on which an injured pedestrian can base an action for damages.—PEARSON v. READ, [1925] 1 D. L. R. 893; [1925] 1 W. W. R. 487, 31 B. C. R. 521.—CAN.

b. **Right of way of user of main road at cross roads & intersections.**—SMITH v. CANADIAN PACIFIC RY. CO., [1922] 3 W. W. R. 737; 70 D. L. R. 409; 16 Sask. L. R. 115.—CAN.

c. —.]—When two motor cars, travelling at right angles to each other, are approaching the same street intersection, the fact that one has by law the right of way does not mean that, however distant that car is from the crossing, the other must stop & allow it to pass. It only means that when the subordinate car has not reasonable time to pass in front of the other it & not the other must slow up or stop & permit the other to pass.—KIRK v. READE (Man.), [1923] 1 W. W. R. 1355.—CAN.

d. —.]—COLLINS v. GENERAL SERVICE TRANSPORT CO., LTD. (B. C.),

[1927] 2 D. L. R. 353.—CAN.

e. —.]—MACANDREW v. THILARD, [1909] S. C. 78, 46 Sc. L. R. 111; 16 S. L. T. 511.—SCOT.

f. —.]—Duty of user of main road to take care.—NASH v. VICTORIA CORPN. (B. C.), [1920] 3 W. W. R. 1058.—CAN.

—.]—HANLEY v. HAYES (1921), 55 O. L. R. 361; [1925] 3 D. L. R. 782.—CAN.

h. —.]—ELDER v. ALEXANDER (T.) & SONS & ALEXANDER (1923), 32 B. C. R. 110.—CAN.

k. —.]—While it is a duty of vehicles approaching a main road from a side road, to give way to vehicles on the main road, this rule does not absolve vehicles on the main road from the duty of approaching the entrance to the side road with caution.—ROBERTSON v. WILSON, [1912] S. C. 1276; 49 Sc. L. R. 916; [1912] 2 S. L. T. 166.—SCOT.

l. —.]—It is the duty of the driver of a vehicle entering a main thoroughfare from a side street to take care to do so in such a manner as not to endanger the traffic on the thoroughfare, & if necessary, to give way to such traffic; but this does not entitle the traffic on the thoroughfare to continue its course & speed without regard to the entering vehicle, nor absolve such traffic from the duty of itself exercising due care to avoid the risk of a collision.—M'NAIR v. GLASGOW CORPN., [1923] S. C. 398; 60 Sc. L. R. 323; [1923] S. L. T. 171.—SCOT.

m. —.]—HUTCHINSON v. LESLIE, [1927] S. C. 95; [1927] S. L. T. 57.—SCOT.

n. —.]—What amounts to intersection.—WALSH v. PEAT (N. B.), [1927] 2 D. L. R. 1120.—CAN.

o. **Right to one-half of road.**—Drivers meeting on a highway are each entitled to one-half of the road measuring from the centre.—HOUGH v. BELLERIVE (1922), 18 Alta. L. R. 483; 69 D. L. R. 251; [1922] 3 W. W. R. 490.—CAN.

p. —.]—The driver of a motor

car is justified in acting on the belief that the driver of an approaching car will obey the requirements of the law & give him one-half of the travelled roadway on which to pass.—PENROSE v. BARR (B. C.), [1927] 4 D. L. R. 407; [1927] 3 W. W. R. 101.—CAN.

q. —.]—Meaning of "centre of the road."—The "centre of the road" in Highways Act, s. 3 (1), to the right of which a vehicle such as there specified must turn out in meeting another, means the fixed centre line of that portion of the road allowance which has been prepared for & is suitable for the use of travelling vehicles, & the sect. is not complied with by turning out sufficiently to allow the other vehicle to use all the worn track but not passing to the right of the centre of the graded highway.—R. v. HURR (Alta.), [1920] 1 W. W. R. 89; 32 Can. Crim. Cas. 21.—CAN.

r. **Passing tramcars—Construction of bye-law.**—BAIN v. DUNCAN (1917), 13 Tas. L. R. 48.—AUS.

t. —.]—The rule of the road engineers that a tramway car should be passed by a following vehicle on the left hand side.—JARDINE v. STONEFIELD LAUNDRY CO. (1887), 14 R. (Ct. of Sess.) 839; 21 Sc. L. R. 599.—SCOT.

aa. **Tramcar overtaking vehicle—Liability under bye-law of overtaken driver.**—If the driver of a vehicle is in such a position in congested traffic that a tramcar overtaking him places his vehicle in the prohibited space without any power on his part of extricating himself, he would not be guilty of having "allowed" his vehicle "to be or pass between the nearest kerb line of any street & any stationary tramcar."—MATTHEWS v. PRAHRAN CITY, [1925] V. L. R. 469; 47 A. L. T. 29; 31 Argus L. R. 338.—AUS.

bb. —.]—CHRISTIE v. GLASGOW CORPN., [1927] S. C. 273; [1927] S. L. T. 215.—SCOT.

cc. **Rule when passing led horses.**—UMPHRAY v. GANSON BROTHERS, [1917] S. C. 371; 54 Sc. L. R. 377; [1917] 1 S. L. T. 178.—SCOT.

Sect. 2.—The rule of the road : Sub-sects. 3 & 4.]**SUB-SECT. 3.—WHETHER OBSERVANCE OBLIGATORY.**

16. General rule — Not obligatory.]—Coach owners are not liable for injuries happening to passengers, from accident or misfortune, where there has been no negligence or default in the driver. Where there is no other carriage on the road, the driver may keep in the middle of the road, & is not bound to keep on the left hand side of the road, even though the accident might have proceeded from the coach not being on the proper side.—*ASTON v. HEAVEN* (1797), 2 Esp. 533; 170 E. R. 445, N. P.

*Annotations:—*Reid. G. W. Ry. v. Blake (1862), 7 L. T. 94; Roadhead v. Mid. Ry. (1869), L. R. 4 Q. B. 379.

17. ———.]—There is no such rule of the road as to make the left always the proper side.—*FINEGAN v. LONDON & NORTH WESTERN RY. CO.* (1889), 53 J. P. 663; 5 T. L. R. 598, D. C.

18. ——— But greater care required on wrong side.]—A person driving a carriage is not bound to keep on the regular side of the road; but, if he does not, he must use more care, & keep a better look out, to avoid concussion, than would be necessary if he were on the proper part of the road.—*PLUCKWELL v. WILSON* (1832), 5 C. & P. 375; 172 E. R. 1016, N. P.

*Annotations:—*Reid. Davis v. Mann (1842), 7 J. P. 53; Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

19. No other traffic on road.] — *ASTON v. HEAVEN*, No. 16, *ante*.

20. ——— Allowing overtaking vehicle to pass on near side—With consent of overtaking driver—Highways Act, 1835 (c. 50), s. 78.]—By above sect., it is an offence for any person wilfully to prevent any other person from passing him or any waggon under his care on a highway, or by negligence or misbehaviour to prevent the free passage of any waggon or person, or not to keep his waggon on the left or near side of the road for the purpose of allowing such passage:—*Held*: it is no offence under the above provision for the driver of a waggon to keep to the off side for the purpose of allowing an overtaking vehicle to pass him on his near side, if the driver of the overtaking vehicle consents so to pass him & there is no other vehicle on the road at the time.—*NUTTALL v. PICKERING*, [1913] 1 K. B. 14; 82 L. J. K. B. 36; 107 L. T. 852; 77 J. P. 30; 10 L. G. R. 1075; 23 Cox C. C. 263, D. C.

21. Sufficient room for other traffic.]—*CRUDEN v. FENTHAM* (1798), 2 Esp. 685; 170 E. R. 496, N. P.

22. ———.]—It is not justification to an action for negligently driving, that pltf. was on the wrong side of the road, if there was room sufficient for deft. to pass without inconvenience.—*CLAY v. WOOD* (1803), 5 Esp. 44; 170 E. R. 732, N. P.

*Annotation:—*Reid. Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

23. ———.]—Salford Improvement Act, 1862, s. 258 provides that "every person who, when driving or having the care or conduct of any cart or carriage . . . shall . . . by negligence or mis-

behaviour, prevent hinder or interrupt the free passage of any person, carriage, cart or animal . . . in the street, or shall not keep his cart or carriage . . . on the left or near side of the road for the purpose of allowing such passage . . . shall . . . be liable to a penalty . . ."

Applt. was charged under the above sect., that he, being a person driving a certain cart, did by negligence interrupt the free passage of a certain carriage. Applt. was driving a one horse lorry along the near tram lines, leaving a space of about ten feet between him & the kerb on the near side of the road. He was told by a police officer to keep to the near side. He did so for a few yards & then he turned on to the tram lines again, & proceeded along the same at a trotting pace. By going to the middle of the road, applt. obstructed three motor vehicles which overtook him, & in passing him they had to go on the offside of the road. There was no evidence to show that there was any vehicle or obstruction on the off tram lines or elsewhere on the offside of the road to prevent the vehicles passing applt. The justices convicted applt. of the offence charged:—*Held*: there was no evidence to show that applt. obstructed the free passage of the vehicles, & the appeal must be allowed.—*SLEITH v. GODFREY* (1920), 90 L. J. K. B. 193; 124 L. T. 152; 85 J. P. 46; 18 L. G. R. 727; 26 Cox, C. C. 655, D. C.

24. ——— Question of fact.]—Although the driver of a carriage is bound to leave sufficient room on the left hand side of the road for other carriages to pass he is only bound to keep it so as to leave sufficient room, it is matter of evidence whether sufficient room is left or not, in case any accident happens.—*WORDSWORTH v. WILLAN* (1805), 5 Esp. 273; 170 E. R. 809, N. P.

25. Tramlines near to kerb—Vehicles unable to pass between lines & kerb.]—The single lines of a tramway constructed under an Act of Parliament were at one place on a road, on an incline some 250 or 300 yards long, so placed that there was no room for a vehicle to pass between a tramcar & the kerb on one side of the road. At the top & at the bottom of the incline were loops which would enable a tram to pass another vehicle on that side of the road. There was ample room for a vehicle to pass a tramcar on the other side of the road. A dray coming down the incline proceeding on its near or left side of the highway met an electric tramcar which was lawfully running on the said lines, proceeding up the hill. As there was no room to pass, both vehicles stopped, & remained facing each other for fifty minutes, at the end of which time the tramcar backed to the loop at the bottom of the incline. The driver of the dray had been instructed by his employers not to cross over the tramlines on to his wrong side to make way for tramcars. A summons was taken out under Tramways Act, 1870 (c. 78), s. 50, against the drayman for wilfully obstructing the tramcar. The justices dismissed the summons, saying that they were of opinion that the drayman had not acted unlawfully in maintaining his right to drive on his left or customary driving side, & that consequently there had been no wilful obstruction on the part of resp. They consented to state

PART I. SECT. 2, SUB-SECT. 3.

d. (General rule.)—*RAMIE v. WALKER* (1885), 18 N. S. R. (6 R. & G.) 175; 6 C. L. T. 448.—**CAN.**

e. ———.]—A person driving a vehicle on the left hand side of the road does so at his peril, even though there be no statutory obligation to keep to the right.—*FLETT v. SANFORD*

(Alta.), [1925] 4 D. L. R. 730; [1925] 3 W. W. R. 618.—**CAN.**

21 i. Sufficient room for other traffic.]—Under Vehicles Act (Sask.), 1917, s. 38, which requires that a person driving a motor on a highway when overtaken by another "shall as soon as practicable turn to the right so as to allow free passage on the left," it

is not necessary for the one overtaken to turn so as to be altogether to the right of the centre of the highway where the person overtaking him has on the left both ample space in which to pass & a sufficiently good road-bed.—*BOGAERT v. KENNEY*, [1920] 2 W. W. R. 312; 52 D. L. R. 336; 13 Sask. L. R. 276.—**CAN.**

a case :—*Held* : as there was a doubt as to whether the justices meant that the drayman had an absolute right to continue on his left-hand side or merely that, owing to the action of the tramcar driver, the drayman's obstruction was not wilful, the case must be remitted to the justices to decide whether there had been wilful obstruction on the part of the drayman, with the direction that the drayman had no absolute right to maintain his course on the left, putting the tramcar driver to any amount of inconvenience, & the tramcar driver had no absolute right to make all other vehicles get out of his way, if, by acting reasonably, he could avoid inconvenience to them. The drivers of both vehicles must act reasonably.—*HARTLEY v. CHADWICK* (1904), 68 J. P. 512, D. C.

SUB-SECT. 4.—DUTIES OF DRIVERS OF VEHICLES.

26. With regard to pedestrians—To use reasonable care.]—A foot passenger, though he may be infirm from disease, has a right to walk in the carriage way, & is entitled to the exercise of reasonable care on the part of persons driving carriages along it.—*ROSS v. LITTON* (1832), 5 C. & P. 407; 172 E. R. 1030, N. P.

27. ———.]—(1) A foot passenger has a right to cross the carriage road, & a person driving along the road is liable to an action if he do not take care so as to avoid driving against a foot passenger who is crossing the road; & if a person (thus driving, cannot pull up in time, because his reins break, that is no defence, as he is bound to have proper tackle.

(2) The rule as to a carriage being on its proper side of the road, does not apply with respect to a carriage & a foot passenger; for, as regards foot passengers, a carriage may go on either side of the road.

PART I. SECT. 2, SUB-SECT. 4.

26 i. With regard to pedestrians—To use reasonable care.]—(*CLERK v. PETRIE* (1879), 6 R. (Ct. of Sess.) 1076; 16 Sc. L. R. 626.—**SCOT.**

26 ii. ———.]—*ANDERSON v. BLACKWOOD* (1885), 13 R. (Ct. of Sess.) 413; 23 Sc. L. R. 227.—**SCOT.**

f. ———.]—*Where road without side walks.]*—On country roads where there are no side walks & foot passengers are necessarily obliged to make use of a portion of the travelled way, the driver of a motor car is bound to exercise care in passing or attempting to pass a person on foot.—*BRIAND v. DUNPHY* (1926), 59 N. S. R. 120.—**CAN.**

g. ———.]—*Where pedestrians prohibited from crossing except at street intersections.]*—Where a city bye-law prohibits pedestrians from crossing the street except at street intersections, a motorist is not bound to keep that same constant look-out for pedestrians crossing between street intersections that is required of him where pedestrians can lawfully cross in the middle of a block.—*CHESTER v. KINNEAR* (Alta.), [1927] 1 D. L. R. 47; [1926] 3 W. W. R. 601.—**CAN.**

h. ———.]—*Whether bound to look beyond road late at night.]*—There is no duty on a driver of a motor late at night to look beyond the track & see whether any straggler is coming on to the track to collide with the motor.—*SHEARER v. DUNEDIN CORPN.* (1904), 21 N. Z. L. R. 192.—**N.Z.**

k. ———.]—*Duty to keep sufficient distance from vehicle in front.]*—*AULD v.*

MBEY (1881), 8 R. (Ct. of Sess.) 195; 18 Sc. L. R. 312.—**SCOT.**

30 i. To avoid accident—Avoidance necessitating infringement of rule of road.]—*WALLACE v. BERGUS*, [1915] S. C. 205; 52 Sc. L. R. 130; [1914] 2 S. L. T. 410.—**SCOT.**

30 ii. ———.]—Persons using a road upon their proper side have the paramount right & are entitled to preference, so that in case of danger of a collision it is the duty of those on their wrong side to give way first. The test to be applied in order to ascertain when the person duly & properly using the road should waive his rights is the test of reasonableness. So soon as it would be evident to a reasonable man that there is danger of an accident, arising from the inability, refusal or neglect of the wrong-doer to give way, then the rightful user of the road is bound to take all reasonable steps to avoid an accident.—*SOLOMON v. MUSSETT & BRIGHT, LTD.*, [1926] App. D. 127.—**S. AF.**

l. Vehicle turning into side street—Duty to give warning of change of course—Turning from stationary position.]—When a car, being stationary on the side of a street, turns into the street almost at right angles, it is not sufficient for the driver of the car to hoot & signal with the hand, it is also his duty to look out & see if he will obstruct oncoming traffic, & if he fails so to look out, he is negligent.—*BARENDRE v. SMITH*, [1923] E. D. L. 269.—**S. AF.**

m. ———.]—A person who meets a vehicle travelling towards him

(3) In an action of trespass for driving a carriage against pltf., the defence of inevitable accident must be specially pleaded.—*COTTERILL v. STARKEY* (1839), 8 C. & P. 691; 173 E. R. 676, N. P.

Annotation :—As to (1) *Consd. Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

28. ———.]—Foot passengers, in crossing a highway, are bound to take due caution to avoid vehicles; & the drivers of vehicles are bound to take due caution to avoid foot passengers.—*COTTON v. WOOD* (1860), 8 C. B. N. S. 508; 29 L. J. C. P. 333; 7 Jur. N. S. 168; 141 E. R. 1288.

Annotations :—*Refd. Hammack v. White* (1862), 11 C. B. N. S. 588; *Manzoni v. Douglas* (1880), 6 Q. B. D. 145; *Jolly v. North Staffordshire Tram. Co.* (1887), *Times*, July 27. *Mentd. Lovegrove v. L. B. & S. C. Ry.*, *Gallagher v. Piper* (1864), 16 C. B. N. S. 669; *Scott v. London Docks Co.* (1864), 11 L. T. 383; *Briggs v. Oliver* (1866), 4 H. & C. 403; *Smith v. G. E. Ry.* (1866), L. R. 1 C. P. 4; *Webber v. G. W. Ry.* (1866), 1 H. & C. 582; *Giblin v. McMullen* (1868), L. R. 2 P. C. 317; *Turner v. G. W. Ry.* (1875), 31 L. T. 22; *Allen v. New Gas Co.* (1876), 1 Ex. D. 251; *Crisp v. Thomas* (1890), 63 L. T. 756.

29. To avoid accident.]—Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases where parties meet on the sudden, & an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means & opportunity to prevent it.—*CHAPLIN v. HAWES* (1828), 3 C. & P. 554; 172 E. R. 513, N. P.

30. ———.]—*Avoidance necessitating infringement of rule of road.]*—(1) The rule of the road as to keeping the proper side, applies to saddle horses as well as carriages; & if a carriage & a horse are to pass, the carriage must keep its proper side, & so must the horse.

(2) If the driver of a carriage is on his proper side, & sees a horse coming furiously on its wrong side of the road, it is the duty of the driver of the carriage to give way & avoid an accident, although, in so doing, he does go a little on what would otherwise be his wrong side of the road.—*TURLEY*

is entitled to assume that such vehicle will maintain its apparent course, & therefore, it is incumbent upon the driver of a vehicle who desires to change his course & to turn into another street to give a warning to that effect.—*UYS v. UYS*, [1927] App. D. 394.—**S. AF.**

n. With regard to horses—Duty of motor to remain stationary on request.]—*CAMPBELL v. PUGSLEY* (N. B.) (1912), 11 E. L. R. 561; 7 D. L. R. 177.—**CAN.**

o. With regard to tramcars—Duty to stop when tram taking up or discharging passengers—Tramcar backed from side street.]—*HOLMIS v. KIRK & Co., LTD.*, [1920] 1 W. W. R. 1037; 53 D. L. R. 53; 28 B. C. R. 122.—**CAN.**

p. ———.]—*Duty to drive at walking pace when tram taking up or discharging passengers.]*—*HARMSWORTH v. SMITH* (1918), 49 N. L. R. 174.—**S. AF.**

q. Cars approaching one another in same rut—Duty of each driver to stop.]—When two motor cars approaching one another are in the same deep rut, there is a duty on the driver of each to stop his car instead of taking the chance of getting out of the rut & getting clear before the cars meet. In the present case the pltf. performed this duty, but defd. did not, & the latter was therefore held liable for the damages caused by the collision which resulted.—*MASON v. ELLIS* [1922] 2 W. W. R. 688; 63 D. L. R. 395; 15 Sask. L. R. 425.—**CAN.**

r. Vehicle swinging out to pass vehicle in front—Duty to give warning or see road clear.]—*KENZIE v. HART* (Sask.), [1927] 3 D. L. R. 839.—**CAN.**

Sect. 2.—The rule of the road: Sub-sect. 4. Sects. 3 & 4. Part II. Sects. 1 & 2: Sub-sects. 1, 2, 3, 4, 5, 6 & 7.]

v. THOMAS (1837), 8 C. & P. 103; 173 E. R. 417, N. P.

31. To act reasonably.]—HARTLEY v. CHADWICK, No. 25, ante.

SECT. 3.—RIGHTS AND DUTIES OF PEDESTRIANS.

32. Right to cross road.]—COTTERILL v. STARKEY, No. 27, ante.

33. —Duty to take care—To avoid vehicles.]—COTTON v. WOOD, No. 28, ante.

Rights of public generally.]—See HIGHWAYS, Vol. XXVI., pp. 316–319, Nos. 481–515.

Duty of drivers to take care.]—See Nos. 26–28, ante.

SECT. 4.—RESTRICTIONS AS TO TRAFFIC.

See Highway Act, 1835 (c. 50), ss. 76, 77; Public Health Act, 1875 (c. 55), s. 172; Public Health Acts (Amendment) Acts, 1890 (c. 59), Part III.; 1907 (c. 53), ss. 9, 80–84; Public Health (London) Act, 1891 (c. 76), s. 16; Metropolitan Police Act, 1839 (c. 47), s. 56; Protection of Animals Act, 1911 (c. 27), s. 9; Metropolitan Streets Acts, 1867 (c. 134), ss. 2–4, 7, 10, 16, 19, 20; 1885 (c. 18), s. 2; City of London (Street Traffic) Act, 1909 (c. lxxvii), s. 2; Tramways Act, 1870 (c. 78), ss. 34, 54, 61, 62; Highways & Locomotives (Amendment) Act, 1878 (c. 77), ss. 26, 35, 38; Local Government Act, 1888 (c. 41), ss. 3 (viii), 41; London Traffic Act, 1924 (c. 34).

Powers & duties of highway authorities.]—See HIGHWAYS, Vol. XXVI., p. 390, Nos. 1170–1173.

Excessive weight & extraordinary traffic.]—See HIGHWAYS, Vol. XXVI., pp. 460–475.

Part II.—Traffic Nuisances and Offences.

SECT. 1.—IN GENERAL.

34. Proceedings under Town Police Clauses Act, 1847 (c. 89), s. 28—Whether police may institute proceedings—Person aggrieved.]—Within a district of an urban district council, where the provisions of above sect. are in force owing to their incorporation with Public Health Act, 1875 (c. 55), s. 171, the police can institute proceedings for offences within that sect. & the institution of such proceedings is not restricted to the person aggrieved or the local authority under Public Health Act, 1875 (c. 55), s. 253.—JOBSON v. HENDERSON (1900), 82 L. T. 260; 64 J. P. 425; 19 Cox, C. C. 477, D. C.

Nuisances & remedies in respect of highways.]—See HIGHWAYS, Vol. XXVI., pp. 413 et

print itself must be an advertisement. Therefore where a print which is a publication of news, but is not in itself an advertisement, is, without the approval of the Comr. of Police, distributed in such a way as to obtain the same consequences as if it were an advertisement, the distributor thereof is not liable to the penalty imposed by the sect. for distributing a print by way of advertisement except in such form & manner as may be approved by the Comr. of Police.—GAGE v. BREALEY (1898), 67 L. J. Q. B. 457; 46 W. R. 415; 14 T. L. R. 324; 42 Sol. Jo. 380, D. C.

Annotation:—Mentd. Westminster Gazette v. Bell (1925), 69 Sol. Jo. 590.

SECT. 2.—PARTICULAR INSTANCES.

SUB-SECT. 1.—ADVERTISEMENTS, PLACARDS, ETC.

See Metropolitan Streets Acts, 1867 (c. 134), ss. 3, 4, 9; 1885 (c. 18), s. 2; London Hackney Carriage Act, 1853 (c. 33), s. 16.

35. Display on vehicle—Necessity for consent of Commissioner of Police—Metropolitan Streets Act, 1867 (c. 134).]—FULTON v. KELLY (1889), 5 T. L. R. 325, D. C.

36. —Whether bicycle included—Construction of local Act.]—A bicycle is a vehicle within Liverpool Corporation Act, 1889 (c. lxxv), s. 12, & may not be used in the streets for displaying advertisements without the consent of the corpn.—ELLIS v. NOTT-BOWER (1896), 60 J. P. 760; 13 T. L. R. 35, D. C.

37. Distribution of prints—Handbill containing news—Metropolitan Streets Act, 1867 (c. 134).]—In order that a print may be carried or distributed by way of advertisement within above Act, the

SUB-SECT. 2.—ANIMALS ON THE HIGHWAY.

See Highway Act, 1864 (c. 101), s. 25; Metropolitan Police Act, 1839 (c. 47), s. 54; Town Police Clauses Act, 1847 (c. 89), ss. 24–27; Public Health Act, 1875 (c. 55), s. 171; Highways, Vol. XXVI., pp. 129, 430, Nos. 1486–1495.

Liabilities of owners of animals generally.]—See ANIMALS, Vol. II., pp. 223–252, Nos. 151–341.

Fences generally.]—See BOUNDARIES, Vol. VII., pp. 281 et seq.

SUB-SECT. 3.—ANNOYING PASSENGERS.

See PUBLIC HEALTH, Vol. XXXVIII., pp. 163, 166, Nos. 89, 116, 117.

SUB-SECT. 4.—DISCHARGE OF FIREARMS.

See Town Police Clauses Act, 1847 (c. 89), s. 28; Public Health Act, 1875 (c. 55), s. 171.

38. Firing revolver.]—R. v. MEADE (1903), 19 T. L. R. 540.

PART I. SECT. 3.

33 i. Right to cross road—Duty to take care—To avoid vehicles.]—RAMSAY v. THOMSON & SONS (1881), 9 R. (Ct. of Sess.) 110; 19 Sc. L. R. 125.—SCOT.

t. Right to security of safety islands.]—Where a person crossing a highway, having a double track of rails in the centre, there being a fifteen foot fairway between the curb of the

street & the outer rail, on each side, within which vehicular traffic is supposed to keep, reaches the first track he may reasonably feel the security afforded by a "safety island."—JEFFARIES v. WOLFENDEN (1915), 31 W. L. R. 428; 21 B. C. R. 432.—CAN.

a. Right to use of road in absence of footpaths.]—Foot passengers on a country road without footpaths on either side are entitled to walk upon the

road itself, & the drivers of vehicles are bound to keep clear of them.—M'KECHNIE v. COUPER (1887), 14 R. (Ct. of Sess.) 345.—SCOT.

PART II. SECT. 2, SUB-SECT. 1.

b. Display on sandwich boards—Attracting crowd & causing obstruction.]—M'GIVERAN v. AULD (1894), 21 R. (Ct. of Sess.) (J.) 69; 31 Sc. L. R. 901.—SCOT.

SUB-SECT. 5.—DRIVING AND RIDING OFFENCES.

See Highway Act, 1835 (c. 50), s. 78; Metropolitan Police Act, 1839 (c. 47), s. 54; Town Police Clauses Act, 1847 (c. 89), s. 28; Offences against the Person Act, 1861 (c. 100), s. 35; Public Health Act, 1875 (c. 55), s. 171; HIGHWAYS, Vol. XXVI., pp. 437-439, Nos. 1547-1558.

39. Riding on shafts—Effect of cart being stationary.]—ANON. (prior to 1820), cited in 3 B. & Ald. at p. 336; 106 E. R. 686.

*Annotation:—*Refd. Parton v. Williams (1820), 3 B. & Ald. 330.

40. Obstruction by passenger—Riding outside omnibus—Contrary to regulation.]—The E. Corpn., who had statutory authority to run motor omnibuses, made regulation prohibiting on one section of a particular route passengers riding on the top of the omnibuses. The regulation was made for the safety of passengers in view of the camber of the road, & notice thereof was exhibited on the top of the omnibuses, but attention was not drawn thereto on passengers' tickets. Applt. who had previous knowledge of the regulation, was an outside passenger on an omnibus on the particular route & had paid the fare entitling him to travel over the section to which the regulation applied. When the omnibuses reached the beginning of that section he refused to come down from the top although his attention was again called to the notice by the conductor & an inspector, applt. stating that he had got his ticket & intended riding on the top to the terminus. The inspector declined to allow the omnibus to proceed while applt. remained on the top, & it was thereby delayed 20 minutes. Applt. having been convicted of a breach of the corpn.'s bye-law which provided that "No passenger or other person shall wilfully obstruct or impede any officer or servant of the council in the execution of his duty upon or in connection with any motor omnibus":—*Held*: applt. was not entitled to be carried on the top of the omnibus on the part of the route to which the regulation applied inasmuch as the corpn. had not, in respect of that part of the route, held themselves out as common carriers of passengers on the top of their omnibuses, or contracted to carry applt. on the top of the omnibus; applt.'s conduct amounted to wilful obstruction of the conductor & inspector within the meaning of the bye-law; & therefore, the conviction was right.—*BAKER v. ELLISON*, [1914] 2 K. B. 762; 83 L. J. K. B. 1335; 111 L. T. 66; 78 J. P. 244; 30 T. L. R. 426; 12 L. G. R. 992; 24 Cox, O. C. 208, D. C.

41. Civil liability—Negligent driving—Liability of master for act of servant—Master's name painted on cart.]—In an action on the case, for the negligent driving of deft.'s servant, if it appear that deft. holds himself out to the world as the owner of the cart, by suffering his name to remain painted on it, & over the door of the house of business to which it belonged, the action is maintainable against him, although it is proved that he had for some days ceased to be the owner of the cart & concerned in the business, having resigned both up to his former partner.—*STABLES v. FLEY* (1825), 1 C. & P. 614; 171 E. R. 1339, N. P.

*Annotations:—*Dbtd. *Smith v. Bailey*, [1891] 2 Q. B. 403. Refd. *Tavernour v. Little* (1839), 3 Jur. 702.

42. ——— By hirer of machine—Liability of owner.]—Deft. who was the owner of a traction

engine to which his name & address were affixed, as required by Locomotives Act, 1865 (c. 83), s. 7, let same for three months. Through the negligent management of the engine whilst it was being used upon a highway by the hirer, personal injuries were occasioned to pltf. who was being driven in a carriage upon the highway:—*Held*: deft. was not liable in respect of such injuries.—*SMITH v. BAILEY*, [1891] 2 Q. B. 403; 60 L. J. Q. B. 779; 65 L. T. 330; 56 J. P. 116; 40 W. R. 28, C. A.

*Annotations:—*Refd. *Kemp v. Elsha*, [1918] 1 K. B. 228. Mentd. *Smith v. General Motor Cab Co.*, [1911] A. C. 188.

———.].—*See, further*, NEGLIGENCE, Vol. XXXVI., pp. 59-63, Nos. 366-405.

43. Criminal liability—Furious driving—Action against constables for wrongful arrest—Commission of offence to be within view of constables.]—Metropolitan Police Act, 1839 (c. 47), s. 51, imposes a penalty not exceeding 40s. for, amongst other things, "furious driving" in a thoroughfare; & s. 63 empowers any constable of the metropolitan police district to take into custody, without warrant, any person who, within view of such constable, shall offend in any manner against the Act. In an action in a county ct. against constables for a tort in taking pltf. into custody on a false & unfounded charge of furiously driving a horse & gig, to the danger of the passengers in a public highway, pltf., in stating his case, admitted that he had been taken before two justices, convicted, & fined 20s., & that he had paid the penalty, & had not taken any steps to unpeach the validity of the conviction. The judge thereupon asked defts. if they could prove the conviction; & they accordingly put in an examined copy, which stated the offence, but did not allege that it was committed "within view of the constables." The judge, being of opinion, that, "under the circumstances, the conviction was an answer to pltf.'s claim for damages," directed the jury to find for defts.:—*Held*: a misdirection.—*JUSTICE v. GOSLING* (1852), 12 C. B. 39; Cox, M. & H. 609; 21 L. J. C. P. 94; 19 L. T. O. S. 91; 16 J. P. 104; 16 Jur. 429; 138 E. R. 815.

*Annotations:—*Mentd. *Caine v. Palace Steam Shipping Co.*, [1907] 1 K. B. 670; *In the Estate of Crippen*, [1911] P. 108.

———.].—*See, further*, CRIMINAL LAW, Vol. XV., pp. 798-800, 863-865, Nos. 8639-8652, 9473-9490.

Negligent, reckless or dangerous driving.]—*See, generally*, NEGLIGENCE, Vol. XXXVI., pp. 59 *et seq.*; CRIMINAL LAW, Vol. XV., pp. 798-800, 863-865, Nos. 8639-8652, 9473-9490; & Nos. 22, 41, 42, *ante*.

———. **Motor cars.]—***See* Part V., Sect. 3, subsect. 4, A. (b), *post*.

SUB-SECT. 6.—DRUNKENNESS.

See Licensing Acts, 1872 (c. 94), s. 12; 1902 (c. 28), ss. 1, 8; Criminal Justice Administration Act, 1914 (c. 58), s. 16; Town Police Clauses Act, 1847 (c. 89), s. 29; Metropolitan Police Act, 1839 (c. 47), s. 58; City Police Act, 1839 (c. xciv), s. 37; INTOXICATING LIQUORS, Vol. XXX., pp. 99, 100, Nos. 758-764.

SUB-SECT. 7.—HACKNEY AND STAGE CARRIAGES, OFFENCES CONCERNING.

See Part IV., Sect. 9, *post*.

PART II. SECT. 2, SUB-SECT. 5.

- c. *Riding on shafts.]—*GRANT v. GLASGOW DAIRY CO. (1881), 9 R. (Ct. of Sess.) 182, 19 Sc. L. R. 165.—SCOT.
d. *One person driving more than one vehicle.]—*JACKSON v. SHAW, [1913] V. L. R. 385.—AUS.

Sect. 2.—Particular instances: Sub-sects. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 & 19.]

SUB-SECT. 8.—HAWKERS AND PEDLARS.

*See Metropolitan Streets Acts, 1867 (c. 134), ss. 3, 4, 6; 1885 (c. 18), s. 2; Metropolitan Streets Act (Amendment) Act, 1867 (c. 5), s. 1; City of London (Street Traffic) Act, 1909 (c. lxvii), ss. 2, 3; &, generally, MARKETS & FAIRS, Vol. XXXIII., pp. 654 *et seq.**

SUB-SECT. 9.—HIGHWAY ACTS, OFFENCES UNDER.

*See Highway Act, 1835 (c. 50), ss. 72, 78, 79; &, generally, HIGHWAYS, Vol. XXVI., pp. 413 *et seq.**

SUB-SECT. 10.—LITTER, REFUSE, ETC.

See Town Police Clauses Act, 1847 (c. 89), s. 28; Public Health Act, 1875 (c. 55), s. 171; Public Health (London) Act, 1891 (c. 76), s. 16; HIGHWAYS, Vol. XXVI., pp. 427, 458, Nos. 1456-1462, 1742; PUBLIC HEALTH, Vol. XXXVIII., p. 238, Nos. 668-670.

SUB-SECT. 11.—LOCOMOTIVES AND MOTOR CARS, OFFENCES CONCERNING.

*See Part V., Sect. 3, sub-sect. 4, *post*.*

SUB-SECT. 12.—LOITERING.

See Metropolitan Police Act, 1839 (c. 47), ss. 61, 67; Vagrancy Act, 1824 (c. 83), s. 4.

Suspected persons, generally.]—*See POOR LAW, Vol. XXXVII., pp. 363-365, Nos. 1651-1662.*

SUB-SECT. 13.—MARKETS AND FAIRS.

See, generally, MARKETS & FAIRS, Vol. XXXIII., pp. 533, 534, Nos. 106-109.

SUB-SECT. 14.—MUSIC, SINGING, ETC.

See Metropolitan Police Act 1864 (c. 55), ss. 1, 2.

44. Metropolitan Police Act, 1864 (c. 55), s. 1—Repealing Metropolitan Police Act, 1839 (c. 47), s. 57—Enforcement of penalty under Metropolitan Police Act, 1839 (c. 47), s. 77—Effect of repeal.]—A street musician was convicted under Metropolitan Police Act, 1864 (c. 55), s. 1, & was sentenced to pay a fine of forty shillings, & in default of payment to be imprisoned for a month:—*Held*: Metropolitan Police Act, 1864 (c. 55), did not operate to impliedly repeal Metropolitan Police Act, 1839 (c. 47), s. 77; the penalty was, therefore, capable of being enforced by imprisonment as provided by that sect., & the conviction was good.—*R. v. HOPKINS*, [1893] 1 Q. B. 621; 57 J. P. 152; 41 W. R. 431; 37 Sol. Jo. 286; 5 R. 315; *sub nom.* *R. v. HOPKINS*, *Ex p.* SPRINGER (OR SPRANGER), *Ex p.* REYNOLDS, 62 L. J. M. C. 57; 68 L. T. 292; *sub nom.* *R. v. HOPKINS*,

Re SALVATION ARMY MUSICIANS, 9 T. L. R. 294, D. C.

Annotations.—Reff. *Shields v. Howard* (1896), 60 J. P. 727. *Mentd.* *Bingley v. Quest* (1907), 97 L. T. 394; *R. v. Leach*, *Ex p.* Fritchley, [1913] 3 K. B. 40.

45. — Right of householder to order musician to depart—Reason must be given.]—By Metropolitan Police Act, 1864 (c. 55), s. 1, any householder within the metropolitan police district may require any street musician to depart from the neighbourhood of his house “on account of the illness or on account of the interruption of the ordinary occupations or pursuits of any inmate of such house, or for other reasonable or sufficient cause”:—*Held*: the householder making the requisition must give to the street musician his reason for doing so.—*SHIELDS v. HOWARD*, [1897] 1 Q. B. 84; 66 L. J. Q. B. 105; 60 J. P. 727; 45 W. R. 138; 13 T. L. R. 8; 41 Sol. Jo. 29, D. C.

46. Salvation Army band—Accident caused by music—Liability.]—A horse belonging to plffs. was injured by another horse which became restive owing to the noise of the music played by a detachment of the Salvation Army in a public street. In an action brought by plffs. against deft. as head of the Salvation Army to recover damages for such injury:—*Held*: in the absence of evidence to show what the relationship was between the particular members of the army & deft., it could not be inferred that such members were the servants of deft. or were acting under his authority.—*LONDON GENERAL OMNIBUS CO. v. BOOTH* (1893), 63 L. J. Q. B. 244; 10 T. L. R. 31, D. C.

Bye-laws.]—*See PUBLIC HEALTH, Vol. XXXVIII., pp. 159, 163, 164, Nos. 63-68, 91-96.*

SUB-SECT. 15.—OBSTRUCTIONS AND PROJECTIONS.

See Metropolis Paving Act, 1817 (c. xxix), s. 72; Metropolis Management Act, 1855 (c. 120), s. 119; Highway Act, 1835 (c. 50), s. 72; City Police Act, 1839 (c. xciv), s. 35; Town Police Clauses Act, 1847 (c. 89), ss. 28, 69, 70; Public Health Act, 1875 (c. 55), s. 171; Public Health Acts (Amendment) Act, 1907 (c. 53), ss. 7, 10, 22, 23.

47. Specific offences under bye-law—General words at end of bye-law—To be restricted to offences ejusdem generis.]—A bye-law made by the town council of the borough of N. after 5 & 6 Will. 4, c. 76, under a local Act for improving the borough of N., prohibited, under a penalty, various nuisances to footways, &, along with others, forbade any one to project over or upon any public footway any awning which shall impede the passengers, or hang out goods for sale or exhibition so as to project over any public footway or carriage way, & to obstruct the passengers . . . or hang out any linen or cloth, etc., at the outside of any house, etc., so as to interfere with the free passage upon any of the streets, etc., or cause or commit any other obstruction, nuisance, or annoyance in any of the streets, etc., or other public places.

Deft. possessed a house which had been used as a private residence, & being desirous of converting the ground floor of the house into a shop, he put a shop front extending the length of the

PART II. SECT. 2, SUB-SECT. 14.

e. Beating a drum—Necessity for proof that noise unusual or calculated to disturb inhabitants.]—*R. v. NUNN* (1884), 10 P. R. 395.—**CAN.**

f. ———.]—*R. v. MARTIN* (1886), 12 O. R. 800.—**CAN.**

g. Band playing causing obstruction—Unreasonable use of street must be proved.]—*LOWDENS v. KRAVENEY*, [1903] 2 I. R. 82.—**IR.**

PART II. SECT. 2, SUB-SECT. 15.

h. Right to obstruct highway with building materials—Duty to light obstruction at night.]—*HERVEY v. FRENCH* (1840), 1 Ont. Dig. 878.—**CAN.**

house & projecting in front of the walls to the foot pavement of the street. The projection was substantially built, & contained a door & shop front supported by wooden pilasters with large glass windows, & the plinths of the pilasters extended one and a half inches over the footway. For this he was convicted in a penalty under the bye-law:—*Held*: the specific offences enumerated were matters of temporary obstruction only; the general words at the end of the bye-law must be restricted to matters *eiusdem generis* with the offences specifically enumerated; on the facts *deft.* had made an obstruction of a permanent character; & therefore, the conviction was wrong.—*R. v. DICKENSON* (1857), 7 E. & B. 831; 26 L. J. M. C. 204; 29 L. T. O. S. 180; 22 J. P. 243; 3 Jur. N. S. 1076; 5 W. R. 654; 119 E. R. 1455.

Annotations—*Mentd.* *R. v. Chantrell* (1875), L. R. 10 Q. B. 587; *Kydd v. Liverpool Watch Committee*, [1907] 2 K. B. 591.

48. Jurisdiction of justices—Proceedings under City Police Act, 1839 (c. xciv), s. 35 (6)—Prohibition.]—*Re ACT FOR REGULATING POLICE IN CITY OF LONDON 1839, Re TELEGRAPH ACTS 1863–1899* (1903), 47 Sol. Jo. 795.

49. Repair of carriage in highway—Exception in cases of accident—City Police Act, 1839 (c. xciv), s. 35.]—By above sect. a person is subjected to a penalty who in any public thoroughfare to the annoyance of the inhabitants or passengers repairs any part of any carriage “except in cases of accident where repair on the spot is necessary.”

A motor omnibus broke down about 10.30 a.m. in a street & was unable to proceed by its own mechanism, but had been pushed out of the traffic into a side street. About two hours afterwards *applt.*, a mechanical fitter in the employment of the owners of the omnibus, arrived, & finding that the breakdown was easily remedied, he proceeded to repair the mechanism, which he did in about half an hour. The breakdown was due to an accident, & the repair in the thoroughfare was necessary to permit of the omnibus proceeding under its own mechanism, the time taken for the repair being reasonable. A magistrate having convicted *applt.* under above sect.:—*Held*: the conviction was right; (LORD ALVERSTONE, C.J. & BUCKNILL, J.) on the ground that as it had been found that the omnibus could have been removed by other means than its own mechanism, its repair in the thoroughfare was not “necessary” within the meaning of the Act; (DARLING, J.) on the ground that the repair to come within the exception must be a repair “on the spot”—that is, where the accident happened, & as the repair was not done “on the spot,” but was done in a street to which the omnibus was dragged, an offence was committed.—*CHAPMAN v. RAWLINGS* (1909), 101 L. T. 605; 73 J. P. 512; 26 T. L. R. 15; 54 Sol. Jo. 49; 7 L. G. R. 1153, D. C.

Obstructions generally.]—*See* HIGHWAYS, Vol. XXVI., pp. 413–427, Nos. 1330–1471.

Projections.]—*See* HIGHWAYS, Vol. XXVI., pp. 299, 300, 513, 514, 565, 566, Nos. 304, 2171–2180, 2593–2597.

Remedies.]—*See, generally,* HIGHWAYS, Vol. XXVI., pp. 448–460, Nos. 1639–1759.

SUB-SECT. 16.—PUBLIC MEETINGS AND STREET PROCESSIONS.

Right of public meeting.]—*See* HIGHWAYS, Vol. XXVI., p. 318, Nos. 499–503.

Assembly of crowds.]—*See* HIGHWAYS, Vol. XXVI., pp. 427, 428, Nos. 1470–1479.

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Unlawful assembly.]—*See* CRIMINAL LAW, Vol. XV., pp. 642–646, Nos. 6830–6883.

Rout & riot.]—*See* CRIMINAL LAW, Vol. XV., pp. 646–650, Nos. 6884–6952.

Bye-laws—Prohibiting sermons & speeches on foreshore.]—*See* PUBLIC HEALTH, Vol. XXXVIII., p. 161, No. 77.

SUB-SECT. 17.—RACING.

50. Promenade made under local Acts—Promotion of motor races by corporation—Ultra vires.]—By a local Act, passed in 1865, the *corp.* of Blackpool were authorised to make & maintain a carriage drive & a promenade, called “the parade,” by the sea. It was provided by sect. 13 of the Act that the carriage drive should be a public highway, by sect. 17 that the parade should not be a public highway, & by sect. 18 that the parade should be “kept & used exclusively for the purposes of recreation by persons on foot, & with or without carriages, in respect of which toll is authorised to be taken.” Sect. 19 authorised a toll of twopence for every bath-chair, etc., or like carriage driven by human power. By a later Act, passed in 1899, additional works were authorised, including a new carriage-way, absorbing the original parade, a new road with a tramway thereon alongside the said carriage-way, & a new parade alongside the tramroad. By sect. 7 it was provided that the *corp.* might appropriate the whole or such part of the new parade as they might think fit for the exclusive use of foot passengers, & by sect. 8 it was provided that the new road should be for the exclusive purpose of the tramways laid thereon. The parade was, in fact, used exclusively for foot passengers & bath-chairs, etc. The *corp.*, in 1906, gave their approval to motor car races being held on the parade, & gave permission for part of the tramway road to be used for the purpose of cars returning to the starting point. They also undertook to keep the portion of the parade over which the races were to be run clear of traffic, & to erect a barrier & provide the necessary police control. This action was brought by the A.-G., at the relation of a ratepayer, for an injunction to restrain the *corp.* from organising or promoting motor races on the sea front:—*Held*: the *corp.* were in the position of trustees of the parade for limited public purposes, namely, for the purpose of use by foot passengers, perambulators, invalid carriages, & similar vehicles, & that it was an abuse of the parade to allow it to be used for either horses or motor cars, & *a fortiori* motor races.—*A.-G. v. BLACKPOOL CORPN.* (1907), 71 J. P. 478.

SUB-SECT. 18.—ROUNDBABOUTS, SWINGS, ETC.

Bye-laws—Prohibiting steam organ in or near street.]—*See* PUBLIC HEALTH, Vol. XXXVIII., p. 159, Nos. 67, 68.

SUB-SECT. —SHAFTS, MACHINES, ENGINES, KILNS, ETC., NEAR HIGHWAYS.

See Highway Act, 1835 (c. 50), s. 70; Locomotive Threshing Engines Act, 1894 (c. 37); Locomotives Act, 1865 (c. 83), s. 6.

Explosive & inflammable substances.]—*See* HIGHWAYS, Vol. XXVI., p. 434, Nos. 1521–1523.

Fires.]—*See* HIGHWAYS, Vol. XXVI., p. 436, Nos. 1537–1539.

Sect. 2.—Particular instances: Sub-sects. 19 & 20. Parts III. & IV. Sects. 1 & 2: Sub-sect. 1.]

Engines & machinery.]—See HIGHWAYS, Vol. XXVI., pp. 436, 437, Nos. 1540–1544.

Fences & duty to fence.]—See, generally, BOUNDARIES, Vol. VII., pp. 281 *et seq.*

SUB-SECT. 20.—TRADING IN STREET.

See HIGHWAYS, Vol. XXVI., pp. 422–425, Nos. 1413–1439; MARKETS & FAIRS, Vol. XXXIII., pp. 533, 534, Nos. 106–109.

Employment of infants.]—See Education Act, 1921 (c. 51), ss. 90–108; INFANTS, Vol. XXVIII., p. 348, Nos. 2189–2192.

Part III.—Lights on Vehicles.

See, now, Road Transport Lighting Act, 1927 (c. 37).

51. Validity of Board of Trade Regulation.]—A tramway co. were convicted before justices of the breach of a regulation of the Board of Trade, made under a local Act, relative to lamps being placed & lighted in a conspicuous position on the front of a tramway engine:—*Held*: the regulation was not invalid as a regulation, & its subject-matter need not have been dealt with by a bye-law; the offence being stated in the words of the regulation was sufficiently described, & the co. were responsible for the personal neglect of their engine driver.—*ST. HELEN'S DISTRICT TRAMWAYS CO. v. WOOD* (1891), 60 L. J. M. C. 141; 56 J. P. 70, D. C.

52. Validity of bye-law.]—A bye-law made by the county council of Warwickshire under Local Government Act, 1888 (c. 41), s. 16, was as follows: "Lights on Vehicles. A person driving or having charge of any vehicle . . . shall from the end of the first hour after sunset to 2 o'clock a.m., except during such part, if any, of that period as shall be between the rising & the setting of the moon, carry attached to such vehicle a lighted lamp or lighted lamps, which shall be so constructed or placed as to exhibit a light in the direction in which he is proceeding, & so as to prove adequate means of signalling the approach or position of the vehicle . . . provided also that where such vehicle is carrying timber, such person shall also carry attached at the end thereof a lamp or lamps so constructed as to exhibit a light or lights visible to persons overtaking such vehicle." Resp., a carter, was summoned for

driving a waggon laden with timber during the prohibited hours without proper lights, contrary to the bye-law. The charge was dismissed on the ground that the bye-law was invalid as being unreasonable:—*Held*: the bye-law was valid.—*WALKER v. STRETTON* (1896), 60 J. P. 313; 44 W. R. 525; 12 T. L. R. 363; 40 Sol. Jo. 480, D. C.

53. —.]—A bye-law made by a county council provided that "no person shall drive or cause to be driven any timber carriage over any main road or other highway in the county between sunset & sunrise unless it has lamps showing a bright & adequate light both to the front & rear of the carriage":—*Held*: the bye-law was reasonable & therefore valid.—*WILLIAMS v. GROVES* (1896), 12 T. L. R. 450, D. C.

54. —.]—*ADAMSON v. MILLER* (1900), 16 T. L. R. 185; 44 Sol. Jo. 278, D. C.

55. Meaning of "Sunset"—Dependent on local time.]—The expression "sunset" in Local Government Act, 1888 (c. 41), s. 85, is not an expression of time within the Statutes Definition of Time Act, 1880 (c. 9), & a bicyclist is not compelled under Local Government Act, 1888 (c. 41), s. 85, to light his lamp an hour after sunset according to Greenwich mean time, but according to the time of sunset as it varies at different places in England.—*GORDON v. CANN* (1899), 68 L. J. Q. B. 434; 80 L. T. 20; 63 J. P. 324; 47 W. R. 269; 15 T. L. R. 165; 43 Sol. Jo. 225, D. C.

Lights on motor cars.]—See Part V., Sect. 3, sub-sect. 4, A. (c), *post*.

Infringement of lighting regulation—Liability for negligent driving.]—See NEGLIGENCE, Vol. XXXVI., pp. 61, 62, No. 389.

Part IV.—Hackney and Stage Carriages.

SECT. 1.—DEFINITIONS.

See Town Police Clauses Act, 1847 (c. 89), s. 38; Town Police Clauses Act, 1889 (c. 14), ss. 3, 4; Locomotives on Highways Act, 1896 (c. 36), s. 1 (1) (b); London Hackney Carriage Act, 1831

(c. 22), s. 4; London Hackney Carriages Act, 1843 (c. 86), s. 2; Metropolitan Public Carriage Act, 1869 (c. 115), ss. 4, 5; London Cab Act, 1896 (c. 27), s. 3; London Cab & Stage Carriage Act, 1907 (c. 55), ss. 3, 5, 6 (1), (2).

PART III.

k. Validity of bye-law—Power to regulate lights on "vehicles"—Right to enforce lighting of motor cycles.]—*CULLIS v. ABERN* (1911), 18 C. L. R. 540.—**AUS.**

l. — Making master liable for neglect of servant to light vehicle.]—*HEFTON & CO. v. M'SWINEY*, [1905] 2 T. R. 47.—**IR.**

m. — Whether repugnant to statute.]—A borough bye-law which requires all vehicles driven in the borough between sunset & sunrise to carry two proper & sufficient lights is not repugnant to the requirement of

Lights on Vehicles Act, 1915, s. 2 (1), that every vehicle in a public highway between half an hour after sunset & half an hour before sunrise shall be provided with a lamp or lamps in proper working order.—*DAY v. BINT*, [1918] N. Z. L. R. 831.—**N.Z.**

n. — Requiring vehicles to carry lights at night.]—*AULD v. BARR* (1897), 25 R. (Ct. of Sess.) (J.) 13, 35 Sc. L. R. 35, 5 S. L. T. 152.—**SCOT.**

o. Infringement of lighting regulation—Liability to third party for negligence.]—*COMBIE v. FISHER* (1925), 58 O. L. R. 228.—**CAN.**

p. — Light should be clearly visible

*at two hundred feet—Not essential for lights to illuminate objects at that distance.]—**GILLIES v. LYE*, [1926] 2 D. L. R. 894; 58 O. L. R. 560.—**CAN.**

q. — Whether driver rendered trespasser as against third party.]—The fact that a motor car which is being driven on a city street at night lacks proper brakes & is without lights does not render the driver a trespasser as against another person making use of the street, nor, it seems, even as against the city.—*SCOTT v. CALGARY CORPN.*, *McDONALD v. CALGARY CORPN.* (Alta.), [1926] 4 D. L. R. 1013; [1926] 3 W. W. R. 722.—**CAN.**

56. "Stage carriage."—*Semble*: the word "stage," when applied to a carriage, means one which conveys goods or passengers for hire, at a fixed time, from one certain spot to another.—*R. v. Ruscoe* (1838), 8 Ad. & El. 386; 3 Nev. & P. K. B. 428; 1 Will. Woll. & H. 435; 7 L. J. M. C. 94; 2 Jur. 888; 112 E. R. 884.

57. —.—A stage carriage means a carriage regularly plying from place to place (*BYLES, J.*).—*COMLEY v. CARPENTER* (1865), 18 C. B. N. S. 378; 6 New Rep. 231; 12 L. T. 453; 11 Jur. N. S. 712; 13 W. R. 812; 144 E. R. 491.

Annotation:—*Distd. Pearson v. Tazewell* (1865), 19 C. B. N. S. 384.

58. —.—A stage carriage . . . is a vehicle the primary object or use of which [is] to carry passengers for a fare (*WILLES, J.*).—*PEARSON v. TAZEWEILL* (1865), 19 C. B. N. S. 384; 13 L. T. 158; 30 J. P. 150; 14 W. R. 39; 144 E. R. 835.

— For purpose of regulations against overcrowding.]—*See* Part IV., Sect. 3, *post*.

For purpose of liability for highway tolls.]—*See* HIGHWAYS, Vol. XXVI., pp. 346, 347, Nos. 745–750.

59. "Hackney carriage."—*COUSINS v. STOCKBRIDGE* (1865), 30 J. P. 166.

60. —.—*BATESON v. ODDY*, No. 79, *post*.

61. —.—*HAWKINS v. EDWARDS*, No. 143, *post*.

62. —.—Vehicle standing on private property.]—*JONES v. SHORT*, No. 91, *post*.

For purpose of local licence.]—*See* Sect. 2, *post*.

For purpose of excise licence.] *See* REVENUE, Vol. XXXIX., p. 210, No. 146.

63. "Carriage"—Motor Cars (Uses & Construction) Order 1904, Arts. 1, 4 (3).—By art. 1 of above Order, "In this order the expression 'carriage' includes a waggon, cart, or other vehicle." By art. 4, "Every person driving or in charge of a motor car when used on any highway shall comply with the regulations hereinafter set forth; namely . . . (3) He shall, when meeting any carriage, horse, or cattle, keep the motor car on the left or near side of the road, & when passing any carriage, horse, or cattle proceeding in the same direction, keep the motor car on the right or off side of the same."

A tramcar running on tramway rails in a highway is a "carriage" within the meaning of the above order, & therefore a motor car, when passing a tramcar proceeding in the same direction, must pass it on the right or off side thereof.—*BURTON*

PART IV. SECT. 1.

56 i. "Stage carriage."—A stage carriage within Carriages Act, 1890, is a vehicle running regularly on some defined route between definite termini, inviting persons to travel therein, each passenger paying a separate & distinct fare for his seat, accordingly a motor bus conveying passengers for hire on a particular day, or days only, between two places is not a "stage carriage."—*PARKIN v. WHITHERS*, [1913] V. L. R. 533.—*AUS.*

56 ii. —.—A motor omnibus plying for hire upon a fixed route was a "stage carriage" within Railway Passenger Duty Act, 1842.—*SMITH v. MACKINTOSH*, [1926] S. C. (J.) 15; [1926] S. L. T. 21.—*SCOT.*

56 iii. —.—A motor charabanc, which ran on a stated route from Glasgow to a place 7 miles distant from the General Post Office, & which, when accommodation permitted, took up & conveyed passengers from point to

point within the city, was a "stage carriage" within Glasgow Police Act, 1866, s. 218, & as such required to be licensed by the magistrates.—*O'HARA & SONS v. MILLER*, [1926] S. C. (J.) 25; [1926] S. L. T. 27.—*SCOT.*

59 i. "Hackney carriage"—A motor charabanc, running on a stated route & carrying passengers who each paid a separate fare.—*Held*: not to be a "hackney carriage" falling under the regulations for hackney carriages contained in Burgh Police (Scotland) Act, 1892, sched. 5.—*CRAIK v. WOOD*, [1921] S. C. (J.) 27; 58 Sc. L. R. 142; [1920] 2 S. L. T. 403.—*SCOT.*

r. Omnibus.]—*Semble*: an "omnibus" is a "hackney carriage" within Carriages Act, 1915.—*HUDSON v. GEE-LONG CORPN.*, [1926] V. L. R. 47; 47 A. L. T. 97; [1926] Argus L. R. 3.—*AUS.*

PART IV. SECT. 2, SUB-SECT. 1.

t. Licence is a privilege.]—As a

r. *NICHOLSON*, [1909] 1 K. B. 397; 78 L. J. K. B. 295; 100 L. T. 344; 73 J. P. 107; 25 T. L. R. 216.

"Omnibus"—For purpose of local licence.]—*See* Sect. 2, *post*.

"Person"—For purpose of fares.]—*See* Sect. 4, *post*.

"Plying for hire."—*See* Sect. 2, sub-sect. 4, Sect. 5, *post*.

SECT. 2.—LICENCES.

SUB-SECT. 1.—IN GENERAL.

See Town Police Clauses Act, 1847 (c. 80), ss. 37–50; Town Police Clauses Act, 1889 (c. 14), ss. 4, 5; Public Health Act, 1875 (c. 55), s. 171; Public Health Act, 1925 (c. 71), s. 76; London Hackney Carriages Act, 1843 (c. 86), ss. 10, 21–24; Metropolitan Public Carriage Act, 1869 (c. 115), ss. 4, 6–8, 11, 15; Roads Act, 1920 (c. 72), ss. 5, 7, 11; London Traffic Act, 1924 (c. 31), s. 6.

64. Necessity for local licence.—Notwithstanding possession of excise licence.]—A person using a hackney carriage plying for hire in a town is not exempted from the obligation of taking out a licence under Town Police Clauses Act, 1847 (c. 89), on the ground that he has already paid post horse duty to the Comrs. of Inland Revenue.—*BUCKLE v. WRIGHTSON* (1861), 5 B. & S. 854; 5 New Rep. 82; 31 L. J. M. C. 43; 11 L. T. 341; 29 J. P. 326; 11 Jur. N. S. 281; 13 W. R. 92; 122 E. R. 1048.

Annotation:—*Reid. Ash v. Lynn* (1866), 7 B. & S. 255.

Necessity for excise licence.]—*See* REVENUE, Vol. XXXIX., p. 210, Nos. 146–151.

65. Name of licensee appearing on vehicle—Evidence of ownership.]—The inscription on a stage coach of the name of the party licensed to use it, is evidence against him of ownership, as well in an action as on summary proceedings.—*BARFORD v. NELSON* (1830), 1 B. & Ad. 571; 9 L. J. O. S. K. B. 93; 109 E. R. 900.

66. —.—Termination of employment—Injunction to restrain continued use of name.]—The manager of an omnibus co., under the provisions of the Metropolitan Stage Carriage statutes, being the licensee of their vehicles, is, after the determination of his office, entitled to an injunction to restrain the continued use of his name as licensee on such vehicles.—*HODGES v. LONDON TRAMS CO.* (1883), 12 Q. B. D. 105; 50 L. T. 202; 32 W. R. 616, D. C.

licence is a privilege, the person who seeks to obtain it may be required to submit to reasonable conditions & to pay a reasonable fee.—*Re ADELAIDE CORPN. BYE-LAW NO. XXV., Ex p. BOUCHER*, [1927] S. A. S. R. 67.—*AUS.*

a. Power of local authority.—To regulate hackney coaches, etc.—*Bye-law requiring hackmen to take out licence—Whether valid.*—*Ex p. LEMON* (1881), 20 N. B. R. (4 P. & R.) 563.—*CAN.*

b. Validity of bye-law.—Giving licensing officer absolute discretion to withhold, revoke or suspend licences.]—*Re GLENELG CORPN. BYE-LAW NO. XXIII., Ex p. MADIGAN*, [1927] S. A. S. R. 85.—*AUS.*

c. —.—Onus of proof of invalidity on person alleging invalidity.]—*REITER v. HOGAN*, [1927] N. Z. L. R. 871.—*N.Z.*

d. Licence fee insufficiently charged owing to misunderstanding.—Right to recover balance.]—*EPSTEIN v. KING WILLIAM'S TOWN BOROUGH COUNCIL* (1909), 26 S. C. 37.—*S. AF.*

*Sect. 2.—Licences: Sub-sects. 2, 3 & 4.]***SUB-SECT. 2.—IN RESPECT OF DRIVERS AND CONDUCTORS.**

For relevant statutory references, see Part IV., Sect. 2, sub-sect. 1, *ante*.

67. Personal privilege.]—An information was laid by an inspector against deft. for unlawfully driving a stage coach without having obtained a licence from the Improvement Comrs. of Llandudno. Deft. was in the employ of a carriage proprietor as a stage coach driver. The licencing committee appointed by the comrs. passed a resolution requiring drivers who desired their licences renewed to apply to the committee in person. The manager of the carriage proprietor applied to the licencing committee for a renewal of, amongst others, deft.'s licence. The committee refused to consider any application unless appets. attended personally. No complaint was made against deft. personally. Deft. subsequently acted as a driver without a licence. The justices held that deft. had failed to obtain a licence in consequence of the committee refusing to hear his application, although they had no complaint against him, & that under those circumstances the charge was trivial, & they accordingly dismissed it. The inspector who preferred the information appealed:—*Held*: the justices were wrong & should have convicted, for there had been a breach of the law, & the comrs. had a right to insist on the personal attendance of appets., the possession of a driver's licence being a personal privilege.—*BANTON v. DAVIES* (1891), 66 L. T. 192; 56 J. P. 294; 17 Cox, C. C. 469, D. C.

68. Whether personal application necessary.]—*BANTON v. DAVIES*, No. 67, *ante*.

69. Unauthorised indorsement by employer—Unfitness to drive.]—By London Hackney Carriages Act, 1843 (c. 86), s. 21, the proprietor of a hackney carriage is required to retain in his possession the licence of every driver, etc., employed by him while such driver, etc., remains in his service. A declaration in case stated, that pltf. obtained a driver's licence under the Act; that he was employed by deft., a proprietor of a hackney carriage, & under the provisions of the Act delivered the licence to him; & that, whilst the licence remained in deft.'s possession, the latter "wrongfully & unjustly wrote in ink upon the licence certain words purporting, & then being intended by deft., to give a character of pltf., as an unfit & improper person to act as a driver of hackney carriages, that is to say," etc., etc.; by reason whereof the licence became defaced & wholly useless to pltf., & pltf. was thereby hindered & prevented from obtaining employment as a driver, etc.:—*Held*: the action was maintainable, case was the proper form, & the declaration was sufficient.—*HURRELL v. ELLIS* (1845), 2 C. B. 295; 15 L. J. C. P. 18; 6 L. T. O. S. 128; 9 Jur. 1013; 135 E. R. 958.

Annotation:—*Apld.* *Norris v. Birch*, [1895] 1 Q. B. 639.

70. — Reasons for discharge.]—The employer of a conductor of a metropolitan stage carriage is not justified in indorsing upon such conductor's licence, which has been deposited with him pursuant to London Hackney Carriage Act, 1843 (c. 86), s. 8, the reason for which he discharges

him from his service. A declaration stated that pltf. had duly obtained a licence to act as a conductor of metropolitan stage carriages, under London Hackney Carriage Act, 1850 (c. 7); that deft., a proprietor of a metropolitan stage carriage employed him to act as conductor; that pltf., on entering on such employment delivered his licence to deft. under the provisions of London Hackney Carriage Act, 1843 (c. 86), s. 8, to be retained by him whilst pltf. remained in his service; & that deft. wrongfully & maliciously wrote in ink on the licence before he re-delivered the same to pltf. on his quitting such service, the words "discharged for being 1s. 4d. short. A. M." to signify that pltf. had been dismissed as being dishonest & that, by reason thereof, the licence became defaced, damaged, & useless to pltf., & he had been prevented from obtaining employment under it:—*Held*: the declaration disclosed a sufficient cause of action.—*ROGERS v. MACNAMARA* (1853), 14 C. B. 27; 2 C. L. R. 569; 23 L. J. C. P. 1; 17 Jur. 1166; 2 W. R. 19; 139 E. R. 12.

Annotation:—*Apld.* *Norris v. Birch*, [1895] 1 Q. B. 639.

71. — — —.]—To entitle deft. to notice of action under a statute, he must honestly intend to put the law into motion, & really believe in the existence of a state of facts which if they existed would have justified him in doing as he did. London Hackney Carriage Act, 1843 (c. 86), s. 24, empowers the proprietor of a cab, if he has any complaint against his driver, to summon him before a magistrate, who may indorse on his licence the nature of the offence; & s. 47 provides that a notice of action shall be given where a party is sued for anything done under the authority of the Act:—*Held*: a cab proprietor who, without summoning the driver before a magistrate, defaced his licence by writing on it that he had been dismissed for damaging his cab & bringing home no money, was not entitled to a notice of action, inasmuch as he could not have honestly intended to put the law into motion, or really believe that he was acting under the authority of the statute.—*HEATH v. BREWER* (1861), 15 C. B. N. S. 803; 3 New Rep. 388; 9 L. T. 653; 143 E. R. 1000.

72. — No evidence of employment.]—*BREWER v. WEST METROPOLITAN TRAMWAYS CO., LTD.* (1888), 4 T. L. R. 263, D. C.

73. — Conveying imputation against character—Whether "matter of complaint" under London Hackney Carriages Act, 1843 (c. 86), s. 22.]—The foreman of a cab proprietor, in making the entries required by above Act, s. 8, inserted in the licence one date of entering the proprietor's service & two dates of quitting it, & signed his name at the end of the entry. The effect of these entries was found to be to prejudice the driver with other cab proprietors, to the knowledge of the foreman who made the entries. At the hearing of a summons against the proprietor for defacing the licence, the driver called two cab proprietors who said that they should refuse to employ a driver producing a licence so marked; but no evidence was given that he had actually asked for employment & been refused it:—*Held*: the entries were not made in compliance with above Act, s. 8, but amounted to

PART IV. SECT. 2, SUB-SECT. 2.

a. Regulations touching conduct of licensed owner or driver—Bye-law providing for relation of master & servant—Presumption that such relation exists.]—*CLUTTERBUCK v. CURRY* (1885), 11 V. L. R. 810.—**AUS.**

1. Distinction between vehicles drawn by

animate & inanimate power—Validity of distinction.]—*R. v. FORSLAW* (1910), 15 B. C. R. 322.—**CAN.**

g. Application for licence for hackney carriage—Consideration of matter irrelevant to application—Form of requisition for licence—Whether mandamus will be compelling corporation to hear

application.]—*R. v. DROGHEDA CORPN.* (1915), 49 I. L. T. 80.—**IR.**

h. Power of Board of Police Commissioners—To impose licence fees on owners & drivers of taxicabs.]—*Re MAJOR HILL TAXICAB & TRANSFER CO., LTD. & OTTAWA CORPN.* (1915), 40 O. W. N. 59; 33 O. L. R. 243.—**CAN.**

a defacement of the licence; such defacement was a "matter of complaint" within the meaning of s. 22 of that Act, over which a metropolitan police magistrate had jurisdiction, & there was evidence of loss or damage upon which the magistrate could award compensation to the driver.—*NORRIS v. BIRCH*, [1895] 1 Q. B. 639; 64 L. J. M. C. 91; 72 L. T. 491; 43 W. R. 271; 11 T. L. R. 172; 39 Sol. Jo. 201; 18 Cox, C. C. 123; 15 R. 222, D. C.

SUB-SECT. 3.—IN RESPECT OF VEHICLES.

For relevant statutory references, see Part IV., Sect. 2, sub-sect. 1, *ante*.

74. Light railway car.—The carriages used on a light railway constructed & worked under the powers given by Light Railway Act, 1896 (c. 48), & orders made thereunder are not "omnibuses" or "hackney carriages" within Town Police Clauses Act, 1847 (c. 89), & Town Police Clauses Act, 1889 (c. 14), & do not, therefore, require to be licensed to ply for hire in the streets of a town under Town Police Clauses Act, 1847 (c. 89), s. 37.—*YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC TRAMWAYS v. ELMS*, [1905] 1 K. B. 396; 74 L. J. K. B. 172; 92 L. T. 202; 69 J. P. 67; 53 W. R. 303; 21 T. L. R. 163; 49 Sol. Jo. 117; 3 L. G. R. 139; 20 Cox, C. C. 795, D. C.
Annotation—*Refd.* Blackpool & Fleetwood Tramroad Co. v. Thornton U. D. C. (1905), 94 L. T. 251.

75. Tramcar.—Applts., the Blackpool & Fleetwood Co., were convicted before justices of having used a tramcar as a hackney carriage without having obtained from the local authority a licence for the carriage to ply for hire, contrary to the [local] Act of 1896:—*Held*: (1) the powers granted to the Board of Trade by virtue of the Act of 1896 were not inconsistent with those granted to the local authority by virtue of Tramways Act, 1870 (c. 78), s. 48, & Parts II. & III. of that Act were incorporated with the Act of 1896; (2) the tramcar was a hackney carriage within Town Police Clauses Act, 1847 (c. 89), s. 38, & as there was nothing in Town Police Clauses Act, 1889 (c. 14), s. 3, which prevented the operation of Tramways Act, 1870 (c. 78), s. 48, upon the tramcar as a hackney carriage, the penalty provided by Town Police Clauses Act, 1847 (c. 49), s. 45, for plying for hire without a licence was rightly inflicted upon applts. by the justices.—*BLACKPOOL & FLEETWOOD TRAMROAD CO. v. BAILEY*, [1920] 1 K. B. 380; 89 L. J. K. B. 784; 122 L. T. 275; 84 J. P. 1; 17 L. G. R. 749, D. C.

76. Omnibus—Plying for hire within prescribed distance.—An omnibus co. ran a motor omnibus service between Birmingham & Walsall without their vehicles being licensed by the borough of Walsall, the licensing authority under Town Police Clauses Act, 1847 (c. 89), & Town Police Clauses Act, 1889 (c. 14). On an information against the co. for unlawfully permitting an omnibus to be used as a hackney carriage standing & plying for hire within the borough, without having a licence, the justices found that the omnibus was not used in standing or plying for hire in any street within the prescribed distance in the borough of

Walsall; but that it was used in standing or plying for hire within the prescribed distance, & they convicted deft. co.:—*Held*: the conviction was right, & the appeal should be dismissed.

Since the Town Police Clauses Act, 1889 (c. Town Police Clauses Act, 1847 (c. 89), s. 45, is not to be read as limited to the case of a hackney carriage which, within sect. 38, is standing or plying for hire in a street. By the later Act an omnibus becomes a hackney carriage for any of the purposes of the earlier Act, & if it plies for hire within the prescribed distance without a licence, it is within sect. 45, although it does not stand or ply for hire in a street.—*BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO. v. THOMPSON*, [1918] 2 K. B. 105; 87 L. J. K. B. 915; 119 L. T. 140; 82 J. P. 213; 16 L. G. R. 514, D. C.

Annotations—*Folld.* Crack v. Holt (1927), 136 L. T. 511; Griffin v. Grey Coaches (1928), 45 T. L. R. 109. *Refd.* Sales v. Lake, [1922] 1 K. B. 553.

Motor car licences generally.—See Part V., Sect. 3, sub-sect. 2, *post*.

SUB-SECT. 4.—PLYING FOR HIRE.

For relevant statutory references, see Part IV., 2, sub-sect. 1, *ante*.

77. Waiting to take up passengers—On railway company's premises.—A carriage while on the premises of a railway co., under a contract with them to await the arrival of their trains, for the conveyance of any passenger by railway who chooses to hire it, is "plying for hire" within Metropolitan Public Carriage Act, 1869 (c. 115), s. 4, & is therefore a hackney carriage & must be licensed.—*CLARKE v. STANFORD* (1871), L. R. 6 Q. B. 357; 40 L. J. M. C. 151; 24 L. T. 389; 35 J. P. 662; *sub nom.* R. v. MIDDLESEX JJ., *CLARKE & GOODE v. STANFORD*, 19 W. R. 846.

Annotations—*Folld.* Allen v. Tunbridge (1871), L. R. 6 C. P. 181. *Distd.* Skinner v. Usher (1872), L. R. 7 Q. B. 423. *Appld.* *Ex p.* Kippius, [1897] 1 Q. B. 1. *Folld.* Crack v. Holt (1927), 136 L. T. 511. *Refd.* Bateson v. Oddy (1871), 30 L. T. 712.

78. ———.—A brougham, the owner of which, by agreement with a railway co., attends at their station to await the arrival of trains for the conveyance of any passenger by the railway who chooses to hire it, & whose driver solicits passengers, is a "hackney carriage plying for hire" within Metropolitan Public Carriage Act, 1869 (c. 115), s. 4.—*ALLEN v. TUNBRIDGE* (1871), L. R. 6 C. P. 481; 40 L. J. M. C. 197; 24 L. T. 796; 19 W. R. 849; *sub nom.* ALLEN v. TROWBRIDGE, 35 J. P. 695.

Annotations—*Consd.* Sales v. Lake, [1922] 1 K. B. 553. *Appld.* Armstrong v. Ogle, [1926] 2 K. B. 438.

79. ———.—O. had a cab standing in a railway station within the limits ready for hire, & without a licence:—*Held*: O. was plying for hire, though standing in a railway station or private yard.

A hackney carriage is one which is offered for public hire to anyone who chooses to engage it, though it stands for that purpose in a private yard. It is not necessary that it should be exposed for hire in the public streets.—*BATESON v. ODDY* (1874), 43 L. J. M. C. 131; 30 L. T. 712; 38 J. P. 598; 22 W. R. 703.

Annotation—*Refd.* Sales v. Lake, [1922] 1 K. B. 553.

PART IV. SECT. 2, SUB-SECT. 3.

k. Carts used for hire.—*R. v. BOYD* (1889), 18 O. R. 485.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 4.

l. What is plying for hire.—The essential element in plying for hire, is the holding out of a vehicle as one into which any member of the public

may enter to be carried over any of the distances included in its ordinary course.—*MONTGOMERY v. PARK*, [1926] V. L. R. 534; 48 A. L. T. 96.—*AUS.*

m. ———.—Ordinarily the plying of a motor vehicle for hire means the act of waiting for soliciting custom & that the act is completed as soon as any person hires it.—*MAYAVARAM*

LOCAL FUND OVERSEER v. PAKKIRI-SAMI THEVAN (1927), 1 L. R. 51 Mad. 527.—*IND.*

n. ——— Liability of driver.—*ANANTAPUR DISTRICT BOARD PRESIDENT v. ISMAIL SHAHIB* (1927), 1 L. R. 51 Mad. 512.—*IND.*

o. Horses kept "for hire."—Municipal Act, 1883, s. 510, authorises the

Sect. 2.—Licences: Sub-sect. 4.]

80. ———.]—Applt., C., was a jobmaster, & rented from a railway co. a portion of an office at a station of the co. in the Metropolis. He also paid 9s. a week for the exclusive use of a strip of ground inside the station, opposite another strip, also inside the station, where certain hackney & private carriages were allowed to wait for passengers arriving by rail. On the portion exclusively used by him, C. kept landaus & broughams ready horsed for the convenience of travellers who might wish for vehicles of a superior class. The driver, who was the other applt., had orders not to solicit custom, but to direct any person who wished to hire him to the office, where a ticket was obtained, filled up with the name of the hirer, the date, etc. No licence having been obtained by appls., a summons was taken out under Metropolitan Public Carriage Act, 1869 (c. 115), against C., as the owner of an unlicensed hackney carriage plying for hire, & against L., as the driver of the same:—*Held*: defts. were properly convicted.—*FOINETT v. CLARK* (1877), 41 J. P. 359.

Annotations:—*Consd.* Griffin v. Grey Coaches (1928), 45 T. L. R. 109. *Refd.* Greyhound Motors v. Lambert, [1928] 1 K. B. 322.

81. ——— In private yard.]—*BATESON v. ODDY*, No. 79, *ante*.

82. ———.]—Resp., who was the owner of a motor omnibus for which he had no licence to ply for hire within a certain area, permitted the omnibus to be used in conveying passengers for reward between a private yard within the area & places outside the area. The occupier of the yard was a jobmaster who gave resp. permission to use the yard in return for payment. By resp.'s instructions the driver of the omnibus did not invite or seek for passengers while it was passing along the streets of the area in question. Resp. was summoned under Town Police (Clauses Acts, 1847 (c. 89), s. 45, & 1889 (c. 14), s. 3, for permitting the omnibus to be used as an omnibus plying for hire within the prescribed distance without a licence.

The magistrate dismissed the summons on the ground that, as passengers were taken up only in the private yard & not in the streets, there had been no plying for hire within the prescribed distance:—*Held*: under the above provisions an omnibus was required to have a licence when plying for hire anywhere within the prescribed distance, whether in a public street or not, & the case must be remitted to the magistrate with a direction to convict.—*CRACK v. HOLT* (1927), 136 L. T. 511; 91 J. P. 36; 43 T. L. R. 231; 25 L. G. R. 114; 28 Cox, C. C. 319, D. C.

Annotation:—*Folld.* Griffin v. Grey Coaches (1928), 45 T. L. R. 109.

83. Omnibus starting outside district.—Taking up passengers within district.]—*DEWHURST v. EDDLES* (1893), 9 T. L. R. 494; 57 J. P. Jo. 373, D. C.

84. ——— No fare charged within district.]—An omnibus, which was not licensed to ply for hire within the urban district of M. W. was run to & from S. road & W. in the City of L. & M. W. its starting place within that urban district being

the highway near the E. Hotel at M. W. The omnibus sometimes stood & waited on the highway near the E. Hotel & sometimes commenced the return journey towards L. immediately, & where it so stood & waited passengers entered the carriage for the purpose of the journey towards L. Signs outside the omnibus indicated the destination thereof, & intending passengers, on inquiry, were informed of its destination. Threepence was charged from S. road or W. to M. W. & twopence from the boundary between the urban district of M. W. & L. to S. road or W. No charge was made from M. W. to the boundary or to any point within the urban district:—*Held*: there was evidence that the omnibus was standing & plying for hire within the urban district of M. W.—*R. v. FLETCHER, Ex p. ANSONIA* (1908), 98 L. T. 740; 72 J. P. 249; 6 L. G. R. 583; 21 Cox, C. C. 578, D. C.

Annotation:—*Consd.* Armstrong v. Ogle, [1926] 2 K. B. 438.

85. ——— Passengers having return tickets.—Return journey by omnibus belonging to different proprietor.]—Applt. was the driver of an omnibus, which was not licensed to ply for hire within the borough of Gateshead. While the omnibus was standing within that borough three passengers entered it with return tickets issued to them at Chester-le-Street entitling them to travel from Chester-le-Street to Newcastle-upon-Tyne & back either on the day of issue or at any future time. The tickets entitled the holders to leave or to join the omnibus at any point on its journey. The owner of the omnibus was a member of an assocn. of omnibus proprietors whose vehicles ran regularly & frequently between Chester-le-Street & Newcastle-upon-Tyne. The return tickets were available for return by any omnibus belonging to a member of the assocn., & not merely by one belonging to that member by whom the ticket was originally issued. Separate fares were charged for each passenger, & the assocn. made their own arrangements & adjustments to ensure that each member received the earnings of his own vehicles:—*Held*: inasmuch as the omnibus was being used in Gateshead for the collection & reception of passengers out of the large unknown & indeterminate class of persons who possessed return tickets it was plying for hire within the prescribed limits of the borough of Gateshead, & therefore applt. was properly convicted of an offence under Town Police (Clauses Act, 1847 (c. 89), s. 45.—*ARMSTRONG v. OGLE*, [1926] 2 K. B. 438; 95 L. J. K. B. 908; 135 L. T. 118; 90 J. P. 146; 42 T. L. R. 553; 21 L. G. R. 398; 28 Cox, C. C. 253, D. C.

Annotation:—*Distd.* Leonard v. Western Services, [1927] 1 K. B. 702.

86. ——— Return journey by omnibus belonging to same proprietor.]—Resps., a limited co., were the proprietors of motor omnibuses by which they conducted a regular daily service between two districts through several intermediate districts, the omnibuses being licensed to ply for hire in all these districts except one of the intermediate districts. Applt. entered one of the omnibuses in a terminal district & took a return ticket for a place within the district for

licensing of owners of livery stables & of horses, etc., for hire. A bye-law passed thereunder required every person owning or keeping a livery stable or letting out horses, etc., for hire to pay a licence fee. Deft. was convicted under this bye-law, for that he did keep horses, etc., for hire "without having paid the licence fee:—*Held*: the conviction was in conformity

with both statute & bye-law.—*R. v. SWALWELL* (1886), 12 O. R. 391.—*CAN. p. Restrictions as to soliciting passengers*]—A person licensed to keep a livery stable at a particular locality under a bye-law made by the board of police comrs. for a city, pursuant to Municipal Act, s. 436, but not having a cab license, for which under a separate bye-law other & larger fees were pay-

able, is not at liberty to stand with his cabs & solicit passengers at places, though owned by him, other than at the place mentioned in his licence.—*R. v. GURR* (1892), 21 O. R. 499.—*CAN.*

q. Vehicles waiting for hire.—Standing in streets.—Engagement by hotel company for nominal consideration.]—An hotel co. engaged three vehicles from a liveryman to keep standing at

which the omnibuses were not licenced, the ticket being available for return by any of the omnibuses. On arrival within the latter district applt. left that omnibus, & shortly afterwards she was there received as a passenger in another of the omnibuses, by which she was conveyed back to the district from which she had come:—*Held*: the latter omnibus was not, by reason of applt. having been received therein as a passenger for the return journey, “plying for hire” within Town Police Clauses Acts 1847 (c. 89) & 1889 (c. 14).—*LEONARD v. WESTERN SERVICES, LTD.*, [1927] 1 K. B. 702; 96 L. J. K. B. 213; 136 L. T. 308; 91 J. P. 18; 43 T. L. R. 131; 25 L. G. R. 55; 28 Cox, C. C. 294, D. C.

Annotation:—*Appld.* *Griffin v. Grey Coaches* (1928), 45 T. L. R. 109.

87. No fare charged—Voluntary contributions invited.—Town Police Clauses Act, 1847 (c. 89), s. 45, incorporated in the Public Health Act, 1875 (c. 55), provides that if the proprietor of any carriage permits the same to be used as a hackney carriage plying for hire within a prescribed distance without obtaining a licence he shall be liable to a penalty. By Town Police Clauses Act of 1889 (c. 14), s. 4 “hackney carriage” is to include an omnibus.

Two ordinary omnibuses were run in the following way: It was intimated by several notices upon the omnibuses that the omnibuses were placed at the disposal of the public free of charge, & also notices stating that voluntary contributions to support the omnibuses would be welcomed. There was a conductor on each of the omnibuses to supply change. Many persons using the omnibuses placed money in the boxes, but some did not.

The magistrates upon an information laid before them, held that this was not a “plying for hire” within the meaning of the statute under which the proceedings were taken:—*Held*: this was an attempt to evade the statute, there was a “plying for hire” within the meaning of the statute, & the case must be remitted to the magistrates to rehear & convict.—*COCKS v. MAYNER* (1893), 70 L. T. 403; 58 J. P. 101; 10 T. L. R. 138; 38 Sol. Jo. 100; 17 Cox, C. C. 745; 10 R. 467, D. C.

88. — Within district—Omnibus starting outside district.—*R. v. FLETCHER, Ex p. ANSONIA*, No. 84, *ante*.

89. Vehicle starting from private premises—Passengers going to vehicle.—Applt. was a cab proprietor owning licenced & unlicenced carriages. On June 17, 1899, he drove a landau, licenced as a hackney carriage, to a cabstand opposite the pier at Harwich. A party of nine people wished to drive together, but there was no hackney carriage standing there licenced to carry more than five. Applt. informed them he had a waggonette at his stables which would hold them all. The party went to his stables & there got into an unlicenced waggonette & were driven out by applt.:—*Held*: there was no plying for hire with the waggonette by applt. within the Act.—*CAVILL v. AMOS* (1900), 61 J. P. 309; 16 T. L. R. 156, D. C.

Annotations:—*Appld.* *Sales v. Lake*, [1922] 1 K. B. 553. *Consd.* *Griffin v. Grey Coaches* (1928), 45 T. L. R. 109.

90. — Tickets previously obtained—Passengers with tickets taken up en route.—

their doors constantly ready for immediate use by guests of the hotel, the hotel co. paying one cent per hour from time of attendance until dismissed or engaged for use by a guest; the hotel becoming responsible for the payment by the guests of the fees charged for

such service.—*Held*: the liveryman did not commit a breach of a municipal bye-law which provided that no cab should stand upon any street while waiting for hire or engagement, by keeping these vehicles waiting on the street for the use of the guests

Resps. advertised charabanc excursions to Brighton. Passengers purchased tickets before the time of departure at the offices of resps.’ agents, & arranged at the same time where they were to be picked up. After the number of passengers was ascertained resps. hired a charabanc, the driver of which proceeded to pick up the passengers holding tickets at the places, being public streets, previously arranged as above. He was not authorised to & did not pick up any other persons en route:—*Held*: the charabanc was not plying for hire within para. 17 (2) of the Order (Statutory Rules & Orders (1917—No. 426)), dated May 1, applying the provisions of s. 7 of Metropolitan Public Carriage Act, 1869 (c. 115), which enacts that if an unlicenced stage carriage “plies for hire” there shall be a penalty.—*SALES v. LAKE*, [1922] 1 K. B. 553; 91 L. J. K. B. 563; 126 L. T. 636; 86 J. P. 80; 38 T. L. R. 336; 66 Sol. Jo. 453; 20 L. G. R. 250; 27 Cox, C. C. 170, D. C.

Annotations.—*Distd.* *Armstrong v. Ogle*, [1926] 2 K. B. 438. *Foll.* *Leonard v. Western Services*, [1927] 1 K. B. 702. *Distd.* *Greyhound Motors v. Lambert*, [1928] 1 K. B. 322; *Griffin v. Grey Coaches* (1928), 45 T. L. R. 109.

91. — Tickets not necessarily issued before commencement of journey.—A motor coach which belonged to applts. & carried passengers between London & Bristol, but was not licenced to ply for hire in the Metropolitan Police District, picked up, at certain points within the Metropolitan Police District, passengers who, before the arrival of the coach at those points, but after its departure from the place where it began its journey, had obtained tickets entitling them to travel to destinations outside the Metropolitan Police District. Applts. had exhibited posters in which it was stated that passengers entering a coach in London must obtain tickets at least ten minutes before the arrival of the coach at the booking office:—*Held*: as applts. clearly had contemplated that the coach might start on its journey with vacant seats all or some of which might be filled within the Metropolitan Police District by persons who had not taken tickets before its departure on its journey, it was plying for hire within the Metropolitan Police District within Metropolitan Public Carriage Act, 1869 (c. 115), s. 7, which imposed a penalty on the owner of an unlicenced stage carriage which plies for hire.

Applts. solicited passengers partly by the posters, which contained time-tables & fares, as well as the notice referred to, & partly by the fact that their coaches were seen to pass along the route every day at fixed times.—*GREYHOUND MOTORS, LTD. v. LAMBERT*, [1928] 1 K. B. 322; 97 L. J. K. B. 122; 138 L. T. 269; 91 J. P. 198; 44 T. L. R. 39; 71 Sol. Jo. 881; 25 L. G. R. 547; 28 Cox, C. C. 469, D. C.

Annotation:—*Repld.* *Griffin v. Grey Coaches* (1928), 45 T. L. R. 109.

92. — Within area for which no licence held.—Resps., Grey Coaches, Ltd., were owners of motor charabancs plying at regular hours between London & Brighton but not licenced to ply for hire within the prescribed distance of the county borough of Brighton, & resp. A. was the driver of one of the charabancs. Placards were exhibited at an office in West street, Brighton,

under the above agreement.—*R. v. MAHER* (1905), 6 O. W. R. 247; 10 O. L. R. 102.—*CAN.*

r. Loitering in public street contrary to bye-law.—*MURPHY v. NEILSON* (1901), 3 F. (Ct. of Sess.) 77.—*SCOT.*

t. Regulation of omnibus traffic—

Sect. 2.—Licences: Sub-sects. 4 & 5, A. & B.]

within the prescribed distance, advertising the times of departure of the charabancs. Tickets could be purchased at the office up to ten minutes before the advertised time, but not afterwards. At 8.45 a.m. on Apr. 10, 1928, there being then no charabanc of resp. co. in the garage adjoining the office two police-sergeants purchased return tickets to London. At 9.10 a.m. a charabanc was driven by resp. A. into the yard of the garage & was entered by the police officers & nineteen other passengers, all of whom had previously taken tickets at the office. No tickets were issued on the charabanc, which proceeded to London:—*Held*: the co. had permitted the charabanc to be used for "plying for hire" & the driver had "plied for hire" with the charabanc.—*GRIFFIN v. GREY COACHES, LTD.* (1928), 45 T. L. R. 109; 72 Sol. Jo. 861; 92 J. P. Jo. 799, D. C.

93. Meaning of "street"—Place to which public have right of passage.]—In a district to which Local Government Act, 1858 (c. 98), applied, a piece of ground adjoining a railway station, & belonging to the co., metalled & separated from the highway only by a gutter, was used as an approach to the railway station. Private carriages were allowed to stand there, but no hackney or public carriages, except those of applt.; applt., by agreement with the co., having the sole right of standing carriages there for the purpose of plying for hire. Applt. having been convicted in a penalty for allowing his carriage to ply there for hire without a licence:—*Held*: the place was not a "street" within Towns Police Clauses Act, 1847 (c. 89), s. 3, for the places included by that sect. in the word "street" were places over which the public had a right of passage; & the conviction was therefore wrong.—*CURTIS v. EMBERY* (1872), L. R. 7 Exch. 369; 42 L. J. M. C. 39; 21 W. R. 143.

Annotation:—*Consd.* Jones v. Short (1900), 69 L. J. Q. B. 473.

94. —Private property of railway company.]—A railway co. provided a cabstand upon a piece of ground which was their private property subject to a public right of footway along it, & which was metalled & paved like an ordinary street & formed the side approach to one of their stations:—*Held*: the piece of ground was not a "street" within Towns Police Clauses Act, 1847 (c. 89), s. 3; the driver of a carriage for which a licence under the Act had not been obtained, by standing for hire upon the cabstand, which was within the prescribed distance in a borough, committed no offence under the latter part of sect. 45 of the Act.—*JONES v. SHORT* (1900), 69 L. J. Q. B. 473; 82 L. T. 197; 64 J. P. 247; 48 W. R. 251; 44 Sol. Jo. 211; 19 Cox, C. C. 472, D. C.

Plying off stand.]—*See* Nos. 136–140, *post*.

SUB-SECT. 5.—GRANT AND SUSPENSION OF LICENCE.

A. Outside the Metropolis.

For relevant statutory references, *see* Part IV., Sect. 2, sub-sect. 1, *ante*.

95. Discretion of licencing authority—Exercise must be just & reasonable.]—*R. v. BLACKPOOL CORPN.* (1899), *Times*, Dec. 7.

Annotation:—*Refd.* R. v. Brighton Corpn., *Ex p.* Tilling (1916), 114 L. T. 800.

96.

—*]*—*Mandamus* directed to issue to the district council to hear & determine applications for licences for hackney carriages, the ct. coming to the conclusion that the district council had in refusing certain licences exercised no discretion in the matter, but had acted in accordance with the terms of an agreement, then cancelled, only to grant licences to two hackney carriage proprietors & their drivers.—*R. v. BARRY DISTRICT COUNCIL, Ex p. JONES* (1900), 16 T. L. R. 565, D. C.

97. ———.]—On an application by a co. to a town council for licences to run a service of omnibuses, & for charabancs, the council refused the former on the ground that they had already licenced an existing co. & that, having taken the opinion of the chief constable, they were satisfied that on account of the narrowness of their streets there would be danger & inconvenience to the public if licences were granted to a competing co. The watch committee of the council recommended that of eight charabanc licences, which they thought desirable, four should be granted to applts. The council, however, refused the application for the charabanc licences, & granted the eight licences to the existing co. A rule having been obtained for a *mandamus*, directed to the council, requiring them to hear & determine the application according to law upon the ground that the council had not properly exercised its discretion under Town Police Clauses Act, 1847 (c. 89):—*Held*: as to the omnibus licences that there being nothing in the evidence to show that the council had not exercised a judicial discretion, the rule must be discharged; but as to the charabanc licences, the evidence showed that the council had been influenced by extra judicial & extraneous considerations which had no bearing upon the application, or by reasons not appearing at all, & the rule must be made absolute.—*R. v. BRIGHTON CORPN., Ex p. THOMAS TILLING, LTD.* (1916), 85 L. J. K. B. 1552; 114 L. T. 800; 80 J. P. 219; 32 T. L. R. 239; 14 L. G. R. 776, D. C.

Annotation:—*Appld.* R. v. Farnborough U. C., *Ex p.* Aldershot District Traction Co., [1920] 1 K. B. 231.

98. What may be considered—Traffic conditions.]—*R. v. BRIGHTON CORPN., Ex p. THOMAS TILLING, LTD.*, No. 97, *ante*.

99. ———.]—By Roads Act, 1920 (c. 72), s. 14 (3), "Where, upon application for a licence to ply for hire with an omnibus, the licencing authority either refuses to grant a licence or grants a licence subject to conditions, in either case applt. shall have a right of appeal to the Minister of Transport from the decision of the licencing authority, & the Minister shall have power to make such order thereon as he thinks fit, & such order shall be binding upon the licencing authority. An order made by the Minister under this sub-sect. shall be final & not subject to appeal to any ct., & shall, on the application of the Minister, be enforceable by writ of *mandamus*. . . ."

An omnibus co., desiring to extend to the centre of a city a service which they were running from another town to the tramway terminus in the city, applied to the city licencing authority, which was itself the owner of the tramways, for licences for 100 omnibuses. The licencing authority refused the licences on the ground of the congestion of traffic in the centre of the city & the fact that over part of the proposed route there was no space for an omnibus to pass between the outside tram-

Magistrates empowered to frame timetables—Validity of timetables assigning

special hours & days to different owners of omnibuses.]—*PENROSE v. BRUCE*,

[1927] S. C. (J.) 79, [1927] S. L. T. 581.—*SCOT*.

way rail & the kerb, but did not suggest that competition with their tramways was a ground for refusing the licences. The co. appealed to the Minister of Transport, & he made an order that the licencing authority should issue eighteen licences on an undertaking by the co. to carry only through traffic & not to interfere with the tramways. The licencing authority refused to comply with the order, & the Minister obtained a rule *nisi* for a *mandamus*:—*Held*: though the sub-sect. meant, not that a *mandamus* should issue as of course, but only that in a proper case it might be granted, yet, as it would be open to the licencing authority & to the Minister to refuse the renewal of the licence, if there should be a breach of the undertaking, the rule must be made absolute.—*R. v. BRADFORD CORPN., Ex p. MINISTER OF TRANSPORT* (1926), 135 L. T. 227; 90 J. P. 140; 42 T. L. R. 524; 24 L. G. R. 373, D. C.

100. — Fares to be charged.—By Town Police Clauses Act, 1847 (c. 89), s. 37, the local authority has power to licence hackney carriages to ply for hire within the prescribed distance; & by Town Police Clauses Act, 1847 (c. 89), s. 68, the local authority has power to make bye-laws fixing the rates or fares to be paid for hackney carriages.

By Town Police Clauses Act, 1889 (c. 14), s. 4, various sects. of Town Police Clauses Act, 1847 (c. 89), with regard to the licencing of hackney carriages are made to apply to the licencing of omnibuses; Town Police Clauses Act, 1847 (c. 89), s. 68, giving power to fix rates or fares is, however, not incorporated. Under Town Police Clauses Act, 1889 (c. 14), s. 6, the local authority has power to make a bye-law to provide for the exhibition on some conspicuous part of every omnibus of a statement in legible letters & figures of the fares to be demanded & received from the persons using or carried for hire in such omnibus:—*Held*: a local authority in considering an application for licences for omnibuses to ply for hire in its district is not entitled to take into consideration the fares charged by the proprietors of the omnibuses, & therefore is not entitled to refuse to grant the licences on the ground that the fares charged are excessive.—*R. v. FARNBOROUGH URBAN COUNCIL, Ex p. ALDERSHOT DISTRICT TRACTION CO., [1920] 1 K. B. 231; 89 L. J. K. B. 284; 122 L. T. 283; 83 J. P. 290; 36 T. L. R. 22; 17 L. G. R. 728, D. C.*

Annotation:—**Expld. & Distd.** *R. v. Transport Minister, Ex p. H. C. Motor Works, [1927] 2 K. B. 401.*

101. — — — — ——A co. ran omnibuses along a route from the centre of a city to a place outside of it. The corpn. of the city ran tramways along a portion of the route within the city. The corpn. refused to licence the omnibuses unless the co. would give an undertaking to charge upon the common portion of the routes a fare higher than the tramway fare. The co. appealed under the Roads Act, 1920 (c. 72), s. 14 (3), to the Minister of Transport, who made an order in effect affirming the decision of the corpn. on the same grounds—namely, that it was in the public interest that the undertaking should be given, inasmuch as it would prevent the long distance passengers by the omnibuses from being excluded therefrom by the short distance passengers who were sufficiently provided for by the corpn. tramway, & would also prevent the revenue of that tramway from being unnecessarily diminished. On rules *nisi* for a *certiorari* to bring up the order of the Minister, & for a *mandamus* to him to determine the appeal in accordance with the law, on the ground that he had considered extraneous matter, namely, the

fares to be charged by the co.:—*Held*: the Minister, having dealt with the fares for the purpose of attaining an object of public interest appropriate to his jurisdiction, had not considered extraneous matter, & the rules should be discharged.—*R. v. MINISTER OF TRANSPORT, Ex p. H. C. MOTOR WORKS, [1927] 2 K. B. 401; 96 L. J. K. B. 686; 137 L. T. 451; 91 J. P. 83; 43 T. L. R. 432; 25 L. G. R. 210.*

102. Enforcement—Mandamus.—*R. v. BLACKPOOL CORPN. (1899), Times, Dec. 7.*

Annotation:—**Refd.** *R. v. Brighton Corpn., Ex p. Tilling (1916), 114 L. T. 800*

103. — — — — ——*R. v. BARRY DISTRICT COUNCIL, Ex p. JONES, No. 96, ante.*

104. — — — — ——*R. v. BRIGHTON CORPN., Ex p. THOMAS TILLING, LTD., No. 97, ante.*

105. — — — — ——*R. v. MINISTER OF TRANSPORT, Ex p. H. C. MOTOR WORKS, No. 101, ante.*

106. — — — — — To enforce order of Minister of Transport.—*R. v. BRADFORD CORPN., Ex p. MINISTER OF TRANSPORT, No. 99, ante.*

B. Within the Metropolis.

For relevant statutory references, see Sect. 2, sub-sect. 1, *ante*.

107. Powers of Commissioners of Metropolitan Police—Exercise of power discretionary—To grant licence—Extent of discretion.—Under the regulations dated Dec. 30, 1907, made by the Secretary of State in pursuance of Metropolitan Public Carriage Act, 1869 (c. 115), ss. 6, 11, the Comr. of the Metropolitan Police has a discretion in regard to the granting of a licence for a cab or a state carriage. This discretion is not limited to the excepted cases set out in clauses (a) & (b) of regulation 1, but is a general discretion in regard to all applications.—*R. v. METROPOLITAN POLICE COMR., Ex p. PEARCE (1910), 80 L. J. K. B. 223; 104 L. T. 135; 75 J. P. 85.*

Annotations:—**Folld.** *R. v. Metropolis Police Comr., Ex p. Humphreys, R. v. Metropolis Police Comr., Ex p. Randall (1911), 75 J. P. 486. Overd. R. v. Metropolitan Police Comrs., Ex p. Holloway, [1911] 2 K. B. 1131.*

108. — — — — ——The discretion of the Comr. of the Metropolitan Police in regard to the granting of licences for cabs or stage carriages under the regulations made by the Secretary of State in pursuance of Metropolitan Public Carriage Act, 1869 (c. 115), ss. 6, 11, is not a general discretion to grant or refuse all applications. It is limited to the exceptions contained in clauses (a) & (b) of regulation 1 of the Order of the Secretary of State dated Dec. 30, 1907.—*R. v. METROPOLITAN POLICE COMR., Ex p. HOLLOWAY, [1911] 2 K. B. 1131; 81 L. J. K. B. 205; 105 L. T. 532; 75 J. P. 490; 27 T. L. R. 573; 55 Sol. Jo. 773, C. A.*

109. — — — — — Cab held under hire purchase agreement.—In dealing with applications for proprietors' licences for motor cabs, the Comr. of Police of the Metropolis is not entitled to lay down & act upon a general rule that he will not grant such a licence where appct. holds his cab upon a hire-purchase agreement.—*R. v. METROPOLIS POLICE COMR., Ex p. HUMPHREYS, R. v. METROPOLIS POLICE COMR., Ex p. RANDALL (1911), 75 J. P. 486; 27 T. L. R. 505; 55 Sol. Jo. 726.*

Annotation:—**Consd.** *R. v. Metropolitan Police Comr., Ex p. Holloway, [1911] 2 K. B. 1131.*

110. — — — — — To renew licence—Renewal suspended on ground of misconduct.—The Comrs. of Metropolitan Police have power under 6 & 7 Vict. c. 86, to suspend the issuing of renewals of licences to omnibus drivers & conductors for a period for misconduct during the preceding year.—*Ex p.*

Sect. 2.—Licences: Sub-sect. 5, B. Sects. 3 & 4: Sub-sect. 1.]

MITCHAM (1864), 5 B. & S. 585; 33 L. J. Q. B. 325; 10 Jur. N. S. 1254; 12 W. R. 983; 122 E. R. 949; *sub nom.* R. v. METROPOLITAN POLICE COMRS., 10 L. T. 573; 28 J. P. 438.

111. Whether entry in register conclusive as to ownership.]—A licence for a taxicab was applied for & issued to deft. as the managing director of a limited co., & his name & address were entered in the register of licences of hackney carriages, kept at Scotland Yard, under the headings "Name of Proprietor" & "Address" with the addition of the words "Managing Director" & the name & address of the co. Pltf., a member of the public, was injured by, as he alleged, the negligent driving of the cab, & he brought an action against deft. to recover damages. At the trial pltf. put in a certified copy of the entry in the register for the purpose of proving that deft. being registered as the proprietor of the cab, was liable for the acts of the driver. Deft. tendered evidence to show that he was not the owner or part owner of the cab, & was therefore not liable. The judge rejected the evidence upon the ground that the entry in the register was conclusive as to the liability of deft. as proprietor for the acts of the driver:—*Held*: the register was not conclusive & the evidence was wrongly rejected.—*KEMP v. ELISHA*, [1918] 1 K. B. 228; 87 L. J. K. B. 428; 118 L. T. 246; 82 J. P. 81; 62 Sol. Jo. 174; 16 L. G. R. 17, C. A.

SECT. 3.—PASSENGERS.

See Railway Passenger Duty Act, 1842 (c. 79), s. 15; Town Police Clauses Act, 1847 (c. 89), ss. 51–53, 68; Town Police Clauses Act, 1889 (c. 115), s. 6; London Hackney Carriage Act, 1831 (c. 22), s. 35; London Hackney Carriage Act, 1853 (c. 33), s. 17; & *generally*, CARRIERS, Vol. VIII., pp. 70–130; TRAMWAYS & LIGHT RAILWAYS.

112. Number of passengers—Meaning of stage carriage—Tramcar.]—A tramway car, as used under the Metropolitan Street Tramways Acts, 1869 (c. xciv.) & 1870 (c. clxxiii.), is a stage carriage within the meaning of Hackney & Stage Carriage Acts, & a penalty is incurred by the conductor for allowing a greater number of passengers to be carried than are allowed by the regulations within Railway Passenger Duty Act, 1842 (c. 79), s. 15. The conductor of a tramway car who allows persons beside himself to ride in the end of the car, between the covered compartment & the extreme end, is liable to a penalty under London Hackney Carriages Act (c. 86), s. 33, such being "the place provided for the conductor" within the meaning of that enactment.—*ODELL v. MEE* (1872), 36 J. P. 102.

113. ———.]—By Stage Carriages Act, 1832 (c. 120), s. 5, the term "stage carriage" shall not be deemed to extend to or include any carriage used or employed wholly upon any railway:—*Held*: this means a railway in the ordinary sense of the term, & a tramcar is not excluded from the definition of stage carriage.—*BRIAN v. AYLWARD* (1902), 18 T. L. R. 371, D. C.

114. ———.]—Resp. was summoned under Railway Passenger Duty Act, 1842 (c. 79), s. 15, for unlawfully conveying in, upon, or about

a tramcar, of which he was conductor, a number of passengers in excess of the number which the car was licenced to carry. The car was licenced to carry thirty passengers in the lower compartment & forty-four in the upper compartment. On the occasion complained of the number of passengers in the upper compartment was forty-eight. Both the upper & the lower compartments were covered in. It was admitted that the day in respect of which resp. was summoned was a special occasion within London County Council (Tramways & Improvements) Act, 1913 (c. cii), s. 27. The magistrate held that the word "inside" in that sect. referred both to the lower & upper compartments of a tramcar & accordingly dismissed the summons:—*Held*: the magistrate was wrong & the case must be remitted to him with directions to convict. The upper compartment was no doubt part of the inside of the tramcar so far as related to protection from the weather, but reading the Acts of 1842 & 1913 together it was necessary to treat the inside of a tramcar as correlative with the lower compartment & the outside as correlative with the upper portion. The fact that s. 27 of the Act of 1913 referred to the inside showed that the legislature still contemplated the existence of an outside.—*PIRESSE v. FISHER*, [1915] 1 K. B. 572; 84 L. J. K. B. 277; 112 L. T. 462; 79 J. P. 174; 31 T. L. R. 65; 13 L. G. R. 269, D. C.

115. ——— Motor omnibus below prescribed weight.]—Stage Carriages Act, 1832 (c. 120), s. 5, contained a definition of "stage carriage" which did not extend to any carriage impelled otherwise than by animal power. Railway Passenger Duty Act, 1842 (c. 79), s. 13, provides that no stage carriage shall carry at one time more than a limited number of passengers. In 1869, sect. 5 of the Act of 1832 was repealed.

The Locomotives on Highways Act, 1896 (c. 36), s. 1 (1), provides that certain vehicles propelled by mechanical power & under a certain weight (subsequently increased by statutory Orders) are to be light locomotives; & by clause (b) of that sub-sect. a light locomotive is to be deemed to be a carriage within the meaning of any Act, & if used as a carriage of any particular class it is to be deemed to be a carriage of that class, & the law relating to carriages of that class is to apply accordingly:—*Held*: under these provisions of the Act of 1896, a motor omnibus below the prescribed limit of weight plying by a fixed route between fixed points was a light locomotive, it was to be deemed to be a carriage within any other Act, & inasmuch as it was used as a carriage of the particular class known as a stage carriage, the law relating to carriages of that class applied to it; & consequently, it should not carry a greater number of passengers than was allowed by sect. 13 of the Act of 1842.—*DENNIS v. MILES*, [1924] 2 K. B. 399; 93 L. J. K. B. 1115; 131 L. T. 146; 88 J. P. 105; 40 T. L. R. 613; 68 Sol. Jo. 755; 22 L. G. R. 489; 27 Cox, C. C. 649, D. C.

Meaning of omnibus.]—The bye-laws of an urban district council with respect to omnibuses were made in 1877, before motor vehicles had come into use. The earlier part of bye-law 14 contained a provision that no greater number of persons should be conveyed in "any omnibus" than was there indicated; while the subsequent part of that bye-law & certain other

of the bye-laws contained references to horse omnibuses. On a day in 1927 resp., who was the driver of a motor omnibus plying within the district, carried in his omnibus a greater number of passengers than was authorised by the provision in the earlier part of bye-law 14:—*Held*: that provision applied to motor omnibuses as well as to horse omnibuses, & resp. was liable for a contravention of the bye-law.—*NEAL v. GUY*, [1928] 2 K. B. 451; 97 L. J. K. B. 644; 139 L. T. 237; 92 J. P. 119; 44 T. L. R. 578; 72 Sol. Jo. 368; 26 L. G. R. 452, D. C.

117. — Validity of bye-law — Confirmation of quarter sessions.—Appls. were summoned for having suffered a greater number of passengers to be conveyed than would allow sitting accommodation to each passenger of eighteen inches. The Local Government Board had approved the bye-laws made by the local board to that effect, but they had not been approved by the quarter sessions. The justices convicted, & held the regulations had been properly made in accordance with the general Tramway Act, but the co. contended they were invalid without approval by the quarter sessions or a judge:—*Held*: the justices were wrong, & the confirmation of quarter sessions was necessary.—*WALLASEY TRAMWAY CO. v. WALLASEY LOCAL BOARD* (1883), 47 J. P. Jo. 821, D. C.

118. Where passengers may travel—"Place provided for conductor."—*ODEIL v. MEE*, No. 112, *ante*.

119. — "Inside" — London County Council (Tramways & Improvements) Act, 1913 (c. cii), s. 27.—*PRESSE v. FISHER*, No. 114, *ante*.

120. Duty to carry—Meaning of street or place — Carriage waiting on railway premises—Hire by person not a traveller.—A hackney carriage whilst on the premises of a railway co. by their leave for the accommodation of passengers by their trains, is not "plying for hire" in any "street or place" within Hackney Carriage Acts, & the driver of such carriage cannot under those Acts be compelled to convey any person desirous of hiring it. *Seem*: if the driver consents to be hired, the regulations of Hackney Carriage Acts as to the amount of fare payable will attach.—*CASE v. STOREY* (1869), L. R. 4 Exch. 319; 38 L. J. M. C. 113; 20 L. T. 618; 33 J. P. 470; 17 W. R. 802.

Annotations—*Distd.* *Clarke v. Stanford* (1871), L. R. 6 Q. B. 357. *Consd.* *Skinner v. Usher* (1872), L. R. 7 Q. B. 423. *Distd.* *Ex p. Kippins*, [1897] 1 Q. B. 1. *Refd.* *Allen v. Tunbridge* (1871), L. R. 6 C. P. 481. *Curtis v. Embery* (1872), L. R. 7 Exch. 369; *Crack v. Holt* (1927), 136 L. T. 511.

121. — Driver required to drive on to railway premises.—By London Hackney Carriage Act, 1853 (c. 33), s. 17, "Every driver of a hackney carriage who shall refuse to drive such carriage to any place within the limits of this Act, not exceeding six miles, to which he shall be required to drive any person hiring or intending to hire such carriage," shall be liable to a penalty:—*Held*: the interior of a railway station, although the private property of the railway co., is a "place" within the meaning of the sect.—*Ex p. KIPPINS*, [1897] 1 Q. B. 1; 66 L. J. Q. B. 95; 75 L. T. 421; 60 J. P. 791; 45 W. R. 188; 13 T. L. R. 34; 18 Cox, C. C. 459, D. C.

122. Who is a "person wishing to hire."—Applt. who was the driver of a hackney carriage standing on a stand for hackney carriages, was asked by one B., a driver in the employment of a firm of livery stable proprietors who had received an order which they could not execute, to drive his hackney carriage to a certain place within the prescribed distance in the borough of Bourne-

mouth in order to take a fare to the railway station. The driver of the hackney carriage, however, refused to go, & the justices found that he had no reasonable excuse for refusing to drive to the place to which he was directed to drive:—*Held*: there was evidence upon which the justices could come to the conclusion that B. was the person hiring, or wishing to hire, applt.'s hackney carriage, & as applt. had refused without reasonable excuse to drive to the place to which he was directed by B. to drive, he had committed an offence under Town Police Clauses Act, 1847 (c. 89), s. 53.—*SHEPHERD v. HACK* (1917), 86 L. J. K. B. 1480; 117 L. T. 151; 81 J. P. 210; 15 L. G. R. 597, D. C.

SECT. 4.—FARES.

SUB-SECT. 1.—OUTSIDE THE METROPOLIS.

See Town Police Clauses Act, 1847 (c. 89), ss. 54-57, 66.

123. Amount of—When regulations apply—Driver consenting but not compellable to be hired.—*CASE v. STOREY*, No. 120, *ante*.

124. Order for payment—Constitutes civil debt —Not enforceable by imprisonment.—By Town Police Clauses Act, 1847 (c. 89), s. 66, if any person refuse to pay on demand to any driver of a hackney carriage the fare allowed by the Act, or bye-laws made thereunder such fare may, together with costs, be recovered before a justice as a penalty.

Where justices, on an information in writing, made an order that debt. should pay a fare & costs, & that in case of non-payment he should be imprisoned in default of a sufficient distress:—*Held*: the order was bad, because the fare was "a sum of money claimed to be due & recoverable on complaint to a ct. of summary jurisdiction" within Summary Jurisdiction Act, 1879 (c. 49), s. 6, & was therefore recoverable only in the manner in which "civil debts" are recoverable in a ct. of summary jurisdiction under Summary Jurisdiction Act, 1879 (c. 49), s. 35.—*R. v. KERSWILL*, [1895] 1 Q. B. 1; 61 L. J. M. C. 70; 71 L. T. 574; 59 J. P. 312; 11 T. L. R. 8; 39 Sol. Jo. 62; 18 Cox, C. C. 49; 10 R. 176; *sub nom.* *R. v. TORQUAY J.J.*, 43 W. R. 59, D. C.

Annotations—*Refd.* *R. v. Lewis & Moss* (1896), 71 L. T. 551; *R. v. Gamble*, [1899] 1 Q. B. 305; *Fishwick v. Gyanl*, [1925] 1 K. B. 617. *Mentd.* *R. v. Slade, Ex p. Saunders*, *R. v. London J.J.*, *Ex p. Saunders* (1895), 64 L. J. M. C. 273.

125. Excessive fare—Whether ground for refusing licence.—*R. v. FARNBOROUGH URBAN COUNCIL, Ex p. ALDERSHOT DISTRICT TRACTION CO.*, No. 100, *ante*.

126. — Where offence of demanding committed—Arrival point.—Applt., the driver of a hackney carriage licenced to ply for a hire in the borough of Salford, took up two passengers inside the boundary & drove them to a place 8½ miles beyond it. On arrival he charged them more than the fare fixed by the bye-laws made under the Salford Improvement Act, 1862, which by sect. 2 applies to the borough of Salford & by sect. 309 imposes a penalty on the driver of any hackney carriage taking a fare greater than that to which he is entitled, & by sect. 324 empowers the corpn. to make bye-laws "for fixing the stands of such hackney carriages . . . & the distance to which they may be compelled to take passengers not exceeding three miles beyond the boundary of the borough," & "for fixing the rates or fares . . . to be paid for such hackney carriages . . ." The bye-laws made it com-

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pulsory on a driver to take a passenger any distance not exceeding three miles beyond the boundary & fixed the fare for the first mile & every additional third of a mile. Applt. was convicted by the Salford stipendiary of taking as a fare a sum greater than that authorised by the bye laws:—*Held*: the conviction must be quashed, on the grounds that if there was any offence, it was committed at the arrival point, which was outside the stipendiary's jurisdiction, & the Act conferred no power to make bye-laws covering a distance of more than three miles beyond the borough boundary.—*ELY v. GODFREY* (1922), 126 L. T. 664; 86 J. P. 82; 20 L. G. R. 268; 27 Cox, C. C. 191, D. C.

127. Illumination of dial of taxi-meter—Validity of bye-law.]—Under a local Improvement Act, giving power to make bye-laws for regulating hackney carriages plying for hire & the conduct of owners & drivers thereof, a corp'n. made by a bye-law that: "The owner of every motor hackney carriage shall have fitted on such carriage an efficient lamp solely for the purpose of illuminating the dial of the taximeter whenever it is necessary in such a manner that the amount of a fare recorded can be clearly seen from the inside of the carriage at all times, & every driver shall see that the lamp is properly lighted & adjusted & so kept":—*Held*: the bye-law was not void either for unreasonableness or uncertainty but was a good & valid bye-law.—*DUNNING v. MAHER* (1912), 106 L. T. 846; 76 J. P. 255; 10 L. G. R. 466; 23 Cox, C. C. 1, D. C.

128. Passenger driven beyond bye-law distance—Jurisdiction.]—*ELY v. GODFREY*, No. 126, *ante*.

SUB-SECT. 2.—WITHIN THE METROPOLIS.

See London Hackney Carriage Act, 1853 (c. 33), ss. 4, 7; London Hackney Carriage (No. 2) Act, 1853 (c. 127), s. 14; Metropolitan Streets Act, 1867 (c. 134), s. 26; Metropolitan Public Carriage Act, 1869 (c. 115), s. 15; London Cab & Stage Carriage Act, 1907 (c. 55), s. 1.

129. Amount of—Who is a "person" Child under ten years.]—A child under ten years of age is a "person" within 16 & 17 Vict. c. 127, s. 14, so as to entitle the driver of a hackney carriage to an additional sixpence, where such child is carried in addition to two adult persons.—*NORTON v. JONES* (1863), 2 New Rep. 25; 8 L. T. 211; 27 J. P. 822; 11 W. R. 573.

130. ——— Infant in arms.]—An infant in arms is not a "child" within the meaning of Sched. K. to the Statutory Order No. 426, dated May 1, 1917, made by the Secretary of State in pursuance of the Metropolitan Carriage Act, 1869 (c. 115), & London Cab & Stage Carriage Act, 1907 (c. 55), & therefore need not be paid for as an extra person.—*KEMP v. LUBBOCK*, [1920] 1 K. B. 253; 89 L. J. K. B. 239; 122 L. T. 220; 83 J. P. 270; 36 T. L. R. 21; 17 L. G. R. 720, D. C.

131. ——— Powers of Home Secretary—Validity of order authorising indefinite number of scales of

charge.]—Metropolitan Public Carriage Act, 1869 (c. 115), impowers the Home Secretary to licence hackney carriages in such manner & in such form & subject to such conditions as he may by order prescribe; & also to make regulations for, amongst other things, fixing the rates of fares & for securing the due publication thereof. In pursuance of the power thus conferred upon him, the Home Secretary made an order prescribing a form of licence, which was to contain the rate to be charged for the hire of each carriage per mile & per hour. The order further required that the application for a licence should specify the sums which appct. desired to have inserted in the licence as the rates at which the carriage should ply for hire; that the carriage should be inspected prior to the licence being issued; & that, before plying for hire, the proprietor should affix to the top of the carriage a metal flag with the rates to be charged in accordance with the licence. Penalties were imposed by the Act for breach of the order. Upon a summons against the proprietor of a hackney carriage for non-compliance with the order in respect of the affixing a flag with the fares, the magistrate refused to convict deft., on the ground that the order was not a sufficient compliance with the Act; inasmuch as the Secretary of State had no power to authorise an indefinite number of scales of charge for hackney carriages, but only one scale binding upon all hirers & all proprietors. The ct. reversed his decision.—*BOCKING v. JONES* (1870), L. R. 6 C. P. 29; 40 L. J. M. C. 19; 23 L. T. 739; 35 J. P. 56; 19 W. R. 227, D. C.

132. ——— Duty of driver to exhibit scale of charges.]—*BOCKING v. JONES*, No. 131, *ante*.

SECT. 5.—STANDS AND STOPPING PLACES.

See Town Police Clauses Act, 1817 (c. 89), s. 68; Town Police Clauses Act, 1889 (c. 14), s. 6; Public Health Act, 1925 (c. 71), s. 76; London Hackney Carriages Act, 1843 (c. 86), ss. 29-33; London Hackney Carriage Act, 1853 (c. 33), ss. 12, 13.

133. Stands—Power to direct & regulate—Removal of stand.]—Where the comrs. of pavement within a certain district were authorised by Act of Parliament to direct & regulate the stands of hackney coaches within the district:—*Held*: this gave them power to remove a stand from a street where it occasioned obstructions in the carriage way.—*R. v. RAWLINSON* (1826), 6 B. & C. 23; 9 Dow. & Ry. K. B. 7; 4 Dow. & Ry. M. C. 186; 5 L. J. O. S. M. C. 16; 108 E. R. 361.

Annotation.—*Apld.* *Frost v. Williams* (1838), 7 Ad. & El. 773.

134. ——— Seizure of vehicles—For offence committed.]—By 30 Geo. 2, c. 22, justices of the peace in London are authorised to make regulations respecting carts or cars let to hire. They ordered, that if any cart or car was found in a place not appointed for a standing place, or more carts were there than they allowed, that the owners should be liable to a penalty, & that the carts might be seized & impounded; & also, that no carman should come to the appointed

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■ Stands—Power to direct & regulate—Removal of stand—Applicability to railway station.]—*R. v. JOHNSTONE, Ex p. BREKEN* (1867), 4 W. W. & A'B. 246.

c. ——— Bye-law as to late arrival on stand by public vehicle—Whether unreasonable & ultra vires.]—A bye-

law (57) which makes it an offence for a driver of a public vehicle to arrive late at any public stand, no matter from what cause, held unreasonable & ultra vires.—*Ex p. HALES* (1899), 19 N. S. W. L. R. L. 378; 15 N. S. W. W. N. 153.—**AUS.**

d. ——— Cab-stand interfering with view of Niagara Falls—Discretion of

council.]—*COLBORNE v. NIAGARA FALLS CORPN.* (1885), 9 O. R. 168.—**CAN.**

e. ——— Duty of cabdriver to remain on stand.]—*SHAW v. CROAIL & SONS* (1885), 12 R. (Ct. of Sess.) 1186.—**SCOT.**

f. ————*DURBAN INSPECTOR OF POLICE v. WILLS* (1919), 40 N. L. R. 112.—**S. AF.**

g. ——— Validity of bye-law preventing

places before a given hour, under a penalty; & then they ordered that all the penalties might be levied by distress & sale of the offender's goods.

Pltf. came to an appointed place too early in the morning. Deft. seized his carts & horses, & impounded them until he paid a sum of money:—*Held*: deft. had no right so to do.—*MOLD v. CLITHEROW* (1823), 2 L. J. O. S. K. B. 26.

135. ————.]—A power given by a local Act to the vestrymen of a parish, to "direct & regulate such stands for hackney coaches & chairs as they, in their discretion, shall think fit" within its limits, is not superseded by London Hackney Carriage Act, 1831 (c. 22), although such stands be within the distance of 5 miles from the General Post Office.

The local Act empowers the vestrymen of the parish of St. Marylebone to direct & regulate stands for hackney coaches within that parish. Metropolitan Paving Act, 1817 (c. xxix), s. 65, enacts, that "if any person shall set out, lay or place any coach, cart, wain, wagon, dray, wheelbarrow, handbarrow, sledge, truck, or other carriage, upon any carriage way, except such coaches & chairs as shall be hereafter licenced by the comrs. for regulating & licencing hackney coaches, chariots & chairs, & which stood for hire according to the statutes & bye-laws made for those purposes, it shall be lawful for persons appointed by the comrs., or trustees or other persons having the control of the pavements in any parochial or other districts, without any warrant or other authority than this Act, to seize such coach, etc." By sect. 137 it is declared that the powers conferred by this Act on comrs. & trustees extend to vestrymen and others having the control of the pavements. Pltf. was the licenced proprietor of a cabriolet & horse, which were standing for hire at a stand prohibited by the rules & regulations for the standing of hackney coaches in Oxford Street, set forth & ordered by the vestrymen of St. Marylebone, who have the control of the pavements in that parish. Defts., acting under the employment of the vestrymen, seized the cabriolet & horse:—*Held*: by virtue of the provisions of these Acts they were justified in so doing.—*FROST v. WILLIAMS* (1838), 7 Ad. & El. 773; 2 Nev. & P. K. B. 475; 112 E. R.

136. ———— **Fixing position of stands—Indication from time to time by notice—Validity of bye-law.**—By an Order in Council, the entire area, places, & parts of places comprised within the boundaries of the township of L. were constituted a "district," for the purposes of "Public Health Act, 1848 (c. 63)." Blackpool Improvement Act, 1853, s. 48, empowered the Local Board from time to time to make bye-laws for, amongst other purposes, regulating the conduct of the drivers of hackney carriages, animals, etc., plying within the district, & for fixing the stands of such hackney carriages & animals. The local board made the following bye-laws:—"That the several places

in the district where painted boards shall from time to time be placed by the said local board to distinguish them as stands, shall be the stands for such number of carriages, horses, asses & mules, etc., as shall be mentioned on such boards; & no driver of any such carriage, etc., shall place the same on any other than some one of such stands, or shall ply for hire in any of the streets or places within the said district, except on one of such stands, under a penalty not exceeding 40s." A licenced driver was convicted of "plying for hire" off a stand. On appeal the justices stated that it was proved to their satisfaction that applt. was driving a licenced carriage on the beach within the district; that he got off & spoke to some people & took them up, having then passed a stand:—*Held*: (1) the bye-law was valid, although it did not on the face of it specify the exact localities where the stands were to be; (2) applt. was properly convicted of "plying for hire" off a stand.—*BLACKPOOL LOCAL BOARD OF HEALTH v. BENNETT, SAME v. KENYON* (1859), 4 H. & N. 127; 23 J. P. 198; 7 W. R. 382; 157 E. R. 784; *sub nom.* *BENNETT v. BLACKPOOL LOCAL BOARD OF HEALTH, KENYON v. SAME*, 28 L. J. M. C. 203; *sub nom.* *R. v. BENNETT, SAME v. KENYON*, 32 L. T. O. S. 299.

Annotation:—*Generally*, *Mentd.* *R. v. Lundie* (1861), 31 L. J. M. C. 157.

137. ———— **Necessity for readiness of drivers of first two motor cabs.**—The penalty provided by London Hackney Carriages Act, 1853 (c. 86), s. 19, applies to a breach of a regulation duly made by the Comr. of Police under London Hackney Carriages Act, 1850 (c. 7), s. 4, requiring that the drivers of the first two motor cabs at the appointed standings must be with their cabs & be ready to be hired at once by any person.—*WILLINGALE v. NORRIS*, [1909] 1 K. B. 57; 78 L. J. K. B. 69; 99 L. T. 830; 72 J. P. 195; 25 T. L. R. 19; 7 L. G. R. 76; 21 Cox, C. C. 737, D. C.

Annotation:—*Mentd.* *Hart v. Hudson*, [1928] 2 K. B. 629.

138. ———— **What amounts to plying off stands.**—*BLACKPOOL LOCAL BOARD OF HEALTH v. BENNETT, SAME v. KENYON*, No. 136, *ante*.

139. ———— **Plying on private property.**—By London Hackney Carriages Act, 1843 (c. 86), s. 33, a penalty is imposed on the driver of a hackney carriage who shall ply for hire elsewhere than at some standing appointed for the purpose:—*Held*: the plying for hire within this sect. must be in some public street or place; & the driver of a hackney carriage, who plied for hire on an open unenclosed piece of private ground, to which the public had access, but over which there was no public right of way, was not within the sect.—*SKINNER v. USHER* (1872), L. R. 7 Q. B. 423; 41 L. J. M. C. 158; 26 L. T. 430; 36 J. P. 693; *sub nom.* *R. v. METROPOLITAN POLICE MAGISTRATE, SKINNER v. USHER*, 20 W. R. 659.

Annotations:—*Consd.* *Ex p. Kippins*, [1897] 1 Q. B. 1. *Refd.* *Birmingham & Midland Motor Omnibus Co. v. Thomson* (1918), 119 L. T. 110.

140. ————.]—The urban sanitary authority of E. made a bye-law that every driver

hackney carriages standing other than on specified stands.]—*MACKENZIE v. SOMERVILLE* (1900), 3 F. (Ct. of Sess.) (J.) 4. —*SCOT*.

h. *Meaning of "stopping place."*—*"Stopping-place"* means the place indicated by a stopping sign.—*Re PROSPECT DISTRICT COUNCIL BYE-LAW, Ex p. HILL*, [1926] S. A. S. R. 326.—*AUS*.

k *Applicability of bye-law regulating stopping.*—A bye-law of the city of Adelaide provides that, except in case of accident or for other per-

mitted reasons, no driver of any motor omnibus shall stop the same at a nearer distance than sixty feet to any intersection of those streets within the city in which a tramway is laid.—*Held*: where a tramway is laid along one only of two intersecting streets the bye-law applies.—*ARNOLD v. HUGHES*, [1926] S. A. S. R. 360.—*AUS*.

l. *Omnibuses plying beyond city boundary—Magistrates empowered to frame bye-laws regulating time & place of departure—Validity of prohibition of stoppage between terminus in city &*

city boundaries.—In exercising the powers conferred by Glasgow Police Act, 1866, s. 243, the magistrates committee had no authority under the sect. to prohibit by bye-laws motor omnibuses which plied from fixed termini within the city to places beyond its boundaries from stopping to take up outward bound passengers at stopping-places other than the termini within the city.—*SCOTTISH GENERAL TRANSPORT CO. v. GLASGOW CORPN.*, [1928] S. C. 248; [1928] S. L. T. 258.—*SCOT*.

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of a hackney carriage when plying for hire shall station his carriage on one of the appointed stands. In the city of E. there was a square in front of a hotel which was not inclosed, & where the public could pass freely except when the hotel keeper's carriages stood there, as the square was let with the hotel, & used for the hotel cabs standing when plying for hire:—*Held*: the driver, when plying for hire there, incurred the penalty imposed by the bye-law, as this place was part of the street.—*MARKS v. FORD* (1880), 45 J. P. 157, D. C.

SECT. 6.—LIGHTS.

See Part III., ante.

SECT. 7.—TOLLS.

See HIGHWAYS, Vol. XXVI., pp. 346, 347, Nos. 745–750.

SECT. 8.—RIGHTS AND LIABILITIES OF OWNERS.

Liability of owner to public.]—See MASTER & SERVANT, Vol. XXXIV., pp. 140, 141, Nos. 1101–1110.

Liability as common carrier.]—See CARRIERS, Vol. VIII., p. 6, Nos. 7, 8.

Whether driver servant of owner—As regards the public.]—See MASTER & SERVANT, Vol. XXXIV., pp. 34, 35, Nos. 111–120.

As regards the owner.]—See MASTER & SERVANT, Vol. XXXIV., pp. 35, 36, Nos. 121–128.

Fraudulent conversion of earnings.]—See CRIMINAL LAW, Vol. XV., p. 937, Nos. 10,328, 10,329.

Whether driver servant of manager of company—Manager registered as proprietor.]—See MASTER & SERVANT, Vol. XXXIV., p. 36, No. 130.

Agreements between owners & drivers—Payment of money claimed on account of earnings—Necessity for writing.]—See LONDON HACKNEY CARRIAGES ACT, 1843 (c. 86), s. 23.

SECT. 9.—OFFENCES.

141. Incorporation of statutes—Breach of regulations made under London Hackney Carriage Act, 1850 (c. 7), s. 4—Penalty imposed by London Hackney Carriage Act, 1853 (c. 33), s. 19.]—*WILLINGALE v. NORRIS*, No. 137, *ante*.

142. ——— Penalty imposed by London Hackney Carriages Act, 1843 (c. 86), s. 29.]—*WILLINGALE v. NORRIS*, No. 137, *ante*.

143. Concealment of number plate.]—A bye-law made under the Town Police Clauses Act, 1847 (c. 89), provided that “every proprietor of a hackney carriage” should cause the number of the licence granted to him in respect of that carriage to be marked on a plate fixed on the outside of the carriage, & should not cause or suffer the plate to be concealed from public view “while such carri-

age may stand, ply, or be driven for hire.” By sect. 38 of the Act every wheeled carriage “used in standing or plying for hire in any street” shall be deemed to be a hackney carriage within the meaning of the Act.

The proprietor of a hackney carriage licenced under the Act, having received an order for a carriage to take a person from his house to a railway station, sent the licenced carriage direct from the yard with the number plate concealed from view by a board placed over it, & in that condition the carriage was driven from the house of the person who had given the order to the railway station along a street within the district to which the bye-law applied. The proprietor having been convicted by justices of an offence against the bye-law:—*Held*: the carriage, whilst it was so being driven along the street, was a “hackney carriage.”—*HAWKINS v. EDWARDS*, [1901] 2 K. B. 169; 70 L. J. K. B. 597; 84 L. T. 532; 65 J. P. 423; 49 W. R. 487; 17 T. L. R. 430; 45 Sol. Jo. 417; 19 Cox, C. C. 692, D. C.

Annotation.—Refd. Birmingham & Midland Motor Omnibus Co. v. Thomson (1918), 119 L. T. 140.

144. Touting in public thoroughfare—While standing on private land.]—By a bye-law it was provided: “A person shall not in any public thoroughfare in the district tout for a hackney carriage.”

Resp. stood on a triangular piece of land at a street corner touting for hackney carriages, having received permission from the owners of the piece of land to stand on it for the purpose of his business. The land where resp. stood was always open for the public to pass over, & the street, including the triangular piece of land, was made by the Corp'n. of B. & had been declared a public highway:—*Held*: the fact that the title to the piece of land on which he stood belonged to private persons did not prevent resp. from infringing the bye-law.—*DERHAM v. STRICKLAND* (1911), 104 L. T. 820; 9 L. G. R. 528; *sub nom.* *DERHAM v. STRICKLAND*, 75 J. P. 300, D. C.

145. Obstructing inspector of hackney carriages.]—*PERCIVAL (R.), LTD. v. SPENCE* (1926), 90 J. P. Jo. 749, D. C.

146. Omnibuses run by corporation—Without requisite consent of Minister of Transport—Injunction.]—The Stockton-on-Tees corp'n. in their Act of 1919 were authorised to run omnibuses both within & without the borough. In the latter case, however, under s. 36 of the Act the consent of the Board of Trade, now the Minister of Transport & the local road authority, was necessary. One of such outside routes was between Port Clarence & West Hartlepool, & for this the necessary consents were obtained, which expired on Feb. 14, 1927. Prior to this, application was made to the Minister for a renewal of his consent, & a local inquiry was ordered, as a result of which such consent was refused.

The corp'n., however, believing that such consent being once given could not be withheld, continued to run their omnibuses on this route. This action was then commenced by the railway whose line ran near to this route, & pltf. now moved for an interlocutory injunction to restrain the corp'n. from continuing to run omnibuses thereon or on

PART IV. SECT. 9.

*m. Stoppage of motor bus near intersection of streets—Tramway in the streets.]—*A bye-law of the city of Adelaide provides that, except in case of accident or for other permitted reasons, no driver of any motor omnibus shall stop the same at a nearer distance than sixty feet to any inter-

section of those streets within the city in which a tramway is laid:—*Held*: where a tramway is laid along one only of two intersecting streets the bye-law applies.—*ARNOLD v. HUGHES*, [1926] S. A. S. R. 360.—*AUS.*

*n. Touting in public thoroughfare—Railway station—Whether within bye-law.]—**R. v. VERRAL* (1889), 18 O. R.

117.—CAN.

*o. Right to arrest for breach of bye-law.]—*A breach of a city bye-law for driving an omnibus without the licence required thereby, does not justify the summary arrest of the offender, even though the officer arresting may have believed that he was acting legally & in the discharge

any other route in respect of which the consent of the Minister had not been obtained:—*Held*: inasmuch as under s. 36 of the Act of 1919 the consent of the Minister of Transport was necessary to enable the corpⁿ. to run their omnibuses, the running of buses upon the route in question after the expiration of such consent, was an infringement of the sect.

In these circumstances it was the duty of the ct. to give effect to the sect. & to say that an injunction must be granted.—*A.-G. v. STOCKTON-ON-TEES CORPN.* (1927), 91 J. P. 172; 25 L. G. R. 489, C. A.

Plying for hire without licence.—*See* Part IV., Sect. 2, sub-sect. 4, *ante*.

Unauthorised indorsement of licence.—*See* Part IV., Sect. 2, sub-sect. 2, *ante*.

Employing unlicensed driver—Service of summons.—*See* PUBLIC HEALTH, Vol. XXXVIII., p. 176, No. 186.

Plying for hire off stands.—*See* Part IV., Sect. 5, *ante*.

Readiness for hire on stands.—*See* No. 137, *ante*.
Overcrowding.—*See* Part IV., Sect. 3, *ante*.

Refusal to carry passengers.—*See* Part IV., Sect. 3, *ante*.

Fares—Charging excessive fares.—*See* No. 126, *ante*.

— **Duty to exhibit scale of charges.**—*See* No. 131, *ante*.

Lighting offences.—*See* Part III., *ante*.

Driving & riding offences.—*See* Part II., Sect. 2, sub-sect. 5, *ante*.

Motor car offences.—*See* Part V., Sect. 3, sub-sect. 4, *post*.

Drunkenness while in charge of carriage.—*See* INTOXICATING LIQUORS, Vol. XXX., p. 100, No. 764.

Mandamus to compel issue of summons.—*See* CROWN PRACTICE, Vol. XVI., p. 278, No. 906.

Jurisdiction of committee of town council—Offences against bye-laws.—*See* LOCAL GOVERNMENT, Vol. XXXIII., p. 61, No. 376.

Part V.—Locomotives and Motor Cars.

SECT. 1.—IN GENERAL.

See Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 38; Locomotives Act, 1898 (c. 29), s. 17 (1).

Motor Car (International Circulation) Act, 1909 (c. 37); Motor Car (International Circulation), (Amendment) Order 1921, No. 1574.

147. What is "locomotive"---Tricycle propelled by steam.—A tricycle was capable of being propelled by the feet of the rider, or by steam as an auxiliary, or by steam alone. There was no smoke, nor escape of steam into the air, nor anything to indicate that it was being worked by steam, nor anything which could frighten horses, or cause danger to the public using the highway beyond any ordinary tricycle. The weight was about two hundredweight, & the tires of the wheels about one & a half inches in width. The tires being of indianrubber, no injury would be done to the surface of the road by working the machine on it:—*Held*: the tricycle was a "locomotive" within the definition in Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 38, & was therefore subject to the rules & regulations for the use of locomotives on highways prescribed by sects. 28 & 29 of that Act, by Locomotives Act, 1861 (c. 70), s. 12, & Locomotives Act, 1865 (c. 83), ss. 3, 4, 7.—*PARKYNS v. PRIEST* (1881), 7 Q. B. D. 313; 50 L. J. M. C. 118; 45 J. P. 751; 30 W. R. 13, D. C.
Annotation—*Appld.* *Waters v. Eddison Steam Rolling Co.*, [1914] 3 K. B. 818.

148. — Steam roller.—*ALLMAN v. GRIST* (1891), 55 J. P. Jo. 721, D. C.

149. — — — — ——*WATERS v. EDDISON STEAM ROLLING CO., LTD.*, No. 170, *post*.

— **"Light locomotive."**—*See* Sect. 3, sub-sect. 1, *post*.

— **"Motor car."**—*See* Sect. 3, sub-sect. 1, *post*.

150. What is "wagon"---Scuffles.—A bye-law under Locomotives Act, 1898 (c. 29), s. 6 (1), that a locomotive drawing two or more loaded or unloaded wagons shall not travel on any highway without a communication cord from the rearmost

wagon to such locomotive, & a person in the rear of such wagons to signal to the driver to stop, etc., involving the employment of three men in the case of one, & six men in the case of two locomotives so travelling is applicable to locomotive plough engines when two of them & their gear are closely following one another on a highway, in which case the proviso to sect. 5 (1) of the Act allows the employment of five men altogether, two in driving each engine & one to accompany them & give assistance. *Seemle*, the set of scuffles which travel on three wheels & the set of harrows which travel on four wheels, & are drawn by a plough engine along a highway are, when on wheels, severally vehicles, & fall within the definition "wagon" in sect. 17 of the Act.—*WILLIAMS v. WOOD* (1914), 78 J. P. 221; 12 L. G. R. 646, D. C.

Annotation—*Consd.* *Smith v. Pickering*, [1915] 1 K. B. 326.
151. — Harrows.—*WILLIAMS v. WOOD*, No. 150, *ante*.

152. — Threshing machine.—By Locomotives Act, 1898 (c. 29), s. 2, "The weight unloaded of every wagon drawn or propelled by a locomotive shall be conspicuously & legibly affixed thereon"; & by sect. 17, "The expression 'wagon' includes any truck, cart, carriage, or other vehicle":—*Held*: in order to constitute a thing a "wagon" within sect. 2 of the Act, it is not necessary, that it should be capable, or used for the purpose, of carrying loads, & that the expression includes an ordinary threshing machine.—*SMITH & SONS v. PICKERING*, [1915] 1 K. B. 326; 84 L. J. K. B. 262; 112 L. T. 452; 79 J. P. 118; 31 T. L. R. 55; 13 L. G. R. 175; 24 Cox, C. C. 570, D. C.

Whether carriage within Customs & Inland Revenue Act, 1888 (c. 8).—*See* REVENUE, Vol. XXXIX., pp. 238, 239, Nos. 126, 127, 140.

SECT. 2.—HEAVY LOCOMOTIVES.

SUB-SECT. 1.—IN GENERAL.

See Locomotives Act, 1861 (c. 70); Locomotives Act, 1865 (c. 83); Highways & Locomotives

of his official duty.—*KELLY v. BARTON*, *KELLY v. ARCHIBALD* (1895), 26 O. R. 608; *affd.*, 22 A. R. 522.—*CAN.*

p Variance between conviction &

information.]—*R. v. DUGGAN* (Ont.) (1901), 21 C. L. T. 35.—*CAN.*

q. Conviction under invalid bye-law—Chief of police given absolute dis-

cretion as to licences.]—*R. v. S.* (1913), 23 W. L. R. 613; 3 W. W. R. 1126; 10 D. L. R. 616; 18 B. C. R. 116; 21 Can. Crim. Cas. 184.—*CAN.*

Sect. 2.—Heavy locomotives: Sub-sects. 1, 2 & 3.]

(Amendment) Act, 1878 (c. 77); Locomotives Act, 1898 (c. 29).

153. What is heavy locomotive—Locomotive in fact emitting smoke—Though designed not to emit smoke.]—HINDLE & PALMER v. NOBLETT, No. 169, *post*.

Light locomotive distinguished.]—See Sect. 3, sub-sect. 1, *post*.

Excessive weight & extraordinary traffic.]—See HIGHWAYS, Vol. XXVI., pp. 460 *et seq.*

SUB-SECT. 2.—REGISTRATION AND LICENCING.

See Locomotives Act, 1898 (c. 29), ss. 9–11, 17 (1), 18 (3).

154. Right to licence—Discretion of County Council to refuse.]—R. v. MIDDLESEX COUNTY COUNCIL (1898), 15 T. L. R. 14, D. C.

155. What vehicles exempted—General test—User of vehicle.]—A traction engine belonging to applts. was used by them on a highway for the removal of night soil from Nottingham to certain neighbouring farmers for the purpose of manuring their fields. The night soil was given by the Nottingham corpn. to applts. who sold it to the farmers at prices varying according to the distance it had to be taken. The traction engine was not licenced by the county council & the prescribed fee had not been paid by applts.:—*Held*: although applts. were acting as sellers of the night soil & as haulage contractors, the traction engine was nevertheless being used by them for an “agricultural purpose,” & was therefore exempt from being licenced under Locomotives Act 1898 (c. 29), s. 9 (1).

It is the use to which the locomotive is put that is the real test as to whether it should be exempt from licence.—*COLE BROTHERS v. HARROP* (1915), 85 L. J. K. B. 494; 113 L. T. 1013; 79 J. P. 519; 31 T. L. R. 599; 13 L. G. R. 1223, D. C.

156. — Steam tramway engines.]—The steam engines authorised by statute to be used on tramways are not locomotives within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 32, & therefore, do not require to be licenced by the county authority.—*BELL v. STOCKTON, ETC. TRAMWAY CO.* (1887), 51 J. P. 801; 3 T. L. R. 511, D. C.

157. — Locomotive used for agricultural purposes—Locomotive let out for hire.]—A locomotive which is sometimes let out by its owner to farmers for the purpose of carrying straw & manure for use in farming operations, & which is sometimes used by the owner himself for the purpose of carrying for hire straw & manure to be used exclusively on farms, & is not used for any other purpose, is within the exemption in Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 32, as being “a locomotive used solely for agricultural purposes,” & may be so used without a licence from the county authority.—*ELLIS & CO. v. HULSE* (1889), 23 Q. B. D. 24; 58 L. J. M. C. 91; 60 L. T. 836; 53 J. P. 598, D. C.

*Annotations:—**Appld.* *Murch v. Baker* (1891), 55 J. P. 583; *Cole v. Harrop* (1915), 85 L. J. K. B. 494. *Refd.* *Hoddell v. Parker* (1910), 79 L. J. K. B. 759.

158. — Traction engine drawing threshing machine.]—M. was the owner of a locomotive traction engine, which was drawing a threshing machine used on one farm along the highway

to another farm, where it was also to be used, & he claimed exemption from licence duty on the ground that the traction engine was used “solely for agricultural purposes”:—*Held*: the justices were wrong in convicting, & M. was within the exemption, & was not using the locomotive as a common carrier.—*MURCH v. BAKER* (1891), 55 J. P. 583, D. C.

159. — Threshing engine hauling wheat to mill.]—A threshing engine was let out on hire by applts. to a farmer to thresh wheat & to haul the wheat, when threshed, in trucks to a mill to be ground. There was no evidence as to whether the farmer had sold the wheat or whether it was to be returned to the farm when ground. The trucks were the property of applts.:—*Held*: the engine, when being used for hauling the wheat to the mill, was not being used for an agricultural purpose, & was therefore at the time not an agricultural locomotive within the exemption in Locomotives Act, 1898 (c. 29), s. 9 (1).—*HODDELL v. PARKER*, [1910] 2 K. B. 323; 79 L. J. K. B. 759; 103 L. T. 42; 74 J. P. 315; 8 L. G. R. 690, D. C.

*Annotations:—**Appld.* *Cole v. Harrop* (1915), 85 L. J. K. B. 491. *Refd.* *L. C. v. Lee*, [1914] 3 K. B. 255.

160. — Locomotive drawing produce to market.]—By Locomotives Act, 1898 (c. 29), s. 9 (1), every locomotive shall be licenced by a county council, provided that this enactment is not to apply to, among other things, any agricultural locomotive. By sect. 17 the expression “agricultural locomotive” includes any locomotive the property of one or more owners or occupiers of agricultural land employed solely “for the purposes of their farms,” & not let out on hire:—*Held*: a locomotive drawing to market trollies laden with farm produce intended for sale was employed for the purpose of a farm within the meaning of sect. 17.—*LONDON COUNTY COUNCIL v. LEE*, [1914] 3 K. B. 255; 83 L. J. K. B. 1373; 111 L. T. 569; 78 J. P. 396; 30 T. L. R. 525; 12 L. G. R. 733; 24 Cox, C. C. 388, D. C.

161. — Traction engine hauling manure for sale to farmers.]—*COLE BROTHERS v. HARROP*, No. 155, *ante*.

162. — Locomotive intended for agricultural use.]—A locomotive, which had previously been used for haulage purposes, was purchased by a person who intended to use it solely for agricultural purposes. It could not however be used therefore without alteration. The locomotive was driven by applt. along a highway from the place where it was purchased to the purchaser's premises without being licenced. It was not on that occasion being used for haulage purposes. Applt. was convicted of using on a highway a locomotive without being licenced:—*Held*: any locomotive which was actually being used or which was intended by the owner to be used for any of the excepted purposes set out in Locomotives Act, 1898 (c. 29), s. 9 (1), did not require to be licenced under that sect., & that therefore applt. had been wrongly convicted.—*DOBSON v. JENNINGS*, [1920] 1 K. B. 242; 89 L. J. K. B. 281; 122 L. T. 62; 83 J. P. 259; 17 L. G. R. 769, D. C.

*Annotation:—**Appld.* *Williams v. Morgan* (1921), 85 J. P. 191.

163. — Locomotive drawing agricultural locomotive to be repaired.]—Resp. was in charge

PART V. SECT. 2, SUB-SECT. 2.
r. Validity of bye-law—Authorising alteration by agreement of rates fixed by statute.]—A bye-law passed

under R. S. O. 1887, c. 184, s. 436, for licensing express waggons, authorised the alteration by agreement of the rates fixed thereby:—*Held*: beyond the powers conferred by the statute,

& a conviction under the bye-law for refusal to pay charges was quashed.—*R. v. LATHAM* (1891), 24 O. R. 616. —CAN.

of a heavy locomotive under steam, drawing behind it another heavy locomotive along a highway. No licence or permit under Locomotives Act, 1898 (c. 29), s. 9 had been taken out in the county. The locomotive under steam was one that belonged to resp.'s father, who had used it for twenty years solely for agricultural purposes. The locomotive that was being hauled had been used on a farm for agricultural purposes & had been purchased by resp., & he intended to use it solely for agricultural purposes, but it was out of repair, & when the alleged offence took place, was being hauled to a place where it could be repaired. On a summons against resp. under Locomotives Act, 1898 (c. 29), s. 9, for using the locomotive under steam on a highway without a licence, the justices, without finding whether resp. was or was not a farmer, found that resp.'s locomotive was an agricultural locomotive, & that the locomotive under steam was being used solely for an agricultural purpose when it was hauling resp.'s agricultural locomotive to be repaired, & they dismissed the summons. Locomotives Act, 1898 (c. 29), s. 9 (1), exempts agricultural locomotives from requiring to have a licence, & by Locomotives Act, 1898 (c. 29), s. 17 (1), "The expression 'agricultural locomotive' includes (a) any locomotive used solely for threshing, ploughing, or any other agricultural purpose, (b) any locomotive, the property of one or more owners or occupiers of agricultural land, employed solely for the purposes of their farms, & not let out on hire":—*Held*: even if resp. was not a farmer, the locomotive under steam was being used for an agricultural purpose as it was being used to take an agricultural locomotive to be repaired, & the justices' decision must be affirmed.—*WILLIAMS v. MORGAN* (1921), 125 L. T. 543; 85 J. P. 191; 19 L. G. R. 409; 27 Cox, C. C. 37, D. C.

164. Construction of bye-law — User within county — Steam roller passing through.—Highways & Locomotives Act, 1878 (c. 29), s. 32, provides that "A county authority may . . . make . . . bye-laws for granting annual licences to locomotives used within their county." By a bye-law made by the London County Council under that section it was provided that "No locomotive shall be used on any highway within the county of London until an annual licence for the use of the same shall have been obtained from the council by the owner thereof":—*Held*: a steam roller which was not at the time being employed in road making, but was merely passing through the county to a destination outside, was being "used within the county" within the meaning of the sect. & the bye-law.—*LONDON COUNTY COUNCIL v. WOOD*, [1897] 2 Q. B. 482; 66 L. J. Q. B. 712; 77 L. T. 312; 61 J. P. 567; 46 W. R. 143; 13 T. L. R. 559; 41 Sol. Jo. 739; 18 Cox, C. C. 639, D. C.

Annotation:—*Refd.* *Waters v. Eddison Steam Rolling Co.*, [1914] 3 K. B. 818.

SUB-SECT. 3.—CONSTRUCTION, WEIGHT AND LOAD OF LOCOMOTIVES AND WAGONS.

See Turnpike Roads Act, 1822 (c. 126), ss. 12-14, 16; Locomotive Act, 1861 (c. 70), ss. 4, 12;

Locomotives Act, 1865 (c. 83), s. 7; Highways & Locomotives (Amendment) Act, 1873 (c. 77), ss. 28, 30; Highways & Locomotives (Amendment) Act, 1878 (c. 77); Local Government Act, 1888 (c. 41), ss. 3 (8), 35 (4) (a), 40 (8), 41 (4) (a); Locomotives on Highways Act, 1896 (c. 36), s. 7; Locomotives Act, 1898 (c. 29), ss. 1, 2, 4, 14.

165. Construction of wheels—Shoes—Whether bearing surface must be continuous.—By Locomotive Act, 1861 (c. 70), s. 3, every locomotive used on a highway & drawing any wagon, shall have the wheels cylindrical & smooth soled, or used with shoes or other bearing surface of a width not less than 9 inches. An engine was so used, which had its wheels fitted with shoes 4½ inches broad, placed parallel to one another, & 3 inches apart, & bolted obliquely across the whole breadth of the wheel; so that when a length of less than 9 inches of one shoe was in contact with the ground the deficiency was made up by the length of contact of the next shoe with the ground:—*Held*: the bearing surface not being continuous, the engine was not in conformity with the Act.—*STRINGER v. SYKES* (1877), 2 Ex. D. 240; 46 L. J. M. C. 139; 36 L. T. 152; 41 J. P. 296; 25 W. R. 273.

Annotations:—*Folld.* *Body v. Jeffery* (1878), 3 Ex. D. 95. *Refd.* *Edmunds v. Savin* (1878), 26 W. R. 755.

166. —————A locomotive was used on a highway, having the tires of the two driving wheels 18 inches wide. Upon the tires were strips or shoes 9½ inches in width, measured across the tire parallel to the axis of the wheel, & 3 inches broad & 1 inch thick. The shoes were placed alternately on each edge of the tire, and in the centre they touched & overlapped one another by about 1½ inch. There was thus always a bearing surface of at least 9 inches in width on the road:—*Held*: no shoes or bearing surface would comply with the statute unless they were similar to the tires of the wheels prescribed, viz., uniform smooth-surface bands of the width of 9 inches at least round the whole circumference of the wheels; these bands must be continuous & unbroken, save in so far as the joints of the material used might render perfect continuity impossible, & the engine in question did not comply with Locomotive Act, 1861 (c. 70), s. 3.—*BODY v. JEFFERY* (1878), 3 Ex. D. 95; 47 L. J. M. C. 69; 38 L. T. 68; 42 J. P. 121; 26 W. R. 356.

Annotation:—*Refd.* *Edmunds v. Savin* (1878), 26 W. R. 755.

See, now, Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 28 (4).

167. ———— What are shoes—Question of fact.—Notwithstanding the dicta of the judges in *Stringer v. Sykes*, & *Body v. Jeffery*, Nos. 165, 166, *ante*, the question of what are "shoes" within Locomotive Act, 1861 (c. 70), s. 3, is a question of fact to be determined by the justices.—*EDMUNDS v. SAVIN* (1878), 26 W. R. 755.

168. Locomotive must consume own smoke—Prosecution—Burden of proof—On defendant.—In prosecuting a person for unlawfully using a locomotive not consuming, as far as practicable, its own smoke, contrary to Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 30, the burden of proof that it does so consume its own smoke lies on deft.—*PITT RIVERS v. GLASSE* (1891), 55 J. P. 663; 7 T. L. R. 438, D. C.

PART V. SECT. 2, SUB-SECT. 3.
t. *Validity of bye-law—Regulating width of tyres—Wrong standard of measuring loads carried adopted.*—*PAGE v. KING* (1912), 13 C. L. R. 529.—*AUS.*

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a. *Discrimination against residents.*—*R. v. PIPE* (1882), 1 O. R. 43.—*CAN.*

b. —.]—A bye-law provided that the width of the tyres of the vehicle of every cart, dray, wagon,

lorry, or other vehicle of the same class, used on any country road should be regulated in proportion to the number of wheels & the weight of the load, according to a scale therein set forth. The scale made no provision

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Sect. 2.—Heavy locomotives: Sub-sects. 3, 4 & 5.
Sect. 3: Sub-sect. 1.]

169. ——— Temporary or accidental cause.]

—Applts. were charged by resp. with using motor engines on a highway which did not consume so far as practicable their own smoke, contrary to Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 30. The motor engines had emitted an excessive quantity of smoke & steam while in charge of applts. on a highway. Evidence was given that the motor engines were so constructed that no smoke or visible vapour was emitted therefrom except from some temporary or accidental cause, & this evidence was not contradicted on the part of resp. The justices were of opinion that the excessive emission of smoke & steam from the motor engines was due not only to the carelessness of applts., but also to the fact that the motor engines did not consume so far as practicable their own smoke; & further, they were not satisfied that such emission was due to any temporary or accidental cause within Locomotives on Highways Act, 1896 (c. 36), s. 1:—*Held*: as the justices had not found as a fact that the motor engines were so constructed that no smoke or visible vapour was emitted therefrom except from any temporary or accidental cause, Locomotives on Highways Act, 1896 (c. 36), s. 1, did not apply, & applts. were properly convicted under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 30.—*HINDLE & PALMER v. NOBLETT* (1908), 99 L. T. 26; 72 J. P. 373; 6 L. G. R. 825, D. C.

Annotation — *Consd. Evans v. Nicholl* (1909), 100 L. T. 496.
 ————.]—See Sect. 3, sub-sect. 1, *post*.

170. Weight & name of owner must be affixed—Application to steam roller.]—By Locomotive Act, 1861 (c. 70), s. 12, the weight of every locomotive, & the name of the owner or owners thereof, shall be conspicuously & legibly affixed thereon; & any owner not having affixed such weight & such name shall, upon conviction thereof before two justices, forfeit a penalty:—*Held*: a steam roller is a locomotive within the meaning of the above enactment.—*WATERS v. EDDISON STEAM ROLLING CO., LTD.*, [1914] 3 K. B. 818; 83 L. J. K. B. 1550; 111 L. T. 805; 78 J. P. 327; 30 T. L. R. 587; 12 L. G. R. 1232, D. C.

SUB-SECT. 4.—CONDITIONS OF, AND RESTRICTIONS ON USE.

See Locomotive Act, 1861 (c. 70), s. 6; Locomotives Act, 1865 (c. 83), ss. 3, 4; Locomotives Act, 1898 (c. 29), ss. 3, 5, 6, 8, 16.

171. Provision of attendants—Person able to assist horses—May be person leading horse & cart.]—Locomotives Act, 1865 (c. 83), s. 3 which, as amended by Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 29, requires one of the three persons employed to conduct a steam locomotive on a public highway to precede such locomotive on foot by twenty yards, & in case of need to assist horses or carriages drawn by

horses, in passing the same, is not the less complied with because such person, whilst preceding the locomotive on foot, leads a horse & cart of his own.—*DAVIS v. BROWNE* (1879), 48 L. J. M. C. 92; 40 L. T. 557; 43 J. P. 416.

172. ——— Locomotive not exceeding five tons.]

—By virtue of the provisions of Locomotives on Highways Act, 1896 (c. 36), as affected by Motor Car Act, 1903 (c. 36), s. 12, & the regulations of 1904 made by the Local Government Board under the latter Act, the obligation imposed by Locomotives Act, 1898 (c. 29), s. 5 (1) (b), to have three men in attendance on a locomotive, not being a steamroller, only applies where the locomotive unladen exceeds 5 tons.—*EVANS v. NICHOLL*, [1909] 1 K. B. 778; 78 L. J. K. B. 428; 100 L. T. 496; 73 J. P. 154; 25 T. L. R. 239; 7 L. G. R. 386; 22 Cox, C. C. 70, D. C.

173. ——— Locomotive drawing two or more wagons—Person to travel in rear—Validity of bye-law.]—*WILLIAMS v. WOOD*, No. 150, *ante*.

174. ——— ———.]—Applt. was in charge of, & was the driver of a locomotive, travelling on a highway & drawing three wagons & no more, & there was no cord or other efficient means of communication extending from the rearmost wagon to the locomotive. By Locomotives Act, 1898 (c. 29), s. 5 (1), two men had to be employed in attending to such a locomotive, & a third man had to accompany it in order to assist persons with horses. By a local bye-law made in 1913 under Locomotives Act, 1898 (c. 29), s. 6 (1), "A person in charge of a locomotive drawing two or more unloaded wagons shall not cause or suffer the locomotive to travel on any highway without having (a) a cord or other efficient means of communication extending from the rearmost wagon to such locomotive, & (b) a person who shall . . . travel in the rear of such wagons. Such last-mentioned person shall signal to the driver of such locomotive to stop or drive to the side of the highway when it shall be necessary. . . ." Local Government (Emergency Provisions) Act, 1916 (c. 12), s. 11 (1), substituted for Locomotives Act, 1898 (c. 29), s. 5 (1), sect. 25 (1) of Local Government (Scotland) Act, 1908 (c. 62). Applt. was convicted of infringing the bye-law by having no cord or other efficient means of communication from the rearmost wagon to the locomotive:—*Held*: although by the Act of 1908, as the locomotive was not drawing more than three wagons, applt. was not bound to have a third man at the rear, yet, as the duties of a third man could now be performed by the second man & as the first part of the bye-law was severable from the second part & was not repugnant to the Act of 1908 & was not unreasonable, that part of the bye-law was valid, & applt. was rightly convicted, whether the second part of the bye-law was or was not *ultra vires*.—*MORGAN v. ENNION* (1920), 123 L. T. 399; 84 J. P. 205; 18 L. G. R. 401, D. C.

175. ——— Two plough trains travelling together.]

—*WILLIAMS v. WOOD*, No. 150, *ante*.

176. Speed—Locomotives Act, 1865 (c. 83), s. 4—Application to railway trains running through

in the case of two-wheeled vehicles for loads exceeding 60 cwt., & in the case of four-wheeled vehicles for loads exceeding 10 tons:—*Held*: the bye-law was equal in operation in the cases of the vehicles to which it applied & it had been validly made within the before-mentioned section.—*Re TUAPEKA COUNTY COUNCIL BYE-LAW* (1914), 33 N. Z. L. R. 1347.—N.Z.

c. Construction of wheels—Spikes

projecting causing damage to road.]—*MILNE & CO. v. MACLENNAN*, [1902] 4 F. (Ct. of Sess.) (J.) 79; 39 Sc. L. R. 641; 10 S. L. T. 93.—SCOT.

PART V. SECT. 2, SUB-SECT. 4.

d. Validity of bye-law—Using bridge—Bye-law as to crossing at owner's risk.]—*McMILLAN v. PORTAGE LA PRAIRIE CORPN.* (1896), 11 Man. L. R. 216.—CAN.

e. ——— Alternative methods of measurement of timber carried—Bye-law unreasonable & ultra vires.]—*HUNTER v. McLEAN* (1907), 27 N. Z. L. R. 231.—N.Z.

f. Provision of attendants—Person able to assist horses—Whether boy of thirteen years old within statute.]—*SMITH v. WOOD* (1882), 10 R. (Ct. of Sess.) (J.) 31.—SCOT.

g. Speed—Heavy Motor Car (Scol-

street.]—The S. railway co. obtained the leave of parties interested in the soil of a highway & in streets of a town adjoining their terminus, & laid rails thereon & ran their railway engines & carriages over such street to a place beyond their terminus. No express power so to use the highway was given by any statute:—*Held*: the Locomotives Act, 1865 (c. 83), s. 4, applied, & the co. could not go at a greater speed than two miles an hour, this being a case of driving a locomotive along a public highway within the meaning of that Act.—*LONDON & SOUTH WESTERN RY. CO. v. MYERS* (1881), 45 J. P. 731, D. C.

177. — Application to locomotive owned by Crown.]—By Locomotives Act, 1865 (c. 83), power is given to local authorities to make regulations as to the speed, not in any case to exceed two miles an hour, at which locomotives may pass through the place subject to their jurisdiction; & by s. 4 it is provided that, subject to those regulations, it shall be not lawful to drive any such locomotive along any turnpike road or public highway at a greater speed than four miles an hour, or through any city, town, or village at a greater speed than two miles an hour:—*Held*: in the absence of any express mention of the Crown in the Act, the sect. did not apply to a locomotive owned by the Crown & driven by a servant of the Crown on Crown service.—*COOPER v. HAWKINS*, [1904] 2 K. B. 164; 73 L. J. K. B. 113; 89 L. T. 476; 68 J. P. 25; 52 W. R. 233; 19 T. L. R. 620; 17 Sol. Jo. 691; 1 L. G. R. 833, D. C.
Annotation:—*Consd.* *Chare v. Hart* (1918), 88 L. J. K. B. 833.

178. Using bridge—What amounts to—Wagons drawn across by ropes.]—*DAWSON v. CRUIT* (1884), 48 J. P. Jo. 148, D. C.

179. Number of unloaded wagons—Bye-law—Application to servant of Crown.]—The rule that the Crown is not bound by a statute unless expressly named, or unless it so appears by necessary implication, applies to a servant of the Crown when acting within the scope of his authority. Where, therefore, a County Council, under Locomotives Act, 1898 (c. 36), s. 6, which empowered them to make bye-laws prohibiting or restricting the use of locomotives on highways, but contained no reference therein to the Crown, made a bye-law that "A person in charge of a locomotive on any highway shall not use the locomotive to draw more than three unloaded wagons with or without any wagon solely used for carrying water for such locomotive," & a civilian driver of a locomotive, hired by the Army Service Corps & used in His Majesty's service, acting under the directions of a warrant officer of that corps, drew five unloaded wagons on a public highway, & in so driving, knocked down a lamp-post, it was held that he could not be convicted of an offence against the bye-law.—*CHARE v. HART* (1918), 88 L. J. K. B. 833; 120 L. T. 443; 83 J. P. 54; 17 L. G. R. 233, D. C.

180. Provision of communication cord—Validity of bye-law.]—*MORGAN v. ENNION*, No. 171, ante.

Excessive weight & extraordinary traffic.]—See *HIGHWAYS*, Vol. XXVI., pp. 460-475, Nos. 1762-1885.

land) *Order*, 1905, Art. 7.]—*AULD v.*

Adam, 235.—*SCOT.*

h. Collision between motor cycle & traction engine—Lights of traction engine not sufficiently far apart in breach of statute—Liability for negli-

gence.]—*TAIT v. TROTTER & SONS*, [1917] S. C. 378; 51 Sc. L. R. 298; [1917] 1 S. L. T. 172.—*SCOT.*

PART V. SECT. 3, SUB-SECT. 1.
k. Application of Highways Act, s. 54, to actions for damages for negligence.]—*HUGHES v. WATKINS & Co.*,

Liability for tolls.]—See, generally, *HIGHWAYS*, Vol. XXVI., pp. 343-349, Nos. 716-765.

Lights.]—See *Road Transport Lighting Act*, 1927 (c. 37).

SUB-SECT. 5.—LIABILITIES OF OWNER TO THIRD PERSONS.

Liability for damage to bridges.]—See, generally, *HIGHWAYS*, Vol. XXVI., pp. 571-588, Nos. 2631-2782.

Liability for nuisance.]—See *HIGHWAYS*, Vol. XXVI., pp. 430-432, Nos. 1496-1511.

Liability of owner for negligence of hirer.]—See *BAILMENT*, Vol. III., p. 115, No. 383.

Liability of owner for acts of servant.]—See, generally, *MASTER & SERVANT*, Vol. XXXIV., pp. 123 *et seq.*

SECT. 3.—LIGHT LOCOMOTIVES AND MOTOR CARS.

SUB-SECT. 1.—IN GENERAL.

See *Locomotives on Highways Act*, 1896 (c. 36); *Motor Car Act*, 1903 (c. 36).

181. Distinguished from heavy locomotive—Engine consuming own smoke—Emission of smoke from temporary or accidental cause.]—*Highways & Locomotives (Amendment) Act*, 1878 (c. 77), s. 30, which prohibits under a penalty the using on a highway of a locomotive not constructed on the principle of consuming its own smoke, or not consuming, so far as practicable, its own smoke, contemplates only the case where smoke is made by the engine in the process of combustion of the fuel used in propelling the vehicle, & does not apply to the case of a locomotive whose engine is a smokeless engine & is so constructed that no smoke can be emitted therefrom except by the driver's negligence; & therefore does not apply to the case where there is an emission from the locomotive of smoke not made by the engine but caused by the negligence of the driver in supplying an excessive quantity of lubricating oil to the machinery. A petrol motor omnibus belonging to applts., while being driven along the highway by applt.'s driver, was emitting considerable quantities of smoke smelling of burnt oil. The omnibus exceeded 2 tons in weight, but was under 5 tons in weight unladen; its engine was a smokeless engine, & the smoke so emitted was not made by the locomotive engine, but was caused through the negligence of the driver in supplying an excessive quantity of lubricating oil to the working parts of the machinery, & no smoke or visible vapour could be emitted from the engine except by reason of the driver's negligence. Upon a summons against applts. under *Highways & Locomotives (Amendment) Act*, 1878 (c. 77), s. 30, for using on the highway a locomotive which did not consume, so far as practicable, its own smoke:—*Held*: as the motor omnibus was under 5 tons in weight, & the engine was a smokeless engine & was so constructed that no smoke or visible vapour could be emitted therefrom except by reason of the driver's negligence, the omnibus was a light

[1927] 3 D. L. R. 302; 60 O. L. R. 448.—*CAN.*

l. —.]—*CARLINO v. ZIMBLARTE*, [1927] 2 D. L. R. 945; 60 O. L. R. 269.—*CAN.*

m. Right to recover damages for injuries—Plaintiff's car not licenced.]—The fact that a motor car is being

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Sect. 3.—Light locomotives and motor cars: Sub-sects. 1, 2 & 3.]

locomotive within Locomotives on Highways Act, 1896 (c. 36), s. 1, as extended to heavy motor cars not exceeding 5 tons in weight by Article 3 of Heavy Motor Car Order, 1904, & was thereby exempted from the operation of Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 30, & applts. had therefore committed no offence under sect. 30.—*STAR OMNIBUS CO. (LONDON) LTD. v. TAGG* (1907), 97 L. T. 481; 71 J. P. 352; 23 T. L. R. 488; 51 Sol. Jo. 467; 5 L. G. R. 808; 21 Cox, C. C. 519, D. C.

182. — — — — —.] — In order that a mechanically propelled vehicle should be exempt from Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 30, as being a "light locomotive" within Locomotives on Highways Act, 1896 (c. 36), s. 1, it is necessary that it should be "so constructed that no smoke or visible vapour is emitted therefrom, except from any temporary or accidental cause;" but if it is so constructed the mere circumstance that on a particular occasion it does emit smoke does not bring it within the first-mentioned sect.—*R. v. WILHAM, Ex p. ROWCLIFFE* (1907), 96 L. T. 712; *sub nom. R. v. WILBRAHAM, Ex p. ROWCLIFFE*, 71 J. P. 336; 5 L. G. R. 764, D. C.

*Annotations.—***Expld.** *Hindle & Palmer v. Noblett* (1908), 72 J. P. 373. **Refd.** *Star Omnibus Co. (London) v. Tagg* (1907), 97 L. T. 481.

183. — **Weight under five tons.]—***EVANS v. NICHOLL*, No. 172, *ante*.

184. — **Weight under seven tons—"Heavy motor car."]** —By Article 4, clause 5, of the Heavy Motor Car Order, 1904, which came into operation on Mar. 1, 1905, a heavy motor car, the weight of which unladen exceeds 5 tons but does not exceed 7 tons, which has been registered before Sept. 1, 1904, & which was in use at the commencement of the regulations, may on complying with the procedure prescribed in the Article be registered anew.

A vehicle which was propelled by other than animal power, & which in fact weighed 6 tons 18 cwts., was in Dec. 1903 improperly registered as a motor car under the Motor Car (Registration & Licensing) Order, 1903; it was in use at the commencement of the regulations in the Heavy Motor Car Order, 1904, & it was registered anew under that order, but more than six months after the commencement of the same. It was being used on a highway, drawing a trailer, the combined unladen weight of both being 9 tons. Upon an information charging that the vehicle was a "locomotive" & was not licenced as such under Locomotives Act, 1898 (c. 39), s. 9:—*Held*: clause 5 of Article 4 deals with the car only

& not with the trailer, & the effect of the clause was that a heavy motor car up to 7 tons in weight unladen may be re-registered under the Article if it fulfils the conditions that it was registered before Sept. 1, 1904, it was in use at the commencement of the regulations, & it has been re-registered either within or after the expiration of six months from the commencement of the regulations, & consequently the vehicle in question was properly re-registered as a heavy motor-car & was not a "locomotive."—*PILGRIM v. SIMMONDS* (1911), 105 L. T. 241; 75 J. P. 427; 9 L. G. R. 966; 22 Cox, C. C. 579, D. C.

185. What is "motor car"—Bath chair propelled by electricity.]—A vehicle used as a bath chair or an ambulance, propelled by electricity with one-quarter horse power, weighing 2½ cwt., & travelling at an average speed of about 2 miles an hour, is a motor car within Motor Car Act, 1903 (c. 36). Consequently the vehicle must be registered under the Act & the driver of the vehicle must be licenced.—*ELIENSON v. PARKER* (1917), 117 L. T. 276; 81 J. P. 265; 33 T. L. R. 380; 61 Sol. Jo. 559; 15 L. G. R. 531, D. C.

186. What is "electrically propelled" vehicle—Finance Act, 1926 (c. 22), Sched. I. para. 5.]—A vehicle propelled by electricity generated by an internal combustion engine on the vehicle is an electrically propelled vehicle within clause 5 of the First Schedule to the Finance Act, 1926 (s. 23), & is therefore not subject to the higher duty imposed upon a vehicle mechanically propelled otherwise than by electricity.—*TILLING-STEVENS MOTORS, LTD. v. KENT COUNTY COUNCIL* (1929), 45 T. L. R. 249, H. L.; *revsq.*, [1929] 1 Ch. 66, C. A.

Whether carriage within Customs & Inland Revenue Act, 1888 (c. 8).]—*See* REVENUE, Vol. XXXIX., pp. 238, 239, Nos. 126, 140.

SUB-SECT. 2.—REGISTRATION AND LICENCING.

See Motor Car Act, 1903 (c. 36), ss. 3, 20 (1); Roads Act, 1920 (c. 72), s. 6, sched. III.; Finance Act, 1922 (c. 17), s. 15; Road Vehicles (Registration & Licensing) Order, 1924; Statutory Rules & Orders, No. 1462.

187. Heavy motor car — Re-registration—Heavy Motor Car Order, 1904 (Statutory Rules & Orders, 1904, p. 522) Article 4.]—*PILGRIM v. SIMMONDS*, No. 184, *ante*.

188. Manufacturer's licence—Duty to renew without notice.]—When under Motor Car Act, 1903 (c. 36), s. 2 (b), a general identification mark is assigned to a manufacturer of or dealer in motor cars, for use as therein specified, it is the duty of the manufacturer or dealer on the expiration

operated on a public highway without the licence required by Vehicles Act, 1924, c. 42, does not preclude the owner or driver of it from recovering damages for injuries caused the car or himself by the negligence of the driver of another car.—*MILLER v. BRITISH AMERICAN OIL CO. (Sask.)*, [1927] 2 W. W. R. 519.—**CAN.**

PART V. SECT. 3, SUB-SECT. 2.

n. Necessity for licence—Omnibus starting outside district—Taking up passengers within district.]—*PASCOE v. ECCLES* (1916), 18 W. A. L. R. 69.—**AUS.**

o. — — — — — **No fare charged within district.]—***HARDY v. SMITH*, [1919] S. R. Q. 41.—**AUS.**

g. — — — — — **Griggs, [1925] S. A. S. R. 345.—AUS.**

q. — — — — — **R. v. REEVES (1882), 1 O. R. 490.—**CAN.****

r. — — — — — **HODSON'S PIONEER MOTOR SERVICE, LTD. v. SAYERS, [1927] N. Z. L. R. 655.—**N.Z.****

t. — — — — — **WHEELER v. SMITH, [1927] N. Z. L. R. 69.—**N.Z.****

a. — **Member of Royal Air Force driving car on superior officer's order.]—***PIRIE v. McFARLANE* (1925), 36 C. L. R. 170.—**AUS.**

b. — **Authority conferred on police commissioners to licence owners.]—**Municipal Act, R. S. O. 1887, c. 184, s. 436, empowers the police comrs. of a city to regulate & licence the owners of omnibuses, etc. The comrs. of a city passed a bye-law enacting that no person or persons should drive or own any omnibus without being

licensed to do so.—*Held*: the authority conferred on the comrs. was to licence owners, & not drivers; & therefore a conviction of a driver for driving without a licence was bad.—*R. v. BUTLER* (1892), 22 O. R. 462.—**CAN.**

c. — **Effect of failure to obtain one.]—**A mere failure to obtain a licence does not deprive the driver of any right of action he would otherwise have against any person who injures him by negligence.—*GODFREY v. COOPER, HART v. COOPER, WARBURTON v. COOPER* (1920), 51 D. L. R. 455; 17 O. W. N. 318, 46 O. L. R. 565.—**CAN.**

d. — — — — — **The owner of an automobile is not deprived of his remedy by action for damage due to the negligence of the owner of another automobile, by the fact that he has**

of the annual licence to renew the licence & to pay the further fee of £3 as therein provided, without any notice being given to him by the local authority that the licence has expired. No such notice is necessary, & if after the expiration of the licence & before it is renewed by the payment of the further fee, the car is used on a public highway, the person so using it commits the offence of using the car without being registered.—*CALDWELL v. HAGUE* (1914), 84 L. J. K. B. 543; 112 L. T. 502; 79 J. P. 152; 13 L. G. R. 297; 24 Cox, C. C. 595, D. C.

Rate of duty.—See REVENUE, Vol. XXXIX., p. 239, Nos. 139, 140.

Liability for penalty.—See REVENUE, Vol. XXXIX., pp. 239, 240, Nos. 141-145.

Liability of licensing authority—Libel contained in registration book.—See LIBEL & SLANDER, Vol. XXXII., p. 184, No. 2269.

SUB-SECT. 3.—CONSTRUCTION AND USE.

See Locomotives on Highways Act, 1896 (c. 36), ss. 2, 3; Motor Car Act, 1903 (c. 36), s. 20 (1).

Motor Cars (Uses & Constructions) Amendment Order, 1925, Article II; Road Transport Lighting Act, 1927 (c. 37).

189. Brakes—What constitute two independent brakes—"Cutting off" engine.—Motor Cars (Use & Construction) Order, 1904, Article 2 (4), which requires that a motor car, within that order, should have two independent brakes, is not complied with by the provision of a band brake & by the fact that if the engine is "cut off" the machinery & wheels are locked as effectively as they could have been by another independent brake.—*WILMOTT v. SOUTHWELL* (1908), 99 L. T. 839; 72 J. P. 491; 25 T. L. R. 22; 7 L. G. R. 8, D. C.

190. — — — Fly-wheel brake.—Appl. caused a steam motor car which exceeded two tons in weight unladen & had a reversible engine

to be used on a highway. The only efficient brake other than the reversible engine was applied by means of a band which was brought to bear upon the periphery of the fly wheel of the engine, the braking power being transmitted from the fly wheel through the piston crank shaft & driving chain of the car to the back axle, & when the engine was out of gear, or if there happened to be a breakage of any of the machinery common to the fly-wheel brake & the engine, the fly-wheel brake could not operate as a brake nor could the engine be reversed so as to operate as a brake. Appl. having been convicted of causing the motor car to be used on the highway without having a brake independent of the engine:—*Held*: the conviction was right inasmuch as the motor car did not have two independent brakes within the meaning of Motor Cars (Use & Construction) Orders, 1904, 1911, 1913, for if anything went wrong with one brake the other would be put out of action. The Orders required that there should be two independent brakes in the sense that one should work notwithstanding that the other could not, & that each should be able to work regardless of the other.—*CANNON v. JEFFORD*, [1915] 3 K. B. 477; 84 L. J. K. B. 1897; 113 L. T. 701; 79 J. P. 478; 31 T. L. R. 489; 13 L. G. R. 944, D. C.

Annotation—*Consd.* *Bowen v. Wilson*, [1927] 1 K. B. 507.

191. — — — Brakes operating on same brake drum—Motor cycle.—A motor cycle had two brakes, a hand brake & a foot brake, operating on the same brake drum on the rear wheel:—*Held*: it had "two independent brakes" within Motor Cars (Use & Construction) Order, 1904, Article II (4), in that the brake drum was part of the wheel & not of the brake. *BOWEN v. WILSON*, [1927] 1 K. B. 507; 96 L. J. K. B. 183; 136 L. T. 310; 91 J. P. 3; 43 T. L. R. 77; 70 Sol. Jo. 1161; 25 L. G. R. 50; 28 Cox, C. C. 298, D. C.

192. — — — On vehicles drawn by tractor.—A tractor belonging to applts., which was drawing

not taken out a licence to permit him to operate his car—*SAMPSON v. ROBERTSON*, [1925] 1 D. L. R. 624; 57 N. S. R. 198.—**CAN.**

e. — — Reasonability of bye-law requiring any person driving motor vehicles through borough to have borough licence.—*ROBERTSON v. BROSNAHAN*, [1917] N. Z. L. R. 557.—**N.Z.**

f. — — Validity of bye-law—*Re ADELAIDE CORPN., Ex p. MITCHELL*, [1925] S. A. S. R. 179.—**AUS.**

g. Necessity for registration—Use of general identification mark—When testing cars or demonstrating to "probable purchaser."—*KROGER v. RYAN*, [1921] V. L. R. 613.—**AUS.**

h. — — — — ——*TAYLOR v. KELLITT*, [1922] V. L. R. 804.—**AUS.**

k. — — — Whether delegated power ultra vires—*GERAGHTY v. PORTER*, [1917] N. Z. L. R. 551.—**N.Z.**

l. — — — Unregistered & unlicensed car—Unlawful use of highway—Liability of city corporation.—Pltf., who was driving his motor car at night along a highway which was in a city, but in the outskirts, & not much travelled, ran against a water-pipe which had been left at the side of the road, & sued the city corpn. for damages for the injury done to his car:—*Held*: pltf.'s car was not registered & licensed, as required by Motor Vehicles Act, R. S. B. C. 1911, c. 169, s. 9, & he was, therefore, making an unlawful use of the highway, & could not recover.—*GREIG v. MERCORPN.* (B. C.) (1913), 24 W. L. R. 328 11 D. L. R. 852. **CAN.**

m. — — Necessity to show number

plate—Effect of not showing it.—*Vehicles Act, c. 38, 1912 (Sask.), s. 5*, which provides that "no motor vehicle shall be used or operated upon any public highway which shall not have been registered under this Act, or which shall not display thereon the number plate as prescribed by this Act," is a bar to the recovery of compensation for damages suffered by an automobile because of the negligence of a municipality in allowing an obstruction to remain on a public street, if the automobile was not carrying at the time the number plate prescribed by the Act.—*ETTER v. SASKATOON CORPN.*, [1917] 3 W. W. R. 1110; 10 Sask. L. R. 115; 39 D. L. R. 1.—**CAN.**

n. — — "Owner" failing to register—Right to recover damages caused by negligence of another on highway—Whether owner of automobile a "trespasser."—*HALPIN v. GRANT SMITH & CO. & McDONNELL, LTD.*, [1920] 2 W. W. R. 753; 53 D. L. R. 381; 15 Alta. L. R. 537.—**CAN.**

o. Unlicensed person bond fide learning to drive—Who is "driver."—A licensed driver who is not in fact driving a motor car, but is sitting beside an unlicensed person who is bond fide learning to drive on a public highway, is to be deemed to be the driver of the motor car for the purposes of Motor Car Act, 1915, s. 10 (1).—*LUCAS v. ROSS*, [1925] V. L. R. 184; 46 A. L. T. 156; 31 Argus L. R. 85.—**AUS.**

p. Whether metal plate at back of omnibus descriptive of vehicle—Or limitation of number of passengers.—

GOON v. BULL, [1925] S. A. S. R. 292.—**AUS.**

q. Revocation of licence—Insufficient notice given to licensee of revocation.—*PARSONS v. GLENELG CORPN.*, [1925] S. A. S. R. 167.—**AUS.**

r. — — Validity of absolute discretion conferred on licensing officer.—*Re GLENELG CORPN. BYE-LAW No. XXIII., Ex p. MADIGAN*, [1927] S. A. S. R. 85.—**AUS.**

s. — — Reasonability of bye-law.—*R. v. MCNEIL* (Alta.), [1925] 1 D. L. R. 227; 43 Can. Crim. Cas. 99; [1921] 3 W. W. R. 908.—**CAN.**

a. Motor omnibus not duly licensed—Liability of owner permitting plying for hire.—The owner of a motor omnibus who permits the same to ply for hire without being duly licensed, contravenes Motor Omnibus Act, 1924, s. 4 (1), & consequently is guilty, under sect. 13 (1), of an offence.—*MONTGOMERY v. CORNWALL*, [1927] V. L. R. 130; 48 A. L. T. 123; [1927] Argus L. R. 32.—**AUS.**

b. Extent of powers given to municipality.—The power given to the city to "arrange all motor vehicles in classes & differentiate in the conditions contained in licences granted" is not restricted to classification of the vehicles themselves, but extends to the routes or areas over which they run or within which they operate.—*R. v. CALBIC*, [1920] 2 W. W. R. 621; 61 D. L. R. 203; 33 Can. Crim. Cas. 352; 28 B. C. R. 113.—**CAN.**

c. Right of licensing authority—To refuse licence to deserter from Army.—*FLANAGAN v. DUNEDIN CORPN.*, [1920] N. Z. L. R. 713.—**N.Z.**

Sect. 3.—Light locomotives and motor cars: Sub-sects. 3 & 4, A. (a).]

a trailer along the highway, had two brakes, a hand brake & a foot brake, which could be operated by the driver simultaneously without losing control of the steering wheel. The trailer was fitted with a brake which was not in any way connected with the brakes of the tractor, but which could be operated by a person occupying the driving seat of the tractor, independently of the brakes of the latter, by a special handle, but no person other than the driver of the tractor was employed anywhere upon either vehicle to operate the brake of the trailer. The driver of the tractor could, without leaving hold of the steering wheel, apply simultaneously the hand brake of the trailer & the foot brake of the tractor, but he could not apply simultaneously the hand brake of the tractor & the hand brake of the trailer without losing control of the steering wheel:—*Held*: applts. had contravened the provisions of Motor Cars (Use & Construction) Order, 1904, Article III (3), because no person competent to apply the trailer brake efficiently was carried upon either the tractor or the trailer. — *ROBINSONS, LTD. v. RICHARDS*, [1928] 2 K. B. 234; 97 L. J. K. B. 483; 139 L. T. 164; 92 J. P. 73; 44 T. L. R. 507; 26 L. G. R. 311, D. C.

193. Lights—Motor Cars (Use & Construction) Order, 1904 (Statutory Rules & Orders, 1904, p. 516) Article 2—Application to motor cycle.]—The definition of a motor car in Motor Cars (Use & Construction) Order, 1904, Article I., is such as to include a motor cycle. By Article II. no person shall use a motor car on a highway unless the conditions thereafter set forth are satisfied. By condition 7 (i.) the lamp or lamps to be carried by a motor car, must be of a certain specified description, "proved that . . . this condition shall not extend to any bicycle, tricycle, or other machine to which Local Government Act, 1888 (c. 41), s. 85, applies":—*Held*: a motor cycle is not within the proviso, & is, therefore, bound to comply with condition 7 (i.).—*WEBSTER v. TERRY*, [1914] 1 K. B. 51; 83 L. J. K. B. 272; 109 L. T. 982; 78 J. P. 34; 30 T. L. R. 23; 12 L. G. R. 242, D. C.

— Illumination of identification mark.]—See Sub-sect. 4, A. (c), post.

See, now, Road Transport Lighting Act, 1927 (c. 37).

194. Overtaking vehicles—Tramcar.]—BURTON v. NICHOLSON, No. 63, *ante*.

See, now, Statutory Rules & Orders, 1909, p. 497.

195. User on bridge—Heavy Motor Car (Amendment) Order 1907 (Statutory Rules & Orders, 1907, p. 428) Article 14—Validity of order.]—Heavy Motor Car (Amendment) Order, 1907, Article 14, which contains regulations as to the use of a heavy motor car on a bridge forming part of a highway, & which purports to have been made by the Local Government Board under the powers conferred by Locomotives on Highways Act, 1896 (c. 36), s. 6, & Motor Car Act, 1903 (c. 36), s. 12, is not *ultra vires* the Local Government Board or invalid. — *LLOYD v. ROSS*, [1913] 2 K. B. 332; 82 L. J. K. B. 578; 109 L. T. 71; 77 J. P. 341; 29 T. L. R. 400; 11 L. G. R. 503; 23 Cox, C. C. 460, D. C.

Annotation · *Consd. A.-G. v. G. N. Ry.* (1915), 80 J. P. 9.

PART V. SECT. 3, SUB-SECT. 4.

—A. (a).

d. Evidence of speed—Sufficiency of—Constables outside "trap."]—*WRIGHT v. DUMBARTONSHIRE PRO-*

CURATOR-FISCAL (1910), 47 Sc. L. R. 699.—*SCOT*.

e. — — — — —.]—WRIGHT v. MITCHELL, [1910] S. C. (J.) 94; 47 Sc. L. R. 699; [1910] 2 S. L. T. 30;

196. User in Royal Parks—Validity of notice of speed limit.]—The comrs. published a notice, which was posted at the park gates, that no car propelled or drawn by mechanical means was to be allowed to proceed at a greater pace than ten miles per hour. This notice was not laid before Parliament:—*Held*: the regulation contained in this notice was good.—*MUSGRAVE v. KENNISON* (1905), 92 L. T. 865; 69 J. P. 341; 21 T. L. R. 600; 49 Sol. Jo. 567; 3 L. G. R. 932; 20 Cox, C. C. 874, D. C.

Annotation:—*Refd. R. v. Plowden, Ex p. Braithwaite* (1909), 78 L. J. K. B. 733.

197. Duty as to condition—Must not be likely to cause danger.]—By Locomotives on Highways Act, 1896 (c. 36), s. 6 (1), the Local Government Board is empowered to make regulations with respect to the use of light locomotives on highways, & their construction, & the conditions under which they may be used. By sect. 7, "A breach of any . . . regulation made under this Act . . . may, on summary conviction, be punished by a fine not exceeding £10." By Motor Cars (Use & Construction) Order, 1904, Article II., clause 6, made under sect. 6 of the Act of 1896. "The motor car & all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway." A motor lorry, being a light locomotive within the meaning of the Act & a motor car within the meaning of the Order, was being driven along a highway. Through no fault of its owners the lorry was in such a condition as to cause danger to persons on the lorry in that one of its axles was defective. The axle broke, & a wheel came off & damaged another vehicle. In an action by the owner of the damaged vehicle against the owners of the lorry for a breach of Article II., clause 6, of the Order:—*Held*: it was not intended by the Act or the Order that every one injured through a breach of the Order should have a right of action for damages; but the duty imposed by the Order was a public duty only to be enforced by the penalty imposed for a breach of it, & not otherwise.—*PHILLIPS v. BRITANNIA HYGIENIC LAUNDRY CO.*, [1923] 2 K. B. 832; 93 L. J. K. B. 5; 129 L. T. 777; 39 T. L. R. 530; 68 Sol. Jo. 102; 21 L. G. R. 709, C. A.

Annotations:—*Refd. Britannia Hygienic Laundry Co. v. Thornycroft* (1925), 94 L. J. K. B. 858. *Mentd. Gayler & Pope v. Davies*, [1924] 2 K. B. 75.

Speed.]—See Sub-sect. 4, A. (a), post.

Regulation of traffic generally.]—See Part I., ante.

Excessive weight & extraordinary traffic.]—See, generally, HIGHWAYS, Vol. XXVI., pp. 460-475, Nos. 1762-1885.

SUB-SECT. 4.—OFFENCES AND PENALTIES.

A. Offences.

(a) Exceeding Speed Limit.

See Motor Car Act, 1903 (c. 36), s. 9.

198. Evidence of speed—Untested watch.]—Evidence held admissible.—*GORHAM v. BRICE* (1902), 18 T. L. R. 424, D. C.

199. — Opinion of one witness—Speed time with stop watch.]—Upon the hearing of an information under Motor Car Act, 1903 (c. 36),

6 Adam, 287. —*SCOT*.

f. — — — — —.]—WRIGHT v. JAMESON, [1910] S. C. (J.) 8.—*SCOT*.
Speed exceeded outside speed limit laws.

Evidence of one

s. 9, for driving a motor car on a public highway at a speed exceeding twenty miles an hour, a police sergeant proved that he placed a police constable at a certain point on the road & stationed himself on the same road at a distance of a quarter of a mile from the constable; that, when the motor car passed the constable, the constable signalled to him & he immediately started the second hand of his stop watch & stopped the same when the car passed him; & that the time taken by the car between the two points as shown by his stop watch was $31\frac{1}{2}$ seconds, or at the rate of twenty-eight miles an hour.

The stop watch was produced in ct. & not objected to. The only evidence as to the rate of speed was that of the police sergeant, who gave evidence of the time as shown by his stop watch. Deft. having been convicted:—*Held*: the evidence of the police sergeant was not evidence of his "opinion" merely, but was evidence of the fact recorded by his stop watch as to the time taken in travelling over the distance, & therefore deft. was not convicted "merely on the opinion of one witness as to the rate of speed" within Motor Car Act, 1903 (c. 36), s. 9 (1).—*PLANCQ v. MARKS* (1906), 94 L. T. 577; 70 J. P. 216; 22 T. L. R. 432; 50 Sol. Jo. 377; 4 L. G. R. 503; 21 Cox, C. C. 157, D. C.

200. Evidence of identity of driver—Person driving at end of "trap."—(1) Deft. was convicted under Motor Car Act, 1903 (c. 36), s. 9 (1), of having driven a motor car at a speed exceeding the legal limit of twenty miles an hour. The evidence was to the effect that two constables were stationed at the seventh milestone & two other constables at the third milestone from St. Albans, at which latter milestone the car was stopped, which deft. was then driving, the chauffeur sitting beside him. Deft. held a licence for driving. The car traversed the distance between the two milestones at the rate of twenty-eight miles an hour. Deft. did not give evidence:—*Held*: there was evidence that deft. had driven the car over the whole distance as alleged, upon which the justices could convict him.

(2) The notice under s. 9 (2) of the Act, of the intended prosecution alleged the offence to have been committed between Markyate & St. Albans, two places which were between ten & twenty miles apart:—*Held*: as deft. was not misled by it, the notice was valid.—*BERESFORD v. ST. ALBANS J.J.* (1905), 22 T. L. R. 1; *sub nom. Ex p. BERESFORD*, 69 J. P. Jo. 520, D. C.

201. Notice of intended prosecution—Necessity for—Offence by heavy motor car.—Motor Car Act, 1903 (c. 36), s. 9 (2), only requires warning or notice of an intended prosecution to be given in the case of an offence against that sect. itself. To drive a heavy motor car at a speed exceeding twelve miles an hour is an offence, not against

Motor Car Act, 1903 (c. 36), s. 9 (2), but against the regulations contained in the Heavy Motor Car Order, 1904, as subsequently amended; which regulations were made under Locomotives on Highways Act, 1896 (c. 36), s. 6, as extended by Motor Car Act, 1903 (c. 36), s. 12 (2). It follows that no warning of an intended prosecution for such an offence is required.—*STAUNTON v. COATES* (1924), 94 L. J. K. B. 95; 132 L. T. 199; 88 J. P. 193; 41 T. L. R. 33; 69 Sol. Jo. 126; 23 L. G. R. 6; 27 Cox, C. C. 663, D. C.

202. — Sufficiency of.—*BERESFORD v. ST. ALBANS J.J.*, No. 200, *ante*.

203. — — ——A statement by a constable who stops the driver of a motor car that he thinks the driver is exceeding the speed limit, but that if, after he had compared the time with that taken by another constable three miles away, it appeared that the driver had not exceeded the speed limit over those three miles he would hear nothing further about it, is a sufficient warning to the driver of an intended prosecution to satisfy the requirements of Motor Car Act, 1903 (c. 36), s. 9 (2).—*JESSOPP v. CLARKE* (1908), 99 L. T. 28; 72 J. P. 358; 24 T. L. R. 672; 6 L. G. R. 686, D. C.

204. — — — Notice of intention to report for driving dangerously.—Applt., when he was driving a motor cycle along a public highway at twenty-eight miles an hour, was stopped & was informed by a police officer that he was driving too fast & would be reported for driving to the danger of the public. This is an offence under Motor Car Act, 1903 (c. 36), s. 1. No further warning was given to applt. either orally or in writing. On an information against applt. under sect. 9 (1) of the Act for driving at a speed exceeding twenty miles an hour, he contended that he had received no warning or notice as required by sect. 9 (2). The justices held that the warning given to applt. at the time when he was stopped was sufficient, & they convicted him:—*Held*: there was no warning of an intended prosecution as required by sect. 9 (2), & the conviction must be quashed.—*PARKES v. COLE* (1922), 127 L. T. 152; 86 J. P. 122; 20 L. G. R. 463; 27 Cox, C. C. 218, D. C.

205. — Service of—Delivery to porter at block of flats.—Notice of an intended prosecution under Motor Car Act, 1903 (c. 36), s. 9, for exceeding the speed limit was delivered by a police officer to the porter of a block of flats, where the driver of the car resided, at the flats. The officer told the porter the purpose of the notice:—*Held*: there was some evidence upon which the justices could find that notice of intended prosecution had been sent to the driver within s. 9 (2) of the Act.—*MARTIN v. BROOMAN* (1909), 73 J. P. 484; 25 T. L. R. 783, D. C.

206. Obstruction of police in execution of duty—Giving warning of police trap.—Two constables,

witness must be corroborated.]—*JAMESON v. SCOTT*, [1914] S. C. (J.) 187; 51 Sc. L. R. 808; [1914] 2 S. L. T. 186; Adam, 529.—*SCOT*.

202 i. Notice of intended prosecution—Sufficiency of.—*CHRISTIE v. STEVENSON*, [1907] S. C. (J.) 100; 44 Sc. L. R. 905; 15 S. L. T. 324.—*SCOT*.

202 ii. — — ——*HUGHES v. NIMMO*, [1910] S. C. (J.) 45.—*SCOT*.

202 iii. — — ——In a prosecution for a contravention of Motor Car Act, 1903, s. 9, which imposes a speed limit, prosecutor must prove that the naming or notice of the intended prosecution required by the sect. was given to the accused; & a conviction without such proof is bad.—*DICKSON v. STEVENSON*, [1912] S. C. (J.) 1.—*SCOT*.

h. Bye-law of council limiting speed of motor cars—Made under provisions of bye-law—Inconsistency with provisions of statute—Validity of.—*CHAPMAN v. WERRIBESHSIRE*, [1925] V. L. R. 525; 47 A. L. J. 38; 31 Argus L. R. 361.—*AUS*.

k. — — ——*BROWN TRANSFER CO. v. TOWNSHEND* (Sask.), [1927] 1 W. W. R. 916.—*CAN*.

l. When non-observance of speed limit justified.—In the case of a motor car, it may sometimes be not only desirable, but essential for the purposes of avoiding civil liability temporarily to exceed a speed of 20 miles an hour to go upon what is, *prima facie*, the wrong side of the road. To do so may sometimes afford the only

method of avoiding a serious accident.—*HOARE v. INVERARITY* (1926), 28 W. A. L. R. 125.—*AUS*.

m. Whether powers of council restricted by statute.—The general powers of a borough council to regulate the speed of motor cars while travelling on the streets of the borough were not restricted by the provisions regarding the speed limit contained in Motor Regulation Act, 1906, s. 9 (re-enacted in 1908 Act, s. 91).—*WESTON v. FRASER*, [1917] N. Z. L. R. 549.—*N.Z.*

n. — Reasonability of.—A borough bye-law which prohibits the driving of a motor car at a greater speed than twelve miles an hour is not necessarily unreasonable, but it becomes unreason-

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having measured certain distances on a road much frequented by motor cars, were watching in order to ascertain the pace at which each car passed over the measured distance, with a view to discovering whether it was proceeding at an illegal rate of speed. Resp. gave a warning of this fact to approaching cars, which then slackened speed. There was no evidence that resp. was acting in concert with any of the drivers of the cars, or that any car when the warning was given was going at an illegal pace:—*Held*: resp. was not guilty of the offence of obstructing the constables when in the execution of their duty within Prevention of Crimes Amendment Act, 1885 (c. 75), s. 2.—*BASTABLE v. LITTLE*, [1907] 1 K. B. 59; 76 L. J. K. B. 77; 96 L. T. 115; 71 J. P. 52; 23 T. L. R. 38; 51 Sol. Jo. 5 L. G. R. 279; 21 Cox, C. C. 354, D. C.

Annotation —*Expld.* *Betts v. Stevens*, [1910] 1 K. B. 1.

207. —.]—Constables were on duty observing & timing the speed of motor cars driven along a certain road with a view to the prosecution of the drivers of such cars as should be travelling at an illegal speed. For that purpose they had measured a certain distance along the road. The deft. warned the drivers of cars which were approaching the measured distance of the presence of the constables & the purpose for which they were there. There was evidence that at the time the warning was given the cars were being driven at an illegal speed, & the drivers upon receipt of the warning slackened their speed & proceeded over the measured distance at a lawful speed, whereby the constables, as deft. intended, were prevented from obtaining such evidence as would be accepted as sufficient in a police ct. that the drivers of the cars were committing an offence:—*Held*: deft. had wilfully obstructed the constables in the execution of their duty within the meaning of Prevention of Crimes (Amendment) Act, 1885 (c. 75).

In my opinion a man who, finding that a car is breaking the law, warns the driver, so that the speed of the car is slackened, & the police are thereby prevented from ascertaining the speed & so are prevented from obtaining the only evidence upon which, according to our experience, cts. will act with confidence, is obstructing the police in the execution of their duty. . . . However, nothing that I now say must be construed to mean that the mere giving of a warning to a passing car that the driver must look out as there is a police trap ahead will amount to an obstruction of the police in the execution of their duty in the absence of evidence that the car was going at an illegal speed at the time of the warning given (*LORD ALVERSTONE, C.J.*).—*BETTS v. STEVENS*, [1910] 1 K. B. 1; 79 L. J. K. B. 17; 101 L. T.

able if it is extended indiscriminately to all streets of the borough at all times, thereby including places & times at which there is little or no traffic.—*INGLIS v. GOUGH, STEWART v. LARKIN*, [1918] N. Z. L. R. 276.—*N.Z.*

o. —.]—*WESTBROOK v. INNES-JONES*, [1928] N. Z. L. R. 46.—*N.Z.*

p. — *Whether ultra vires municipality.*—*SEWART v. TODRICH*, [1908] S. C. (J.) 8; 45 Sc. L. R. 235; 15 S. L. T. 622.—*SCOT.*

q. *Sufficiency of complaint against person exceeding speed limit.*—*CONNELL v. MITCHELL*, [1909] S. C. (J.) 13.—*SCOT.*

564; 73 J. P. 486; 26 T. L. R. 5; 7 L. G. R. 1052; 22 Cox, C. C. 187, D. C.

Penalties — Indorsement of licence.] — See Nos. 234, 235, post.

(b) Reckless or Dangerous Driving.

See Motor Car Act, 1903 (c. 36), s. 1.

See CRIMINAL LAW, Vol. XV., pp. 863–865, Nos. 9178–9490.

208. What may be taken into consideration—Traffic on highway.]—By Light Locomotives on Highways Order, 1896, Article 4 (1), no person shall drive a light locomotive at any speed that is greater than is reasonable & proper, having regard to the traffic on the highway. Applt. drove his motor tricycle at a speed from 18 to 20 miles an hour along a highway, but there was no direct evidence that any traffic was interrupted, interfered with, incommoded, or affected. The justices found that the speed was excessive, having regard to the traffic on the highway:—*Held*: the justices were right in convicting, as the words “Having regard to the traffic on the highway” meant having regard to the traffic on the road, & not to the traffic in the immediate vicinity of the motor.—*SMITH v. BOON* (1901), 84 L. T. 593; 65 J. P. 486; 49 W. R. 480; 17 T. L. R. 472; 45 Sol. Jo. 485; 19 Cox, C. C. 698, D. C.

Annotations:—*Appld.* *Mayhew v. Sutton* (1901), 71 L. J. K. B. 46. *Refd.* *Ex p. Stone* (1909), 73 J. P. 441.

209. ——— What might reasonably be expected.]—The driver of a motor car was convicted before justices under Motor Car Act, 1903 (c. 36), s. 1 (1), of driving the car on a certain public highway “at a speed which was dangerous to the public having regard to all the circumstances of the case.” At the hearing of an appeal to the quarter sessions evidence was given by resp. as to the traffic which might reasonably be expected to be on the highway, although the admission of any evidence as to hypothetical traffic was objected to by applt.:—*Held*: the evidence was properly admitted.—*ELWES v. HOPKINS*, [1906] 2 K. B. 1; 75 L. J. K. B. 450; 91 L. T. 547; 70 J. P. 262; 4 L. G. R. 615; 21 Cox, C. C. 133, D. C.

210. ——— Passengers on highway.]—To convict the driver of a motor car of the offence of driving it at an excessive speed “to the common danger of passengers” on a highway, contrary to Light Locomotives on Highways Order, 1896 (c. 36), s. 1, Article 4, it is not necessary to prove that there were passengers on the highway.—*MAYHEW v. SUTTON* (1901), 71 L. J. K. B. 46; 86 L. T. 18; 50 W. R. 216; 18 T. L. R. 52; 46 Sol. Jo. 51; 20 Cox, C. C. 116, D. C.

211. ——— Danger to person in car.]—Applt. having refused to pay toll for a motor car, resp., the toll collector placed himself in front of the car to prevent it proceeding. Having been warned to stand clear, resp., after the car was in motion, hung on to the side of the car, was carried along, &

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—A. (b).

208 i What may be taken into consideration—Traffic on highway.]—*CHAMMEN v. GILMORE*, [1914] V. L. R. 455.—*AUS.*

208 ii. —.]—*R. v. ENTLE*, [1927] 2 D. L. R. 558; 47 Can. Crim. Cas. 121; 59 N. S. R. 181.—*CAN.*

208 iii. —.]—*R. (CAHILL) v. DUBLIN JJ.*, [1904] I. R. 698.—*IR.*

208 iv. —.]—*WESTBROOK v. INNES-JONES*, [1928] N. Z. L. R. 46.—*N.Z.*

208 v. —.]—*R. v. DE KOCK*, [1918] E. D. L. 221.—*S. AF.*

210 i. — *Passengers on highway.]—*The driving of a vehicle on the public street in a culpable & reckless manner, whereby injury to property is caused, is not a crime by the common law of Scotland, unless the driving is to the danger of the Regees.—*M'ALLISTER v. [1907] S. C. (J.) 95; 44 Sc. L. R. 734; 15 S. L. T. 70.—SCOT.*

r. Power of court of petty sessions To suspend licence.]—*BUCKLEY v. BOWEN*, [1925] V. L. R. 530; 47 A. L. T. 40; 31 Argus L. R. 359.—*AUS.*

t. Whether accused liable criminally.]—The driver of a motor car must show reasonable care towards other users of a highway. If he dis-

after having asked applt. to stop fell off & was injured. The speed of the car was reasonable & no danger was caused to any one but resp.

The justices convicted the applt. of reckless driving under Motor Car Act, 1903 (c. 36), s. 1 (1):—*Held*: the conviction was wrong.—*TROUGHTON v. MANNING* (1905), 92 L. T. 855; 69 J. P. 207; 53 W. R. 493; 21 T. L. R. 408; 3 L. G. R. 548; 20 Cox, C. C. 861; *sub nom.* *HOUGHTON v. MANNING*, 49 Sol. Jo. 446, D. C.

212. — Speed of car—Defendant charged with driving "in manner dangerous to public."—Upon the hearing of an information under Motor Car Act, 1903 (c. 36), s. 1 (1), against the driving of a motor car for having driven the motor car on a public highway "in a manner which was dangerous to the public," evidence of the speed at which the motor car was driven is admissible & may be taken into consideration by the justices, although the sub-sect. makes it a separate & distinct offence for a person to drive a motor car on a public highway "at a speed which is dangerous to the public."—*HARGREAVES v. BALDWIN* (1905), 93 L. T. 311; 69 J. P. 397; 21 T. L. R. 715; 3 L. G. R. 973, D. C.

213. — — — — —.]—Each of applts. drove a motor charabanc at a speed in excess of the speed limit on a public highway for a distance of 2 miles, within which distance there were 15 roads converging on the highway, making at one point dangerous cross roads, & two railway stations with entrances abutting on the highway. Applts. were charged under Motor Car Act, 1903 (c. 36), s. 1 (1), with having driven in a manner dangerous to the public having regard to all the circumstances of the case, including the nature, condition & use of the highway, & to the amount of traffic which actually was at the time, or which might reasonably be expected to be, on the highway. Applts. were convicted:—*Held*: there was evidence to support the conviction, notwithstanding that the evidence showed that applts. might also have committed the offence of driving at a speed which was dangerous to the public.—*BERESFORD v. RICHARDSON*, [1921] 1 K. B. 243; 90 L. J. K. B. 313; 124 L. T. 274; 85 J. P. 60; 37 T. L. R. 53; 18 L. G. R. 855; 26 Cox, C. C. 673, D. C.

214. — — — — — Whether bar to conviction for exceeding speed limit.]—The driver of a motor car was convicted under Motor Car Act, 1903 (c. 36), s. 1, of driving his motor car in a manner which was dangerous to the public. Evidence was given as to speed, & the question of speed, besides other circumstances, was taken into consideration on such conviction. He was then charged on a second information with driving his car at a speed exceeding 20 miles an hour, contrary to Motor Car Act, 1903 (c. 36), s. 9:—*Held*: as the question of speed had been taken into consideration on the conviction under sect. 1, the conviction was a bar to a conviction under sect. 9 for driving at a speed exceeding 20 miles an hour.—*WELTON v. TANEBORE* (1908), 99 L. T.

regards this duty, he is criminally liable for the consequences of his acts.—*MCCARTHY v. R.* (Sask.) (1921), 62 S. C. R. 40; [1921] 2 W. W. R. 751; 35 Can. Crim. Cas. 213; 61 D. L. R. 170.—**CAN.**

a. Liability of owner of car for reckless driving of servant.]—*VARAJ LALL v. R.* (1921), 1 L. R. 51 Cal. 948.—**IND.**

b. Taxicab driver requested to use spectacles when driving—Failure to do so—Efficiency not appreciably affected by defective eyesight—Liability for negligence.]—*R. v. ABAS MIRZA* (1918),

1 L. R. 12 Bom. 396.—**IND.**

c. Validity of conviction—Several offences charged in summons.]—*R. v. CAVAN JJ.*, [1914] 2 I. R. 150.—**IR.**

d. Indorsation of licence.]—*CAMPBELL v. STRACHAN*, [1927] N. I. 226.—**IR.**

e. —.]—*BEIL v. MITCHELL*, [1905] 8 F. (Ct. of Sess. (J.) 15; 43 Sc. L. R. 53; 13 S. L. T. 494.—**SCOT.**

f. —.]—Where a person holding a licence under Motor Car Act, 1903, has been convicted of a first offence under sect. 1 of that Act the sheriff is bound to order indorsation of his

668; 72 J. P. 419; 24 T. L. R. 873; 6 L. G. R. 891; 21 Cox, C. C. 702, D. C.

215. — — — Defendant charged with driving "at speed dangerous to public."]—Proof of the fact that a motor car is driven through a village at the rate of 23 miles an hour is evidence that will support a conviction under Motor Car Act, 1903 (c. 36), s. 1, for driving a motor car, on a highway, at a speed which is dangerous to the public, having regard to all the circumstances of the case.—*Ex p. STONE* (1909), 73 J. P. 444; 25 T. L. R. 787, D. C.

216. Validity of conviction—Single conviction for more than one offence—Speed or manner dangerous to public.]—The provisions of Motor Car Act, 1903 (c. 36), s. 1 (1), prohibiting the driving of a motor car "at a speed or in a manner which is dangerous to the public" create two distinct offences; & a conviction for driving a motor car "at a speed or in a manner which was dangerous to the public" is therefore bad for duplicity.—*R. v. WELLS, ETC., JJ.*, *Ex p. CLIFFORD* (1904), 91 L. T. 98; 68 J. P. 392; 20 T. L. R. 549; 2 L. G. R. 913; 20 Cox, C. C. 671, D. C.

Annotations:—Ex p. Hargreaves v. Baldwin (1905), 93 L. T. 311 **Consd.** *Beresford v. Richardson*, [1921] 1 K. B. 243; *R. v. Jones, Ex p. Thomas*, [1921] 1 K. B. 632. **Refd.** *Ex p. Beecham*, [1913] 3 K. B. 45.

217. Driving recklessly & at speed dangerous to public.]—Appet. was summoned under Motor Car Act, 1903 (c. 36), s. 1, for, & convicted of, driving a motor car on a highway "recklessly & at a speed which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition & use of the said highway, & to the amount of traffic which actually was at the time, or might reasonably have been expected to be, on the said highway":—*Held*: as the driving of the car was one indivisible act which might constitute both the offences charged, the conviction was not bad for duplicity.—*R. v. JONES, Ex p. THOMAS*, [1921] 1 K. B. 632; 90 L. J. K. B. 543; 124 L. T. 668; 85 J. P. 112; 37 T. L. R. 299; 19 L. G. R. 354; 26 Cox, C. C. 706, D. C.

218. — Refusal by owner to give name & address of driver—Refusal of driver not condition precedent.]—A conviction of the owner of a motor car under Motor Car Act, 1903 (c. 36), s. 3 (1), stated that deft. did unlawfully refuse to give the name & address of the person who at a specified time & place was driving deft.'s motor car, such name & address being required in order that proceedings might be taken against him under Motor Car Act, 1903 (c. 36), s. 1, & rule 6, Article 1, of the Statutory Rules & Orders, 1904:—*Held*: the conviction was bad, in that it did not state what offence the driver of the motor car was alleged to have committed. It was not a condition precedent to the obligation of the owner of a motor car to give the name & address of the driver of his car that the driver should previously have been asked for & should have refused to give his name & address.—*R. v. HANKEY*, [1905] 2 K. B. 687; 74 L. J. K. B. 922;

licence; & it is not within the power of the Ct. of appeal, standing the conviction, to alter the sentence by ordering the removal of the indorsation.—*CROMWELL v. RENTON*, [1911] S. C. (J.) 86; 48 Sc. L. R. 823; [1911] 2 S. L. T. 53; ■ *Adam*, 498.—**SCOT.**

g. Necessity to specify modus of negligence.]—*TODRICK v. DENNELAR* (1901), 7 F. (Ct. of Sess. (J.) 8; 42 Sc. L. R. 199; 12 S. L. T. 573.—**SCOT.**

h. —.]—*HODGERT v. DURBAN INSPECTOR OF POLICE* (1925), 46 N. L. R. 184.—**S. AF.**

Sect. 3.—Light locomotives and motor cars: Sub-sect. 4, A. (b), (c), (d), (e), & B.]

93 L. T. 107; 69 J. P. 219; 54 W. R. 80; 21 T. L. R. 409; 3 L. G. R. 554; 21 Cox, C. C. 1; *sub nom.* R. v. HANKEY, ETC., JJ., *Ex p.* CRAVEN (EARL), 49 Sol. Jo. 419, D. C.

Annotations:—Appld. R. v. Chancellor, *Ex p.* Hassall (1905), 69 J. P. 383. *Refd.* *Ex p.* Beecham, [1913] 3 K. B. 45; *Ponton v. Cox* (1926), 136 L. T. 506.

219. — Failure to give information leading to identification of driver—Conviction must aver offence committed by driver.]—The conviction of an owner of a motor car “for that he . . . then being the owner of a registered motor car, H 746, on being duly required so to do, failed to give information to lead to the identification of the person or persons driving such car at . . . on . . . contrary to Motor Car Act, 1903 (c. 36), s. 1 (3),” is bad, in that it does not aver that the driver of such car had committed an offence under Motor Car Act, 1903 (c. 36), s. 1.—R. v. CHANCELLOR, *Ex p.* HASSALL (1905), 69 J. P. 383; 3 L. G. R. 1012, D. C.

Annotation:—Refd. *Ex p.* Beecham, [1913] 3 K. B. 45.

220. — — — — —.]—R. v. HANKEY, No. 218, *ante*.

221. — — — — — Sufficiency of general averment.]—In the conviction of the owner of a motor car under Motor Car Act 1903 (c. 36), s. 1 (3), for refusing to give information which may lead to the identification of the driver, it is sufficient to state generally that the driver had committed an offence under Motor Car Act, 1903 (c. 36), s. 1 (1) without more particularly specifying that offence.—*Ex p.* BEECHAM, [1913] 3 K. B. 45; 82 L. J. K. B. 905; 109 L. T. 442; 29 T. L. R. 586; 23 Cox, C. C. 571; 77 J. P. Jo. 280, D. C.

222. Aiding & abetting commission of offence—Person in control of car.]—A person who has aided & abetted the commission of an offence punishable on summary conviction may, under Summary Jurisdiction Act, 1848 (c. 43), s. 5, be convicted upon an information which charges him with having committed the offence as principal offender.

Applt. appealed to quarter sessions against a conviction for unlawfully driving his motor car at a speed dangerous to the public. At the hearing of the appeal there was a conflict of evidence as to whether the car was being driven by applt. or by a lady seated by his side in the car. The quarter sessions, without deciding whether applt. was himself driving the car, dismissed the appeal, finding as facts that if the lady was driving she was doing so with the consent & approval of applt., who must have known that the speed was dangerous, & who, being in control of the car, could, & ought to, have prevented it:—*Held*: there was evidence on which applt. could be convicted of aiding & abetting the commission of the offence.—*DU CROS v. LAMBOURNE*, [1907] 1 K. B. 40; 76 L. J. K. B. 50; 95 L. T. 782; 70 J. P. 525; 23 T. L. R. 3; 5 L. G. R. 120; 21 Cox, C. C. 311, D. C.

Annotations:—Consd. *Gould v. Houghton*, [1921] 1 K. B. 509. *Refd.* *Provincial Motor Cab Co. v. Dunning* (1909), 101 L. T. 231; *Samson v. Aitchison*, [1912] A. C. 841;

k. Whether recklessness or negligence need be wilful.]—WAUGH v. CAMPBELL, [1920] S. C. (J.) 1; 57 Sc. L. R. 63; [1919] 2 S. L. T. 233.—SCOT.

PART V. SECT. 3, SUB-SECT. 4. —A. (c).

1. Failure to keep tail lamp lighted.]—LOCH v. DEAKIN, *Ex p.* DEAKIN,

[1925] S. R. Q. 237; 19 Q. J. P. 105.—AUS.

m. Whether mens rea necessary.] In a prosecution of the driver of a motor car for driving his car without having attached thereto a lamp exhibiting the red light towards the rear prescribed by Locomotives on Highways Act, 1896, s. 2, & Motor Cars (Use & Construction) (Scotland)

Pratt v. Patrick, [1924] 1 K. B. 488; *Pickup v. United Kingdom Dental Board*, [1928] 2 K. B. 459. *Mentd.* R. v. De Marny (1906), 96 L. T. 159.

Penalties—Indorsement of licence.]—See No. 233, *post*.

(c) Failure to illuminate Identification Plate.

See Roads Act, 1920 (c. 72), s. 6; Road Vehicles (Registration & Licencing Order) 1924.

223. Criminal intent unnecessary—Liability of owner for act of servant.]—Appls., a limited co., who were motor cab proprietors, were convicted before a magistrate of aiding & abetting a driver in their service in using a motor cab in contravention of Art. 11 of the Motor Car (Registration & Licencing) Order, 1903 on the following facts: The driver was using a motor cab more than one hour after sunset having a lamp, which was lighted, hanging too low to illuminate the identification plate. The motor cab was fitted with a proper & permanent bracket on which to hang the lamp. Appls. had in their service a foreman, who was charged by them with the duty of seeing that the cabs left their premises in such a condition as to comply in all respects with the Motor Car Acts, 1896 (c. 36) & 1903 (c. 36) & the regulations of the Board of Trade made thereunder. The magistrate found that appls. were careless in not seeing to it that a proper lamp was fixed on the cab.—*Held*: there was evidence on which appls. might be convicted of aiding & abetting their driver in committing a breach of the above regulation.—*PROVINCIAL MOTOR CAB CO., LTD. v. DUNNING*, [1909] 2 K. B. 599; 101 L. T. 231; 73 J. P. 387; 7 L. G. R. 765; 22 Cox, C. C. 159; *sub nom.* *PROVINCIAL MOTOR CAB CO. v. DUNNING, KYNASTON'S CASE*, 78 L. J. K. B. 822; *sub nom.* *PROVINCIAL MOTOR CAB CO. v. DUNNING, PARKER'S CASE, SAME v. SAME, KYNASTON'S CASE*, 25 T. L. R. 646, D. C. *Annotation:—Mentd.* *Dickeson v. Mayes*, [1910] 1 K. B. 452.

224. Whether offence under Motor Car Act, 1903 (c. 36).]—Resp. having been convicted of using a motor car at night on a public highway without having a lamp burning on the back of the car as required by Article XI. of the Motor Car (Registration & Licencing) Order, 1903, was called upon to produce his licence for the purposes of indorsement, & having failed to do so, he was charged with the commission of an offence under Motor Car Act, 1903 (c. 36), s. 4. The justices dismissed the charge:—*Held*: (1) resp. should have been convicted, as the offence of which he had been convicted was an offence under Motor Car Act, 1903 (c. 36); (2) it was also “an offence in connection with the driving of a motor car.”—*BROWN v. CROSSLEY*, [1911] 1 K. B. 603; 80 L. J. K. B. 478; 104 L. T. 429; 75 J. P. 177; 27 T. L. R. 194; 9 L. G. R. 194; 22 Cox, C. C. 402, D. C.

Annotations:—As to (1) Appld. *Printz v. Sewell*, [1912] 2 K. B. 511. *Foldl.* *Simmonds v. Pond* (1918), 88 L. J. K. B. 857. *As to (2) Appld.* *White v. Jackson* (1915), 81 L. J. K. B. 1900.

225. —.]—Applt. was charged under Article II. of the Motor Car (Registration & Licencing) Order, 1903, with using a motor cycle at night on a public highway without having a lamp burning on

Order, 1904, Art. II. (7) (i):—*Held*: the fact that the lamp was not burning *per se* rendered the accused guilty; & it was no defence that he did not intend to contravene the order, had shown no negligence, & did not know that his lamp, which had been lighted, had been blown out.—*HOWMAN v. RUSSELL*, [1923] S. C. (J.) 32; 60 Sc. L. R. 363; [1923] S. L. T. 336.—SCOT.

the cycle so contrived as to illuminate every letter or figure on the cycle as required by the article :—*Held* : the offence with which applt. was charged was an offence under Motor Car Act, 1903 (c. 36), s. 2 (4) & it was open to him under the sub-sect. to set up the defence that he had taken all steps reasonably practicable to prevent the letters & figures which ought to have been illuminated being obscured or rendered not easily distinguishable.—*PRINTZ v. SEWELL*, [1912] 2 K. B. 511; 81 L. J. K. B. 905; 106 L. T. 880; 76 J. P. 295; 28 T. L. R. 396; 10 L. G. R. 665; 23 Cox, C. C. 23, D. C.

226. Whether "offence in connection with the driving of a motor car."—*BROWN v. CROSSLEY*, No. 224, *ante*.

227. Defence to proceedings—All reasonable precautions taken.—*PRINTZ v. SEWELL*, No. 225, *ante*.

(d) *Failure to Produce Licence.*

228. Failure to produce licence—For indorsement.—A breach of Motor Cars (Use & Construction) Order, 1904, Article IV., in allowing a motor car to stand on a highway so as to cause an unnecessary obstruction thereof is not an offence in connection with the driving of a motor car within Motor Car Act, 1903 (c. 36), s. 4; & therefore a driver who, after being convicted of that breach of the Order of 1904, refuses to produce his licence for the purposes of indorsement cannot be convicted of an offence under Motor Car Act, 1903 (c. 36).—*R. v. YORKSHIRE (WEST RIDING) JJ., Ex p. SHACKLETON*, [1910] 1 K. B. 439; 79 L. J. K. B. 244; 102 L. T. 138; 22 Cox, C. C. 280; *sub nom. R. v. BEAVER & ACKROYD, Ex p. SHACKLETON*, 74 J. P. 127; 8 L. G. R. 163, D. C.

Annotation :—*Expld. Brown v. Crossley*, [1911] 1 K. B. 603.

229. —————*BROWN v. CROSSLEY*, No. 224, *ante*.

230. —————The holder of a driver's licence under Motor Car Act, 1903 (c. 36), was convicted of having unlawfully used petrol for a purpose other than one of those expressly authorised by the Motor Spirit (Consolidation) & Gas Restriction Order, 1918, made under Regulations 2F & 2JJ of the Defence of the Realm Regulations. He failed to produce his licence for indorsement as required by sect. 4 (1), of the Act :—*Held* : as he had been convicted of an "offence in connection with the driving of a motor car" within sect. 4 (1), of the Act, he was bound to produce his licence for indorsement & should be convicted for its non-production under sub-sect. 2 of the same sect.—*SIMMONDS v. POND* (1918), 88 L. J. K. B. 857; 120 L. T. 124; 83 J. P. 56; 35 T. L. R. 187; 17 L. G. R. 228; 26 Cox, C. C. 365, D. C.

231. ———— "Person driving a motor car"—Licence demanded in court room.—*HAMILTON v. JONES* (1925), 42 T. L. R. 148, D. C.

(e) *Other Cases.*

232. Failure to keep record of use of general identification mark—Use by employee without authority.—Article XII. of the Motor Car Registration & Licensing Order 1903, provides that on every occasion on which the general identification

mark (which by Motor Car Act, 1903 (c. 36), s. 2 (4) (b), may be assigned to a manufacturer of motor cars) is used, the manufacturer shall keep a record of the distinguishing number on the identification plate & of the name & address of the person driving the car.

Appls. were manufacturers of motor cycles to whom a general identification mark had been assigned. Their stock of motor cycles was placed by them under the charge of a man in their employment. This man took out one of their motor cycles without their knowledge or authority & used it for his own private purposes. No record as required by Article XII. was kept on the occasion of this user of the motor cycle, & applts. were in consequence charged with the offence of a breach of Article XII. :—*Held* : as the user of the motor cycle was unauthorised by & unknown to applts. the failure to keep a record did not render them guilty of the offence charged.—*PIELON & MOORE, LTD. v. KEEL*, [1914] 3 K. B. 165; 83 L. J. K. B. 1516; 111 L. T. 214; 78 J. P. 247; 12 L. G. R. 950; 24 Cox, C. C. 234, D. C.

Leaving car so as to obstruct highway.—*See* Nos. 236, 237, *post*.

Improper identification plate.—*See* No. 238, *post*.

Offences in regard to lights.—*See* Nos. 239–241, *post*.

Unlawful use of petrol.—*See* No. 242, *post*.

Drunkenness.—*See* Criminal Justice Act, 1925 (c. 86), s. 40.

B. Penalties.

See Locomotives on Highways Act, 1896 (c. 36), s. 7; Motor Car Act, 1903 (c. 36), ss. 1, 11 (1).

233. Indorsement of licence—Driving at speed dangerous to public—First offence.—*R. v. LANDMARK* (1901), 68 J. P. Jo. 568, D. C.

234. ———— Exceeding speed limit—Limit fixed under Parks Regulation Act, 1872 (c. 15)—First or second offence.—Where the driver of a motor car is convicted of a first or second offence of exceeding a speed limit fixed in a lawful way other than under Motor Car Act, 1903 (c. 36), *e.g.*, under rules made by the Comrs. of Works & Public Buildings in connection with the regulations prescribed by the Parks Regulation Act, 1872 (c. 15), the ct. before whom the conviction takes place has no power under Motor Car Act, 1903 (c. 36), s. 4, to indorse on the convicted person's licence particulars of the conviction.—*R. v. MARSHAM, Ex p. CHAMBERLAIN*, [1907] 2 K. B. 638; 76 L. J. K. B. 1036; 97 L. T. 396; 71 J. P. 445; 23 T. L. R. 629; 51 Sol. Jo. 592; 5 L. G. R. 998; 21 Cox, C. C. 510, D. C.

Annotation :—*Appld. R. v. Plowden*, [1909] 2 K. B. 269.

235. ———— Third offence.—A ct. before whom a person is convicted of a third offence of driving a motor car in a Royal park at a speed exceeding the limit prescribed by the parks regulations has power to indorse the driver's licence under Motor Car Act, 1903 (c. 36), s. 4, notwithstanding that the parks regulations prescribing the speed limit were not made until after

PART V. SECT. 3, SUB-SECT. 4.

— A. (e).

n. Offence committed by driver of motor car & failing to stop—Duty of owner to give information—Condition precedent to owner's liability.—In order to impose on the owner of a car a duty under Motor Car Act, 1915, s. 10 (3), "to give any information which is within his power to give & which may lead to the identification & apprehension of the driver," the fact

that it is alleged that the driver had committed an offence against sect. 10 of the Act must be communicated to the owner. It is not a condition precedent to the liability of the owner of a motor car to give the information required under sect. 10 (3) that the driver of the car must have "refused to give his name or address," or otherwise evaded identification as described in the sub-sect when called upon to do so by a member of the police force.—*COYSH v. GRIMWADE*, [1926] V. L. R.

178; 47 A. L. T. 113; [1926] *Argus* L. R. 104.—*AUS.*

o. Duty of driver to sound horn—On seeing passenger alight from street car—Liability for negligence.—*COE v. MAYBERRY*, [1918] 3 W. W. R. 382; 11 Sask. L. R. 425; *affd.*, [1919] 1 W. W. R. 357—*CAN.*

p. —————It is not necessary at all times & in all circumstances for the safety of the travelling public that a motorist should sound his hooter

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the Motor Car Act, 1903 (c. 36), had come into force.—*R. v. PLOWDEN*, [1909] 2 K. B. 269; *sub nom. R. v. PLOWDEN, Ex p. BRAITHWAITE*, 78 L. J. K. B. 733; 100 L. T. 856; 73 J. P. 266; 25 T. L. R. 430; 7 L. G. R. 584; 22 Cox, C. C. 114, D. C.

236. — Leaving car so as to obstruct highway —Whether offence in connection with driving of motor car.]—Leaving a motor car unattended so as to cause an obstruction on a highway is not an offence in connection with the driving of a motor car, & therefore, a conviction of the driver for so doing, cannot be indorsed on his licence under Motor Car Act, 1903 (c. 36), s. 4 (1).—*R. v. LYNDON, Ex p. MOFFAT* (1908), 72 J. P. 227; 6 L. G. R. 890, D. C.

Annotation:—Folld. R. v. Yorkshire (West Riding) JJ., Ex p. Shackleton, [1910] 1 K. B. 439.

237. — — — — —.]—*R. v. YORKSHIRE (WEST RIDING) JJ., Ex p. SHACKLETON*, No. 228, *ante*.

238. — Improper identification plate.]—The driver of a motor car driving a motor car on a public highway the letters & figures on the identification plate of which are not in accordance with the regulations made by the Local Government Board by virtue of Motor Car Act, 1903 (c. 36), s. 7, commits an offence under that statute, & therefore his licence may be indorsed under the provisions of Motor Car Act, 1903 (c. 36), s. 4.—*R. v. GILL, Ex p. MCKIM* (1909), 100 L. T. 858; 73 J. P. 290; 7 L. G. R. 589; 22 Cox, C. C. 118, D. C.

Annotation:—Refd. Brown v. Crossley, [1911] 1 K. B. 603.

239. — Offence in regard to lights—Driving without offside light.]—A conviction under Motor Cars (Use & Construction) Order, 1904 for driving a motor car without a light is a conviction for "an offence in connection with the driving of a motor car" within the meaning of Motor Car Act, 1903 (c. 36), s. 4, & the justices are entitled under that sect. to cause particulars of the conviction to be indorsed upon any licence under the Act held by the person so convicted.—*Ex p. SYMES* (1910), 103 L. T. 428; 75 J. P. 33; 27 T. L. R. 21; 9 L. G. R. 151, 22 Cox, C. C. 346, D. C.

Annotations:—Appld. White v. Jackson (1915), 84 L. J. K. B. 1900. *Refd. Brown v. Crossley*, [1911] 1 K. B. 603.

240. — — — — — Driving without rear light.]—*BROWN v. CROSSLEY*, No. 224, *ante*.

241. — — — — — Using powerful head lights.]—By an Order of the Secretary of State made under the Defence of the Realm (Consolidation) Regulations, 1914, the use of powerful lamps on motor cars was prohibited.

Appl. was convicted of an offence under this Order. At the time of the commission of the offence he was driving the car:—*Held*: he had been convicted of an offence "in connection with the driving of a motor car" within the meaning of Motor Car Act, 1903 (c. 36), s. 4 (1), & was therefore liable to have particulars of the con-

viction indorsed upon his licence.—*WHITE v. JACKSON* (1915), 84 L. J. K. B. 1900; 113 L. T. 783; 79 J. P. 447; 31 T. L. R. 505; 13 L. G. R. 1319, D. C.

Annotation:—Consd. Simmonds v. Pond (1918), 88 L. J. K. B. 857.

242. — Unlawful use of petrol.]—*SIMMONDS v. POND*, No. 230, *ante*.

243. Suspension of licence—From what date suspension runs—Effect of appeal to quarter sessions.]—When a ct. of summary jurisdiction convict a person holding a licence under the Motor Car Act, 1903 (c. 36), of an offence under the Act & suspend his licence under sect. 4, sub-sect. 1 (a) of the Act, but make no order under sub-sect. 4 of that sect. deferring the operation of the order of suspension pending an appeal, an appeal to quarter sessions does not defer the operation of the order of suspension of the licence, which runs from the date when it is made, & not from the date when the appeal is disposed of by quarter sessions.—*KIDNER v. DANIELS* (1910), 102 L. T. 132; 74 J. P. 127; 8 L. G. R. 159; 22 Cox, C. C. 276, D. C.

Fine.]—See, generally, MAGISTRATES, Vol. XXXIII., pp. 459-462, Nos. 1716-1736.

C. Evidence and Procedure.

See, generally, MAGISTRATES, Vol. XXXIII., pp. 320 et seq.

244. Summons—Time for service—What is reasonable time.]—On Apr. 30 a constable told C., who was a chauffeur, that he would be summoned for driving a motor car contrary to Motor Car Act, 1903 (c. 36), s. 1, on that date. On May 2 C. left his lodgings at Newtown, taking his motor car to Coventry on his master's business. Before leaving he told his landlady to take in the summons if it came for him. On May 4 the summons, returnable on May 7, was left with his landlady, & on May 7 he was convicted in his absence & without his knowledge of an offence under Motor Car Act, 1903 (c. 36), s. 1. On May 9 C. returned to Newtown. It appeared that the justices were under the impression that the summons had actually reached C.

The ct. made absolute a rule for *certiorari* to bring up & quash the conviction on the ground that if the justices had known that the summons did not reach C. they might well have formed a different conclusion as to whether there had been a reasonable time between the service & the hearing of the summons.—*R. v. ANWYL, ETC., MERIONETHSHIRE JJ., Ex p. COOKSON* (1909), 73 J. P. 485, D. C.

245. — Statement of previous convictions.]—Where a summons is taken out against the driver of a motor car under Motor Car Act, 1903 (c. 36), s. 1 (1), it is not necessary that the summons should contain a statement as to previous convictions under the Act, & though insertion of such a statement may not be wrong in law, it is preferable that no such statement be included in the summons. The proper method is to give deft. separate notice

before turning from one street into another.—*R. v. EVERITT*, [1920] E. D. L. 170.—S. AF.

q. Act prohibiting intoxicated person driving car—Not in force in Nova Scotia.]—*R. v. CHAPMAN (N. S.)* (1922), 66 D. L. R. 72; 37 Can. Crim. Cas. 194.—CAN.

r. Failure to return to scene of accident—Person other than owner in charge—Onus of proving owner's consent.]—*R. v. SMITH*, [1927] 4 D. L. R. 410; [1927] 2 W. W. R. 722; 48

Can. Crim. Cas. 219; 21 Sask. L. R. 600.—CAN.

t. Trade licence—Use of licence by person other than licensee—Whether such person chargeable with offence against regulations.]—*WAUGH v. PATERSON*, [1924] S. C. (J.) 52; 61 Sc. L. R. 366; [1924] S. L. T. 432.—SCOT.

a. Leaving motor car on road unattended—Necessity of proving obstruction.]—*HENDERSON v. GRAY*, [1927] S. C. (J.) 43; [1927] S. L. T.

294.—SCOT.

b. Burden of proof—Of owner's responsibility for infraction of Act.]—In order to hold an owner of an automobile responsible for an infraction of Motor-traffic Regulation Act it must be shown that he was the driver or that the driver was intrusted with its care.—*R. v. RAISTON* (1919), 27 B. C. R. 174.—CAN.

c. — Motor Vehicles Act, 1914 (c. 207), s. 23.]—The above sect., as to the burden of proof when loss

that such previous convictions will be charged against him.—*R. v. HANKEY, ETC., JJ.* (1910), 55 Sol. Jo. 77, D. C.

246. Notice of intent to charge previous convictions.]—*R. v. HANKEY, ETC., JJ., No. 245, ante.*

247. Appearance of defendant—Necessity for personal appearance—Jurisdiction of justices to grant warrant.]—Where in answer to a summons issued by a ct. of summary jurisdiction deft. has appeared by counsel there is no obligation upon him to appear personally, & the justices have no jurisdiction to compel his personal appearance by warrant.—*R. v. THOMPSON*, [1909] 2 K. B. 614; 78 L. J. K. B. 1085; 25 T. L. R. 651; 7 L. G. R. 979; *sub nom. R. v. THOMPSON, Ex p. MARTIN*, 100 L. T. 970; 73 J. P. 403; 22 Cox, C. C. 129, D. C.

Annotations—*Appld. R. v. Montgomery, Ex p. Long* (1910), 102 L. T. 325. *Refd. Martin v. White*, [1910] 1 K. B. 665; *R. v. Clarke, Ex p. Crippen* (1910), 103 L. T. 636; *R. v. Garrett-Pegge, Ex p. Brown* (1911), 80 L. J. K. B. 609. *Mentd. R. v. Turner* (1909), 3 Cr. App. Rep. 103.

248. ———.]—On the hearing of a summons for driving a motor car at a speed exceeding the limit, deft. appeared by his solr., who pleaded guilty on his behalf, & also to a previous conviction. The inspector of police intimated that he required deft.'s personal appearance, & thereupon the justices granted a warrant:—*Held*: under the circumstances, a warrant ought not to have been issued.—*R. v. MONTGOMERY, Ex p. LONG* (1910), 102 L. T. 325; 74 J. P. 110; 26 T. L. R. 225; 8 L. G. R. 234; 22 Cox, C. C. 304, D. C.

249. Admissibility of evidence—Secondary evidence of contents of licence—Notice to produce not given.]—*Appl.*, having exceeded the speed limit, was stopped by a constable, & on demand produced his licence. At the hearing of the summons for exceeding the speed limit, the constable gave evidence that the name & address in the licence was that of *applt.* No notice to produce the licence had been given, but *applt.* was present in ct. at the hearing:—*Held*: the evidence was admissible.—*MARSHALL v. FORD* (1908), 99 L. T. 796; 72 J. P. 480; 6 L. G. R. 1126; 21 Cox, C. C. 731, D. C.

Annotation—*Consd. Martin v. White*, [1910] 1 K. B. 665.

250. ———.]—*Appl.* Lionel Walker Birch Martin, of Ryder Street Chambers, St. James's Street, London, who held a licence to drive a motor car issued by the London County Council & numbered 5080, was in 1909 convicted by a ct. of summary jurisdiction of driving a motor car on a public highway at a speed exceeding 20 miles an hour contrary to Motor Car Act, 1903 (c. 36), s. 9. It was then proved that the driver of a motor car of the name of Lionel Martin & of the same address as *applt.* had been convicted of a similar offence in 1907; & that a person having the same four names & of the same address as *applt.* had held a licence from the London County Council from a date before 1907 continuously down to the present time, that the licence was numbered 5080, & that no one having a London address could have that number except the person having those four names & that address.

or damage is sustained by any person by reason of a motor vehicle on the highway, does not relieve the judge or the jury from the task of weighing the evidence & coming to a conclusion upon it; it means that the burden of disproving his negligence now falls as heavily upon deft. as that of proving negligence would fall upon *pltf.* but for the sect. The effect of the sect. is not merely to alter the

procedure at the trial; but, so soon as it is proved that the damage was sustained by reason of the motor vehicle on the highway, the owner is rendered liable unless he can prove that he was not negligent. In doing so, every defence which he might otherwise raise is still open to him; but he is, nevertheless, at that stage, *prima facie* liable.—*WHITTEN v. BURTWELL* (1920), 47 O. L. R. 210; 18 O. W. N.

A police constable gave evidence that he stopped the motor car upon the occasion in 1907, & the driver upon demand produced to him a licence which was issued by the London County Council & numbered 5080. No notice to produce the licence was given. It was next proved by the production of a certified copy of the conviction that a person with the same four names & of the same address as *applt.* was convicted of a similar offence in 1908. *Appl.*, who was represented by counsel at the hearing, absented himself from the ct. & was not called as a witness. The justices found upon the above evidence that *applt.* was the person who had been convicted on both the former occasions, & they imposed a fine of £20, & ordered his licence to be indorsed:—*Held*: with regard to the conviction in 1907, the evidence of the police constable as to the contents of the licence produced to him on the occasion when the offence was committed was admissible as evidence of the identity of *applt.* with the person who was then convicted, & no notice to produce the licence was necessary; with regard to the conviction in 1908, the identity of the names & of the address was some evidence of the identity of *applt.* with the person who was then convicted; & the justices were entitled to have regard to *applt.*'s wilful absence & conclude that he was the person who was convicted on both those occasions & to order his licence to be indorsed.—*MARTIN v. WHITE*, [1910] 1 K. B. 665; 79 L. J. K. B. 553; 102 L. T. 23; 74 J. P. 106; 26 T. L. R. 218; 8 L. G. R. 218; 22 Cox, C. C. 236, D. C.

251. Examination of witnesses—By justices' clerk Whether grounds for quashing conviction.]—*Ex p. HORLICK* (1908), 21 T. L. R. 717; 72 J. P. Jo. 280, D. C.

252. ——— By police officer—Whether ground for quashing conviction—Where offer of adjournment refused by defendant.]—An information was preferred by resp. against *applt.* under Motor Car Act, 1903 (c. 36), s. 1 (1), for driving a motor car at a speed which was dangerous to the public having regard to all the circumstances of the case. *Appl.* appeared before the justices with his solr. at the hearing of the information, but resp. was not present either personally or by counsel or solr.

A police officer, who was one of the witnesses for the prosecution, examined the other witnesses for the prosecution, & during the course of the case *applt.*'s solr. requested the justices' clerk to make a note of the police officer's name. The justices thereupon announced that the case was adjourned. *Appl.*'s solr., however, said that he preferred that the case should proceed. Accordingly the hearing proceeded & *applt.* was convicted:—*Held*: the offer to adjourn having been declined by *applt.*'s solr. neither the absence of resp. nor the fact that the police officer, although a witness, conducted the examination of the other witnesses for the prosecution invalidated the conviction.—*MAY v. BEBLEY*, [1910] 2 K. B. 722; 79 L. J. K. B. 852; 102 L. T. 326; 74 J. P. 111; 8 L. G. R. 166; 22 Cox, C. C. 306, D. C.

Certiorari to quash proceedings.]—*See CROWN PRACTICE*, Vol. XVI., p. 416, Nos. 2758, 2759.

51.—CAN.

d. ——— Under Vehicles & Highway Traffic Act, 1924 (Alta.), c. 31.]—*KASTINUK v. NICHOLSON* (Alta.), [1926] 3 D. L. R. 704.—CAN.

e. Jurisdiction of Burgh magistrate—To try offences against Motor Car Act, 1903.]—*M'PIERSON v. BOYD*, [1907] S. C. (J.) 42; 44 Sc. L. R. 323; 14 S. L. T. 712.—SCOT.

Sect. 3.—Light locomotives and motor cars: Sub-sect. 4, D.; sub-sect. 5. Part VI.]

D. Appeals.

See Motor Car Act, 1903 (c. 36), ss. 4 (4), 11 (2).

253. Ground of appeal—Misreception of evidence—Statements made but not taken into consideration.]—A summons set out that deft. was charged with driving a motor car on a public highway at a speed which was dangerous to the public having regard to all the circumstances of the case, "the same being his second offence," & deft. was so charged at petty sessions by the clerk of the ct. In the course of the hearing, whilst giving evidence, two constables mentioned that deft.'s licence was indorsed when they saw it, on the car being stopped. Objection to these statements was made, & the ct. took no written note of them, the chairman of the justices deleting a note he had made, & stating that the bench would take no notice of the statements. Deft. was convicted:—*Held*: there had been no misreception of evidence, & the conviction must be upheld.—*CHOLERTON v. COPPING* (1906), 70 J. P. 484, D. C.

254. — Absence of informant—Effect of refusal by defendant of offer to adjourn.]—*MAY v. BEELEY*, No. 252, *ante*.

— *Bias of justices.]—See generally, MAGISTRATES*, Vol. XXXIII., pp. 292-298, Nos. 83-131.

— *Improper examination of witnesses.]—See Sub-sect. 4, C., ante.*

255. Whether appeal lies to quarter sessions—Conviction under Motor Car Act, 1903 (c. 36)—Fine exceeding twenty shillings—Costs not in-

cluded.]—By Motor Car Act, 1903 (c. 36), s. 11 (1), a person guilty of an offence under that Act for which no special penalty is provided is liable on summary conviction to a fine not exceeding £20; & by sub-sect. 2, an appeal to quarter sessions is given to any person adjudged to pay a fine exceeding 20s.

A person convicted under sect. 9 of the Act of driving a motor car at a speed exceeding twenty miles an hour was fined 20s. & the conviction adjudged him to pay to the clerk of the peace the sum of £1, & also pay to the informant the sum of 18s. for costs. An appeal to quarter sessions was dismissed on the ground that there was no right of appeal under the Act:—*Held*: a "fine" under sect. 11 (2) of the Act did not include the costs which deft. was ordered to pay, & therefore, no appeal lay to quarter sessions.—*Ex p. NOVIS*, [1905] 2 K. B. 456; 93 L. T. 534; 69 J. P. 288; 21 T. L. R. 517; 3 L. G. R. 753; 21 Cox, C. C. 33; *sub nom. R. v. NOVIS*, 71 L. J. K. B. 633; 49 Sol. Jo. 516, D. C.

SUB-SECT. 5.—LIABILITIES OF OWNER TO THIRD PERSONS.

Liability for negligence.]—See NEGLIGENCE, Vol. XXXVI., pp. 59-66, Nos. 366-428.

Liability for nuisance.]—See HIGHWAYS, Vol. XXVI., pp. 432, 433, Nos. 1506, 1512, 1514.

Liability of owner for acts of servant.]—See MASTER & SERVANT, Vol. XXXIV., pp. 138-143, Nos. 1083-1131.

PART V. SECT. 3, SUB-SECT. 4.
—D.

f. Person "disqualified for obtaining a licence"—Right to appeal.]—A person whose licence to drive a motor car has been suspended under Motor Car Act, 1915, s. 8, is a person "disqualified for obtaining a licence" under sect. 8 (3) of that Act, & therefore has, as such, a right of appeal to general sessions under sub-sect. (4) of that sect.—*JONES v. DONOVAN*, [1927] V. L. R. 322; 19 A. L. J. 1, [1927] *Argus* L. R. 231.—*AUS.*

PART V. SECT. 3, SUB-SECT. 5.

g. Responsibility of master—For acts of servant—Chauffeur on errand of his own.]—*MATTEI v. GILLIES* (1908), 16 O. L. R. 558; 11 O. W. R. 1083.—*CAN.*

h. — — — — —.]—*B. & R. Co., LTD. v. McLEOD* (1912), 22 W. L. R. 274; 5 Alta. L. R. 176; 2 W. W. R. 1093.—*CAN.*

k. — — — — —.]—*BERNSTEIN v. LYNCH* (1913), 28 O. L. R. 435; 4 O. W. N. 1005.—*CAN.*

l. — — — — —.]—*WYNNE v. DALBY* (1913), 30 O. L. R. 67; 5 O. W. N. 487.—*CAN.*

m. — — — — —.]—The owner of an automobile placed it in a garage for repair or for some other purpose not clearly shown, but not for demonstrating; S., the servant of the keeper of the garage, thinking the automobile was in the garage for use in demonstrating, took it out & operated it so negligently that pltf. were injured:—*Held*: under Motor Vehicles Act (c. 48), s. 19, which was the statute in force at the time of the injury, the owner was liable therefor.—*Downs v. FISHER* (1915), 8 O. W. N. 257; 33 O. L. R. 504; 23 D. L. R. 726.—*CAN.*

n. — — — — —.]—*McILROY v. KOBOLD*, [1917] 3 W. W. R. 6; 35 D. L. R. 587; 28 Man. L. R. 109.—*CAN.*

o. — — — — —.]—*JOHNSON v. MOSHER*, [1919] 3 W. W. R. 1039; 50 D. L. R.

321; 15 Alta. L. R. 1039.—*CAN.*

p. — — — — —.]—C. placed his motor vehicle in a garage with instructions that it be cleaned, jacked up, & the batteries removed. The garage-owner or his servant, without the knowledge or consent of C., drove the car on a highway & struck & injured the pltf., who sought to recover damages from C. as owner under Motor Vehicles Act, s. 19.—*Held*: C. was not liable, the car being used on the highway without his consent, express or implied.—*LEBAR v. BARBER & CLARKE*, [1923] 3 D. L. R. 1147; 52 O. L. R. 299.—*CAN.*

q. — — — — —.]—*WEAVER v. EDMONTON CORPN.* (Alta.), [1923] 4 D. L. R. 388; [1923] 3 W. W. R. 682.—*CAN.*

r. Onus of proof of negligence on plaintiff.]—Pltf.'s horse was injured on a highway by coming into collision with a motor vehicle driven by deft., & pltf. alleging negligence on the part of deft., sought damages for the injury:—*Held*: the onus of proving negligence which was the cause of the injury was upon pltf.—*QUEER v. GREIG* (B. C.) (1912), 21 W. L. R. 1.—*CAN.*

t. Application of Motor Vehicles Act, s. 23 (1).]—*DRURY v. STUMP* (1921), 64 D. L. R. 412; 50 O. L. R. 319.—*CAN.*

a. Application of British Columbia Act, 1920, c. 62, s. 35.]—The above sect. creates no civil liability in damages on the owner of a motor vehicle for a violation of the Act by a person entrusted with its possession.—*PERRIN v. VANCOUVER DRIVE-YOURSELF AUTO LIVERY*, [1921] 3 W. W. R. 61; 61 D. L. R. 140; 30 B. C. R. 211.—*CAN.*

b. Duty to keep windshield clear.]—When the windshield of an automobile becomes obscured by frost, the driver is under a duty to pedestrians either to open it to see where he is going or to take other precautions to protect them from being run over.—*BOWLER v. WINSON* (Alta.), [1925] 3 W. W. R. 449.—*CAN.*

c. Highway Act, 1923 (c. 48)—

*Limitation of action.]—**HARRIS v. YELLOW CAR, LTD.*, [1926] 3 D. L. R. 254; 59 O. L. R. 8.—*CAN.*

d. — — — — —.]—of owner for damages caused by third party driving his car without permission.]—*WAINIO v. BEAUDREAU* (Ont.), [1927] 4 D. L. R. 1131.—*CAN.*

e. Motor Vehicles Act—Presumption of negligence on part of defendant—Onus of rebuttal on defendant.]—*TORONTO GENERAL TRUSIS CORPN. v. DUNN* (1910), 15 W. L. R. 314; 20 Man. L. R. 412.—*CAN.*

aa. — — — — —.]—*WALES v. HARPER* (Man.) (1911), 17 W. L. R. 623.—*CAN.*

bb. — — — — —.]—*CUPERMAN v. ASHDOWN* (1911), 16 W. L. R. 687; 20 Man. L. R. 424.—*CAN.*

cc. — — — — —.]—The non-observance of a duty imposed by statute is in itself evidence of negligence.—*STEWART v. STEELE* (1912), 22 W. L. R. 6; 6 D. L. R. 1; 2 W. W. R. 902.—*CAN.*

dd. — — — — —.]—The effect of Motor Vehicle Act, R. S. M. 1913, c. 131, s. 63, is, that the happening of an accident caused by a motor vehicle *prima facie* indicates negligence, & negligence will be presumed unless its absence is shown.—*WEILGOSZ v. McGREGOR* (1914), 27 W. L. R. 324; 6 W. W. R. 175; 16 D. L. R. 406; 24 Man. L. R. 133; 50 C. L. J. N. S. 439.—*CAN.*

ee. — — — — —.]—*GILLINGHAM v. LEWIS* (1915), 48 N. S. R. 233.—*CAN.*

ff. — — — — —.]—*BRADSHAW v. CONLIN* (1917), 40 O. L. R. 494; 12 O. W. N. 110; 39 D. L. R. 86.—*CAN.*

gg. — — — — —.]—*BABINSKY v. WILSON* (1918), 24 R. L. N. S. 433.—*CAN.*

hh. — — — — —.]—In an action for damages for personal injuries caused by deft.'s automobile:—*Held*: deft. had failed to satisfy the onus cast upon him by Motor Vehicle Act, R. S. M. 1913, c. 131, of proving that the damage suffered by pltf. did not

Part VI.—Bicycles.

See Local Government Act, 1888 (c. 41), s. 85; Road Transport Lighting Act, 1927 (c. 37), ss. 1, 5, Sched.

256. Whether "vehicle"—Within local Act.]—ELLIS v. NOTT-BOWER, No. 36, *ante*.

Whether "carriage"—Within Highway Acts.]—See HIGHWAYS, Vol. XXVI., p. 348, Nos. 754-757.

— Within Bread Act, 1836 (c. 37), s. 7.]—See FOOD & DRUGS, Vol. XXV., p. 119, No. 415.

Whether ordinary or personal luggage.]—See CARRIERS, Vol. VIII., p. 119, Nos. 796, 801.

257. Use of bicycle—Necessity for light—Power of constable to arrest.]—A constable who sees a person riding a bicycle at night without a proper light contrary to the provisions of s. 85 of the Local Government Act, 1888, has no power to stop him for the purpose of ascertaining his name & address.—HATTON v. TREEBY, [1897] 2 Q. B. 452; 66 L. J. Q. B. 729; 77 L. T. 309; 61 J. P. 586; 46 W. R. 6; 13 T. L. R. 556; 18 Cox, C. C. 633, D. C.

— During what period.]—See Part III., *ante*.

258. — Validity of bye-law made under repealed statute.]—A bye-law made under a statute which has been repealed ceases to have any

validity unless preserved by some provision in the repealing or other statute.

By Norwich Improvement Act, 1879, s. 45, the corp'n. of Norwich were empowered to make bye-laws for regulating the use within their district of bicycles & other machines of a similar nature. They accordingly made a bye-law forbidding, under a penalty, any person (*inter alia*) to ride a bicycle on a footpath. By Local Government Act, 1888 (c. 41), s. 85, the provisions of certain Acts, "& all other provisions of any public or private Acts, in so far as they give power to any local authority to make bye-laws for regulating the use of bicycles, tricycles, velocipedes, & other similar machines" were repealed, & bicycles, tricycles, velocipedes, & other similar machines were thereby declared to be carriages within the meaning of Highway Acts. Applt. was charged before justices with contravening the above bye-law, & was convicted:—*Held*: the repeal of Norwich Improvement Act, 1879, by Local Government Act, 1888 (c. 41), carried with it the repeal of the bye-law & the conviction must be quashed.—WATSON v. WINCH, [1916] 1 K. B. 688; 85 L. J. K. B. 537; 111 L. T. 1209; 80 J. P. 149; 32 T. L. R. 244; 14 L. G. R. 486, D. C.

— Riding on footpath.]—See HIGHWAYS, Vol. XXVI., p. 438, No. 1557.

Motor-cycles.]—See Part V., Sect. 3, *ante*.

result from deft.'s negligence.—LECHWY v. SEWREY (Man.), [1918] 2 W. W. R. 386.—CAN.

p. — — — — —.]—Pltf., on foot upon a street-crossing in a town, was knocked down & injured by a motor vehicle owned by M. & driven by his daughter, aged 20 years. In an action against M. & his daughter to recover damages for pltf.'s injuries.—*Held*: as to the speed of the vehicle, that the daughter had not satisfied the *onus* cast upon her by Motor Vehicles Act, R. S. O. 1911, s. 23, by proving that she was not negligent in the driving of the vehicle.—WALKER v. MARTIN (1919), 46 O. L. R. 141, 17 O. W. N. 51.—CAN.

— — — — —.]—HARRIS v. VEN (Sask.) (1920), 54 D. L. R. 632.—CAN.

r. — — — — —.]—GI PETERBOROUGH RADIAL RY. CO (1920), 47 O. L. R. 540; 51 D. L. R. 236, 18 O. W. N. 260.—CAN.

t. — — — — —.]—Deft. driving an automobile ran into pltf. riding a bicycle. The ct. did not accept as correct the account of the accident given by either &, as the ct. was not satisfied as to how the accident occurred, deft. was held liable under Motor Vehicles Act, s. 33, as he had not satisfied the burden of showing that the damage did not arise through his negligence.—JACKSON v. LYNCH (Alta.) (1920), 3 W. W. R. 884.—CAN.

a. — — — — —.]—BANKS v. WEBBER (N. S.) (1920), 53 D. L. R. 736.—CAN.

b. — — — — —.]—Motor Vehicle Act, R. S. M. 1913, c. 131,

s. 63, presumptive negligence arises against the owner or driver of a motor vehicle when any loss or damage is incurred by any person by reason of the operation of such motor vehicle. The rule *res ipsa loquitur* applies & the *onus* rests on the owner or driver to show that the loss or damage did not arise through his negligence.—PERESZ-LEKI v. HOME BREWERIES, LTD. (Man.), [1923] 3 D. L. R. 1021, [1923] 2 W. W. R. 385.—CAN.

c. — — — — —.]—When in an action for loss or damage caused by a motor vehicle the judge after hearing & weighing the evidence comes to a determinate conclusion that the loss or damage did not arise from the negligence or improper conduct of the owner or driver of the vehicle, the question of *onus* of proof under Vehicles & Highway Traffic Act, 1924, c. 31, s. 66, need not be further considered.—SCHONBERNER v. BARRON (Alta.), [1927] 3 D. L. R. 708; [1927] 2 W. W. R. 417.—CAN.

d. Meaning of "paid employee."]—The words "paid employee" mean apparently "paid employee" of the person for whose benefit the operating is being done.—HUTCHINSON v. SHEARER, [1918] 2 W. W. R. 480; 13 Alta. L. R. 309; 41 D. L. R. 118.—CAN.

e. Whether duty to look back lies on persons travelling with stream of traffic.]—In travelling on a highway whether it be pedestrians, or a person driving a horse & carriage, or on horseback, if going with the traffic there is no duty cast upon them to look behind at short intervals, as they are

entitled to expect that those following will not run them down.—BEAUCHAMP v. SAVORY & SAVORY (1921), 30 B. C. R. 429.—CAN.

f. Unlicensed driver—Right of to sue for negligence on highway—Motor Vehicle Act, 1924 (c. 177), s. 9A (1)]—Lack of the driver's licence required by the above sect., which prohibits the driving of a motor vehicle unless such licence has been obtained, does not prevent the unlicensed driver from recovering judgment for damages caused him by the negligence of another person in the use of the highway.—WALKER v. BRITISH COLUMBIA ELECTRIC RY. CO., [1926] 1 D. L. R. 1162; [1926] 1 W. W. R. 503; 36 B. C. R. 338.—CAN.

g. Requirement of Motor Vehicles Act, 1922 (c. 195), s. 26 (2)—Whether there is a duty to stop dead on entering place mentioned in section.]—WEART v. STAUFFER MUNICIPAL DISTRICT (Alta.), [1923] 2 W. W. R. 51.—CAN.

PART VI.

h. Whether vehicle.]—A bicycle is a "vehicle."—R. v. JUSTIN (1893), 21 O. R. 327.—CAN.

k. — — — — —.]—R. v. KIKABIAN (1917), 1 L. R. 41 Bom. 464.—IND.

l. Whether carriage.]—M'KEE v. M'GRATH (1892), 30 L. R. 1r. 41.—IR.

m. "Drive any vehicle" whether "ride any bicycle" included.]—SMITH v. BONE (1911), 7 Tas. L. R. 109.—AUS.

n. Liability for obstruction—Cycling on footpath.]—YELDHAM v. CARPENTER (1912), 46 L. T. 186.—IR.

Part VII.—Aircraft.

See Air Navigation Act, 1920 (c. 80).

259. Liability for trespass.] — *Semble*: an aeronaut is not liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage.—*PICKERING v. RUDD* (1815), 4 Camp. 219; 1 Stark. 56; 171 E. R. 70, N. P.

Annotations:—*Consd.* *Kenyon v. Hart* (1865), 6 B. & S. 249. *Mentd.* *Wells v. Ody* (1836), 1 M. & W. 452; *Foulkes v. Scarfe* (1812), 4 Man. & G. 126; *Harvey v. Walters*

(1873), L. R. 8 C. P. 162; *Clifton v. Bury* (1887), 4 T. L. R. 8; *Lemmon v. Webb*, [1895] A. C. 1.

260. —.]—I understand the good sense though not the legal reason of LORD ELLENBOROUGH'S doubt [in *Pickering v. Rudd*], No. 259, *ante*, whether an action of trespass would lie against a man passing over the land of another in a balloon (BLACKBURN, J.).—*KENYON v. HART* (1865), as reported in 6 B. & S. 249; 122 E. R. 1188. *Annotation* —*Mentd.* *Clifton v. Bury* (1887), 4 T. L. R. 8.

STREETS.

See HIGHWAYS, STREETS, AND BRIDGES.

STURGEON.

See CONSTITUTIONAL LAW.

SUBINFEUDATION.

See COPYHOLDS.

SUBMISSION.

See ARBITRATION.

SUBORNATION OF PERJURY.

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See CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL; CROWN PRACTICE; EVIDENCE.

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Post Office

See POST OFFICE

Part I.—Definitions.

See Telegraph Acts, 1863 (c. 112), s. 3; 1869 (c. 73), s. 3; 1878 (c. 96), s. 2; 1892 (c. 59), s. 3; 1908 (c. 33), s. 9 (1).

1. Telegram — Telephone communication.] — Edison's telephone, for which patents were granted in 1877 & 1878, consists of a transmitter, a wire, & a receiver. When sounds are spoken into the transmitter, electric currents of varying intensity pass along the wire, so that corresponding or equivalent sounds are heard at the receiver, & two persons at a distance can thus converse with one another. A co. leased these telephones to subscribers at yearly rents which produced a profit to the co., & arranged the wires so that sub-

scribers could converse with one another when put into communication by a servant of the co.:—*Held*: (1) Edison's telephone was a "telegraph" within Telegraph Act, 1863 (c. 112), & Telegraph Act, 1869 (c. 73), although the telephone was not invented or contemplated in 1869; (2) a conversation through the telephone was a "message," or at all events a "communication transmitted by a telegraph," & therefore a "telegram" within the meaning of those Acts; & that since the co. made a profit out of the rents, conversations held by subscribers through their telephones were infringements of the exclusive privilege of transmitting telegrams granted to the Postmaster-

General by Telegraph Act, 1869 (c. 73), & were not within the exceptions mentioned in Telegraph Act, 1869 (c. 73), s. 5.

In simpler language, the Postmaster-General is to have the exclusive privilege of transmitting messages or other communications by any wire & apparatus connected therewith used for telegraphic communication, or by any other apparatus for transmitting messages or other communications by means of electric signals. The result of the definition seems to be that any apparatus for transmitting messages by electric signals is a telegraph, whether a wire is used or not, & that any apparatus, of which a wire used for telegraphic communication is an essential part, is a telegraph, whether the communication is made by electricity or not. It would include, on the one hand, electric signals made, if such a thing were possible, from place to place, through the earth or the air: &

on the other, a set of common bells, worked by wires pulled by the hand, if they were so arranged as to constitute a code of signals (STEPHEN. J.).—*A.-G. v. EDISON TELEPHONE CO. OF LONDON* (1880), 6 Q. B. D. 244; 50 L. J. Q. B. 145; 43 L. T. 697; 29 W. R. 428.

Annotations:—As to (1) *Refd.* British Broadcasting Co. v. Wireless League Gazette Publishing Co. (1926), 95 L. J. Ch. 272. As to (2) *Consd.* Postmaster-General v. National Telephone Co., [1908] 2 Ch. 172. As to (2) *Refd.* Wands-worth Board of Works v. United Telephone Co. (1884), 53 L. J. Q. B. 449. *Generally, Mentd.* Wakefield & District Light Hys. v. Wakefield Corp., [1907] 2 K. B. 256.

2. — *Electric signal.*—*POSTMASTER-GENERAL v. NATIONAL TELEPHONE CO., LTD., No. 8, post.*

3. *Telegraph.*—*A.-G. v. EDISON TELEPHONE CO. OF LONDON, No. 1, ante.*

4. — *Telephone.*—*A.-G. v. EDISON TELEPHONE CO. OF LONDON, No. 1, ante.*

Wireless telegraphy.—*See Wireless Telegraphy Act, 1904 (c. 24), s. 1 (7).*

Part II.—The Postmaster-General.

SECT. 1.—IN GENERAL.

5. *Exemption from liability*—For acts of servants.]—Where a certain sum is charged for a telegram & deft. is afterwards called upon to pay an increased sum:—*Held*: deft. is bound to pay the amount so claimed, the Postmaster-General being in no way estopped from suing, & not being bound by inaccurate representations made by a clerk in his employ.—*POSTMASTER-GENERAL v. GREEN* (1887), 51 J. P. 582; 3 T. L. R. 780, C. A.

6. — — —.]—The Postmaster-General is not liable in his official capacity as head of the telegraph department of the Post Office for wrongful acts done by his subordinates in carrying on the business of the department.—*BAINBRIDGE v. POSTMASTER-GENERAL*, [1906] 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70, C. A.

Annotations:—*Appld.* Roper v. Public Works Comrs., [1915] 1 K. B. 45. *Consd.* Mackenzie-Kennedy v. Air Council, [1927] 2 K. B. 517.

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— *Bye-laws under Public Health Acts.*—*See Public Health Acts (Amendment) Act, 1890 (c. 59), ss. 13, 15 (1).*

—.]—*See, also, Telegraph Acts, 1869 (c. 73), ss. 10 (3), 22; 1892 (c. 59), s. 4.*

PART II. SECT. 1.

5 i. *Exemption from liability*—For acts of servants.]—In an action against the Postmaster-General in his individual capacity, by his servants, negligently opening a flagway for the purpose of erecting telegraph poles.—*Held*: the action did not lie.—*JONES v. MONSELL* (1872), 1 L. R. 6 C. L. 155.—*IR.*

a. *Permission given by county council to National Telephone Company*—To erect poles, paying rent for wayleave—& granting special telephone facilities to council—Purchase of telephone company's plant, property, & assets, by the Postmaster-General—Postmaster-General not bound by agreement for rent & facilities.]—*DUBLIN COUNTY COUNCIL v. POSTMASTER-GENERAL*, [1914] 2 I. R. 208.—*IR.*

b. *Liability of Postmaster-General*—To pay costs when unsuccessful in an action.]—Where the Postmaster-General brings an action under Tele-

graph Act, 1878, s. 11, which entitled him to institute proceedings as if the Postmaster-General were a body corporate, & to recover any sum due under Telegraph Acts, or any contract made for the purpose of those Acts, as a debt, in any manner in which it might be recovered if it were a debt due to a private person, the Postmaster-General can recover, & is liable to pay costs.—*POSTMASTER-GENERAL v. GREAT SOUTHERN & WESTERN RY. CO. OF IRELAND*, [1916] 1 I. R. 74, 83; 50 L. L. T. 137.—*IR.*

c. — — —.]—Where the Postmaster-General in his corporate capacity successfully applies for compensation under Malicious Injuries Code for injury to corporate property, the county ct. judge & the judge of assize may award him costs.—*POSTMASTER-GENERAL v. ANTRIM COUNTY COUNCIL & BALLYCASTLE RURAL DISTRICT COUNCIL*, [1922] 2 I. R. 12.—*IR.*

d. *Damage to telephone wires*—*Right of Postmaster-General to recover wages of workmen.*—Telegraph & telephone wires, the property of the Postmaster-General, situate in the division of Downpatrick, in the County of Down, were maliciously damaged. The necessary repair work was executed by four employees of appot.:—*Held*: the Postmaster-General was entitled to be paid compensation in respect of the amount of men's wages, time of salaried officer, & establishment charges.—*POSTMASTER-GENERAL v. DOWN COUNTY COUNCIL*, [1924] 3 I. R. 15.—*IR.*

PART II. SECT. 2, SUB-SECT. 1.

e. *Postmaster-General purchasing undertaking of telephone company*—Whether bound by contracts entered into by company & road authority.]—*DUBLIN COUNTY COUNCIL v. POSTMASTER-GENERAL*, [1914] 2 I. R. 208.—*IR.*

SECT. 2.—MONOPOLY OF POSTMASTER-GENERAL

SUB-SECT. 1.—IN GENERAL.

See Telegraph Act, 1869 (c. 73), s. 4; Telephone Transfer Act, 1911 (c. 26); Telephone Transfer Amendment Act, 1911 (c. 56).

7. *Whether exemption from monopoly*—*Private telephone.*—*A.-G. v. EDISON TELEPHONE CO. OF LONDON, No. 1, ante.*

8. — — — *A to A class.*—(1) Private telegraph or telephone lines of the A. to A. class, such as lines from a merchant's office to his private house, or from a head to a branch office, fall within Telegraph Act, 1869 (c. 73), s. 5, & are therefore excepted from the Postmaster-General's monopoly, but private lines of the A. to B. class, namely, lines connecting two or more separate & independent persons or business, are not within the exception.

(2) Unlicensed electric signals, where no telephone is used, of the kind described in the second schedule to the special case are not excepted from the Postmaster-General's monopoly.

(3) A point was made that the transmission of a signal, as described in the second schedule, does not amount to the transmission of a telegram within Telegraph Act, 1869 (c. 73). I think the point is untenable in view of the definition clause

(LORD LOREBURN, C.).—POSTMASTER-GENERAL *v.* NATIONAL TELEPHONE CO., LTD., [1909] A. C. 269; 78 L. J. Ch. 422; 100 L. T. 658; 73 J. P. 321; 25 T. L. R. 487; 53 Sol. Jo. 429, II. L.

9. ——— **A to B class.**]—POSTMASTER-GENERAL *v.* NATIONAL TELEPHONE CO., LTD., No. 8, *ante*.

10. ——— **Electric signals.**]—POSTMASTER-GENERAL *v.* NATIONAL TELEPHONE CO., LTD., No. 8, *ante*.

SUB-SECT. 2.—DELEGATION OF POWERS AND DUTIES.

See Telegraph Acts, 1863 (c. 112), s. 43; 1868 (c. 110), s. 14; 1869 (c. 73), s. 5; 1892 (c. 59), s. 5.

11. **Whether licence confers monopoly.**]—Defts. were a co. incorporated under Companies Act, 1862 (c. 89), & licenced by the Postmaster-General under Telegraph Act, 1869 (c. 73), s. 5, to establish telegraphs within the limits of their districts, which included the London Stock Exchange, for the purpose of simultaneously transmitting news to their subscribers. This news consisted, amongst other things, of current fluctuations of prices on the Stock Exchange, & was by the permission of the Stock Exchange collected there by defts.' agents & distributed from defts.' offices to the offices of their subscribers by means of tape-recording instruments supplied by defts. Pltf. was not a member of the Stock Exchange, & was in the habit of advertising for business. Defts. had entered into three separate contracts with pltf. by which they undertook to supply him with three of their instruments. By the rules of the Stock Exchange its members were not allowed to advertise, & the Stock Exchange having required defts. to cease supplying outside brokers who advertised with the special information collected in the building, defts. disconnected the three

instruments from the supply of that class of news :—*Held* : the licence of defts. was neither a monopoly at common law nor part of the monopoly conferred on the Postmaster-General by Telegraph Act, 1869 (c. 73), & therefore there was no duty imposed by the licence for the non-performance of which pltf. could sue defts.—COCHRANE *v.* EXCHANGE TELEGRAPH CO., LTD. (1896), 65 L. J. Ch. 334; 12 T. L. R. 197; 40 Sol. Jo. 275.

12. **Licencee subject to control of local authority—Refusal of consent—Difference not referable to statutory tribunal.**]—TUNBRIDGE WELLS CORPN. *v.* NATIONAL TELEPHONE CO., No. 43, *post*.

13. ——— ——— ———.]—NATIONAL TELEPHONE CO., LTD. *v.* HUDDERSFIELD CORPN. (1901), 17 T. L. R. 460, C. A.

14. **Licence strictly construed—Full powers of Postmaster-General not inferred.**]—By Telegraph Act, 1863 (c. 112), s. 6 (1), the Postmaster-General has power to place a telegraph under any public road, & by sub-sect. 4 he can place a telegraph over or across a railway. By sect. 32 of that Act he must not place any work over or across a railway without the consent of the directors thereof; but by the proviso to that sect. he is not restricted from placing any work in a public road because the road crosses a railway. But sect. 32 does not say that in such a case the work shall be deemed not to be carried across a railway. Therefore a licence by the Postmaster-General which empowers a telephone co. to exercise his powers of executing works other than works under, in, upon, over, along or across any railway does not authorise them to lay a cable in a public road on a bridge which crosses a railway without the consent of the railway co. who are owners of & liable to repair the bridge but do not repair the road.—SOUTH EASTERN RY. CO. *v.* NATIONAL TELEPHONE CO., LTD., [1908] 2 Ch. 50; 77 L. J. Ch. 679; 99 L. T. 339; 21 T. L. R. 579; *on appeal*, [1908] 2 Ch. 514; 21 T. L. R. 795, C. A.

Part III.—Construction and Maintenance of Telegraphs.

See Telegraph Act, 1863 (c. 112).

15. **Erection of telegraph in highway—Consent of body in control of highway—Whether necessary—Company not authorised by special Act.**]—Metropolis Management Act, 1855 (c. 120), s. 96, does not confer upon a vestry or a board of works, constituted under that statute, such a property in the streets situate within their district, as to entitle them to maintain an action for an injunction against the erection of a telephone wire across a street, the telephone wire being erected at a great height & causing no appreciable danger to the public or to the traffic in the street. Notwithstanding Telegraph Act, 1869 (c. 73), s. 3, a telephone co. registered under Companies Act, 1862 (c. 89), & not incorporated under any special Act, does not fall within the phrase "the co." used in the Telegraph Act, 1863 (c. 112), & therefore is not forbidden by Telegraph Act, 1863 (c. 112),

s. 12, to erect its wires across a street, unless the consent of the body having the control of the street is obtained.—WANDSWORTH BOARD OF WORKS *v.* UNITED TELEPHONE CO. (1884), 13 Q. B. D. 904; 53 L. J. Q. B. 449; 51 L. T. 148; 48 J. P. 676; 32 W. R. 776, C. A.

Annotations :—*Refd.* Fareham L. B. & Fareham Electric Light Co. *v.* Smith (1891), 7 T. L. R. 443; Baird *v.* Tunbridge Wells Corpn., [1891] 2 Q. B. 867; Postmaster-General *v.* Liverpool Corpn. (1922), 92 L. J. K. B. 382. *Mentd.* A.-G. *v.* Conduitt Colliery Co., [1895] 1 Q. B. 301; Holmfrith L. B. *v.* Shore, (1895) 59 J. P. 314; Tunbridge Wells Corpn. *v.* Baird (1896), 60 J. P. 788; St. Mary, Battersea Vestry *v.* County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31; Finchley Electric Light Co. *v.* Finchley U. D. C., [1903] 1 Ch. 437; Westminster Corpn. *v.* Johnson, Same *v.* Fuller, [1904] 2 K. B. 737; Noble *v.* Harrison, [1926] 2 K. B. 332.

16. ——— ——— **Refusal of consent—Reference to arbitration.**]—A corpn. of a county borough on being applied to by the Postmaster-General under

PART II. SECT. 2, SUB-SECT. 2.

f. **Licence to use lines when constructed—Extent of powers conferred.**]—POSTMASTER-GENERAL *v.* EDINBURGH CORPN. (1897), 10 Ry. & Can. Tr. Cas. 247.—SCOT.

PART III.

g. **Erection of telegraph in highway—Resort to arbitration in case of**

disagreement.]—MCKENZIE *v.* MCKAY (1858), 3 N. S. R. (2 Thom.) 321.—CAN.

h. ——— ———.]—GILCHRIST *v.* DOMINION TELEGRAPH CO. (1880), 19 N. B. R. (3 P. & B.) 553.—CAN.

k. ——— **Liability for damage—Caused by erection being not in accordance with Act.**]—HOWARD *v.* ST. THOMAS CORPN. (1889), 19 O. R. 719.—CAN.

l. ——— ——— **Obstruction.**]—WELLS

v. WESTERN UNION TELEGRAPH CO. (1895), 40 N. S. R. 81.—CAN.

m. ——— ——— ———.]—A telephone co. having permission by its Act of incorporation to erect poles on the streets of towns & incorporated villages, so as not to interfere with the public right of travel, is not relieved from liability for damages when it plants the poles on the highway in

Telegraph Act, 1878 (c. 76), s. 3, for their consent to the erection of certain telephone wires on poles in & along certain public roads within the borough refused their consent. The difference was referred under Telegraph Act, 1878 (c. 76), s. 4, to the county ct. judge of the district who decided that such wires should be erected overhead as proposed by the Postmaster-General, the corpn. thereupon applied to the Railway Comrs. The substantial objections of the corpn. were (a) that overhead wires lowered the value of house property in the roads where they were erected; (b) that they disfigured such roads; (c) that they were dangerous in times of storm; (d) that their vibration was a nuisance; (e) that they obstructed traffic:—*Held*: the overhead wires as proposed by the Postmaster-General should be allowed, but if the corpn. should within one month give notice that they would bear the extra cost of laying any line underground in any street such line should be placed underground accordingly.—*CROYDON CORPN. v. POSTMASTER-GENERAL* (1910), 74 J. P. 424; 8 L. G. R. 1005; *sub nom.* *POSTMASTER-GENERAL v. CROYDON CORPN.*, 14 Ry. & Can. Tr. Cas. 158.

17. ————.] — *POSTMASTER-GENERAL v. LEICESTER CORPN.* (1913), 77 J. P. Jo. 605.

18. ———— **Whether refusal unreasonable.**—Where a local authority had *bonâ fide* exercised their discretion in refusing their consent to the placing of a distributing telegraph pole on a narrow pavement, about one-fifth of which would have been confiscated for that purpose, & where a suitable site on private ground was available at a rental of £1 *per annum*:—*Held*: the local authority had not withheld their consent unreasonably.—*POSTMASTER-GENERAL v. DARLINGTON CORPN.* (1914), 15 Ry. & Can. Tr. Cas. 333.

19. ———— **Owners of soil—Highway not taken over by local authority.**—By Telegraph Act, 1863 (c. 112), s. 12, "the co," now the Postmaster-General, "shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road."

The Postmaster-General, being desirous of placing telegraph posts & wires in, along, & across a street or public road in an urban district, being a public highway not repairable by the inhabitants at large, required the urban district council to give their consent thereto under Telegraph Act, 1863 (c. 112), s. 12. It was admitted that the highway was a "street" which the urban district council could require the frontagers to make good under Public Health Act, 1875 (c. 55), s. 150:—*Held*: the urban district council, not being liable to repair the road, were not the body "having the control

of" it within Telegraph Act, 1875 (c. 55), s. 12, & that streets which have not been taken over by the local authority remain under the control of the owners of the soil over which they are made.—*POSTMASTER-GENERAL v. HENDON URBAN COUNCIL* [1914] 1 K. B. 564; 83 L. J. K. B. 618; 110 L. T. 213; 78 J. P. 145; 30 T. L. R. 171; 12 L. G. R. 437; 15 Ry. & Can. Tr. Cas. 185, C. A.

Annotation:—*Reid*. *Postmaster-General v. Hutchings* (1916), 85 L. J. K. B. 1008.

20. ———— **Under special Act—Immunity from penalty for road breaking.**—A telegraph co., by their Act of Parliament, were empowered, under the superintendence of the persons having control of the road or street, to break up the soil thereof, & place their telegraph posts. After giving the notices required by their Act, they broke up a road & placed posts, the road being only 28 feet wide:—*Held*: they committed no offence, & were not liable to the penalty prescribed by Turnpike Roads Act, 1822 (c. 126), s. 118.—*BRITISH ELECTRIC TELEGRAPH CO. v. DAVIES* (1863), 27 J. P. 390.

21. ———— **Compensation payable to owner of soil—Where not controlled by local authority.**—*POSTMASTER-GENERAL v. HUTCHINGS*, No. 38, *post*.

22. **Erection of telegraph on private property—Interference with amenities of owner—Alternative site ordered.**—*POSTMASTER-GENERAL v. HURST* (1913), 77 J. P. Jo. 605.

———.]—*See, also*, Nos. 38, 49, *post*.

23. **Laying wires in highway—Consent of person liable to repair of highway—Landowner.**—A telephone co., acting under a licence from the Postmaster-General pursuant to Telegraph Act, 1863 (c. 112), Telegraph Act, 1878 (c. 76), & Telegraph Act, 1892 (c. 59), need not obtain the previous consent of a tramway co. before proceeding to break open a street or public road on which tramway lines are laid for the purpose of laying telephone wires, even though the tramway co. is liable for the repair of that street or public road.—*BRISTOL TRAMWAYS & CARRIAGE CO. v. NATIONAL TELEPHONE CO.*, [1899] 2 Ch. 282; 68 L. J. Ch. 566; 80 L. T. 836; 63 J. P. 583; 15 T. L. R. 430; 43 Sol. Jo. 603.

24. **Power to carry wires across railway—Under special Act—Meaning of "across."**—*Pltfs.*, a railway co., established by 7 Vict. c. xxv., were empowered by their Act to carry their railway across certain public highways at particular places therein mentioned, on a level. *Defts.*, an Electric Telegraph Co., were incorporated by 14 & 15 Vict. c. cxxxv; & by sect. 37 of that Act it was enacted, "that it shall be lawful for the co. from time to time to lay down & place under any public roads, streets, highways, & other thoroughfares, & either along or across such places, any wires, pipes, or tubes which shall or may be necessary or con-

such a way as to become an element of danger to the public, although, as required by the Act of incorporation, the poles are planted under the supervision of the municipality.—*BONN v. BELL TELEPHONE CO.* (1899), 30 O. R. 696.—*CAN.*

n. ————.] — *CHATHAM CORPN.* (1899), 26 A. R. 521; 19 C. L. T. 382.—*CAN.*

o. ————.]—*Howse v. SOUTHWOLD TOWNSHIP* (1912), 22 O. W. R. 797; 3 O. W. N. 1592; 27 O. L. R. 29; D. L. R. 709.—*CAN.*

———.]—*McISAAC v. MARITIME TELEGRAPH & TELEPHONE CO., LTD.* (1917), 50 N. S. R. 331; 33 D. L. R. 31.—*CAN.*

q. ———— **Consent of body in control of highway—Validity of bye-law.**—A bye-

law passed by the city council ratified an agreement between the city & a telephone co., providing that no other person, firm, or co. should, for five years, have any license or permission to use any of the public streets, etc., of the city for the purpose of carrying on any telephone business:—*Held*: this bye-law was in contravention of Municipal Act (c. 42), s. 286, & was *ultra vires* of the council.—*Re ROBINSON & ST. THOMAS CORPN.* (1893), 23 O. R. 489.—*CAN.*

r. ————.]—*Re ROBERTSON v. COLBORNE MUNICIPAL COUNCIL* (1912), 23 O. W. R. 325; 4 O. W. N. 274; 8 D. L. R. 119.—*CAN.*

t. ————.]—*TEMISKAMING TELEPHONE CO., LTD. v. COBALT CORPN.* (1919), 44 O. L. R. 367; 15 O. W. N.

242.—*CAN.*

a. ————.]—*BELL TELEPHONE CO. v. OWEN SOUND CORPN.* (1901), 24 C. L. T. 320; 8 O. L. R. 74; 4 O. W. R. 69.—*CAN.*

Whether — *TORONTO CORPN. v. BELL TELEPHONE CO. OF CANADA*, [1905] A. C. 52.—*CAN.*

c. ————.]—*VANCOUVER CORPN. v. BRITISH COLUMBIA TELEPHONE CO.* (1905), 1 W. L. R. 461.—*CAN.*

d. ————.]—*HALDIMAND COUNTY v. BELL TELEPHONE CO. OF CANADA* (1912), 25 O. L. R. 467; 21 O. W. R. 194; 3 O. W. N. 607; 11 D. L. R. 197.—*CAN.*

e. ———— **Sufficiency of subsequent consent.**—*STEVENS v.*

venient for the purposes of any electric or other telegraph, or intended electric or other telegraph; & from time to time to alter, repair, amend, & reinstate the same, & for such purposes to break up or open the pavement or soil of any such places, the co. doing as little damage as may be, & making compensation for all damage to be caused thereby to the parties who shall have sustained such damage; provided that nothing in this present provision contained shall extend or apply to any railway or canal, or to any of the works or conveniences connected with any railway or canal, except, that, subject to the provisions of this Act, it shall be lawful for the co. to carry their wires, pipes, & tubes, directly, but not otherwise, across any railway or canal, but so & in such manner, & only at such place & time, as not in anywise to damage, or be likely to damage, the railway or canal, or any of the works connected therewith, or at all to interrupt or interfere with the use thereof, or the passage & conveyance of traffic along the same." Defts. carried their wires & pipes across plffs.' railway, at a place where it crossed the public highway on a level, by carrying their wires, etc., under plffs.' rails, & through the ballast & soil of the line, & as plffs. alleged, "after & by reason of the wrongs complained of, the repair & renovation of part of the soil & ballast of plffs.' railway became in some measure less easy & convenient, by reason of the necessity of avoiding or interfering with the wires & pipes":—*Held*: in such case, defts. were not empowered, under the preceding sect. to carry their wires, etc., across the railway in the manner they had adopted, as they had thereby interfered with the railway.

Semble: the telegraph co. could not, in any case, carry their wires, etc., under a railway within the meaning of that term as used in sect. 37.

The question, turns upon the meaning of the word "across." Looking at the words in the same clause, which expressly give them the power to go under public roads, while the proviso confines them, in the case of railways & canals, to going directly across, it seems to me that the true construction of the proviso is, that in such cases they are excluded from going under (PARKE, J.).—SOUTH EASTERN RY. CO. v. EUROPEAN & AMERICAN ELECTRIC PRINTING TELEGRAPH CO. (1854), 9 Exch. 363; 2 C. L. R. 467; 23 L. J. Ex. 113; 22 L. T. O. S. 227; 156 E. R. 154.

25. Power to construct telegraph—Agreement for free transport of men & stores—Extent of agreement.—By an agreement the Postmaster-General acquired the right to construct & maintain a line of telegraph wires along the railway belonging to the A. & B. Railway Co. A clause in the agreement provided for the free carriage of stores & men employed by the Postmaster-General "in

the construction maintenance or repair of the lines of telegraph of the Postmaster-General":—*Held*: the telegraph lines in question must be limited to those the subject-matter of the agreement.—METROPOLITAN RY. CO. v. POSTMASTER-GENERAL (1916), 85 L. J. K. B. 1541; 115 L. T. 842; 32 T. L. R. 682.

26. Acquisition of undertaking by Postmaster-General—Railway telegraph—Interest of railway company.—By Telegraph Act, 1868 (c. 110), s. 7, any railway co. possessed of a telegraph open to the use of the public on Jan. 1, 1868, for transmitting messages for money, or possessing any beneficial interest in such telegraph, may require the Postmaster-General to purchase the right of such railway co. to transmit such messages or other beneficial interest. By Telegraph Act, 1869 (c. 73), s. 10, any telegraph co. with which the Postmaster-General may not come to an agreement with respect to the amount of compensation to be paid to them for their undertaking, may have such amount settled by arbn. in manner provided by Lands Clauses Consolidation Act, 1845 (c. 18). By an agreement with a telegraph co., under which the telegraph co. erected & placed their telegraphic apparatus on the Cowes & Newport Railway Cos.' line, the railway co. took the exclusive use of one wire during the continuance of the agreement, for messages of their own relating to the business of the co., but were prohibited from using the wire for public use or for profit, or for any other purpose than the transmission of the railway co.'s own messages, & at the end of the agreement which was to be in force for twenty-one years, the telegraph co. were to remove their telegraphic apparatus:—*Held*: the railway co. had no such interest in the telegraph as to entitle them to require the Postmaster-General to purchase it under Telegraph Act, 1868 (c. 110), & Telegraph Act, 1869 (c. 73).—COWES & NEWPORT RY. CO. v. BOARD OF TRADE (1874), 43 L. J. Q. B. 212; *sub nom.* R. v. BOARD OF TRADE, *Re* COWES & NEWPORT RY. CO. & POSTMASTER-GENERAL, 22 W. R. 807.

27. — Undertaking of telegraph company—Agreement for maintenance by railway company—Construction of agreement.—POSTMASTER-GENERAL v. GREAT WESTERN RY. CO. (1889), 5 T. L. R. 714, H. L.; *affg.* S. C. *sub nom.* GREAT WESTERN RY. CO. v. R. (1888), 4 T. L. R. 383, C. A.

28. Poles owned by railway company—Carrying wires of railway company & Postmaster-General—Cost of shifting poles & wires—Rateably divided.—POSTMASTER-GENERAL v. GREAT WESTERN RY. CO. (1889), 5 T. L. R. 714, H. L.; *affg.* S. C. *sub nom.* GREAT WESTERN RY. CO. v. R. (1888), 4 T. L. R. 383, C. A.

NATIONAL TELEPHONE CO., LTD., LEE (EDWARD) & CO., LTD. v. NATIONAL TELEPHONE CO., LTD., [1911] 1 L. R. 9.—IR.

f. — Presumption that consent given.—A telephone co. which acquires from another co. the latter's poles & wires which have been on a highway for years without objection from the municipal council is entitled to assume that such equipment is on the highway with the council's approval.—OKANAGAN TELEPHONE CO. v. SUMMERLAND TELEPHONE CO., LTD.,

[1918] 1 W. W. R. 656; 25 B. C. R. 221.—CAN.

g. — Right of railway company to work telegraph line.—Where by mutual agreement between appct. railway co. & resp. telegraph co. the latter was exclusively entitled to erect & work lines on the former's property for the purposes of its own business & bound to furnish for the use of the former, a special wire for the purposes of the railway as it is existed at the date of the contract:—*Held*: resp.'s exclusive right for the purposes of its own

business did not exclude the railway co. from erecting & working telegraph lines on its own property for the purposes of its railway business.—REID-NEWFOUNDLAND CO. v. ANGLO-AMERICAN TELEGRAPH CO., [1910] A. C. 560.—NFLD.

h. Agreement taking over "special wire" Wire used for unprivileged messages—Duty of party using wire to account for profits.—REID-NEWFOUNDLAND CO. v. ANGLO-AMERICAN TELEGRAPH CO. (1912), 9 Nfld. L. R. App. NFLD.

Part IV.—The Conduct of Telegraphic Business.

Statutory duties to the public using telegraphs.]—See Telegraph Acts, 1863 (c. 112), ss. 41, 42, 45; 1868 (c. 110), ss. 16, 20; 1869 (c. 73), s. 23; 1885 (c. 58), s. 2.

Statutory charges for the use of telegraphs.]—See Telegraph Acts, 1885 (c. 58), s. 2; 1897 (c. 41), s. 1.

Production of telegram as evidence in legal proceedings—Whether ordered.]—See EVIDENCE, Vol. XXII., p. 379, Nos. 3871–3879.

Defamatory matter sent by telegram—Effect on privilege as defence.]—See LIBEL, Vol. XXXII., p. 116, No. 1482.

29. Conditions on back of telegram form—Validity of.]—Electric Telegraph Company's Act, 1853, s. 66, enacts, "that the use of any electric telegraph erected or formed under the provisions of the Act for the purpose of receiving & sending messages shall, subject to the prior rights of use thereof for the service of Her Majesty & for the purposes of the co., & subject also to such reasonable regulations as may be from time to time made or entered into by the co., be open for the sending

& receiving of messages by all persons alike without favour or preference." Pltfs. sent a message to defts.' office, to be transmitted by their telegraph to a vessel lying off Exmouth, requiring the master to proceed with her to Hull. The message was received by defts., subject, amongst others, to the following condition, "The co. will not be responsible for mistakes in the transmission of unrepeatd messages, from whatever cause they may arise." In the transmission of the message, which was an unrepeatd one, "Southampton" was by mistake substituted for "Hull," in consequence of which the vessel went to the former place, & pltfs. sustained loss in the sale of the cargo, oranges, at a bad market:—*Held*: the above condition was a reasonable one within sect. 66 of the Act, & afforded an answer to the action.—*MACANDREW v. ELECTRIC TELEGRAPH CO.* (1855), 17 C. B. 3; 25 L. J. C. P. 26; 26 L. T. O. S. 75; 1 Jur. N. S. 1073; 4 W. R. 7; 139 E. R. 965.

Annotations:—*Mentd.* *Simons v. G. W. Ry., L. & N. W. Ry. v. Dunham* (1856), 26 L. J. C. P. 25; *Harrison v. L. B. & S. C. Ry.* (1860), 2 B. & S. 122.

Part V.—Special Provisions as to Telephones.

See Telegraph Act, 1899 (c. 38); Telegraph (Construction) Act, 1908 (c. 33); Telegraph (Arbitration) Act, 1909 (c. 20); Telephone Transfer Act, 1911 (c. 26); Telephone Transfer (Amendment) Act, 1911 (c. 56).

30. Licence granted to telephone company—To lay underground wires—Under agreement with local authority—Duration of powers under agreement.]—The word "thereof" in Telegraph Act, 1899

(c. 38), s. 3 (1), refers to the word "powers" & not to the word "licence." Accordingly, where a telephone co. had entered into an agreement with a local authority for the laying down of underground wires, & that agreement had come to an end under a proviso for determination therein contained, the subsequent grant by the Postmaster-General to the local authority of a new licence, which is silent as to the continuance

PART IV.

k. Construction of agreements between telegraph company & Government of Tasmania—As to cable laid in 1869 between Victoria & Tasmania—Power to reduce & abolish rates.]—*EASTERN EXTENSION AUSTRALASIA & CHINA TELEGRAPH CO. v. COMMONWEALTH* (1908), 6 C. L. R. 647.—**AUS.**

l. Regulation forbidding publication of telephone subscribers lists—Whether ultra vires powers in Post & Telegraph Act.]—*COMMONWEALTH & POSTMASTER-GENERAL v. PROGRESS ADVERTISING & PRESS AGENCY CO., LTD.* (1910), 10 C. L. R. 457.—**AUS.**

m. Grant of exclusive right to foreign company—To construct & operate telegraph line over property of railway company.]—A foreign telegraph co. has a right to enter into a contract with a railway co. in Canada for the exclusive privilege of constructing & operating a line of telegraph over the road of such railway co. provided the contract is consistent with the purposes for which the foreign co. is incorporated & not prohibited by its charter nor by the laws of the Province of Canada in which the contract is made. The right of a foreign corpn. to enter into such a contract, & carry on the business provided for thereby, is a right recognised thereby the comity of nations.—*CANADIAN PACIFIC RY. CO. v. WESTERN UNION TELEGRAPH CO.* (1889), 17 S. C. R. 151.—**CAN.**

n. Duty of franchise holder to supply telegraph service—To persons willing to pay in advance therefor.]—*RED DEER*

TOWN COUNCIL v. WESTERN GENERAL ELECTRIC CO. (1910), 11 W. L. R. 657; 3 Alta. L. R. 145.—**CAN.**

o. Ontario Railway & Municipal Board—Jurisdiction to order connection of systems in adjacent territories.]—*Re BRUSSELS VILLAGE & MCKILLOP MUNICIPAL TELEPHONE SYSTEM, Re BLYTH VILLAGE & MCKILLOP TOWNSHIP* (1912), 21 O. W. R. 628; 3 O. W. N. 781; 26 O. L. R. 29; 2 D. L. R. 813.—**CAN.**

p. — Sale of parts of system & plant to township corporations—Approval of Board—Necessity for.]—A telephone co., operating in seven townships & villages, agreed to sell parts of its plant & system to the corpsns. of two of the townships.—*Held*: before any agreement of sale or purchase could become operative the approval of the Ontario Railway & Municipal Board was essential.—*Re CONSOLIDATED TELEPHONE CO., LTD., & CALEDON & ERIN TOWNSHIPS* (1920), 48 O. L. R. 140; 18 O. W. N. 401.—**CAN.**

q. Divulging contents of telegrams—Telegraph clerks—How far bound to disclose contents of messages to court—As witnesses under subpoena.]—Notwithstanding the oath administered to telegraph operators in the employ of the New York, Newfoundland & London Telegraph Co., that they should not wilfully divulge or reveal the contents of any message passing over the line:—*Held*: they are bound when subpoenaed as a witness to give evidence & all facts within their knowledge touching the matter in

question; such messages are not in law privileged communications.—*Re NEW YORK, NEWFOUNDLAND & LONDON TELEGRAPH CO.* (1861), 4 Nfld. L. R. 575.—**NFLD.**

r. — Whether indictment lies against manager of telegraph department—For "wrongfully & knowingly divulging contents" of telegram.]—*R. v. STRODE, LEMON'S CASE* (1872), Mac. 928.—**N.Z.**

t. Contract to let office as telegraph office—Reasonable notice to determine contract necessary.]—Pltfs. had let a portion of their premises to deft. Govt. as a telegraph office, had fitted it up, & one of their firm had been instructed in telegraphy & taken charge of the office. There was no written agreement as to hiring; the salary was the receipts of office. Without notice the instruments were removed, & another person appointed operator without any cause assigned:—*Held*: to terminate such a contract pltfs. were entitled to a reasonable notice, such as six months; in such a contract a notice is implied & should have been given.—*MARCH v. NEWFOUNDLAND GOVERNMENT* (1891), 7 Nfld. L. R. 558.—**NFLD.**

PART V.

a. Licence granted to telephone company amounting to monopoly—Whether ultra vires.]—A bye-law passed by the city council ratified an agreement between the city & a telephone co., providing that no other person, firm, or co., should, for five years, have any license or permission to use any of the public streets, etc., of the city for the

of the powers of the telephone co., will not extend the duration of the powers conferred by the agreement.—*NATIONAL TELEPHONE CO., LTD. v. KINGSTON-UPON-HULL CORPN.* (1903), 89 L. T. 291; 68 J. P. 62; 51 W. R. 617; 19 T. L. R. 577; 47 Sol. Jo. 638; 1 L. G. R. 777.

Annotation:—*Mentd. Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K. B. 1.

31. — Provision for intercommunication with rival licences.]—Defts. were licencees whose licence had been extended in respect of an exchange area under the provisions of Telegraph Act, 1899

(c. 38), s. 3, & they were requested by plffs., who were subsequent licencees for the same exchange area, to provide intercommunication with their system. The ct. after considering the report of a special scientific referee, who had by their order held a local investigation, made a declaration as to the facilities for intercommunication to be given by defts. to plffs.—*SWANSEA CORPN. v. NATIONAL TELEPHONE CO.* (1906), 75 L. J. Ch. 407; 94 L. T. 565; 70 J. P. 306; 22 T. L. R. 471; 4 L. G. R. 809, C. A.

Part VI.—Special Provisions as to Wireless Telegraphy.

See Wireless Telegraphy Act, 1904 (c. 24).

32. Whether wireless telegraphy within Telegraph Acts.]—*A.-G. v. EDISON TELEPHONE CO. OF LONDON*, No. 1, *ante*.

Part VII.—Submarine Cables.

See Submarine Telegraph Act, 1885 (c. 49); Pacific Cable Acts, 1901 (c. 31); 1902 (c. 26); 1911 (c. 36).

33. Protection of cable—Sacrifice by ship to avoid injury—Compensation payable for shipowner's loss.]—Submarine Telegraph Act, 1885 (c. 49), Sched., Article VII., provides that shipowners who can prove that they have sacrificed (*inter alia*) an anchor in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable:—*Held*: the liability of the owner of the cable under this article was to make compensation for the sacrifice of the anchor, but not further to pay the damages resulting from such sacrifice. *Seem*: the amount of compensation is not necessarily limited to the cost of replacing the material sacrificed, but depends on the circumstances of each case.—*AGINCOURT S.S. CO., LTD. v. EASTERN EXTENSION AUSTRALASIA & CHINA TELEGRAPH CO., LTD.*, [1907] 2 K. B. 305; 76 L. J. K. B. 884; 97 L. T. 410; 23 T. L. R. 490; 10 Asp. M. L. C. 499; 12 Com. Cas. 302, C. A.

34. Lease of cable—Lessor covenanting to repair on notice—Failure to repair through unfavourable weather.]—Pltf. co. in 1912 leased certain cables to deft. co. for ninety nine years. The lease contained a covenant by pltf. co. to repair the cables & to effect such repairs with the greatest possible dispatch after receiving notice from deft. co. that the same were necessary & it was provided that in case of any breach of the covenant to effect repairs with the greatest possible dispatch or in the event of interruption in through communication continuing for more than eighteen months, deft. co. should have power to give notice determining the lease. In 1917 a break occurred &

was not repaired within eighteen months, & deft. co. gave notice to determine the lease. A cable ship was employed jointly by pltf. & deft. co., as the latter co. desired to repair a cable owned by them. On the two cos. being unable to agree which cable should be first repaired the Admty. ordered the repair of deft. co.'s own cable to be made first on the ground that it was the cable of the greater capacity. The Admty. also gave orders that the cable ship should recoil at a certain station & twice ordered its return owing to submarine perils. During the latter part of the operations of the cable ship, there was an unexpected duration of unfavourable weather. Pltf. co., in these circumstances, claimed relief under the provisions of Courts (Emergency Powers) Act, 1917 (c. 25), s. 2, & Courts (Emergency Powers) Act, 1919 (c. 64), s. 1 (1) (a), & (b), against the exercise by deft. co. of their power to determine the lease:—*Held*: pltf. co. were not entitled to relief under Courts (Emergency Powers) Act, 1917 (c. 25), s. 2 as the repair was not restricted by virtue of an enactment relating to the Defence of the Realm or a regulation made thereunder, & the orders of the Admty. were not an interference with pltf. co.'s rights of property, but were given for the purpose of assisting & not restricting pltf. co.'s endeavours to repair their cable, neither could pltf. co. be said to have incurred a forfeiture in respect of the failure to repair; the immediate cause of the delay in repairing was the unfavourable weather experienced.—*DIRECT UNITED STATES CABLE CO. v. WESTERN UNION TELEGRAPH CO.*, [1921] 1 Ch. 370; 90 L. J. Ch. 102; 123 L. T. 232; 36 T. L. R. 402.

Damage to submarine cable.]—See Nos. 64-66, *post*.

purpose of carrying on any telephone business:—*Held*: this bye-law was in contravention of Municipal Act, 55 Viet. c. 42 (O.), s. 280, & was *ultra vires* the council.—*Re ROBINSON & ST. THOMAS CORPN.* (1893), 23 O. R. 489.—*CAN.*

PART VI.

b. Prohibition of manufacture of broad-

casting equipment—Validity of.]—Wireless Telegraphy Regulations, reg. 92, which provides that "no person or firm shall manufacture . . . equipment for use as broadcast receivers, or for use in those receivers, until he has been granted a dealer's licence," etc., is *ultra vires* the power conferred by Wireless Telegraphy Act, 1905-1919, s. 10, upon the Governor-General to make regulations not inconsistent with

the Act "proscribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act." There is nothing in Wireless Telegraphy Act, 1905-1909, against the manufacture of such equipment.—*CARBINES v. POWELL* (1925), 36 C. L. R. 88; 31 Argus, L. It. 241.—*AUS.*

Part VIII.—Adjustment of Differences.

See Telegraph Acts, 1878 (c. 76), s. 3, 5; 1892 (c. 59), s. 2; 1908 (c. 33), ss. 4, 6; 1909 (c. 20), ss. 1, 2.

35. Consent of road authority—Consent made subject to conditions—Conditions unreasonable.]—The Corpn. of London, as successors of the Comrs. of Sewers of the City of London, on being applied to by the Postmaster-General under Telegraph Act, 1878 (c. 76), s. 3, for their consent to the placing & maintaining of a line of lines of underground telegraphs under certain streets in the City of London, refused their consent, except on condition that the said line or lines of telegraphs should not be "laid for the use of the National Telephone co., unless the telephone co. were prepared to provide an improved service at a reduced cost." This difference, after having been referred to the judge of the City of London Ct., was, in accordance with Telegraph Act, 1878 (c. 76), s. 4, brought before the Railway Comrs.:—*Held*: the following words in Telegraph Act, 1863 (c. 112), s. 5, "any consent may be given on such pecuniary or other terms or conditions, being in themselves lawful, as the person or body giving consent thinks fit," only entitled street authorities in withholding such consent to raise objections of a kind which concerned them as a street authority; & the objection raised by the corpn. was an unreasonable one, inasmuch as it did not apply to the public at large & did not affect the corpn.'s interests as a street authority at all.

It was contrary to the general principles of common law & contrary, therefore, to the probable intention of this enactment that they, the mere street authority, should have the right to exclude any portion of the public whatever. Any objections which they may raise must be objections affecting, *prima facie* at any rate, the whole of the public, the whole of the persons who may be concerned in the matter. This objection does not apply to the whole of the public (WRIGHT, J.).—**POSTMASTER-GENERAL v. LONDON CORPN.** (1898), 78 L. T. 120; 62 J. P. 390; 14 T. L. R. 222; 10 Ry. & Can. Tr. Cas. 231.

36. — — —.]—The Corpn. of Glasgow refused their consent to the laying of wires by the Postmaster-General except on the condition "that such consent was not to be made applicable to the purposes of any private co. or individual, whose application if made direct to the corpn. could be refused by the corpn. without right of appeal." The Postmaster-General admitted that the wires when laid would be used by the National Telephone co. as junction lines with the Post Office trunk lines, & stated that this would be done in pursuance of a Treasury Minute which had been laid before Parliament:—*Held*: (1) the Postmaster-General was carrying out a definite policy sanctioned by the legislature, & must be assumed to be acting in the public interest in providing facilities for the telephone co.; & the corpn. were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorised by the law; (2) the Comrs. under Telegraph Act, 1878 (c. 76), s. 3, as "the authority by whom the difference is to be determined, may . . . give their consent either unconditionally or subject to such pecuniary or other terms, conditions & stipulations as they may think just," & therefore may fix pecuniary terms where

such terms are no part of the original difference.—**POSTMASTER-GENERAL v. GLASGOW CORPN.** (1900), 10 Ry. & Can. Tr. Cas. 238.

Annotation:—*As to* (1) **Appld.** *Postmaster-General v. Edinburgh Corpn.* (1897), 10 Ry. & Can. Tr. Cas. 247.

37. — — — Conditions ultra vires.]—**POSTMASTER-GENERAL v. LONDON CORPN.**, No. 35, *ante*.

38. — — —.]—Where the Postmaster-General desires to carry telegraph wires along roads which have been dedicated to the public but have not been built on & have not been taken over by the local authority, but are public roads within Telegraph Acts, a condition should not be imposed that the Postmaster-General shall pay to the owner of the soil of the roads a rental which has no relation to the actual damage but is in the nature of a payment for use & occupation.

The owner of the soil of roads which had been dedicated to the public but had not been taken over by the local authorities attached to his consent to certain telegraphic lines being placed under & over the roads a condition that the Postmaster-General should make a payment of a rent of £10 a year so long as the telegraphic lines were maintained, & upon the Postmaster-General objecting to the condition a county ct. judge imposed a rent of £5 a year. The parties being dissatisfied with the decision of the county ct. judge:—*Held*: the condition, being inconsistent with the true character, & capacity of the person having the control of the public roads, ought not to have been imposed, & the Postmaster-General was entitled to be relieved from the obligation to pay the rent.—**POSTMASTER-GENERAL v. HUTCHINGS**, [1916] 1 K. B. 774; 85 L. J. K. B. 1008; 115 L. T. 78; 80 J. P. 246; 32 T. L. R. 296; 14 L. G. R. 554.

Annotation:—**Distd.** *Postmaster-General v. Brooks*, [1922] 2 K. B. 176.

39. — — — Substituted methods allowed by commissioners.]—A local board, on being applied to by the Postmaster-General under Telegraph Act, 1878 (c. 76), s. 3, for their consent to the placing of telegraphs & posts upon, along, & over streets & roads in their district, refused their consent, except on condition that the wires across or along streets or roads should be underground. This difference, after having been referred to a metropolitan police magistrate, was, in accordance with Telegraph Act, 1878 (c. 76), s. 4, brought before the Railway Comrs., the Comrs. decided that overhead wires should be allowed, subject to conditions.—**WANDSWORTH DISTRICT LOCAL BOARD v. POSTMASTER-GENERAL** (1884), 4 Ry. & Can. Tr. Cas. 301.

40. — — —.]—**POSTMASTER-GENERAL v. GLASGOW CORPN.**, No. 36, *ante*.

41. — — — Refusal of consent—Difference referred to commissioners.]—An Urban District Council, on being applied to by the Postmaster-General under Telegraph Act, 1878 (c. 76), s. 3, for the consent of the placing of telephone wires & posts upon along & over a certain road in their district refused their consent.

The difference was referred under Telegraph Act, 1878 (c. 76), s. 4, to the county ct. judge of the district who decided that the telephone lines should be laid underground. The Postmaster-General then brought the difference before the Railway Comrs. The substantial objection of the District Council was that the 6 or 7 posts on which

the wires would be carried overhead would be an obstruction to foot passengers using the pavement. The comrs. after hearing evidence & viewing the road decided that the posts & overhead wires should be allowed.—*Re* POSTMASTER-GENERAL & WATFORD URBAN DISTRICT COUNCIL (1908), 72 J. P. 184; *sub nom.* POSTMASTER-GENERAL *v.* WATFORD URBAN DISTRICT COUNCIL, 52 Sol. Jo. 302; 6 L. G. R. 504; 13 Ry. & Can. Tr. Cas. 160.

Annotation:—Refd. Postmaster-General *v.* Tottenham U. D. C. (1910), 14 Ry. & Can. Tr. Cas. 154.

42. ————.]—The Postmaster-General under Telegraph Act, 1878 (c. 76), s. 4, appealed to the Railway Comrs. from so much of a decision of the stipendiary magistrate for Borough of Woolwich as required the Postmaster-General to erect certain telegraphic lines on painted iron poles & to place certain other telegraph lines underground. The Postmaster-General asked for the Comrs.' consent to placing telegraphic lines overhead on painted wooden poles in certain streets which consisted mainly of artisans' dwellings.

The streets in which the magistrate ordered the wires to be placed underground consisted of artisans' dwellings of a superior character, all built upon the Corbett Estate. Most of the houses were purchased & owned by the best class of artisans. There were no overhead wires on the Corbett Estate, but underground wires on part of it, & the Postmaster-General wished to extend the telegraphic system overhead by bringing it up from the underground trench. The Comrs. after hearing evidence & viewing the streets allowed painted wooden poles to be erected instead of painted iron ones but as to the streets in the Corbett Estate, decided that it would be unreasonable under the circumstances to allow overhead wires.—*Re* POSTMASTER-GENERAL & WOOLWICH BOROUGH COUNCIL (1908), 72 J. P. 186; *sub nom.* POSTMASTER-GENERAL *v.* WOOLWICH BOROUGH COUNCIL, 6 L. G. R. 509; 13 Ry. & Can. Tr. Cas. 165.

43. ————.]—**Application by licencees.**—Under the Telegraph Acts the Postmaster-General delegated certain powers to the N. T. co. The co. thereupon entered into an agreement with the mayor, etc., of T. W. for the exercise of certain powers within their district.

By that agreement, with the exception of certain work mentioned in the schedule, it was provided that the co. should not exercise any of the powers conferred on the Postmaster-General by the Telegraph Acts, 1863 (c. 112), & 1878 (c. 76), in respect of which the consent of the corpn. was required without obtaining a further consent in writing from the corpn. It was further provided that if any dispute or difference arose concerning the premises or the rights & liabilities of the parties, such dispute or difference should be referred to arbn.

Upon the corpn. refusing their consent to some further works beyond those mentioned in the schedule, the N. T. co. applied to the county ct. judge as arbitrator under Telegraph Act, 1878 (c. 76), ss. 3, 4:—*Held*: the county ct. judge had no jurisdiction as the co., being only the delegates of powers from the Postmaster-General, could not proceed under Telegraph Act, 1878 (c. 112), ss. 3, 4, but only under the arbn. clause in their agreement.—TUNBRIDGE WELLS CORPN. *v.* NATIONAL TELEPHONE CO. (1900), 83 L. T. 525; 64 J. P. 756; 48 W. R. 686; *sub nom.* NATIONAL TELEPHONE CO. *v.* TUNBRIDGE WELLS CORPN., 16 T. L. R. 446 44 Sol. Jo. 552, D. C.; *affd.* (1901), 85 L. T. 368, C. A.

Annotation:—Mentd. Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169.

PHONE CO., LTD. *v.* HUDDERSFIELD CORPN. (1901), 17 T. L. R. 460, C. A.

45. ————.]—**Objection to overhead wires.**—Upon a reference to the Railway & Canal Comrs. of a difference between a local authority & the Postmaster-General arising from the refusal of consent by the local authority to the placing of telephone lines in certain streets:—*Held*: where it appears that the cost of laying the wires underground, as compared with that of carrying them overhead, would be excessive, the extra burden of the former method will not be imposed upon the taxpayers; but inasmuch as the circumstance that the locality in which the wires were to be placed was a residential district, & admirably kept by the local authority with a view to its being residential, & that overhead wires would be a disfigurement to the streets, the objection to such wires was considered to be a very real objection, & an opportunity was given to the objectors to find the necessary funds for defraying the extra cost of laying the wires underground in all or any of the streets in question.—CROYDON CORPN. *v.* POSTMASTER-GENERAL (1910), 74 J. P. 424; 8 L. G. R. 1005; *sub nom.* POSTMASTER-GENERAL *v.* CROYDON CORPN., 14 Ry. & Can. Tr. Cas. 158.

46. ————.]—An Urban District Council having refused their consent to the placing of an overhead telegraph wire on poles for a distance of a quarter of a mile along a road in their district & the county ct. judge for the district having found that their refusal was reasonable, the Postmaster-General applied to the Railway Comrs.

The District Council had expended £6,000 in altering their own overhead wires to underground wires & in laying new underground wires. In 1897 the Postmaster-General had applied for the consent of the district council to lay underground wires in the road in question which had been granted & the wires had been laid accordingly:—*Held*: under the circumstances of the case the wires should be laid underground on the district council undertaking to do the work of excavation, laying the pipes & filling the trenches for £50.—*Re* POSTMASTER-GENERAL & TOTTENHAM URBAN DISTRICT COUNCIL (1910), 74 J. P. 434; *sub nom.* POSTMASTER-GENERAL *v.* TOTTENHAM URBAN DISTRICT COUNCIL, 8 L. G. R. 791; 14 Ry. & Can. Tr. Cas. 154.

47. ————.]—WANDSWORTH DISTRICT LOCAL BOARD *v.* POSTMASTER-GENERAL, No. 39, *ante*.

48. ————.]—POSTMASTER-GENERAL *v.* LEICESTER CORPN. (1913), 77 J. P. Jo. 605.

49. Consent of owner of private land—Refusal of consent—Difference referred to Commissioners.—(1) Where, under Telegraph (Construction) Act, 1916 (c. 40), s. 1, the owner, lessee, or occupier of private land refuses or fails to give his consent to the placing of a telegraphic line on or across his land within two months after being required to do so by notice from the Postmaster-General, the difference thereby arising between the Postmaster-General & the owner, lessee, or occupier, must be referred direct to the Railway & Canal Commission. A stipendiary magistrate or county ct. judge has no jurisdiction to entertain that question.

(2) If the convenient user or enjoyment of private land is interfered with by the placing thereon of a telegraphic line, or if the land has any special advantages which the placing of the line thereon will, or may reasonably be expected to injure, the Railway & Canal Commission may have regard to these circumstances in considering,

under Telegraph (Construction) Act, 1916 (c. 40), s. 1, what terms to impose on the Postmaster-General. It is reasonable, when compensation is directed to be made by the Postmaster-General, to order the payment of an annual sum & not of a lump sum.—*POSTMASTER-GENERAL v. BROOKS*, [1922] 2 K. B. 176; 91 L. J. K. B. 689; 127 L. T. 529; 38 T. L. R. 623; 20 L. G. R. 558.

50. ——— Terms imposed by Commissioners.]—*POSTMASTER-GENERAL v. BROOKS*, No. 49, *ante*.

51. Decision of Commissioners—Whether appeal lies.]—By an agreement under seal made in 1905 a telephone co. agreed to sell to the Postmaster-General all the plant in use by the co., on Dec. 31, 1911, & any dispute as to the value of the plant was to be referred to the Railway & Canal Commission, if they should be authorised to determine it. Telegraph (Arbitration) Act, 1909 (c. 20), s. 1, enacted that any difference between the Postmaster-General & any body or person under any agreement relating to telephones should, if the parties agreed, be referred to the Railway & Canal Commission, who were bound to determine it; & sect. 2, that all proceedings relating thereto

should be conducted by the Commission in the same manner as any other proceeding was conducted by them under the Railway & Canal Traffic Acts, 1873 & 1888, & that any order of the Commission on any such difference should be enforceable as any other order of the Commission, provided (*inter alia*) that any such matter of difference might, in certain events, be heard & determined by the two appointed Comrs. A difference having arisen as to the value of the plant, the Commission, at the request of the parties, fixed & determined the value:—*Held*: the reference to the Commission under the Telegraph (Arbitration) Act, 1909 (c. 30), was a reference to them as a ct. of record & not as arbitrators, & an appeal lay from their decision on a point of law to the Ct. of Appeal.—*NATIONAL TELEPHONE CO., LTD. v. POSTMASTER-GENERAL*, [1913] A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562; 29 T. L. R. 637; 57 Sol. Jo. 661; 15 Ry. & Can. Tr. Cas. 109, H. L.

Annotations:—*Reid*. *Cheshire Lines Committee v. Butler, Greenough & Esplen & Walford (Liverpool)* (1917), 16 Ry. & Can. Tr. Cas. 212. *Mentd.* *Re Roaler*, [1915] 1 K. B. 21; *Oldham, Ashton & Hyde Electric Tramways v. Ashton Corpn.*, [1921] 3 K. B. 511; *Canada Cement Co. v. East Montreal* [1922] 1 A. C. 249.

Part IX.—Compensation.

52. Acquisition of undertaking by Postmaster-General—Compensation for loss of office—Telegraph officers of railway company.]—(1) Telegraph Act, 1868 (c. 110), s. 8 (7), applies only to the three telegraph cos. named at the beginning of sect. 8; & therefore, the telegraph superintendent of a railway co. is not entitled to compensation for the loss of his office, when the telegraphic business of the co. is acquired by the Postmaster-General.

(2) The superintendent of one of the three named telegraph cos. was held entitled to compensation in respect of profits on allowance for expenses while travelling on the co.'s service.—*R. v. POSTMASTER-GENERAL* (1875), 32 L. T. 559; *subsequent proceedings* (1878), 3 Q. B. D. 428, C. A.

53. ——— Assessment of compensation—Emoluments.]—The Telegraph Act, 1868 (c. 110), enables the Postmaster-General to purchase the undertakings of telegraph cos. By s. 8 (7), every officer & clerk of any co., the undertakings of which may be so purchased, who has been not less than five years in the service of the telegraph cos. & in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph cos. & is in receipt of remuneration at a rate of not less than £50 a year, shall, if he receives no offer of an appointment by the Postmaster-General in the telegraphic department, etc., receive during his life from the Postmaster-General by way of compensation for the loss of his office from the time at which the govt. takes possession of the co.'s telegraph, an annuity payable half yearly, equal, if he shall have been in the service of telegraph cos. twenty years, to two-thirds of the annual emolument derived by him from his office on June 24, 1868.

Mandamus to the Postmaster-General to assess compensation to S., an officer of a telegraph co., in respect of the expenses allowed him as a part of the emolument of his office. Return that it was the duty of S. from time to time, when required, to travel upon the co.'s business, & that the co. had agreed with him upon rates of allowances, as an indemnity against the extra personal

expenditure incurred, or assumed to be incurred, by him while travelling on the business of the co., beyond his ordinary expenditure, namely, 12s. 6d. for twenty-four hours' absence from headquarters, & 5s. for twelve hours' like absence, when such last-mentioned absence did not oblige him to stop away from home, & that the allowances so made did not form any part of his yearly salary or remuneration, but were made for the purpose of indemnifying him against extra personal expenditure, & that the refusal to assess compensation was only so far as regarded these allowances. Plea, that the allowances were not made as an indemnity, but were made to the co.'s officers when travelling, whether extra expense was incurred by them or not, & were fixed payments; that the co.'s officers when travelling received the allowances, & saved a large part of the money which they would otherwise have expended at home for board & lodging, & that the allowances were part of the annual emoluments of the officers:—*Held*: anything which S.'s allowance enabled him to save from his ordinary expenses was an "emolument," & therefore a subject for compensation.—*R. v. POSTMASTER-GENERAL* (1878), 3 Q. B. D. 428; 47 L. J. Q. B. 435; 38 L. T. 89; 26 W. R. 322, C. A.

Annotations:—*Apld.* *Cooper v. R.* (1880), 14 Ch. D. 311. *Reid*. *Livingstone v. Westminster Corpn.*, [1904] 2 K. B. 109; *Druce v. Ry. Clearing House* (1925), 133 L. T. 514. *Mentd.* *R. v. I. R. Comrs.* (1888), 36 W. R. 696.

54. ——— Right of owners to compensation—Where "beneficial interest" already disposed of.]—By Telegraph Act, 1868 (c. 110), s. 7, a railway co. possessing a beneficial interest in a telegraph open to the use of the public on Jan. 1, 1868, may, under certain circumstances, require the Postmaster-General to purchase such interest upon terms to be settled, failing agreement by arbn. By Telegraph Act, 1868 (c. 110), s. 9 (11), an umpire is, in default of appointment by the arbitrators, to be nominated by the Chief Justice of the Common Pleas. The S. & D. Railway Co., which connected two portions of the London & South Western Railway, entered into an agree-

ment in 1866, by which they undertook to complete all the works, including the telegraphs, & then to hand over, for the term of one thousand years, their line to the South Western, who undertook to pay them 45 per cent. of the "gross receipts from traffic conveyed by the railway." At the date of this agreement the S. & D. Railway had two telegraph wires along their line. In 1865 the South Western had made an agreement with the Electric Telegraph Co., by which the latter were to have the exclusive right of transmitting messages along the lines which the South Western then had or might afterwards acquire. After the passing of Telegraph Acts, the Postmaster-General acquired these telegraphs & paid compensation in respect thereof to the South Western. The S. & D. Railway Co. then applied for compensation in respect of their telegraph & afterwards requested the Chief Justice of the Common Pleas to appoint an umpire, which he declined to do, on the ground that the S. & D. Co. had no "beneficial interest" in a telegraph within Telegraph Act, 1868 (c. 110), s. 7. On motion to make a rule absolute for a *mandamus* to compel such appointment to be made:—*Held*: the S. & D. Railway have under the agreement with the South Western parted with the "beneficial interest" in their telegraph, that messages sent by the telegraph formed no part of "traffic conveyed by the railway," & consequently they were not entitled to compensation under Telegraph Acts.—*R. v. COLERIDGE (LORD)* (1876), 45 L. J. Q. B. 649; 31 L. T. 752.

Annotation:—*Mentd.* *R. v. London (Bp)* (1889), 58 L. J. Q. B. 385.

55. — Compensation in respect of future losses.—By Telegraph Act, 1868 (c. 110), s. 9 (6), the Postmaster-General shall pay railway cos. by way of compensation, clause D., such sums as shall be settled by arbn. in respect of the loss by such railway co. of the privilege of granting other wayleaves & making future arrangements with telegraph or other cos., & in respect of granting a monopoly to the Postmaster-General for the conveyance of telegraphs over their railways. By clause II. of the same sub-sect., on acquisition of the telegraphs, the Postmaster-General shall

have a perpetual right of way for his poles & wires over the whole of the railway co.'s system, & in consideration thereof he shall pay to the railway co. such sum per mile per wire over the whole of the said system by way of yearly rent as shall be fixed by arbn. The arbitrator, in determining the amounts to be paid to the railway co. under this Act, shall have regard to the agreements which subsist between the railway co. & any telegraph co., & also to a compulsory sale being required from the railway co.; & in estimating the amount to be paid under any one part of this sect. shall have regard to the advantages to be obtained & the disadvantages to be sustained by the railway co. under any other part of this sect. By sub-sect. 8 of the same sect., to the railway co. is reserved power to erect & work private telegraphs for annual rent or payment for wayleave from traders. An arbitrator had awarded a certain lump sum to defts. as & by way of compensation in pursuance of the provisions of Telegraph Act, 1868 (c. 110), s. 9 (6), but had made no allusion in his award to any yearly rent under clause II. of that sect.:—*Held*: defts. were precluded from any further compensation for extra poles or wires which the Postmaster-General might in future require to be erected upon their railway system.—*R. v. METROPOLITAN RY. CO.* (1883), 50 L. T. 6, C. A.

56. Erection of telegraph on private lands—Amount of compensation.—*POSTMASTER-GENERAL v. HUTCHINGS*, No. 38, *ante*.

57. — Factors to be considered.—*POSTMASTER-GENERAL v. BROOKS*, No. 49, *ante*.

58. — Mode of payment.—*POSTMASTER-GENERAL v. BROOKS*, No. 49, *ante*.

59. Compensation for damage—Absence of negligence of undertakers—Duty of claimant to show.—In order that a person may maintain a claim for compensation under Telegraph Act, 1863 (c. 112), s. 7, for damage done by reason of the exercise of the powers of the Act as distinct from an action at law, it is not incumbent upon him to show that the undertakers in doing the damage did not act negligently.—*ST. JAMES & PAUL MALL ELECTRIC LIGHT CO., LTD. v. R.* (1901), 73 L. J. K. B. 518; 90 L. T. 341; 68 J. P. 288.

Part X.—Penal Provisions relating to Telegraphs.

See Malicious Damage Act, 1861 (c. 97), ss. 37, 38; Telegraph Acts, 1863 (c. 112), ss. 18, 22, 40, 45; 1868 (c. 110), s. 20; 1869 (c. 73), s. 6; 1878 (c. 70), ss. 8–11; Submarine Telegraph Act, 1885 (c. 49), s. 3.

Wireless Telegraphy Act, 1904 (c. 24), s. 1; Post Office Protection Act, 1884 (c. 76), s. 11.

60. Injury to works of Postmaster-General—Negligence of Postmaster-General.—Telegraph Act, 1878 (c. 76), s. 8, which provides that where any undertakers, body, or person, by themselves or by their agents, destroy or injure any telegraphic line of the Postmaster-General, such undertakers, body, or person shall be liable to pay to the Postmaster-General such expenses, if any, as he may incur in making good the said destruction or injury, does not apply where the destruction or injury is occasioned by the Postmaster-General's own negligence or by the negligence of those for whom by legal succession or otherwise the Postmaster-General is responsible.—*POSTMASTER-GENERAL v. LIVERPOOL CORPN.*, [1923]

A. C. 587; 92 L. J. K. B. 791; 130 L. T. 41 87 J. P. 157; 39 T. L. R. 598; 67 Sol. Jo. 701 21 L. G. R. 553, H. L.

Annotation:—*Refd.* *Postmaster-General v. Beck & Pollitzer* (1921), 88 J. P. 137.

61. — Who may be liable.—By Telegraph Act, 1878 (c. 76), s. 8: "Where any undertakers, body, or person, by themselves or by their agents, destroy or injure any telegraphic line of the Postmaster-General, such undertakers, body, or person shall not only be liable to pay to the Postmaster-General such expenses, if any, as he may incur in making good the said destruction or injury, but also, if the telegraphic communication is carelessly or wilfully interrupted, shall be liable to a fine not exceeding £20 per day for every day during which such interruption continues." By Telegraph Act, 1878 (c. 76), s. 2, "The expression 'telegraphic line' means telegraphs, posts, . . . & also any . . . apparatus . . . used for the purpose of transmitting telegraphic messages."

Defts.' servant while driving their motor lorry

along a public highway caused it, without any negligence on his part, to come into collision with a fire alarm post belonging to the Postmaster-General & thereby injured the post. In an action by the Postmaster-General under Telegraph Act, 1878 (c. 76), s. 8 to recover the expenses of making good the injury:—*Held*: the word "person" must be read, not as limited to persons who had special statutory rights in the highway which might come into conflict with the corresponding

rights of the Postmaster-General, but in its natural & unrestricted sense as including all persons exercising their common law right of passage; & defts. were liable to make good the damage done. —*POSTMASTER-GENERAL v. BECK & POLLITZER*, [1924] 2 K. B. 308; 93 L. J. K. B. 1017; 131 L. T. 750; 88 J. P. 137; 68 Sol. Jo. 883; 22 L. G. R. 657, C. A.

Forgery of telegram.—*See* CRIMINAL LAW, Vol. XV., pp. 1066, Nos. 12064, 12065.

Part XI.—Rights and Liabilities of Telegraph Undertakers.

62. Wires interfering with private or public rights—Power to remove.—*ATTENBOROUGH & SON v. LONDON, ETC., TELEPHONE CO.*, [1884] W. N. 2; Bitt. Rep. in Ch. 109.

63. ————Erection of wires unauthorised by statute.—In a suit by a telephone co. against the local authority to recover damages for cutting down & removing telephone wires stretched across a public street, it appeared that the co. was not authorised by statute so to place their wires:—*Held*: the action failed. The removal was within the legal powers of defts., & there was no allegation of any unnecessary damage having been caused by the cutting.—*NATIONAL TELEPHONE CO. v. ST. PETER PORT CONSTABLES*, [1900] A. C. 317; 69 L. J. P. C. 71; 82 L. T. 398, P. C.

— **Liability for nuisance.**—*See* HIGHWAYS, Vol. XXVI., pp. 313, 406, 414, Nos. 452, 1278, 1333.

— **Right of local authority to prevent erection in highway.**—*See* Nos. 15–20, *ante*.

64. Damage to submarine cable.—*SPIRIT OF THE AGE SUBMARINE TELEGRAPH CO. v. GIBB* (1858), 10 L. T. 275.

65. —————To a declaration for injury, through negligent navigation, to a submerged electric cable, defts. pleaded that they were navigating the seas in the usual manner, & that they had occasion to let down their anchor near the place where the cable was injured as alleged, & that without default, & by means of the action of the winds & waves, the cable & the ship's anchor became entangled, & that there was no notice to defts. of the existence or position of the cable. Replication that defts. had the means of knowledge of the existence & locality of the cable & neglected to make use of such means of knowledge. There was also a new assignment, being an argumentive

traverse of the plea:—*Held*: the declaration was good, although notice of the existence of the cable was not alleged; that the plea was good, as putting in issue the negligence charged & the replication was good.—*SUBMARINE TELEGRAPH CO. v. DICKSON* (1864), 15 C. B. N. S. 759; 3 New Rep. 572; 33 L. J. C. P. 139 10 L. T. 32; 10 Jur. N. S. 211; 12 W. R. 384 2 Mar. L. C. 9 143 E. R. 983.

Annotations—*Refd.* *The Clara Killam* (1870), L. R. 3 A. & E. 161. *Mentd.* *Wilson v. Newberry* (1871), 36 J. P. 215.

66. —————A ship cast anchor near the South Foreland. Her anchor got foul of a submarine telegraph cable. The crew heaved up the anchor to the water's edge, & the telegraph cable came up entangled with it. In order to free the anchor from the telegraph cable, the mate of the ship, acting under the direction of the master, cut the telegraph cable in two with a hatchet. By the exercise of ordinary nautical skill the anchor might have been freed from the cable by the crew, without cutting the cable:—*Held*: the ct. had jurisdiction to entertain an action instituted by the owners of the telegraph cable against the ship for the damage done to the cable, & the owners of the telegraph cable were entitled to judgment in the action.—*THE CLARA KILLAM* (1870), L. R. 3 A. & E. 161; 39 L. J. Adm. 50; 23 L. T. 27; 19 W. R. 25; 3 Mar. L. C. 463.

Annotations—*Refd.* *Turner v. Mersey Docks & Harbour Board, The Zeta*, [1892] P. 285; *The Normandy*, [1901] P. 187.

— *See, also*, NUISANCE, Vol. XXXVI., p. 197, No. 373.

Damage to telephone wire—From tramway wires.—*See* ELECTRIC LIGHTING, Vol. XX., p. 212, No. 77; NUISANCE, Vol. XXXVI., p. 197, No. 372.

Part XII.—Relation between Telegraph Undertakers and their Customers.

67. Whether common carriers.—I do not see any analogy between the liability of a common carrier & that of a telegraph co. (*BRAMWELL, L.J.*).

v. REUTER'S TELEGRAM CO. (1877), 3 C. P. D. 1; 47 L. J. Q. B. 1; 37 L. T. 370; 42 J. P. 308; 26 W. R. 23, C. A.; *affg.* S. C. *sub nom.*

DIXON v. REUTER'S TELEGRAPH CO., LTD., 16 L. J. Q. B. 197.

Annotations—*Mentd.* *Coventry, Sheppard v. G. E. Ry.* (1883), 49 L. T. 641; *Cunnington v. G. N. Ry.* (1883), 49 L. T. 392; *Firbank's Executors v. Humphreys* (1886), 18 Q. B. D. 54; *Brown v. Law* (1895), 72 L. T. 779; *Starkey v. Bank of England*, [1903] A. C. 111; *Edwards v. Porter, McNeill v. Hawes*, [1923] 2 K. B. 538.

PART XII.

c. Liability for misdelivery of telegram.—*BLAKENEY v. PEQUIS* (No. 2) (1885), 6 N. S. W. L. R. (L.) 223; 2 N. S. W. W. N. 30.—AUS.

d. ————Liability beyond the line.

—*STEVENSON v. MONTREAL TELEGRAPH CO.* (1858), 16 U. C. R. 530.—CAN.

e. Liability for non-transmission of telegram.—*KINGHORNE v. MONTREAL TELEGRAPH CO.* (1859), 18 U. C. R.

60.—CAN.

f. —————*BAXTER v. DOMINION TELEGRAPH CO.* (1875), 37 U. C. R. 470.—CAN.

g. Alleged breach of agreement of service—Defendant company

PART XIV.—RATEABILITY OF PROPERTY OCCUPIED FOR TELEGRAPHIC PURPOSES. 897

68. Liability for mistake in telegram—"Unrepeated" telegram.]—*MACANDREW v. ELECTRIC TELEGRAPH CO.*, No. 29, *ante*.

—.]—*See, also*, *CONTRACT*, Vol. XII., pp. 49, 79, Nos. 271, 470; *SALE OF GOODS*, Vol. XXXIX., p. 652, No. 2464.

69. Liability for non-delivery—Negligence of telegram collector.]—Deft.'s business was to collect telegraphic messages for transmission to America & other places. Pltfs. entrusted deft. with a message in cipher, which was unintelligible to deft., for transmission to America. Deft. negligently omitted to send the message. The consequence was that pltfs. lost a sum of money which they would have earned for commission upon an order to which the message related:—*Held*: pltfs. could not recover such sum of money from

deft., but only nominal damages.—*SANDERS v. STUART* (1876), 1 C. P. D. 326; 45 L. J. Q. B. 682; 40 J. P. 728; 24 W. R. 949; *sub nom.* *SAUNDERS v. STEWART*, 35 L. T. 370.

Liability for misdelivery.]—*See CONTRACT*, Vol. XII., p. 49, No. 272.

70. Misappropriation of telegraph fees—By telegraph clerk of railway company—Whether railway company liable.]—*NORTH EASTERN RY. CO. v. R.* (1889), 6 T. L. R. 15, C. A.

Agreement for telephonic communication—Whether stamp duties payable.]—*See REVENUE*, Vol. XXXIX., p. 276, No. 607, 608.

Agreement for hire of telephone wire & apparatus—Relation of landlord & tenant.]—*See LANDLORD & TENANT*, Vol. XXXI., pp. 97, 456, Nos. 2364, 6041.

Part XIII.—Telegraphic and Telephonic Communications.

71. Notice of injunction.]—A sheriff's officer & an auctioneer proceeded with the sale of the property of a trader seized under a *fi. fa.* after they had received notice by a letter from debtor's solr. that he had filed a liquidation petition, & had also received notice by telegram that the Ct. of Bankruptcy had made an order restraining further proceedings under the writ:—*Held*: the sheriff's officer & the auctioneer had been guilty of contempt of ct., & they must pay the costs of a motion to commit them.—*Re BRYANT* (1876), 4 Ch. D. 98; 35 L. T. 489; 25 W. R. 230.

Annotation—*Consd. Re Bishop, Ex p. Langley, Ex p. Smith* (1879), 13 Ch. D. 110.

72. —.]—Sufficient notice of the granting of an injunction may be given by telegram; but, if it is sought to commit for contempt a person who, after receiving such a notice, disregards it, the ct. must decide upon the particular facts whether he had in fact notice of the injunction, & it is the

duty of those who ask for the committal to prove this beyond reasonable doubt.

A London solr., who obtains an order from the Ct. of Bankruptcy in London restraining a sale under an execution in the country, ought, instead of telegraphing the order to the sheriff's officer, to telegraph it to a solr. at the place, as his agent, asking him to give notice of it to the persons affected.—*Re BISHOP, Ex p. LANGLEY, Ex p. SMITH* (1879), 13 Ch. D. 110; 49 L. J. Bcy. 1; 41 L. T. 388; 28 W. R. 174, C. A.

Order stopping cheque.]—*See BANKERS & BANKING*, Vol. III., p. 221, No. 589.

Contracts by telegram—Telegram as memorandum or note.]—*See CONTRACT*, Vol. XII., pp. 132, 140, 155, Nos. 889, 890, 947-949, 1087-1098.

— **Offer & acceptance.**]—*See CONTRACT*, Vol. XII., pp. 59, 75, 76, 79, 92, Nos. 330, 436, 438, 461, 465, 467, 561.

Part XIV.—Rateability of Property occupied for Telegraphic Purposes.

See Telegraph Act, 1868 (c. 110), s. 22, & generally, *RATES & RATING*, Vol. XXXVIII., pp. 417 *et seq.*

Necessity for exclusive occupation.]—*See RATES & RATING*, Vol. XXXVIII., p. 447, No. 158.

73. Telephone apparatus—Wires & posts along railway.]—The Electric Telegraph Co. are liable to be rated for the relief of the poor in respect of their wires & posts placed along the line of a railway co., notwithstanding the latter may require their removal to a more convenient place.—*ELECTRIC TELEGRAPH CO. v. SALFORD OVERSEERS* (1855), 11

under no obligation to ascertain nature of customers' communications.]—*ELECTRIC DESPATCH CO. OF TORONTO v. BELL TELEPHONE CO.* (Ont.) (1891), 20 S. C. R. 83.—*CAN.*

h. Liability for mistake in transmission of telegram.]—A telegraph co. is the agent of the person sending a message only for the purpose of delivering the specific message & the person who delivers a message to be sent is not responsible for any mistake made by the operator in the transmission.—*ROSS v. LONG* (1899), 40 N. S. R. 174.—*CAN.*

k. —.]—A sub-postmaster, on transmitting a telegram, acts as a J.—VOL. XLII.

public officer & in the discharge of a public duty, & if he is guilty of negligence in the transmission of the telegram, causing loss to the sender, he is liable to the sender for the loss so sustained.—*HAMILTON v. CLANCY*, [1914] 2 I. R. 514.—*IR.*

l. —.]—*MARAS v. ANDERSON*, [1909] E. D. C. 76.—*S. AF.*

m. Board of Railway Commissioners—Whether Board may order telephone company—To furnish subscriber with telephone directory.]—*DIGNAM v. BELL TELEPHONE CO.* (1909), 8 Can. Ry. Cas. 200.—*CAN.*

n. — *Right to authorise additional*

Exch. 181; 3 C. L. R. 973; 24 L. J. M. C. 146; 25 L. T. O. S. 166; 19 J. P. 375; 1 Jur. N. S. 733; 3 W. R. 518; 156 E. R. 795.

Annotations—*Consd. Smith v. Lambeth Assmt. Com.* (1882), 52 L. J. M. C. 1. *Apld. Lancashire Telephone Co. v. Manchester Overseers* (1884), 14 Q. B. D. 267. *Refd. R. v. Musson* (1858), 27 L. J. M. C. 100; *Grant v. Oxford L. B.* (1868), 9 B. & S. 900; *Watkins v. Milton-next-Gravesend Overseers* (1868), L. R. 3 Q. B. 350; *Pinllico Tram. Co. v. Greenwich* (1873), L. R. 8 Q. B. 9; *R. v. St. Pancras Assmt. Com.* (1877), 46 L. J. M. C. 243; *Paris & New York Telegraph Co. v. Penzance Union* (1884), 12 Q. B. D. 552; *Taylor v. Pendleton Overseers* (1887), 19 Q. B. D. 288; *M., S. & L. Ry. v. Kingston-upon-Hull* (1896), 75 L. T. 127.

toll.]—*INGERSOLL TELEPHONE CO. v. BELL TELEPHONE CO. OF CANADA* (1918), 22 Can. Ry. Cas. 135.—*CAN.*

o. Contract for telephone service—Whether bailment.]—*EDWARDS v. EDMONTON CORPN.* (Alta.) (1915), 8 W. W. R. 441; 25 D. L. R. 825.—*CAN.*

p. Omission of subscriber's name from directory—Right to damages.]—*FLANDERS v. BRITISH COLUMBIA TELEPHONE CO.* (1926), 36 B. C. R. 352; [1926] 1 W. W. R. 358.—*CAN.*

q. Right to recover yearly rent in advance—Breach of agreement to pay.]—*NATIONAL TELEPHONE CO. v. GRIFFEN*, [1906] 2 I. R. 115.—*IR.*

M M M

— **Wires, poles & attachments.]**—See RATES & RATING, Vol. XXXVIII., p. 442, No. 135.

74. Assessment.]—A vestry applied by *mandamus* to compel the Postmaster-General to pay poor rates upon the rateable value of telegraph posts & wires, as fixed by an assessment committee. The Postmaster-General had tendered a smaller amount, proportionate to an assessment fixed by the Comrs. of the Treasury, which the vestry had refused:—*Held*: by Telegraph Act, 1868 (c. 110), & Telegraph Act, 1869 (c. 73), no duty is cast upon the Postmaster-General to pay the rates imposed by those Acts; & there is no remedy by *mandamus* against him to enforce the payment of rates fixed by an assessment committee.—*R. v. POSTMASTER-GENERAL* (1873), 28 L. T. 337; *sub nom. MARYLEBONE, VESTRY v. POSTMASTER-GENERAL*, 37 J. P. 196; 21 W. R. 459.

75. —.]—Telegraph Act, 1868 (c. 110), empowers the Postmaster-General to purchase, for the purposes of the Act, the undertaking, including land & property, of any telegraph co., & sect. 22 provides that all land, property & undertakings so purchased shall be assessable & rateable to parochial rates at sums not exceeding the rateable value at which such land, property & undertakings were properly assessed at the time of such purchase. In 1870 the Postmaster-General purchased the undertaking of a telegraph co., including a house held by the co. under a lease for twenty-one years

from Sept. 1867. At the time of the purchase a portion of the house was subject to an underlease granted by the co. to H. for the remainder of the term less one day, & containing a covenant by the co. to pay all parochial rates. The Postmaster-General occupied & used for telegraphic purposes only, the portion of the house not comprised in the underlease until the year 1878, when he demised that portion to others, & thenceforth no part of the house was occupied or used for telegraphic purposes. The rateable annual value at which the portion comprised in the underlease could properly have been assessed as a separate tenement at the time of the purchase was £108. In 1880 the assessment committee of the district separately assessed that portion in respect of parochial rates at the rateable annual value of £334:—*Held*: sect. 22 applied notwithstanding that all use of the house for telegraphic purposes had ceased, & therefore the occupier of the premises comprised in the underlease was not liable to be assessed in any sum exceeding the rateable value at which these premises could have been properly assessed at the time of the purchase.—*ST. GABRIEL, FENCHURCH OVERSEERS v. WILLIAMS* (1885), 10 Q. B. D. 649; 55 L. J. M. C. 11; 51 L. T. 270; 50 J. P. 533; 31 W. R. 256; 2 T. L. R. 138, D. C.

Mandamus to enforce payment by Postmaster-General.]—See CROWN PRACTICE, Vol. XVI., p. 281, No. 931.

Part XV.—Income Tax on Telegraphic Undertakings.

generally, INCOME TAX, Vol. XXVIII., pp. 17–84, Nos. 87–483.

76. Foreign cable company—Exercising trade in United Kingdom.]—Appls., a foreign co. domiciled in Copenhagen, had three marine cables in connection with Aberdeen & Newcastle, communicating with the telegraph lines of the Post Office in the United Kingdom. They had also work rooms with clerks in London, Newcastle, & Aberdeen. Messages from this country were forwarded over the lines of the Post Office & the cables of applts. to Denmark, & thence by their wires & the wires of foreign govts. to Russia, China, Japan, & India. The total charges paid for transmitting such messages were collected by the Post Office, & after deducting their dues, handed to applts., who retained the amount due to them for the transmission of messages over their cables & lines, & paid the residue to the various govts. & cos. respectively entitled to it. No profits were made by applts. from the transmission of messages over the land lines in the United Kingdom:—*Held*: applts. must be taken to exercise a trade in the

United Kingdom under 16 & 17 Vict. c. 31, s. 2, sched. D., & they were chargeable to income tax on the balance of profits or gains from their receipts in this country from the transmission of messages.—*ERICHSEN v. LAST* (1881), 8 Q. B. D. 414; 51 L. J. Q. B. 86; 45 L. T. 703; 46 J. P. 357; 30 W. R. 301; 4 Tax Cas. 422, C. A.

Annotations:—*Appld.* Werle v. Colquhoun (1888), 20 Q. B. D. 753. *Apprvd.* Grainger v. Gough, [1896] A. C. 325. *Consd.* De Beers Consolidated Mines v. Howe, [1905] 2 K. B. 612. *Distd.* New Zealand Taxes Comr. v. Eastern Extension Australasia & China Telegraph Co., [1906] A. C. 526. *Appld.* Wilcock v. Pinto, [1925] 1 K. B. 30. *Consd.* MacLaine v. Eccott, [1926] A. C. 424. *Appld.* Tara v. Scanlan, Nielsen, Andersen v. Collins, Muller (London) v. Lethem, Same v. I. R. Comrs., [1928] A. C. 34. *Refd.* Pommery & Greno v. Aphorpe (1886), 56 L. J. Q. B. 155; *Re* Watson, Sandie & Hull (1897), 14 T. L. R. 124; Lovell & Christmas v. Taxes Comr., [1908] A. C. 46; Beynon Co. v. Ogg (1918), 7 Tax Cas. 125; Weiss, Biheller & Brooks v. Farmer, [1918] 2 K. B. 725; Smidth v. Greenwood (1922), 8 Tax Cas. 193; Royal Agricultural Soc. of England v. Wilson, Brighton College v. Marriott (1921), 132 L. T. 258; Lysaght v. I. R. Comrs. (1927), 13 Tax Cas. 511; Muller (London) v. Lethem, Same v. I. R. Comrs., [1927] 1 K. B. 780. *Mentd.* Kirkwood v. Gadd, [1910] A. C. 422; Brighton College v. Marriott, [1925] 1 K. B. 312.

PART XIV.

74 i Assessment.]—In assessing for purposes of taxation the poles, wires, conduits, & cables of a telephone co., the cost of construction, or the value as part of a going concern, is not the test: they must be valued, in the assessment division in which they happen to be, just as materials which, if sold or taken in payment of a just debt from a solvent debtor, would have to be removed & taken away by the purchaser or creditor.—*Re BELL TELEPHONE CO. & HAMILTON CORPN.* (1898), 25 A. R. 351.—**CAN.**

r. Unit of taxation—Quarter section

—*Right of adjacent owner to notice of passing of resolution.]*—Rural Telephone Act, R. S. S., c. 96, makes the quarter section the unit of taxation, & a person who owns a quarter section on the telephone line but resides on land contiguous to that quarter section but not itself on the line, is not entitled to notice of the passing of a resolution authorising a proposed loan as a "resident occupant" under sect. 26 of the Act.—*SENGER v. BLUCHER RURAL MUNICIPALITY* (No. 343) (Sask.), [1923], 4 D. L. R. 153; [1923] 2 W. W. R. 1137.—**CAN.**

t. Liability of Commercial Cable

Company—To taxation under Taxing Act—Whether company "carrying on telegraph business in & from the Colony."]—*COMMERCIAL CABLE CO. v. A.-G. OF NEWFOUNDLAND* (1912), 9 Nfld. L. R. App. xix.—**NFLD.**

PART XV.

a. Whether telegraph companies exempted from payment of taxes imposed by 5 Edw. 7, c. 7.]—*R. v. ANGLO-AMERICAN TELEGRAPH CO.* (1907), 9 Nfld. L. R. 290.—**NFLD.**

b. —.]—*A.-G. v. COMMERCIAL CABLE CO.* (1911), 9 Nfld. L. R. 464.—**NFLD.**

Part XVI.—Telegraphic Addresses and Codes.

77. Property in telegraphic address—Where in cypher.]—Pltfs., a telegram co. in London, made an arrangement with defts., being two individuals in Australia, for the transmission of messages, in which certain words were used as short expressions of the names & addresses of the principal customers; & defts. were described as pltfs.' agents. In a little time the parties quarrelled, & one of defts. came to England to carry on an independent telegram business with his partner in Australia, & sent circulars to pltfs.' customers, mentioning that he had their cyphers. On motion to restrain him from using the cyphers:—*Held*: there was nothing confidential in the cyphers, & he was entitled to use them.—*REUTER'S TELEGRAM CO. v. BYRON* (1874), 43 L. J. Ch. 661.

Annotations:—*Consd.* Merryweather v. Moore, [1892] 2 Ch. 518; Lamb v. Evans, [1893] 1 Ch. 218. *Refd.* Robb v. Green (1895), 64 L. J. Q. B. 593.

78. ———.]—The short address, "Street London" was used for many years in sending telegrams from abroad to Street & Co., of Cornhill. A bank adopted by arrangement with the Post Office the phrase "Street London," as a cypher address for telegrams from abroad to themselves:—*Held*: the ct. had no jurisdiction to restrain the bank from using such cypher address.—*STREET v. UNION BANK OF SPAIN & ENGLAND* (1885), 30 Ch. D. 156; 55 L. J. Ch. 31; 53 L. T. 262; 33 W. R. 901; 1 T. L. R. 554.

79. Property in code.]—Pltf. published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmissions of messages, & it was accompanied by figure cyphers for reference or private interpretation. The book was registered under Copyright Act, 1842 (c. 45). Defts. bought a copy of the book, & compiled for their own use with its aid a new & independent work, as alleged, which was their own private telegraph code, & they distributed copies of their book amongst their agents at home & abroad, but they had not printed their

book for sale or exportation:—*Held*: defts. had infringed the copyright of pltf., & a perpetual injunction must be granted.—*AGER v. PENINSULAR & ORIENTAL STEAM NAVIGATION CO.* (1884), 20 Ch. D. 637; 53 L. J. Ch. 589; 50 L. T. 477; 33 W. R. 116.

Annotations:—*Folld.* Ager v. Collingridge (1886), 2 T. L. R. 291. *Refd.* Anderson v. Lieber Code Co., [1917] 2 K. B. 469.

80. ———.]—Pltf. had published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmissions of messages, with the addition of figure cyphers for reference or private interpretation, which was registered under Copyright Act. Defts. had printed a book containing some 70,000 of the words comprised in pltf.'s book, with the addition of interpretations suited to the purposes of a certain trade, for the use of themselves & their correspondents:—*Held*: defts. had infringed pltf.'s copyright, & a perpetual injunction must be granted.—*AGER v. COLLINGRIDGE* (1886), 2 T. L. R. 291.

Annotation:—*Apld.* Anderson v. Lieber Code Co., [1917] 2 K. B. 469

81. ———.]—A person in the employment of pltfs. under a contract of service compiled in the course of his employment a telegraphic code consisting of words of five letters, each word differing from every other word in at least two letters, & being pronounceable but meaningless in itself. The code consisted of 100,000 words, which the compiler selected from an original list of 450,000 words on certain principles, which were based on the requirements of telegraphic & cable cos. Pltfs. went through the formalities necessary to copyright the work. Subsequently defts. published a code, in which was reproduced a substantial part of pltfs.' code:—*Held*: pltfs.' code was a proper subject of copyright, for the infringement of which by defts., pltfs. were entitled to recover.—*ANDERSON & CO., LTD. v. LIEBER CODE CO.*, [1917] 2 K. B. 469; 86 L. J. K. B. 1220; 117 L. T. 361; 33 T. L. R. 420; 61 Sol. Jo. 515.

TENANCY.

See LANDLORD AND TENANT.

TENANT AT WILL.

See LANDLORD AND TENANT.

TENANT BY CURTESY.

See REAL PROPERTY AND CHATTELS REAL.

TENANT BY SUFFERANCE.

See LANDLORD AND TENANT.

TENANT FOR LIFE.

See INFANTS AND CHILDREN ; REAL PROPERTY AND CHATTELS REAL ; SETTLEMENTS.

TENANT IN COMMON.

See REAL PROPERTY AND CHATTELS REAL.

TENANT IN TAIL.

See REAL PROPERTY AND CHATTELS REAL.

TENANT RIGHT.

See AGRICULTURE.

TENDER.

See ADMIRALTY ; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS ; CONTRACT ; SALE OF GOODS.

TENDER OF AMENDS.

See PUBLIC AUTHORITIES, BODIES, AND OFFICERS.

TENEMENT.

See COPYHOLDS ; LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL.

TENURE.

See CONSTITUTIONAL LAW ; COPYHOLDS ; REAL PROPERTY AND CHATTELS REAL.

TERM.

See LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL ; SETTLEMENTS.

TERRITORIAL FORCE.

See ROYAL FORCES.

TERRITORIAL WATERS.

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TESTAMENTARY EXPENSES.

See ESTATE AND OTHER DEATH DUTIES ; EXECUTORS AND ADMINISTRATORS ; WILLS.

TESTATORS.

See WILLS.

TESTATUM.

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THAMES.

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THEATRES AND OTHER PLACES OF ENTERTAINMENT.

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<i>Child Performers</i>	„ INFANTS.	<i>Intoxicating Liquors</i>	„ INTOXICATING LIQUORS.
<i>Copyright</i>	„ COPYRIGHT.	<i>Local Government</i>	„ LOCAL GOVERNMENT.
<i>Criminal Law</i>	„ CRIMINAL LAW.	<i>Performing Rights</i>	„ COPYRIGHT.
<i>Disorderly</i>	„ CRIMINAL LAW.	<i>Refreshment Houses</i>	„ INTOXICATING LIQUORS.
<i>Gaming</i>	„ GAMING AND WAGER-ING.		

Part I.—Theatres.

SECT. 1.—LICENCES OR LETTERS PATENT.

SUB-SECT. 1.—NECESSITY FOR.

See Theatres Act, 1843 (c. 68), s. 2.

1. House or other place of public resort—Had or kept for public performance of stage plays—What amounts to house or other place—Booth-theatre.]—A booth-theatre, which is taken to pieces & carried from place to place for theatrical performances, is not a “house or other place of public resort for the public performance of stage plays” within Theatres Act, 1843 (c. 68), s. 2.—*DAVYS v. DOUGLAS* (1859), 4 H. & N. 180; 28 L. J. M. C. 193; 32 L. T. O. S. 283; 23 J. P. 135; 157 E. R. 806; *sub nom.* *DAVIS v. DOUGLAS*, 7 W. R. 327.

*Annotations:—***Consd.** *Fredericks v. Payne* (1862), 32 L. J. M. C. 11. **Distd.** *Tarling v. Fredericks* (1873), 28 L. T. 814. **Refd.** *Sewell v. Taylor* (1859), 23 J. P. 792; *Fredericks v. Howle* (1862), 6 L. T. 544.

2. ————.]—A booth, consisting of two caravans or wagons, having painted on it “Olympic Theatre,” drawn from place to place by horses & when supported by poles resting on the ground formed a temporary booth with a stage thereon, in which certain stage plays were acted, & which booth was moved from place to place for theatrical performances:—*Held*: the acting stage plays for hire in such booth, not being a patent theatre or duly licenced as a theatre, is acting in a “place” within Theatres Act, 1843 (c. 68), s. 11, & for which the manager is liable to the penalty thereby imposed.

Theatres Act, 1843 (c. 68), s. 11, certainly includes the case of this applt. The “acting was for hire,” whether payment was made at the door or any other place (*BRAMWELL, B.*).—*FREDERICKS v. PAYNE* (1862), 1 H. & C. 584; 32 L. J. M. C. 14; 7 L. T. 329; 27 J. P. 104; 8 Jur. N. S. 1109; 11 W. R. 36; 158 E. R. 1016; *sub nom.* *PAYNE v. FREDERICKS*, 1 New Rep. 32.

3. ————.]—*TARLING v. FREDERICKS*, No. 14, *post*.

4. ———— What amounts to having or keeping—Hiring public room for short period.]—A person who hires an unlicenced public room for six nights, & publicly performs stage plays in it, is not liable to be convicted under Theatres Act, 1843 (c. 68), s. 2, for “having & keeping” a place of public resort for the public performance of stage plays without a licence.—*R. v. STRUGNELL* (1865), 1 L. R. 1 Q. B. 93; 7 B. & S. 124; 35 L. J. M. C. 78; 13 L. T. 433; 14 W. R. 193; *sub nom.* *R. v. ROSENTHAL, R. v. STRUGNELL*, 30 J. P. 101; 12 Jur. N. S. 269.

*Annotations:—***Distd.** *Shelley v. Bethell* (1883), 12 Q. B. D. 11. **Refd.** *R. v. Heyworth, etc.*, West Derby JJ. (1866), 14 L. T. 600.

5. ———— Permitting use on few occasions for benefit of charity.]—Applt. was the owner & occupier of a building which he gratuitously allowed to be used on a few occasions for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity. Applt. had no licence for the performance of stage plays in such building:—*Held*: he was rightly convicted of having or keeping a house for the public performance of stage plays without a licence, under Theatres Act, 1843 (c. 68), s. 2.—*SHELLEY v. BETHELL* (1883), 12 Q. B. D. 11; 53 L. J. M. C. 16; 49 L. T. 779; 48 J. P. 244; 32 W. R. 276, D. C.

6. ———— What amounts to “letters patent”—Albert Hall charters.]—The charters of 1867 & 1888 under which the Royal Albert Hall was incorporated, which give power to hold theatrical entertainments in the small hall, are not “letters patent” within Theatres Act, 1843 (c. 68); &, therefore a licence under sect. 2 of that Act is necessary for the performance of stage plays therein.—*ROYAL ALBERT HALL v. LONDON COUNTY COUNCIL* (1911), 104 L. T. 894; 75 J. P. 337; 27 T. L. R. 362; 9 L. G. R. 626, D. C.

*Annotation:—***Consd.** *L. C. C. v. Hall of Arts & Sciences Corp.* (1913), 78 J. P. 11.

Sect. 1.—Licences or letters patent: Sub-sects. 1 & 2.
Sects. 2, 3, 4 & 5: Sub-sects. 1 & 2.]

7. Music & dancing licence insufficient.]—Neither Letters Patent from the Crown, nor a licence from the Lord Chamberlain, can be granted for any dramatic performances, within 10 Geo. 2, c. 28, except in Westminster, or some place where Her Majesty may be residing; & a sessions licence under 28 Geo. 3, c. 30, which is the only other authority for such performances, cannot be granted for them, unless at a place not within twenty miles of London or Westminster. Dramatic performances therefore within twenty miles of London or Westminster, & not in Westminster or in the place of Her Majesty's residence, cannot be rendered legal by any authority whatever, for Disorderly Houses Act, 1751 (c. 36), extends only to music & dancing.—*LEVY v. YATES* (1838), 8 Ad. & El. 129; 3 Nev. & P. K. B. 240; 1 Will. Woll. & H. 219; 7 L. J. Q. B. 138; 112 E. R. 785; *sub nom. LEVI v. YATES*, 2 Jur. 324.

Annotation:—Refd. Brightman v. Tate, [1919] 1 K. B. 463.

Offences in respect of unlicensed places.]—See Sect. 4, post.

SUB-SECT. 2.—GRANT OF.

See Theatres Act, 1843 (c. 68), ss. 3, 5, 7–10; Metropolis Management & Building Acts Amendment Act, 1878 (c. 32), s. 13; Local Government Act, 1888 (c. 41), ss. 7, 28 (2).

8. Application for grant of letters patent—What must be shown.]—(1) The ct. refused to seal a patent for representing Italian Operas; because the provisions for carrying it on were by agreement with the Lord Chamberlain, his exors. & administrators; & the right to the patent was not sufficiently connected with the property in the House. Not sufficient for the party applying merely to answer objections; but he must lay a proper case. Upon such application the ct. will take care, that the King is not deceived, nor his object disappointed; & will represent the whole to the King; but will not decide upon the merits of various claimants. Ct. will not sign a patent, which does not put the parties under some control; though there is no *caveat*.

(2) I hope I shall not be obliged to order a master to take the management of an opera house into his hands because I am sure it would be very unfit for him (*LORD THURLOW, C.*).—*Ex p. O'REILLY* (1790), 1 Ves. 112; 30 E. R. 256, L. C.

Annotation:—Generally, Refd. Ex p. Ford (1802), 7 Ves. 617.

9. Discretion of licensing authority—To refuse licence—Discretion of justices.]—Ex p. HARRINGTON (1888), 4 T. L. R. 435, C. A.

10. — To attach conditions to grant—Condition that grantee shall not apply for excise licence.]—A county council acting as the licensing authority for the performance of stage plays may, in the

exercise of their discretion, attach to the grant of a licence for such performances a condition that the grantee shall undertake not to apply to the excise authorities under Excise Act, 1835 (c. 39), s. 7, for an excise licence to sell intoxicating liquors in his theatre.—*R. v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL*, [1896] 2 Q. B. 386; 65 L. J. M. C. 136; 75 L. T. 252; 60 J. P. 550; 44 W. R. 650; 12 T. L. R. 454; 40 Sol. Jo. 568, D. C.

Annotations:—Apld. Manchester Palace of Varieties v. Manchester Corpn. (1898), 62 J. P. 425. *Expld. L. C. C. v. Bermondsey Bioscope Co.*, [1911] 1 K. B. 445. *Refd. R. v. Sheerness U. D. C.* (1898), 62 J. P. 563.

11. — — — — —.]—A county council acting as the licensing authority for the performance of stage plays, may, in the exercise of their discretion, attach to the grant of a licence for such performances a condition that the licensee would not apply for a licence to sell beer, spirits or wine on the premises of the theatre. Where the licensee bound himself by a deed of covenant not to apply for a licence for the sale of intoxicating liquor, a memorandum of which deed was attached to the theatre licence, the ct. refused to set the deed aside.—*MANCHESTER PALACE OF VARIETIES, LTD. v. MANCHESTER CORPN.* (1898), 62 J. P. 425.

12. — — — — — Resolution prohibiting sale of liquor & tobacco—Validity of resolution.]—A rule made under Theatres Act, 1843 (c. 68), s. 9, that "no spirituous liquors, wines, ale, porter, cider, perry, or tobacco shall be sold or disposed of in the building," is not *ultra vires* as depriving the excise authorities of their discretion to grant a licence under Excise Act, 1835 (c. 39), s. 7, nor does it prevent the licensing authority from determining on the merits an application for a licence under Theatres Act, 1843 (c. 68), s. 2, free of all restrictions.—*R. v. SHEERNESS URBAN DISTRICT COUNCIL* (1898), 62 J. P. 563; 14 T. L. R. 533; *sub nom. Re SHEERNESS URBAN DISTRICT COUNCIL, Ex p. SMITH & DORING*, 42 Sol. Jo. 612, C. A.

Annotation:—Refd. L. C. C. v. Bermondsey Bioscope Co., [1911] 1 K. B. 445.

SECT. 2.—STRUCTURAL REQUIREMENTS.

See Part III., Sect. 3, post.

SECT. 3.—CLOSING ORDERS.

See Theatres Act, 1843 (c. 68), ss. 8, 9.

SECT. 4.—OFFENCES IN RESPECT OF THEATRES.

See Metropolitan Police Act, 1839 (c. 47), s. 46; Theatres Act, 1843 (c. 68), ss. 11, 15–17, 19–21; Criminal Justice Act, 1925 (c. 86), s. 43; Theatrical Performers' Registration Act, 1925 (c. 50), ss. 5, 6,

PART I. SECT. 1, SUB-SECT. 2.

a. Application for grant of letters patent—What Chancellor will consider.]—Upon an application to the Chancellor to withhold the Great Seal from a patent authorising A. to have a theatre for exhibiting, during certain months of the year, feats of horsemanship, & musical pieces (provided they are not such as have been theretofore exhibited at the Theatre Royal), dancing, tumbling & pantomimes, the Chancellor will only consider whether it is legal or not; not whether the Crown ought to grant it or not.—*Ex p. DALY* (1788), Vern. & Scr. 499.—*IR.*

b. — Rights of applicant after grant of patent—Whether he may

restrain performances in other theatres where no patent granted.]—CALCRAFT v. WEST (1845), 2 Jo. & Lat. 123; 8 L. Eq. R. 74.—*IR.*

c. License fee—For picture shows—Whether ultra vires.]—The authority given in Towns Incorporation Act, s. 64 (24), to regulate by licensing all theatres, circuses, or other shows or exhibitions for hire does not authorise a town incorporated under the Act to impose a license fee for revenue purposes, & a bye-law imposing an annual fee of \$300 on moving picture shows was declared *ultra vires*.—*It. v. DIMOCK* (1916), 44 N. B. R. 124.—*CAN.*

d. — Authority to impose.]—Theatres Act does not authorise the

Lieutenant-Governor-in-Council to impose a license fee upon theatres.—*LETHBRIDGE v. WILSON* (1915), 1 Alta. L. R. 178; 1 W. W. R. 424.—*CAN.*

e. Who may grant—Justices of the Peace.]—Justices of the Peace have power to grant a theatre licence to perform plays, etc., under the implied authority contained in 5 & 11 Will. 4, c. 39, s. 7.—*MORRISON v. CUSTOMS COMRS.*, [1927] N. I. 115.—*IR.*

PART I. SECT. 4.

1. Meaning of "free & unobstructed passage-ways."]—The provision in Theatres Act, reg. 39, requiring passage-ways to be kept "free & unobstructed" means free of inanimate

7, 9, 13; Theatrical Employers Registration (Amendment) Act, 1928 (c. 46), ss. 1, 2.

13. Acting or causing play to be acted for hire in unlicensed place—What amounts to "place"—Booth-theatre.]—FREDERICKS v. PAYNE, No. 2, *ante*.

14. ———.]—A person who, without licence, acts stage plays for hire in a temporary booth, brings himself within the penalty imposed by Theatres Act, 1843 (c. 68), s. 11, on persons performing stage plays "in any place not being a patent theatre, or duly licensed as a theatre."—TARLING v. FREDERICKS (1873), 28 L. T. 814; 38 J. P. 197; 21 W. R. 785, D. C.

15. ——— Not place which requires licence.]—FREDERICKS v. PAYNE, No. 2, *ante*.

16. ——— What amounts to acting for hire—No payment made at door—Or any other place.]—FREDERICKS v. PAYNE, No. 2, *ante*.

17. ——— Liability to penalty.]—FREDERICKS v. PAYNE, No. 2, *ante*.

18. ———.]—R. v. STRUGNELL, No. 4, *ante*.

19. ———.]—TARLING v. FREDERICKS, No. 14, *ante*.

20. ——— Liability of person causing play to be acted—Though agent for others.]—10 Geo. 2, c. 28, s. 2, inflicting a penalty of £50 on persons performing, or causing to be performed, plays, etc., without Letters Patent, etc., is not repealed by 5 Geo. 4, c. 83.

Proof that a party was the acting manager of a theatre, & that he paid the salary of & dismissed one of the performers, is sufficient proof that he caused the performances; & if he caused the performances it is not material whether he did so as the agent of others or not.—PARSONS v. CHAPMAN (1831), 5 C. & P. 33; 172 E. R. 865, N. P.

21. ——— Proof of causing play to be acted—Acting manager paying salaries & dismissing performers.]—PARSONS v. CHAPMAN, No. 20, *ante*.

22. Keeping, using, or knowingly letting house or other tenement—For purpose of being used as unlicensed theatre—What amounts to "tenement"—Portable booth.]—A booth or show consisting of two caravans or wagons on wheels temporarily staked to the ground & used as a theatre, into which admission was obtained by payment of 3d. each person, at fairs by strolling players is not "a house or other tenement for the purpose of being used as an unlicensed theatre" within Metropolitan Police Act, 1839 (c. 47), s. 46, & therefore the manager of such a booth or show is not liable to the penalty imposed by that sect. on persons keeping, using or knowingly letting any house or other tenement for the purpose of being used as an unlicensed theatre.—FREDERICKS v. HOWIE (1862), 1 H. & C. 381; 31 L. J. M. C. 249; 6 L. T. 544; 26 J. P. 824; 8 Jur. N. S. 750; 10 W. R. 796; 158 E. R. 933.

Annotation:—*Reid*. Farmer v. Cotton's Trustees, [1915] A. C. 922.

Nuisances in respect of theatres & exhibitions.]—See HIGHWAYS, Vol. XXVI., pp. 427–429, Nos. 1472–1483; NUISANCE, Vol. XXXVI., p. 185, Nos. 287–294.

things.—R. v. HAZZA (Alfa.) (1916), 34 W. L. R. 97; 10 W. W. R. 117; 28 D. L. R. 373; 25 Can. Crim. Cas. 306.—CAN.

g. Keeping theatre open after licensed hours.]—AMRITA LAL BOSE v. CALCUTTA CORPN. (1917), 1 L. R. 44 Calc. 1025.—IND.

h. ——— Validity of bye-law.]—PRABODH CHANDRA BOSE v. CALCUTTA CORPN. (1919), 1 L. R. 47, Calc. 547.—IND.

k. Overcrowding.]—WESTMACOTT v. DOYLE (1904), 23 N. Z. L. R. 601.—N.Z.

l. Concert party acting on wooden platform—No consent of magistrate given.]—PATRICK v. WOOD (1905), 4 Adam 648; 8 F. (Ct. of Sess.) (J.) 4; 43 Sc. L. R. 46; 13 S. L. T. 520.—SCOT.

PART I. SECT. 5, SUB-SECT. 2.

m. Right to seat—Ejection before occupying it—Nominal damage may be

SECT. 5.—RIGHTS OF THE PUBLIC.

SUB-SECT. 1.—IN GENERAL.

23. Right of ticket holder—To stay & witness whole performance—Remedy for forcible expulsion—Action for assault & false imprisonment.]—The purchaser of a ticket for a seat at a theatre or other similar entertainment has a right to stay & witness the whole of the performance, provided that he behaves properly & complies with the rules of the management.

The licence granted by the sale of the ticket includes a contract not to revoke the licence arbitrarily during the performance.

Where therefore pltf. who had purchased a ticket for a seat at a cinema show, was forcibly turned out of his seat by the direction of the manager, who was acting under a mistaken belief that pltf. had not paid for his seat:—*Held*: in an action for assault & false imprisonment pltf. was entitled to recover substantial damages.—HURST v. PICTURE THEATRES, LTD., [1915] 1 K. B. 1; 83 L. J. K. B. 1836; 111 L. T. 972; 30 T. L. R. 642; 58 Sol. Jo. 739, C. A.

Annotations:—*Consd.* Cox v. Coulson, [1916] 2 K. B. 177; *Said v. Butt*, [1920] 3 K. B. 497. *Reid*. British Actors Film Co. v. Glover, [1918] 1 K. B. 299; *Joel v. International Circus & Christmas Fair* (1920), 124 L. T. 459; *Messenger v. British Broadcasting Co.* (1928), 97 L. J. K. B. 251.

SUB-SECT. 2.—RIGHT OF ADMISSION.

24. Right to seat—Or return of money—Person informed that seat available—No right to enter private box.]—If three persons be told on entering a theatre that there is room, when in fact there is not, their proper course is to leave the theatre, & demand the return of their money; & such persons are not justified in getting into a private box in the theatre, & if they do, the proprietor may remove them, using no more force than is necessary, & if, in going out of the theatre, one of them strike a servant of the proprietor's in the presence of a constable, such constable will be justified in taking all the three persons into custody, if the jury shall be satisfied that they were acting with a common purpose.—LEWIS v. ARNOLD (1830), 4 C. & P. 354; 172 E. R. 737, N. P.

Annotation:—*Reid*. *Said v. Butt*, [1920] 3 K. B. 497.

25. Letting of boxes or stalls.]—A lease of the Opera House contained a covenant on the part of the lessee not to grant away, assign, dispose of, etc., the stalls or boxes "for any longer period than one year or season." On Dec. 21, 1851, the lessee leased certain boxes for one year, to commence from Mar. 1852. On Aug. 1, 1852, he made another lease of the same boxes to a different person, with this *habendum*, "from Feb. 1 now next ensuing, or from such subsequent year, upon which the theatre shall be opened, & thenceforth for the full term of one year, to be computed from that day":—*Held*: this was not a breach of the covenant.—CROFT v. LUMLEY (1858), 6 H. L. Cas. 672; 27 L. J. Q. B. 321; 31 L. T. O. S. 382; 22 J. P. 639; 4 Jur. N. S. 903; 6 W. R.

recovered.]—Where the purchaser of a ticket of admission to a place of amusement, who has entered the place of amusement, but has not occupied a seat, is ejected, he may recover nominal damages for breach of contract & damages for assault.—BARNSWELL v. NATIONAL AMUSEMENT CO., LTD., (1915), 21 B. C. R. 435; 31 W. L. R. 542; 23 D. L. R. 615.—CAN.

n. Right to free admission.]—The owners of a theatre, by deed bear-

Sect. 5.—Rights of the public : Sub-sects. 2 & 3.]

523; 10 E. R. 1459, H. L.; *affg.* (1856), 5 E. & B. 648, 682, Ex. Ch.

Annotations:—Mentd. Hill v. Cowdery (1856), 1 H. & N. 360; Mumford v. Oxford, Worcester & Wolverhampton Ry. (1856), 1 H. & N. 34; Dendy v. Nicholl (1858), 4 C. B. N. S. 376; Price v. Worwood (1859), 4 H. & N. 512; Jeffries v. Alexander (1860), 8 H. L. Cas. 594; Avison v. Holmes, Penny v. Avison (1861), 1 John. & H. 530; Benham v. Keane (1861), 1 John. & H. 685; Ward v. Day (1864), 5 B. & S. 359; Clough v. L. & N. W. Ry. (1871), L. R. 7 Exch. 26; Toleman v. Portbury (1871), L. R. 6 Q. B. 245; Morrison v. Universal Marine Insce. (1873), L. R. 8 Exch. 197; Davenport v. R. (1877), 3 App. Cas. 115; Lancashire Waggon Co. v. Nuttall (1879), 40 L. T. 291; James v. Young (1884), 27 Ch. D. 652; Ackroyd v. Smithies (1885), 54 L. T. 130; Keith Prowse v. National Telephone Co., [1894] 2 Ch. 147; *Re* Cotgrave, Mynors v. Cotgrave, [1903] 2 Ch. 705; Harman v. Ainslie, [1904] 1 K. B. 698; Wulfsbery v. S.S. Weardale (1916), 85 L. J. K. B. 1717; Davies v. Bristow, Penrhos College v. Butler, [1920] 3 K. B. 428; Hartell v. Blackler, [1920] 2 K. B. 161; Kin Tye Loong v. Seth (1920), 89 L. J. P. C. 113; R. v. Paulson, [1921] 1 A. C. 271; Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773.

26. — Liability of lessee to be rated.]—The proprietors of Drury Lane Theatre demised, for a term of years, at a nominal rent, a private box, with the power of exclusively occupying it upon the nights on which there should be performances. The proprietors had also access to the box, but not the right of occupying it during the performance; & they were entitled & bound to perform the repairs upon it:—*Held*: the lessee was rateable to the poor for the occupation of the box, under an Act which authorised the making rates on all persons who should inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement or hereditament. Although the co. of proprietors were rated for the theatre generally.—*R. v. St. MARTIN'S IN THE FIELDS (INHABITANTS)* (1842), 3 Q. B. 204; 2 Gal. & Dav. 426; 11 L. J. M. C. 112; 6 J. P. 655; 6 Jur. 850; 114 E. R. 485.

Annotations:—Consd. Morrish v. Hall (1863), 2 New Rep. 448. *Refd.* Daly v. Edwardes (1900), 82 L. T. 372. *Mentd.* Spear v. Bodmin Union Grdns. (1880), 49 L. J. M. C. 69; Rochdale Canal Co. v. Brewster (1894), Ryde & K. Rat. App. 143.

27. — Right of proprietor to enter.]—The lease of a theatre contained a covenant on the part of the lessee not to convert the theatre, or any part thereof, to any other use than for acting or performing of operas, plays, concerts, balls, masquerades, assemblies, & such theatrical & other purposes as had been usually given therein. The lessee, for valuable consideration, sub-demised certain boxes & pit stalls, together with free & uninterrupted admission into, & egress & regress to & from, & the full use & enjoyment of such boxes & stalls during all such nights as the theatre should be open for the reception of audience or co. to any public performance or exhibition of any opera or any entertainment whatsoever of or upon the stage, except balls or masquerades, to pltf. for a term of years, reserving full right of access to the boxes & stalls for the purposes of repair. The underlease contained a covenant for quiet enjoyment of the demised premises; but no covenant on the part of the grantor of the underlease to observe or perform the covenants of the original lease. Afterwards the lessee of the theatre agreed to let it for a term of three months for the purpose of holding religious meetings. In order that the theatre might be converted into a convenient place for holding such meetings, the divisions between the boxes were removed, & the pit, including the site of pltf.'s stalls, was boarded over; but these alterations were not permanent,

& the parties disclaimed any intention of using the theatre for religious services beyond the three months:—*Held*: without pltf.'s consent the theatre could not be converted to other than theatrical purposes, nor could the original lessee, or any person claiming under him, enter on pltf.'s boxes or stalls; but under the circumstances, the proper remedy was in damages, & not by way of injunction.—*LEADER v. MOODY* (1875), L. R. 20 Eq. 145; 44 L. J. Ch. 711; 32 L. T. 422; 23 W. R. 606.

Annotation:—Mentd. Holford v. Acton U. C., [1898] 2 Ch. 240.

28. — Owner of reversion obtaining lease & property of theatre—Effect of winding-up order.]—Where the owner of the reversion of a theatre having by an order in a winding-up of a co. obtained the lease & property of the theatre, the lessee of property boxes & stalls brought an action, asking for an injunction to restrain the reversioner from preventing pltf. from having access to his boxes & stalls:—*Held*: the order in the winding-up did not affect the rights of third parties; deft. could only exclude pltf. by action for the recovery of land where third parties would have notice & an opportunity of appearing.—*LEADER v. HAYES* (1886), 54 L. T. 204.

29. Grant or reservation of right to free admission—Nature of right—Licence.]—A., in 1792, grants a lease of a theatre to B., B. covenanting not to grant rights of admission, except 250 free admissions, without the consent of A.; & in case of any of the covenants being broken, the lease to be void. B. then assigns his interest to trustees, to receive the profits & pay the debts, etc., who leave B. in the management & direction of the concern, in the course of which, in 1799, B. grants a ticket of admission to C. for twenty-one years. In 1800, the trustees take possession of the theatre, but suffer C. to exercise his privilege of admission till 1814, when the ticket is stopped, on the ground that B. had no right to make such a grant:—*Held*: (1) the covenant by B. with A., not to grant rights of admission, supposing it to have been broken, did not avoid the grant to C.; (2) as the trustees had left B. in the management of the theatre, they must be taken to have authorised the grant, & could not afterwards disavow it; (3) this was not an interest in land, but a licence to C. to enjoy the privilege of admission, & therefore it was not necessary that it should pass by deed, or that B. should have been authorised by the trustees in writing to make such a grant.—*TAYLER v. WATERS* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E. R. 150.

Annotations:—As to (3) Consd. Wood v. Leadbitter (1845), 13 M. & W. 838. *Distd.* Webber v. Lee (1882), 9 Q. B. D. 315. *Consd.* Hurst v. Picture Theatres, [1915] 1 K. B. 1. *Refd.* Wood v. Mauley (1839), 11 Ad. & El. 34. *Generally, Mentd.* Hewlins v. Shippam (1826), 5 B. & C. 221; Liggins v. Inge (1831), 7 Bing. 682; Williams v. Morris (1841), 8 M. & W. 488; Wells v. Kingston upon Hull Corp'n. (1875), 44 L. J. C. P. 257; McManus v. Cooke (1887), 35 Ch. D. 681; Met. Ry. v. Fowler, [1892] 1 Q. B. 165.

30. — Grant not binding on assignee of theatre.]—An agreement that pltf. should be paid £360, on Dec. 31, 1834, for £313, lent by him on Apr. 26, 1834, if four persons named should be alive on Dec. 31, & that pltf. should have the use of two boxes at the V. theatre, in the intermediate time, gratuitously, but if either of the four persons should die, pltf. should pay a reasonable sum for the use of the boxes:—*Held*: not an agreement running with the land, & therefore not binding, as to the use of the boxes, on an

ing date in 1839, made for valuable consideration, covenanted to confirm to debenture holders the privilege of

free admission to the theatre. Petitioner was entitled to the benefits of the deed of 1839, but subsequently

lost his debenture. In 1851, resp. became lessee of the theatre, with notice of the deed of 1839:—*Held*: petitioner

assignee of the theatre.—*FLIGHT v. GLOSSOPP* (1835), 2 Bing. N. C. 125; 2 Scott, 220; 1 Hodg. 263; 4 L. J. C. P. 268; 132 E. R. 50.

31. ————.]—A licence is determined by an assignment of the subject matter in respect of which the privilege is to be enjoyed. By lease not under seal, R. & C., trustees on behalf of themselves & the other proprietors of a theatre, demised it to S. for three years, reserving to themselves & the other proprietors free liberty of admission to the theatre. S., by lease not under seal, let the theatre to pltf. for two nights, subject to the terms on which he held the theatre:—*Held*: the licence was determined, & an action of trespass might be maintained by pltf. against deft., a proprietor, who entered the theatre during his tenancy.—*COLEMAN v. FOSTER* (1856), 1 H. & N. 37; 4 W. R. 489; 156 E. R. 1108.

32. ————.]—Trustees acting for the shareholders or rentallers of a theatre called the Queen's Theatre & Opera House, who had obtained a feu right to the site, granted in 1858 a disposition of the ground, & buildings to one J. B. subject (*inter alia*) to the real burden of a perpetual annuity of £2 per share to each rentaller of the said Queen's Theatre & Opera House & to the successors or assignees of them; & it was further declared that each of the said rentallers, or the assignee or successors of such should at all times be entitled (*inter alia*) to free admission to the auditorium of the said Queen's Theatre & Opera House, also declaring that J. B. should not convert the said theatre to any other use; & that he should keep it open for performance six months in each year. There was no stipulation as to insurance of the theatre or as to the rebuilding of it in case of destruction by fire or otherwise. In 1865 the theatre was entirely destroyed by fire & was rebuilt by J. B.'s trustee & called by another name. In 1875 it was again entirely burnt down & again rebuilt. From 1865 to 1879 the theatre, under the new name, was twice sold, but in each case the conveyance was granted subject to the "real burdens, conditions, provisions, declarations, & others" specified in the original disposition of 1858 & especially under the burden of payment of the annuities to the rentallers & of allowing "these parties the privileges to which they are entitled." The privilege of free admission was enjoyed by the rentallers for fourteen years after the destruction of the first theatre. But in 1879 disputes arose as to the validity of the rentallers' right to (*inter alia*) the privilege of free admission. The trustees maintained that the rentallers were entitled under the disposition of 1858 & the succeeding conveyances to the same privileges in the new theatre which they had in the first:—*Held*: the privileges conferred on the rentallers by the original dispositions, other than the payment of the annuities which was constituted a real burden, rested only on the personal obligation of the original disponent, & were confined to the theatre then in existence; & the subsequent deeds to which the rentallers were not parties were not intended to, & did not confer on them any new right.—*SCOTT v. HOWARD* (1881), 6 App. Cas. 295, H. L.

33. ————.]—**Right to specific performance.**—A lease of a theatre, with a covenant for renewal, contained a proviso that the lessee should not let any box with the exception of forty-one specified boxes, for more than the season, or than from year

to year. On an assignment of the term, the assignor reserved the right for himself & his nominees, during the existing or any renewed lease, to occupy box No. 124, not being one of the excepted boxes. On a renewal being obtained, a similar covenant as to forty-one boxes was inserted in the renewed lease, but they were not specified. The lessee under the renewed lease obtained the renewal by means of the covenant in the old lease & with notice of the reservation as to box No. 124. He granted long leases of forty-one boxes, exclusively of No. 124:—*Held*: the possibility of a forfeiture being incurred if he performed the agreement as to No. 124, was no defence to a suit for its specific performance.—*HELLING v. LUMLEY* (1858), 3 De G. & J. 493; 28 L. J. Ch. 249; 33 L. T. O. S. 18; 23 J. P. 356; 5 Jur. N. S. 301; 7 W. R. 152; 44 E. R. 1358, L. J.

Annotation:—*Mentd.* Willmott v. Barber (1880), 15 Ch. D. 96.

34. ————.]—**Right conferred by statute—Extent of privilege.**—A new renter of Drury Lane Theatre under 1 Geo. 4, c. lx. is entitled to a free admission to any disengaged stall, the stalls being a portion of the "usual audience part of the theatre" within sect. 3 of that Act:—*Held*: when once the new renter has given up his ticket & been shown to a seat in that portion of the usual audience part to which he first seeks admission, he is entitled, during the remainder of the performance, to no greater privilege than an ordinary member of the public who has been admitted by payment to that portion of the usual audience part of the theatre.—*DAUNEY v. CHATTERTON* (1875), 45 L. J. Q. B. 293; 33 L. T. 628; *sub nom.* *DAUNEY v. CHATTERTON*, 40 J. P. 180, C. A.

35. ————.]—**Right confined to theatre then existing—Not to theatre subsequently built on same site.**—*SCOTT v. HOWARD*, No. 32, *ante*.

36. **Identity of purchaser of ticket concealed—Purchase in another name—Absence of contract.**—Pltf. desired to be present at the first performance of a play at a theatre. He knew that, in consequence of his having made certain serious & unfounded charges against some members of the theatre staff, an application for a ticket in his own name would be refused. He therefore obtained a ticket through the agency of a friend who bought the ticket at the theatre without disclosing that it was for pltf. By order of deft., the managing director of the theatre, pltf. was refused admission to the theatre on the night in question. Pltf. claimed damages from deft. for maliciously procuring the proprietors of the theatre to break a contract for the admission of pltf. to the theatre, alleged to have been made by them with pltf. by the sale of the ticket:—*Held*: the non-disclosure of the fact that the ticket was bought for pltf. prevented the sale of the ticket from constituting a contract as alleged, the identity of pltf. being in the circumstances a material element in the formation of the contract; & that the action therefore failed.—*SAID v. BUTT*, [1920] 3 K. B. 497; 90 L. J. K. B. 239; 124 L. T. 413; 36 T. L. R. 762.

Annotations:—*Refd.* *Dyster v. Randall*, [1926] Ch. 932; *Scammell v. Attlee* (1928), 45 T. L. R. 75.

SUB-SECT. 3.—RIGHT TO EXPRESS OPINION.

37. **Right to express feelings & opinions—On merits of performance.**—Although the audience in a public theatre have a right to express the

was not entitled specifically to enforce against resp. the privilege of free admission created by the deed of 1839.—*MALONE v. HARRIS* (1859), 11 L. Ch. R.

33; *Drury, temp.* Nap. 655.—*IR.*

PART I. SECT. 5, SUB-SECT. 3.

37 i. **Right to express feelings &**

opinions—On merits of performance.—*SEYMOUR v. M'LAREN* (1828), 6 Sh. (Ct. of Sess.) 969.—*SCOT.*

37 ii. ————.]—The rights of an

Sect. 5.—Rights of the public : Sub-sects. 3 & 4, A., B. & C. Sect. 6.]

feelings excited at the moment by the performance, & in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage, yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise & disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual or doing any injury to the house, they are, in point of law, guilty of a riot.—*CLIFFORD v. BRANDON* (1809), 2 Camp. 358; 170 E. R. 1183, N. P.

Annotations:—Refd. R. v. Stainer (1870), 39 L. J. M. C. 54; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leathem* (1901), 70 L. J. P. C. 76; *Said v. Butt*, [1920] 3 K. B. 497. *Mentd. R. v. Concy* (1882), 8 Q. B. D. 534.

38. ———.]—The public, who go to a theatre, have a right to express their free & unbiassed opinions of the merits of the performers who appear upon the stage; but parties have no right to go to a theatre, by a preconcerted plan to make such a noise that an actor, without any judgment being formed of his performance, should be driven from the stage; & if two persons are shown to have laid a preconcerted plan to deprive a person who comes out as an actor of the benefits which he expected to result from his appearance on the stage, they are liable in an action for a conspiracy—*GREGORY v. BRUNSWICK (DUKE)* (1843), 1 Car. & Kir. 24, N. P.; *subsequent proceedings* (1844), 6 Man. & G. 953.

Annotations:—Refd. Henwood v. Harrison (1872), L. R. 7 C. P. 606; *Said v. Butt*, [1920] 3 K. B. 497. *Mentd. Fletcher v. Cathorpe* (1845), 5 L. T. O. S. 432.

39. Interruption of performance—By noise & disturbance—In execution of common purpose—Conspiracy.]—*R. v. LEIGH* (1778), 1 Car. & Kir. 28. n.; *sub nom. ANON.*, 2 Camp. 372, n. cited in 6 Man. & G. at p. 217; 170 E. R. 1188, N. P. *Annotation:—Refd. Gregory v. Brunswick* (1843), 6 Man. & G. 205.

40. ———.]—*GREGORY v. BRUNSWICK (DUKE)*, No. 38, *ante*.

41. ———.]—*Riot.*—*CLIFFORD v. BRANDON*, No. 37, *ante*.

Comments by newspapers.]—See LIBEL & SLANDER, Vol. XXXII., p. 147, Nos. 1777, 1778.

SUB-SECT. 4.—LIABILITY OF PROPRIETORS FOR NEGLIGENCE.

A. In General.

42. Relationship between proprietors & persons frequenting theatre—Invitor & invitee.]—*COX v. COULSON*, No. 53, *post*.

43. ———.]—Defts. were the freeholders of a large space of ground on which various side shows were held, & defts. issued advertisements inviting people to visit the place. Pltf. visited the place & paid for a ticket for a side show belonging to a concessionaire from defts. & containing a contrivance for throwing a person into the air. The person who was in charge of the contrivance, but who was not a servant of defts., improperly invited pltf. to sit on it in a wrong position & pltf. was injured through being thrown off the con-

trivance. In an action for damages for negligence:—*Held*: the position of defts. & pltf. was that of inviters & invitee & as there was no evidence that the performance was intrinsically dangerous & no evidence of negligence by defts. or by any servant of theirs, pltf. could not recover.—*SHREHAN v. DREAMLAND, MARGATE, LTD.* (1923), 40 T. L. R. 155, C. A.

B. Injuries Resulting from Defects in Structure of Building.

44. Premises undergoing repairs—Liability for employment of improper persons.]—In an action against the owners of a public exhibition for not properly maintaining a staircase, whereby the same fell down, & pltf., who had paid for admission, was injured, there having been alterations which, it was alleged, caused the fall; the questions left to the jury were, whether they had employed proper persons to make the alterations, & whether these persons had employed proper care & skill.

The question is one of negligence, & I must request the jury to say yes or no to the question, whether the persons employed by defts. to make the alterations had exercised the necessary skill & caution to effect that object (*WIGHTMAN, J.*).—*BRAZIER v. POLYTECHNIC INSTITUTION* (1859), 1 F. & F. 507.

Annotations:—Consd. Readhead v. Mid. Ry. (1869), L. R. 4 Q. B. 379; *Francis v. Cockrell* (1870), L. R. 5 Q. B. 501.

45. ———.]—*Liability for want of care & skill by persons employed.*—*BRAZIER v. POLYTECHNIC INSTITUTION*, No. 44, *ante*.

46. ———.]—In an action against the lessees, as “owners & possessed of” a place of public exhibition, for not properly constructing & maintaining it, whereby a staircase fell, & pltf., a visitor, was injured:—*Held*: they were not responsible for latent defects in the staircase, whether in construction or in material, at the time they took the building, but were only responsible for any want of due care to keep it in a reasonably safe condition, & were liable for repair of it in an improper manner, tending to weaken its strength.—*PIKE v. POLYTECHNIC INSTITUTION* (1859), 1 F. & F. 712.

Annotations:—Consd. Readhead v. Mid. Ry. (1869), L. R. 4 Q. B. 379; *Francis v. Cockrell* (1870), L. R. 5 Q. B. 501.

47. Injuries caused by latent defects—In construction or material—Defects existing when building taken over—No liability.]—*PIKE v. POLYTECHNIC INSTITUTION*, No. 46, *ante*.

48. Liability for failure to keep premises reasonably safe.]—*PIKE v. POLYTECHNIC INSTITUTION*, No. 46, *ante*.

49. Person causing erection of building for viewing public exhibition—Implied undertaking—That due care exercised in erection.]—A man who causes a building to be erected for viewing a public exhibition & admits persons on payment of money to a seat in the building impliedly undertakes that due care has been exercised in the erection, & that the building is reasonably fit for the purpose; & it is immaterial whether the money is to be appropriated to his own use or not. Deft., acting on behalf of himself & others interested in certain races, entered into a contract with E., who was a competent person to be so employed, to erect for them a grand stand for the purpose

audience at a theatre are perfectly well defined. They may cry down a play or other performance which they dislike, or they may hiss or hoot the actors who depend on their approbation or their caprice. Even that privilege, however, is confined within its limits. They

must not break the peace, or act in such a manner as has a tendency to excite terror or disturbance. Their censure or approbation, although it may be noisy, must not be riotous. That censure or approbation must be the expression of the feelings of the moment.

For if it be premeditated by a number of persons confederated beforehand to cry down even a performance, or an actor, it becomes criminal (*BUSHE, C.J.*).—*R. v. FORBES* (1823), 2 State Tr. N. S. App. 939.—*IR.*

of viewing the races; & deft. employed a person, who received 5s., to be appropriated to the race fund, from every person admitted. The stand was negligently & improperly constructed, but not to the knowledge of deft., & in consequence fell & injured pltf., who was one of the persons so admitted:—*Held*: pltf. could maintain an action against deft. for the damage sustained, although deft. was personally free from negligence, & had employed a competent person to erect the stand.—*FRANCIS v. COCKRELL* (1870), L. R. 5 Q. B. 501; 10 B. & S. 950; 39 L. J. Q. B. 291; 23 L. T. 466; 18 W. R. 1205, Ex. Ch.

Annotations:—*Consd.* *Searle v. Laverick* (1874), L. R. 9 Q. B. 122; *Randall v. Newson* (1877), 2 Q. B. D. 102. *Apld.* *Kiddle v. Lovett* (1885), 16 Q. B. D. 605. *Consd.* *Marney v. Scott*, [1899] 1 Q. B. 986. *Apld.* *Maclean v. Segar*, [1917] 2 K. B. 325. *Consd.* *Liebigs Extract of Meat Co. v. Mersey Docks & Harbour Board & Nelson*, [1918] 2 K. B. 381. *Refd.* *John v. Bacon* (1870), L. R. 5 C. P. 437; *Carstairs v. Taylor* (1871), L. R. 6 Exch. 217; *Richardson v. G. E. Ry.* (1875), L. R. 10 C. P. 486; *Kopitoff v. Wilson* (1876), 1 Q. B. D. 377; *Tarry v. Ashton* (1876), 1 Q. B. D. 314; *Hyman v. Nye* (1881), 4 Q. B. D. 685; *Heaven v. Pender* (1883), 11 Q. B. D. 503; *Blacker v. Lake & Elliot* (1912), 106 L. T. 533; *Norman v. G. W. Ry.*, [1914] 2 K. B. 153; *Cox v. Coulson*, [1916] 2 K. B. 177; *Brannigen v. Harrington* (1921), 37 T. L. R. 349; *British Petroleum Co. v. A.-G. for Ceylon*, [1926] A. C. 147.

50. — That building reasonably fit for purpose.]—*FRANCIS v. COCKRELL*, No. 49, *ante*.

51. — Employment of competent contractor—Erection of grand stand on racecourse—Whether admission money appropriated to person causing erection immaterial.]—*FRANCIS v. COCKRELL*, No. 49, *ante*.

C. Injuries Resulting from Conduct of Performance.

52. Whether contract that spectators shall be safe implied.]—*WELSH v. CANTERBURY & PARAGON, LTD.* (1894), 10 T. L. R. 478.

Annotation:—*Refd.* *Cox v. Coulson* (1915), 31 T. L. R. 390.

53. — Duty to use reasonable care—That spectator not exposed to unusual danger—Which proprietor knew or ought to have known.]—Deft. was the lessee & manager of a theatre. He had arranged for the performance of a play in his theatre with the manager of a touring theatrical co., who was to provide actors & scenery, deft. providing the theatre, the lighting, & the play bills; each took an agreed proportion of the receipts. Pltf. took & occupied a seat in the theatre; during the performance an actor fired a pistol, which should have contained only a blank cartridge, but in the barrel of which, by some unexplained mischance, there was also a second cartridge of smaller size, which when the pistol was fired struck pltf. on the wrist, inflicting a serious wound. The county ct. judge held that it was an implied term of the contract between pltf. & deft. that all persons connected with the performance of the play should exercise reasonable care so that members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care:—*Held*: the implied warranty found by the county ct. judge was too wide, that the true relation between pltf. & deft. was that of invitor & invitee, deft. owed pltf. a duty to use reasonable care that she was not exposed to unusual danger, the existence of which deft. either knew or ought to have known, & there must be a new trial to inquire into the supervision exercised over the firearms

& the ammunition for them & into the loading of the pistols.—*COX v. COULSON*, [1916] 2 K. B. 177; 85 L. J. K. B. 1081; 114 L. T. 599; 32 T. L. R. 406; 60 Sol. Jo. 402, C. A.

Annotations:—*Follid.* *Sheehan v. Dreamland Margate* (1923), 40 T. L. R. 155. *Refd.* *Maclean v. Segar*, [1917] 2 K. B. 325.

54. — — Performance not intrinsically dangerous.]—*SHEEHAN v. DREAMLAND, MARGATE, LTD.*, No. 43, *ante*.

55. Spectator sitting on seat placed under tight rope—Performer accidentally dropping chair.]—*WELSH v. CANTERBURY & PARAGON, LTD.* (1894), 10 T. L. R. 478.

Annotation:—*Refd.* *Cox v. Coulson* (1915), 31 T. L. R. 390.

56. Discharge of pistol in course of performance—Supposed to contain only blank cartridge—Pistol in fact containing live cartridge.]—*COX v. COULSON*, No. 53, *ante*.

SECT. 6.—PERFORMERS.

See 'Theatrical Employers' Registration Act, 1925 (c. 50); Theatrical Employers' Registration (Amendment) Act, 1928 (c. 46).

57. Status of performer—Distinction between actress & chorus girl.]—*THOMAS v. GATTI (A. & S.), LTD.* (1906), *Times*, June 22.

58. — "Servant"—Within Preferential Payments in Bankruptcy Act, 1888 (c. 62), s. 1 (1) (b)—Right to priority in winding up.]—An artist engaged to sing during an opera season at a certain sum for each performance:—*Held*: upon the terms of the contract as a whole, to be a "servant," & his remuneration to be "wages or salary in respect of services rendered," within above subsect., so as to entitle him to priority of payment up to £50 upon the winding up of the co. by whom he was engaged.—*Re WINTER GERMAN OPERA, LTD.* (1907), 23 T. L. R. 662.

59. Performer called upon to resume part—In consequence of illness of another—Celebrity acquired by previous performance—Right to reasonable notice.]—A performer, who is called on to resume, in consequence of the illness of another, a part in which by previous performances she has acquired celebrity, is entitled to reasonable notice previous to the time of performance, such notice to be proportioned to the reputation at stake.

Proprietors of a theatre are perfectly right in having regulations, & enforcing them by the payment of fines. It is a duty which they owe to themselves & the public, for if performers should refuse to appear on the night for which they were advertised the property in the house would be in danger of being injured by the audience; & I am sure that performers will find it to their interest to submit to these fines, if they do not appear when the public have a right to expect them. . . . The jurisdiction of a manager is a very arbitrary one, but in this kingdom all arbitrary jurisdictions have a limitation (*BEST, C.J.*).—*GRADDON v. PRICE* (1827), 2 C. & P. 610; 172 E. R. 277, N. P.

60. Regulations of theatre—Right of proprietors to enforce—Imposition of fines.]—*GRADDON v. PRICE*, No. 59, *ante*.

Defamatory statements on performers in way of profession.]—See *LIBEL & SLANDER*, Vol. XXXII., p. 23; Nos. 130–134; Supp. IV., p. 751, No. 1948a.

PART I. SECT. 5, SUB-SECT. 4.—C.

52 i. Whether contract that spectators shall be safe implied.]—*GENGE v. NORTH*

OTAGO AGRICULTURAL & PASTORAL ASSOCN. (1892), 11 N. Z. L. R. 423.—*N.Z.*

o. Damage to field of turnips—

Descent by parachute on field causing crowds to damage field.]—*SCOTT'S TRUSTEES v. MOSS* (1889), 17 R. (Ct. of Sess.) 32; 27 Sc. L. R. 30.—*SCOT.*

SECT. 7.—THEATRICAL CONTRACTS.

SUB-SECT. 1.—IN GENERAL.

See Theatrical Employers' Registration Act, 1925 (c. 50); Theatrical Employers' Registration (Amendment) Act, 1928 (c. 46).

61. Duration of engagement—Chorus girl—Engagement determinable on fortnight's notice.]—THOMAS v. GATTI (A. & S.), LTD. (1906), *Times*, June 22.

—Effect of usage on engagement of actor or actress.]—See Nos. 125–127, *post*.

—Usage giving right to terminate engagement.]—See No. 123, *post*.

62. Recovery of salary—Performer paid for nights of performance—Whether performing or not—Form of action.]—A performer at a theatre, who is to be paid for nights of performance on which he does not perform, as well as for those on which he does perform, should not declare for work & labour, but “for arrears of salary as a hired performer.”—FRAZER v. BUNN (1838), 8 C. & P. 704; 173 E. R. 682, N. P.; *subsequent proceedings*, 3 Jur. 251.

Employment of children in public entertainments.]—See Children (Employment Abroad) Act, 1913 (c. 7), s. 2; Education Act, 1921 (c. 51), ss. 100–104.

SUB-SECT. 2.—FORMATION OF CONTRACT.

See, generally, CONTRACT, Vol. XII., pp. 51 *et seq*.

63. What amounts to concluded contract—Agreement for engagement at West End salary—“To be mutually arranged between us.”]—LOFTUS v. ROBERTS (1902), 18 T. L. R. 532, C. A. Annotation:—*Refd.* Broome v. SpOak, [1903] 1 Ch. 586.

64. —Engagement at progressive salary for successive years—Option of retaining services on same terms & conditions.]—Defts. agreed to engage pltf. who was an actor, for the principal part in pantomime at a salary of £130 per week for the first year, £140 a week for the second year, & £150 a week for the third year, with the option, in consideration of the engagement, of retaining pltf.'s services on the same terms & conditions as set forth in the agreement for the following pantomime season:—*Held*: the contract meant that, if the option was exercised, the weekly salary payable would be that which was payable for the third year, & the contract was not void for uncertainty.—WADE v. ROBERT ARTHUR THEATRES CO., LTD. (1907), 24 T. L. R. 77.

SUB-SECT. 3.—VALIDITY OF CONTRACT.

See, generally, CONTRACT, Vol. XII., pp. 234 *et seq*.

65. Agreement to perform or produce performance at unlicensed theatre.]—If two parties enter into an agreement to produce certain performances

at an unlicensed theatre, & to share the profits, such contract is illegal; & a bill of exchange given by one of his partner as a security for his moiety, is void; & an action cannot be maintained to recover the amount.—DE BEGNIS v. ARMISTEAD (1833), 10 Bing. 107; 3 Moo. & S. 511; 2 L. J. C. P. 214; 131 E. R. 846.

Annotations:—*Consd.* Ewing v. Osbaldiston (1837), 1 My. & Cr. 53. *Refd.* Wigan v. Strange (1865), L. R. 1 C. P. 175; Brightman v. Tate, [1919] 1 K. B. 463. *Mentd.* M'Callan v. Mortimer (1842), 9 M. & W. 636; Pidgeon v. Burslem (1849), 3 Exch. 465.

66. —.]—No play can lawfully be acted for hire, gain, or reward, within 20 miles of London, without the authority of letters patent from the King, or of a licence from the Lord Chamberlain; & no such letters patent or licence can be granted so as to authorise the performance of plays at any place, except within the city or liberties of Westminster, or where the King may happen to reside.

An agreement, therefore, for a partnership in acting plays at a theatre situate within 20 miles of London, but not within the city or liberties of Westminster, or in the place of the King's residence is one to which the ct. will not give effect.—EWING v. OSBALDISTON (1837), 2 My. & Cr. 53; Donnelly, 179; 6 L. J. M. C. 137; 1 Jur. 50; 40 E. R. 561.

Annotations:—*Folld.* Levy v. Yates (1838), 8 Ad. & El. 129. *Mentd.* Aberaman Ironworks v. Wickens (1868), L. R. 5 Eq. 485.

67. —Money advanced by participant in concern—Right to recover.]—DE BEGNIS v. ARMISTEAD, No. 65, *ante*.

—.]—See, also, Nos. 73–75, *post*.

Contracts in restraint of trade.]—See Sub-sect. 9, *post*.

SUB-SECT. 4.—INTERPRETATION OF CONTRACT.

See, generally, CONTRACT, Vol. XII., p. 607 *et seq*.

68. Obligation to employ—Engagement for two years—Obligation to employ for reasonable time—Obligation on performer not to perform elsewhere.]—Pltf., the manager of a London theatre engaged deft., a provincial actor desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject the ct. inferred an engagement on the part of pltf. to employ deft. for a reasonable time & on the part of deft. not to perform elsewhere. Pltf. having, under these circumstances, delayed deft.'s appearance for five months, deft. broke his engagement & went to another theatre:—*Held*: he had a right so to do, & pltf. was not entitled to an interlocutory injunction to prevent his performing there.—FECHTER v. MONTGOMERY (1863), 33 Beav. 22; 55 E. R. 274.

Annotations:—*Consd.* Montague v. Flockton (1873), L. R. 16 Eq. 189. *Distd.* Grinston v. Cuninghame, [1894] 1 Q. B. 125. *Consd.* Turpin v. Victoria Palace, [1918] 2 K. B. 539; Marbe v. George Edwardes (Daly's Theatre), [1928] 1 K. B. 269. *Refd.* Turner v. Sawdon, [1901] 2 K. B. 653.

69. —Performer engaged on tour—Not en-

PART I. SECT. 7, SUB-SECT. 4.

p. Construction of agreement for letting theatre—Deposit forfeited as “compensation” for breach of agreement by tenant.]—RAYNER v. LYNTER (1865), 4 N. S. W. S. C. R. (L.) 366.—AUS.

q. Personal liability for wages of “labourers, servants & apprentices”—Who is a servant—Actress employed by theatrical company.]—An actress engaged by a theatrical co. (incorporated under Ontario Cos. Act, R. S. O. 1914, c. 78), at a weekly salary, under a written contract, to play such parts as

might be assigned to her, is not a “servant” of the co. within sect. 98 (1) of the Act, which provides that “the directors of the co. shall be liable to the labourers, servants, & apprentices thereof for all debts not exceeding one year's wages due for services performed by the co. while they are such directors respectively.”—RYAN v. WILLIS (1919), 43 O. L. R. 624; 44 D. L. R. 634; 15 O. W. N. 70.—CAN.

r. Condition requiring notice prior to engagement—Whether breach of condition permits rescission.]—A. a comedian entered into an agreement with B.,

theatrical manager, to perform at a music hall on a date a year subsequent to the agreement. The agreement was embodied in a minute in which the engagement was declared to be “subject to the other rules of the establishment printed on the back hereof.”

Rule 6 provided that “all artistes engaged . . . must give 14 days notice prior to such engagement, such notice to be accompanied with bill matter.” A. did not give notice in terms of rule 6 & B. refused to allow him to perform:—*Held*: Rule 6 was not a condition

titled to act in all plays—Reasonable opportunity of acting.]—GRIMSTON v. CUNINGHAM, No. 111, *post*.

70. — Right of understudy to play principal part—In absence of principal.]—By a written contract debts., who were the managers of a theatre, engaged pltf., who was an actress, for the run of a certain play, at the theatre to understudy the principal actress at a certain salary, & pltf. agreed not to appear at any place of public entertainment elsewhere during her engagement without debts.' consent. During the run of the piece the principal actress left the theatre & pltf. claimed the right to play the part, which debts. refused. In an action to recover damages for breach of the contract, evidence was given on behalf of debts., that an understudy was not entitled as of right to play the principal's part if the latter was absent:—*Held*: upon this evidence & upon the true construction of the contract, no right was conferred on pltf. to play the part, the contract merely imposing on pltf. the obligation of playing the part if called upon by the managers to do so.—NEWMAN v. GATTI (1907), 24 T. L. R. 18, C. A.

Annotations:—*Consd.* Turpin v. Victoria Palace, [1918] 2 K. B. 539. *Distd.* Marbe v. George Edwardes (Daly's Theatre), [1928] 1 K. B. 269. *Mentd.* Crawford v. White City Rink Newcastle on Tyne (1913), 29 T. L. R. 318.

71. — Engagement to play named part in named play.]—An actress, who had acquired considerable reputation in the United States & was anxious to appear in London in order to add to her popularity, obtained an engagement with the managers of a London theatre to rehearse & play a named part in a named play from a certain date at such times & at such theatres in the West End of London as the managers should from time to time direct at a salary of £100 for every week during the run of the play. By a collateral agreement the managers undertook to advertise the actress's name in a prominent position, & up to the date of the dress rehearsal they duly performed this undertaking. On that date they refused to allow her to appear in the part either on the agreed date or at all. The actress brought an action against the managers claiming damages for breach of contract including damages for injury to her reputation in not being allowed to appear in the part as advertised. Debts. paid the agreed salary up to a certain date, & paid into ct. the balance from that date until the piece ceased to run, & contended that pltf. was not entitled to any further damages:—*Held*: the contract imposed an express obligation upon debts. to allow pltf. to appear in the part as agreed, & damages for breach of that obligation might properly include such a sum as a jury might reasonably award as compensation for loss of reputation.—MARBE v. GEORGE EDWARDES (DALY'S THEATRE), LTD., [1928] 1 K. B. 269; 96 L. J. K. B. 980; 138 L. T. 51; 43 T. L. R. 809, C. A.

of the contract the breach of which by A. entitled B. to rescind the contract, but was merely a stipulation for the breach of which damages might be claimed.—WADE v. WALDON, [1909] S. C. 571; 46 Sc. L. R. 359, [1909] 1 S. L. T. 215.—SCOT.

t. *Engagement of theatrical performer*—Condition that engagement was "subject to theatre being in the occupancy & possession of the management"—Theatre not completed by date of engagement.]—A music hall performer was engaged by a theatre co. to appear at a theatre on a future date, "subject to the said theatre being in the occupancy & possession of the management." At the date of the contract the theatre was in course of erection; & (through no fault of the theatre co.) it was not

ready for use at the date specified for the performance. The theatre co. having in consequence cancelled the engagement, the performer brought an action of damages against the co. for breach of contract:—*Held*: the provision as to the theatre being in the occupancy & possession of the management was a condition of the contract which applied to the circumstance of the theatre not being completed; & accordingly, that defenders, not being in the occupancy & possession of the theatre, fell to be absolved.—HALCROFT v. WEST END PLAYHOUSE, LTD., [1916] S. C. 182; 53 Sc. L. R. 201; [1915] 2 S. L. T. 363.—SCOT.

a. *Agreement to erect proscenium & drop-curtain*—Implied term of contract.]—Where pltf. agreed in writing

72. *Engagement for week's performance—Salary due at expiration of week—Attachment before expiration of week.*]—S., a music hall artiste, was indebted to M. in the sum of £31 18s. 4d. for which amount & costs judgment was obtained against him. For the week beginning May 15, S. was engaged to give a week's performance at Liverpool at a salary of £180 per week.

On May 17, a garnishee order *nisi* was obtained by M. against S.'s employers to attach the proportion of salary alleged to be due to S. for the performances already given by him that week, the affidavit upon which the application was based stating that the garnishees were indebted to S. in the sum of £100 or thereabouts. By the terms of S.'s agreement his engagement was expressed to be for one week commencing May 15, at a salary of £180 per week:—*Held*: there was no debt due to S. which was liable to attachment until the expiration of his week's engagement.—MAPLESON v. SEARS (1911), 105 L. T. 639; 28 T. L. R. 30; 56 Sol. Jo. 54, D. C.

Contracts with theatrical agents.]—See Nos. 94, 95, *post*.

Contracts for exclusive performance & in restraint of trade.]—See Sub-sect. 9, C., *post*.

SUB-SECT. 5.—PERFORMANCE AND EXCUSES FOR NON-PERFORMANCE.

See, generally, CONTRACT, Vol. XII., pp. 303 *et seq.*

73. *Illegality of purpose—Agreement to perform or produce performance at unlicensed theatre—Or such other place as might be appointed—No request to perform at unlicensed place.*]—No action can be maintained for the breach of an agreement "to dance at the King's Theatre in the Haymarket or at such other place as pltf. should appoint," if it appear that no licence for that theatre was granted by the Lord Chamberlain, as required by 10 Geo. 2, c. 28; & that pltf. did not request debt. to dance at any other place which was licensed.—GALLINI v. LABORIE (1793), 5 Term Rep. 242; 101 E. R. 136.

Annotations:—*Consd.* Ewing v. Osbaldeston (1837), 2 My. & Cr. 53. *Refd.* R. v. Handy (1795), 1 Term Rep. 286; Wigan v. Strange (1865), L. R. 1 C. P. 175.

74. — — — Sketch at music hall—Sketch in fact "stage play."—Pltf. agreed with debt. co. to produce at their music hall a sketch called The Fighting Parson for a period of six weeks, & the agreement contained a clause that "if it should be found that the artist's performance is contrary to law, or is objected to by any licensing or other public authority, this engagement may be cancelled by the co." After pltf. had produced the sketch at the music hall for five weeks debts., in consequence of the decision of a magistrate that

to erect a proscenium & drop-curtain to fit a stage in debts.' market-hall, in consideration of pltf. having the use of the drop-curtain for advertising purposes for a fixed period:—*Held*: it was an implied condition of the contract that debts. would, with due regard to their interests as owners of the property, give reasonable facilities for the holding of appropriate public entertainments in the hall during such period.—PHILLIPS v. BULAWAYO MARKET & OFFICES CO. (1899), 16 S. C. 432.—S. AF.

PART I. SECT. 7, SUB-SECT. 5.

b. *Illegality of purpose.*]—The managers of a French co. of comedians having hired a minor theatre, "for their performances" at a rent of £120, not

Sect. 7.—Theatrical contracts : Sub-sects. 5 & 6.]

a somewhat similar sketch was a stage play, & that it was therefore contrary to Theatres Act, 1843 (c. 68), s. 11, to present it at a place not licenced as a theatre, gave notice to pltf. cancelling the engagement:—*Held*: as the sketch was a stage play, & as it could not be legally performed at a music hall, defts. were entitled under the agreement to cancel the engagement.—*GRAY v. OXFORD, LTD.* (1906), 22 T. L. R. 684, C. A.

Annotation:—*Folld. Scott v. Macnagton* (1908), *Times*, Nov. 25.

75. —.—.—*SCOTT v. MACNAGHTON* (1908), *Times*, Nov. 25.

76. —.—.— *Parties aware of illegality.*—*SCOTT v. MACNAGHTON* (1908), *Times*, Nov. 25.

77. *Impossibility of performance—Illness of performer.*—Pltf. contracted with deft.'s wife, as her husband's agent, that she should play the piano at a concert to be given by pltf. on a specified day. She was, on the day in question, unable to perform through illness. The contract contained no express term as to what was to be done in case of her being too ill to perform. In an action against deft. for breach of this contract:—*Held*: his wife's illness & consequent incapacity excused him, inasmuch as the contract was in its nature not absolute, but conditional upon her being well enough to perform.—*ROBINSON v. DAVISON* (1871), L. R. 6 Exch. 269; 40 L. J. Ex. 172; 24 L. T. 755; 19 W. R. 1036.

Annotations:—*Refd. Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *The Penelope*, [1928] P. 180. *Mentd. Howell v. Coupland* (1876), 1 Q. B. D. 258; *Nickoll & Knight v. Ashton, Edridge*, [1901] 2 K. B. 126.

78. *Failure to attend rehearsals.*—

Declaration that pltf., a singer, agreed with deft., director of the Italian Opera, in London, that he would undertake the part of first tenor in the theatres, halls, & drawing rooms in the United Kingdom during his engagement, to begin on Mar. 30, 1875, & terminate on July 13, 1875, at a salary of £150 per month. Pltf. should sing in concerts as well as operas, but should not sing anywhere out of the theatre in the United Kingdom from Jan. 1 to Dec. 1, 1875, without the written permission of deft., except at more than 50 miles from London, & out of the season of the theatre. That pltf. agreed to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals. Averment that pltf. did not sing anywhere in the United Kingdom from Jan. 1, 1875, to the date of the commencement of the action; that pltf. was prevented by temporary illness from being in London before Mar. 28, 1875, on which day he arrived in London: & that, save as aforesaid, he was & is ready to perform his part of the contract. Breach, that deft. refused to receive pltf. into his service. Plea, that pltf. was not in London six days before the commencement of the engagement ready for rehearsals, as was necessary for him to be, wherefore deft. refused to receive pltf. into his service. Demurrer:—*Held*: the stipulation as to rehearsals was not a condition precedent: for it did not go to the root of the matter, as pltf. was to sing in concerts at halls & drawing rooms as well as at the theatre, & also to abstain from singing within 50 miles of London from Jan. 1 previous to the commencement of the engagement on Mar. 30; the plea was therefore bad.—*BETTINI*

v. GYE (1876), 1 Q. B. D. 183; 45 L. J. Q. B. 209; 34 L. T. 246; 40 J. P. 453; 24 W. R. 551.

Annotations:—*Refd. Poussard v. Spiers & Pond* (1876), 24 W. R. 819. *Mentd. London Guarantee Co. v. Fearnley* (1880), 5 App. Cas. 911; *Hosking v. Pahang Corpn.* (1891), 36 Sol. Jo. 107; *Kildston v. Monceau Ironworks Co.* (1902), 86 L. T. 556; *Leiston Gas Co. v. Leiston-cum-Sizewell U. D. C.*, [1916] 2 K. B. 428; *Metropolitan Water Board v. Dick, Kerr*, [1917] 2 K. B. 1; *Kidner v. Stimpson* (1918), 34 T. L. R. 434; *Dawsons v. Bonnin*, [1922] 2 A. C. 413.

79. —.—.— *Failure to attend on opening night.*—Pltf. agreed in writing with defts. to sing & play in the chief female part in a new opera about to be brought out at defts.' theatre, at a weekly salary of £11 for three months, provided the opera ran for that time, commencing on or about Nov. 14. The first performance was announced for Saturday, Nov. 28, & no objection was raised by pltf. as to this delay. She attended several rehearsals, such attendance, though not expressed in the written engagement, being an implied part of it. Owing to delays of the composer, the music of the latter part of the opera was not in the hands of defts. till a few days before Nov. 28, & the final rehearsals did not take place till the beginning of the last week. Pltf. was taken ill, & was unable to attend any of the rehearsals in that week: & it being uncertain how long her illness might continue, defts.' manager made a provisional engagement with another artiste, Miss L., to study the part & be ready to take it if pltf. was unable. If she was not wanted, Miss L. was to receive a douceur; if she was called on to perform, she was to receive £15 a week till Dec. 25, if the piece ran so long. Pltf. continued too ill to attend the rehearsals or the first performance on Saturday, Nov. 28, or on the first three days of the next week; Miss L. accordingly performed on those days. On Thursday, Dec. 4, pltf. was well enough to perform & tendered her services, which defts. refused to accept; on which she brought an action for wrongful dismissal. The jury found (*inter alia*) that the employment of Miss L. by defts. under the circumstances was reasonable:—*Held*: pltf.'s inability to perform on the opening & early performances went to the root of the matter, & justified defts. in rescinding the contract.—*POUSSARD v. SPIERS & POND* (1876), 1 Q. B. D. 410; 45 L. J. Q. B. 621; 34 L. T. 572; 40 J. P. 645; 24 W. R. 819.

Annotations:—*Refd. Loates v. Maple* (1903), 88 L. T. 288; *Storey v. Fulham Steel Works Co.* (1907), 24 T. L. R. 89; *The Penelope*, [1928] P. 180. *Mentd. F. A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397; *Metropolitan Water Board v. Dick, Kerr*, [1917] 2 K. B. 1; *Bank Line v. Capel*, [1919] A. C. 435.

80. —.—.— *Provision of deputy in accordance with contract.*—Pltf., who was an actor, made with defts. an agreement by which pltf. was to find a co., described as consisting of himself & a full co., & in the event of the non-appearance of a principal pltf. was to provide a deputy to the satisfaction of defts. Pltf. became too ill to appear, but he provided a substitute. Defts. thereupon alleged that as pltf. could not appear the basis of the contract was gone. In an action for damages for breach of the contract:—*Held*: pltf. was a principal to whom the clause as to the provision of a deputy applied, & his absence was not a frustration of the contract & he was entitled to damages.—*TERRY v. VARIETY THEATRES CONTROLLING CO., LTD.* (1928), 44 T. L. R. 451, C. A.

entitled to resile on an allegation that they had afterwards discovered it was illegal for them to represent their pieces in that theatre—the theatre being a lawful place of exhibi-

tion for various performances, & the contract not specifying any of an illegal sort for which it was let.—*CLOUP & PELLISSIE v. ALEXANDER* (1831), 11 Sh. (Ct. of Sess.) 448; 6 Fac. Coll.

319.—*SCOT.*

c. Outbreak of influenza—Right of performer to guaranteed salary—Performer able to perform.—*COOK v. WILLIAMSON (J. C.), LTD.* (1919), 19

81. ——— Temporary inefficiency—If going to root of contract.]—HARLEY v. HENDERSON (1884), *Times*, Feb. 18, 19.

82. Performer failing to send in "bill matter"—Ground for damages—Not ground for cancellation.]—ELEN v. LONDON MUSIC HALL, LTD. (1905), cited in *Times*, May 31.

83. Time for performance—Agreement to perform on specified dates—Provision for transfer of dates—New dates to be fixed by agreement.]—Pltf., who was a music hall artist, & defts., who were music hall proprietors, made a contract under which pltf. was to perform at certain of the halls on specified dates, & the contract contained a clause stating that "the dates mentioned in this contract may be transferred by (pltf.) provided two months' notice is given by artist, other dates to be given in lieu of dates transferred." Pltf. gave notice to transfer a number of dates & defts. then claimed that they were entitled to fix the dates on which pltf. was to perform. In an action by pltf. against defts. for breach of the contract:—*Held*: under the above clause neither party was entitled to fix the dates, but that while the artist had a right to transfer dates, the new dates were to be fixed by agreement, each party to act reasonably.—TERRY v. MOSS'S EMPIRES, LTD. (1915), 32 T. L. R. 92, C. A.

Annotation:—*Refd.* Harrison v. Walker, [1919] 2 K. B. 453.

SUB-SECT. 6.—BREACH OF CONTRACT.

84. Restraint by injunction—Agreement to perform for certain period at particular theatre—Absence of negative covenant restricting performance elsewhere.]—D., an actor, contracted with W., the manager of a theatre, to play at W.'s theatre for twelve consecutive nights, commencing on a certain day, stipulating that he should be at liberty during those nights to perform, among other characters, three which were named; but there was no express condition that D. should not act elsewhere during the twelve nights. On the approach of the day appointed for commencing the engagement, D. declared that he would only act in a piece which could not be produced at W.'s theatre; & when told that was impossible, declared that he would not act at all for W., & advertised himself to act at another theatre on the night appointed for the commencement of his engagement:—*Held*: an injunction might be granted to prevent D. acting during the twelve nights at any other theatre during the ordinary hours at which W.'s theatre was open for public performance.—WEBSTER v. DILLON (1857), 30 L. T. O. S. 71; 3 Jur. N. S. 432; 5 W. R. 867.

Annotations:—*Apld.* Montague v. Flockton (1873), L. R. 16 Eq. 189. *Expld.* Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416. *Refd.* De Mattos v. Gibson (1859), 4 De G. & J. 276; Peto v. Brighton, Uckfield & Tunbridge Wells Ry. (1863), 11 W. R. 874.

85. ———.]—An actor who enters into a contract to perform for a certain period at a particular theatre may be restrained by injunction from performing at any other theatre during the

pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere.—MONTAGUE v. FLOCKTON (1873), L. R. 16 Eq. 189; 42 L. J. Ch. 677; 28 L. T. 580; 37 J. P. 676; 21 W. R. 668.

Annotations:—*Dtd.* Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416; Silver v. Gatti (1893), 37 Sol. Jo. 776; Davis v. Foreman, [1894] 3 Ch. 654. The Ct. of Appeal, in the recent case of Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416, have held that the Vice-Chancellor acted as he did in misapprehension of the real decision in Lumley v. Wagner, No. 107, post (KEKEWICH, J.). *Refd.* "Star" Newspaper Co. v. O'Connor & Wetton (1893), 9 T. L. R. 526; Mortimer v. Beckett, [1920] 1 Ch. 571.

86. ———.]—SILVER v. GATTI (1893), 37 Sol. Jo. 776.

87. Breach before time for performance—Right to sue for anticipatory breach.]—GLINSERETTI v. RICKARDS (1907), *Times*, Jan. 26, C. A.

Annotation:—*Distd.* Harvey v. Tivoli, Manchester (1907), 23 T. L. R. 592.

88. Measure of damages—Provision for liquidated sum equalling amount of salary—Subsequent arrangement altering basis of salary.]—Before the war deft. agreed to perform twice every evening as a comedian at pltf.'s music hall for one week beginning on Oct. 12, 1914, at a salary of £150. The contract provided that "in case the artist shall, except through illness . . . or accident . . . fail to perform at any performance, he should pay to the management as & for liquidated damages a sum equal to the sum which the artist would have received for such performance, in addition to costs & expenses incurred by the management through the default of the artist." After the outbreak of war an arrangement was come to between the managements of the various music halls & the artists, including deft., that the gross receipts of the halls during the war should be divided into two equal parts, of which the management should take one part & the performers at the hall the other part, sharing that part in the proportion of their respective salaries. Deft. having failed to perform at pltf.'s hall, they brought an action for damages against him:—*Held*: in order to ascertain the measure of damages the sum fixed in the contract had to be altered in view of the subsequent arrangement, & pltf. were entitled to recover such proportion of the artists' share in the receipts which would probably have been received if deft. had performed his agreement, as deft. would have been entitled to.—GOLDER'S GREEN AMUSEMENT & DEVELOPMENT CO., LTD. v. RELPH (1915), 31 T. L. R. 343.

89. ——— Loss of publicity.]—There is no reason in law why pltf. in an action for breach of contract should not, in an appropriate case, recover damages for loss of publicity caused by deft.'s breach of contract.

Whether damages for loss of publicity can be recovered in any case depends primarily on the nature & true construction of the contract, & secondarily on the special circumstances known to both parties at the time of making the contract.

Defts. entered into a contract whereby they engaged pltf., a music hall artiste, to perform at

S. R. N. S. W. 317; 36 N. S. W. W. N. 105.—AUS.

*d. Premises not licensed.]—*STANFORD v. CITY BIOSCOPE, [1917] C. P. D. 591.—S. AF.

PART I. SECT. 7, SUB-SECT. 6.

e. Whether special damages for loss of profits allowed.]—Pltf. were actors who came from England under an agreement to act in Australia under deft.'s management. Defts. agreed to

pay pltf. a certain salary & their return fares to England on the termination of the agreement. Defts. did not pay the return fares & pltf. were unable to return to England:—*Held*: pltf. were not entitled to recover special damages for loss of profits arising from their inability to fulfil contracts to act in England made after the agreement between pltf. & defts. although when that contract was made defts. were aware that pltf. were actors in demand in England & could easily procure

engagements.—WATSON v. BRENNAN'S AMPHITHEATRES, LTD. (1915), 15 S. R. N. S. W. 332; 32 N. S. W. W. N. 107.—AUS.

f. Right of performer to reasonable notice—Of determination of contract.]—CROMER v. HARRY RICHARDS' TIVOLI THEATRES, LTD., [1921] S. A. S. R. 325.—AUS.

g. Effect of penal clause on right to rescind contract.]—PALMER v. ROEBUCK (1876), 4 Buch. 74.—S. AF.

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Sect. 7.—Theatrical contracts: Sub-sects. 6, 7, 8 & 9, A., B. & C.]

their music hall for specified periods in four successive years at a weekly salary. The music hall was well known & was regarded as a West End place of entertainment, & approbation by audiences there opened the gateway of London success to the artiste. The contract contained no clause which placed on defts. any express or implied obligation to allow pltf. to appear & perform at their music hall during the contract periods. Pltf. brought an action against defts. for damages for breach of contract, alleging that they had wrongfully repudiated their bargain with her. She claimed damages (a) for loss of salary, (b) for loss of publicity arising from the refusal of defts. to permit her to perform. No evidence was given at the trial that it was the common intent of the parties, at the date of the contract, that enhanced publicity should follow from pltf.'s appearance at defts.' hall, & defts. entered into the contract upon no other basis than the business engagement of an artiste at the salary they agreed to pay, no element of publicity to pltf. entering into their part of the bargain. The jury found that defts. had committed the breach of contract alleged & assessed the damages at £100 for loss of salary, & £100 for loss of publicity:—*Held*: on the contract & in the circumstances, damages for loss of publicity were not recoverable in law, & there must be judgment for pltf. for £100 only for loss of salary.—*TURPIN v. VICTORIA PALACE, LTD.*, [1918] 2 K. B. 539; 88 L. J. K. B. 569; 119 L. T. 405; 34 T. L. R. 548; *on appeal*, [1919] 1 K. B. 366, C. A.

Annotation:—*Dbtd. Marbe v. George Edwardes (Daly's Theatre)*, [1928] 1 K. B. 269.

90. — *Loss of salary.*—*TURPIN v. VICTORIA PALACE, LTD.*, No. 89, *ante*.

91. — *Loss of reputation.*—*MARBE v. GEORGE EDWARDES (DALY'S THEATRE), LTD.*, No. 71, *ante*.

SUB-SECT. 7.—EFFECT OF DEATH OF PARTY.

92. *Agreement to perform at music hall—Music hall owned by partnership—Death of partner.*—A partnership, consisting of defts. & another person, carried on the business of music hall proprietors under the name of the A. Co. Pltfs., a troupe of music hall performers, entitled into a contract with the A. Co. to give certain performances at the co.'s music hall. Pltfs. had no knowledge of the persons of whom the co. consisted. After the making of the contract & before the time for performance arrived defts.' partner died:—*Held*: the contract was not of such a personal character on the part of the partnership as to be put an end to by the death of deceased partner, & it could be enforced against defts., the surviving partners.—*PHILLIPS v. ALHAMBRA PALACE CO.*, [1901] 1 K. B. 59; 83 L. T. 431; 49 W. R. 223; 17 T. L. R. 40; 45 Sol. Jo. 81; *sub nom.* *PHILLIPS v. HULL ALHAMBRA PALACE CO.*, 70 L. J. Q. B. 26, D. C.

Annotation:—*Refd. Bouchard v. Prince's Hall Restaurant* (1904), 20 T. L. R. 574.

93. — *Agreement by troupe—Death of member of troupe.*—By a contract between the proprietors of a music hall, & a troupe consisting of three brothers, called the Harvey Boys, the former engaged the latter to perform for a week at the music hall. The contract was signed "Harvey Boys" by one of the troupe. The two elder brothers shared the profits of the troupe, & paid their younger brother a salary. One of the elder brothers died before the time for the performance

arrived, & the surviving elder brother engaged another person to take his brother's place, he himself taking the profits & paying the two others salaries. The proprietors of the music hall cancelled the contract on account of the death of one of the members of the troupe. In an action by the three members of the troupe to recover damages for breach of contract:—*Held*: the contract was made with the three original persons who composed the troupe, & the present members were not entitled to sue upon it.—*HARVEY v. THE TIVOLI, MANCHESTER, LTD.* (1907), 23 T. L. R. 592, D. C.

SUB-SECT. 8.—CONTRACTS WITH THEATRICAL AGENTS.

94. *Agreement for commission—Commission on re-engagement—Meaning of re-engagement—Question for jury.*—*ROBEY v. ARNOLD* (1898), 14 T. L. R. 220, C. A.

95. — — — — —.]—*ARNOLD v. STRATTON* (1898), 14 T. L. R. 537, C. A.

96. — *Commission on future engagements—At named music hall—Music hall pulled down & re-built.*—*AUCKLAND & BRUNETTI v. COLLINS* (1898), 14 T. L. R. 348, D. C.

97. — *Agreement with partnership—Effect of dissolution.*—Deft. in Aug. 1911, gave a commission note to S. & R., who were in partnership as theatrical agents, authorising them to act as her agents & business managers for five years with the option of a further five years, & agreeing to pay a commission of 10 per cent. on all salaried work undertaken by her. S. & R. dissolved partnership in July, 1912:—*Held*: the commission note did not entitle them to claim commission in respect of engagements on salaries obtained by deft. after the dissolution of their partnership.—*SALES v. CRISPI* (1913), 29 T. L. R. 491.

SUB-SECT. 9.—CONTRACTS IN RESTRAINT OF TRADE.

A. In General.

See, generally, TRADE & TRADE UNIONS.

98. *Legality of—Agreement not to write dramatic pieces for other theatre.*—Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal; as a similar restraint of a performer would be; not resembling a covenant restraining trade generally.—*MORRIS v. COLMAN* (1812), 18 Ves. 437; 34 E. R. 382, L. C.

Annotations:—*Consd. Clarke v. Price* (1819), 2 Wils. Ch. 157; *Kemble v. Kean* (1829), 6 Sim. 333; *Lumley v. Wagner* (1852), 1 De G. M. & G. 604. *Refd. Taylor v. Davis* (1834), 4 L. J. Ch. 18; *Kimberley v. Jennings* (1836), 6 Sim. 340; *Hills v. Croll* (1845), 1 Coop. temp. Cott. 83, n.; *Dietrichsen v. Cabburn* (1846), 1 Coop. temp. Cott. 72; *Stevens v. Benning* (1855), 6 De G. M. & G. 223; *Merchants' Trading Co. v. Banner* (1871), L. R. 12 Eq. 18; *Donnell v. Bennett* (1883), 31 W. R. 316; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

99. — *Agreement not to perform at other theatre.*—*MORRIS v. COLMAN*, No. 98, *ante*.

B. Construction.

100. *Contract for exclusive performance—Meaning of "exclusive"—Performance of same nature.*—*GAIETY THEATRE CO., LTD. v. LOFTUS* (1893), *Times*, Aug. 11.

101. — *Not to permit any colourable imitation or version of performance—Reproduction of performance on cinematograph.*—Pltfs., who were music hall proprietors, made an agreement with deft. by which it was provided that deft. should

give pl'ts. his exclusive services & that he should not permit any colourable imitation, representation, or version of his performance to be given within a certain radius. It was alleged by pl'ts. that def't. permitted the representation of one of his sketches on a cinematograph at certain picture palaces within the prescribed area, & they brought an action against him to restrain him from this alleged breach of the agreement:—*Held*: on the evidence, def't. had taken no part in the alleged reproduction of his performance, & therefore he was entitled to judgment.—*LONDON THEATRE OF VARIETIES, LTD. v. EVANS* (1914), 31 T. L. R. 75, C. A.

102. Contract not to perform elsewhere—During engagement—Meaning of "perform"—Performance on Sunday.—Pl'tf. K., a music hall artiste, entered into contracts with each of the three def't. cos. by which she agreed to perform for ten weeks certain, commencing at a certain date, every evening at the time notified by the management, in "her usual entertainment as mimic" in two of the contracts, "as singer & mimic" in the other, at a salary of £8 per week in respect of each hall, subject to the following conditions (*inter alia*) viz., "that the said artiste shall not perform before nor during this engagement at any theatre, music hall, club, concert, or place of entertainment within one mile of the said music halls respectively." At the end of the contract was this clause: "In the event of the above-named artiste not observing these conditions in every respect, the co. shall have the option of cancelling this agreement." During the fulfilment of the engagement she went to a smoking concert at a certain club one Sunday evening within a mile of these music halls by invitation. Nobody except members & their guests were admitted to this club, & no admission money was paid. At this concert she sang a song & danced for a few minutes. The following night she performed at the halls, but at one of them the manager asked if she had sung at the club, & she replied she had done so. He told her it was against the rules, & that she must not do it again. The following night a letter was handed her cancelling the three engagements, & signed by the manager of the halls. These actions were then brought by pl'tf. to recover damages for wrongful dismissal & for breach of contract:—*Held*: the word "engagement" did not include Sundays, that day in such contracts being a *dies non*; the performance was not within the meaning of the word "perform" as contemplated by the parties, for pl'tf. did not use her powers of mimicry. Although singing was included in one contract, singing before a private audience such as the present case was not a performance.—*KELLY v. LONDON PAVILION, LTD., KELLY v. NEW TIVOLI, LTD., KELLY v. THE OXFORD, LTD.* (1897), 77 L. T. 215; 13 T. L. R. 584; *affd.* on other grounds (1898), 14 T. L. R. 234, C. A.

103. ——— Meaning of "engagement"—Sunday not included.—By pl'tf.'s contract of engagement with def'ts. she undertook not to perform elsewhere during the engagement:—*Held*: this stipulation applied only to the days for which she was engaged by the contract, viz. week days, & did not apply to Sundays.—*KELLY v. LONDON PAVILION, LTD., SAME v. THE OXFORD, LTD., SAME v. NEW TIVOLI, LTD.* (1898), 14 T. L. R. 234, C. A.

104. ——— For fixed period before completion of

engagement—Engagement for different weeks at considerable intervals—Restraint applicable to each week.—*LONDON MUSIC HALL, LTD. v. AUSTIN* (1908), *Times*, Dec. 16.

105. Agreement excluding interest in music hall or theatre—Or other place of entertainment—Financial interest in cinematograph companies.—Pl'ts. who were music hall proprietors, in 1914 made with def't., who had been their manager, an agreement whereby he undertook until Sept. 1917, not to be "interested in any music hall, theatre, circus, hippodrome, or other place of entertainment" within a certain area.

During the specified period def't. became financially interested in two cos. which gave cinematograph entertainments within the area in question, & pl'ts. brought an action against him for an injunction to restrain him from being interested therein.—*Held*: as a cinematograph theatre was a place of entertainment of an entirely different kind from a music hall, the action failed.—*LONDON THEATRES OF VARIETIES, LTD. v. GIBBONS* (1916), 33 T. L. R. 26.

C. Whether Enforceable by Injunction.

106. Covenant not to perform elsewhere—Positive part of contract unenforceable.—The proprietors of Covent Garden Theatre agreed with an actor that he should act for twenty-four nights, during a certain period of time, at their theatre, & that, in the meantime, he should not act at any other place in London:—*Held*: the ct. cannot enforce the positive part of the contract, & therefore, it will not restrain by injunction in breach of the negative part.—*KEMBLE v. KEAN* (1829), 6 Sim. 333; 58 E. R. 619.

Annotations:—*Overd.* *Lumley v. Wagner* (1852), 1 De G. M. & G. 604. *Reid.* *Pickering v. Ely* (Bp.) (1843), 12 L. J. Ch. 271; *Daggett v. Ryman* (1868), 16 W. R. 302.

107. ————J. W. agreed with B. L. that she, J. W., would sing at B. L.'s theatre during a certain period of time, & would not sing elsewhere without his written authority:—*Held*: on a bill filed to restrain J. W. from singing for a third party, & granting an injunction for that purpose, the positive & negative stipulations of the agreement formed but one contract, & the ct. would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract.—*LUMLEY v. WAGNER* (1852), 1 De G. M. & G. 604; 21 L. J. Ch. 898; 19 L. T. O. S. 264; 16 Jur. 871; 42 E. R. 687.

Annotations:—*Consd.* *Montague v. Flockton* (1873), L. R. 16 Eq. 189; *Donnell v. Bennett* (1883), 22 Ch. D. 835. *Expld.* *Piperno v. Harmston* (1886), 3 T. L. R. 219. *Consd.* *Whitwood Chemical Co. v. Hardman*, [1891] 1 Ch. 416; *Lanner v. Palace Theatre, Eccarius & Armstrong* (1893), 9 T. L. R. 162; *Lanner v. Palace Theatre, Eccarius & Armstrong* (1893), 9 T. L. R. 165. *Distd.* *Silver v. Gatti* (1893), 37 Sol. Jo. 776. *Consd.* *Mutual Reserve Fund Life Assn. v. New York Life Insce. & Harvoy* (1896), 75 L. T. 528; *Mortimer v. Beckett*, [1920] 1 Ch. 571. *Reid.* *Johnson v. Shrewsbury & Birmingham Ry.* (1853), 3 De G. M. & G. 914; *Fechter v. Montgomery* (1863), 33 Beav. 22; *Adamson v. Gill* (1868), 17 L. T. 464; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Cochrane v. Exchange Telegraph Co.* (1869), 65 L. J. Ch. 334; *Merchants' Trading Co. v. Banner* (1871), L. R. 12 Eq. 18; *Warne v. Routledge* (1874), L. R. 18 Eq. 497; *Ryan v. Mutual Tontine Westminster Chambers Assn.*, [1893] 1 Ch. 116; *Davis v. Foreman*, [1894] 3 Ch. 654; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Yorkshire Miners' Assn. v. Howden*, [1905] A. C. 256; *Chapman v. Westerby* (1913), 58 Sol. Jo. 50. *Mentd.* *Dollfus v. Pickford* (1854), 2 W. R. 220; *South Wales Ry. v. Wythes* (1854), 5 De G. M. & G. 880; *Paris Chocolate*

PART I. SECT. 7, SUB-SECT. 9.—C. h. *Covenant not to perform elsewhere—Contract severable—Injunction against breach in particular place.*—

HALLAM v. HARVEY (1901), 1 S. R. N. S. W. (Eq.) 155; 18 N. S. W. W. N. 225.—AUS.

k. *Covenant not to perform in*

South Africa within twelve months—Of termination of agreement.—*AFRICAN THEATRES, LTD. v. JEWELL* (1918), 39 N. L. R. 1.—S. AF.

Sect. 7.—Theatrical contracts : Sub-sect. 9, C. Sect. 8 : Sub-sects. 1 & 2. Sect. 9.]

Co. v. Crystal Palace Co. (1855), 3 Sm. & G. 119; Stevens v. Benning (1855), 6 De G. M. & G. 223; Hope v. Hope (1857), 8 De G. M. & G. 731; Stocker v. Wedderburn (1857), 3 K. & J. 393; De Mattos v. Gibson (1859), 4 De G. & J. 276; Ogden v. Fossick (1862), 4 De G. F. & J. 426; Gladstone v. Ottoman Bank (1863), 1 Hem. & M. 505; Messageries Imperiales Co. v. Baines (1863), 7 L. T. 763; Peto v. Brighton, Uckfield & Tunbridge Wells Ry. (1863), 1 Hem. & M. 468; Brett v. East India & London Shipping Co. (1864), 2 Hem. & M. 404; Daggett v. Ryman (1868), 16 W. R. 302; Cornwall v. Hawkins (1872), 20 W. R. 653; Wilkinson v. Clements (1872), 8 Ch. App. 102, n.; Crosse v. Duckers (1873), 21 W. R. 287; Fothergill v. Rowland (1873), L. R. 17 Eq. 132; Leech v. Schweder (1874), 9 Ch. App. 465, n.; Wolverhampton & Walsall Ry. v. L. & N. W. Ry. (1875), L. R. 16 Eq. 433; Bowen v. Hall (1881), 6 Q. B. D. 333; "Star" Newspaper Co. v. O'Connor & Wetton (1893), 9 T. L. R. 526; Kelth Prowse v. National Telephone Co., [1894] 2 Ch. 147; Ehrman v. Bartholomew, [1898] 1 Ch. 671; Robinson v. Heuer, [1898] 2 Ch. 451; Alexander v. Mansions Proprietary (1900), 16 T. L. R. 431; Formby v. Barker, [1903] 2 Ch. 539; Kirchner v. Gruban, [1909] 1 Ch. 413; Lord Strathcona S.S. Co. v. Dominion Coal Co., [1926] A. C. 108; Rely-A-Bell Burglar & Fire Alarm Co. v. Eisler, [1926] Ch. 609; *Re Walt*, [1927] 1 Ch. 606.

108. — "During the year"—Salary not payable beyond end of season.]—An opera singer by agreement dated only as to the year, 1870, agreed to sing at a certain theatre for the whole London season, & nowhere else in the Kingdom of Great Britain, *pendant l'annee* 1871, without the written consent of the employer. The singer's salary did not extend beyond the season which ended on Aug. 5. On motion for injunction to restrain him singing elsewhere after the season was over but during the year 1871:—*Held*: the ct. would not under the circumstances of the case grant an injunction on an interlocutory application.—*MAPLESON v. BENTHAM* (1871), 20 W. R. 176.

109. — Contract of adult apprenticeship.]—*LANNER v. PALACE THEATRE, LTD., ECCARIUS & ARMSTRONG* (1893), 9 T. L. R. 162.

110. — —.]—*LANNER v. PALACE THEATRE, LTD., ECCARIUS & ARMSTRONG* (1893), 9 T. L. R. 165; 37 Sol. Jo. 175.

111. — Agreement subject to rules—Rules prohibiting acting elsewhere.]—Deft., an actor, agreed with pltf., a theatrical manager, to act & to understudy as a member of pltf.'s co. on tour in America for twenty-five weeks, or longer if required, but not more than forty weeks, subject to certain rules, by one of which no member of the co. was allowed to act at any other theatre without permission. Shortly after the beginning of the tour pltf. produced a play in America, in which deft. was not given a part to act, but was called on to understudy. A week later deft. wrote asking pltf. to cancel the engagement, & this being refused deft. returned to England, & entered into an engagement & acted at a theatre in London. Deft. alleged in his affidavit that pltf. had verbally promised that deft. should perform in certain parts, but had not kept such promise.

On an application for an injunction to restrain deft. from acting at any theatre other than where pltf.'s co. played:—*Held*: the negative stipulation against acting elsewhere could be enforced by injunction, the alleged verbal promise could not, in the absence of any circumstances showing want of good faith on pltf.'s part, be considered in construing the contract, that the allotting of parts to deft. was no part of the consideration, that pltf. had not failed to carry out his part of the contract, & an injunction ought to be granted.

In the present case, what is the obligation on the part of pltf. contained in the contract? Pltf. engages deft. to act & understudy; but that does not mean that he undertakes to provide a part for him in every play that may be produced . . .

a manager cannot be expected to give every actor whom he engages a part in every play which may be produced, & generally to attempt to do so would not be for the benefit of the actor. All that deft. can be entitled to is to have a reasonable opportunity of acting & understudying, having regard to all the circumstances of the case (*WILLS, J.*).—*GRIMSTON v. CUNINGHAM*, [1894] 1 Q. B. 125; 10 T. L. R. 81; 38 Sol. Jo. 143, D. C. *Annotation*:—*Consd. Marbe v. George Edwardes* (*Daly's Theatre*), [1928] 1 K. B. 269.

112. — Restraint to continue for six months after end of engagement—Reasonable restraint.]—By an agreement in writing deft. agreed to appear at pltf.'s theatre at Manchester at a salary of £60 per week. The agreement contained the following clause: "Prior to the commencement of this engagement & during its continuance or within six months afterwards, no artist shall perform at any place or entertainment within 20 miles of Manchester . . . without the written consent of the director. . . ." Deft. having been billed to appear at a theatre at Salford, in violation of this agreement & after leave to appear there had been refused her, pltf. brought this action, claiming an injunction:—*Held*: on the evidence, the restraint was reasonable, & therefore the injunction claimed should be granted.—*TIVOLI, MANCHESTER, LTD. v. COLLEY* (1904), 52 W. R. 632; 20 T. L. R. 437; 48 Sol. Jo. 417.

113. — Effect of injunction preventing earning of livelihood—Interim injunction not granted.]—The ct. ought not to grant an *interim* injunction to restrain a person from following his trade or profession if it is satisfied that to do so may prevent such person from earning his livelihood.—*PALACE THEATRE, LTD. v. CLENSY & HACKNEY & SHEPHERD'S-BUSH EMPIRE PALACES, LTD.* (1909), 26 T. L. R. 28, C. A.

SECT. 8.—THEATRICAL USAGES.

SUB-SECT. 1.—IN GENERAL.

Usages generally, *see* CUSTOM & USAGES, Vol. XVII., pp. 25 *et seq.*

114. Existence of usage—Usage of hiring pianos by lessees of theatre—Liability of pianos to distress by landlord.]—In the absence of evidence establishing a custom that pianos are so constantly hired to lessees of theatres for theatrical purposes as to exclude the doctrine of reputed ownership, the ct. cannot assume as a matter of law that the lessee of a theatre is not the true owner of the piano which is in the theatre. In such a case the piano is not exempted by the law of Distress Amendment Act, 1908 (c. 53), from liability to distress by the landlord of the theatre.—*CHAPPELL & Co., LTD. v. HARRISON* (1910), 103 L. T. 594; 75 J. P. 20; 27 T. L. R. 85, D. C.

SUB-SECT. 2.—APPLICATION TO THEATRICAL CONTRACTS.

115. Usage must be universal.]—(1) Where an actor is engaged by a manager to take a part in a piece about to be produced. There is no custom in the theatrical profession which compels the manager to allow the artist, even though engaged, to open in the part.

(2) Can you on this sort of contract introduce any evidence of the custom among actors, & of this I have grave doubts as, for instance like the agricultural customs in counties or "a bakers dozen" & if it were to control the contract it must

be proved to be fixed, regular & practically invariable, so as to be universal. With regard to this there was a strong conflict of evidence & they would probably be guided by its reasonableness (GROVE, J.).—WHITE v. HENDERSON (1885), 2 T. L. R. 119.

116. Usage must be reasonable.]—WHITE v. HENDERSON, No. 115, *ante*.

117. —.]—DUNBAR v. CARDIFF PHILHARMONIC MUSIC HALL CO. (1893), 9 T. L. R. 461, D. C.

118. Admissibility in evidence—Performer engaged for three years—Usage to pay only during season in each year.]—By a written contract, pltf. agreed to perform at deft.'s theatre, & deft. agreed to engaged her for three years & pay her a salary of £5, £6, & £7 per week in those years respectively :—*Held* : parol evidence was admissible to show that, according to the uniform usage of the theatrical profession, pltf. was to be paid only during the theatrical season, *i.e.* during the time when the theatre was open for performance, in each of those years.—GRANT v. MADDUX (1846), 15 M. & W. 737 ; 16 L. J. Ex. 227 ; 7 L. T. O. S. 187 ; 153 E. R. 1048.

Annotations :—*Refd.* Sotilichos v. Kemp (1848), 18 L. J. Ex. 36 ; Myers v. Sarl (1860), 3 E. & E. 306 ; Clayton-Greene v. De Courville (1920), 36 T. L. R. 790. *Mentd.* Simpson v. Margitson (1847), 11 Q. B. 23 ; Harmer v. Cornelius (1858), 4 Jur. N. S. 1110 ; Abbott v. Bates (1875), 45 L. J. Q. B. 117 ; Bruner v. Moore, [1904] 1 Ch. 305.

119. — Agreement to provide theatre for specified period—Usage not to permit other performance during period.]—COTTON v. SOUNES (1902), 18 T. L. R. 456.

Annotation :—*Refd.* Clayton-Greene v. De Courville (1920), 36 T. L. R. 790.

120. Existence of usage—Usage conferring rights on acting manager of theatre—Use of private box.]—An acting manager cannot, under the words "usual privileges of his situation," claim, as matter of right, the use of a private box, & the power of giving orders of admission, though both are usually allowed as a matter of courtesy.—LACY v. OSBALDISTON (1837), 8 C. & P. 80 ; 173 E. R. 408, N. P.

Annotation :—*Mentd.* Pearce v. Foster (1885), 55 L. J. Q. B. 121.

121. — Giving orders for admission.]—LACY v. OSBALDISTON, No. 120, *ante*.

122. — Performer engaged for part—No usage to allow performer to open in part.]—WHITE v. HENDERSON, No. 115, *ante*.

123. — Usage giving right to terminate engagement—Reasonable cause preventing opening of theatre—Question for jury.]—DUNBAR v. CARDIFF PHILHARMONIC MUSIC HALL CO. (1893), 9 T. L. R. 461, D. C.

124. — No usage that tour means three weeks.]—WYATT v. PHIPPS (1896), 40 Sol. Jo. 781.

125. — Actor or actress engaged for part at West End theatre—Usage as to duration of engagement—Engagement for the run of the piece.]—THOMAS v. GATTI (A. & S.), LTD. (1906), *Times*, June 22.

126. — — — — —.]—It is the settled, certain, & established custom of the theatrical profession that whenever an actor or actress is engaged for a part in a play at a West End theatre in London the engagement is for the run of the piece, unless there is an express stipulation to the contrary.—CLAYTON-GREENE v. DE COURVILLE (1920), 36 T. L. R. 790.

Annotation :—*Consd.* George Edwardes (Daly's Theatre) v. Comber (1926), 42 T. L. R. 247.

127. — — — — —.]—The ct. held that, when an actor is engaged for a part in a play at a London West End theatre, the engagement, in the absence of an express condition to the contrary, is, according to the custom of the theatrical profession, for the run of the piece, & not for an indefinite period terminable by notice.—GEORGE EDWARDES (DALY'S THEATRE), LTD. v. COMBER (1926), 42 T. L. R. 247.

SECT. 9.—RECEIVERS.

See, generally, RECEIVERS, Vol. XXXIX., pp. 24 *et seq.*

128. Whether receiver or manager appointed.]—*Ex p.* O'REILLY, No. 8, *ante*.

129. —.]—*Ex p.* FORD (1802), 7 Ves. 617 ; 32 E. R. 248, L. C.

Annotation :—*Refd.* Waters v. Taylor (1808), 15 Ves. 10.

130. — In case of partnership.]—Although an agreement to refer disputes to arbn. is, generally, no objection to a suit in a ct. of equity, yet upon the nature of the subject, the management of the Opera House & the anxious provision of the parties for arbn. the ct. refused upon motion to interfere, before they had taken that course.

The principle upon which a ct. of equity interferes between partners by appointing a manager, receiver, etc., is merely with a view to the relief, by winding up & disposing of the concern & dividing produce : not to carry it on. The ct. therefore would not upon motion appoint a manager, etc., of the Opera House except upon the principle applicable to any other partnership as necessary to the relief, a foreclosure ; taking into consideration also the difficulties from the nature of the subject & the contract, an anxious provision for arbn. & that one party was by the express contract manager.—WATERS v. TAYLOR (1808), 15 Ves. 10 ; 33 E. R. 658, L. C. ; *subsequent proceedings* (1813), 2 Ves. & B. 299, L. C.

Annotations :—*Refd.* Taylor v. Waters (1836), 5 L. J. Ch. 210 ; Automatic Self Cleansing Filter Syndicate Co. v. Cuninghame, [1906] 2 Ch. 31. *Mentd.* Gourlay v. Somerset (1815), 19 Ves. 429 ; Roberts v. Eberhardt (1853), Kay, 148.

131. — — — — —.]—PIPERNO v. HARMSTON (1886), 3 T. L. R. 219, C. A.

Appointment of receiver in partnership cases generally.]—*See* PARTNERSHIP, Vol. XXXVI., pp. 482 *et seq.*

Part II.—Stage Plays.

SECT. 1.—WHAT AMOUNTS TO STAGE PLAY OR ENTERTAINMENT OF THE STAGE.

See Theatres Act, 1843 (c. 68), s. 23.

132. Question of fact.—Deft. occupied a house of public resort, licenced under Disorderly Houses Act, 1752 (c. 36), for music & dancing. There was a pit & private boxes, a band, a stage, & curtain. Upon this stage was performed a ballet divertissement by dancers dressed as ballet dancers, who danced, & in so doing described, by certain gestures & motions, the ideas of war, peace, & reconciliation:—*Held*: (1) the question, whether a performance is a "stage play," within Theatres Act, 1843 (c. 68), is a question of fact; (2) the performance was a stage play, within the meaning of the Act.

I think those words "other entertainment of the stage," must be construed with reference to the previous words, as including only entertainments of the same kind as those which are specified expressly, as "tragedy, comedy, farce, opera, play, interlude, melodrama, pantomime," extending only to entertainments of a dramatic character (WILLES, J.).—*WIGAN v. STRANGE* (1865), L. R. 1 C. P. 175; Har. & Ruth. 41; 35 L. J. M. C. 31; 13 L. T. 371; 29 J. P. 774; 12 Jur. N. S. 9; 14 W. R. 103.

133. Tumbling.—Tumbling is not an entertainment of the stage within 10 Geo. 2, c. 28.—*R. v. HANDY* (1795), 6 Term Rep. 286; 101 E. R. 556.

Annotations:—*Refd.* *R. v. Neville* (1830), 1 B. & Ad. 489; *De Bagnis v. Arnstead* (1833), 2 L. J. C. P. 214; *Wigan v. Strange* (1865), L. R. 1 C. P. 175.

134. Dramatic performance — Duologue.—A dramatic performance, a duologue, by two persons, is a stage play, within Theatres Act, 1843 (c. 68).—*THORNE v. COLSON* (1861), 3 L. T. 697; 25 J. P. 101.

135. ———.—*THORNE v. ST. CLAIR* (1861), 25 J. P. 102.

136. ——— Tragedy, comedy, farce, etc.—*WIGAN v. STRANGE*, No. 132, *ante*.

137. Ballet dancing—Gestures & motions descriptive of war, peace, & reconciliation.—*WIGAN v. STRANGE*, No. 132, *ante*.

138. Actions of performers shown by means of mirrors—Performers placed in chamber below stage—Only two characters bodily on stage—For short dialogue subordinate to plot.—The following was held to be a dramatic entertainment or "stage-play," within the prohibition of Theatres Act, 1843 (c. 68): On the rising of the curtain, there was a representation of a storm at sea & of a man swimming, not a living person, but in theatrical phrase a "double." When the storm subsided, a drop scene was disclosed, with a lake in the background. A character then appeared upon the stage, in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant, & a short dialogue ensued. These two were the only persons who appeared bodily on the stage; & they were twice on the stage together. There were several other characters, a king, a princess, etc., & a chorus; & the dialogue between them was a composed set drama, with a regular plot of love, courtship, & matrimony. With the exception

of the two persons above mentioned, the dialogue between whom was wholly subordinate to the plot of the piece, none of the characters were at any time bodily upon the stage: they had their places in a chamber below it, where they acted their parts, & addressed each other in the words allotted to them: but by a combination of lenses & mirrors their figures were reflected upon a mirror at the back of the stage, so as to present to the spectators the appearance of persons actually upon the stage. There was dancing, music, & singing, but no change of scenery or dress during the performance.—*DAY v. SIMPSON* (1865), 18 C. B. N. S. 680; 6 New Rep. 153; 34 L. J. M. C. 149; 12 L. T. 386; 11 Jur. N. S. 487; 13 W. R. 748; 144 E. R. 612.

SECT. 2.—LICENCING OF PLAYS.

See, now, Theatres Act, 1843 (c. 68), ss. 12, 15; Criminal Justice Act, 1925 (c. 86), s. 43.

139. Acting or causing to be acted unlicenced stage play.—*R. v. HARPER* (1733), 2 Barn. K. B. 349; 94 E. R. 546.

140. ——— Proof of "causing."—In a conviction of deft. for causing to be acted at a certain place called the Coburg Theatre, in the parish of St. Mary, Lambeth, for gain & reward, a certain entertainment of the stage called Richard the Third, the evidence set forth was, that deft. was seen once or twice at the rehearsals of Richard; that another person was stage manager; that deft. engaged I. S. to perform, & gave him a check for the amount of his benefit:—*Held*: this was sufficient to warrant the justices in drawing the conclusion that deft. caused the play of Richard the Third to be performed.—*R. v. GLOSSOP* (1821), 4 B. & Ald. 616; 106 E. R. 1062.

Annotations:—*Refd.* *R. v. Neville* (1830), 1 B. & Ad. 489; *Ewing v. Osbaldeston* (1837), 2 My. & Cr. 53.

141. ——— Liability to penalty.—The statute 10 Geo. 2, c. 28, s. 4, imposes a penalty of £50 for acting any entertainment of the stage without licence; & it is by sect. 6 enacted, "That the penalty shall be recovered in a summary way before two justices, to be levied by distress & sale; & that for want of a sufficient distress, the offender shall be committed to prison for any time not exceeding six months, there to remain without bail or mainprize"; & then an appeal is given to the Quarter Sessions. A conviction by two justices, under this statute, having been affirmed on appeal, was, together with the order of sessions, removed into this ct. by *certiorari*, & confirmed. A *levari facias* issued out of this ct. for the penalty, & there was a return of *nulla bona*. This ct. not having authority to exercise the discretion given by the statute to the justices, as to the term of imprisonment, granted a *procedendo* to carry back to the sessions the record of conviction, & the order of sessions, & commanding the justices to enter continuances upon the appeal from session to session, & proceed to award execution.—*R. v. NEVILLE* (1831), 2 B. & Ad. 299; 109 E. R. 1154.

Annotations:—*Refd.* *Ewing v. Osbaldeston* (1837), Donnelly, 179. *Mentd.* *R. v. Warwickshire JJ.* (1835), 2 Ad. & El. 768.

PART II. SECT. 2.

to be acted unlicensed stage play—Whether proprietor of letters patent may restrain lessee from pro-
v. RUSHBURY (1888), 15 R. (Ct. of Sess.) 828.—SCOT.

Part III.—Music and Dancing and Other Public Entertainments.

SECT. 1.—IN GENERAL.

1. **Right of entry by constable**—Premises in which cinematograph exhibition is being or about to be given—Cinematograph Act, 1909 (c. 30), s. 4.]—By above sect., “A constable or any officer appointed for the purpose by a county council may at all reasonable times enter any premises whether licenced or not, in which he has reason to believe that . . . an exhibition, for the purpose of which inflammable films are used is being or is about to be given, with a view to seeing whether the provisions of this Act, or any regulations made thereunder & the conditions of any licence granted under this Act, have been complied with . . .” :—*Held*: under the sect. it is not necessary that a constable entering premises for the purposes therein specified should be appointed by a county council; (2) where a constable has entered premises for the *bonâ fide* purpose of ascertaining the nature of the films being used, the fact that, acting on instructions he also keeps observation on other matters connected with the exhibition, as, for example, the use of music on unlicensed premises, does not constitute him a trespasser.—*McVITTIE v. TURNER* (1915), 85 L. J. K. B. 23; 113 L. T. 982; 80 J. P. 25; 60 Sol. Jo. 238; 13 L. G. R. 1181, C. A.

SECT. 2.—LICENCES.

SUB-SECT. 1.—IN GENERAL.

143. **Surrender of licence—Caused by application for new licence.**—*HOFFMANN v. BOND*, No. 152, *post*.

SUB-SECT. 2.—NECESSITY FOR LICENCE.

A. In General.

See Disorderly Houses Act, 1751 (c. 36), ss. 2-4, 13, 14; Public Entertainments Act, 1875 (c. 21), s. 1; Music & Dancing Licences (Middlesex) Act, 1894 (c. 15), s. 2; Public Health Acts Amendment Act, 1890 (c. 59), s. 51; Home Counties (Music & Dancing) Licencing Act, 1926 (c. 31), ss. 1, 3 (1) (8), 5, sched. 1.

144. **Under Disorderly Houses Act, 1751 (c. 36)—Room not kept or used solely for musical performance—Though musical performance regularly given.**—A room in which musical performances are regularly exhibited, though it is not kept or used solely for that purpose, is within above Act.—*BELLIS v. BEAL* (1797), 2 Esp. 591; 170 E. R. 466. *Annotation*:—*Refd.* *Kelly v. London Pavilion, Same v. New Tivoli, Same v. Oxford* (1897), 77 L. T. 215.

145. **Dancing not principal part of entertainment—Though principal part of particular performance.**—Where dancing is not the principal part of a public entertainment, even though it is the principal part of a particular performance in the entertainment, if that particular performance be not a principal part of the entertainment, a dancing licence is not required under above Act.—*FAY v. BIGNELL* (1883), 1 Cab. & El. 112.

PART III. SECT. 2, SUB-SECT. 2.—A. **m. Boxing match.**—*R. v. EGAN* (1850), 1 Legge, 588.—AUS.

n. Music played at licensed tavern.—Where a building used as a dancing-

room was built separate from a house licensed as a tavern, but had communication therewith through a porch, & there was no other entrance to the dancing room:—*Held*: it was a part

of the house, & that the proprietor was liable to a fine under a bye-law of the city of St. John for allowing music to be played therein.—*Ex p. HARLEY* (1862), 10 N. B. R. (5 All.) 264.—CAN.

146. **Action for penalty—Pleading.**—*BUTLER v. MAPP* (1834), 10 Bing. 391; 4 Moo. & S. 258; 3 L. J. C. P. 136; 131 E. R. 956.

—*See, also*, CRIMINAL LAW, Vol. XV., pp. 757-759, Nos. 8148-8171.

147. **Under Public Health Acts—What amounts to “place”—Tent on roped off space on waste land—Donations voluntary.**—*FARNDALE v. BAINBRIDGE* (1898), 42 Sol. Jo. 192, D. C.

—*See, also*, CRIMINAL LAW, Vol. XV., p. 759, No. 8172.

Offences under Cinematograph Act.—*See* Sect. 5, *post*.

B. Cinematograph Licences.

See Cinematograph Act, 1909 (c. 30), ss. 1, 7.

148. **Cinematograph exhibition at which inflammable films used.**—Although a cinematograph exhibition at which only non-inflammable films are used may be given without any licence under Cinematograph Act, 1909 (c. 30), at all, it is no objection to the validity of a condition attached by the licencing authority to the grant of a licence under Cinematograph Act, 1909 (c. 30), s. 2, that it prohibits the use of the licenced premises at certain times for cinematograph exhibitions even with non-inflammable films, nor that, the licence being limited to certain days of the week, the condition prohibits the use of the premises for such exhibitions on a day to which the licence does not extend.—*ELLIS v. NORTH METROPOLITAN THEATRES*, [1915] 2 K. B. 61; 84 L. J. K. B. 1077; 112 L. T. 1018; 79 J. P. 297; 31 T. L. R. 201; 13 L. G. R. 735, D. C.

149. **What amounts to “exhibition”—Display in places of public entertainment for profit.**—*A.-G. v. VITAGRAPH CO., LTD.*, No. 183, *post*.

150. **Showing of films by dealer to intending customers.**—*A.-G. v. VITAGRAPH CO., LTD.*, No. 183, *post*.

SUB-SECT. 3.—GRANT OF LICENCE.

A. In General.

See Music & Dancing Licences (Middlesex) Act, 1894 (c. 15), s. 2; Public Health Acts (Amendment) Act, 1890 (c. 59), ss. 38, 51; Home Counties (Music & Dancing) Licencing Act, 1926 (c. 31), ss. 2, 3, 4.

151. **Discretion of justices—To grant licence for one purpose only—Music licence.**—Under Disorderly Houses Act, 1751 (c. 36), s. 2, which empowers justices to licence a house for public dancing, music, or other public entertainment of a like kind, the justices have a discretion to grant a licence for one of the purposes only, viz., music; & the keeper of a house with a music licence only is liable to the penalty for keeping a house without a licence, if he permit public dancing in the house.—*BROWN v. NUGENT* (1872), L. R. 7 Q. B. 588; 41 L. J. M. C. 166; 41 L. J. Q. B. 304; 26 L. T. 880; 20 W. R. 989, Ex. Ch.

Sect. 2.—Licences: Sub-sect. 3, A. & B. (a) & (b).]

152. — To grant licence for short period.]—A local improvement Act enacted that no house or room shall be kept or used for public dancing or music without a licence from the justices at the general annual licencing meeting, & certain conditions were imposed for breach of which the licence might be forfeited & revoked by the justices. L. got a licence in 1870 for one year, & each year the occupier got one till 1873, when the justices refused the licence & revoked it. In 1871 L. had transferred his house to H.:—*Held*: the justices had an implied right to grant the licence for one year, though no period was mentioned in the statute, & were entitled to revoke it.

L. must be taken to have surrendered the first licence of 1870, when he applied in the following years (COCKBURN, C.J.).—*HOFFMANN v. BOND* (1875), 32 L. T. 775; 40 J. P. 5.

153. — To attach conditions to licence—Condition as to charge for admission.]—In places where Public Health Acts (Amendment) Act, 1890 (c. 59), s. 51, is in force, the licencing justices are entitled to make it a condition of granting a music & dancing licence for a hall connected with a public-house that a charge of at least 3d. per head shall be made for admission, & that such sum shall not be returned in the form of refreshment.—*Ex p. RICHARDS* (1904), 68 J. P. 536; 20 T. L. R. 669; *sub nom. R. v. ILKESTONE LICENSING JJ.*, 68 J. P. Jo. 352, D. C.

154. — To refuse licence—On ground that majority of shareholders in company alien enemies.]—The terms & conditions which a county council may impose on the grant of a licence under Cinematograph Act, 1909 (c. 30), s. 2, are not limited to terms & conditions for securing safety; & therefore the matters to which a county council may have regard in considering an application for a licence under the Act are not confined to matters relating to safety.

The London County Council, as the licencing authority, under Disorderly Houses Act, 1751 (c. 36), & Cinematograph Act, 1909 (c. 30), refused to grant the renewal of music & cinematograph licences to a limited co. registered in England on the ground that the large majority of its shares were held by alien enemies. A rule having been obtained for a *mandamus* directed to the Council requiring them to hear & determine the application according to law, upon the ground that they were actuated by extraneous considerations, namely, the shareholding & nationality of shareholders in the co.:—*Held*: apart altogether from the question whether or not the alien enemy shareholders were entitled to vote, the Council could in the exercise of their discretion refuse to grant licences to a co., the majority of whose shareholders were alien enemies.—*R. v. LONDON COUNTY COUNCIL, Ex p. LONDON & PROVINCIAL ELECTRIC THEATRES, LTD.*, [1915] 2 K. B. 466; 84 L. J. K. B. 1787; 113 L. T. 118; 79 J. P. 417; 31 T. L. R. 329; 59 Sol. Jo. 382; 13 L. G. R. 847, C. A.

Annotations:—*Refd. R. v. Burnley JJ., Ex p. Longmore* (1916), 85 L. J. K. B. 1565. *Mentd. Robson v. Premier Oil & Pipe Line Co.*, [1915] 2 Ch. 124; *R. v. Brighton Corpn., Ex p. Tilling* (1916), 85 L. J. K. B. 1552.

155. Time for application—Power of justices to make rules—Construction of local Act.]—A local Act provided that no house should be used for public entertainment without a licence from

the justices for the borough, & that the justices might grant such licences at any special session convened by fourteen days' previous notice:—*Held*: the justices had no right to lay down a rule that applications for these licences must be made only at the general annual licencing meeting.—*R. v. OLDHAM JJ., Ex p. MELLOR* (1909), 101 L. T. 430; 73 J. P. 390, D. C.

*B. Cinematograph Licences.**(a) In General.*

See Cinematograph Act, 1909 (c. 30), ss. 2, 5, 6, 7.

156. Licencing authority—County council—Right to delegate powers.]—By Cinematograph Act, 1909 (c. 30), s. 2, county councils are empowered to grant cinematograph licences, & by sect. 5 it is provided that a county council may "delegate to justices sitting in petty sessions any of the powers conferred on the council by this Act."

Sect. 6 enacts that the provisions of the Act are to apply in the case of a county borough as if the borough council were a county council:—*Held*: justices sitting in petty sessions to whom the powers of a county or borough council under the Act have been delegated do not, when exercising such powers, sit as a ct. of summary jurisdiction, & therefore, they have no power to state a case for the opinion of the ct. under the Summary Jurisdiction Acts.—*HUISS v. LIVERPOOL JJ.*, [1914] 1 K. B. 109; 83 L. J. K. B. 133; 110 L. T. 38; 78 J. P. 45; 30 T. L. R. 25; 58 Sol. Jo. 83; 12 L. G. R. 15, D. C.

Annotations:—*Consd. Stott v. Gamble*, [1916] 2 K. B. 504. *Refd. Newman v. Foster* (1916), 86 L. J. K. B. 360.

157. — Borough council.]—*HUISS v. LIVERPOOL JJ.*, No. 156, *ante*.

158. — Justices in petty sessions to whom powers delegated—Not court of summary jurisdiction—No power to state case under Summary Jurisdiction Acts.]—*HUISS v. LIVERPOOL JJ.*, No. 156, *ante*.

159. — — — Discretion to refuse licence—On ground that majority of shareholders in company alien enemies.]—*R. v. LONDON COUNTY COUNCIL, Ex p. LONDON & PROVINCIAL ELECTRIC THEATRES, LTD.*, No. 154, *ante*.

(b) Discretion of Licencing Authority to attach Conditions.

160. Restrictions on exercise of discretion.]—By Cinematograph Act, 1909 (c. 30), s. 2 (1), which is entitled "An Act to make better provision for securing safety at cinematograph & other exhibitions," it is enacted that "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid"—i.e., for cinematograph exhibitions—"on such terms & conditions & under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

A licence was granted under the sect. subject to the following condition: "Children under fourteen years of age shall not be allowed to enter into or be in the licenced premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licenced premises under any circumstances after 9 p.m." :—*Held*: the condition was *ultra vires* inasmuch as there was no connection between the ground upon which the condition was imposed, namely, regard for the health & welfare

PART III. SECT. 2, SUB-SECT. 3.

—B. (b).

o. Restriction as to hours during

which premises may open.]—*GREATER WILLIAMS (J.D.) AMUSEMENT CO., LTD. v. MELBOURNE CORPN.* (1915), 20 C. L. R. 576.—*AUS.*

p. Structural bye-laws complied —Whether local authority can licence.]—*COOK v. BUCKLE* (1917), C. L. R. 311.—*AUS.*

of young children generally, & the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions.—**THEATRE DE LUXE (HALIFAX), LTD. v. GLEDHILL**, [1915] 2 K. B. 49; 112 L. T. 519; 79 J. P. 238; 31 T. L. R. 138; 13 L. G. R. 541; 24 Cox, C. C. 614; *sub nom.* **HALIFAX THEATRE DE LUXE, LTD. v. GLEDHILL**, 84 L. J. K. B. 649, D. C.

Annotations:—**Distd.** *Ellis v. North Metropolitan Theatres*, [1915] 2 K. B. 61; *R. v. Burnley J.J., Ex p. Longmore* (1916), 85 L. J. K. B. 1565. **Consd.** *Stott v. Gamble*, [1916] 2 K. B. 504; *Ellis v. Dubowski*, [1921] 3 K. B. 621. **Refd.** *Ex p. Stott* (1915), 32 T. L. R. 84.

161. Conditions must be reasonable.—(1) By Cinematograph Act, 1909 (c. 30), s. 2 (1), the proper authority may licence persons to hold cinematograph exhibitions "on such terms & conditions & under such restrictions as . . . (they) may by the respective licences determine":—**Held**: such terms, etc., must be reasonable & may be formulated generally, subject to the right of each appct. to contend, when applying for a licence, that they should not be imposed in his case.

(2) A licence was issued subject (*inter alia*) to a condition that no film should be exhibited to which objection was taken by any three of the licensing justices:—**Held**: the condition was unreasonable & invalid.

(3) The licensing justices exacted an undertaking from the licensee, first, that he would not tempt children under sixteen to frequent his exhibition by the offer of free or reduced admission or sweetmeats; & secondly, that on being notified by the medical officer of health that any department of a public elementary school had been closed on account of the prevalence of infectious disease, he would exclude children attending that school:—**Held**: both were reasonable undertakings to impose. — *R. v. BURNLEY J.J., Ex p. LONGMORE* (1916), 85 L. J. K. B. 1565; 115 L. T. 525; 80 J. P. 382; 32 T. L. R. 695; 14 L. G. R. 960, D. C.

Annotation:—*As to* (1) **Consd.** *Ellis v. Dubowski*, [1921] 3 K. B. 621.

162. — Procedure where condition unreasonable — Whether prohibition or mandamus.—

(1) A licensing committee in granting a licence under Cinematograph Act, 1909 (c. 30), attached to the licence a condition "that no film be shown which has not been certified for public exhibition by the British Board of Film Censors." This Board consisted of persons appointed by traders in the film industry for censorship purposes, & had no statutory or constitutional authority:—**Held**: the condition was unreasonable & *ultra vires*. *Semble*: if the condition had reserved to the committee the right to review the decisions of the Board, the condition would have been reasonable & *intra vires*.

(2) *Qu.*: whether the proper remedy for a licensee who has accepted a licence subject to a condition is not to apply to the ct. for a writ of prohibition or *mandamus*, if he wishes to allege that the condition is unreasonable.—**ELLIS v. DUBOWSKI**, [1921] 3 K. B. 621; 91 L. J. K. B. 89; 126 L. T. 91; 85 J. P. 230; 37 T. L. R. 910; 19 L. G. R. 641; 27 Cox, C. C. 107, D. C.

Annotation:—*As to* (1) **Distd.** *Mills v. L. C. C.*, [1925] 1 K. B. 213.

163. General conditions—To be dispensed with in particular cases.—*R. v. BURNLEY J.J., Ex p. LONGMORE*, No. 161, *ante*.

164. Condition against opening on certain days—Sundays, Good Friday & Christmas Day.—A county council, in granting a licence under Cinematograph Act, 1909 (c. 30), s. 2, to use certain premises for a cinematograph exhibition,

for the purposes of which inflammable films are used, have power to insert therein a condition that the premises shall not be opened under the licence on Sundays, Good Friday, & Christmas Day.—**LONDON COUNTY COUNCIL v. BERMONDSEY BIOSCOPE CO., LTD.**, [1911] 1 K. B. 445; 80 L. J. K. B. 141; 103 L. T. 760; 75 J. P. 53; 27 T. L. R. 141; 9 L. G. R. 79, D. C.

Annotations:—**Apld.** *Ellis v. North Metropolitan Theatres*, [1915] 2 K. B. 61. **Apprvd.** *R. v. L. C. C., Ex p. London & Provincial Electric Theatres*, [1915] 2 K. B. 466. **Consd.** *Theatre de Luxe (Halifax) v. Gledhill*, [1915] 2 K. B. 49; *R. v. Burnley J.J., Ex p. Longmore* (1916), 85 L. J. K. B. 1565. **Refd.** *Stott v. Gamble*, [1916] 2 K. B. 504; *Ellis v. Dubowski*, [1921] 3 K. B. 621; *Mills v. L. C. C.*, [1925] 1 K. B. 213.

165. Condition as to allowing children on premises after certain hours.—**THEATRE DE LUXE (HALIFAX), LTD. v. GLEDHILL**, No. 160, *ante*.

166. Condition prohibiting exhibition—With non-inflammable films—At certain times.—**ELLIS v. NORTH METROPOLITAN THEATRES**, No. 148, *ante*.

167. — On objection to film—Right to give notice of objection—Certiorari to quash notice.—A licensing authority under Cinematograph Act, 1909 (c. 30), granted to a theatre proprietor a licence for the exhibition of cinematograph films at his theatre. The licence was subject to the condition that the licensee should not exhibit any film if he had notice that the licensing authority objected to it. A firm who had acquired the sole right of exhibition of a certain film in the district in which the theatre was situated entered into an agreement with the licensee for the exhibition of the film at his theatre. The licensing authority having given notice to the licensee that they objected to the exhibition of the film, the firm applied for a writ of *certiorari* to bring up the notice to be quashed on the ground that the condition attached to the licence was unreasonable & void & that they were aggrieved by the notice as being destructive of their property:—**Held**: whether the condition was unreasonable or not, appcts. were not persons who were aggrieved by the notice & were not entitled to apply for a *certiorari*.—*Ex p. STOTT*, [1916] 1 K. B. 7; 85 L. J. K. B. 502; 114 L. T. 234; 80 J. P. 169; 32 T. L. R. 84; 60 Sol. Jo. 418, D. C.

Annotations:—**Distd.** *R. v. Burnley J.J., Ex p. Longmore* (1916), 85 L. J. K. B. 1565. **Apld.** *Stott v. Gamble*, [1916] 2 K. B. 504.

168. — — — Interference with contractual rights.—A licensing authority under Cinematograph Act, 1909 (c. 30), licenced the proprietors of a theatre to use it for the exhibition of cinematograph films. The licence was subject to the following condition: "No film shall be shown that is objectionable or indecent or anything likely or tending to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace, & no offensive representations of living persons shall be shown. Provided also that no film shall be exhibited if notice that the justices"—i.e., the licensing authority—"object to such film has been given to the licensee."

Grantees of the right of letting for exhibition a certain film agreed to let the film to the proprietors of the theatre for an agreed sum. The licensing authority gave notice to the proprietors of the theatre that they objected to the exhibition of the film. In an action by the grantees against the licensing authority for interfering with their contractual rights without just cause or excuse:—**Held**: the meaning of the condition was that the licensing authority might give notice of objection to a film where they had *bond fide* & in the judicial exercise of their discretion come to the conclusion

Sect. 2.—Licences: Sub-sect. 3, B. (b). Sects. 3 & 4.]

that the film was objectionable on one of the grounds mentioned therein, & so interpreted the condition was reasonable & valid; even if the condition was unreasonable & void, the grantees had no cause of action, inasmuch as there was no evidence that the licencing authority knowingly or for their own ends induced the licencees to commit an actionable wrong.—*STOTT v. GAMBLE*, [1916] 2 K. B. 504; 85 L. J. K. B. 1750; 115 L. T. 309; 80 J. P. 443; 32 T. L. R. 579; 14 L. G. R. 769.

169. ——— Objection taken by any three licencing justices.]—*R. v. BURNLEY JJ., Ex p. LONGMORE*, No. 161, *ante*.

170. ——— Unless film certified by British Board of Film Censors—Effect of reserving right to review decision of Board.]—*ELLIS v. DUBOWSKI*, No. 162, *ante*.

171. ——— ———.]—The London County Council granted a licence under Cinematograph Act, 1909 (c. 30), subject to certain conditions, one of which provided: "That no film—other than photographs of current events—which has not been passed for universal exhibition by the British Board of Film Censors shall be exhibited in the premises without the express consent of the Council during the time that any child under or appearing to be under the age of sixteen years is therein: Provided that this condition shall not apply in the case of any child who is accompanied by a parent or *bonâ fide* adult guardian of such child." The Board was an unofficial body appointed by firms in the film industry for censorship purposes, & formed no constituent part of the council:—*Held*: as the effect of the condition was to reserve to the council the right to review the decision of the Board, it was not *ultra vires* or unreasonable, & further that the condition was not unreasonable & void for uncertainty by reason of the words "child . . . appearing to be under the age of 16 years" & "accompanied by . . . a *bonâ fide* adult guardian of such child."—*MILLS v. LONDON COUNTY COUNCIL*, [1925] 1 K. B. 213; 94 L. J. K. B. 216; 132 L. T. 386; 89 J. P. 6; 41 T. L. R. 122; 69 Sol. Jo. 254; 23 L. G. R. 43; 27 Cox, C. C. 720, D. C.

Annotation:—Reid. Short v. Poole Corpn. (1925), 42 T. L. R. 107.

172. ——— While children present—Children "under or appearing to be under" sixteen years—unless accompanied by bonâ fide adult guardian.]—*MILLS v. LONDON COUNTY COUNCIL*, No. 171, *ante*.

173. Conditions not confined to provisions for securing safety.]—*R. v. LONDON COUNTY COUNCIL, Ex p. LONDON & PROVINCIAL ELECTRIC THEATRES, LTD.*, No. 154, *ante*.

174. Condition not to induce children to frequent exhibition—Children under sixteen—By free or reduced admission—Or sweetmeats.]—*R. v. BURNLEY JJ., Ex p. LONGMORE*, No. 161, *ante*.

175. Condition to exclude schoolchildren—On notification of infectious disease.]—*R. v. BURNLEY JJ., Ex p. LONGMORE*, No. 161, *ante*.

SECT. 3.—STRUCTURAL REQUIREMENTS AS TO PLACES OF PUBLIC RESORT.

See Metropolis Management & Building Acts (Amendment) Act, 1878 (c. 32), ss. 11, 12; Local Government Act, 1888 (c. 41), s. 40; Public Health Acts (Amendment) Act, 1890 (c. 59), s. 36;

Public Health Acts (Amendment) Act, 1907 (c. 53), s. 44.

176. Certificate of compliance with fire regulations—Necessity for—Metropolis Management & Building Acts (Amendment) Act, 1878 (c. 32), s. 12—In case of licenced building.]—The provisions of above sect. requiring for houses, rooms, or other places of public resort to be kept open for public dancing or music a certificate from, now, the London County Council that such house, room or place, is in accordance with the regulations made by the Council in pursuance of above Act, to apply to houses not licenced under Disorderly Houses Act, 1751 (c. 36), or Theatres Act, 1843 (c. 68).—*R. v. HANNAY*, [1891] 2 Q. B. 709; 60 L. J. M. C. 167; 56 J. P. 151; 40 W. R. 14, D. C.

177. ——— ——— In case of unlicenced building.]—*R. v. HANNAY*, No. 176, *ante*.

178. ——— ——— Buildings erected or existing at passing of Act.]—By above sect. it is provided that the Metropolitan Board of Works, whose place has now been taken by the London County Council, shall make such regulations as are thought expedient for the protection from fire of houses or other places of public resort within the metropolis which are open for the public performance of stage plays, or other places of resort within the metropolis having a superficial area for the accommodation of the public of not less than 500 square feet & kept open for public dancing, music, or other public entertainment of the like kind; & that it shall not be lawful from & after the making of such regulations for any person to have or keep open such house or place of public resort for any of the above purposes unless & until a certificate shall have been granted to the effect that such house or other place on its completion was in accordance with the regulations, such certificate to be granted by the Metropolitan Board of Works, now the London County Council:—*Held*: the provisions of the section had no application to buildings other than those which were erected or came into existence after the passing of the Act.—*LONDON COUNTY COUNCIL v. HALL OF ARTS & SCIENCE CORPN.* (1913), 110 L. T. 28; 78 J. P. 11; 30 T. L. R. 3; 11 L. G. R. 1177, D. C.

179. Notice to remedy defects causing danger—Metropolis Management & Building Acts (Amendment Act) 1878 (c. 32), s. 11—Compliance with notice—Power to serve other notice in respect of same building.]—Where a notice has been served upon the owner of a building, under above sect., requiring him to remedy structural defects from which special danger from fire may result, & the requirements of that notice have been complied with, there is no power subsequently to serve another notice under that sect. in respect of the same building.

The first observation on the sect. [above sect.] is that it relates entirely to defects in structure, & not to defects arising from want of repair, or from the mode of control or management of the premises, such as keeping doors locked or the like (*CHANNELL, J.*).—*ST. JAMES'S HALL CO. v. LONDON COUNTY COUNCIL*, [1901] 2 K. B. 250; 70 L. J. K. B. 610; 84 L. T. 568; 49 W. R. 572; 17 T. L. R. 483; 45 Sol. Jo. 505.

180. ——— Defects in structure.]—*ST. JAMES'S HALL CO. v. LONDON COUNTY COUNCIL*, No. 179, *ante*.

181. ——— Defects arising from want of repair.]—*ST. JAMES'S HALL CO. v. LONDON COUNTY COUNCIL*, No. 179, *ante*.

182. ——— Defects arising from mode or control of management.]—*ST. JAMES'S HALL CO. v. LONDON COUNTY COUNCIL*, No. 179, *ante*.

183. Regulations for securing safety in cinematograph exhibitions—Cinematograph Act, 1909 (c. 30), s. 1—Exhibition by dealer or manufacturer in presence of customers.]—Above Act, s. 1, provides that an exhibition of pictures by means of a cinematograph, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as expressly provided for by the Act, elsewhere than in premises licenced for the purpose in accordance with the provisions of the Act:—*Held*: the statute does not apply to cases where a dealer or manufacturer in the exercise of his trade runs films through a cinematograph machine in the presence of prospective customers.

Though above sect. is in very wide terms the word "exhibition" must have some limitation imposed upon it, & must be construed as referring to displays of pictures in places of public entertainment for a profit.—*A.-G. v. VITAGRAPH CO., LTD.*, [1915] 1 Ch. 206; 84 L. J. Ch. 142; 112 L. T. 245; 79 J. P. 150; 31 T. L. R. 70; 59 Sol. Jo. 160; 13 L. G. R. 148.

184. ——— Keeping gangways & passages clear—Obstruction due to incomplete seating accommodation.]—Under Cinematograph Act, 1909 (c. 30), s. 1, "An exhibition of pictures . . . by means of a cinematograph . . . shall not be given unless the regulations made by the Secretary of State for securing safety are complied with." The regulations made by the Secretary of State provided that "the gangways & the staircases, & the passages leading to the exits, shall, during the presence of the public in the building, be kept clear of obstruction."

All the seats for which resp.'s cinematograph theatre was licenced had not been installed. At a certain performance a number of persons were standing in the gangways & passages, so that persons going to & from seats had to pass through them, but the number of persons present did not exceed the number for which the theatre was licenced:—*Held*: the persons standing in the gangways & passages leading to the exits constituted an obstruction within the regulations, & the fact that if the theatre had contained all the seats for which it was licenced all the people present could have been seated was no answer to the charge.—*PORTER v. WATT* (1914), 84 L. J. K. B. 394; 112 L. T. 508; 79 J. P. 212; 31 T. L. R. 84; 13 L. G. R. 488; 24 Cox, C. C. 603, D. C.

See Statutory Rules & Orders, 1913, No. 665; 1920, No. 1768; 1923, No. 983.

185. Sufficiency of entrances & exits—Public Health Acts (Amendment) Act, 1890 (c. 59), s. 36—Right of local authority to refuse to pass plans—Narrowness & congestion of streets adjoining theatre.]—The owners of land in Cambridge, intending to build thereon a cinematograph theatre, submitted plans to the corpn. under

Public Health Act, 1875 (c. 55), s. 158, which plans complied in every respect with the bye-laws of the borough as to building. The corpn. refused to pass the plans, alleging that by reason of the narrowness of several of the adjoining streets, & the congested traffic, the building would not be provided with ample, safe & convenient means of egress for the public, & would be an infringement of Public Health Acts (Amendment) Act, 1890 (c. 59), s. 36:—*Held*: the corpn. were not entitled to refuse their approval of the plans on account of the narrowness of adjoining streets & the congestion of traffic therein.—*R. v. CAMBRIDGE CORPN., Ex p. CAMBRIDGE PICTURE PLAYHOUSES, LTD.*, [1922] 1 K. B. 250; 91 L. J. K. B. 118; 126 L. T. 365; 86 J. P. 13; 38 T. L. R. 96; 66 Sol. Jo. 125; 20 L. G. R. 67; D. C.

SECT. 4.—SUNDAY ENTERTAINMENTS.

See CRIMINAL LAW, Vol. XV., pp. 759, 760, Nos. 8173–8178; Sunday Observance Act, 1780 (c. 49), ss. 1, 3, 5.

186. Crystal Palace—Charter prohibiting admission on Sunday for money payment—Conversion of shares into tickets—Tickets giving right to admission on Sunday.]—The charter of the Crystal Palace Co. was granted on condition that no person should be admitted to the building or grounds on Sundays, in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the legislature should have been obtained for admission on such consideration. By a subsequent Act, the directors were empowered to convert the shares into tickets of admission for life or a term of years, the Act providing that nothing therein contained should alter the charter or relieve the co. from its covenants or conditions, except so far as the charter was expressly varied by the Act. The directors under this Act proposed to convert the shares into tickets of admission for the holders & their nominees, such tickets giving the privilege of admission to the building & grounds on Sunday afternoons:—*Held*: (1) the directors, by granting these tickets in consideration of the surrender of shares, would be receiving indirectly a money payment for the privilege of the Sunday admissions attached to the tickets, & there was nothing in the Act enabling them to dispense with the prohibiting condition imposed by the charter or to grant any other tickets than ordinary tickets conferring no such privilege of admission on Sundays; (2) the prohibition in the charter was express, & not limited in its operation by the provisions of Sunday Observance Act, 1780 (c. 49), against profanation of the Lord's day.—*RENDALL v. CRYSTAL PALACE CO.* (1858), 4 K. & J. 326; 27 L. J. Ch. 397; 31 L. T. O. S. 51; 22 J. P. 321; 6 W. R. 416; 70 E. R. 136.

Annotation:—Generally, *Mentd. Jenkin v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392.

PART III. SECT. 4.

q. Sunday Observance Act—Whether in force in Victoria.]—21 Geo. 3, c. 49, prohibiting taking money for admission to entertainments on a Sunday.—*Held*: to be in force in Victoria by virtue of 9 Geo. 4, c. 83, s. 24.—*McHUGH v. ROBERTSON, BENN v. SYMES* (1885), 11 V. L. R. (L.) 410.—AUS.

r. — Whether in force in New South Wales.]—*WALKER v. SOLOMON* (1890), 11 N. S. W. L. R. (L.) 88; 11 N. S. W. W. N. 167.—AUS.

t. — Free admission allowed—Superior seats charged for.]—*SCOTT v. CAWSEY* (1907), 5 C. L. R. 132.—AUS.

a. — Whether in force in Ontario.]—Imperial Act 21 Geo. 3, c. 49, prohibiting amusements & entertainments on the Lord's Day, is in force in Ontario, & an application to quash a conviction thereunder for keeping a disorderly house known as the "Royal Opera House," opened & used for public entertainment & amusement on the Lord's

Day, was therefore refused.—*R. v. BARNES* (1880), 45 U. C. R. 276.—CAN.

b. — Moving picture show.]—Moving picture show given on Sunday, where no admission is charged, is not an offence under Lord's Day Act, R. S. C. (1906), c. 153, s. 7, although an employee is stationed at the door with a plate on which persons who so desire may contribute.—*R. v. THOMPSON* (1913), 25 W. L. R. 576; 14 D. L. R. 175; 22 Can. Crim. Cas. 78; 7 Alta. L. R. 40.—CAN.

SECT. 5.—OFFENCES.

See Home Counties (Music & Dancing) Licencing Act, 1926 (c. 31), s. 3.

187. Under Cinematograph Act, 1909 (c. 30), ss. 1, 3—Exhibition on unlicensed premises—Use of inflammable films—Meaning of “inflammable.”]—Appls. were summoned by resp. for allowing on premises which had not been licensed under above Act, a cinematograph exhibition for which inflammable films were used. Resps. had tested the films at the close of a performance by means of a naked light, which easily set some of them alight. The justices held that some of the films were inflammable inasmuch as they were easily set on fire, & they convicted applts.:—*Held*: there was evidence to support the conviction, as it was not necessary for the prosecution to prove that the films were liable to catch fire while being used in the cinematograph.—VICTORIA PIER, (FOLKESTONE) SYNDICATE, LTD. v. REEVE (1912), 76 J. P. 374; 28 T. L. R. 443; 10 L. G. R. 967, D. C.

— Occupier allowing use of premises in contravention of Act—Meaning of “occupier”—Owner employing manager subject to control.]—By above Act, s. 3, “If the occupier of any premises” used for cinematograph exhibitions “allows those premises to be used in contravention of the provisions of this Act” he is liable to a penalty:—*Held*: where the owner of such premises employs a servant to manage them on his behalf & subject to his control the owner & not the manager is the occupier for the purposes of that sect.—BRUCE v. McMANUS, [1915] 3 K. B. 1; 84 L. J. K. B. 1860; 113 L. T. 332; 79 J. P. 294; 31 T. L. R. 387; 13 L. G. R. 727, D. C.

189. Under Disorderly Houses Act, 1751 (c. 36)—Person having licence for music only—Permitting public dancing.]—BROWN v. NUGENT, No. 151, ante.

—.]—See, also, Sect. 2, sub-sect. 2, A., ante.

Under Public Health Acts.]—See Sect. 2, sub-sect. 2, A., ante.

Part IV.—Billiards.

See Gaming Act, 1845 (c. 109), ss. 10–14, 20; Summary Jurisdiction Act, 1884 (c. 43), sched.; Finance (1909–10) Act, 1910 (c. 8), s. 52; Licencing (Consolidation) Act, 1910 (c. 24), s. 79; Licencing Act, 1921 (c. 42), s. 19.

190. Grant of billiard licence—Discretion of justices—No appeal against refusal.]—There is no appeal against the refusal of justices to grant a licence to a party to keep a house for public billiard playing.—*Ex p.* CHAMBERLAIN (1857), 8 E. & B. 644; 4 Jur. N. S. 477; 120 E. R. 240; *sub nom.* R. v. DEVONSHIRE JJ., 30 L. T. O. S. 150; 6 W. R. 75; 21 J. P. Jo. 773.

191. — Payment of fee to justices’ clerk—Not condition precedent—Failure to take up & pay for licence.]—On Mar. 13, 1919, applts. applied for & obtained from the licencing justices a renewal of their billiard licence. The licence was prepared & signed by the justices’ clerk, & was duly sealed, but applts., although notified that it was ready, did not apply for it or pay the fee to which the clerk was entitled, & in consequence of this the clerk, on Apr. 6, treated the licence as lapsed, & so entered it in his minute book. Applts. being charged, under Gaming Act, 1845 (c. 109), s. 11, with unlawfully keeping on their premises a public billiard table without being duly licensed & not holding a victualler’s licence, the justices convicted them, being of opinion that the licence had lapsed & that applts. were in the position of having

no licence:—*Held*: payment of the clerk’s fee was not a condition precedent to the grant of the licence, & applts. were duly licensed although they had not taken up & paid for the licence.—WHITEFIELD BILLIARD HALL CO., LTD. v. PICKERING, [1920] 1 K. B. 604; 89 L. J. K. B. 287; 122 L. T. 429; 84 J. P. 30; 18 L. G. R. 185, D. C.

192. Offences against tenor of licence—Condition prohibiting supply of exciseable liquors—Licencee also holding beer licence—Supply of beer not an offence.]—Exciseable liquors are liquors subject to the duty of excise; & therefore, beer, upon which an excise duty is no longer paid, is not an exciseable liquor. A. was licensed under Gaming Act, 1845 (c. 109), to keep a house for billiard playing; & the licence provided that A. should not knowingly allow the consumption of exciseable liquors in the house by persons resorting thereto. He was also licensed under Beerhouse Act, 1840 (c. 61), & 32 & 33 Vict. c. 27, to sell beer, wine, etc., to be consumed in the house. A. had allowed the consumption of beer by persons resorting to the house for the purpose of playing billiards, & was convicted of an offence against the tenor of his billiard licence:—*Held*: A. had not been guilty of selling exciseable liquor, & was wrongly convicted.—JONES v. WHITTAKER (1870), L. R. 5 Q. B. 541; 39 L. J. M. C. 139; 22 L. T. 535; 34 J. P. 663; 18 W. R. 1197.

193. — Permitting play after closing hours—

PART III. SECT. 5.

c. Exhibition of film of “indecent or obscene nature.”]—Deft. exhibited in a theatre a moving picture or cinematograph film dealing with venereal disease & its effects. The display was not in the nature of an advertisement & purported to be a pictorial representation of a play of recognised literary merit.—*Held*: deft. had exhibited a film of an indecent or obscene nature within Police Offences Act, 1915, s. 173, as amended by Venereal Diseases Act, 1916, s. 25 (1).—KIERNAN v. LIPMAN, [1920] V. L. R. 81.—AUS.

PART IV.

d. Grant of billiard licence—Discretionary.]—The grant of a licence under a bye-law made by a county council by virtue of Counties Act, 1908,

s. 107, for the licensing of public billiard-saloons is discretionary; & the refusal of such a licence in time of war, in conformity with a previous resolution of the council “that no billiard-room licence be issued during the currency of the “war” is not an improper exercise of the council’s discretion.—THATCHER v. COOK COUNTY COUNCIL, [1916] N. Z. L. R. 943.—N.Z.

e. Right of corporation—To suppress all billiard tables.]—*Semble*: the corpn. of the city of Toronto has a right to suppress all billiard tables within its jurisdiction.—R. v. HOME DISTRICT, LICENCES INSPECTOR (1835), 4 O. S. 9.—CAN.

f. — To impose licence fee.]—A bye-law of the corpn. of London, passed under 10 & 11 Vict. c. 48, providing that the owner of a billiard

table shall pay £10 per annum for a licence to keep the same, had not the effect of abrogating the duty imposed on billiard tables by the provincial Act 50 Geo. 3, c. 6, but must be considered as a regulation super-added for the purposes of the town of London.—CHURCH v. RICHARDS (1850), 6 U. C. R. 562.—CAN.

g. — Validity of bye-law.]—A bye-law fixing the sum to be paid for a licence for billiard tables in a town at \$300, & enacting that it should be unlawful to have any internal means of communication between a room in which a billiard or bagatelle table was kept, & any place in which spirituous liquors might be sold:—*Held*: valid.—*Re* NEILLY & ADDISON v. OWEN SOUND CORPN. (1875), 37 U. C. R. 289.—CAN.

h. — — —.]—*Re* FOSTER

Licencee holder of publican's licence—Play by lodgers.]—By Gaming Act, 1845 (c. 109), s. 13, the holder of a victualler's licence who keeps a public billiard table, & allows persons to play thereon when the premises are not allowed to be open for the sale of wine, etc., is liable to a certain penalty. By Licencing Act, 1874 (c. 49), s. 10, a person licenced to sell any intoxicating liquor, to be consumed on the premises, may sell such liquor at any time to persons lodging in his house. Applt. held a victualler's licence for a certain house at H. The closing hour at H. on week days is 11 p.m., & after that time two gentlemen, lodgers in the house, were found playing billiards. The justices thought that Gaming Act, 1845 (c. 109), s. 13,

absolutely prohibited all persons without exception from playing at a billiard table during closing hours, & such prohibition was not affected by Licencing Act, 1874 (c. 49), s. 10. Accordingly applt. was convicted, but the justices stated a case:—*Held*: the conviction was right.—OVENDEN v. RAYMOND (1876), 34 L. T. 698; 40 J. P. 727, D. C.

194. ——— Licencee holder of beer licence.]—A beerhouse keeper who has obtained a licence to keep a billiard table, & allows billiards to be played after the closing hour for the beerhouse, is not liable to the penalty in Gaming Act, 1845 (c. 109), s. 13, which applies only to victuallers licenced under 11 Geo. 4, c. 61.—BENT v. LISTER (1888), 52 J. P. 389; 4 T. L. R. 493, D. C.

Part V.—Racecourses.

See Racecourses Licencing Act, 1879 (c. 18), ss. 1–5, 7; Local Government Act, 1888 (c. 41), s. 3 (v).
195. Erection of defective grand stand on race-

course—Injury to spectator—Liability for negligence—Employment of competent contractor.]—FRANCIS v. COCKRELL, No. 49, *ante*.

& RALEIGH TOWNSHIP (1910), 22 O. L. R. 26; 16 O. W. R. 1012; 2 O. W. N. 65.—CAN.

k. ——— To prohibit billiards in taverns.]—A provision that no billiard table or bowling alley should be licensed or kept in any tavern, inn, or house of entertainment:—*Held*: authorised by the power given to the corps. to regulate billiard tables & bowling alleys.—*Re* ARKELL & ST. THOMAS CORPN. (1876), 38 U. C. R. 594.—CAN.

l. ——— To require closing of pool rooms on Sundays.]—*Re* FISHER & CARMAN VILLAGE (1905), 16 Man. L. R. 560; 1 W. L. R. 455.—CAN.

m. ——— To revoke licence.]—*Re* CRABBE & SWAN RIVER TOWN COUNCIL

(1913), 23 W. L. R. 372; 3 W. W. R. 1047; 23 Man. L. R. 14 9 D. L. R. 405.—CAN.

n. Construction of Licencing Act, 1881, s. 155.]—The above sect., prohibiting any person during the time at which licensed premises are directed to be closed from allowing any one to play "billiards or bagatelle or any other game in such premises" refers only to games of a like nature to billiards & bagatelle & does not include games of cards.—LIGHT v. MILTON (1883), 2 N. Z. L. R. 214 (S. C.).—N.Z.

o. Permitting game after closing-hour—Variance between definitions of statute & bye-law—Conviction under statute—Validity of.]—TWOHILL v. FAIR-

HALL (1901), 21 N. Z. L. R. 535. — N.Z.

PART V.

p. Liability of proprietor for purses.]—The proprietor of a race course is not responsible for the purses run for, unless upon an express undertaking.—GATES v. TINNING (1849), 5 U. C. R. 540.—CAN.

q. Sale of betting privileges on race course.]—STRATFORD TURF ASSOCN. v. FITCH (1897), 28 O. R. 579.—CAN.

r. Right of public to enter to bet with licensed totalisator—Right of club to exclude bookmakers—Entrance obtained by concealment.]—POLLOCK v. SAUNDERS (1897), 15 N. Z. L. R. 581.—N.Z.

THEFT.

See CRIMINAL LAW AND PROCEDURE.

THELLUSSON ACT.

See PERPETUITIES.

THIRD PARTY PROCEDURE.

See PRACTICE AND PROCEDURE.

THIRTY-NINE ARTICLES.

See ECCLESIASTICAL LAW.

THISTLES.

See AGRICULTURE.

THREATS.

See CRIMINAL LAW AND PROCEDURE ; PATENTS AND INVENTIONS ; TRADE MARKS, TRADE NAMES, AND DESIGNS.

THRESHING-MACHINES.

See AGRICULTURE.

TIDAL WATERS.

See FISHERIES ; WATERS AND WATERCOURSES.

TIMBER.

See AGRICULTURE ; LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL ; SETTLEMENTS.

TIME.

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<i>of</i> STATUTES.	<i>Specific Subjects</i> TITLES <i>passim.</i>

Part I.—The Calendar and Divisions of Time.

SECT. 1.—IN GENERAL. See Calendar (New Style) Act, 1750 (c. 23) ; Calendar Act, 1751 (c. 30) ; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 223, 226, 227. 1. St. Thomas' Day—Whether Old St. Thomas' Day.]—Pltf. prescribed for a right of sole pasture "from the feast of St. Thomas until Apr. 18" & proved the exercise of the right between those periods. On motion to set aside a nonsuit:—	<i>Held</i> : it was not necessary to allege the right in the pleadings from Old St. Thomas's day.— SMITH v. FLOWER (1826), 3 Bing. 401 ; 11 Moore, C. P. 264 ; 4 L. J. O. S. C. P. 113 ; 130 E. R. 567. 2. Martinmas — Whether November 23.]—In replevin deft. avowed for rent due & in arrear at Martinmas "to wit, Nov. 23" :— <i>Held</i> : Martinmas must be taken to mean New Martinmas, & the subsequent words "to wit, Nov. 23" being
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PART I. SECT. 1.
a. "Period."—"Period" must be held to mean a continuous period of time.—HOLZ v. BRUNO CLAY WORKS, LTD.
(Sask.), [1922] 1 W. W. R. 131 ; 62 D. L. R. 656.—CAN.

surplusage, could not be taken to explain that Old Martinmas was intended.—*SMITH v. WALTON* (1832), 8 Bing. 235; 1 Moo. & S. 380; 1 L. J. C. P. 85; 131 E. R. 391.

3. Michaelmas—September 29—Effect of custom on presumption.]—The custom of the country cannot be set up against the legal presumption that Michaelmas means any other day than Sept. 29 (*ERLE, C.J.*).—*HOGG v. NORRIS & BERRINGTON* (1860), 2 F. & F. 246, N. P.

Notice to quit—Tenancy commencing on feast day—Whether old style or new.]—See *LANDLORD & TENANT*, Vol. XXXI., p. 441, Nos. 5871–5880.

Judicial notice of time.]—See *EVIDENCE*, Vol. XXII., p. 147, Nos. 1237–1252.

SECT. 2.—YEAR.

SUB-SECT. 1.—IN GENERAL.

See *Calendar (New Style) Act, 1750* (c. 23); *Calendar Act, 1751* (c. 30); *Supreme Court of Judicature Consolidation Act, 1925* (c. 49), ss. 223, 226, 227.

4. Commencement of year—Mayor's Court—November.]—*ASHFIELD'S CASE* (1623), 2 Roll. Rep. 380; 81 E. R. 864.

5. ——— Sheriff's Court—October.]—*ASHFIELD'S CASE* (1623), 2 Roll. Rep. 380; 81 E. R. 864.

SUB-SECT. 2.—MEANING OF YEAR.

6 Year's service—Whitsuntide to Whitsuntide.]—*R. v. NEWSTEAD (INHABITANTS)* (1770), Burr. S. C. 669.

*Annotations:—*Consd. *R. v. Hanwood* (1780), 2 Doug. K. B. 439. *Distd. R. v. Bow* (1800), 8 Term Rep. 445; *R. v. Standon Massey* (1809), 10 East, 576.

7. ——— Time fixed by annual fair—Fair held day after Michaelmas—Michaelmas falling on Saturday.]—A statute fair being held yearly on the day after old Michaelmas, except when old Michaelmas falls on a Saturday; & then the fair being held on the Monday:—*Held: a hiring from such Monday till old Michaelmas day following is not a yearly hiring under which a settlement can be obtained.*—*R. v. STANDON MASSEY (INHABITANTS)* (1809), 10 East, 576; 103 E. R. 894.

8. ——— Specified dates not completing whole year—Service for three hundred & sixty-five days—Year of service being Leap Year.]—A hiring on Oct. 13, 1807, to serve till Oct. 11, following, & service until that day, was held not to confer a settlement, although the year 1808 was leap year.—*R. v. WORMINGHALL (INHABITANTS)* (1817), 0 M. & S. 350; 105 E. R. 1274.

9. ——— ——— ———.]—Where, upon a yearly hiring from May 13, the following May 12 is excluded from the service by a dissolution of the contract, no settlement is gained, although the service continue three hundred & sixty-five days, by reason of its being leap year.

PART I. SECT. 2, SUB-SECT. 2.

b. Municipal year.]—The municipal year, under 12 Vict. c. 81, begins on Jan. 1, & ends on Dec. 31, & is not to be reckoned from the day appointed for the municipal elections of one year to the same day of the next year.—*MELLISH v. BRANTFORD TOWN COUNCIL* (1852), 1 C. P. 35.—CAN.

c. In Public School Act, s. 81 (3).]—The above sect. provides that bye-laws passed under the said sect. for altering, etc., school sections, shall not J.—VOL. XLII.

be passed later than May 1 in the year, & shall not take effect before Dec. 25 next thereafter:—*Held: the word "year" as used therein means the calendar year commencing Jan. 1 & ending Dec. 31, & a bye-law altering certain school sections passed on Sept. 25, was invalid.*—*Re ASPHODEL TOWNSHIP SCHOOL SECTION No. 5 (TRUSTEES) & HUMPHRIES* (1894), 24 O. R. 682.—CAN.

d. In Liquor License Act, s. 20.]—The words "in any year" in the above

When a leap year occurs, a year must be understood to mean three hundred & sixty-six days (*LORD TENTERDEN, C.J.*).—*R. v. ROXLEY (INHABITANTS)* (1829), 5 Man. & Ry. K. B. 40; 2 Man. & Ry. M. C. 554.

10. Leap year—Means three hundred & sixty-six days.]—*R. v. ROXLEY (INHABITANTS)*, No. 9, ante.

11. Theatrical engagement for number of years—Payment during theatrical season—Usage of profession.]—By a written contract, pltf. agreed to perform at deft.'s theatre, & deft. agreed to engage her for three years, & pay her a salary of £5, £6, & £7 per week in those years respectively:—*Held: parol evidence was admissible to show that, according to the uniform usage of the theatrical profession, pltf. was to be paid only during the theatrical season, i.e. during the time when the theatre was open for performance, in each of those years.*—*GRANT v. MADDOX* (1846), 15 M. & W. 737; 16 L. J. Ex. 227; 7 L. T. O. S. 187; 153 E. R. 1048.

*Annotations:—*Consd. *Myers v. Sarl* (1860), 3 E. & E. 306. *Refd. Simpson v. Margitson* (1847), 11 Q. B. 23; *Sotilichos v. Kemp* (1848), 18 L. J. Ex. 36; *Bruner v. Moore*, [1904] 1 Ch. 305. *Mentd. Harmer v. Cornelius* (1858), 4 Jur. N. S. 1110; *Abbott v. Bates* (1875), 45 L. J. Q. B. 117; *Clayton-Greene v. De Courville* (1920), 36 T. L. R. 790.

12. Year in statutes—Three hundred & sixty-five days.]—(1) The time to collate within six months shall be reckoned half a year or a hundred & eight-two days, & not six months of twenty-eight days each; for where a statute speaks of years, they shall be taken at three hundred & sixty-five days; but where it mentions months, they shall be intended lunar months of twenty-eight days each.

(2) There is a great difference in our ordinary speech, between the singular number, as a twelve-month, includes all the year, according to the calendar, but twelve months shall be reckoned according to twenty-eight days to each month.—*CATESBY'S CASE* (1607), 6 Co. Rep. 61 b; 77 E. R. 346; *sub nom. PETERBOROUGH (BP.) v. CATESBY*, Cro. Jac. 166; *sub nom. BAKER & PETERBOROUGH (BP.) v. CATESBY*, Yelv. 100; *sub nom. ANON.*, Jenk. 282; *affg. S. C. sub nom. CATESBY v. PETERBOROUGH (BP.) & BAKER*, Cro. Jac. 141.

*Annotations:—*As to (1) *Consd. Bruner v. Moore*, [1904] 1 Ch. 305. *Refd. Thorneaton v. Savill* (1622), Palm. 306; *Cornwallis v. Hood* (1665), Cart. 33. As to (2) *Refd. Crooke v. M'Tavish* (1823), 1 Bing. 307.

Year of office—Re-election of mayor.] See *ELECTIONS*, Vol. XX., p. 135, No. 1087.

Bequest of year's wages.]—See *WILLS*.

Apportionment of directors' fees—Fixed sum "per annum."]—See *COMPANIES*, Vol. IX., pp. 462, 463, Nos. 2999–3005.

Annual meeting of company.]—See *COMPANIES*, Vol. IX., 563, p. Nos. 3732, 3733.

Residence of clergy.]—See *ECCLESIASTICAL LAW*, Vol. XIX., pp. 410, 423, 424, Nos. 2451, 2507, 2598, 2601.

Financial year—Public revenue.]—See *Public*

sect. mean "calendar year," & not "licence year."—*Re GOULDEN & OTTAWA CORPN.* (1897), 28 O. R. 387.—CAN.

e. ———.]—*Re HASSARD & TORONTO CORPN.* (1908), 16 O. L. R. 500; 12 O. W. R. 50.—CAN.

f. "This year"—Means current calendar year.]—*REEVES & CO. v. OZIAS (Alta.)* (1910), 15 W. L. R. 641.—CAN.

g. "Current year."]—A trust directed his estate to be conveyed to a

Sect. 2.—Year: Sub-sect. 2. Sect. 3: Sub-sect. 1, A., B. & C.]

Revenue & Consolidated Fund Charges Act, 1854 (c. 94), s. 2; Interpretation Act, 1889 (c. 63), s. 22.

— **Local revenue.**—*See* Local Government Act, 1888 (c. 41), s. 73.

— **Income tax.**—*See* Taxes Management Act, 1880 (c. 19), s. 48.

— **Savings Bank year.**—*See* Government Annuities Act, 1882 (c. 51), s. 14.

— **School year.**—*See* Education Act, 1921 (c. 51), s. 170 (7).

SECT. 3.—MONTH.

SUB-SECT. 1.—MEANING OF MONTH.

A. General Rules.

13. *Primâ facie* lunar month.—Where, by deed of arbn., dated June 1, the arbitrators were to make their award on or before Oct. 1, with power, in case they should not agree in making their award within the time, to appoint an umpire, & his award to be binding, so as it be made within six months after the date of his appointment, & the arbitrators appointed an umpire within the time allowed to them, who made his umpirage within six calendar, but not within six lunar months of his appointment:—*Held*: the umpirage was ill-made.

There is nothing *ultra* the expression itself to explain the meaning of the parties; in which respect the case differs from *Lang v. Gale*, No. 60, *post*, & therefore the six months must be taken as lunar (*per* CUR.).—*Re* SWINFORD (1817), 6 M. & S. 226; 105 E. R. 1227.

14. —.]—*Webb v. Fairman*, No. 232, *post*.

15. —.]—In common law, the word "month" means four weeks, but in the ecclesiastical cts., it means calendar month (KNIGHT BRUCE, V.-C.).—*Bluck v. Rackham* (1846), as reported in 5 Moo. P. C. C. 305; 13 E. R. 508.

Annotation:—*Refd.* Bruner v. Moore, [1904] 1 Ch. 305.

16. —.]—"Month" in all contracts, except there is some evidence to show that "calendar month" is meant, means "lunar" month, except in mercantile transactions in the city of London, where "month" means "calendar month." Therefore, where an artist agreed to engrave a copy of a picture in twenty-one months from the date of its receipt by him, having it in his possession at intervals as might be agreed upon for fourteen months for that purpose:—*Held*: "months" in this contract meant "lunar months," in the absence of evidence to the contrary, & such a work was not a mercantile transaction to bring it within the custom in the City of London, to construe the word "month" to mean "calendar month" in mercantile transactions.—*Turner v. Barlow* (1863), 3 F. & F. 946, N. P.

Annotation:—*Refd.* Bruner v. Moore, [1904] 1 Ch. 305.

17. —.]—In every contract, not being a contract relating to a mercantile transaction in the City of London, the word "month" *primâ facie* means lunar month, but the context or the surrounding circumstances may show that the word was not used to denote a lunar month, & it may then be construed as meaning a calendar month.—

beneficiary at a period of one year after the current year in which the trustor should die, & appointed the rents of the said two years to be applied in a particular manner:—*Held*: the words "current year" meant the year from Jan. 1, to Dec. 31, & not the agricultural year, with reference to

which the rents were paid.—*Williamson v. Hay* (1855), 17 Dunl. (Ct. of Sess.) 960; 27 Sc. Jur. 488.—SCOT.

PART I. SECT. 3, SUB-SECT. 1.—A.

h. Calendar month.—The word "month" means by the law of Scot-

HELISHAM-JONES v. HENNEN & Co. (1914), 81 L. J. Ch. 569; 112 L. T. 281; [1915] H. B. R. 167.

18. —.]—"Month" in law is, *primâ facie*, a lunar month or twenty-eight days, unless otherwise expressed. But, in mtge. transactions, a month means a calendar month.

By a mtge. dated Mar. 9, 1917, defts., as mtgors., conveyed certain lands in Cornwall containing about 500 acres, with the mines & minerals thereunder, to pltf. as mtgee. to secure £5,000 & interest at 8 per cent. The mtge. contained a provision that if interest were paid on every half-yearly day on which it was payable until Mar. 9, 1923, or within "twenty-eight days" after each such day, the mtgee. would not call it in, "provided also that in case a co. shall be formed with limited liability within six months of the declaration of peace, & which co. shall acquire the said premises," then the mtgee. would accept first mtge. debentures of the said co. for the £5,000 to be in full satisfaction & discharge of the principal moneys secured by the mtge. No interest on the mtge. had been paid since Mar. 1922. Within six calendar months of the Declaration of Peace, but some days after the expiration of six lunar months, a co. with limited liability was formed by defts. with a memorandum & articles duly registered & a capital of £10,000, divided into 100,000 shares of 2s. each, & defts. agreed to sell to the new co. the premises comprised in the mtge. of Mar. 9, 1917. Some three & a half years before the formation of this co. the remises & mines comprised in the mtge. had been entirely abandoned, certain of the plant & machinery sold, & the shafts filled up. Only £10 12s. of the capital of the co. had been paid up, & there was no ostensible business to be carried on. Pltf. claimed judgment for £5,000 an account, & in default of payment foreclosure. The defence was that there had been a compliance with the proviso in both respects:—*Held*: the transaction being one of mtge. was excepted from the rule at common law that "month" *primâ facie* meant lunar month, & further, apart from its being an exception to the rule, there was sufficient context in the mtge. deed to show that the six months referred to in the proviso for redemption meant six calendar months.—*Schiller v. Petersen & Co.*, [1924] 1 Ch. 394; 93 L. J. Ch. 386; 130 L. T. 810; 40 T. L. R. 268; 68 Sol. Jo. 340, C. A.

Annotation:—*Refd.* Phipps v. Rogers, [1924] 2 K. B. 45.

19. —.]—*Phipps (P.) & Co. v. Rogers*, No. 43, *post*.

— **Meaning in particular transactions.**—*See* Sub-sect. 1, C., *post*.

20. Intention of parties to be considered.—*Lang v. Gale*, No. 60, *post*.

21. —.]—The meaning of the word "month" must depend on the intention of the parties (*per* CUR.).—*Cockell v. Gray* (1822), 3 Brod. & Bing. 186; 6 Moore, C. P. 483; 129 E. R. 1254.

22. Admission of secondary meaning — Surrounding circumstances.—*Bruner v. Moore*, No. 31, *post*.

23. — —.]—*Helisham-Jones v. Hennen & Co.*, No. 17, *ante*.

24. — —.]—*Erith Engineering Co., Ltd. v. Sanford Riley Stoker Co. & Babcock & Wilcox, Ltd.*, No. 57, *post*.

land, a calendar not a lunar month.—*Smith v. Robertson* (1826), 4 Sh. (Ct. of Sess.) 442; 1 Fac. Coll. 363.—SCOT.

k. —.]—The presumption of law is that when a month is spoken of a calendar month is meant.—*Ismail v. Richards* (1910), 20 C. T. R. 529.—S. AF.

25. ———.]—PHIPPS (P.) & Co. v. ROGERS, No. 43, *post*.

26. ——— Question for judge.] — (1) "Months" denote at law lunar months, unless there is admissible evidence for an intention in the parties using the word to denote calendar months.

(2) It is a question for the judge whether the context or the surrounding circumstances at the time the instrument was made show that calendar months were intended; but evidence that by the usage of a particular trade, business, or place, calendar months were intended, is for the jury.

(3) In an action by an auctioneer on a contract for payment of commission upon the sale of an estate, if the sale should be within two months after an auction:—*Held*: evidence of the conduct of the parties to the contract would not alone withdraw the construction of the word "months" from the judge; but evidence of the word "months" meaning in the trade of auctioneers calendar months, was to be left to the jury.—SIMPSON v. MARGITSON (1847), 11 Q. B. 23; 17 L. J. Q. B. 81; 12 Jur. 155; 116 E. R. 383.

Annotations:—As to (1) *Refd.* Marsh v. Higgins (1850), 8 C. B. 551; Hutton v. Brown (1881), 45 L. T. 343. As to (2) *Refd.* Bruner v. Moore, [1904] 1 Ch. 305; Schiller v. Petersen (1924), 130 L. T. 810. *Generally, Mentd.* Yangtze Insee. Assocn. v. Indemnity Mutual Marine Assocn., [1908] 2 K. B. 504.

27. ——— Conduct making one construction inequitable.]—BRUNER v. MOORE, No. 31, *post*.

28. ——— Belief or subsequent conduct of parties.]—BRUNER v. MOORE, No. 31, *post*.

29. ——— Terms of contract.]—HELISHAM-JONES v. HENNEN & Co., No. 17, *ante*.

30. Distinction between "a twelvemonth" & "twelve months."]—CATESBY'S CASE, No. 12, *ante*.

B. Effect of Custom and Usage.

31. General rule.]—In legal documents the primary meaning of month is lunar month. There is no general exception making it mean calendar month in commercial documents. It can only bear that meaning in cases where, according to the ordinary rules of construction of documents, a secondary meaning can be admitted. The belief or subsequent conduct of the parties cannot affect the construction, but an agreement to extend the time may be inferred from conduct which would make it inequitable to insist on the limit to lunar months.

In the construction of a document the meaning of "month" is lunar month except where a contrary custom of a trade or place be proved or a contrary intention appears either from the document to be construed or from surrounding contemporaneous circumstances.—BRUNER v. MOORE, [1904] 1 Ch. 305; 73 L. J. Ch. 377; 89 L. T. 738; 52 W. R. 295; 20 T. L. R. 125; 48 Sol. Jo. 131.

Annotations:—*Consd.* Schiller v. Petersen, [1924] 1 Ch. 394. *Refd.* Morrell v. Studd & Millington, [1913] 2 Ch. 648; Erith Engineering Co. v. Sanford Riley Stoker Co. & Babcock & Wilcox (1920), 37 R. P. C. 217; Phipps v. Rogers, [1925] 1 K. B. 14. *Mentd.* Hartley v. Hymans, [1920] 3 K. B. 475.

PART I. SECT. 3, SUB-SECT. 1.—C.

41 i. Commercial matters.]—By the arts. of assocn. of a co., Cos. Act, 1863, Sched. 1, Table A, was excluded, but many of the regulations were nearly co-incident with those contained in Table A. By the arts. a clear month's notice of a call was necessary. The word "month" was used in other articles:—*Held*: considering the circumstances, the word "month" with regard to the validity of a call, must be taken to mean a calendar month in

accordance with Acts Shortening Act, 1867, s. 11.—BROADWATER TIN MINING Co. v. OLIVER (1874), 4 Q. S. C. R. 91.—AUS.

41 ii. ———.]—"Month" in a document between parties:—*Held*: lunar & not calendar month.—WALLACE v. SCHMIDT (1883), 17 S. A. L. R. 20.—AUS.

41 iii. ———.]—*Re* GERHARD (No. 2) (1901), 27 V. L. R. 484.—AUS.

41 iv. ———.]—A policy of insurance is a mercantile instrument: therefore

32. Whether lunar or calendar—Stock Exchange.]—In contracts for stock the computation must be by lunar months.—JOCELYN v. HAWKINS (1721), 1 Stra. 446; 93 E. R. 626.

33. ———.]—Change-alley computation is to be taken by calendar months.—TITUS v. PRESTON (LADY) (1725), 1 Stra. 652; 93 E. R. 760.

34. ——— Freight of ship by month.]—Where a ship is freighted by a month, the months are calendar not lunar ones.—JOLLY v. YOUNG (1794), 1 Esp. 185; 170 E. R. 323.

Annotations:—*Refd.* Simpson v. Margitson (1847), 11 Q. B. 23; Bruner v. Moore, [1904] 1 Ch. 305.

35. ——— City of London.]—TURNER v. BARLOW, No. 16, *ante*.

36. ———.]—HELISHAM-JONES v. HENNEN & Co., No. 17, *ante*.

37. ——— Notice to domestic servant.]—PHIPPS (P.) & Co. v. ROGERS, No. 43, *post*.

38. Question for the jury.]—SIMPSON v. MARGITSON, No. 26, *ante*.

C. Particular Instances.

See Interpretation Act, 1889 (c. 62), s. 3; Law of Property Act, 1925 (c. 20), s. 61, R. S. C. Ord. 61, r. 1.

39. Auctioneers.]—SIMPSON v. MARGITSON, No. 26, *ante*.

40. Charter regulating election of mayor.]—If a charter appoint the election of the mayor to be the next day after a month from the prescriptive day it means a lunar month after such day.—R. v. MORGAN (1740), 7 Mod. Rep. 322; 87 E. R. 1267.

Charterparty.]—*See* SHIPPING, Vol. XLI., p. 357, No. 2060–2061.

41. Commercial matters.]—In legal matters "a month" means a lunar month; but in commercial matters "a month" always means a calendar month.—HART v. MIDDLETON (1845), 2 Car. & Kir. 9, N. P.

Annotation:—*Refd.* Phipps v. Rogers, [1924] 2 K. B. 45.

42. ———.]—BRUNER v. MOORE, No. 31, *ante*.

43. ———.]—A written agreement of tenancy of a public-house contained the clause: "Either party shall be at liberty to determine the tenancy hereby created upon giving to the other three months' previous notice in writing of his or their intention so to do expiring on any one of the days appointed as special transfer sessions by the justices of the district in which the said premises are situate." On Oct. 12, 1923, the landlords served on the tenant a notice to quit in these terms: "We hereby give you notice to quit & deliver up to us . . . on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof all that," etc., naming the demised premises.

The justices of the district at the annual general meeting in Feb. 1923, had fixed Jan. 8, 1924, as a date of special transfer sessions. At the annual general meeting in Feb. 1924, Apr. 8, 1924, was fixed for special transfer sessions. If the words "three months" in the tenancy agreement meant lunar months, the earliest day on which the tenancy

the terms "months" used therein, limiting the time for bringing an action for a loss, means calendar months.—POMARES v. PROVINCIAL INSURANCE Co. (1873), N. B. Dig. 432.—CAN.

41 v. ———.]—"Month" in an insurance policy in the form here in question, with provisions for payment of semi-annual premiums on named days of specific calendar months, means a calendar month.—MANUFACTURERS LIFE INSURANCE Co. v. GORDON (1892), 20 A. R. 309.—CAN.

Sect. 3.—Month: Sub-sect. 1, C.; sub-sect. 2.]

could be terminated by a valid notice to quit given on Oct. 12, 1923, would be the earlier day fixed for the special transfer sessions—namely Jan. 8, 1924; but if the words “three months” meant three calendar months, Apr. 8, 1924, would be the earliest day. The landlords, notwithstanding that they had supplied the tenant with liquors after Jan. 8 in the belief that he was entitled to three calendar months’ notice to quit, brought an action for possession of the premises, alleging that the tenancy had been determined by a valid notice to quit expiring on Jan. 8:—*Held*: the expression “three months” in the tenancy agreement meant three lunar months.

As to the meaning of “month.” There is no doubt of the common law rule that *primâ facie* month means lunar month. It is stated in Coke & Blackstone; a large number of authorities for it are referred to in *Norton on Deeds*. A recent instance of its application is found in the judgment of FARWELL, J., in *Bruner v. Moore*, No. 31, *ante*. There are statutory exceptions, exceptions in the case of ecclesiastical documents, exceptions by custom mercantile, or otherwise, as in the case of notice to domestic servants. The relation of landlord & tenant has never been held to come within these exceptions. There may be an exception if the context or the surrounding circumstances at the time of making the contract show a contrary intention (SCRUTTON, L.J.).—*PHIPPS (P.) & Co. v. ROGERS*, [1925] 1 K. B. 11; 93 L. J. K. B. 1009; 132 L. T. 240; 89 J. P. 1; 40 T. L. R. 849; 69 Sol. Jo. 841, C. A.

44. Contract of marriage—Condition as to truth of issue — Within twelve months.]—*YELPE v. LAWRENCE* (1674), 3 Keb. 349, 355; 84 E. R. 759, 763.

45. Covenants to pay money.]—On a covenant to pay such a sum of money “within one month next following” the month shall be reckoned a lunar month of twenty-eight days, & not a calendar month.—*BARKSDALE v. MORGAN* (1693), 4 Mod. Rep. 185; 87 E. R. 338.

46. —.]—*NICHOLS v. SWORDPAINTER* (1732), 2 Barn. K. B. 163; 94 E. R. 123.

47. —.]—*Semble*: on a covenant to pay money at the end of six months, it will be understood to mean calendar, not lunar, months.—*DYKE v. SWEETING* (1745), Willes, 585; 125 E. R. 1333.

Annotations:—*Distd.* *Simpson v. Margitson* (1847), 11 Q. B. 23. *Consd.* *Schiller v. Petersen*, [1924] 1 Ch. 394.

Decrees & Orders.]—*See* R. S. C., Ord. 64, r. 1.

County Court Order.]—*See* COUNTY COURTS, Vol. XIII., p. 510, No. 598.

48. Ecclesiastical matters.]—*CATESBY’S CASE*, No. 12, *ante*.

49. —.]—The word months in Acts of Parliament means lunar, except in the case of *Tempus*

52 i. Legal documents.]—The month required by 2 Geo. 2, c. 23, for the delivery of an attorney’s bill before the issuing of process, is a lunar & not a calendar month, & the day of the service of the bill is included.—*BERRY v. ANDRUSS* (1835), 3 O. S. 645.—*CAN.*

52 ii. —.]—The six months after the service of the bill within which an order *pro confesso* may be obtained *et p.*, are six calendar months.—*BOULTON v. MCNAUGHTON* (1863), 1 Ch. Ch. 216.—*CAN.*

52 iii. —.]—*Re* PORTAGE LA PRAIRIE MUNICIPALITY, *SHAW v. PORTAGE LA PRAIRIE MUNICIPALITY* (1910), 20 Man. L. R. 769; 15 W. L. R. 718.—*CAN.*

52 iv. —.]—The six months for redemption given to the tenant, after the execution of the *habere* by 4 Geo. 1, c. 5, are calendar months; construing that statute by 11 Anne., c. 2, in *pari materia*.—*DEVEREUX v. BRADSTREET* (1784), Wallis by Lyne 338.—*IR.*

52 v. —.]—The six months given to tenants to redeem under Statutes of Ejectment for non-payment of rent, are calendar months; & the day on which the *habere* is executed, is not to be included in the calculation.—*DOWLING v. FOXALL* (1809), 1 Ball & B. 193.—*IR.*

52 vi. —.]—The nine months allowed by the stat. 8, Geo. 1, c. 2, s. 4, to a mtgee. of an evicted lease to redeem, are calendar months.—*BID-DULPH v. ST. JOHN & KEEFFE* (1805),

Semestre with regard to lapse of livings, & the other instance of the six months allowed in respect to prohibitions.—*FRANCO v. ALVARES* (1746), 3 Atk. 342; 26 E. R. 998, L. C.

Annotations:—*Consd.* *Schiller v. Petersen*, [1924] 1 Ch. 394. *Mentd.* *Tollner v. Marriott* (1830), 4 Sim. 19; *Re Hartley*, *Stedman v. Dunster* (1887), 34 Ch. D. 742.

50. —.]—*BLUCK v. RACKHAM*, No. 15, *ante*.

51. —.]—*PHIPPS (P.) & Co. v. ROGERS*, No. 43, *ante*.

Hire of chattels.]—*See* BAILMENT, Vol. III., p. 92, No. 240.

52. Legal documents.]—*HART v. MIDDLETON*, No. 41, *ante*.

53. —.]—*BRUNER v. MOORE*, No. 31, *ante*.

54. Mortgage.]—When a decree of foreclosure is made the time for redeeming must be computed according to calendar months & not according to lunar ones.—*ANON.* (1740), Barn. Ch. 324; 2 Eq. Cas. Abr. 605; 27 E. R. 664, L. C.

Annotation:—*Consd.* *Schiller v. Petersen*, [1924] 1 Ch. 394.

55. —.]—*SCHILLER v. PETERSEN & Co.*, No. 18, *ante*.

56. Notice — Determination of agency.]—By a contract dated May 8, 1905, defts. agreed with a partnership firm that the firm should become deft.’s agents in a qualified sense, & that the benefit of the contract might be assigned by the firm to a limited co. to be formed to carry on the business of the firm on the memorandum & arts. of assocn. of the proposed co. being approved by defts. It was also by the contract agreed (*inter alia*) that the agreement thereby constituted between the parties should continue until Dec. 31, 1911, & should continue thereafter subject to determination by twelve months’ previous notice in writing by either side. On Nov. 2, 1910, defts. gave to the partnership firm written notice to determine the contract of agency on Dec. 31, 1911, which notice the firm refused to accept. By a second contract dated Dec. 5, 1910, & made between the firm, except one of the partners, who had previously died, & defts., & supplemental to the first contract, defts. agreed for a further period of seven years from the termination of the first contract to supply the firm with pianos on certain terms, & the parties agreed that the rights & liabilities under both contracts might be transferred by the firm to a limited co. formed to carry on the firm’s business, & stated that they were at the time of its execution unable to agree as to the date upon which the first contract determined, & that each of them reserved the right to have such date ascertained in the usual way, & the contract was entered into without prejudice. The first contract was not otherwise varied. On Jan. 24, 1911, the firm was formed into a limited co., pl’ts. in the action, & by an agreement of Jan. 28, 1911, made between the members of the partnership firm & pl’ts., the members agreed to sell to pl’ts. (*inter alia*) the full benefit of both contracts. By arrangement

2 Sch. & Lef. 521.—*IR.*

52 vii. —.]—*TULLOCH v. WEL-LINGTON HARBOUR BOARD* (1903), 23 N. Z. L. R. 20.—*N.Z.*

52 viii. —.]—The word “month” in any contract or legal instrument meaning lunar month.—*LIDDLE v. ROLLESTON*, [1919] N. Z. L. R. 408.—*N.Z.*

1. Acts of Parliament.]—13 & 14 Vict. c. 21, s. 4, is retrospective & the word “month” is therefore to be deemed & taken to mean a calendar month in all Acts of Parliament of whatever date, unless words be added showing lunar month to be intended.—*FARQUHARSON v. WHYTE* (1886), 13 R. (Ct. of Sess.) (J.) 29; 23 Sc. L. R. 360.—*SCOT.*

between the parties an originating summons was taken out for the purpose of obtaining the decision of the ct. as to the validity of the notice given by defts. & on the construction in the first contract of the notice clause:—*Held*: “months” meant calendar months.—*Re AN INDENTURE, ETC., MARSHALL (SIR HERBERT) & SONS, LTD. v. BRINSMEAD (JOHN) & SONS, LTD. (1912), 106 L. T. 460.*

Annotation:—*Mentd. Re Lancashire & Yorkshire Bank's Lease, Davis v. Lancashire & Yorkshire Bank, [1914] 1 Ch. 522.*

57. — Determination of right to use patent.]—On Oct. 9, 1914, a full, sole & exclusive licence was granted under a patent during the term & any extended term thereof subject to the following provision for revocation: “Each party to this agreement shall be at liberty upon giving notice in writing before June 30, 1917, to the other party to determine these presents upon Dec. 31, 1917, & these presents shall thereupon cease & determine. Either party shall further be entitled at any time after the said June 30, 1917, to determine these presents upon giving six months' notice in writing of its intention so to do.” The licensors by letter dated Dec. 24, 1919, posted in the United States, purported to give notice to determine the licence. This letter was received by the licencees on Jan. 6, 1920. The licencees brought an action for a declaration (*inter alia*) that this purported notice of determination of the licence was wholly void & inoperative & that the licence had not been determined thereby or at all & remained binding on first-named defts. Upon delivery of the statement of claim & before delivery of the defences defts. obtained an order under R. S. C., Ord. 34, r. 2, to the effect that the question of law whether the said licence was determined by the said letter & if so, on what date, should be set down to be argued before the ct. & that all other proceedings in the action should be stayed until after the determination of such question. When the case came on for argument the points argued were, first, whether the words “six months” in the clause of the licence quoted above meant lunar months or calendar months, & secondly, whether, on the construction of the letter, it was a notice to determine the licence on July 1, 1920:—*Held*: having regard to the context “six months” meant six calendar months & the letter was a notice to determine the licence on July 1, 1920, & was not a good notice.—*ERITH ENGINEERING CO., LTD. v. SANFORD RILEY STOKER CO. & BABCOCK & WILCOX, LTD. (1920), 37 R. P. C. 217, C. A.*

Annotation:—*Refd. Schiller v. Petersen, [1924] 1 Ch. 394.*

58. — Notice to quit.]—*PHIPPS (P.) & Co. v. ROGERS, No. 43, ante.*

—*See LANDLORD & TENANT, Vol. XXXI., pp. 437, 438, 448, Nos. 5832, 5833, 5947. Pleading.]—See R. S. C., Ord. 64.*

59. Sale of goods.]—*WEBB v. FAIRMANER, No 232, post.*

60. Sale of land.]—The word month may mean lunar or calendar month, according to the intention of the contracting parties: therefore where upon a sale of land on Jan. 24, it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, & that a draft of the conveyance should be delivered within three months from the said date, to be re-delivered within four months from said date, & the purchase to be completed on June 24 making a period of precisely five calendar months from the date of the sale & conditions, the word months was held

to mean calendar & not lunar months, by reference to the whole period fixed for the completion of the contract.—*LANG v. GALE (1813), 1 M. & S. 111; 105 E. R. 42.*

Annotations.—*Distd. Re Swinford & Horn (1817), 6 M. & S. 226. Consd. Cockell v. Gray (1822), 6 Moore, C. P. 483; Erith Engineering Co. v. Sanford Riley Stoker Co. & Babcock & Wilcox (1920), 37 R. P. C. 217. Refd. Simpson v. Margitson (1847), 11 Q. B. 23; Bruner v. Moore, [1904] 1 Ch. 305; Helsham-Jones v. Hennen (1911), 84 L. J. Ch. 569; Schiller v. Petersen, [1924] 1 Ch. 394.*

61. —.]—Where parties contract that the purchase of lands shall be completed within so many months, calendar & not lunar months are intended.—*HIPWELL v. KNIGHT (1835), 1 Y. & C. Ex. 401; 4 L. J. Ex. Eq. 52; 160 E. R. 163.*

Annotation:—*Distd. Simpson v. Margitson (1847), 11 Q. B. 23.*

62. —.]—A. wrote to B. offering to buy land of B. at a certain price, specifying the date for completion, & that the purchase-money should be paid as to a part down & as to the residue within two years, “& to be secured to your satisfaction.” The offer further stated that for the space of a month B. was to be at liberty to accept the offer, & if not accepted conditionally or otherwise within that time the offer was to be considered as withdrawn. The offer was dated Sept., but omitted the day:—*Held*: in an action for specific performance, “month” meant “lunar month” & that the offer ran from the day on which the offer was in fact made.—*MORRELL v. STUDD & MILLINGTON, [1913] 2 Ch. 648; 83 L. J. Ch. 114; 109 L. T. 628*

Annotation:—*Mentd. Hartley v. Hymans, [1920] 3 K. B. 475.*

63. — Auctioneer's commission reduced if no sale within two months.]—*SIMPSON v. MARGITSON, No. 26, ante.*

Statutes.]—See Interpretation Act, 1889 (c. 62), s. 3.

Tenancy for months.]—See LANDLORD & TENANT, Vol. XXXI., p. 65, No. 2123.

64. Testamentary provisions — Payment of legacy.]—*SLANING'S CASE (1596), Poph. 102; 79 E. R. 1212.*

65. — Condition as to residence.]—*WALCOT v. BOTFIELD, No. 70, post.*

SUB-SECT. 2.—COMPUTATION OF CALENDAR MONTH.

66. From day on which computation commences —To day of corresponding number “in ensuing month.”]—The proper mode of computing a calendar month, where the computation commences in the course of a month, is, to reckon from the day on which such computation commences to the day of the corresponding number in the next ensuing month. Where, therefore, notice of action was required to be given, under Limitations of Actions & Costs Act, 1842 (c. 97), s. 4, “one calendar month at least” before the action was commenced, & the notice having been given on Apr. 28, the writ was issued on May 29, it was held that the notice was sufficient.—*FREEMAN v. READ (1863), 4 B. & S. 174; 2 New Rep. 320; 32 L. J. M. C. 226; 8 L. T. 458; 10 Jur. N. S. 149; 11 W. R. 802; 122 E. R. 425.*

Annotations:—*Refd. Quartermaine v. Selby (1889), 5 T. L. R. 223. Mentd. Dawson v. Willoughby (1864), 5 B. & S. 920; R. v. Rollett (1875), L. R. 10 Q. B. 469; Heath v. Weaverham Overseers, [1894] 2 Q. B. 108; R. v. Berger, [1894] 1 Q. B. 823; Ferrand v. Bingley U. C., [1903] 2 K. B. 445.*

67. — To day before corresponding number in ensuing month—Effect of no corresponding numerical day.]—A person sentenced to imprison-

Sect. 3.—Month: Sub-sect. 2. Sects. 4 & 5: Sub-sects. 1 & 2.]

ment for the space of one calendar month is entitled to be discharged on the day in the succeeding month immediately preceding the day corresponding to that from which his sentence takes effect. On Oct. 31 pltf. was sentenced to be imprisoned for one offence for one calendar month, & for a second offence for a period of fourteen days, commencing after the expiration of the calendar month. Pursuant to his sentence he was detained in custody until Dec. 14:—*Held*: the detention was lawful, for as the calendar month did not expire until Nov. 30, he was not entitled to be discharged from the second term of imprisonment, until the full period of fourteen days' computed from Dec. 1 had expired.—*MIGOTTI v. COLVILL* (1879), 4 C. P. D. 233; 48 L. J. M. C. 190; 40 L. T. 747; 43 J. P. 620; 27 W. R. 744; 14 Cox, C. C. 305, C. A.; *affg.* S. C. *sub nom.* *NIGOTTI v. COLVILLE*, 40 L. T. 522.

Annotations:—*Consd.* *Henderson v. Preston* (1888), 59 L. T. 334. *Refd.* *Quartermaine v. Selby* (1889), 5 T. L. R. 223.

Computation of time generally.]—See Part III., *post*.

SECT. 4.—WEEK.

68. Sunday to Sunday.]—If it had been from Sunday to Sunday it would have been within the time, being within one of those weeks which are the ordinary measure of time (WOOD, V.-C.).—*BAZALGETTE v. LOWE* (1855), 3 Eq. Rep. 491; 24 L. J. Ch. 368; 3 W. R. 356; *on appeal*, 24 L. J. Ch. 416; 25 L. T. O. S. 75; 3 W. R. 390, L. J.J.

For purpose of Shops Act.]—See Shops Act, 1912 (c. 3), s. 19 (1).

Week's notice.]—See LANDLORD & TENANT, Vol. XXXI., p. 438, Nos. 5840, 5841.

SECT. 5.—DAY.

SUB-SECT. 1.—MEANING OF DAY.

69. Day of conviction—May comprise several natural days.]—The Commission day of the assizes was the 19th. A prisoner in custody on a charge of felony assigned his goods to pltf. *bonâ fide*, & for value, on the 20th. He was tried & found guilty on the 24th. The record of his conviction, upon which no adjournments were entered, stated that he was convicted at the assizes held on the 19th:—*Held*: pltf. did not contradict the record by showing that the assignor was not, in fact, convicted till the 24th, for that the 19th, as used in the record, was a legal phrase for a period which might comprehend several natural days, & the ct. would take notice of a fraction of that period for the purpose of supporting the assignment.—*WHITAKER v. WISBEY* (1852), 12 C. B. 44; 21 L. J. C. P. 116; 19 L. T. O. S. 156; 16 J. P. 344; 16 Jur. 411; 6 Cox, C. C. 109; 138 E. R. 817.

Annotations:—*Refd.* *Preston v. Peeke* (1853), 31 L. T. O. S. R. v. *Roberts* (1873), L. R. ■ Q. B. 77.

PART I. SECT. 4.

m. Factories & Shops Act, 1896, s. 21—Meaning of employing for so many hours "in any one week"—"Working week."]—The word "week" in the above sect. in cases where employee's are engaged by the week, means from pay day to pay day—that is, a week of work—& does not mean the period from Sunday to Saturday.—*BISHOP v. HOOPER*, [1905] V. L. R. 220.—**AUS.**

n. Includes Sundays & holidays.]—Re ARMOUR & ONONDAGA TOWNSHIP (1907), 9 O. W. R. 833; 14 O. L. R.

606.—CAN.

o. —.]—Re DUNCAN & MIDLAND CORPN. (1908), 16 O. L. R. 132; 11 O. W. R. 2424.—**CAN.**

p. Publication of bye-law—"Three successive weeks."]—The publication of a proposed bye-law in a newspaper "each week for three successive weeks," as required by Consolidated Municipal Act, 1903, means a publication once in each of three successive periods of seven days, beginning on the first day of actual publication.—*Re RIOKEY & MARLBOROUGH TOWNSHIP CORPN.* (1907), 9 O. W. R. 563, 930;

14 O. L. R. 587.—CAN.

PART I. SECT. 5, SUB-SECT. 1.

q. Clear days.]—MASTERS v. PHINNEY (1859), 3 N. S. R. (2 Thom.) 429.—**CAN.**

*r. —.]—*A contract provided that "two days in each week pltf.'s land shall have the water from the N. spring":—*Held*: the words "two days" must be read in their ordinary popular signification to mean two days of twenty-four hours' each.—*DREYER v. LETTERSTEDT'S EXECUTORS* (1865), 5 S. 97.—**S. AF.**

70. Residence required for number of days—Whether residence for part of day sufficient—During period.]—Under directions in a will that the *cestuis que trust* should reside or keep up a suitable establishment at D., so as to keep it clean, neat, & well aired, & that the tenant in possession, who should be of full age, should reside at D. for the period of six months in each year, from Jan. 1 in one year to Jan. 1 in the next year, or in default should suffer a forfeiture; & that if he were a Member of Parliament, residence at D. for at least three months, including occasional residence during Parliament, & keeping up a suitable establishment, should be equivalent to the residence for six months in the year, before required:—*Held*: (1) a personal presence at D. was required for a period amounting in the aggregate to six lunar months in the year, subject to the proviso as to the tenant in possession being a Member of Parliament; (2) residence during any part of a day was sufficient to constitute residence for the day, & it was not essential that the residence should be for a consecutive period.—*WALCOT v. BOTFIELD* (1854), Kay, 534; 2 Eq. Rep. 758; 23 L. T. O. S. 127; 18 Jur. 570; 2 W. R. 393; 69 E. R. 226.

Annotations:—*As to* (1) *Consd.* *Re Wright, Mott v. Issott*, [1907] 1 Ch. 231. *Apld.* *Re Vivian, Vivian v. Swansea* (1920), 36 T. L. R. 222.

71. ——— At commencement.]—Two persons domiciled in England arrived in Scotland about 4 a.m. of July 1, 1870, remained there until July 21, & between 11 & 12 a.m. of that day contracted a marriage by declaration before a registrar:—*Held*: they had not lived in Scotland for twenty-one days next proceeding the marriage, & therefore it was invalid.—*LAWFORD v. DAVIES* (1878), 4 P. D. 61; 47 L. J. P. 38; 30 L. T. 111; 26 W. R. 424.

Annotations:—*Refd.* *Bonaparte v. Bonaparte*, [1892] P. 402. *Mentd.* *G. v. G.* (falsely called *K.*) (1908), 25 T. L. R. 328.

72. "Before evening"—Any time before sunset.]—The directors of a co. having passed a resolution forfeiting shares, pursuant to the arts. of assocn., gave notice that if payment of arrears of calls were made before the evening of May 10, 1871, they would consent to restore the shares so forfeited. A cheque was handed to the company on May 10; the person who brought it was directed to pay it into the co.'s bankers, & was furnished with an authority to them to receive it; he arrived a few minutes after banking hours, but it was duly paid in the next day:—*Held*: the evening of May 10 meant any time before sunset, & not the end of the usual banking hours.—*Re QUEBRADA CO., LTD., CLARKE'S CASE* (1873), 42 L. J. Ch. 277; *sub nom.* *Re NEW QUEBRADA CO., LTD., CLARKE'S CASE*, 27 L. T. 843; 21 W. R. 429.

73. Dally—Whether Sundays included.]—By the South Metropolitan Gas Co.'s special Acts of 1869, & 1876 provision was made for the public testing of the quality of the gas supplied by them to their customers. The mode of testing & the situation & number of the testing places, which

were to be provided by the co. & to be under the control of the Metropolitan Board of Works, whose powers subsequently became vested in plffs., the London County Council, were to be prescribed by gas referees appointed by the Board of Trade, & "daily" testings were to be made by gas examiners appointed by the Metropolitan Board.

Similar provisions were contained in the special Acts of the other metropolitan gas cos. By an Act passed in 1880, which was applicable to all the metropolitan gas cos., the provisions as to "daily" testings were substantially re-enacted by a sect. which provided that a gas examiner should, at each testing place, "make daily" such number of tests as the gas referees should prescribe. Other sects gave the Metropolitan Board, as "the controlling authority," the control & management of the testing places.

There was also a provision in the Act of 1869, which was to be read with the Act of 1880, defining "day" as twenty-four hours, beginning at 9 o'clock in the forenoon of one day & ending at 9 o'clock in the forenoon of the next. The practice under these Acts until 1902 had been to test on week days only:—*Held*: the words "daily" in the Act of 1880 must be construed literally, as including Sundays, & the previous practice under that & the earlier Acts was not sufficient to justify the ct. in departing from that literal construction; & accordingly, the gas examiners appointed by the London County Council were entitled to test on Sundays the gas supplied by the co.—*LONDON COUNTY COUNCIL v. SOUTH METROPOLITAN GAS CO.*, [1904] 1 Ch. 76; 73 L. J. Ch. 136; 89 L. T. 618; 68 J. P. 5; 52 W. R. 161; 20 T. L. R. 83; 48 Sol. Jo. 99; 2 L. G. R. 161, C. A.

Annotation:—*Consd. Salisbury & Fordingbridge Drainage District Board v. Southern Tanning Co. (1920), Ltd.*, [1927] 2 K. B. 566.

74. "Any working day"—Exclusion of Sundays & holidays.—In 1884 a local authority, the predecessors in title of defts., were empowered by a special Act to construct a reservoir, & for that purpose to divert a stream, which fed a watercourse that flowed for some distance across plff.'s lands & supplied a co., his lessees, with water for the purposes of their works. Sect. 8 of the Act provided that the local authority should permit "the owners, lessees, & occupiers" of the works to take compensation water along the watercourse not exceeding a specified quantity "during any working day," & imposed liability to damages on the local board if they failed to permit the due quantity of compensation water to flow into the watercourse. In 1890 the co. ceased to use their works & subsequently dismantled them & surrendered their lease to plff. Meanwhile the watercourse gradually fell into disuse & great disrepair, its banks became broken down in places, so that the water escaped & did not reach the site of the works; & in 1909 defts. diverted the stream & prevented water from flowing into the watercourse. In an action by plff. claiming a declaration of his right to the compensation water under the Act & an injunction to restrain defts. from diverting or interfering with the flow of water to the watercourse:—*Held*: "any working days"

meant the days of the week other than Sundays & holidays.—*HANBURY v. LLANFRECHFA UPPER URBAN DISTRICT COUNCIL* (1911), 75 J. P. 307; 9 L. G. R. 360.

75. Computation of demurrage—Carriage on railway—"Forty-eight hours."—In calculating the period of forty-eight hours the whole of each day, excluding Sunday but including the time after 1 p.m. on Saturday, was to be counted.—*LANCASHIRE & YORKSHIRE RY. CO. v. SWANN*, [1916] 1 K. B. 263; 85 L. J. K. B. 694; 114 L. T. 517; 32 T. L. R. 188; 60 Sol. Jo. 496.

—**Carriage by sea.**—*See, generally*, SHIPPING, Vol. XLI., pp. 566–576, Nos. 3910–3998.

Distress—Prohibited periods.—*See* DISTRESS, Vol. XVIII., pp. 310, 311, Nos. 455–463.

—**Sale after expiry of five whole days.**—*See* DISTRESS, Vol. XVIII., p. 351, Nos. 883–885.

Marine insurance policy—"For — days after arrival."—*See* INSURANCE, Vol. XXIX., p. 137, Nos. 903, 904.

"Clear days"—Implied by "at least."—*See* Part III., Sect. 3, sub-sect. 2, F., *post*.

Fractions of day.—*See* Part III., Sect. 6, *post*.

Days exclusive or inclusive.—*See* Part III., Sect. 2, *post*.

SUB-SECT. 2.—LAST DAY OF PERIOD.

76. Whole of last day allowed.—Deft. whose time for pleading expired on the 26th, on the 24th took out a summons for further time to plead, returnable on the 25th; this summons not being attended, another summons was taken out, returnable on the 26th, which having been dismissed on the afternoon of that day, plff. on the same day signed judgment:—*Held*: the judgment was irregular, deft. being entitled to the whole of the 26th to deliver his pleas.—*EVANS v. SENIOR* (1850), 4 Exch. 818; 19 L. J. Ex. 159; 14 L. T. O. S. 422.

77. ——Although the last time of payment of money by force of a condition, is a convenient time in which the money may be counted before sunset; yet if the tender be made to him who ought to receive the money, at the place specified, at any time of the day, & he refuse it, the condition is saved forever, & the mtgor., or obligor, etc., need not make a tender again before the last instant.—*WADE'S CASE* (1601), 5 Co. Rep. 114 a; 77 E. R. 232.

Annotations:—*Refd. Lancashire v. Kellingworth* (1700), 1 Ld. Raym. 686; *Startup v. Macdonald* (1843), 6 Man. & G. 593. *Mentd. Case of Mixed Money* (1605), 2 State Tr. 113; *A.-G. v. Lade* (1715), Park. 57; *Betterbee v. Davis* (1811), 3 Camp. 70; *Dean v. James* (1833), 4 B. & Ad. 546; *Isherwood v. Whitmore* (1843), 11 M. & W. 347; *Re Farley, Ex p. Danks* (1852), 1 W. R. 57.

78. — Unless act cannot be completed on last day.—A bond conditioned to be at such a place on such a day, to choose arbitrators, etc., is not performed by an attendance at the last instant.—*EDMUNDS v. MARKS* (1597), Cro. Eliz. 549; 78 E. R. 795.

—**Payment of rent.**—*See* LANDLORD & TENANT, Vol. XXXI., pp. 232, 233, Nos. 3718–3726.

—**Expiration of notice to quit.**—*See* LANDLORD & TENANT, Vol. XXXI., p. 544, No. 6889.

Whether included in computing period.—*See* Part III., *post*.

t. Ninety days & three months not equivalent terms.—*HALIFAX CORPN. v. CLUSEN* (1886), 18 N. S. R. (6 R. & G.) 521; 6 C. L. T. 542.—CAN.

a. Includes Sundays.—An agreement to pay for the rental of certain machinery at \$62 per day includes

Sundays in the absence of a contrary expression of intention.—*PERRY v. BRANDON* (1914), 26 O. W. R. 560; 7 O. W. N. 100; 32 O. L. R. 94.—CAN.

PART I. SECT. 5, SUB-SECT. 2.

76i. Whole of last day allowed.—

PROUDFOOT v. BUSH (1862), 12 C. P. 52.—CAN.

76ii. ——Where a note was made payable "in the month of Oct." Oct. 31, was deemed to be the day of payment.—*BEUKES v. VAN WYK* (1844), 2 Men. 282.—S. AF.

SECT. 6.—**HOUR.**

See Statutes (Definition of Time) Act, 1880 (c. 9); Summer Time Acts, 1922 (c. 22); 1925 (c. 64).

79. Afternoon—Noon till evening.]—What is afternoon? It may mean any time between noon & midnight but its ordinary meaning is from noon till evening (EARLE, J.).—*R. v. KNAPP* (1853), 2 E. & B. 447; 22 L. J. M. C. 139; 21 L. T. O. S. 138; 17 J. P. 599; 1 C. L. R. 443; 118 E. R. 834; *sub nom. R. v. BUCKINGHAMSHIRE JJ.*, 17 Jur. 530; 1 W. R. 385.

80. Whether Greenwich or local time meant—Sitting of court.]—The time appointed for the sitting of a ct. must be understood as the mean time at the place where the ct. sits, & not Greenwich time, unless it be so expressed.—*CURTIS v. MARCH* (1858), 3 H. & N. 866; 28 L. J. Ex. 36; 32 L. T. O. S. 149; 23 J. P. 663; 4 Jur. N. S. 1112.

Annotation:—Refd. Irwin v Grey (1867), L. R. 2 H. L. 20.

81. — Lighting up—Local Government Act, 1888 (c. 41).]—The expression “sunset” in Local Government Act, 1888 (c. 41), s. 85, is not an expression of time within Statutes (Definition of Time) Act, 1880 (c. 9), & a bicyclist is not compelled under Local Government Act, 1888 (c. 41), s. 85, to light his lamp an hour after sunset according to Greenwich mean time, but according to the time of sunset as it varies at different places in England.—*GORDON v. CANN* (1899), 68 L. J. Q. B. 434; 80 L. T. 20; 63 J. P. 324; 15 T. L. R. 165; 43 Sol. Jo. 225; 47 W. R. 269, D. C.

SECT. 7.—**TERMS AND SITTINGS OF PUBLIC BODIES.**

Law Courts.]—See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 223; R. S. C., Ord. 63; Statutory Rules & Orders, 1916, No. 604.

Judicial notice of sittings.]—See EVIDENCE, Vol. XXII., p. 143, Nos. 1190, 1191.

Part II.—**Sundays and Holidays.**SECT. 1.—**IN GENERAL.**

See Bank Holidays Act, 1871 (c. 17); Holidays Extension Act, 1875 (c. 13); Factory & Workshops Act, 1901 (c. 22), s. 156 (1); Shops Act, 1912 (c. 3), s. 19; Statutory Rules & Orders, 1916, Nos. 195, 414, 505; R. S. C., Ord. 63.

82. Saturday—Not holiday within exception clause.]—I cannot accept defts.’ view that Saturdays should be treated as holidays within the exception clause (KENNEDY, J.).—*AKT. INGLEWOOD v. MILLAR’S KARRI & JARRAH FORESTS, LTD.* (1903), 88 L. T. 559; 19 T. L. R. 405; 9 App. M. L. C. 411; 8 Com. Cas. 196.

83. Sunday—Whether dies non at common law.]—At common law Sunday is not a *dies non*.—*CHILD v. EDWARDS*, [1909] 2 K. B. 753; 78 L. J. K. B. 1061; 101 L. T. 422; 25 T. L. R. 706; 73 J. P. Jo. 337.

Observance of Sundays & holidays.]—See Sect. 2, *post*.

Computation of time when holidays intervene.]—See Part III., Sect. 4, *post*.

Computation of time when period ends on holiday.]—See Part III., Sect. 5, *post*.

Effect of holidays on computation of weekly earnings.]—See MASTER & SERVANT, Vol. XXXIV., p. 421, No. 3453.

In computation of demurrage.]—See SHIPPING, Vol. XLI., p. 575, Nos. 3985–3991.

SECT. 2.—**OBSERVANCE OF SUNDAYS AND HOLIDAYS.**SUB-SECT. 1.—**IN GENERAL.**

84. What acts permitted—General rule.]—*RAWLINS v. WEST DERBY OVERSEERS*, No. 134, *post*.

PART I. SECT. 6.

b. Time for holding sale—Mountain standard time stipulated by statute—Sale carried out at local time irregular.]—*GREAT WEST LIFE ASSURANCE CO. v. HILL* (1909), 2 Sask. L. R. 158.—CAN.

c. Sunset & sunrise.]—The times of sunset & sunrise are the times at which the sun sets & rises at the *locus* of the alleged offence, & not the times at which it sets & rises at Greenwich.—

MACKINNON v. NICOLSON, [1916] S. C. (J.) 6; 53 Sc. L. R. 269; [1916] 1 S. L. T. 115; 7 Adam, 713.—SCOT.

d. Notice of meeting.]—The trust deed of a co. stipulated that a notice calling an extraordinary meeting of shareholders should specify the place, the day & the hour of meeting:—*Held*: notice that such a meeting would be held on a certain date “immediately after the ordinary general meeting” convened for 12 o’clock on the same

day, was a sufficient compliance with the terms of the trust deed the word “hour” merely referring to the period of the day.—*Re WEMMER GOLD MINING CO., Ex p. ALBU* (1890), 6 H. C. 6.—S. AF.

PART II. SECT. 1.

e. Sittings of court.]—Where a ct. was by statute bound to sit on a certain day in each week unless Christmas Day, New Year’s Day, or

85. — Selling meat.]—Selling meat on a Sunday no offence at common law.—*R. v. BROTHERTON* (1724), 2 Stra. 702; 2 Sess. Cas. K. B. 224; 93 W. R. 794.

Annotations:—Refd. Smith v. Sparrow (1827), 4 Bing. 81; *Lilley v. Bennett* (1888), 5 T. L. R. 156.

Under Sunday Observance Act, 1677 (c. 7).]—See FOOD & DRUGS, Vol. XXV., p. 131, Nos. 514, 515.

Under bye-law.] See Sub-sect. 3, *post*.

86. — Sale of goods—Sale by private contract.]—A sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor, or his agent, is not void at common law, or by Sunday Observance Act, 1677 (c. 7).

To bring this case within Sunday Observance Act, 1677 (c. 7), we must pronounce that either D. or H. worked within their ordinary callings on the Sunday. But the sale of horses by private contract was not D.’s ordinary calling, nor was it H.’s, his calling was that of a horse auctioneer, & he was not within his ordinary calling in selling this horse by private contract (*MANSFIELD, C.J.*).—*DRURY v. DEFONTAINE* (1808), 1 Taunt. 131; 127 E. R. 781.

Annotations:—Dtd. Smith v. Sparrow (1827), 4 Bing. 81. *Apld. Begbie v. Levi* (1830), 1 Cr. & J. 180. *Refd. Bloxsome v. Williams* (1824), 3 B. & C. 232; *Fennell v. Ridler* (1826), 5 B. & C. 406.

Sale of intoxicating liquors.]—See INTOXICATING LIQUORS, Vol. XXX., pp. 72, 94–96, Nos. 572–575, 724, 730–733.

87. — Appointment of overseers.]—*R. v. BRIDGEWATER OVERSEERS* (1771), 1 Cowp. 139; 98 E. R. 1010; *sub nom. ANON.*, Lofft, 618.

Annotations:—Mentd. R. v. Great Marlow (1802), 2 East, 244; *Penney v. Slade* (1839), 1 Arn. 539.

88. — Enlistment of soldier.]—An enlistment, valid in other respects, is not invalid because made on a Sunday.—*WOLTON v. GAVIN* (1850), 16 Q. B. 48; 20 L. J. Q. B. 73; 15 Jur. 329; 117 E. R. 794; *sub nom.* *WALTON v. GAVIN*, 16 L. T. O. S. 300; 14 J. P. 722.

Annotations:—*Mentd.* *Wolton v. Freeze* (1851), 18 L. T. O. S. 158; *R. v. Roberts* (1878), 38 L. T. 690.

— Killing game.]—*See* *GAME*, Vol. XXV., p. 349, Nos. 11, 12.

— Legal proceedings.]—*See* Sub-sect. 4, *post*.

— Notice to quit.]—*See* *LANDLORD & TENANT*, Vol. XXXI., p. 440, No. 5857.

89. Permission to enter premises—"At convenient time"—Sunday not convenient time.]—*KENT'S (EARL) CASE* (1588), *Gouldsb.* 76; 75 E. R. 1006.

90. Denial on Sunday—Not act of bankruptcy.]—Denial on a Sunday not an act of bkpcy.—*Ex p. PRESTON* (1813), 2 Ves. & B. 311; 35 E. R. 338; *sub nom.* *Re PRESTON, Ex p. PRESTON*, 2 Rose, 21, L. C.

91. Admission to place of recreation—Prohibition by charter of incorporation—Proposal to admit on Sunday by membership ticket—Proposal ultra vires charter.]—A charter of incorporation was granted to the co. on condition that no person should be admitted to the co.'s building or grounds on the Lord's Day in consideration of any money payment, whether made directly or indirectly, unless the sanction of the legislature should have been obtained. The co. having obtained an Act of Parliament authorising their directors to agree with the proprietors of any shares or stock for the conversion thereof into tickets of admission for life or years for such proprietor or his nominee, but providing that nothing therein contained should relieve the co. from any condition contained in the charter, advertisements were issued by the directors, offering to accept the surrender of shares in exchange for tickets of admission for a term limited, to be made out to bearer, & to be available for Sundays as well as ordinary days:—*Held*: the admission of any person on Sunday by means of such a ticket as proposed would occasion a forfeiture of the co.'s charter; & upon bill filed by a shareholder, the co. was restrained from accepting a surrender of any shares in exchange for such tickets of admission.—*RENDALL v. CRYSTAL PALACE CO.* (1858), 4 K. & J. 326; 27 L. J. Ch. 397; 31 L. T. O. S. 51; 22 J. P. 321; 6 W. R. 416; 70 E. R. 136.

Annotation:—*Mentd.* *Jenkin v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392.

SUB-SECT. 2.—SUNDAY OBSERVANCE ACTS.

A. In General.

See Sunday Observance Act, 1677 (c. 7); Sunday Observation Prosecution Act, 1871 (c. 87).

92. Application of Act—Contract not completed on Sunday—Goods delivered in ensuing week.]—A. not knowing that B. was a horse dealer, made a verbal bargain with him on a Sunday for the purchase of a horse. The price, which was above £10, was then specified, & B. warranted the horse to be sound. It was not delivered, however, until the following Tuesday, when the money was paid:—*Held*: (1) there was not any complete contract

until the delivery of the horse, & consequently that the contract was not void within Sunday Observance Act, 1677 (c. 7), s. 2; (2) assuming it to be void, the purchaser having no knowledge of the fact that the vendor was exercising his ordinary calling on the Sunday, had not been guilty of any breach of the law, & therefore was entitled to recover back the price of the horse.—*BLOXSOME v. WILLIAMS* (1821), 3 B. & C. 232; 5 Dow. & Ry. K. B. 82; 2 L. J. O. S. K. B. 224; 107 E. R. 720.

Annotations:—*As to* (1) *Refd.* *Begbie v. Levi* (1830), 1 Cr. & J. 180. *As to* (2) *Consd.* *Re Mahmoud & Ispahani*, [1921] 2 K. B. 716. *Refd.* *Brightman v. Tate*, [1919] 1 K. B. 463. *Generally, Refd.* *Fennell v. Ridler* (1826), 5 B. & C. 406; *Smith v. Sparrow* (1827), 4 Bing. 84; *Elder v. Kelly* (1919), 88 L. J. K. B. 1253. *Mentd.* *Whitham & Butterworth v. Lindley* (1920), 37 T. L. R. 75.

93. — Contract entered into on Sunday—Character of acts.]—A contract entered into on a Sunday, in the making of which either party is exercising his ordinary calling, is void, under Sunday Observance Act, 1677 (c. 7), & it is of no consequence whether the act be done openly or concealedly, or whether it be an act of work & labour or not.—*FENNELL v. RIDLER* (1826), 5 B. & C. 406; 8 Dow. & Ry. K. B. 204; 4 L. J. O. S. K. B. 207; 108 E. R. 151.

Annotations:—*Appld.* *Smith v. Sparrow* (1827), 4 Bing. 81. *Refd.* *Begbie v. Levi* (1830), 1 Cr. & J. 180.

94. — Drawing bill of exchange.]—Where, in an action by an indorsee against an acceptor of a bill of exchange, it appeared that the bill was drawn on a Sunday:—*Held*: the bill was not void under Sunday Observance Act, 1677 (c. 7).—*BEGBIE v. LEVI* (1830), 1 Cr. & J. 180; 1 Tyr. 130; 9 L. J. O. S. Ex. 51.

95. — Where consideration executed—Property in chattels passed.]—*SCARFE v. MORGAN*, No. 111, *post*.

96. — Delivery & acceptance on Sunday—Previous parol contract.]—*Qu.*: whether Sunday Observance Act, 1677 (c. 7), avoids a previous parol contract for the sale of goods, where the delivery & acceptance take place on a Sunday.—*BEAUMONT v. BRENGERI* (1847), 5 C. B. 301; 136 E. R. 893.

Annotations:—*Mentd.* *Matvin v. Wallace* (1856), 2 Jur. N. S. 689; *Cusack v. Robinson* (1861), 1 B. & S. 299.

97. Sale by agent.]—On an information under Sunday Observance Act, 1677 (c. 7), it was proved that at 1.20 p.m. on Sunday, May 13, 1906, several persons went to applt.'s shop & purchased oranges, sweets & eggs. At 1.30 p.m. a child purchased some currants & a youth tobacco. A police constable who was watching went into the shop & saw a young man, who was in charge of the shop, & the latter made a communication to him about applt. The young man was a railway clerk, & was seventeen years of age. The shop remained open until 10 p.m. He saw applt. on May 14, 1906, on the subject, & he replied that he was doing nothing wrong so long as he himself kept away from the shop. In cross-examination the witness said that applt., in addition to the shop where he carries on business as a grocer & general dealer, was a beer retailer at Barnsley. He was also a cycle repairer. The justices convicted applt.:—*Held*: the conviction was good.—*CONNOR v. QUEST* (1906), 96 L. T. 28; 71 J. P. 62; 21 Cox, C. C. 345, D. C.

—*See, also*, No. 123, *post*.

98. Sale unlawful under Act—Whether bar to

any other legal holiday, should fall upon such day:—*Held*: a day proclaimed by the Governor-General & the Lieutenant-Governor as a holiday for a general public thanksgiving was a legal holiday within the Act, & the ct. was not bound to sit upon such a day.—

DIBBLEE v. FRY (1901), 35 N. B. R. 282.—*CAN.*

PART II. SECT. 2, SUB-SECT. 2.—A.

1. Meaning of "law."]—The word "law" used in the exception in Lord's Day Act (Dom.), s. 8, means such

common law & Imperial Statutes in force in Manitoba at the date of the Act & thereafter.—*Re ACT TO AMEND THE LORD'S DAY ACT*, [1923] 3 D. L. R. 495; 40 Can. Crim. Cas. 143; 33 Man. L. R. 197; [1923] 2 W. W. R. 520.—*CAN.*

Sect. 2.—Observance of Sundays and holidays: Sub-sect. 2, A. & B. (a) i., ii. & iii., (b), (c), & C. (a).]

conviction for adulteration.]—Though the effect of a contravention of the Sunday Observance Act, 1677 (c. 7), upon a contract of sale is to avoid it, in the sense that it cannot be sued upon in a civil action, it does not avoid it so far as to relieve the seller from liability to prosecution if the article sold, being an article of food, was adulterated.—*ELDER v. KELLY*, [1919] 2 K. B. 179; 88 L. J. K. B. 1253; 121 L. T. 94; 83 J. P. 166; 35 T. L. R. 391; 17 L. G. R. 413; 26 Cox, C. C. 406, D. C.

B. Matters within Purview of Acts.

(a) "Exercise of Ordinary Calling."

i. In General.

See Sunday Observance Act, 1677 (c. 7).

99. "Carrier"—Driver of van.]—The driver of a van travelling to & from London & York, is a carrier within Sunday Observance Act, 1627 (c. 4), & liable to be convicted in the penalty of 20s. for travelling on the Lord's Day.—*Exp. p. MIDDLETON* (1824), 3 B. & C. 164; 2 L. J. O. S. K. B. 220; 107 E. R. 695; *sub nom. R. v. MIDDLETON*, 2 Dow. & Ry. M. C. 412; 4 Dow. & Ry. K. B. 824.

100. — Driver of stage coach.]—The driving of a stage coach on Sunday is not prohibited by Sunday Observance Acts, 1627 (c. 2) or 1677 (c. 7).—*SANDIMAN v. BREACH* (1827), 7 B. & C. 96; 9 Dow. & Ry. K. B. 796; 5 L. J. O. S. K. B. 298; 108 E. R. 661.

Annotations:—Consd. R. v. Nevill (1846), 8 Q. B. 452. *Refd. Begbie v. Levi* (1830), 1 Cr. & J. 180; *R. v. Cleworth* (1864), 4 B. & S. 927. *Mentd. Poate v. Dicken* (1834), 1 Cr. M. & R. 422; *Kitchen v. Shaw* (1837), 6 Ad. & El. 729; *Whitmore v. Wenlock Town Clerk*, *Russell v. Downes*, *Bowen v. Williams* (1843), 13 L. J. C. P. 55; *Elliott v. Bishop* (1854), 10 Exch. 496; *R. v. Payne* (1866), 14 W. R. 661; *Tillmanns v. S.S. Knutsford*, [1908] 2 K. B. 385.

101. Solicitor.]—*PEATE v. DICKENS*, No. 110, *post*.

102. Railway porter.]—*R. v. SUTCLIFFE* (1850), 14 J. P. Jo. 68.

103. Farmer.]—(1) A farmer is not within Sunday Observance Act, 1677 (c. 7), s. 1, which enacts that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any wordly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof, works of necessity & charity only excepted"; & inflicts a penalty recoverable before justices of the peace.

(2) *Seemle*: the term "labourer" in this section extends to an agricultural labourer.

(3) *Concessum*: whether haymaking is a work of necessity is a question of fact on which the finding of the justices before whom a party is convicted under this sect. must be taken as con-

clusive.—*R. v. CLEWORTH* (1864), 4 B. & S. 927; 3 New Rep. 422; 9 L. T. 682; 28 J. P. 261; 122 E. R. 707; *sub nom. R. v. SILVESTER*, 33 L. J. M. C. 79; 10 Jur. N. S. 360; *sub nom. CLEWORTH v. LEIGH JJ.*, 12 W. R. 375.

Annotations:—As to (1) *Appl. Palmer v. Snow*, [1900] 1 Q. B. 725. *Generally, Mentd. Gunnestad v. Price*, Fullmore v. Walt (1875), L. R. 10 Exch. 65; *R. v. Yates* (1883), 48 J. P. 102; *Knutsford (Owners) v. Tillmanns* (1908), 99 L. T. 399.

104. "Labourer"—Agricultural labourer.]—*R. v. CLEWORTH*, No. 103, *ante*.

105. Barber.]—A hairdresser is not within Sunday Observance Act, 1677 (c. 7), s. 1, which provides that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any wordly labour, business, or work of their ordinary callings, upon the Lord's Day."—*PALMER v. SNOW*, [1900] 1 Q. B. 725; 69 L. J. Q. B. 356; 82 L. T. 199; 64 J. P. 342; 48 W. R. 351; 16 T. L. R. 168; 44 Sol. Jo. 211; 19 Cox, C. C. 475, D. C.

106. Holder of refreshment house licence.]—The mere fact that a person is the holder of a refreshment house licence does not exempt him from the operation of Sunday Observance Act, 1677 (c. 7).—*AMORETTE v. JAMES*, [1915] 1 K. B. 124; 84 L. J. K. B. 563; 112 L. T. 167; 79 J. P. 116; 31 T. L. R. 22; 59 Sol. Jo. 162; 13 L. G. R. 598; 24 Cox, C. C. 510, D. C.

Annotation:—Refd. Slater v. Evans, [1916] 2 K. B. 403.

107. "Tradesman"—Amusement caterer.]—Appl. carried on the business of an amusement caterer on weekdays & Sundays at premises where any one who chose played at certain games, paying applt. for the use of the implements employed in the games. In the event of a player achieving a certain result he received an article from applt. Shooting at targets also took place on the premises, the guns or rifles, used for the purpose being loaded with cartridges, which were supplied by applt. for payment in money:—*Held*: applt. was a "tradesman" within Sunday Observance Act, 1677 (c. 7), s. 1, & was therefore liable to be convicted under that sect. for having exercised the business or work of his ordinary calling upon a Sunday.—*HAWKEY v. STIRLING*, [1918] 1 K. B. 63; 87 L. J. K. B. 112; 117 L. T. 724; 82 J. P. 17; 34 T. L. R. 18; 16 L. G. R. 52; 26 Cox, C. C. 119, D. C.

ii. What Acts are pursuant to Ordinary Calling.

See Sunday Observance Act, 1677 (c. 7).

108. Horse auctioneer—Sale of horses by private contract.]—*DRURY v. DEFONTAINE*, No. 86, *ante*.

109. Farmer & labourer—Contract of hiring.]—Sunday Observance Act, 1677 (c. 7), s. 5, enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any

PART II. SECT. 2, SUB-SECT. 2.—
B. (a) i.

g. General rule.]—To avoid a contract made on Sunday, under 29 Car. II, c. 7, it must be shown that it was in the ordinary calling of the person making it.—*BETHUNE v. HAMILTON* (1840), 6 O. S. 105.—**CAN.**

103 i. Farmer.]—Deft. was convicted under 8 Vict. c. 45, for that he did, on Sunday, work at his ordinary calling, inasmuch as he & his men did make & haul in hay on the said day:—*Held*: the conviction must be quashed, as not showing any offence within the statute, for deft. was not alleged to be of, nor to have worked at, any particular calling.—*HESPELER v. SHAW* (1858), 16 U. C. R. 104.—**CAN.**

103 ii. —.]—*HAMREN v. MOTT* (1903), 5 Terr. L. R. 400.—**CAN.**

103 iii. —.]—*R. v. SAM ROW* (B. C.), [1919] 3 W. W. R. 315; 31 Can. Crim. Cas. 269.—**CAN.**

108 i. Holder of refreshment house licence.]—A sale of apples & candy on Sunday by a licensed restaurant proprietor to two police officers who took the eatables away from the seller's premises without consuming them:—*Held*: to be prohibited by Lord's Day Act, R. S. C., 1096, c. 153.—*R. v. KENT*, [1925] 1 D. L. R. 1117; [1925] 1 W. W. R. 315; 43 Can. Crim. Cas. 261; 21 Alta. L. R. 105.—**CAN.**

h. Giving or taking in security.]—The giving or taking in security on Sunday is not void as a buying or selling.—*WILT v. LAI* (1850), 7 U. C. R. 535.—**CAN.**

k. Druggist.]—*R. v. HOWARTH* (1873), 33 U. C. R. 537.—**CAN.**

l. "Tradesman."]—Speaking generally, a tradesman who sells his wares on Sunday violates the law.—*R. v. LATTY* (1913), 18 B. C. R. 413.—**CAN.**

m. Agreement for lien.]—An agreement made on a Sunday by a rancher for a lien on horses agisted by him within the work of his ordinary calling is void under Dominion Act, s. 5.—*Re JORGENSEN*, [1923] 2 W. W. R. 600; 17 Sask. L. R. 52.—**CAN.**

PART II. SECT. 2, SUB-SECT. 2.—
B. (a) ii.

n. Sale of timber.]—Where A. had received money on an agreement to deliver timber to B. which he afterwards refused to deliver, & was sued by B. to recover the money back, it is no defence to show that the agreement was made on a Sunday, & there-

wordly labour, business, or work of their ordinary calling on the Lord's Day, & subjects parties offending to a penalty:—*Held*: this statute only prohibits labour, business, or work done in the course of a man's ordinary calling, & therefore, a contract of hiring made on a Sunday between a farmer & a labourer for a year, was valid, & a service under it conferred a settlement.—*R. v. WHITNASH (INHABITANTS)* (1827), 7 B. & C. 596; 1 Man. & Ry. K. B. 452; 1 Man. & Ry. M. C. 177; 6 L. J. O. S. M. C. 26; 108 E. R. 845.

Annotations:—*Refd.* *Begbie v. Levi* (1830), 1 Cr. & J. 180; *Peate v. Dickens* (1834), 3 Dowl. 171; *Wolton v. Gavin* (1850), 20 L. J. Q. B. 73.

110. Solicitor—Undertaking liability for client.]—An attorney is not within Sunday Observance Act, 1677 (c. 7), s. 1, which prohibits certain persons from doing any work of their ordinary calling on the Lord's Day.

An attorney who acting on behalf of his client agrees to become personally responsible for part of the debt owing by the client does not thereby do any work of his ordinary calling within the meaning of that Act.—*PEATE v. DICKENS* (1834), 3 Dowl. 171; 1 Cr. M. & R. 422; 5 Tyr. 116; 4 L. J. Ex. 28.

Annotation.—*Refd.* *R. v. Lloyd* (1852), 19 L. T. O. S. 263.

111. Farmer—Letting out stallion to cover mare.]—Pltf. sent a mare to deft. a farmer, to be covered by a stallion belonging to him; the contract was performed on a Sunday. Deft. afterwards claimed to detain the mare until he was paid a sum of money, which consisted of the fee due on that occasion, & also of other moneys due to deft. on the general account:—*Held*: (1) deft. was entitled to a lien for the costs of covering the mare; (2) this was not a contract within Sunday Observance Act, 1677 (c. 7), s. 1, it not being made in the exercise of deft.'s ordinary calling; & even if it were, the contract having been executed, the lien would attach; (3) the claim by deft. to retain the mare in respect of two sums, for one of which the lien could not be supported, was not a waiver of his lien as to the other, nor did it dispense with the necessity of a tender of that sum.

If the contract is executed, & a property either special or general has passed thereby, the property must remain; & on that ground also, this lien would be supported, though it were or might have been illegal to have performed this operation on a Sunday (*PARKE, B.*).—*SCARFE v. MORGAN* (1838), 4 M. & W. 270; 1 Horn. & H. 292; 7 L. J. Ex. 324; 2 Jur. 569; 150 E. R. 1430.

Annotations:—*As to* (1) *Refd.* *Jackson v. Cummins* (1839), 5 M. & W. 342; *Beaumont v. Brengeri* (1847), 5 C. B. 301; *Skinner v. Lambert* (1850), 16 L. T. O. S. 244; *Short v. Mercler* (1851), 20 L. J. Ch. 289; *Weeks v. Goode* (1859), 6 C. B. N. S. 367; *Rumsey v. N. E. Rty.* (1863), 14 C. B. N. S. 641; *Taylor v. Chester* (1869), L. R. 4 Q. B. 309; *Hatton v. Car Maintenance Co.* (1914), 110 L. T. 765. *As to* (3) *Expld.* *Kerford v. Mondel* (1859), 28 L. J. Ex. 303. *Refd.* *Dirks v. Richards* (1842), 6 Jur. 562; *Beaumont v. Brengeri* (1847), 5 C. B. 301; *Albemarle Supply Co. v. Hind*, [1928] 1 K. B. 307.

112. Tradesman—Giving guarantee for services of traveller.]—A guarantee given by B. a tradesman to A., another tradesman, for the faithful services of C., a traveller, to be employed by A., is not an act done in the way of the ordinary business of B., within Sunday Observance Act, 1677 (c. 7).—*NORTON v. POWELL* (1842), 4 Man. & G. 42; 11 L. J. C. P. 202; 134 E. R. 18.

fore void under 8 Vict. c. 45.—*VAILE v. DUGGAN* (1850), 7 U. C. R. 568.—*CAN.*

o. Steamboat plying for hire.]—*v. TINNING* (1854), 11 U. C. R. 636.—*CAN.*

p. Sale of fruit.]—The sale of fruit by a merchant from his store on Sunday is in contravention of 29 Car.

2, c. 27, & also of Lord's Day Act.—*R. v. DIMOND* (1917), 23 H. C. R. 325; 27 Can. Crim. Cas. 28.—*CAN.*

PART II. SECT. 2, SUB-SECT. 2.—
C. (a).

g. Consent of Attorney-General —
Attorney-General not member of legal

iii. Aiding and Abetting.

See Sunday Observance Act, 1677 (c. 7).

113. What constitutes—Purchase from seller of goods—Mere purchase.]—The purchase of cigarettes from the proprietor of an eating-house on a Sunday does not *per se* amount to the offence of aiding & abetting the vendor in the offence, under Sunday Observance Act, 1677 (c. 7), of the vendor exercising his ordinary calling on the Lord's Day.

Qu.: whether it would amount to such an offence if the purchaser knew that the vendor was exercising his ordinary calling on a Sunday.—*CHIVERS v. HAND* (1914), 84 L. J. K. B. 304; 112 L. T. 221; 79 J. P. 88; 31 T. L. R. 19; 13 L. G. R. 537; 24 Cox, C. C. 520, D. C.

Annotation:—*Distd.* *Fairburn v. Evans*, [1916] 1 K. B. 218.

114. ——— Purchaser's knowledge of seller's ordinary calling.]—*BLOXSOME v. WILLIAMS*, No. 92, *ante*.

115. ——— ———.]—*CHIVERS v. HAND*, No. 113, *ante*.

116. ———.]—Applt. purchased sweets from a refreshment house keeper on a Sunday & took them from the premises for consumption. At the time of his purchase applt. knew that the refreshment house keeper was exercising his ordinary calling on the Sunday, & that he had constantly been convicted of having done so on previous occasions, under Sunday Observance Act, 1677 (c. 7):—*Held*: applt. could be convicted of aiding & abetting the refreshment house keeper in the exercise of his ordinary calling in contravention of the Act of 1677.—*FAIRBURN v. EVANS*, [1916] 1 K. B. 218; 85 L. J. K. B. 479; 114 L. T. 363; 80 J. P. 63; 32 T. L. R. 166; 25 Cox, C. C. 289; 14 L. G. R. 306, D. C.

Annotation:—*Mentd.* *Brightman v. Tate*, [1919] 1 K. B. 463.

(b) Public Entertainment.

See CRIMINAL LAW, Vol. XV., pp. 759-760, Nos. 8173-8178.

(c) Exemptions.

See Sub-sect. 5, post.

C. Breach.

(a) Prosecution.

See Sunday Observance Act, 1677 (c. 7); Sunday Observation Prosecution Act, 1871 (c. 87).

117. Consent of chief constable—Whether verbal consent sufficient—Subsequent confirmation in writing.]—By Sunday Observance Prosecution Act, 1871 (c. 87), "No prosecution . . . shall be instituted . . . for any offence . . . under " Sunday Observance Act, 1677 (c. 7), "except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed. . . ."

Applt. was convicted under Sunday Observance Act, 1677 (c. 7). The chief constable gave a verbal consent before the information was laid, & gave consent in writing after the information was laid & the summons issued:—*Held*: the prosecution was instituted when the information was laid, & therefore was not instituted with the consent in writing of the chief constable, & the conviction was bad.—*THORPE v. PRIESTNALL*,

profession.]—*BAIN v. STACEY* (1915), 11 Tas. L. R. 79.—*AUS.*

r. ——— Condition precedent to jurisdiction of magistrates.]—*R. v. CANADIAN PACIFIC RY. CO.* (N. W. P.) (1907), 6 W. L. R. 620.—*CAN.*

t. ——— Whether deputy may grant leave.]—*Re CRIMINAL CODE* (1910),

Sect. 2.—Observance of Sundays and holidays : Sub-sect. 2, C. (a) & (b) ; sub-sect. 3.]

[1897] 1 Q. B. 159 ; 66 L. J. Q. B. 248 ; 60 J. P. 821 ; 45 W. R. 223 ; 13 T. L. R. 95, D. C.

Annotation :—Consd. Re Boaler, Re Vexatious Actions Act, 1896, [1914] 1 K. B. 122.

118. — Prosecution under Bread Act, 1822 (c. cvi)—Whether necessary.]—The provision of Sunday Observation Prosecution Act, 1871 (c. 87), s. 1, that no prosecution or other proceeding shall be instituted for any offence committed under Sunday Observance Act, 1677 (c. 7), except by or with the consent in writing of the chief officer of police of the district or with the consent in writing of two justices of the peace or a stipendiary magistrate, has no application to prosecutions under Bread Act, 1822 (c. cvi), s. 16, for selling or exposing for sale bread on the Lord's Day.—*R. v. MEAD*, [1902] 2 K. B. 212 ; 71 L. J. K. B. 871 ; 87 L. T. 136 ; 66 J. P. 676 ; 20 Cox, C. C. 337 ; *sub nom. R. v. MEAD, Ex p. WREBITZKY, Ex p. GRODZINSKY*, 50 W. R. 589 ; *sub nom. R. v. MEAD, Ex p. WERLITZKY, R. v. MEAD, Ex p. GRODZINSKY*, 18 T. L. R. 544 ; 46 Sol. Jo. 465, D. C.

119. — Consent by superintendent—Validity.]—In the county & city of Kingston-upon-Hull a superintendent of police was in fact in chief command of the police in the police district during the temporary absence of the chief constable. He consented to the institution of a prosecution against a person for an offence alleged to have been committed by him under Sunday Observance Act, 1677 (c. 7). At Kingston-upon-Hull there is no office of deputy chief constable :—*Held* : the superintendent of police had no power to give the consent, inasmuch as Sunday Observation Prosecution Act, 1871 (c. 87), refers to the "chief officer of police" as a person designated by name, & the superintendent of police did not necessarily come within the definition of that expression contained in the Act.—*R. v. HALKETT*, [1910] 1 K. B. 50 ; 101 L. T. 603 ; 22 Cox, C. C. 202 ; *sub nom. R. v. HALKETT, Ex p. BUTINCK*, 79 L. J. K. B. 12 ; 74 J. P. 12.

120. Conviction for more than one offence on same day—Validity.]—A person can commit but one offence on the same day, by "exercising his ordinary calling on a Sunday," contrary to Sunday Observance Act, 1677 (c. 7). If a justice of peace proceeded to convict him in more than one penalty for the same day, it is an excess of jurisdiction for which an action will lie, before the convictions are

quashed.—*CREPPS v. DURDEN* (1777), 2 Cowp. 640 ; 98 E. R. 1283.

Annotations :—Apld. *Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89. **Refd.** *R. v. Younger* (1793), 5 Term Rep. 449 ; *Gray v. Cookson & Clayton* (1812), 16 East, 13 ; *Groome v. Forrester* (1816), 5 M. & S. 314 ; *Westbury on Severn Union Case* (1854), 4 E. & B. 314. **Mentd.** *Britain v. Kinnaird* (1819), 1 Brod. & Bing. 432 ; *Gimbert v. Coyney* (1825), M'Cle. & Yo. 469 ; *Dingsdale v. Clarke* (1829), 8 L. J. O. S. M. C. 137 ; *Mills v. Collett* (1829), 6 Bing. 85 ; *Re Baker* (1857), 2 H. & N. 219 ; *Milnes v. Bale, Milnes v. Lee* (1875), L. R. 10 C. P. 591 ; *Blake v. Beech* (1876), 1 Ex. D. 320 ; *R. v. Portsmouth JJ.*, [1892] 1 Q. B. 491 ; *Llewellyn v. Vale of Glamorgan Ry.*, [1898] 1 Q. B. 473 ; *R. v. Baggallay, Ex p. Hurlock, Hurlock v. Shinn, R. v. Henderwick, Ex p. Slado, Morris v. Ashton* (1912), 11 L. G. R. 367 ; *Parker v. Sutherland* (1917), 86 L. J. K. B. 1052.

121. — Two shops run by husband & wife—Both convicted for offending on same day.]—Applt., who was a married woman, was summoned under Sunday Observance Act, 1677 (c. 7), s. 1, for selling sweets on Sunday in a shop used by applt. & her husband, who was the owner of the business. Applt. managed the business in the absence of her husband. Prior to the conviction of applt., her husband was convicted of a similar offence committed on the same day at another shop :—*Held* : there being evidence that applt. had committed the offence charged, she was rightly convicted.—*BILLINGHAM v. MENHINICK* (1909), 73 J. P. 384.

(b) Effect on Rights of Parties inter se.

Sec Sunday Observance Act, 1677 (c. 7).

122. Right to sue on contract—Purchaser ignorant of vendor's delinquency.]—*BLOXSOME v. WILLIAMS*, No. 92, *ante*.

123. — Contract by agent.]—An action will not lie on a contract entered into on a Sunday, although entered into by an agent, & although the objection is taken by the party at whose request the contract was entered into.—*SMITH v. SPARROW* (1827), 4 Bing. 84 ; 12 Moore, C. P. 266 ; 5 L. J. O. S. C. P. 80 ; 130 E. R. 700 ; *previous proceedings* (1826), 2 C. & P. 544, N. P.

Annotation — Refd. *Beaumont v. Brengerl* (1847), 5 C. B. 301.

124. — Objection taken by other party to contract.]—*SMITH v. SPARROW*, No. 123, *ante*.

125. — Sale of goods—Goods kept by purchaser—Liability on quantum meruit.]—Deft. kept a heifer which he had bought of a drover on Sunday, & afterwards made a promise to pay for :—*Held* : having kept the beast he was liable, at all events, on the *quantum meruit*, notwithstanding the contract made on Sunday.—*WILLIAMS v. PAUL* (1830),

13 S. C. R. 434 ; 30 C. L. T. 687.—**CAN.**

a. Killing seals.]—*KEAN v. WINSOR* (1906), 9 Nfld. L. R. 183.—**NFLD.**

b. Information must be presented by British subject—Under Quebec Sunday Observance Act.]—*R. v. PANOS* (No. 1) (1908), 14 Can. Crim. Cas. 291.—**CAN.**

c. Gambling.]—*R. v. QUICK* (1910), 17 O. W. R. 250 ; 17 Can. Crim. Cas. 61.—**CAN.**

d. Liability of master for sale by servant.]—*KAJEE v. R.* (1919), 40 N. L. R. 321.—**S. AF.**

PART II. SECT. 2, SUB-SECT. 2.—C. (b).

e. General rule.]—An action does not lie for work done on Sunday.—*BRADY v. GROGAN* (1842), Arm. M. & O. 278.—**IR.**

f. Right to sue on contract—Contract to publish advertisements in Sunday newspaper.]—*SYDNEY NEWS-PAPER PUBLISHING Co. v. MUIR* (1888), 9 N. S. W. L. R. (L.) 375 ; 5 N. S. W. W. N. 8.—**AUS.**

g. — Contract to perform on Sundays.]—An agreement provided that deft., an actor, should serve pltf. for two years as principal comedian at such places & theatres in the Australasian colonies or in any other part of the world as pltf. might require the number of performances to be regulated by pltf. & to include Sunday performance :—*Held* : though performances on Sunday for gain are illegal by law of N. S. W. & suit might be maintained on the agreement in this state the fair construction of the agreement being that deft. contracted to perform on Sunday performances at those places where such performances are not illegal.—*HALLAM v. HARVEY* (1901), 1 S. R. N. S. W. 155 ; 18 N. S. W. W. N. 225.—**AUS.**

h. — Sunday labour in port—Refusal to perform.]—*GREEN v. CANADIAN PACIFIC RY. Co.* (B. C.) (1911), 18 W. L. R. 608.—**CAN.**

k. — Sales of real & personal property.]—All sales of real & personal property made on Sunday are void.—*LAI v. STALL* (1850), 6 U. C. R. 506.—**CAN.**

l. — Sale of land.] An agreement for the sale of land made on a Sunday is illegal & will not be enforced by the ct.—*SIMPSON v. PROESTLER* (B. C.) (1913), 25 W. L. R. 243 ; 13 D. L. R. 191 ; 21 Can. Crim. Cas. 415.—**CAN.**

m. — Duty of court.]—Where a tradesman comes into ct. upon a contract entered into on the Lord's Day for the sale by him of goods in the exercise of his ordinary trade or business, it is the duty of the ct. to notice that such contract was made in violation of the statute, even though no objection on that ground is taken in the pleadings.—*BRONFMAN v. DUTCH-YESAN* (Sask.), [1919] 3 W. W. R. 565 ; 48 D. L. R. 645.—**CAN.**

n. Delivery on week-day—Purchaser selling goods—Liability to account for proceeds.]—Where a contract for sale of hay was made on Sunday & the hay was delivered on a week-day following & the purchaser sold the same :—*Held* : although the vendor could not recover on the contract the purchaser must account for the proceeds of the hay.—*SCHUMAN v.*

6 Bing. 653; 4 Moo. & P. 532; 8 L. J. O. S. C. P. 280; 130 E. R. 1433.

Annotation:—*Consd.* Simpson v. Nicholls (1838), 3 M. & W. 240.

126. ——— **Necessity for subsequent promise to pay.**—To *indebitatus assumpsit* for goods sold & delivered & on an account stated debt. pleaded as to 18s. 6d., parcel, that they were sold on a Sunday in the way of pltf.'s trade & business. Replication that although the goods were sold at the time & in the manner stated, still that debt. kept & detained the same without offering to return them, whereby he became liable to pay for them on a *quantum valebat*. On demurrer to the replication it was held bad, on the ground that it ought to have shown a new promise to pay after the retaining of the goods by debt.—SIMPSON v. NICHOLLS (1838), 3 M. & W. 240; 6 Dowl. 355; 1 Horn. & H. 12; 7 L. J. Ex. 117; 2 J. P. 135; 2 Jur. 82; 150 E. R. 1132.

Annotation:—*Refd.* Beaumont v. Brengeri (1847), 5 C. B. 301.

127. Lien.—SCARFE v. MORGAN, No. 111, *ante*.

SUB-SECT. 3.—BYE-LAWS AND LOCAL ACTS.

128. Validity of bye-law—Navigation of canal.—

Where a canal co., in the exercise of a power, under a local Act, to make bye-laws for the orderly governing of the navigation of their canal, which was a public one, subject to the payment of a certain toll, made a bye-law prohibiting parties from navigating their canal on a Sunday:—*Held*: a bad bye-law.—CALDER & HEBBLE NAVIGATION CO. v. PHILLING (1845), 14 M. & W. 76; 3 Ry. & Can. Cas. 735; 14 L. J. Ex. 223; 5 L. T. O. S. 57; 10 J. P. 24; 9 Jur. 377; 53 E. R. 396.

Annotations:—*Mentd.* Ryde Pier Co. v. Porter (1867), 31 J. P. 791; Stike v. Collins (1886), 55 L. T. 182; Thomas v. Sutters, [1900] 1 Ch. 10.

DRAB (Sask.), [1919] 3 W. W. R. 588, 49 D. L. R. 57.—CAN.

o. ——— **Sale of cattle—Money paid not recoverable.**—A contract made in Manitoba on Sunday between a dairyman & a cattle dealer for the purchase of cattle to be used in the former's business is illegal under Lord's Day Act, R. S. C., 1906, c. 153, s. 5, & money paid thereunder cannot be recovered.—MERKEL v. MCKENDRY, [1926] 2 D. L. R. 995; [1926] 2 W. W. R. 7; 35 Man. L. R. 506.—CAN.

p. ——— **Pltf. sold to debt. a cow on a Sunday contrary to the provisions of Ordinance 1 of 1838 which makes a sale of cattle on Sunday illegal & imposes a penalty for contravention. The cow was delivered to the debt. by the pltf. on the following morning. Subsequently pltf. sued debt. for the restoration of the cow or payment of its value:—***Held*: on appeal, that the sale having taken place on a Sunday was illegal under the Ordinance, & that, as the pltf. could not succeed without showing or founding upon the illegal transaction he was not entitled to recover. *In pari delicto inelior est conditio possidentis*.—BRANDT v. BERGSTEDT, [1927] C. P. D. 344.—S. AF.

q. ——— **FITZPATRICK v. DAWES, [1907] E. D. C. 321.—S. AF.**

r. ——— **For rescission.**—The ct. will not entertain an action by a purchaser for a rescission of a sale & return of the price on the ground of breach of warranty, where such sale has taken place on a Sunday in contravention of Ord. 1 of 1838, s. 2.—BLACK v. SCHROEDER (1907), 24 S. C. 170.—

t. ——— **Against agent for an account.**—RUSKIN v. WASSERMAN, [1917] W. L. D. 176.—S. AF.

u. Action for misrepresentation.—NICHOLLS v. STANTON (1915), 15 S. R. N. S. W. 337; 32 N. S. W. W. N. 102.—AUS.

x. Sale of cigars—By druggist.—A cigar is not a drug, but a luxury, & it is an offence under C. S. U. C. c. 104, for a druggist to sell them on Sunday. Even if it could be shown that the sale of a cigar was a work of necessity or mercy in any particular case, it could not be asserted as a general proposition.—R. v. WELLS, R. v. ALDEEN, R. v. WALDOCK, R. v. ROE (1911), 19 O. W. R. 452; 2 O. W. N. 1232; 21 O. L. R. 77.—CAN.

a. ——— **By hotel employee.**—R. v. WAISH & CRANE (1913), 26 W. L. R. 394.—CAN.

b. Right to drawback on duty.—In a claim made by distillers in Scotland for a drawback on duty allowed for spirits distilled for exportation to England.—*Held*: by the words of the Acts allowing the abatement "for every day" the still should work, did not include Sunday, though the distillers worked the stills on Sabbaths, it being a profanation of the laws with regard to the Sabbath, which hold it illegal to work on that day, & therefore that they could not claim a drawback on the duty for spirits made & distilled on that day.—EASTON & CO. v. BROWN (1798), 4 Pat. App. 39.—SCOT.

PART II. SECT. 2, SUB-SECT. 3.

c. Validity of bye-law—Not to drive any cart, etc., through corporate limits.—A corpn. bye-law made it unlawful to drive any cart, etc., laden or returning from having been laden, through the corporate limits on a Sunday. Debt. who did not live within the corpn. drove a wagon, laden, on a Sunday over a high road that passed

129. — Street music.—A bye-law made by the council of a borough under Municipal Corporations Act, 1882 (c. 50), s. 23, provided that no person not being a member of Her Majesty's Army or Auxiliary Forces, acting under the orders of his commanding officer, should sound or play upon any musical instrument in any of the streets in the borough on Sunday:—*Held*: such bye-law was unreasonable & *ultra vires* & therefore void.—JOHNSON v. CROYDON CORPN. (1886), 16 Q. B. D. 708; 55 L. J. M. C. 117; 54 L. T. 295; 50 J. P. 487; 2 T. L. R. 371, D. C.

Annotations:—*Refd.* Kruse v. Johnson, [1898] 2 Q. B. 91. *Mentd.* Munro v. Watson (1887), 57 L. T. 366; Gray v. Sylvester (1897), 61 J. P. 807; Jones v. Walters (1898), 78 L. T. 167; White v. Morley (1899), 63 J. P. 550.

130. Construction of local Act—"Conducting or driving" cattle—Driving calves to market in van.

—A local Act for a parish, in which was a large cattle market, enacted that it shall not be lawful for any drover or other person to conduct or drive through any of the streets in the parish any oxen, sheep, or other cattle, during Sunday:—*Held*: a person driving a van with horses in which were calves being conveyed to the market was not "driving" or "conducting" cattle within the meaning of the statute.—TRIGGS v. LESTER (1866), L. R. 1 Q. B. 259; 13 L. T. 701; 30 J. P. 228; 14 W. R. 279.

131. Recovery of penalty—Selling meat.—A penalty of 20s. having been imposed by one of the bye-laws of the Butcher's Co. on all persons selling meat on a Sunday within their jurisdiction, it was declared by a subsequent clause that if any offender should deny, refuse, or neglect to pay the penalty he should be liable to an action of debt:—*Held*: it was not necessary to prove a previous demand in order to maintain such action, although averred in the declaration.—BUTCHER'S CO. v. BULLOCK (1803), 3 Bos. & P. 434; 127 E. R. 236.

through the township.—*Held*: the corpn. had no power by bye-law to stop a high road.—TONKIN v. FLEMING (1870), 4 S. A. L. R. 71.—AUS.

d. ——— **Park preaching.**—It was provided by R. S. O., 1887, c. 184, s. 504, sub-sect. 10, that the council of every city & town may pass bye-laws for the management of the farm, park, garden, etc.—*Held*: the municipal council of a city had power under this enactment to pass a bye-law providing that no person shall on the Sabbath day, in any public park, square, garden, etc., in the city, publicly preach, lecture, or declaim.—RE CRIBBIN & TORONTO CORPN. (1891), 21 O. R. 325.—CAN.

e. ——— **Fruit selling on Sunday.**—R. v. PETERSKY (1895), 4 B. C. R. 385.—CAN.

f. ——— **Bye-law affecting public morals.**—R. v. PETERSKY (1897), 5 B. C. R. 549.—CAN.

g. ——— **A municipal bye-law forbidding the opening of restaurants & the sale therein of any merchandise on Sundays, is ultra vires, as it deals with the observance of Sunday or the Lord's Day.**—CORPN. DE LA PAROISSE DE ST. PROSPER v. RODRIQUE (Que.) (1917), 56 S. C. R. 157; 40 D. L. R. 30.—CAN.

h. ——— **Passed on Good Friday.**—Re SCHUMACHER & CHESLEY CORPN. (1910), 16 O. W. R. 641; 21 O. L. R. 522; 1 O. W. N. 1011.—CAN.

k. ——— **Bye-law closing premises on New Year's Day, & when New Year's Day a Sunday, on Monday—Whether Monday to be treated as a Sunday in the matter of bona fide travellers.**—HENDERSON v. ROSS, [1928] S. C. (J.) 74; [1928] S. L. T. 449.—SCOT.

Sect. 2.—Observance of Sundays and holidays: Subsect. 4, A. & B. (a), (b) & (c), & C.]

SUB-SECT. 4.—LEGAL PROCEEDINGS ON SUNDAYS AND HOLIDAYS.

A. In General.

See Sunday Observance Act, 1677 (c. 7), s. 6; R. S. C., Ord. 64, r. 4.

132. General rule—Judicial acts prohibited—Not ministerial acts.]—An arrest on a Sunday is good, no judicial acts can be done on a Sunday, ministerial may.—**MACKALLEY'S CASE** (1611), 11 Co. Rep. 65 a; Cro. Jac. 279; 77 E. R. 828; *sub nom.* ANON., Jenk. 291.

Annotations:—*Refd.* Waite v. Stoke Hundred (1618), Cro. Jac. 496; Harvy v. Broad (1704), 2 Salk. 626; Swann v. Broome (1764), 3 Burr. 1595. *Mentd.* Heydon's Case (1613), 11 Co. Rep. 5 a; Hodges v. Marks (1615), Cro. Jac. 485; R. v. Cary (1616), 3 Bulst. 206; Holloway's Case (1628), W. Jo. 198; Gwinne v. Poole (1692), 2 Lut. App. 1560; R. v. Plummer (1701), Kel. 109; Jackson v. Humphreys (1707), 1 Salk. 273; R. v. Tooley (1709), 2 Lut. Raym. 1296; Smith v. Bouchier (1734), Cunn. 89; O'Brian's Case (1844), 1 Den. 9; R. v. Davis (1861), L. & C. 61; Galliard v. Laxton (1862), 2 B. & S. 363; Barnacott v. Passmore (1887), 51 J. P. 821.

133. ———.]—WAITE v. STOKES HUNDRED (1618), Cro. Jac. 496; Godb. 280; 79 E. R. 423.

134. ———.]—Judicial acts cannot be done on a Sunday, but other acts may be lawfully done (MAULE, J.).—**RAWLINS v. WEST DERRY OVERSEERS** (1846), 2 C. B. 72; Cox & Atk. 132; 1 Lut. Reg. Cas. 373; Bar. & Arn. 599; Pig. & R. 229; 15 L. J. C. P. 70; 10 Jur. 268; 135 E. R. 868.

Annotation:—*Refd.* Hughes v. Griffiths (1862), 13 C. B. N. S. 324.

135. Writ returnable on Sunday—Writ of inquiry.]—MINOR v. WILSON (1732), Kel. W. 59; 25 E. R. 489.

136. ——— Writ of distringas.]—A writ of *distringas* returnable on a Sunday is a nullity.—**MORRISON v. MANLEY** (1842), 6 Jur. 838.

137. Issue of writ of summons on Sunday.]—A writ of summons dated on a Sunday is a nullity, & the objection is not waived by lapse of time.—**HANSON v. SHACKELTON** (1835), 4 Dowl. 48; 1 Har. & W. 342.

Annotation:—*Refd.* Maltby v. Murrells (1860), 5 H. & N. 813.

138. Copy writ of summons tested on Sunday.]—CORRAIL v. FOULKES (1848), 3 New Pract. Cas. 90; 2 Saund. & C. 262; 11 L. T. O. S. 133.

139. Putting in bail.]—Bail above may be put in on a *dies non juridicus*.—**BADDELEY v. ADAMS** (1793), 5 Term Rep. 170; 101 E. R. 97.

140. Swearing affidavit on Sunday.]—*Qu.*: whether an affidavit which appears by the jurat to have been sworn in court on a Sunday, is void.—**DOE d. WILLIAMSON v. ROE** (1845), 15 L. J. Q. B. 39.

141. Sitting of court on Sunday—To take verdict of jury.]—*Semble*: if on a Saturday the jury be locked up to consider their verdict & cannot agree, & one of the jurors be ill, the ct. may be adjourned to Sunday, & may sit on the Sunday in order that the jury may be asked if they have agreed on their

verdict, & the judge may restate & explain to them parts of the evidence as to which they wish further information & explanation.—*Re* **NEWTON** (1849), 13 Q. B. at p. 734; 18 L. J. M. C. at p. 206; 116 E. R. at p. 1444; *sub nom.* R. v. **NEWTON**, 3 Car. & Kir. 85.

Annotation:—*Mentd.* R. v. Charlesworth (1861), 1 B. & S. 460.

142. Judgment recorded on Sunday.]—A judgment recorded on a Sunday is void.—**PAGE v. FAUCET** (1591), Cro. Eliz. 227; 78 E. R. 482.

Annotation:—*Refd.* Harvy v. Broad (1704), 2 Salk. 626.

143. Judgment given on Sunday.]—If a writ of *summonceas ad warrantizandum* be returnable on a Sunday, & the vouchee dies on that day, the recovery is void; because Sunday being a *dies non juridicus* judgment could not possibly have been given until the Monday following, consequently the judgment must have been given after the death of the vouchee.—**BROOME v. SWAN** (1766), 6 Bro. Parl. Cas. 333; 2 E. R. 1115, H. L.; *affg.* S. C. *sub nom.* **SWANN v. BROOME** (1764), 3 Burr. 1595.

144. Signing judgment for want of defence.]—A judgment for want of a plea cannot be signed on a *dies non juridicus*.—**HARRISON v. SMITH** (1829), 9 B. & C. 243; 7 L. J. O. S. K. B. 171; 109 E. R. 91.

B. Service of Process, Pleadings, etc.

(a) In General.

See Sunday Observance Act, 1677 (c. 7), s. 6.

145. General rule—Service void.]—The service of process on a Sunday is absolutely void by Sunday Observance Act, 1677 (c. 7), s. 6, & cannot be made good by any subsequent waiver of deft. by his not objecting till after a rule to plead given.—**TAYLOR v. PHILLIPS** (1802), 3 East, 155; 102 E. R. 556.

Annotations:—*Consd.* Maltby v. Murrells (1860), 5 H. & N. 813. *Refd.* Coates v. Sandy (1841), 2 Man. & G. 313; Graham v. Ingleby (1848), 1 Exch. 651; R. v. Leominster (1862), 2 B. & S. 391; Oulton v. Radcliffe (1874), L. R. 9 C. P. 189.

146. Service of citation—Under ecclesiastical law.]—A citation issued by the chancellor of a diocese against a person for incontinency, may be served on a Sunday, notwithstanding Sunday Observance Act, 1677 (c. 7).—**BROOKBANK v. ALLENSON** (1699), 12 Mod. Rep. 275; 88 E. R. 1318; *sub nom.* **ALANSON v. BROOKBANK**, 5 Mod. Rep. 449; Carth. 505; *sub nom.* **ALLEN v. BROOKBANK**, 2 Salk. 625.

147. Service of attachment.]—Whether an attachment may be served on Sunday.—**CECIL v. NOTTINGHAM (TOWN)** (1700), 12 Mod. Rep. 348; 88 E. R. 1371.

148. ———.]—A rule *nisi* for an attachment of non-payment of money, pursuant to the master's allocatur, cannot be served on a Sunday.—**MCILHEAM v. SMITH** (1798), 8 Term Rep. 86; 101 E. R. 1281.

Annotation:—*Refd.* Rawlins v. West Derby Overseers (1846), 1 Lut. Reg. Cas. 373.

149. Service of subpoena.]—Subpoena, served on

PART II. SECT. 2, SUB-SECT. 4.—A.

1. General rule — Judicial acts prohibited.]—The only day on which no judicial act can be done in this Province is the Lord's day, or Sunday. Other statutory holidays are not *dies non juridici* in this sense.—**FOSTER v. TORONTO RY. CO.** (1899), 31 O. R. 1.—**CAN.**

137 i. Issue of writ of summons on Sunday.]—**HUNT v. GORDON** (1880), Udal, 50.—**FIJI.**

137 ii. ———.]—It is irregular to issue a writ, on Sunday.—**HALL v. BRUSH**

(1840), 1 Ont. Dig. 201.—**CAN.**

137 iii. ———.]—A writ of summons dated on Sunday is void, & a judgment & subsequent proceedings founded thereon will be set aside, & the date of summons is not amendable.—**MCKINNON v. PROUD** (1874), 1 P. E. I. 474.—**CAN.**

m. Taxation of costs.]—Good Friday, though a public holiday, is not a *dies non*, & a taxation of costs on that day is not irregular.—**GILLMORE v. GILBERT** (1850), 7 N. B. R. (2 All.) 50.—**CAN.**

n. Right of judge to refuse to proceed with action on holidays.]—On a close holiday, a judge might properly decline to proceed with any inquiry, trial, or other matter on the civil side of his ct.—**RAM DAS CHAKRABATTI v. COTTON GINNING CO. (OFFICIAL LIQUIDATOR)** (1887), 1 L. R. 9 All. 366.—**IND.**

o. Order of prohibition.]—An order of prohibition made by the High Comr. for the Western Pacific, it was alleged, upon a Sunday:—*Held*: not to be bad upon that ground.—**HUNT v. GORDON** (1884), 2 N. Z. L. R. C. A. 160.—**N.Z.**

Sunday, irregular.—*MACKRETH v. NICHOLSON* (1815), 19 Ves. 367; 34 E. R. 554, L. C.

150. Service of warrant.]—Deft., who was in custody at Cambridge, received an order on a Saturday for his discharge: this was forwarded to the under-sheriff at Wisbeach: on the next day, Sunday, the gaoler received a warrant of detainer under a writ of *ca. sa.*, which had been issued the day before:—*Held*: deft. was not entitled to his discharge under Sunday Observance Act, 1677 (c. 77), s. 6, on the ground that the service of the warrant on Sunday was void.—*SAMUEL v. BUTLER* (1847), 1 Exch. 439; 17 L. J. Ex. 54; 10 L. T. O. S. 168; 11 Jur. 978; 154 E. R. 187.

Annotation:—*Refd.* Hooper v. Lane (1857), 6 H. L. Cas. 413.

(b) *Pleadings.*

See R. S. C., Ord. 64, r. 4.

151. Delivery of statement of claim.]—*WALGRAVE v. TAYLOR* (1700), 1 Ld. Raym. 705; 91 E. R. 1370; *sub nom.* *WALDEGRAVE'S CASE*, 12 Mod. Rep. 606.

152. —.]—Declaration cannot be delivered on a Sunday.—*TAYLOR'S CASE* (1701), 12 Mod. Rep. 667; 88 E. R. 1590.

153. —.]—Claim against prisoner in gaol.]—*TOMPKINS v. WOODLEY* (1742), Barnes, 387; 94 E. R. 968.

154. —.]—Action for ejectment.]—A declaration in ejectment was left at the house of the tenant in possession on Saturday, & received by him on the next day, Sunday, before the *essoin* day:—*Held*: this was service of process on a Sunday, within Sunday Observance Act, 1677 (c. 7), s. 6, & void.—*DOE d. WARREN v. ROE* (1826), 8 Dow. & Ry. K. B. 342.

(c) *Notices.*

155. Notice of award.]—Notice of an award on a Sunday is good, if the party cannot otherwise be served.—*ANON.* (1697), 12 Mod. Rep. 158; 88 E. R. 1233.

156. Notice of signing judgment.]—*ANON.* (1728), 1 Barn. K. B. 139; 94 E. R. 97.

157. Notice to appear.]—Notice to appear on Sunday being the return day, good.—*LLOYD v. BEESTON* (1734), Cooke, Pr. Cas. 100; 125 E. R. 983.

158. Notice of pleading.]—*WALKER v. TOWNE* (1746), Barnes, 309; 94 E. R. 929.

159. —.]—Service of notice of declaration on a Sunday is bad, though deft. accept it knowing it to be irregular.—*MORGAN v. JOHNSON* (1791), 1 Hy. Bl. 628; 126 E. R. 358.

Annotation:—*Refd.* Oulton v. Radcliffe (1874), L. R. 9 C. P. 189.

160. —.]—Service of notice of plea filed on a Sunday is void by construction of Sunday Observance Act, 1677 (c. 7), s. 6, which avoids all process, etc., served on that day.—*ROBERTS v. MONKHOUSE* (1807), 8 East, 547; 103 E. R. 453.

Annotations:—*Appld.* Doe d. Warren v. Roe (1826), 8 Dow. & Ry. K. B. 342. *Refd.* Rawlins v. West Derby Overseers (1846), 2 C. B. 72.

PART II. SECT. 2, SUB-SECT. 4.—
B. (b).

p. *Delivery of statement of claim.]*—Under 29 Car. II, c. 7, s. 6, which is in force in Alberta, the service of a statement of claim on Sunday is void.—*LAMB v. LAMB* (Alta.), [1925] 4 D. L. R. 526; [1925] 3 W. W. R. 397.—*CAN.*

q. —.]—*MILNER v. MILNER* (Alta.), [1927] 4 D. L. R. 644; [1927] 3 W. W. R. 241.—*CAN.*

PART II. SECT. 2, SUB-SECT. 4.—
B. (c).

r. *Service on Good Friday.]*—Service of a notice on Good Friday is

good.—*CLARKE v. FULLER* (1846), 2 U. C. R. 99.—*CAN.*

t. *Service on Queen's birthday.]*—The service of a paper upon an attorney on the Queen's birthday is good.—*UPTON v. PHELAN* (1878), 18 N. B. R. (2 P. & B.) 192.—*CAN.*

a. *Copy of appointment to examine.]*—The service of a copy of an appointment to examine on pltf.'s solr. on a Sunday for a Monday is insufficient.—*LOVELACE v. HARRINGTON* (1884), 10 P. R. 157.—*CAN.*

b. *Schedule of prices charged for light & energy.]*—*CHAMBERS ELECTRIC LIGHT CO. v. CANTWELL* (1909), 43 N. S. R. 419; 6 E. L. R. 529.—*CAN.*

161. Notice of trial—Service on Easter Tuesday.]—A notice for trial on a day that was Easter Tuesday, held good.—*CHARNOCK v. SMITH* (1835), 1 Har. & W. 217.

162. Notice to produce.]—Service [of notice to produce] on a Sunday is bad.—*HUGHES v. BUDD* (1840), 8 Dowl. 315; 4 Jur. 150.

Annotation:—*Refd.* Rawlins v. West Derby Overseers (1846), 2 C. B. 72.

163. Notice of appeal—Against maintenance order.]—Notice of appeal under Bastardy Act, 1884 (c. 101), s. 4, is in the nature of process, & cannot be legally served on a Sunday.—*R. v. MIDDLESEX JJ.* (1848), 5 Dow. & L. 580; 3 New Mag. Cas. 1; 3 New Sess. Cas. 152; 2 Saund. & C. 571; 17 L. J. M. C. 111; 11 L. T. O. S. 132; 12 Jur. 434; 12 J. P. Jo. 392.

Annotations:—*Fold.* Milch v. Frankau, [1909] 2 K. B. 100. *Refd.* Mumford v. Hitchcocks (1863), 14 C. B. N. S. 361.

— **Against removal order.]**—See POOR LAW, Vol. XXXVII., p. 345, Nos. 1483, 1484.

164. Notice of objection.]—A notice of objection sent by post, so that it would in the ordinary course of the post, be delivered on a Sunday is nevertheless well served.—*COLVILL v. LEWIS* (1846), 2 C. B. 60; Bar. & Arn. 608; Cox & Atk. 137; 135 E. R. 863; *sub nom.* *COLVILLE v. ROCHESTER TOWN CLERK*, 1 Lut. Reg. Cas. 380, n.; 15 L. J. C. P. 72, n.

Annotation:—*Refd.* Rawlins v. West Derby Overseers (1846), 2 C. B. 72.

165. Notice of removal of pauper.]—By Poor Law Amendment Act, 1834 (c. 76), s. 79, no pauper shall be removed under any order of removal until twenty-one days after a notice of chargeability, accompanied by a copy of the order & of the examination, shall have been sent "by post or otherwise," by the overseers of the parish obtaining the order to the overseer of the parish to whom the order is directed:—*Held*: admitting that the delivery of those documents in the ordinary manner would be service of an order or process within Sunday Observance Act, 1677 (c. 7), s. 6, the transmission of them by post under Poor Law Amendment Act, 1834 (c. 76), s. 79, where, by the ordinary course of post, they reached on Sunday the hands of the overseers of the parish to whom the order was directed, was not void by Sunday Observance Act, 1677 (c. 7), s. 6.—*R. v. LEOMINSTER (INHABITANTS)* (1862), 2 B. & S. 391; 31 L. J. M. C. 95; 6 L. T. 216; 26 J. P. 342; 8 Jur. N. S. 793; 121 E. R. 1119.

C. *Execution of Process.*

166. Scire facias tested on Sunday.]—If a *sci. fa.* be tested on a Sunday, it is error.—*BARRET v. CLEYDON* (1558), 2 Dyer, 168 a; 73 E. R. 368.

Annotations:—*Refd.* Swann v. Broome (1764), 3 Burr. 1595. *Mentd.* Worcester v. Paddon (1598), Cro. Eliz. 605; Barnardiston v. Soames (1674), Freem. K. B. 380.

167. Arrest on Sunday.]—*MACKALLEY'S CASE*, No. 132, *ante*.

PART II. SECT. 2, SUB-SECT. 4.—C.

c. *Arrest, commitment or conviction on Sunday or holiday.]*—Judicial proceedings should not be conducted on Sunday, & where prisoner was committed for trial at a preliminary investigation before a magistrate on a Sunday:—*Held*: he was entitled to his discharge.—*R. v. CAVELIER* (1896), 11 Man. L. R. 333.—*CAN.*

d. —.]—*R. v. LEAHY, Ex p. GARLAND* (1901), 35 N. B. R. 509.—*CAN.*

e. —.]—Easter Monday is not a non-judicial day, & the ct. refused to set aside a conviction made on that day for an offence against Canada

Sect. 2.—Observance of Sundays and holidays: Subsect. 4, C.; sub-sect. 5.]

—.]—*WAITE v. STOKE HUNDRED* (1618), Cro. Jac. 490; Godb. 280; 79 E. R. 423.

169. —.]—Attachment lies for arresting on Sunday.—*ANON.* (1670), 1 Mod. Rep. 50; 86 E. R. 728.

170. —.]—*ANON.* (1825), 3 L. J. O. S. K. B. 128.

171. — Arrest on criminal process.]—An arrest cannot be made on a Sunday upon process for good behaviour.—*PRINSOR'S CASE* (1641), Cro. Car. 602; 79 E. R. 1118.

172. —.]—*JOHNSON v. COLTSON* (1679), T. Raym. 250; 83 E. R. 129.

Annotation:—Refd. Ex p. Eglington (1853), 18 Jur. 224.

—.]—*See CRIMINAL LAW*, Vol. XIV., pp. 188, 189, Nos. 1685–1687.

173. — Arrest on civil process.]—Bail cannot take debt on a Sunday, in order to surrender her.—*BROOKES v. WARREN* (1779), 2 Win. Bl. 1273; 90 E. R. 748.

—.]—*See SHERIFFS*, Vol. XLI., pp. 88, 89, Nos. 253–263.

— Arrest on attachment.]—*See CONTEMPT OF COURT*, Vol. XVI., p. 77, Nos. 945, 946.

174. — Validity of subsequent detainer.]—Where a prisoner has been arrested on a Sunday, a subsequent detainer by another party, without collusion, is not vitiated by the illegality of the original arrest.—*Re RAMSDEN* (1846), 15 L. J. M. C. 113; 11 J. P. 21.

175. Arrest on Christmas Day.]—By 9 Geo. 4, c. 31, s. 23, it is enacted, that if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, he shall be guilty of a misdemeanour, & being convicted thereof, shall suffer such punishment, by fine & imprisonment as the ct. shall award. Where, therefore, debt., a clergyman, was arrested on Christmas Day, whilst he was officiating in a chapel, & he afterwards gave a bail bond, the ct. ordered the writ & subsequent proceedings to be set aside; but as neither pltf. nor his attorney ordered the arrest to be made on Christmas day, the rule for setting aside the proceedings was made absolute without costs.—*GODDARD v. HARRIS* (1831), 7 Bing. 320; 5 Moo. & P. 122; 9 L. T. O. S. C. P. 109; 131 E. R. 124.

176. Execution of writ of inquiry on Sunday.]—A writ of inquiry cannot be executed on a Sunday, & the ct. is bound to look into the almanac & take notice of it though not specially assigned for error.—*HOYLE v. CORNWALLIS (LORD)* (1720), 1 Stra. 387; 93 E. R. 584; *sub nom. CORNWALLIS (LORD) v. HOYLE*, Fortes. Rep. 373.

Annotations:—Refd. R. v. Sparrow (1739), 2 Sess. Cas. K. B. 184. *Mentd. Smith v. R.* (1849), 13 Jur. 850.

Temperance Act.—R. v. McKAY, Ex p. CORMIER (1907), 38 N. B. R. 231; 3 E. L. R. 407.—CAN.

i. —.]—*Ex p. MOORE* (1921), 58 D. L. R. 307; 36 Can. Crim. Cas. 257; 48 N. B. R. 340.—CAN.

—.]—*R. v. SAWCHUK (Man.)*, [1923] 2 W. W. R. 824.—CAN.

h. —.]—The fact that an arrest under a warrant issued under Criminal Code, s. 655, for an offence against Manitoba Temperance Act, C. A., 1924, c. 118, is made on a Sunday does not render the arrest illegal.—*R. v. SMITH*, [1927] 2 D. L. R. 982; [1927] 1 W. W. R. 734; 47 Can. Crim. Cas. 345; 36 Man. L. R. 386.—CAN.

k. —.]—*CROWE v. HALLIDAY* (1791), 2 Ridg. Parl. Rep. 289.—IR.

l. —.]—Attachments for non-

payments of costs are in the nature of executions, & cannot be executed upon a Sunday.—*HAWKINS v. FACKMAN* (1795), 2 Ridg. Parl. Rep. 309, n.; Ridg. L. & S. 541.—IR.

m. —.]—An arrest under an attachment issued by the insolvent ct. against a party for refusing to give testimony, may be executed on a Sunday.—*WALSH v. JORDAN* (1825), Sm. & Bat. 433.—IR.

n. —.]—*R. v. TORRENS, Re LYNCH v. TORRENS* (1833), 2 Ir. L. Rec. N. S. 28.—IR.

o. —.]—*R. v. RAMSAY* (1867), 16 W. R. 191.—IR.

p. Search warrant.]—A search warrant under the Canada Temperance Act cannot be executed on Sunday.—*R. v. LAWLOR, Ex p. WILLIS* (1917), 44 N. B. R. 347; 27 Can. Crim. Cas. 383.—CAN.

177. Execution of fieri facias on Sunday.]—

The assistants of a sheriff's office, for the purpose of executing a writ of *fi. fa.* illegally entered pltf.'s premises on a Sunday by breaking open a window. They afterwards by the officer's direction, abandoned possession on the Monday following. On the Thursday after, the officer himself entered the same premises to execute a distress warrant:—*Held*: he was not debarred by the act of his assistants from selling the goods when seized on the second occasion.—*PERCIVAL v. STAMP* (1853), 9 Exch. 167; 2 C. L. R. 282; 23 L. J. Ex. 25; 22 L. T. O. S. 90; 18 J. P. 105; 2 W. R. 14; 156 E. R. 71.

Annotation:—Refd. Hooper v. Lane (1857), 5 H. L. Cas. 443.

Execution of distress warrant.]—*See DISTRESS*, Vol. XVIII., p. 311, Nos. 462–463.

SUB-SECT. 5.—EXEMPTIONS FROM OBSERVANCE.

See Sunday Observance Act, 1677 (c. 7); Sunday Observation Prosecution Act, 1871 (c. 87).

178. Work of necessity—Carriage of hay.]—*WHEELER'S CASE* (1613), Godb. 218; 78 E. R. 133.

Annotations:—Refd. Camden v. Home (1791), 4 Term Rep. 382; *Gould v. Gapper* (1804), 5 East, 345.

179. — Barber.]—An apprentice to a barber in Scotland, bound by his indentures "not to absent himself from his master's business on holiday or week day, late hours or early, without leave," went away on Sundays without leave, & without shaving his master's customers:—*Held*: the apprentice could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, & that work & all other sorts of handicraft were illegal, in England as well as in Scotland, not being works of necessity, or mercy, or charity.—*PHILLIPS v. INNES* (1837), 4 Cl. & Fin. 234; 7 E. R. 90, H. L.

Annotations:—Distd. Palmer v. Snow, [1900] 1 Q. B. 725. *Refd. R. v. Cleworth* (1864), 28 J. P. 261; *Rossi v. Edinburgh Lord Provost*, [1905] A. C. 21.

180. — Haymaking.]—*R. v. CLEWORTH*, No. 103, *ante*.

181. — Question of fact—Finding of justices conclusive.]—*R. v. CLEWORTH*, No. 103, *ante*.

182. Preparation of food—Baking & selling bread.]—*R. v. PAWLETT* (1707), 11 Mod. Rep. 114; 88 E. R. 935.

183. — —.]—Baking provisions on a Sunday, & the like, not an offence within Sunday Observance Act, 1677 (c. 7).—*R. v. COX* (1759), 2 Burr. 785; 97 E. R. 562.

Annotations:—Apld. R. v. Younger (1793), 5 Term Rep. 449. *Consd. Bullen v. Ward* (1905), 74 L. J. K. B. 916.

—.]—*See, also, FOOD & DRUGS*, Vol. XXV., p. 121, Nos. 430–433.

— Cook's shop—Fish & chip shop.]—A

PART II. SECT. 2, SUB-SECT. 5.

q. Work of necessity — Driving sheep.]—*MELBOURNE BANKING CO. v. BREWER* (1875), 1 N. S. W. S. C. R. N. S. 103, n.—AUS.

r. — Accepting delivery of milk on Sunday.]—The taking by a condensed milk co. of milk from farmers on Sunday, the farmers not being able to keep the milk over Sunday & deliver it, on Monday in a condition suitable for manufacture:—*Held*: to be a work of necessity within Lord's Day Act, R. S. C. 1906, c. 153, s. 12.—*Re MAPLE LEAF CONDENSED MILK CO.* (1921), 49 O. L. R. 6; 34 Can. Crim. Cas. 215; 19 O. W. N. 388; 59 D. L. R. 503.—CAN.

t. — Sale of gasoline.]—*R. v. CUMMINGS, R. v. ROBINSON*, [1925] 1 D. L. R. 1126; [1925] 1 W. W. R.

tradesman in the course of his business cut up & cooked or fried potatoes, sometimes alone & sometimes with fish, which he sold hot on his premises to the poorer classes. He was charged with exercising his ordinary calling by doing this on a Sunday:—*Held*: his premises came within the exception of Sunday Observance Act, 1677 (c. 7), s. 3, as being a "cook's shop" for such as otherwise could not be provided, & he was therefore not liable to the penalty imposed by sect. 1 of the Act.—*BULLEN v. WARD* (1905), 74 L. J. K. B. 916; 93 L. T. 439; 69 J. P. 422; 54 W. R. 411; 21 T. L. R. 753; 49 Sol. Jo. 743; 21 Cox, C. C. 28, D. C.

Annotation:—*Consd. Amorette v. James*, [1915] 1 K. B. 124.

185. Work of charity.—*PHILLIPS v. INNES*, No. 179, *ante*.

186. Railways—Delivery of luggage from cloak room.—*Pltf.*, arriving in London by depts.' railway on Saturday evening, left a portmanteau at the luggage & cloak office on the up platform of the Paddington Station, & on paying 2d. received a ticket acknowledging the receipt with printed conditions, among which was a notice that the co. would not "deliver up luggage except to persons producing the proper receipt." On Sunday evening, intending to leave London by another railway, he came to the Paddington Station for his portmanteau, & found the office shut. After some time he was told by a porter

that the superintendent was on the other side; whereupon he went across to the down platform, from which a train was starting, & the superintendent sent a porter with a key of the office, & he obtained his portmanteau. He was thus delayed forty minutes, & prevented from leaving London by the other railway that night. In an action for not redelivering the portmanteau within a reasonable time the jury found for *pltf.*:—*Held*: by the ticket depts. were bound to deliver up the portmanteau on Sunday as well as on other days, on a reasonable request & within a reasonable time; & whether there had been an unreasonable delay was a question for the jury.—*STALLARD v. GREAT WESTERN RY. CO.* (1862), 2 B. & S. 419; 31 L. J. Q. B. 137; 26 J. P. 518; 8 Jur. N. S. 1076; 10 W. R. 488; 121 E. R. 1129; *sub nom.* *STANNER v. GREAT WESTERN RY. CO.*, 6 L. T. 217.

Jews — Employment on Sundays.—*See* FACTORIES & SHOPS, Vol. XXIV., p. 927, No. 190.

Supply of gas—Daily test.—*See* GAS, Vol. XXV., p. 492, No. 125.

Sale of ice cream—Whether "meat" within Sunday Observance Act 1677 (c. 7).—*See* FOOD & DRUGS, Vol. XXV., p. 131, Nos. 514, 515.

Intoxicating liquors.—*See* INTOXICATING LIQUORS, Vol. XXX., p. 72, Nos. 572–575.

Factory & shop half holidays.—*See* FACTORIES & SHOPS, Vol. XXIV., pp. 927, 931–934, Nos. 189, 212–227.

325, 43 Can. Crim. Cas. 254 21
Alta. L. R. 117.—CAN.

a. — Sale of refreshments.—*MUNRO v. SWAN*, [1918] N. Z. L. R. 382.—N.Z.

b. Land agent making contract for sale.—29 Car. 2 (c. 7), s. 1, as to Sunday trading is applicable to, & in force, in Victoria. But such Act does not apply to a land agent, who is not within the words "other person" in the Act, & therefore a contract for the sale of land completed by a land agent on a Sunday may be valid.—*RONALD v. LALOR* (1872), 3 V. R. (Eq.) 98.—AUS.

c. Impounding cattle.—*Fr p. GUNTHORP, Ex p. TULLY* (1892), 13 N. S. W. L. R. (L.) 232, 9 N. S. W. W. N. 48.—AUS.

d. Seamen & firemen.—Seamen & firemen are not included in the words tradesman, artificer, workman, labourer, or other person in the 29 Car. 2, c. 7.—*MARSHALL v. FOSTER* (1898), 21 V. L. R. 155.—AUS.

e. —.—*MURRAY v. COAST S.S. CO., LINDEN v. COAST S.S. CO.* (1912), 22 W. L. R. 572; 3 W. W. R. 153; 17 B. C. R. 469; 8 D. L. R. 378.—CAN.

f. Serving "actual or intending passengers" by railway.—*KELLY v. HART*, [1910] A. C. 192, P. C.—AUS.

g. Cab driver.—A cab driver, the servant of a livery stable keeper, is not within Lord's Day Act, R. S. O. 1887, c. 203, s. 2.—*R. v. BUDWAY*, 8 C. L. T. Occ. N. 269.—CAN.

h. —.—A cab driver is not within any of the classes of persons enumerated in Lord's Day Act, R. S. O. 1887, c. 203, s. 1, & cannot be lawfully convicted, thereunder for driving a cab on Sunday.—*R. v. SOMERS* (1893), 24 O. R. 244.—CAN.

k. Travellers for pleasure on steam

boat.—*R. v. DAGGETT, R. v. FORTIER* (1882), 1 O. R. 537.—CAN.

l. Public servant of Crown.—*R. v. BERRIMAN* (1883), 4 O. R. 282.—CAN.

m. Company operating street railway.—Defts. were incorporated by letters patent under Street Railway Act, R. S. O. 1887, c. 171, which authorised them to construct & operate (on all days except Sunday) a street railway:—*Held*: an action would not lie by the Crown to restrain depts. from operating the road on Sunday, the restriction against them doing so being at most an implied one, & no substantial injury to the public or any other interference with proprietary rights, being shown.—*A.-G. v. NIAGARA FALLS, WESLEY PARK & CLIFTON TRAMWAY CO.* (1891), 18 A. R. 453.—CAN.

n. —.—A co. incorporated for the purpose of operating street cars does not come within Lord's Day Act, R. S. O. 1887, c. 203, s. 1.—*A.-G. v. HAMILTON STREET RY. CO.* (1897), 24 A. R. 170.—CAN.

o. Foreman of railway elevator.—Deft. was convicted of following his ordinary calling of foreman of the Grand Trunk Railway Co. elevator in superintending the unloading of grain from a vessel into the elevator on Sunday:—*Held*: R. S. O. 1897, c. 246, does not apply to that railway, & as it did not apply to the employer it did not apply to the employee.—*R. v. REID* (1899), 30 O. R. 732.—CAN.

p. Barber.—*Re LAMBERT* (1900), 7 B. C. R. 396.—CAN.

q. Playing base-ball.—A public base-ball game held on Sunday, & to which an admission fee is charged does not come within the purview of Dominion Sunday Observance Act, R. S. C.—*CALDWELL v. SHAUGHNESSY* (1916), Q. R. 51 S. C. 146.—CAN.

r. Sale of secondhand automobile.—The sale on Sunday of a secondhand automobile by one farmer to another & the taking on Sunday of a lien note thereon is not illegal in Manitoba.—*COTE v. FRIESEN*, [1921] 3 W. W. R. 436; 31 Man. L. R. 334.—CAN.

t. Contracts of insurance.—*NORTHWESTERN LIFE ASSURANCE CO. v. KUSHNIR* (Sask.), [1922] 1 W. W. R. 962.—CAN.

aa. Newspaper editor.—*R. v. DANIELS* (Ont.) (1926), 46 Can. Crim. Cas. 205.—CAN.

bb. Sale of farm implement on Sunday by one farmer to another.—*DEMCHEENKO v. FRICKE*, [1926] 2 D. L. R. 1096; [1926] 2 W. W. R. 221; 20 Sask. L. R. 492.—CAN.

cc. Delivery of goods on Sunday.—Where deft. a European, was sued for damages for non-delivery of goods & contended that he was not bound to deliver on Sunday.—*Held*: delivery on Sunday was not unlawful, & in the absence of custom to the contrary, deft. was bound to deliver the goods on that day if they had not already been delivered.—*LALCHAND BAIKISSAN v. KERSTEN* (1890), 1 L. R. 15 Bom. 338.—IND.

dd. Sealing.—There is no law which relieves sealers from going on the ice because of the sanctity of the Sabbath, or justify their refusal when so ordered.—*RICHARDS v. JOB BROTHERS & CO.* (1892), 7 Nfld. L. R. 642.—NFLD.

ee. Watchman.—Scots Act, 1579, c. 70, prohibiting Sunday labour, did not apply to a watchman's job which involved Sunday work so as to render the job one which a partially disabled workman claiming compensation under Workmen's Compensation Act, 1906, was not bound to accept.—*SMITH v. BEARDMORE (WILLIAM) & CO., LTD.* (1922), 15 B. W. C. C. 389.—SCOT.

Part III.—Computation of Time.

SECT. 1.—IN GENERAL.

187. Court takes judicial notice of computation of time.]—HARVY (OR HARVEY) *v.* BROAD (OR BREAD) (1704), 2 Salk. 626; 6 Mod. Rep. 159, 196; Holt, K. B. 761; 91 E. R. 529.

*Annotations:—*Refd. *R. v. Gumley* (1727), 2 Ld. Raym. 1528. *Mentd.* *Beech v. Parker* (1730), 1 Barn. K. B. 356.

—.]—*See, further,* EVIDENCE, Vol. XXII., p. 147, Nos. 1238–1252.

188. Computation of time in criminal matter—Same as in civil matter.]—The same rules govern the computation of periods of time whether the statute limiting the period deals with civil or criminal matters.—*RADCLIFFE v. BARTHOLOMEW*, [1892] 1 Q. B. 161; 61 L. J. M. C. 63; 65 L. T. 677; 56 J. P. 262; 40 W. R. 63; 36 Sol. Jo. 43; *sub nom.* *RATCLIFFE v. BARTHOLOMEW*, 8 T. L. R. 43, D. C.

189. Method of computation—No general rule.]—No general rule exists for the computation of time either under Bankruptcy Act, 1890 (c. 71), or any other statute, or, indeed, where time is mentioned in a contract, & the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made. . . . To say that by the common law a part of a day is the whole of a day is to say something which is contrary to the truth (*LORD ESHER, M.R.*).

It is contended that the old authorities show that formerly, when time had to be computed from the doing of an act, the first day, that is the day on which the act was done, was included, & that that rule is applicable to the present case. But it has been shown from subsequent cases that there is no such universal rule, & that in the reckoning of time each case must rely on its own circumstances & subject-matter (*A. L. SMITH, L.J.*).—*Re NORTH, Ex p. HASLUCK*, [1895] 2 Q. B. 264; 64 L. J. Q. B. 694; 59 J. P. 724; 11 T. L. R. 417; 39 Sol. Jo. 560; 2 Mans. 326; 14 R. 436; *sub nom.* *Re NORTH, Ex p. PARKINSON*, 72 L. T. 854, C. A.

*Annotations:—*Refd. *Bridge v. Adams* (1899), 63 J. P. Jo. 394; *Goldsmiths' Co. v. West Metropolitan Ry.*, [1904] 1 K. B. 1. *Mentd.* *Mason v. Bolton's Library*, [1913] 1 K. B. 83; *R. v. Norman*, [1924] 2 K. B. 315.

SECT. 2.—INCLUSION OR EXCLUSION OF FIRST AND LAST DAYS.

SUB-SECT. 1.—IN GENERAL.

190. General rule—One day excluded & one included.]—ANON. (1731), 2 Barn. K. B. 34; 94 E. R. 338.

191. ———.]—The six days' notice of applying for a *certiorari* to remove an order of justices, must be reckoned exclusively of one day, & inclusively of the rest; & this is the general

PART III. SECT. 1.

189 i. Method of computation—No general rule.]—In construing a document there is no hard & fast general rule for the computation of time.—*CLIFFORD v. MINISTER OF LANDS* (1905), 25 N. Z. L. R. 535.—N.Z.

PART III. SECT. 2, SUB-SECT. 1.

f. General rule.]—*Semble:* where time is directed to be computed from an act done or an event happened the day whereon the act is done or event occurs is to be reckoned as inclusive.—*STEELE v. BRADDELL* (1838), Milw. 1.—IR.

g. ———.]—Where the parties have not indicated how a definite period of time fixed by a contract should be calculated the computation should, as a general rule, be made by including the first day & excluding the last day; but the ct. should reserve to itself the right to calculate the period with mathematical exactness where special circumstances render such a mode desirable.—*JOUBERT v. ENSLIN*, [1910] App. D. 6.—S. AF.

h. When both days excluded.] Where there is to be an interval of a week between two events, the days on which those events occur must be

rule of computation in matters of practice.—*R. v. GOODENOUGH* (1835), 2 Ad. & El. 463; 111 E. R. 179; *sub nom.* *R. v. CUMBERLAND JJ.*, 1 Har. & W. 16; 4 Nev. & M. K. B. 378; 2 Nev. & M. M. C. 552; 4 L. J. M. C. 72.

192. ———.]—*R. v. TURNER*, No. 309, *post*.

193. Whether first day included—Depends on particular circumstances.]—*Re NORTH, Ex p. HASLUCK*, No. 189, *ante*.

194. ——— Renewal of writ of summons.]—A writ of summons had been renewed under C. L. P. Act, 1852 (c. 76), s. 11, & the six months during which it had to run, had expired on a Sunday:—*Held:* the writ could not be renewed on the day following such expiration.—ANON. (1863), 1 H. & C. 664; 1 New Rep. 331; 32 L. J. Ex. 88; 7 L. T. 718; 11 W. R. 293; 158 E. R. 1051.

— Time running from particular day or event.]

—*See* Sub-sect. 2, *post*.

195. Computation under penal statutes.]—*Qu.*: if a penal statute say, that prosecution shall be in so many days, whether they shall be inclusively or exclusively taken.

The law allows no fractions of a day. General computation of time in penal laws is taken inclusively (*PARKER, C.J.*).—*R. v. GREEN* (1714), as reported in 10 Mod. Rep. 212; 88 E. R. 698.

*Annotations:—**Mentd.* *R. v. Marriott* (1717), 1 Stra. 66. *R. v. Venables* (1725), Fortes Rep. 325; *R. v. Floyd* (1733), Kel. W. 286; *Smith v. Boucher* (1734), 2 Stra. 993; *R. v. Killett* (1767), 4 Burr. 2063.

196. Act to be done specified number of days before given event.]—Where an act is required by statute to be done so many days at least before a given event, the time must be reckoned, excluding both the day of the act & that of the event.—*R. v. SHROPSHIRE JJ.* (1838), 8 Ad. & El. 173; 112 E. R. 803; *sub nom.* *R. v. SALOP JJ.*, 3 Nev. & P. K. B. 286; 1 Will. Woll. & H. 158; 7 L. J. M. C. 56; 2 Jur. 807.

*Annotations:—**Apld.* *Mitchell v. Foster* (1810), 4 Per. & Dav. 150; *R. v. Middlesex JJ.* (1845), 3 Dow. & L. 109; *Norton v. Salisbury Town Clerk* (1846), 4 C. B. 32; *R. v. Aberdare Canal Co.* (1850), 14 Q. B. 854. *Consd.* *R. v. Sussex JJ.* (1862), 2 B. & S. 664; *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204; *R. v. Turner* (1909), 3 Cr. App. Rep. 103. *Refd.* *Young v. Higgon* (1810), 6 M. & W. 49; *Chambers v. Smith* (1843), 1 L. T. O. S. 170.

Term created by deed.]—*See* DEEDS, Vol. XVII., p. 359, Nos. 1691–1695.

— From what date deed effective.]—*See* DEEDS, Vol. XVII., pp. 228, 229, Nos. 425–436.

SUB-SECT. 2.—TIME RUNNING FROM PARTICULAR DAY OR EVENT.

A. In General.

197. Whether day of act or date included—Time to be computed from act done.]—In real actions the writ may abate in part. In personal ones it cannot.

excluded in the computation of the week.—*BARTRAM v. GRICE* (1912), 22 O. W. R. 191; 3 O. W. N. 1296; 1 D. L. R. 682.—CAN.

PART III. SECT. 2, SUB-SECT. 2.—A.

197 i. Whether day of act or date included—Time to be computed from act done.]—By an agreement dated Sept. 20, money was to be paid within one month, & on Oct. 21, the money was tendered:—*Held:* sufficient, the day of the execution of the instrument being excluded in the computation of the time.—*BARNES v. BOOMER* (1861), 10 Gr. 532.—CAN.

There shall be no fraction of a day. Unless to prevent an inconvenience. Where time is to be computed from an act done, the day in which the act is done must be included.—*BELLASIS v. HESTER* (1697), 1 *Ld. Raym.* 280; 91 *E. R.* 1084; *sub nom.* *BELASYSE v. HESTER*, 2 *Lut.* 1589.

Annotations :—*Apld.* *R. v. Adderley* (1780), 2 *Doug. K. B.* 463. *Refd.* *Coleman v. Sayer* (1728), 1 *Barn. K. B.* 303; *Young v. Higgon* (1840), 6 *M. & W.* 49. *Mentd.* *Story v. Atkins* (1726), 2 *Ld. Raym.* 1427; *Hill v. White & Williams* (1839), 8 *Scott*, 249; *Dundalk Western Ry. v. Tapster* (1841), 2 *Ry. & Can. Cas.* 586.

198. ———.]—*NORRIS v. GAWTRY HUNDRED* (1617), *Hol.* 139; 1 *Brownl.* 156; 80 *E. R.* 289.

Annotations :—*Apld.* *R. v. Adderley* (1780), 2 *Doug. K. B.* 463. *Refd.* *Belasyse v. Hester* (1697), 2 *Lut.* 1589; *Young v. Hester* (1840), 6 *M. & W.* 49.

199. ———.]—A computation of time from the doing of an act commences the instant the act is done. A computation from the day on which the act is done not until the subsequent day.—*ANON.* (1699), 1 *Ld. Raym.* 480; 91 *E. R.* 1219; *sub nom.* *HOWARD'S CASE*, *Holt*, *K. B.* 195; 2 *Salk.* 625.

Annotations :—*Consd.* *Pugh v. Leeds* (1777), 2 *Cowp.* 714. *Refd.* *Tomlinson v. Bullock* (1879), 43 *J. P.* 508; *Re Shurey*, *Savory v. Shurey*, [1918] 1 *Ch.* 263.

200. ———.]—We find in the case of *Bellasis v. Hester*, No. 197, *ante*, . . . that it is laid down by the majority of the ct. that where the computation is to be made from an act done . . . the day when such act was done is to be included (*LORD MANSFIELD*).—*R. v. ADDERLEY* (1780), 2 *Doug. K. B.* 463; 99 *E. R.* 295.

Annotations :—*Apld.* *Castle v. Burditt* (1790), 3 *Term Rep.* 623; *Glassington v. Rawlins* (1803), 3 *East*, 407. *Distd.* *Lester v. Garland* (1808), 15 *Ves.* 248. *Expld.* *Webb v. Fairmaner* (1838), 6 *Dowl.* 519. *Apld.* *Re Whitby, Ex p. Whitby* (1839), 8 *L. J. Bey.* 55. *Consd.* *Young v. Higgon* (1840), 6 *M. & W.* 49. *Refd.* *Re North, Ex p. Hasluck*, [1895] 2 *Q. B.* 264. *Mentd.* *Yorath v. Hopkins* (1835), 5 *Tyr.* 794.

201. ———.]—Where computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning. Therefore when the law requires that a month's notice of an action be given, the month begins with the day on which the notice is served.—*CASTLE v. BURDITT* (1790), 3 *Term Rep.* 623; 100 *E. R.* 768.

Annotations :—*Distd.* *Lester v. Garland* (1808), 15 *Ves.* 218. *Dbtd.* *Webb v. Fairmaner* (1838), 3 *M. & W.* 473. *N.F.* *Young v. Higgon* (1840), 6 *M. & W.* 49. *Refd.* *Re Whitby, Ex p. Whitby* (1839), 8 *L. J. Bey.* 55; *Freeman v. Read* (1863), 4 *B. & S.* 174.

202. ———.]—Where time is to be computed from an act done, the day on which such act is done is to be included in the computation. Therefore where Bankrupts Act, 1624 (c. 19), s. 2, enacts that a trader lying in prison two months, *i.e.* lunar months, after an arrest for debt shall be adjudged a bkpt., that includes the day of the arrest.—*GLASSINGTON v. RAWLINS* (1803), 3 *East*, 407; 102 *E. R.* 653.

Annotations :—*Distd.* *Lester v. Garland* (1808), 15 *Ves.* 248; *Webb v. Fairmaner* (1838), 3 *M. & W.* 473. *Apld.* *Re Whitby, Ex p. Whitby* (1839), 8 *L. J. Bey.* 55; *Migotti v. Colville* (1879), 4 *C. P. D.* 233. *Refd.* *Pellew v. East Wonford Hundred* (1829), 4 *Man. & Ry. K. B.* 130; *Re North, Ex p. Hasluck*, [1895] 2 *Q. B.* 264.

203. ———.]—No general rule in computing time from an act or an event, that the day is to be inclusive or exclusive; depending on the reason of the thing according to the circumstances.

It is not necessary to lay down any general rule upon this subject: but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort

of indivisible point; so that any act done in the compass of it, is no more referable to any one, than to any other, portion of it; but the act & the day are co-extensive; & therefore the act cannot properly be said to be passed, until the day is passed (*GRANT, M.R.*).—*LESTER v. GARLAND* (1808), 15 *Ves.* 248; 33 *E. R.* 748.

Annotations :—*Consd.* *Pellew v. Wonford* (1829), 9 *B. & C.* 134. *Apld.* *Hardy v. Ryle* (1829), 9 *B. & C.* 603; *Godson v. Sanctuary* (1832), 4 *B. & Ad.* 255; *Webb v. Fairmaner* (1838), 3 *M. & W.* 473; *Young v. Higgon* (1840), 6 *M. & W.* 49. *Consd.* *Re Railway Sleepers Supply Co.* (1885), 29 *Ch. D.* 204. *Apprvd.* *Re North, Ex p. Hasluck*, [1895] 2 *Q. B.* 264. *Apld.* *Goldsmiths' Co. v. West Metropolitan Ry.*, [1904] 1 *K. B.* 1. *Refd.* *In the Goods of Wilmot* (1834), 1 *Curt.* 1; *Re Whitby, Ex p. Whitby* (1839), 8 *L. J. Bey.* 55; *Weeks v. Wray* (1868), 9 *B. & S.* 62; *Isaacs v. Royal Insee.* (1870), *L. R.* 5 *Exch.* 296; *Migotti v. Colville* (1879), 4 *C. P. D.* 233.

204. ———.]—Under Bankrupts Act, 1825 (c. 16), s. 81, where the computation of time is to be from an act done, the day when such act is done is to be included. For some purposes the ct. notices the fraction of a day.

In cases of this description, where, under the statute, time is to be computed from an act done, the day on which the act is done should be included in the computation (*LORD ELDON, C.*).—*Re STARKEY, Ex p. FARQUHAR* (1826), *Mont. & M.* 7. *L. C.*

Annotation :—*Folld.* *Godson v. Sanctuary* (1832), 4 *B. & Ad.* 255.

205. ———.]—After an affidavit of debt has been filed under Judgments Act, 1837 (c. 110), s. 8, the sending of goods in part satisfaction of the demand on the day the docket is struck, is not an act of bkpey. The day on which such affidavit is filed is included in the computation of the two calendar months allowed for the issuing of the fiat. A fraction of a day will not be calculated, to bring the fiat within the time allowed by the statute.—*Re WHITBY, Ex p. WHITBY* (1839), 4 *Deac.* 139; *Mont. & Ch.* 671; 8 *L. J. Bey.* 55.

206. ———.]—In the computation of the calendar month's notice of action to a justice, required by Constables Protection Act, 1751 (c. 44), s. 1, the day of giving the notice, & the day of suing out the writ, are both to be excluded.

According to the earlier authorities on this subject, whenever a period of time was to be computed from an act done, & not from a particular day, the day on which the act was done was reckoned inclusive. The point may now be considered as settled by a course of recent decisions, all proceeding upon the same principle, that the day from which the computation is made ought, in cases like the present, to be excluded (*PAIRKE, B.*).

Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time (*ALDERSON, B.*).—*YOUNG v. HIGGON* (1840), 8 *Dowl.* 212; 6 *M. & W.* 49; 9 *L. J. M. C.* 29; 4 *J. P.* 88; 4 *Jur.* 125; 151 *E. R.* 317.

Annotations :—*Consd.* *Re Railway Sleepers Supply Co.* (1885), 29 *Ch. D.* 204. *Refd.* *Re Higham & Jessop* (1841), 5 *J. P.* 193; *Chapman v. Eley* (1842), 4 *Man. & G.* 631; *Russell v. Ledsam* (1845), 14 *M. & W.* 574; *Williams v. Nash* (1859), 28 *L. J. Ch.* 886; *Radcliffe v. Bartholomew*, [1892] 1 *Q. B.* 161; *Goldsmiths' Co. v. West Metropolitan Ry.*, [1904] 1 *K. B.* 1; *R. v. Turner* (1909), 3 *Cr. App. Rep.* 103; *English v. Cliff*, [1914] 2 *Ch.* 376. *Mentd.* *Quartermaine v. Selby* (1889), 5 *T. L. R.* 223.

207. ———.]—Pltfs. insured their goods against fire with defts. by a policy for six months, whereby it was provided that, from Feb. 14, 1868, until Aug. 14, 1868, & for so long after as the assured should pay the sum of 225 dollars, & defts.,

**Sect. 2.—Inclusion or exclusion of first and last days :
Sub-sect. 2, A., B. & C.]**

at the time above-mentioned, accept the same, debts.' funds should be liable to make good losses by fire to pl'tfs.' goods. Pl'tfs. intended to keep up this policy, & debts. knew their intention, but the renewal premium was not demanded or paid on Aug. 14, 1868. On that day a fire took place which destroyed pl'tfs.' goods. The course of business between pl'tfs. & debts. was, that debts. should come to pl'tfs. & demand the renewal premium :—*Held* : under the terms of the policy the whole of Aug. 14, was protected ; & debts. were, therefore, liable for loss caused by a fire happening on that day.

In general, the day on which the engagement is entered into is excluded & the last day of the term is included (KELLY, C.B.).—ISAACS v. ROYAL INSURANCE CO. (1870), L. R. 5 Exch. 296 ; 39 L. J. Ex. 189 ; 22 L. T. 681 ; 18 W. R. 982.

Annotations :—*Refd.* Lett v. Osborne (1882), 47 L. T. 40 ; *Re North, Ex p. Hasluck*, [1895] 2 Q. B. 264.

208. ——— Whether distinguishable from day of act.]—*Re ANDREWES & ANDREWES* (1845), 5 L. T. O. S. 202.

209. ——— Act done by party against whom computation made.]—One rule for ascertaining whether the day on which the act is done should be included or not, is to see whether the act is to be done by the party against whom the computation is made.—PELLEW v. WONFORD (INHABITANTS) (1829), 9 B. & C. 134 ; 7 L. J. O. S. M. C. 84 ; 109 E. R. 50 ; *sub nom.* PELLEW v. EAST WONFORD HUNDRED, 4 Man. & Ry. K. B. 130 ; 2 Man. & Ry. M. C. 127.

Annotations :—*Apld.* Hardy v. Ryle (1829), 9 B. & C. 603. *Consd.* Young v. Higgon (1840), 6 M. & W. 49. *Refd.* Webb v. Fairmaner (1838), 5 Dowl. 549 ; *Re Whitby, Ex p. Whitby* (1839), 8 L. J. Bcy. 55 ; Williams v. Burgess (1840), 12 Ad. & El. 635.

210. ——— Act to which party against whom computation made is privy.]—Upon this question, whether a day is to be reckoned inclusive or exclusive, the cases of *Lester v. Garland*, No. 203, *ante*, & *Pellew v. Wonford (Inhabitants)*, No. 209, *ante*, were cited in the argument, & are those alone which it will be necessary to notice. In the former case, this distinction was taken by the Master of the Rolls, which gets rid of the difficulties in many of the cases : if the act done be an act to which the party against whom the time is to run, is privy, then the day on which it is done is to be included ; otherwise, it is excluded. The Master of the Rolls points out this distinction as reconciling many of the cases ; but he does not treat it as a binding rule in all instances : it prevails, however, in general (BAYLEY, J.).—HARDY v. RYLE (1829), 9 B. & C. 603 ; 2 Man. & Ry. M. C. 301 ; 4 Man. & Ry. K. B. 295 ; 7 L. J. O. S. M. C. 118 ; 109 E. R. 224.

Annotations :—*Consd.* Young v. Higgon (1840), 6 M. & W. 49. *Apld.* Radcliffe v. Bartholomew, [1892] 1 Q. B. 161. *Refd.* Webb v. Fairmaner (1838), 3 M. & W. 473 ; Wilkinson v. Gaston (1846), 9 Q. B. 137. *Mentd.* Kitchen v. Shaw (1837), 6 Ad. & El. 729 ; *Ex p. Johnson* (1839), 7 Dowl. 702 ; Gibson v. Ireson (1842), 3 Q. B. 39 ; Lindsay v. Leigh (1848), 3 New Sess. Cas. 99 ; *Ex p. Gordon* (1855), 25 L. J. M. C. 12 ; Taylor v. Carr (1862), 2 B. & S. 335 ; Lawrence v. Todd (1863), 14 C. B. N. S. 554.

211. ——— Time to be computed from particular date—Whether distinguishable from day of date.]—ANON. (1562), Dal. 41 ; 123 E. R. 257.

212. ——— Indentures of demise were ingrossed bearing date May 26, of land in L. to have & to hold for three years from henceforth, & the said indentures were delivered at 4 o'clock in the afternoon of June 20 in the same year :—*Held* : (1) "from henceforth" shall be accounted from the day of the delivery of the indentures,

& not by any computation of date ; (2) though the delivery was in the afternoon of June 20, the lease shall end on June 19, for the law rejects all fractions of a day ; (3) in this case, as also where a lease is limited to take effect from the making thereof, the day of the delivery shall be taken inclusively ; but if a lease be made to begin from the day of the making or from the day of the date, the day itself of the date is excluded.

"From the date" & "from the day of the date" are of one sense.—CLAYTON'S CASE (1585), 5 Co. Rep. 1 a ; 77 E. R. 48.

Annotations :—*As to* (1) *Apld.* Browne v. Burton (1847), 6 Dow. & L. 289. *Refd.* Pugh v. Leeds (1777), 2 Cowp. 714. *As to* (2) *Apld.* Sidebotham v. Holland, [1895] 1 Q. B. 378. *As to* (3) *Consd.* Bellasis v. Hester (1696), 1 Ld. Raym. 280. *Apld.* Steele v. Mart (1825), 4 B. & C. 272. *Refd.* Oshey v. Hicks (1610), Cro. Jac. 263 ; Hemming v. Brabason (1660), O. Bridg. 1. *Generally, Mentd.* Lief v. Saltingstone (1674), 1 Mod. Rep. 189 ; Reynolds v. Thorpe (1728), 2 Stra. 796.

213. ———]—SCAVAGE v. PARKER (1622), Cro. Jac. 647 ; 79 E. R. 558.

214. ———]—It used to be held that "from the date," includes the day, & "from the day of the date," excludes it. But since the case of *Pugh v. The Duke of Leeds*, No. 276, *post*, these formal distinctions have been done away ; & the rule of good sense has been established, that such words shall be construed according to the meaning of the parties who use them (LORD ELLENBOROUGH).—WATSON v. PEARS (1809), 2 Camp. 294 ; 170 E. R. 1160, N. P.

Annotation :—*Refd.* Isaacs v. Royal Insee. (1870), L. R. 5 Exch. 296.

215. ———]—In computing time under 16 Vict. c. 5, avoiding letters patent, on failure in payment of stamp duties :—*Held* : the day of the date is excluded, & the three years do not expire until twelve o'clock at night of the anniversary of the day on which the letters patent were granted.

If the language of the Act had been from the day of the date thereof, the three years would not have begun to run until the following day, but it has been pointed out by the ct., that in fact "the date thereof" & "the day of the date thereof" are synonymous (ROMILLY, M.R.).—WILLIAMS v. NASH (1859), 28 Beav. 93 ; 28 L. J. Ch. 886 ; 33 L. T. O. S. 377 ; 5 Jur. N. S. 696 ; 54 E. R. 301.

Annotation :—*Refd.* Isaacs v. Royal Insee. (1870), 39 L. J. Ex. 189.

216. ——— Date in lease.]—If a demise be made *habendum* from the day of the making the day is excluded.—BARWICK'S CASE (1597), as reported in 5 Co. Rep. 93 b ; 77 E. R. 199.

Annotations :—*Apld.* Cornish v. Cawsey (1648), Aleyn, 75. *Refd.* Hemming v. Brabason (1660), O. Bridg. 1 ; Pugh v. Leeds (1777), 2 Cowp. 714. *Mentd.* St. Saviour's, Southwark Churchwardens' Case (1613), 10 Co. Rep. 66 b ; Fox v. Whitecooke (1614), 2 Bulst. 290 ; Holland v. Fisher (1662), O. Bridg. 181 ; R. v. Kemp (1695), Holt, K. B. 419 ; R. v. Chester (Bp.) (1698), 1 Ld. Raym. 292 ; Savill v. Bethell, [1902] 1 Ch. 523.

217. ———]—NORRIS v. GAWTRY HUNDRED (1617), as reported in Hob. 139 ; 80 E. R. 289.

Annotations :—*Refd.* Belasyse v. Hester (1697), 2 Lut. App. 1589 ; R. v. Adderley (1780), 2 Doug. K. B. 463 ; Young v. Higgon (1840), 9 L. J. M. C. 29. *Mentd.* Ligo v. Chiffin (1669), 2 Keb. 561.

218. ———]—HATTER v. ASH (1696), 1 Ld. Raym. 84 ; 3 Lev. 438 ; 91 E. R. 953 ; *sub nom.* HATHS v. ASH, 2 Salk. 413.

Annotations :—*Consd.* Pugh v. Leeds (1777), 2 Cowp. 714. *Refd.* Ackland v. Lutley (1839), 9 Ad. & El. 879.

219. ———]—ANON. (1699), No. 199, *ante*.

220. ———]—If a writ is made returnable on the octave, etc., of another day, that day shall be included in the computation.—R. v. GUMLEY

(1729), 2 Ld. Raym. 1528; 1 Barn. K. B. 74; 2 Stra. 811; 92 E. R. 491.

— — — — — “Calendar month.”]—See Part I., Sect. 3, sub-sect. 2, *ante*.

221. — — — — — Creation of term by will.]—Testator gave his property to trustees, to be accumulated for twenty-one years, & to convey upon certain trusts. Testator died on Jan. 5, 1820:—*Held*: the dividend of certain stock, due on Jan. 5, 1841, belonged to the accumulating fund.

Where a party creates a term from a particular day, that day is excluded in the computation of the term; & if the party makes use of the expression, as he does here, in the third person, I should have thought it perfectly clear, that, in such an instrument, the term of twenty-one years would extend to the twenty-first anniversary of the day mentioned, & that the whole of that day would be a portion of the term; in other words, that the whole of the twenty-first anniversary of the day of the death would be included (SHADWELL, V.-C.).—GORST v. LOWNDES (1841), 11 Sim. 434; 10 L. J. Ch. 161; 5 Jur. 457; 59 E. R. 940.

222. — — — — — Time to be computed from death of person.]—Appointment of exor., provided he proved the will within three calendar months next after the death of deceased, in computing the time, the day of the death excluded.—*In the Goods of WILMOT* (1834), 1 Curt. 1; 163 E. R. 1.

Meaning of “from.”]—See Sect. 3, sub-sect. 2, D., *post*.

B. Period Before Expiration of which Act may Not be Done.

223. General rule—First & last days excluded.]—The rule for judgment must have four clear days, exclusive of the first & last, & of Sunday, before judgment entered.—ROBERTS v. STACEY (1810), 13 East, 21; 104 E. R. 274.

Annotation:—*Apld.* R. v. Herefordshire JJ. (1820), 3 B. & Ald. 581.

224. — — — — —.]—By 49 Geo. 3, c. 68, s. 5, ten clear days’ notice of the intention to appeal is required:—*Held*: the ten days are to be taken exclusively, both of the day of serving the notice & the day of holding the sessions.—R. v. HEREFORDSHIRE JJ. (1820), 3 B. & Ald. 581; 106 E. R. 773.

225. — — — — —.]—YOUNG v. HIGGON, No. 206, *ante*.

226. — — — — —.]—Under Rule 29, which requires that eight days at least before moving for permanent alimony notice of the motion should be

given, the eight days must be reckoned exclusive of the day on which the notice is given & of that on which the motion is made.—ROBINSON v. ROBINSON (1861), 30 L. J. P. M. & A. 189.

227. — — — — —.]—A judge’s order, that “three days after the service of this order at deft.’s residence, pltf. be at liberty to proceed as if personal service of the writ of summons had been effected on deft.,” was served at deft.’s residence on Dec. 20, & no appearance having been entered by deft., pltf. signed judgment on the morning of Dec. 23:—*Held*: under the order, deft. had to the end of Dec. 23 to enter an appearance, & the judgment ought not to have been signed till Dec. 24.—WEEKS v. WRAY (1868), L. R. 3 Q. B. 212; 9 B. & S. 62; 37 L. J. Q. B. 84; 17 L. T. 498; 16 V. R. 399.

228. (1) The general rule of law in the computation of time is that fractions of a day are not reckoned (CHITTY, J.).

(2) The word “at” means after the interval, or at some time after the interval, [Cos. Act, 1862 (c. 89), s. 51]. The word “at” refers grammatically rather to a point of time than a period (CHITTY, J.).

(3) “An interval of not less than fourteen days” is equivalent to saying that fourteen days must intervene or elapse between the two dates (CHITTY, J.).—*Re RAILWAY SLEEPERS SUPPLY CO.* (1885), 29 Ch. D. 204; 54 L. J. Ch. 720; 52 L. T. 731; 33 W. R. 595; 1 T. L. R. 399.

Annotations:—*As to* (1) *Refd.* *Re North, Ex p Hasluck*, [1895] 2 Q. B. 264. *As to* (3) *Consd.* *Re Miller’s Dale, etc. Co.* (1885), 34 W. R. 192; *Ladies’ Dress Assocn. v Pulbrook* (1899), 68 L. J. Q. B. 871. *Refd.* *Bridge v. Adams* (1899), 63 J. P. Jo. 394; *R. v Turner*, [1910] 1 K. B. 346. *Generally, Mentd.* *Briton Medical, General & Life Assocn. v. Jones* (1889), 61 L. T. 384.

229. Time of expiration—Midnight on last day.]—The answer became sufficient on Aug. 2, & the four weeks allowed from that time to amend the bill, extra the vacation, expired on Nov. 18. Deft. served notice of motion to dismiss at half-past seven o’clock on the evening of Nov. 18:—*Held*: the four weeks did not expire till twelve o’clock at night, & consequently the notice of motion was given before pltf. was in default.—PRESTON v. COLLETT (1851), 20 L. J. Ch. 228; 16 L. T. O. S. 551.

Meaning of “from.”]—See Part III., Sect. 3, sub-sect. 2, D., *post*.

C. Period Within which Act Must be Done.

230. General rule—First day excluded.]—When the sheriff is ruled to bring in the body he has

PART III. SECT. 2, SUB-SECT. 2.—C.

230 i. General rule—First day excluded.]—The time of redemption of land sold for taxes, under 6 Geo. 4, c. 7, being within twelve calendar months from the time of the sale, excludes the day on which the sale takes place.—BOULTON v. RUTTAN (1831), 2 O. S. 396.—CAN.

230 ii. — — — — —.]—In computing the time for short notice of trial the first day was exclusive, & the last inclusive.—LOVE v. ARMOUR (1840), 3 Ont. Dig. 6987.—CAN.

230 iii. — — — — —.]—SCOTT v. DICKSON (1855), 1 P. R. 366.—CAN.

230 iv. — — — — —.]—On an application by solrs. to tax costs against their clients, when the bill was rendered on Aug. 21, & the petition presented on Sept. 22:—*Held*: too soon. The month must be reckoned exclusive of the day of rendering the bill & presenting the petition.—*Re MORPHY & KERR* (1866), 1 Ch. Ch. 56.—CAN.

230 v. — — — — —.]—In computing

the statutory intervals between calls, the time must be reckoned exclusively of the day on which the previous call was payable.—BANK OF NOVA SCOTIA v. FORBES (1883), 16 N. S. R. (4 R. & G.) 295.—CAN.

230 vi. — — — — —.]—In computing the time within which an action must be brought against a bailiff for something done in pursuance of Division Courts Act, R. S. O. 1877, c. 47, s. 231, the day on which the act was committed must be excluded.—HANNS v. JOHNSTON (1883), 3 O. R. 100.—CAN.

230 vii. — — — — —.]—Canada Temperance Act, s. 46, provides that the hearing may be adjourned to a certain time & place, but no such adjournment shall be more than a week:—*Held*: the week must be computed as seven days exclusive of the day of adjournment.—R. v. COLLINS, R. v. GOULAIS (1887), 14 O. R. 613.—CAN.

230 viii. — — — — —.]—THOMSON v. QUIRK (1889), 18 S. C. R. 695.—CAN.

230 ix. — — — — —.]—KOKSILAH

QUARRY CO.’S, LTD. LIABILITY v. R. (1897), 5 B. C. R. 600.—CAN.

230 x. — — — — —.]—ELGIN COUNTY CORPN. v. ROBERT (Ont) (1905), 36 S. C. R. 27.—CAN.

230 xi. — — — — —.]—In a letter of licence from creditors to a debtor, “for & during the term of one year from the date hereof”:—*Held*: the day of the date should be excluded from the computation of the year.—AMMERMAN v. DIGGES (1861), 12 I. C. L. R. App. I.—IR.

230 xii. — — — — —.]—MILLER v. WHEATLEY (1891), 28 L. R. Ir. 144.—IR.

230 xiii. — — — — —.]—SCOTT v. RUTHERFORD (1839), 2 Dunl. (Ct. of Sess.) 206; 15 Fac. Coll. 514.—SCOT.

230 xiv. — — — — —.]—FREW v. MORRIS (1897), 24 R. (Ct. of Sess.) (J.) 50; 34 Sc. L. R. 527; 4 S. L. T. 342.—SCOT.

k. First & last day excluded.]—In computing the time for setting down a cause the day on which it is set down,

Sect. 2.—Inclusion or exclusion of first and last days : Sub-sect. 2, C.; sub-sect. 3. Sect. 3: Sub-sects. 1 & 2, A.]

four days, exclusive of the day when the rule issued, & was served upon the sheriff.—ANON. (1774), Lofft, 631; 98 E. R. 836.

231. ———.]—Seven days' time for pleading, gives the whole of the seventh day to plead in, after excluding the day on which the order is made.—PEPPERELL v. BURRILL (1834), 1 Cr. M. & R. 372; 2 Dowl. 674; 4 Tyr. 811; 3 L. J. Ex. 305; 149 E. R. 1124.

*Annotations:—*Apld. Macher v. Billing (1834), 1 Cr. M. & R. 577; Smith v. Rathbone (1836), 2 Har. & W. 330. *Refd.* Shield v. Quick (1841), 8 M. & W. 289. *Mentd.* Hough v. Bond (1836), Tyr. & Gr. 617.

232. ———.]—(1) If a party purchase goods to be paid for in two calendar months, the credit does not expire till the end of the corresponding day of the second month.

A very reasonable rule was laid down by LORD TENTERDEN, which is a very good test to apply, viz. by reducing the time to one day, in which case the party would clearly be entitled to the whole of the next day after the injury was done, otherwise he might have no time at all in which to give notice (PARKE, B.).

(2) If the question between the parties at a trial be for how long a period certain credit was given, & it is assumed on both sides, that calendar months were meant, & the case left to the jury on that assumption, a party will not be allowed afterwards, in showing cause against a rule for a new trial, to avail himself of the presumption of law, that as no particular kind of months were mentioned, lunar ones must be intended.—WEBB v. FAIRMANER (1838), 3 M. & W. 473; 6 Dowl. 549; 1 Horn & H. 108; 7 L. J. Ex. 140; 2 Jur. 397; 150 E. R. 1231.

*Annotations:—*As to (1) Apld. Young v. Higgon (1840), 6 M. & W. 49. *Distd.* Russell v. Ledsam (1845), 14 M. & W. 574. *Consd.* Spartall v. Benecke (1850), 10 C. B. 212; Isaacs v. Royal Insee. (1870), L. R. 5 Exch. 296. *Refd.* Blunt v. Hilslop (1838), 2 Jur. 542; Williams v. Nash (1859), 28 L. J. Ch. 886; *Re* Railway Sleepers Supply Co. (1885), 29 Ch. D. 204; Goldsmiths' Co. v. West Metropolitan Ry., [1904] 1 K. B. 1; R. v. Turner (1909), 3 Cr. App. Rep. 103; English v. Cliff, [1914] 2 Ch. 376. *As to (2) Refd.* Simpson v. Margitson (1847), 11 Q. B. 23.

233. ———.]—Where, upon Jan. 10, a judge's order was made, that deft. should have four days to apply to the ct. upon a summons, dated Jan. 9, & that in the meantime proceedings be stayed; & a motion was made on Jan. 14, to set aside the interlocutory judgment, which was never drawn up:—*Held*: final judgment might be signed on Jan. 15, the four days mentioned in the order having then expired.—ARMSTONE v. JUDKINS (1840), 4 Jur. 722.

234. ———.]—S. 3, Geo. 4, c. 39, s. 1, enacts that warrants of attorney to confess judgment shall be filed "within twenty one days after the execution." Sect. 2 enacts that, unless they be "filed as aforesaid, within the space of twenty-one days from the execution," or unless

judgment be signed or execution issued within the same period, they, & the judgment & execution thereon, shall be fraudulent & void against the assignees of the party giving the warrant, if he become bkpt. "after the expiration of twenty-one days next after" execution of the warrant:—*Held*: the twenty-one days for filing are to be reckoned exclusively of the day of execution; & a warrant executed on Dec. 9 & filed on Dec. 30, was in time.—WILLIAMS v. BURGESS (1840), 12 Ad. & El. 635; 9 Dowl. 544; Arn. & H. 65; 4 Per. & Dav. 443; 10 L. J. Q. B. 10; 5 Jur. 71; 113 E. R. 955.

*Annotations:—*Apld. *Re* Higham & Jessop (1840), 9 Dowl. 203; Radcliffe v. Bartholomew, [1892] 1 Q. B. 161. *Refd.* R. v. St. Mary, Whitechapel JJ. & Overseers (1843), 7 Jur. 602.

235. ———.]—(1) The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date (PARKE, B.).

(2) The law never takes notice of the fraction of a day, except where there are conflicting rights between subjects (PARKE, B.).—RUSSELL v. LEDSAM (1845), 14 M. & W. 574; 14 L. J. Ex. 353; 5 L. T. O. S. 495; 9 Jur. 557; 153 E. R. 604; *affd.* on other grounds, *sub nom.* LEDSAM v. RUSSELL (1847), 16 M. & W. 633, Ex. Ch.; (1848), 1 H. L. Cas. 687, H. L.

*Annotations:—*As to (1) Apld. Williams v. Nash (1859), 28 Beav. 93; Goldsmiths' Co. v. West Metropolitan Ry., [1904] 1 K. B. 1. *Consd.* English v. Cliff, [1914] 1 Ch. 376. *Refd.* Isaacs v. Royal Insee. (1870), 39 L. J. Ex. 189; Brakspear v. Barton, [1924] 2 K. B. 88. *As to (2) Consd.* R. v. Edwards (1853), 9 Exch. 32. *Generally, Refd.* Crossley v. Potter (1853), 1 Macr. 240. *Mentd.* Sturm v. Jeffree (1847), 8 L. T. O. S. 415; *Re* Markwick's Patent (1860), 13 Moo. P. C. C. 310.

236. ———.]—WILLIAMS v. NASH, No. 215, *ante.*

237. ———.]—Under a special Act which incorporated Lands Clauses Act, 1845 (c. 18), a railway co. were empowered to take lands compulsorily for the purpose of their undertaking, & the powers of the co. for this purpose were to cease after the expiration of three years from the passing of the Act. The Act received the Royal assent on Aug. 9, 1899, & on Aug. 9, 1902, the co. gave to plffs. a notice to treat for the purchase of lands belonging to them & scheduled in the special Act. On an application for an injunction to restrain the co. from proceeding under this notice:—*Held*: the day of the passing of the Act must be excluded in the computation of the three years, & the notice was served in time.

The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded (MATHEW, L.J.).—GOLDSMITHS' CO. v. WEST METROPOLITAN RY. CO., [1904] 1 K. B. 1; 72 L. J. K. B. 931; 89 L. T. 428; 68 J. P. 41, 52 W. R. 21; 20 T. L. R. 7; 48 Sol. Jo. 13, C. A.

*Annotation:—*Refd. Brakspear v. Barton, [1924] 2 K. B. 88.

238. ———.]—Time to be computed from passing

& the first day of hearing, are both excluded.—BEARD v. GREY (1870), 3 Ch. Ch. 104.—CAN.

l. ———.]—*Re* ONTARIO TANNERS' SUPPLIES CO. & ONTARIO & QUEBEC RY. CO. (1888), 12 P. R. 563.—CAN.

m. ———.]—*Re* OSTROM & SIDNEY TOWNSHIP CORPN. (1888), 15 A. R. 372.—CAN.

n. ———.]—*Re* JENNINGS (A BANKRUPT), *Ex p.* BELFAST & COUNTY DOWN RY. CO. (1851), 1 L. Ch. R. 236.—IR.

p. Whether holidays must be

—*Re* TORONTO CITY WEST RIDING ELECTION (1871), 31 U. C. R. 409.—CAN.

q. ———.]—DECHENE v. MONTREAL (CITY) (1894), 10 T. L. R. 640, P. C.—CAN.

r. Date of Act coming into operation.—Under a statute providing compensation for offices, etc., thereby abolished, but limiting the period for claiming to 12 months "after any claim for compensation shall have arisen:—*Held*: this period falls to be calculated from the date when the act came into operation, & the office thereby fell; & not from the first

term thereafter, at which the salary would have been due, had the office continued.—VEITCH v. HARVEY (1830), 9 Sh. (Ct. of Sess.) 20.—SCOT.

t. Day of injury included.—When is last day available for action.—In computing the time of six months within which action for compensation must be brought, under Act 36 of 1907, s. 20 (Transvaal), the day of the injury, death or admission respectively must be included, & the last day available for action is the day preceding the corresponding calendar day.—LAMMAS v. NICHOLL & ALDERSON, [1911] T. P. D. 962.—S. AF.

of statute.]—Where a statute provides that certain proceedings can be taken only within six months from the passing of the Act, the day on which the Act was passed is excluded, & therefore, under Rent & Mortgage Interest Restrictions Act, 1923 (c. 32), s. 8 (2), which came into operation on July 31, 1923, the last day for taking proceedings to recover back over payments of rent under the Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), is not Jan. 30, but Jan. 31, 1924. —*TRUSS v. OLIVIER* (1924), 40 T. L. R. 588, D. C.

Meaning of "from."—See Part III., Sect. 3, sub-sect. 2, D., *post*.

SUB-SECT. 3.—PARTICULAR INSTANCES.

Appeal in Bankruptcy.—See *BANKRUPTCY*, Vol. IV., pp. 529, 530, Nos. 4845-4854.

Authority of arbitrator.—See *ARBITRATION*, Vol. II., p. 410, Nos. 634-641.

Commencement & duration of leases.—See *LANDLORD & TENANT*, Vol. XXX., pp. 461 *et seq.*

Companies—Interval between meetings.—See *COMPANIES*, Vol. IX., p. 580, Nos. 3872-3874.

Compulsory acquisition of land.—See *COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 170, Nos. 478, 479.

Contracts not to be performed within a year.—See *CONTRACT*, Vol. XII., pp. 118 *et seq.*

Contract for sale of goods.—See *SALE OF GOODS*, Vol. XXXIX., p. 598, No. 1960.

Contracts of insurance.—See *INSURANCE*, Vol. XXIX., pp. 360, 403, Nos. 2915, 3191.

Increase of rent—Within Rent & Mortgage Restriction Acts.—See *LANDLORD & TENANT*, Vol. XXXI., p. 567, Nos. 7136-7138.

Lapse of patronage of benefice.—See *ECCLESIASTICAL LAW*, Vol. XIX., pp. 394, 395, Nos. 2196-2210.

Limitation of time for taking proceedings—On attorney's bill.—See *SOLICITORS*, pp. 176-198, *ante*.

— **Creditors action in bankruptcy.**—See *BANKRUPTCY*, Vol. IV., pp. 131, 132, Nos. 1202-1205.

— **Criminal proceedings.**—See *CRIMINAL LAW*, Vol. XIV., p. 153, Nos. 1278-1283.

— **Recovery of rent overpaid.**—See *LANDLORD & TENANT*, Vol. XXXI., p. 574, Nos. 7217-7223.

Limitation of time in wills.—See *WILLS*.

Notice of appeal—From County Court.—See *COUNTY COURTS*, Vol. XIII., p. 535, Nos. 868-874.

— **In bankruptcy.**—See *BANKRUPTCY*, Vol. IV., p. 531, Nos. 4870-4872.

— **Against stopping up or diverting highway.**—See *HIGHWAYS*, Vol. XXVI., p. 484, Nos. 1960-1965.

In affiliation proceedings.—See *BASTARDY*, Vol. III., p. 405, Nos. 380-382.

— **Removal of pauper.**—See *POOR LAW*, Vol. XXXVII., p. 346, Nos. 1497-1506.

Notice of demand for jury—In county court.—See *COUNTY COURTS*, Vol. XIII., p. 500, Nos. 500, 501.

Notices to offender & court—Proceedings against habitual criminal.—See *CRIMINAL LAW*, Vol. XIV., p. 483, No. 5261; Supp. No. III., p. 407, No. 5261a.

Notice of application for certiorari.—See *CROWN PRACTICE*, Vol. XVI., p. 462, Nos. 3370, 3371.

Notice of application for licence for sale of intoxicating liquors.—See *INTOXICATING LIQUORS*, Vol. XXX., p. 13, Nos. 50, 51.

Notice to quit.—See *LANDLORD & TENANT*, Vol. XXXI., pp. 435 *et seq.*

Period of service of artied clerk.—See *SOLICITORS*.

Retention of proceeds of sale by sheriff—Within Bankruptcy Acts.—See *BANKRUPTCY*, Vol. V., p. 817, Nos. 6945, 6946.

Time of payment of bill of exchange.—See *BILLS OF EXCHANGE*, Vol. VI., pp. 54-56, Nos. 415-448.

Time for sale of distress.—See *DISTRESS*, Vol. XVIII., pp. 351, 352, Nos. 883-895.

SECT. 3.—CONSTRUCTION OF TERMS.

SUB-SECT. 1.—IN GENERAL.

See, generally, *DEEDS*, Vol. XVII., pp. 242 *et seq.*

239. Construed to effectuate intention of parties.—*ANON.* (1557), 2 Dyer, 142 a; 73 E. R. 310.

Annotation :—*Refd.* *ANON.* (1560), Dal. 27.

240. —.—*ANON.* (1561), Dal. 27; 123 E. R. 246.

241. —.—Wherever a right is to be divested, the time must be extended in order to support the transaction of the parties. . . . The principle established in the case of *Pugh v. Leeds (Duke)*, No. 276, *post*, was, that the time should be taken exclusive or inclusive as would best effectuate the act intended to be done by the parties (*BULLER, J.*). —*Ex p. FALLON* (1793), 5 Term Rep. 283; 101 E. R. 159.

Annotations :—*Refd.* *Williams v. Burgess* (1841), 9 Dowl. 544; *R. v. St. Mary, Whitechapel, JJ. & Overseers* (1843), 7 Jur. 602. *Mentd.* *Washburn v. Birch* (1793), 5 Term Rep. 472; *Kelfe v. Ambrosio* (1798), 7 Term Rep. 551.

— "From."—See Sub-sect. 2, D., *post*.

Construction of terms in bonds.—See *BONDS*, Vol. VII., pp. 187-191, Nos. 270-303.

SUB-SECT. 2.—PARTICULAR WORDS AND PHRASES.

A. "Reasonable Time."

242. Whether question for judge or jury.—*BELL v. WARDELL*, No. 299, *post*.

243. —.—What is reasonable notice to the indorser of non-payment by the drawer of a promissory note, or acceptor of a bill of exchange, is a question of law.

It is of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law (*ASHHURST, J.*).—*TINDAL v. BROWN* (1786), 1 Term Rep. 167; 99 E. R. 1033; *affd.*, 2 Term Rep. 186, Ex. Ch.

Annotations :—*Dbtd.* *Hopes v. Alder* (1800), 6 East, 16, n. *Consd.* *Darbishire v. Parker* (1805), 8 East, 3. *Refd.* *Stevens v. Aldridge* (1818), 5 Price, 334; *Moule v. Brown* (1838), 4 Bing. N. C. 266. *Mentd.* *Bickerdike v. Bollman* (1786), 1 Term Rep. 405; *Brown v. Harraden* (1791), 4 Term Rep. 148; *Ex p. Barclay* (1802), 7 Ves. 597; *Haynes v. Birks* (1801), 3 Bos. & P. 599; *Esdalle v. Sowerby* (1809), 11 East, 114; *Williams v. Smith* (1819), 2 B. & Ald. 496; *Philpot v. Briant* (1828), 4 Bing. 717; *Pickin v. Graham* (1833), 1 Cr. & M. 725; *Solarte v. Palmer* (1834), 8 Bl. N. S. 874; *Chapman v. Keane* (1835), 3 Ad. & El. 193; *Hedger v. Steavenson* (1837), 2 M. & W. 799; *Furze v. Sharwood* (1841), 2 Q. B. 388; *King v. Bickley* (1842), 2 Q. B. 419; *Caunt v. Thompson* (1849), 7 C. B. 400; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1.

244. —.—The question of reasonable time is a mixed question of law & fact. It will be for the jury to say what the facts are, but the judge will direct them upon those facts, whether the time was reasonable or not, as a matter of law.—*DAVIS v. CAPPER* (1829), 4 C. & P. 134; 10 B. & C. p. 36; 2 Man. & Ry. M. C. p. 578; 5 Man. & Ry. K. B. p. 60; 172 E. R. 640, N. P.

245. —.—Defts., overseers of the township of B., agreed with pltf. & several other persons

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who had given notices of appeal against a poor rate made for the township, that all matters in difference between defts., as such overseers, & pltf. & the other applts., should be referred to the decision of two persons named; & that the costs of pltf. & other applts., incurred by them in relation to the appeals, up to the time of the agreement, should be taxed, & paid by the overseers of the township.

A declaration in *assumpsit* against defts., for non-payment of such costs, alleged that they were taxed in a reasonable time after the making of the agreement, of which defts. had notice, & were requested to pay the amount, but that they had not paid it, & it still remained unpaid to pltf. Defts. pleaded, that the costs were not taxed in a reasonable time after the making of the agreement; on which traverse an issue was joined, & found for defts.:—*Held*: the question, whether such reasonable time had elapsed, was a question for the decision of the jury, & not of the judge.—*BURTON v. GRIFFITHS* (1843), 11 M. & W. 817; 1 L. T. O. S. 289; 152 E. R. 1035.

246. Meaning depends on circumstances.]—There is, of course, no such thing as a reasonable time in the abstract. It must always depend upon circumstances (*LORD HERSHELL, C.*).—*HICK v. RAYMOND & REID*, [1893] A. C. 22; 62 L. J. Q. B. 98; 68 L. T. 175; 41 W. R. 384; 9 T. L. R. 141; 37 Sol. Jo. 145; 7 Asp. M. L. C. 233; 1 R. 125, H. L.; *affq.* S. C. *sub nom.* *HICK v. RODOCANACHI*, [1891] 2 Q. B. 626, C. A.

Annotations:—*Apld.* *Carlton S.S. Co. v. Castle Mail Packets Co.*, [1898] A. C. 486; *Sims v. Mid. Ry.*, [1913] 1 K. B. 103. *Consd.* *Stewart v. Rank* (1920), 36 T. L. R. 728. *Refd.* *Castlegate S.S. Co. v. Dempsey*, [1892] 1 Q. B. 54; *Lyle Shipping Co. v. Cardiff Corpn.*, [1900] 2 Q. B. 638; *Hulthen v. Stewart*, [1902] 2 K. B. 199; *Ropner v. Stoate*, *Hosegood* (1905), 92 L. T. 328; *Akt. Hekla v. Bryson*, *Jameson* (1908), 100 L. T. 155; *Ralli v. Compania Naviera Sota v. Aznar*, [1920] 2 K. B. 287; *Van Diewen v. Hollis*, [1920] A. C. 239; *Verlost's Administratrix v. Motor Union Insce.*, [1925] 2 K. B. 137. *Mentd.* *MacLay v. Bakers & Spiller* (1900), 16 T. L. R. 401; *Langham S.S. Co. v. Gallagher* (1911), 12 Asp. M. L. C. 109; *Transoceanica Societa Italiana Di Navigazione v. Shipton*, [1923] 1 K. B. 31; *R. v. Roberts*, *Ex p. Scurr*, [1924] 2 K. B. 695.

Construction in particular instances.]—*See* *TITLES passim.*

B. "Forthwith."

247. Whether expression of time.]—An order of the ct. for the delivering up of a deed "forthwith" is a sufficient expression of time within the meaning of Consolidated Ord. 23, r. 10.—*THOMAS v. NOKES* (1868), L. R. 6 Eq. 521; 16 W. R. 995.

Annotations:—*Apld.* *Halford v. Hardy* (1899), 81 L. T. 721. *Refd.* *Carter v. Roberts*, [1903] 2 Ch. 312.

248. —.]—Having regard to *Thomas v. Nokes*, No. 247, *ante*, I think that . . . it must be held that the use of the word "forthwith" dispenses with the necessity for fixing a time (*KEKEWICH, J.*).—*HALFORD v. HARDY* (1899), 81 L. T. 721.

Annotations:—*Refd.* *Carter v. Roberts*, [1903] 2 Ch. 312; *Re Launder*, *Launder v. Richards* (1908), 98 L. T. 554. *Mentd.* *D. v. A.*, [1900] 1 Ch. 484.

249. Meaning of "forthwith"—No unreasonable delay.]—The word "forthwith" must not receive that strict construction, that it must follow immediately or instantly on what precedes it; but it ought to receive a fair interpretation implying a reasonable time, & no unreasonable delay (*COLERIDGE, J.*).—*R. v. WORCESTER JJ.* (1839), 7 Dowl. 789; 3 Jur. 1052.

Annotation:—*Dbtd.* *R. v. Berkshire JJ.* (1879), 48 L. J. M. C. 137.

250. —.]—There is no doubt the word "forthwith" means with all reasonable celerity (*TINDAL, C.J.*).—*BURGESS v. BOETEFEUR* (1844), as reported in 7 Man. & G. 481; 135 E. R. 193.

Annotations:—*Mentd.* *R. v. Stonnell* (1845), 1 Cox, C. C. 142; *Jephson v. Barker & Redman*, *Swan v. Same* (1886), 3 T. L. R. 40; *R. v. Ireland*, [1910] 1 K. B. 634; *R. v. Rabjohns*, [1913] 3 K. B. 171.

251. —.]—Without putting any critical construction on the word "forthwith"; it means, I think, with as little delay as the circumstances will reasonably admit of (*COLERIDGE, J.*).—*Ex p. LOWE* (1846), 3 Dow. & L. 737; 2 New Sess. Cas. 331; 15 L. J. M. C. 99; 10 J. P. 632.

Annotation:—*Apld.* *R. v. Ely JJ.* (1855), 1 Jur. N. S. 1017.

252. —.]—Where the order to pay forthwith was served on applt. he was not bound to pay *eo instanti* but would have a reasonable time (*ERLE, J.*).—*R. v. ELY JJ.* (1855), 5 E. & B. 489; 25 L. J. M. C. 1; 26 L. T. O. S. 57; 20 J. P. 116; 1 Jur. N. S. 1017; 4 W. R. 5; 119 E. R. 563.

Annotation:—*Mentd.* *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

253. —.]—"Forthwith" does not mean within so many minutes, but within a reasonable time (*WILLES, J.*).—*KING v. CHAMBERLAIN* (1871), 40 L. J. C. P. 273; 24 L. T. 736; 35 J. P. 743.

Annotations:—*Mentd.* *Agnew v. Jobson* (1877), 47 L. J. M. C. 67; *Burns v. Nowell* (1880), 5 Q. B. D. 444; *Trebeck v. Croudace*, [1918] 1 K. B. 158.

254. — At once—Circumstances of case regarded.]—"Forthwith" of course means "at once" having regard to the circumstances of the case (*BOWEN, L.J.*).—*LOWE v. FOX* (1885), 15 Q. B. D. 667; 54 L. J. Q. B. 561; 53 L. T. 886; 50 J. P. 244; 34 W. R. 141, C. A.; *affd.* on other grounds (1887), 12 App. Cas. 206, H. L.

Annotations:—*Mentd.* *Re Smith's Estate*, *Clements v. Ward* (1887), 35 Ch. D. 589; *Hulley v. Silversprings Bleaching Co.*, [1922] 1 Ch. 268.

255. — In statute.]—As the statute prescribes that a copy of the *capias* should be forthwith delivered, I am bound to give that construction to it which will have the greatest effect for the case & favour of the party arrested (*WILLIAMS, J.*).—*SHEARMAN v. MACKNIGHT* (1837), Will. Woll. & Dav. 189.

256. —.]—When an act is required by a statute or a rule of ct. to be done "forthwith," the word "forthwith" must be construed with regard to the object of the provision & the circumstances of the case.—*Re SOUTHAM, Ex p. LAMB* (1881), 19 Ch. D. 169; 51 L. J. Ch. 207; 45 L. T. 639; 30 W. R. 126, C. A.

Annotations:—*Apld.* *Re Lyon, Ex p. Lyon* (1882), 45 L. T. 768. *Refd.* *Re Jones, Ex p. Williams* (1882), 46 L. T. 237; *Re Vitoria, Ex p. Spanish Corpn.*, [1894] 1 Q. B. 259; *Re Barley*, [1923] 1 Ch. 177.

257. — In award.]—The award directed that A. & B. should forthwith execute certain reconveyances to C., & that C. should forthwith execute indemnities & releases to A. & B.:—*Held*: "forthwith" in the latter case, meant, as soon as A. & B. had, by their execution of the reconveyances, put themselves in a position to call for the execution of the indemnities; & the award was good, although B. was no party to the submission.—*BOYES v. BLUCK, BLUCK v. BOYES, CLOSSMAN v. BLUCK, BLUCK v. CLOSSMAN* (1853), 13 C. B. 652; 1 C. L. R. 215; 138 E. R. 1355; *sub nom.* *Re BLUCK & BOYES*, 22 L. J. C. P. 173.

258. — In rule of court.]—*Re SOUTHAM, Ex p. LAMB*, No. 256, *ante*.

259. — Service of judge's order.]—A party obtaining a judge's order ought to serve it "forthwith."

PART III. SECT. 3, SUB-SECT. 2.—B.

249 i. Meaning of "forthwith"—No unreasonable delay.]—"Forthwith" means immediately, without the lapse of an interval of time.—*ADAMS v. ROGERS*, [1907] V. L. R. 245.—**AUS.**

with," *i.e.* before the opposite party can take the next step.—**KENNEY v. HUTCHINSON** (1840), 6 M. & W. 134; 8 Dowl. 171; 9 L. J. Ex. 60; 4 Jur. 106.

Annotation:—**Apld.** *Maple v. Woodgate* (1846), 7 L. T. O. S. 93.

— **In contract.**—*See* **CONTRACT**, Vol. XII., p. 309, Nos. 2551, 2552.

— **In covenant to repair.**—*See* **LANDLORD & TENANT**, Vol. XXXI., p. 332, No. 4755.

— **In notice to appear to party on bail.**—*See* **CRIMINAL LAW**, Vol. XIV., p. 157, No. 1333.

— **Obtaining certificate of dismissal under Summary Jurisdiction Acts.**—*See* **MAGISTRATES**, Vol. XXXIII., pp. 347, 348, Nos. 569–571.

— **In shipping contracts.**—*See* **SHIPPING**, Vol. XLI., pp. 308, 312, Nos. 1699, 1727.

— **Filing notice of appeal—In county court.**—*See* **COUNTY COURTS**, Vol. XIII., p. 535, No. 874.

— **Under Bankruptcy Rules.**—*See* **BANKRUPTCY**, Vol. IV., p. 532, Nos. 4876–4878.

C. "Immediately."

260. Meaning of "immediately" — Whether all intermediate terms excluded.—The word immediately, although in strictness it excludes all mean times, yet to make good the deeds & intents of parties it shall be construed such convenient time as is reasonably requisite for doing the thing (*per* CUR.).—**PYBUS v. MITFORD** (1672), as reported in 2 Lev. 75; 83 E. R. 456.

Annotations:—**Consd.** *R. v. Francis* (1735), Cunn. 165. **Apld.** *Thompson v. Gibson* (1841), 8 M. & W. 281; *Folkard v. Met. Ry.* (1873), L. R. 8 C. P. 470. **Mentd.** *Southcot v. Stowel* (1677), 2 Mod. Rep. 207; *Coulthman v. Senhouse* (1678), T. Jo. 105; *Davis v. Speed* (1692), Carth. 262; *Tipping v. Cosins* (1694), Comb. 312; *Baker v. Wall* (1695), 1 Ld. Raym. 185; *Penhay v. Hurrell* (1702), Freem. Ch. 258; *Adams v. Savage* (1703), 2 Ld. Raym. 854; *Clifton v. Jackson* (1701), 2 Vern. 486; *Litton Strode v. Falkland* (1708), 3 Rep. Ch. 169; *Wells v. Ferguson* (1708), 11 Mod. Rep. 199; *Roper v. Radcliffe* (1712), 9 Mod. Rep. 181; *Darblson v. Beaumont* (1713), Fortes. Rep. 18; *Newcomen v. Barkham* (1716), 2 Vern. 729; *Hopkins v. Hopkins* (1739), West temp. Hard. 606; *Newcomen v. Bethlem Hospital* (1711), Amb. 8; *Bagshaw v. Spencer* (1718), 1 Ves. Sen. 112; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Winter v. Perratt* (1843), 9 Cl. & Fin. 606; *Cooper v. Arnold* (1855), 1 De G. M. & G. 574; *Owen v. Gibbons*, [1902] 1 Ch. 636.

261. — — — — —]—It was said that that word [immediately] excludes all intermediate time & actions, but it will appear that it has not necessarily so strict a signification (**LORD HARDWICKE, C.J.**).—*R. v. FRANCIS* (1735), Cunn. 165; *Lee temp. Hard.* 113; 2 Stra. 1015; 2 Com. 478; 95 E. R. 70.

Annotations:—**Apld.** *Thompson v. Gibson* (1841), 8 M. & W. 281. **Dtd.** *Grace v. Clinch* (1843), 4 Q. B. 606. **Mentd.** *R. v. Borthwick* (1779), 1 Doug. K. B. 207.

262. — **Promptly according to circumstances.**]—The word "immediately" is to be taken to mean promptly & expeditiously, according to the circumstances of the case.

Deft., on Thursday, May 2, was summarily convicted of an offence under 6 Geo. 4, c. 129, sect. 12 of which directs that the execution of the judgment shall be suspended in case deft. shall immediately enter into recognisance with sureties, etc. He was taken off some distance to gaol in execution of the sentence the same day. On Saturday, his attorney was ready to tender sufficient sureties for him, but no justices sat on that day. On the following Monday the sureties, were tendered & rejected, as being offered too late. Upon an application to this ct. for a rule calling upon the justices to take such recognisances:—**Held**: the word "immediately" is to be taken to mean "promptly according to the circumstances of the case," & he had come promptly according to the circumstances of this case.—*R. v. ASTON* (1850), 4 New Mag. Cas. 106; 4 New Sess. Cas. 283;

19 L. J. M. C. 236; 15 L. T. O. S. 259; 15 J. P. 9; 14 Jur. 1045.

263. — — — — —]—By Licencing Act, 1872 (c. 94), s. 52, an appeal is given to a person aggrieved by an order or conviction made by a ct. of summary jurisdiction, & by sub-sect. 3 the applt. is required "immediately after" giving notice of appeal to the sessions against the order or conviction to enter into a recognisance to try the appeal, etc.:—**Held**: the question whether an applt. had duly complied with the requirements of the sect. was one of fact to be determined by the sessions, having regard to all the circumstances of the case. The word "immediately" means the same thing as "forthwith," & implies prompt action & as speedy as the circumstances reasonably admit of.—*R. v. BERKSHIRE J.J.* (1879), 4 Q. B. D. 469; 48 L. J. M. C. 137; 27 W. R. 798; *sub nom.* *Ex p. TUCK*, 43 J. P. 607.

264. — — — — —]—*Juries Act*, 1825 (c. 50), s. 34, provides that the person or party who shall apply for a special jury shall pay all the expenses occasioned thereby without having any further allowance for the same on taxation than he would be entitled to, if the case had been tried by a common jury; "unless the judge before whom the cause is tried shall, immediately after the verdict, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

On Jan. 27, 1913, an action was tried with a special jury. The verdict was for pltf. upon one issue & for defts. upon another. Judgment was given for pltf. for a fixed sum with the costs of one issue. Each party was ordered to pay the costs of the issue on which they had failed, & an account which was not opposed, was directed. No certificate for a special jury was then asked for or given. On Apr. 24, 1913, on an application relating to the account, defts.' counsel applied for a certificate, & the judge gave it:—**Held**: the judge had not certified in time, for the word "immediately," must be construed literally, unless special circumstances prevented the certificate being made or applied for at the trial or the judge expressly reserved his decision on the point, & in either of such cases it should be applied for at the first reasonable opportunity.

There is no doubt that the word "immediately" has been construed & may in my judgment be construed to mean as immediately as the circumstances permit (**KENNEDY, L.J.**).—*BARKER v. LEWIS & PEAT*, [1913] 3 K. B. 34; 82 L. J. K. B. 843; 108 L. T. 941; 29 T. L. R. 565; 57 Sol. Jo. 577, C. A.

265. — **Must be construed reasonably.**]—*PYBUS v. MITFORD*, No. 260, *ante*.

266. — — — — —]—In an action by the consignees of goods against shipowner for non-delivery of goods according to bills of lading, in which there was a condition that the goods should be taken from the ship by the consignees immediately the ship was ready for discharge, & that otherwise they would be landed or put into craft at the merchant's risk & expense, & the goods having been landed at a dock the day after the ship was ready for discharge, but after the consignees were ready to receive on payment of freight, & the goods having been detained for some time for dock charges, payment of which was refused:—**Held**: it was for the jury whether the consignees had complied with the condition, or whether, if not, deft. had gone beyond it in landing the goods, but, even if pltf. were entitled to recover, yet they might have received the goods on payment of a small sum under protest, they would not be entitled

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to recover full damages for the delay, as their proper course was to have paid the disputed sum under protest, & then sued to recover it.

When a man is called upon by a contract to do an act, & no time is specified, he is allowed a reasonable time for doing it; & what is a reasonable time may depend on all the circumstances of the case. But here the word used being "immediately" it implies that there is a more stringent requisition than what is ordinarily implied in the word "reasonable." Still it must receive a reasonable interpretation, so far that it cannot be considered as imposing an obligation to do what is impossible. . . . The term "immediately" must be taken to mean, that whenever the ship is ready to discharge, the merchant must be there with his craft ready to receive the cargo. . . . This condition is inserted in cases of consignments of cargoes perishable in their nature, such as fruit, & requiring to be cleared quickly. . . . & the shipowner or master cannot know to whom the bills of lading have been assigned. . . . it is not unreasonable in such cases, that the merchant, making use of such means as he may have for hearing of the arrivals of vessels, should be bound to get his papers & his entries passed, & have his craft ready alongside the ship when she is ready to discharge (COCKBURN, C.J.).—*ALEXIADI v. ROBINSON* (1861), 2 F. & F. 679.

267. — In statute.]—A cause was tried by a special jury at the Spring Assizes, 1855, & a verdict found for deft. Deft.'s counsel then asked the judge to certify for the special jury, & he consented, but the associate omitted to indorse the certificate on the record. In the following term, a rule nisi was obtained for a new trial, which was not disposed of until Trinity Vacation. On taxation of costs it was discovered that the certificate was not indorsed on the record, & on application to the judge on Aug. 14, he signed the certificate:—*Held*: the certificate was too late, & the ct. set it aside.

When a statute requires an act to be done immediately, I do not see how we can construe it to mean that the act may be done some weeks afterwards (POLLOCK, C.B.).—*LEECH v. LAMB* (1855), 11 Exch. 437; 25 L. J. Ex. 17; 26 L. T. O. S. 107; 1 Jur. N. S. 1175; 156 E. R. 902; *sub nom.* *LEACH v. LAMB*, 4 W. R. 99.

*Annotation:—*Consd. *Barker v. Lewis & Peat*, [1913] 3 K. B. 34.

268. "Immediately afterwards."]—In an action on the case for a nuisance to pltf.'s market, which was the last cause tried at an assizes, the verdict was found for pltf. with nominal damages, & the judge thereupon immediately adjourned the ct. to his lodgings, & quitted the ct. No application was made in ct. for a certificate under 3 & 4 Vict. c. 24, that the action was brought to try a right; but pltf.'s counsel followed the judge to his lodgings, & there, within a quarter of an hour after the delivery of the verdict, obtained from him such certificate:—*Held*: it was well given.

In strict construction, the words "immediately afterwards" exclude the lapse of any interval of time, but their meaning, with reference to a case like the present, must be, that the certificate shall be granted as speedily as conveniently can be (ROLFE, B.).—*THOMPSON v. GIBSON* (1841), 8 M. & W. 281; 9 Dowl. 717; 10 L. J. Ex. 241; 5 Jur. 390; 151 E. R. 1045.

*Annotations:—*Appld. *Page v. Pearce* (1841), 8 M. & W. 677; *Helmes v. Hedges* (1842), 12 L. J. Q. B. 100. *Consd.* *Duncan v. Topham* (1849), 8 C. B. 225. *Appld.* *King v. Chamberlain* (1871), 40 L. J. C. P. 273; *Folkard v. Met. Ry.* (1873), L. R. 8 C. P. 470. *Refd.* *Leech v. Lamb* (1855), 11 Exch. 437.

269. —.]—It has already been decided, & necessarily so, that the words "immediately afterwards" in the statute, cannot be construed literally; & if you abandon the literal construction of the words, what can you substitute but "within reasonable time"? (LORD ABINGER, C.B.).—*PAGE v. PEARCE* (1841), 8 M. & W. 677; 9 Dowl. 815; 10 L. J. Ex. 434; 151 E. R. 1211.

*Annotation:—*Appld. *Helmes v. Hedges* (1842), 12 L. J. Q. B. 100.

270. —.]—A certificate under 3 & 4 Vict. c. 24, s. 2, that a slander is wilful & malicious, is given too late to be "immediately" after the verdict within that statute, if it be given after an interval of ten days from the trial & at another assize town, & there be no circumstances to account for such delay.

Construing the words "immediately afterwards" as meaning within a reasonable time for the purpose, it would be contrary to the fact to say that the certificate in this case was given immediately afterwards (WILLES, J.).—*FORSDIKE v. STONE* (1868), L. R. 3 C. P. 607; 37 L. J. C. P. 301; 18 L. T. 722; 16 W. R. 976.

*Annotations:—*Appld. *Tyne Alkali Co. v. Lawson* (1877), 36 L. T. 100. *Follid.* *Barker v. Lewis & Peat*, [1913] 3 K. B. 34. *Mentd.* *Phillips v. S. W. Ry.* (1879), 4 Q. B. D. 406.

271. "Immediately after verdict."]—The words in Juries Act, 1825 (c. 50), s. 34, requiring the judge's certificate "immediately after verdict" mean that the judge shall certify within a reasonable time after the verdict pronounced.—*CHRISTIE v. RICHARDSON* (1842), 2 Dowl. N. S. 503; 10 M. & W. 688; 12 L. J. Ex. 86; 6 Jur. 1069; 152 E. R. 648.

*Annotations:—*Expld. *Leech v. Lamb* (1855), 25 L. J. Ex. 17. *Consd.* *Barker v. Lewis & Peat*, [1913] 3 K. B. 34.

272. —.]—Where a judge, during the absence of the jury to consider their verdict, had intimated his intention of certifying for a special jury, but, in consequence of the delivery of the verdict taking place while the judge was engaged with another cause, his signature to the indorsement made by the officer of the ct. was not then applied for, & was supplied some weeks afterwards:—*Held*: this was not a "certifying under the judge's hand immediately after verdict," under Juries Act, 1825 (c. 50), s. 34.—*GRACE v. CLINCH* (1843), 4 Q. B. 606; 3 Gal. & Dav. 591; 12 L. J. Q. B. 273; 1 L. T. O. S. 144; 7 Jur. 576; 114 E. R. 1026.

*Annotations:—*Follid. *Leech v. Lamb* (1855), 11 Exch. 437. *Refd.* *Skipper v. Bodkin* (1860), 2 Sw. & Tr. 1; *Barker v. Lewis & Peat*, [1913] 3 K. B. 34.

273. —.]—*FORSDIKE v. STONE*, No. 270. *ante*.

274. Immediately after execution of award.]—Declaration in *assumpsit* alleged that, before the promise, etc., a cause, wherein the now defts. were pltf's. & G. was deft., was referred by judge's order to the award of pltf's. A. & B., & such third persons as they should appoint in writing, or any two of them; that afterwards, & before the promise, etc., by a writing dated Jan. 5, 1841, A. & B. appointed pltf. C. to be the third arbitrator; that defts. afterwards, in consideration that pltf's., at the request of defts., would take upon themselves the burthen of the reference, promised pltf's. to pay them their reasonable costs of the said award as they should by their said award appoint; that pltf's. accepted the burthen, etc., & within the time limited, made their award ready to be delivered to the parties, & thereby awarded, amongst other things, that defts. should pay pltf's. a certain sum for their costs, the said sum to be paid to pltf's. immediately after the execution of the award, whereof defts. afterwards had notice; nevertheless, though the sum was a fair sum, & a reasonable

time had elapsed before the commencement of the suit, debts. had not paid:—*Held*: the award directing payment of costs “immediately after the execution of the award” must be construed to mean “within a reasonable time after notice.”—*HOGGINS v. GORDON* (1842), 3 Q. B. 466; 2 Gal. & Dav. 656; 11 L. J. Q. B. 286; 6 Jur. 895; 114 E. R. 586.

Annotations:—*Mentd.* *Veitch v. Russell* (1842), 3 Gal. & Dav. 198; *Kennedy v. Brown* (1863), 11 C. B. N. S. 677; *Crampton & Holt v. Ridley* (1887), 20 Q. B. D. 48.

275. “Immediately after trial.”—The judges’ certificate for costs, under City of London Small Debts Act, 1852, must be given at the trial, or immediately after, before another trial proceeds. Three days after the trial is too late.—*PICARD v. CORNELL* (1856), 26 L. T. O. S. 228.

“Immediately on demand.”—*See* CONTRACT, Vol. XII., p. 430, No. 3481.

D. “From.”

276. Meaning of “from”—Construed to effectuate intention of parties.—(1) The word “from” may mean either inclusion or exclusion according to the context & subject matter & the ct. will construe it so to effectuate the deeds of parties & not to destroy them.

(2) In law there is no fraction of a day (*LORD MANSFIELD, C.J.*).—*PUGH v. LEEDS (DUKE)* (1777), 2 Cowp. 714; 98 E. R. 1323.

Annotations:—*As to* (1) *Consd.* *Ex p. Fallon* (1793), 5 Term Rep. 283; *Watson v. Pears* (1809), 2 Camp. 294; *Isaacs v. Royal Insee.* (1870), L. R. 5 Exch. 296. *Refd.* *Welch v. Fisher* (1818), 1 Taunt. 338; *Cockell v. Gray* (1822), 6 Moore, C. P. 483; *Kerr v. Jeston* (1842), 6 Jur. 1110; *Sidebotham v. Holland* (1894), 61 L. J. Q. B. 200; *Brakspear v. Barton*, [1924] 2 K. B. 88. *As to* (2) *Expld.* *R v. Gamlingay* (1790), 3 Term Rep. 513. *Consd.* *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204. *Generally, Refd.* *Doe d. Cox v. Day* (1809), 10 East, 427; *Ackland v. Lutley* (1839), 9 Ad. & El. 879; *English v. Cliff*, [1914] 2 Ch. 376.

277. ———.—The point principally relied upon is that the word “from” is exclusive. . . . Supposing that the word, *primâ facie*, has an exclusive meaning, there is no rule that prevents us from interpreting it so as to be inclusive, if the use of the word in the transaction leads us to do so (*WILLIAMS, J.*).—*WILKINSON v. GASTON* (1846), 9 Q. B. 137; 15 L. J. Q. B. 339; 7 L. T. O. S. 225; 10 Jur. 804; 115 E. R. 1227.

Annotation:—*Mentd.* *Wallis v. Warren* (1849), 4 Exch. 361.

278. ——— Whether day fixed for commencement excluded.—*Pltfs.*, a tramcar co., effected with debts. an insurance against “claims for personal injury in respect of accidents caused by vehicles for twelve calendar months from Nov. 24, 1887,” to the amount of “£250 in respect of any one accident.” On Nov. 24, 1888, one of *pltfs.*’ tramcars was overturned, forty persons were injured, & *pltfs.* became liable to pay claims to the amount of £833:—*Held*: the effect of “from” in the expression “for twelve calendar months from Nov. 24, 1887,” was to exclude Nov. 24, 1887, & to include Nov. 24, 1888, in the period of the insurance.

I cannot but think that as regards time, “from” is akin to “after,” & excludes the date fixed for the commencement of the computation (*DAY, J.*).—*SOUTH STAFFORDSHIRE TRAMWAYS CO. v. SICKNESS & ACCIDENT ASSURANCE ASSOCN.*, [1891] 1 Q. B. 402; 60 L. J. Q. B. 47; 63 L. T. 807; 55 J. P. 168; 7 T. L. R. 14, D. C.; *on appeal*, [1891] 1 Q. B. p. 406, C. A.

Annotations:—*Consd.* *Sheffield Corpn. v. Sheffield Electric Light Co.*, [1898] 1 Ch. 203. *Mentd.* *Allen v. London Guarantee & Accident Co.* (1912), 28 T. L. R. 254.

——— **Insurance policies.**—*See* INSURANCE, Vol. XXIX., pp. 126, 313, 360, Nos. 787, 2580, 2915.

279. “From & after”—In Provisional Order.—By a Provisional Order under Electric Lighting Acts, confirmed by Electric Lighting Orders Confirmation Act, 1892 (cc. xix), which received the Royal assent on June 27, 1892, debt. co. were authorised to carry on an electric undertaking in Sheffield. The Order contained an option for the corpn. within forty-two years to purchase the undertaking “upon the terms of issuing or transferring to the undertakers such an amount of Sheffield Corpn. stock as will produce by the interest or dividends thereon an annuity of 5 per cent. *per annum* upon the sum properly expended by the undertakers upon the undertaking & chargeable to capital account.” This option was subject to a proviso for payment of an additional sum if the option were exercised within ten years, & alternative options were given to the corpn. to purchase for a capital sum if the power were not exercised until after twenty-one years or thirty-one years respectively.

Under the Sheffield Corporation Acts, 1883 & 1888 the corpn. had power to issue irredeemable or redeemable stock.

By a Provisional Order under the Public Health Act, confirmed by an Act which received the Royal assent on the same June 27, the power to issue irredeemable stock was repealed.

The two Provisional Orders contained provisions that they should come into operation, the first-mentioned “on the day” the last-mentioned “from & after the day,” upon which they received the Royal assent.

The corpn. gave notice to purchase. The co. refused to sell on the ground that the corpn. were bound to issue irredeemable stock, & had no power to do it. The corpn. brought this action for specific performance:—*Held*: the Provisional Order under the Electric Lighting Act came into operation on the day of, & the Order under the Public Health Act the day after, the Royal assent, but, even if they came into operation on the same day, they could not be construed together so as to give or reserve to the corpn. a power to issue irredeemable stock for the purpose of this purchase.—*SHEFFIELD CORPN. v. SHEFFIELD ELECTRIC LIGHT CO.*, [1898] 1 Ch. 203; 67 L. J. Ch. 113; 77 L. T. 616; 62 J. P. 87; 46 W. R. 485.

E. “Until.”

280. Whether inclusive.—*NEWMAN v. BEAUMOND* (1593), Owen, 50; 74 E. R. 892.

Annotation:—*Consd.* *R. v. Stevens & Agnew* (1804), 5 East, 214.

281. ———.—*NICHOLS v. RAMSET* (1677), 2 Mod. Rep. 280; 86 E. R. 1072.

Annotation:—*Consd.* *R. v. Stevens & Agnew* (1804), 5 East, 214.

282. ———.—*Seemle*: the word “till” is inclusive of the day to which it is prefixed.—*DAKINS v. WAGNER* (1835), 3 Dowl. 535.

283. ———.—Where an arbitrator enlarges the time for making his award “until” a particular day, the time is to be construed as inclusive of that day.

There is no doubt that . . . there is no absolute rule as to the meaning to be attached to the word “until,” as it may be construed either as inclusive or exclusive, as it may with strict propriety mean either (*WILLIAMS, J.*).—*KERR v. JESTON* (1842), 1 Dowl. N. S. 538; 6 Jur. 1110.

Annotation:—*Mentd.* *Lord v. Lord* (1855), 5 E. & B. 404.

284. ———.—Deft. had the whole of that day to remove, the word “at” or “until” being inclusive (*WIGHTMAN, J.*).—*ARCHER v. SADLER* (1859), 1 F. & F. 481, N. P.

Sect. 3.—Construction of terms: Sub-sect. 2, E., F. & G.]

285. — Depends on intention of parties.]—

If the word until occurred in a contract, & the context or subject-matter evidently showed that it was meant in an inclusive sense, there can be no doubt but that the ct., in furtherance of such intention, would so construe it (LORD ELLENBOROUGH, C.J.).—*R. v. STEVENS & AGNEW* (1804), 5 East, 244; 1 Smith, K. B. 437; 102 E. R. 1063.

Annotations:—Consd. Wilkinson v. Gaston (1846), 11 Q. B. 137; *Bellhouse v. Mellor* (1859), 4 H. & N. 116. *Mentd. R. v. O'Connell* (1844), 3 L. T. O. S. 323; *Douglas v. R.* (1848), 13 Q. B. 74; *R. v. Duffy* (1849), 7 State, Tr. N. S. 795.

286. — —.]—The word "until" is ambiguous, & may be construed either inclusive or exclusive of the day mentioned, according to the subject-matter & the true intent of the document in which it is used (WATSON, B.).—*BELLHOUSE v. MELLOR, PROUDMAN v. MELLOR* (1859), 4 H. & N. 116; 32 L. T. O. S. 317; 157 E. R. 780; *sub nom. BACKHOUSE v. MELLOR, PROUDHON v. MELLOR*, 28 L. J. Ex. 141; 5 Jur. N. S. 175.

Annotations:—Consd. Isaacs v. Royal Insee. (1870), L. R. 5 Exch. 296. *Refd. Tomline v. Cadman* (1859), 6 C. B. N. S. 733. *Mentd. Williams v. Dray* (1860), 29 L. J. Q. B. 86.

In submission to arbitration.]—See ARBITRATION, Vol. II., p. 410, Nos. 639, 640.

In insurance policies.]—See INSURANCE, Vol. XXIX., p. 313, No. 2580.

F. "At Least."

287. Specified number of days "at least"—Means clear days.]—*ZOUCH v. EMPSEY* (1821), 4 B. & Ald. 522; 106 E. R. 1028.

Annotations:—Apld. R. v. Middlesex JJ. (1845), 3 Dow. & L. 109. *Refd. R. v. Shropshire JJ.* (1838), 8 Ad. & El. 173.

288. — —.]—The rule which requires notice to be given by an attorney, of his intention to apply for admission "three days, at least," before the term, must be construed as if it required "three clear days," & the days must all be exclusive.—*Re PRAUGLEY* (1836), 4 Ad. & El. 781; 6 Nev. & M. K. B. 421; 6 L. J. K. B. 259; 111 E. R. 977; *sub nom. ANON.*, 2 Har. & W. 65.

Annotation:—Apld. R. v. Shropshire JJ. (1838), 8 Ad. & El. 173.

289. — —.]—*R. v. SHROPSHIRE JJ.*, No. 196, *ante*.

— —.]—The fifteen days which, by Uniformity of Process Act, 1832 (c. 39), s. 3, must elapse between the *teste* & return of a writ of *distringas*, are fifteen clear days.

In our former judgment, we said that "not less than fifteen days" meant fifteen days, one exclusive & one inclusive; but upon looking at 13 Car. 2, st. 2, c. 2, s. 6, which recites that, in actions commenced by original writs, it was necessary that there should be "fifteen days at the least" between the day of the *teste* & the return of the writ, we think the words in Uniformity of Process Act, 1832 (c. 39), must be construed to mean fifteen full days (PARKE, B.).—*CHAMBERS v. SMITH* (1843), 12 M. & W. 2; 13 L. J. Ex. 25; 2 L. T. O. S. 101; 7 Jur. 1019; 152 E. R. 1085.

Annotations:—Consd. Re Railway Sleepers Supply Co. (1885), 29 Ch. D. 204; *R. v. Turner*, [1910] 1 K. B. 346; *R. v. Middlesex JJ.* (1845), 14 L. J. M. C. 139; *Browne v. Black* (1911), 80 L. J. K. B. 758.

291. — —.]—A local Act required seven days' notice at least to be given by an applt. of his intention to bring an appeal. Notice was served on Dec. 31. The sessions commenced on Jan. 7, on which day appeals were entered, but not heard till a subsequent day:—*Held*: (1) the notice was insufficient, as both the day of giving the notice, & the day of holding the sessions, must be

excluded: & the day of bringing an appeal is the day on which it is entered, not that on which it is heard; (2) the fraction of a day cannot be taken into consideration in such a case.

If this question were to be considered now for the first time, I should be disposed to doubt whether by the words, "seven days' notice at least," more was meant than that seven days should be the shortest notice, but that more might be given if the party pleased; but it has been so frequently decided that the words "at least" have the effect of excluding the day of the notice, as well as the day of the act of which notice is given, that it seems to me too late now to raise the question, & that we must abide by what has been so frequently decided. . . . It was contended that the fraction of a day might be considered, & that the notice might be calculated from the hour of the day on which it was served; but there is no authority for such a proposition as applicable to cases like the present. In all such cases the general rule excluding fractions of a day from the computation of time has been applied, & great inconvenience might follow if it were not so. Where the question is which of two acts, or conflicting rights, shall take precedence of the other, the precise time, including fractions of a day, must necessarily be inquired into (WIGHTMAN, J.).—*R. v. MIDDLESEX JJ.* (1845), 3 Dow. & L. 109; 1 New Mag. Cas. 336; 2 New Sess. Cas. 73; 14 L. J. M. C. 139; 5 L. T. O. S. 221; 10 J. P. 6; 9 Jur. 758.

Annotations:—As to (1) Refd. R. v. Carnarvon & Anglesen Grdn. (1849), 14 L. T. O. S. 200; *R. v. St. Mary's, Warwick* (1853), 21 L. T. O. S. 74. *As to (2) Refd. Campbell v. Strangeways* (1877), 42 J. P. 39.

292. — —.]—The ct. has no power to hear an appeal, where resp. fails to appear, unless applt. has served upon him a notice under 6 & 7 Vict. c. 18, s. 62, of his intention to prosecute the appeal, ten days at least before the first day appointed by the ct. for hearing appeals, that is, ten clear days, exclusive both of the day of service & of the day so appointed.—*NORTON v. SALISBURY TOWN-CLERK* (1846), 4 C. B. 32; 1 Lut. Reg. Cas. 538; 16 L. J. C. P. 9; 8 L. T. O. S. 143; 10 J. P. 806; 10 Jur. 970; 136 E. R. 412.

Annotation:—Refd. Luckett v. Gilder (1861), 11 C. B. N. S. 1.

293. — —.]—By a Canal Act, inhabitants of a county possessing a certain property qualification were made comrs. for settling & determining all differences between the canal co. & the proprietors of lands through which the canal passed.

The Act provided that no meeting of the comrs. should be held for putting the Act in execution, unless previous notice should be given in some newspaper published or circulated in the county, at least 10 days before such meeting:—*Held*: notice of a meeting to be held on Feb. 12 bearing date Jan. 27 & published in a newspaper of the date of Jan. 27 was insufficient, although it was proved that the newspaper was printed & partly circulated on Jan. 26.—*R. v. ABERDARE CANAL CO.* (1850), 14 Q. B. 854; 4 New Mag. Cas. 123; 19 L. J. Q. B. 251; 15 L. T. O. S. 453; 14 J. P. 497; 14 Jur. 735; 117 E. R. 328.

Annotations:—Mentd. R. v. Salford Overseers (1852), 16 Jur. 907; *Wildes v. Russell* (1866), Har. & Ruth. 689; *R. v. Woodhouse*, [1906] 1 K. B. 501.

294. — —.]—Companies Clauses Consolidation Act, 1845 (c. 16), s. 22, requires notice of each call to be given twenty-one days at the least. The notice was posted on Jan. 24, received on Jan. 25 at Liverpool, for a call payable on Feb. 15. Another call, notice posted on May 28, received on May 29, for a call payable on June 19:—*Held*: twenty-one days at the least meant twenty-one

clear days.—**AMBERGATE, NOTTINGHAM & BOSTON RY. CO. v. MITCHELL** (1850), 15 L. T. O. S. 234.

295. ———.]—Prior to a municipal election the town clerk is by 38 & 39 Vict. c. 40, s. 1 (1), to issue a notice stating, amongst other things, the last day on which nomination papers are to be delivered. By sub-sect. 3, nomination papers are to be delivered seven days at least before the day of election, & the mayor is to sit at the town hall on a subsequent day to decide on the validity of objections made to nomination papers. In accordance with the above enactments, the town clerk issued a notice for a forthcoming municipal election, stating that Oct. 23 was the last day on which nomination papers were to be delivered. Oct. 23 only allowed six days, exclusive of Sundays & the days of nomination & election, to intervene between the nomination day & the day of election :—*Held* : seven days mean seven clear days, exclusive of the nomination day & the day of election as well as of Sundays.—**HOWES v. TURNER** (1876), 1 C. P. D. 670 ; 45 L. J. Q. B. 550 ; 35 L. T. 58 ; *sub nom.* **HOWES & PEIRCE v. WRIGHT & TURNER**, 40 J. P. 680, D. C.

Annotations :—*Refd.* Harford v. Linskey, [1899] 1 Q. B. 852. *Mentd.* Monks v. Jackson (1876), 1 C. P. D. 683 ; Gothard v. Clarke (1880), 5 C. P. D. 253 ; Line v. Warren (1885), 14 Q. B. D. 548.

296. ———.]—Notice “at least fourteen days before the date” of a meeting of debenture holders means fourteen clear days between the issue of the advertisement or circular calling the meeting & the day of the meeting ; & the notice so given is effectual, though it may not actually reach any debenture holder until some days afterwards.—**SNEATH v. VAILEY GOLD, LTD.**, [1893] 1 Ch. 477 ; 68 L. T. 602 ; 2 R. 292, C. A.

Annotation :—*Mentd.* Mercantile Investment & General Trust Co. v. River Plate Trust, Loan & Agency Co., [1894] 1 Ch. 578.

297. ——— **Means not less than specified number.**]
—Excise Management Act, 1834 (c. 51), s. 19, requires that a summons to appear before justices & answer a summons under the statute shall be served ten days “at least” before the hearing. A party was summoned on the 20th day of the month to appear on the 30th & was convicted for default of appearance :—*Held* : the justices had no jurisdiction, as the ten days must be reckoned exclusively of the day of serving the summons & that of convicting deft.

Ten days “at least” must mean not less than ten days, according to any construction (**LORD DENMAN, C.J.**).—**MITCHELL v. FOSTER** (1840), 9 Dowl. 527 ; 12 Ad. & El. 472 ; 4 Per. & Dav. 150 ; 9 L. J. M. C. 95 ; 5 Jur. 70 ; 113 E. R. 891.

Annotation :—*Appld.* R. v. Middlesex JJ. (1845), 3 Dow. & L. 109.

298. One calendar month “at least.”—**FREE-MAN v. READ**, No. 66, *ante*.

G. Other Words and Phrases.

299. “Seasonable time”—**Whether question of law or fact.**—(1) “Seasonable time” partly question of law & partly of fact.

(2) Reasonable time . . . of which the ct. are the proper judges (**WILLES, J.**).—**BEIL v. WARDELL** (1740), Willes, 202 ; 125 E. R. 1131.

Annotations :—*As to* (2) *Consd.* Darbishire v. Barber (1805), 6 East, 3. *Generally, Refd.* Mounsey v. Ismay (1863), 1 H. & C. 729. *Mentd.* Selby v. Bardons (1832), 3 B. & Ad. 2 ; Mortimer v. Moore (1845), ■ Q. B. 294 ; Sowerby v.

Coleman (1867), L. R. ■ Exch. 96 ; Hall v. Nottingham (1875), 1 Ex. D. 1 ; Mercer v. Denne (1905), 74 L. J. Ch. 723.

300. “Next term.”—The words, next term, in a statute, ought to be construed next term, in which the thing required can be done.—**KEARLE v. WHITELAND** (1756), Say. 313 ; 96 E. R. 892.

301. “Instanter.”—Under the conditions of pleading issuably & taking short notice of trial, if a declaration is delivered after the sittings have begun, but so early that there would be time for notice of trial for the adjournment day upon deft. pleading *instanter*, that is, within twenty-four hours, he must so plead.—**PRICE v. SIMPSON** (1808), 1 Taunt. 343 ; 127 E. R. 866.

302. “Present” year.—A tenant erected certain premises in May, but was to pay rent as from Feb. 2 preceding, to Feb. 2 in the next year, after which he was to hold them as a tenant from year to year. In Oct. 1833, he received a notice to quit “at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year’s holding of or in the said messuage, etc., shall expire, after the expiration of half a year from the delivery of this notice” :—*Held* : the word “present” must have reference to the expiration of the year current after the time stated in the notice, or might be rejected altogether & that the notice was a good notice for Feb. 1835.—**DOE d. WILLIAMS v. SMITH** (1836), 5 Ad. & El. 350 ; 2 Har. & W. 176 ; 6 Nev. & M. K. B. 829 ; 5 L. J. K. B. 216 ; 111 E. R. 1198.

Annotations :—*Distd.* Doe d. Richmond Corpn. v. Morphet (1845), 7 Q. B. 577. *Consd.* Widdo v. Dyer, [1900] 1 Q. B. 23.

303. “Then” “ad time.”—“Then” “ad time” means the very time at which the other event happened. . . . But of “instantly” the more natural & usual sense is instantly after (**LORD DENMAN, C.J.**).—**R. v. BROWNLOW** (1839), 11 Ad. & El. 119 ; 8 Dowl. 157 ; 3 Per. & Dav. 52 ; 9 L. J. M. C. 15 ; 4 Jur. 103 ; 113 E. R. 358.

Annotations :—*Consd.* Oldershaw v. King (1857), 3 Jur. N. S. 1152. *Refd.* Grace v. Clinch (1843), 4 Q. B. 606. *Mentd.* Re Appleton (1839), 3 J. P. 738.

304. “Instantly.”—**R. v. BROWNLOW**, No. 303, *ante*.

305. “Thereupon.”—A judgment was entered up in vacation, under a warrant of attorney, given “to appear as of Trinity term now last, Michaelmas term now next, or of some other subsequent term, at the office of pleas, & then & there to receive a declaration at the suit of pltf., & thereupon to confess judgment by *nul dicit*, etc., to be thereupon forthwith entered of record” :—*Held* : the word “thereupon” did not necessarily refer to time at all, & as it must be taken in the strongest sense against the warrantor, it was not necessary that the act of signing judgment should be concurrent with that of receiving the declaration ; but the warrant did not authorise a signing of judgment in vacation.—**RAYMENT v. SMITH** (1843), 1 Dow. & L. 166 ; 12 L. J. Q. B. 279 ; 7 Jur. 674.

Annotations :—*Folld.* Bird v. Manning (1841), 13 L. J. Q. B. 123. *Mentd.* Bate v. Lawrence (1814), 7 Man. & G. 405 ; Alcock v. Sutcliffe (1847), 16 L. J. Q. B. 129.

306. ———.]—A judgment entered up on Jan. 4, 1844, as of Michaelmas term, 7 Vict., on a warrant of attorney, given by a party in 1835, to appear as of last Hilary term, next Easter term, or any subsequent term, & then & there to receive a

PART III. SECT. 3, SUB-SECT. 2.—G.

a. “Or as soon thereafter as possible” —*Reasonable time.*—Deft. on Oct. 12, agreed to move a house for pltf., & to finish the moving on Oct. 21, “or as soon thereafter as possible” :—

Held : the words quoted meant within a reasonable time after Oct. 21, & in the circumstances, a few days thereafter would have been a reasonable time.—**ARCHAMBAULT v. DAY** (Sask.) (1914), 27 W. L. R. 15.—**CAN.**

b. “Up to Wednesday” —*Includes last hour of Wednesday.*—**METROPOLITAN ENGINEERING WORKS v. DEBRUMER** (1917), 1 L. R. 45 Calc. 481.—**IND.**

Sect. 3.—Construction of terms: Sub-sect. 2, G. |
Sect. 4: Sub-sects. 1 & 2.]

declaration, & thereupon to confess the same action, or else to suffer a judgment, by *nil dicit* or otherwise, to pass against him in the same action, & to be thereupon forthwith entered up of record":—*Held*: bad.—*BIRD v. MANNING* (1844), 13 L. J. Q. B. 123; 2 L. T. O. S. 333; 8 Jur. 175.

Annotations:—*Reid*. *Bate v. Lawrence* (1844), 7 Man. & G. 405; *Alcock v. Sutcliffe* (1847), 16 L. J. Q. B. 129.

307. "Not less than."]—*CHAMBERS v. SMITH*, No. 290, *ante*.

308. —.]—*Re RAILWAY SLEEPERS SUPPLY Co.*, No. 228, *ante*.

309. —.]—(1) When a certain number of days are specified they are to be reckoned exclusive of one of the day's & inclusive of the other unless clear days are expressed (*per CUR.*).

(2) In *Chambers v. Smith*, No. 290, *ante*, the ct., after having in the first instance thought that the words "not less than fifteen days" were to be construed according to what I have called the ordinary rule, namely, inclusive of one of the days & exclusive of the other, on reconsideration came to the conclusion that they were to be construed as meaning fifteen clear days. The words upon which that decision was based are the nearest to be found in the authorities to those which we have to construe in the present case, & we therefore come to the conclusion that the provision that "not less than seven days" notice has to be given means "seven clear days" notice, & we so answer the question (*per CUR.*).—*R. v. TURNER*, [1910] 1 K. B. 346; 79 L. J. K. B. 176; 102 L. T. 367; 74 J. P. 81; 26 T. L. R. 112; 54 Sol. Jo. 164; 22 Cox, C. C. 310; 3 Cr. App. Rep. 103, C. O. A.

Annotations:—*As to* (1) *Folld. R. v. Dean* (1924), 18 Cr. App. Rep. 21. *Reid*. *Browne v. Black*, [1911] 1 K. B. 975. *Generally*, *Mentd.* *R. v. Johnson* (1909), 3 Cr. App. Rep. 168; *R. v. Condon* (1910), 4 Cr. App. Rep. 109; *R. v. Fawcett* (1910), 74 J. P. 444; *R. v. Marshall* (1910), 74 J. P. 381; *R. v. Moran* (1910), 5 Cr. App. Rep. 219; *R. v. Walker* (1910), 27 T. L. R. 51; *R. v. Waller*, [1910] 1 K. B. 364; *R. v. Summers* (1914), 10 Cr. App. Rep. 11; *R. v. Harris*, [1922] 2 K. B. 543; *R. v. Coney* (1923), 92 L. J. K. B. 915.

310. "Peremptory" order.]—An order "peremptory" for time to plead does not preclude deft. from again applying by summons for further time; & if he take out such further summons, judgment signed for want of a plea after the summons is returnable, is irregular.

The peremptory order is only the expression of the then opinion of the judge; but it is not absolutely final; neither does it import any undertaking or contract on the part of deft. The meaning of the word is only that the judge makes an absolute order, but, like all other orders, liable to be varied if he thinks fit (*PARKE, B.*).—*BEAZLEY v. BAILEY* (1846), 16 M. & W. 58; 4 Dow. & L. 271; 1 New Pract. Cas. 528; 16 L. J. Ex. 1; 10 Jur. 906; 8 L. T. O. S. 164.

Annotation:—*Consd.* *Falck v. Axthelm* (1889), 59 L. J. Q. B. 161.

311. —.]—What is the meaning of "peremptory" in such an order? It was argued that it has really no meaning, & a case was cited to show that to be so. I think the real meaning is that the order is peremptory that deft. shall plead within one month unless the order is altered. . . . If the order remains unaltered, it is an order for a month peremptory; that deft. shall have one month to plead & no more (*LORD ESHER, M.R.*).—*FAICK v. AXTHELM* (1889), 24 Q. B. D. 174; 59 L. J. Q. B. 161; 38 W. R. 196, C. A.

312. "As soon as possible."]—A contract by a manufacturer to furnish certain specified goods "as soon as possible," means within a reasonable

time, regard being had to the manufacturer's ability to produce them, & the orders he may already have in hand.—*ATTWOOD v. EMERY* (1856), 1 C. B. N. S. 110; 26 L. J. C. P. 73; 5 W. R. 19; 140 E. R. 45; *sub nom.* *ATWOOD v. EMERY*, 28 L. T. O. S. 85.

Annotations:—*Consd.* *Bergheim v. Blaenavon Iron & Steel Co.* (1875), 32 L. T. 451. *Expld.* *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. D. 670.

313. —.]—To do a thing "as soon as possible" means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time (*BRAMWELL, L.J.*).—*HYDRAULIC ENGINEERING Co., LTD. v. McHAFFIE* (1878), 4 Q. B. D. 670; 27 W. R. 221, C. A.

Annotations:—*Reid*. *Vorlest's Administratrix v. Motor Union Insee.*, [1925] 2 K. B. 137. *Mentd.* *Hammond v. Bussey* (1887), 20 Q. B. D. 79; *Re Hall & Pim* (1927), 137 L. T. 585.

314. "At"—Whether inclusive.]—*ARCHER v. SADLER*, No. 284, *ante*.

315. — After an interval.]—*Re RAILWAY SLEEPERS SUPPLY Co.*, No. 228, *ante*.

316. — Reference to point of time.]—*Re RAILWAY SLEEPERS SUPPLY Co.*, No. 228, *ante*.

317. "Upon the trial."]—"Upon the trial" means "after the trial" & no particular time is limited. The result seems to me to be that the thing must be done within a reasonable time after the trial (*BRETT, J.*).—*FOLKARD v. METROPOLITAN RY. Co.* (1873), L. R. 8 C. P. 470; 42 L. J. C. P. 162; 29 L. T. 101; 21 W. R. 736.

318. "On"—Includes shortly after.]—A decree nisi for dissolution of marriage was made against a wife on Aug. 3, 1880, & was made absolute in due course. The wife appealed, & her appeal was dismissed on July 19, 1881. On July 30 she took out a summons to have permanent maintenance allowed her. Owing to her absence abroad the summons was not heard till Dec. 1882, when the President dismissed it. The wife appealed:—*Held*: as the application to the President was out of time, & he had exercised a discretion under the special circumstances of the case, the ct. would not interfere with his decision.

It is not to be conceived that a period of more than a year can be included in the word "on." "On" if not confined to the time of making the decree, must mean shortly after (*JESSEL, M.R.*).—*ROBERTSON v. ROBERTSON & FAVAGROSSA* (1883), 8 P. D. 94; 48 L. T. 590; 31 W. R. 652, C. A.

Annotations:—*Appld.* *Scott v. Scott*, [1921] P. 107. *Mentd.* *Re Smith, Rigg v. Hughes* (1844), 9 P. D. 68; *Ashcroft v. Ashcroft & Roberts*, [1902] P. 270.

319. — Within reasonable time.]—The word "on" does not mean an unlimited time within the judge's discretion, but it does mean within a reasonable time having regard to all the circumstances of the case (*LORD STERNDAL, M.R.*).—*SCOTT v. SCOTT*, [1921] P. 107; 90 L. J. P. 171; 124 L. T. 619; 37 T. L. R. 158, C. A.

Annotation:—*Reid*. *Fox v. Fox*, [1925] P. 157.

320. — Coming into operation of Provisional Order.]—*SHEFFIELD CORPN. v. SHEFFIELD ELECTRIC LIGHT Co.*, No. 279, *ante*.

321. — Notice given before specified date.]—*ELLIOTT v. POPULAR PLAYHOUSE, LTD.* (1909), *Times*, April 1.

322. "Sunset."]—*GORDON v. CANN*, No. 81, *ante*.

323. "Henceforth."]—The word "henceforth" means from the date of the order, & does not mean "henceforth & for ever" (*DARLING, J.*).—*R. v. LLEWELLYN, Ex p. SQUIRE* (1906), 96 L. T. 32; 71 J. P. 51, D. C.

324. "Already"—In statute.]—The word "already" in *Burials Act, 1855* (c. 128), s. 9, which

provides that "no ground not already used as or appropriated for a cemetery shall be used for burials . . . within the distance of one hundred yards from any dwelling-house" without the consent of the owner, lessee & occupier, has reference to the date of that Act.—*GODDEN v. HYTHE BURIAL BOARD*, [1906] 2 Ch. 270; 75 L. J. Ch. 595; 95 L. T. 129; 70 J. P. 285; 22 T. L. R. 631; 4 L. G. R. 787, C. A.

Annotation:—*Mentd. Young v. Kingston-on-Thames, Surbiton, New Malden & Coombe Joint Burial Committee* (1906), 76 L. J. K. B. 382.

"Directly."—See *CONTRACT*, Vol. XII., p. 309, No. 2550.

"On demand."—See *BILLS OF SALE*, Vol. VII., pp. 135-137, Nos. 765-771.

"As soon as practicable"—Under *Port of London (Port Rates on Goods) Provisional Order Act, 1910*.—See *SHIPPING*, Vol. XLI., p. 967, No. 8590.

"At the end of the year"—Within *Income Tax Acts*.—See *INCOME TAX*, Vol. XXVIII., p. 97, No. 580.

SECT. 4.—HOLIDAYS INTERVENING.

SUB-SECT. 1.—IN CONTRACT.

Charterparty—Computation of demurrage.—See *SHIPPING*, Vol. XLI., pp. 567, 573, 575, 576, Nos. 3915, 3916, 3967-3970, 3985-3991, 3996, 3998.

— *Dispatch money.*—See *SHIPPING*, Vol. XLI., pp. 580, 581, Nos. 4012-4016.

Contract of carriage.—See *CARRIERS*, Vol. VIII., pp. 208, 209, Nos. 1328, 1333.

Contract to perform in theatre.—See *THEATRES*, p. 915, No. 103, *ante*.

SUB-SECT. 2.—LEGAL PROCEEDINGS.

See, *now*, R. S. C., Ord. 61, rr. 2, 4, 5.

325. Whether Sunday included.—The days between the Thursday before & the Wednesday after Easter Day are to be reckoned in the computation of such fifteen days [fifteen days under *Uniformity of Process Act, 1832* (c. 39), s. 3].

I quite agree that the intention of the legislature cannot have been to exclude those days altogether. It might as well be contended that the Sundays intervening between the *teste* & return ought not to be reckoned in computing the fifteen days (*ROLFE, B.*).—*CHAMBERS v. SMITH* (1843), 12 M. & W. 2; 13 L. J. Ex. 25; 2 L. T. O. S. 101; 7 Jur. 1019; 152 E. R. 1085.

Annotations:—*Refd. R. v. Middlesex JJ.* (1845), 14 L. J. M. C. 139; *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204; *R. v. Turner*, [1910] 1 K. B. 346; *Browne v. Black* (1911), 80 L. J. K. B. 758.

326. —.—]—Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior cts. under *Summary Jurisdiction Act, 1843* (c. 43), s. 2, although it be the last day.—*PEACOCK v. R.* (1858), 4 C. B. N. S. 264; 27 L. J. C. P. 224; 31 L. T. O. S. 101; 22 J. P. 403; 6 W. R. 517; 110 E. R. 1085.

Annotations:—*Folld. R. v. Leicestershire JJ.* (1859), 1 L. T. 92; *Ex p. Simpkin* (1859), 2 E. & E. 392. *Appld. Morgan v. Edwards* (1860), 5 H. & N. 415. *Folld. Pennell*

v. Uxbridge (1862), 31 L. J. M. C. 92. *Expld. Mumford v. Hitchcocks* (1863), 14 C. B. N. S. 361. *Folld. Wynne v. Ronaldson* (1865), 12 L. T. 711. *Expld. Park Gate Iron Co. v. Coates* (1870), L. R. 5 C. P. 634. *Refd. Morris v. Barrett* (1859), 7 C. B. N. S. 139; *Woodhouse v. Woods* (1859), 29 L. J. M. C. 149; *Rutter v. St. Albans Corpn.*, *Lockhart v. St. Albans Corpn.* (1888), 52 J. P. 420.

327. —.—]—By *Nuisances Removal Act, 1855* (c. 121), s. 40, appeals to the quarter sessions against orders made under the Act are not to be heard, unless applt. within fourteen days after the making of the order appealed against, gives written notice of appeal & written grounds of appeal, &, within two days of giving such notice, enters into a recognisance before a justice, with sufficient securities, conditioned to try the appeal:—*Held*: Sunday was not to be excluded from the computation of the two days within which applt. was to enter into the recognisance, although Sunday happened to be the last of them; therefore, in a case where applt. had given notice of appeal on a Friday & did not enter into the recognisance till the following Monday, the Sessions were right in refusing to hear the appeal.—*Ex p. SIMPKIN* (1859), 2 E. & E. 392; 29 L. J. M. C. 23; 24 J. P. 262; 6 Jur. N. S. 144; 121 E. R. 148; *sub nom. R. v. LEICESTERSHIRE JJ.*, 1 L. T. 92; 8 W. R. 66.

Annotations:—*Distd. Milch v. Frankau*, [1909] 2 K. B. 100. *Refd. Mumford v. Hitchcocks* (1863), 14 C. B. N. S. 361.

328. —.—]—G., an attorney in a county town, instructed by the London attorneys of the party interested, attended to resist a summons before justices in the county town. The justices decided against the party, who, being dissatisfied, sent the justices a written notice demanding a case to be stated by the justices under 20 & 21 Vict. c. 43. The justices stated the case & sent it to G. on Thursday, who the next day forwarded it to the London attorneys. The latter deposited the case in the office of the ct. on the Monday following:—*Held*: G. had presumably authority to receive the case for applt., & as the case had not been transmitted to the ct. within three days after it had been received the provisions of sect. 2 of the above-mentioned statute had not been complied with, & consequently the appeal must be struck out.

The decision in the Ct. of Common Pleas [*Peacock v. R.*, No. 326, *ante*] is precisely in point on the construction of the statute that the Sunday is to be included in the three days allowed for transmitting the case. By that decision I am bound (*BLACKBURN, J.*).—*PENNELL v. UXBRIDGE CHURCHWARDENS* (1862), 31 L. J. M. C. 92; 5 L. T. 685; 26 J. P. 87; 8 Jur. N. S. 99; 10 W. R. 319.

Annotations:—*Appld. Godman v. Crofton*, [1911] 3 K. B. 803. *Refd. Re Mayor v. Harding* (1867), 16 L. T. 429; *Mackinnon v. Clark*, [1898] 1 Q. B. 251.

329. —.—]—In the computation of the time within which an affidavit verifying a petition to wind up a co. must be filed under rule 4 of the *Companies Rules of 1862*, Sunday is not to be reckoned.—*Re YEOLAND CONSOLS, LTD.* (1888), 58 L. T. 108; 4 T. L. R. 364.

330. —.—]—Sunday is not to be reckoned in computing the "two clear days" required by R. S. C., Ord. 52, r. 5, to elapse between service of notice of motion & the day named for hearing.—*BRAMMALL v. MUTUAL INDUSTRIAL CORPN.* (1915),

PART III. SECT. 4, SUB-SECT. 2.

325 i. Whether Sunday included.—There must be two clear days between the service of a notice & the day for hearing the motion, & in the computation thereof Sunday is not to be

reckoned.—*Re CROOKS* (1865), 1 Ch. Ch. 304.—*CAN.*

325 ii. —.—]—Sundays & holidays are excluded in computing the five days' notice necessary in short notice of trial.—*O'DONNELL v. O'DONNELL* (1884), 10 P. R. 264.—*CAN.*

325 iii. —.—]—*CAREFOOT v. NICHOLS & SHEPARD CO.*, [1921] 1 W. W. R. 616; 14 Sask. L. R. 501; 62 D. L. R. 495.—*CAN.*

325 iv. —.—]—*DEFIANCE CHURN CO. v. TAIT* (1894), 12 N. Z. L. R. 607.—*N.Z.*

Sect. 4.—Holidays intervening: Sub-sect. 2. Sects. 5 & 6: Sub-sect. 1.]

84 L. J. Ch. 474; 112 L. T. 1071; 59 Sol. Jo. 382.

— **Transmission of case to High Court.]—** See *MAGISTRATES*, Vol. XXXIII., pp. 414, 415, Nos. 1251, 1252.

331. Appeal from Comptroller-General of Patents—Whether vacation included in time.]—R. S. C., Ord. 53A, r. 4, provides that all appeals to the ct. from any decision of the Comptroller-General of Patents & Designs under Patents & Designs Act, 1907 (c. 29), ss. 20, 26, 27, shall be brought by petition presented to the ct. within one calendar month of the decision of the comptroller or within such further time as the ct. may under special circumstances allow.

The question to be determined under this summons was whether the period of vacation counted in the month within which the appeal was to be brought:—*Held*: the period of vacation did count.—*Re BELDAM'S PATENT*, [1911] 1 Ch. 60; 80 L. J. Ch. 133; 27 R. P. C. 758; *Re BELDAM'S PATENT*, *TURNER v. BELDAM*, 103 L. T. 454; 55 Sol. Jo. 46.

Bankruptcy proceedings.]—See *BANKRUPTCY*, Vol. IV., p. 530, Nos. 4852–4854.

Election petitions.]—See *ELECTIONS*, Vol. XX., p. 151, No. 1273.

Matrimonial causes.]—See *HUSBAND & WIFE*, Vol. XXVII., p. 318, No. 2963.

SECT. 5.—PERIOD ENDING ON HOLIDAY.

See, now, R. S. C., Ord. 54, r. 3.

332. Legal proceedings—Act to be done by court.]

—In the computation of time, where the last day falls on a Sunday or holiday, & the act is to be done by the ct., & not by the party, *e.g.* the sealing of a writ, it may be done on the next practicable day. A warrant under 14 & 15 Vict. c. 52, was issued by a county ct. judge upon an affidavit that debt. was about to go abroad. The seven days limited for the issuing of a *capias* expired on Good Friday:—*Held*: a *capias* issued on the following Wednesday was in time, that being the earliest day on which it was practicable to issue the writ.—*HUGHES v. GRIFFITHS* (1862), 13 C. B. N. S. 324; 32 L. J. Q. P. 47; 143 E. R. 129.

*Annotations:—*Consd. *Williams v. Gibbons* (1863), 4 B. & S. 617. *N.F. Wynne v. Ronaldson* (1865), 12 L. T. 711. *Reid. Mumford v. Hitchcock* (1863), 32 L. J. C. P. 168; *Milch v. Frankau*, [1909] 2 K. B. 100.

333. ———.]—By R. S. C., Ord. 52, r. 3, where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, & by reason thereof such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done, or taken, on the day on which the offices shall be next open:—*Held*: where the last of the eight days would be a Sunday, an appeal from chambers to the ct. might be made on the Monday following.—*TAYLOR v. JONES*

(1875), 1 C. P. D. 87; 45 L. J. Q. B. 110; 34 L. T. 131; 1 Char. Pr. Cas. 160.

*Annotations:—*Reid. *Bennett v. Cosgriff* (1878), 38 L. T. 177; *Pletts v. Beattie*, [1896] 1 Q. B. 519.

334. ——— Act to be done by party—Service of notice of appeal.]—A conviction having taken place under 4 Geo. 4, c. 45, on Monday May 2, & notice of appeal served on the following Monday:—*Held*: it was too late, for it was not “within six days after the cause of the complaint,” within 4 Cro. 4, c. 95, s. 87.—*R. v. MIDDLESEX J.J.* (1843), 2 Dowl. N. S. 719; 12 L. J. M. C. 59; 7 J. P. 240; 7 Jur. 396.

*Annotations:—*Consd. *R. v. Middlesex J.J.* (1845), 5 L. T. O. S. 221. *Folld. Rowberry v. Morgan* (1854), 9 Exch. 730. *Apld. Ex p. Simpkin* (1859), 2 E. & E. 392. *Reid. Peacock v. R.* (1858), 4 C. B. N. S. 264; *R. v. Leicestershire J.J.* (1859), 8 W. R. 66; *Radcliffe v. Bartholomew*, [1892] 1 Q. B. 161.

335. ———.]—An order, which was a refusal of an application, was made by the London Bkpcy. Ct. on Mar. 10. An appeal was entered with the Registrar of Appeals on Apr. 4, & on the same day notice was served on resp. The Registrar's office had been entirely closed for the Easter Vacation from Mar. 30 to Apr. 3 both inclusive:—*Held*: notwithstanding the closing of the office, the notice of appeal might have been served on resp., & as it had not been served within twenty-one days, the appeal was too late.—*Re LAMBERT, Ex p. SAFFERY* (1877), 5 Ch. D. 365; 46 L. J. Bcy. 89; 36 L. T. 532; 25 W. R. 572, C. A.

*Annotations:—*Reid. *Christopher v. Croll* (1885), 16 Q. B. D. 66. *Mentd. Re Baum, Ex p. Isaacs* (1878), 9 Ch. D. 271.

336. ———.]—In calculating the time within which to serve notice of motion by way of appeal from an order of a judge at chambers, Sunday cannot be excluded; so that when the last day on which notice of motion could be served was a Sunday & notice of motion was not given until the Monday:—*Held*: the notice was out of time.—*CHAMBERN v. HEIGHWEY* (1890), 51 J. P. 520, D. C.

337. ——— Application to magistrates to state case.]—Where the last of the three days allowed for an application to justices to state a case under Summary Jurisdiction Act, 1857 (c. 43), s. 2, falls on a Sunday, it is to be computed as one of the days, & an application made on the Monday is too late.—*WYNNE v. RONALDSON* (1865), 12 L. T. 711; 29 J. P. 566; 13 W. R. 899.

338. ——— Time expressly fixed by Act of Parliament.]—C. L. P. Act, 1852 (c. 76), empowers pltf., in case of non-appearance by deft., where the writ of summons is indorsed in the special form given by the Act, on filing an affidavit of personal service, etc., at once to sign judgment; & pltf. may, upon judgment, issue execution at the expiration of eight days from the last day for appearance.

In such case, if Sunday is the last of such eight days, it is to be reckoned in the computation as one of those days.—*ROWBERRY v. MORGAN* (1854), 9 Exch. 730; 2 C. L. R. 1029; 23 L. J. Ex. 191; 23 L. T. O. S. 129; 18 Jur. 452; 2 W. R. 431; 156 E. R. 313.

*Annotations:—*Apld. *Peacock v. R.* (1858), 4 C. B. N. S. 264; *Ex p. Simpkin* (1859), 2 E. & E. 392. *Distd. Hughes v. Griffiths* (1862), 13 C. B. N. S. 324. *Reid. Lewis v. Calor* (1858), 1 F. & F. 306; *Mumford v. Hitchcocks* (1863), 14 C. B. N. S. 361; *Pritchard v. Pritchard* (1884), 14 Q. B. D. 55; *Milch v. Frankau*, [1909] 2 K. B. 100.

PART III. SECT. 5.

*c. Legal proceedings.]—*REVEL-STOKE SAW MILL CO., LTD. *v. ALBERTA BOTTLE CO., LTD.* (1915), 30 W. L. R. 312; 7 W. W. R. 1002; 21 D. L. R. 779; 9 Alta. L. R. 155.—CAN.

*d. ———.]—*Where the day on which money is due under an agreement falls on Sunday:—*Seemle*: the payment must be made on Saturday.—*WHITTIER v. McLENNAN* (1856), 13

U. C. R. 638.—CAN.

*e. ———.]—*The provision in Interpretation Act with regard to the expiration of time for doing any act under any statute is not confined to matters of procedure.—*Re NELSON CORPN. BYE-LAW*, No. 11 (1898), 6 B. C. R. 163.—CAN.

*f. ———.]—**Re SCOTT & BRANDON CORPN.* (1895), 10 Man. L. R. 494.—CAN.

*g. ———.]—*BANK OF BRITISH NORTH

AMERICA *v. MUNRO* (1893), 9 Man. L. R. 151.—CAN.

*h. Payment under contract—Periodical payment.]—*Where a contract provides for payments to be made on a fixed date in each month at a specified place of business, & the date so fixed falls in any particular month on a Sunday or public holiday, then the payment for that month may be made on the first business day thereafter.—*DAVIS v. PRETORIUS*, [1909] T. S. 868.—S. AF.

339. ———.]—When the time for doing an act or taking a proceeding is expressly fixed by Act of Parliament, Consolidated General Orders, Ord. 37, r. 12, providing for cases where the time for doing an act or taking a proceeding expires on a day on which the offices are closed, does not enable such act or proceeding to be done or taken after the expiration of the time so fixed.—*FLOWER v. BRIGHT* (1862), 2 John. & H. 590; 10 W. R. 558; 70 E. R. 1194.

340. ———.]—*ANON.* (1863), No. 194, *ante*.

341. ———.]—A writ of summons, specially indorsed, was served on deft. on Friday, Mar. 27. The following Friday, which, under ordinary circumstances, would have been the last day for entering an appearance, was Good Friday, & no appearance had been then entered. On that day & the four following days the offices were closed, as usual at Easter. On the Wednesday, when the offices re-opened, pltf. signed judgment for want of appearance:—*Held*: this judgment was irregular, as being signed too soon, for deft. had the whole of Wednesday within which to appear.—*MUMFORD v. HITCHCOCKS* (1863), 14 C. B. N. S. 361; 2 New Rep. 122; 32 L. J. C. P. 168; 8 L. T. 282; 9 Jur. N. S. 1200; 11 W. R. 645; 143 E. R. 485.

Annotation:—*Reid. Milch v. Frankau*, [1909] 2 K. B. 100.

342. ——— **Period ending on Monday—Public holiday falling on preceding Sunday.**—Where a rule to plead expires on a Monday, on which day the offices are, in fact, closed, because the Sunday preceding was the Queen's birthday, the Monday is not excluded from the computation of time, & deft. is bound to plead before the opening of the office on Tuesday.—*WILKINSON v. BRITTON* (1840), 1 Man. & G. 557; 1 Scott, N. R. 348; 133 E. R. 453.

—— **Mayor's Court.**—*See* MAYORS COURT, Vol. XXXIV., p. 535, No. 86.

Operation of Statute of Limitations.—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 330, 539, Nos. 162, 163, 1914.

Right to distrain.—*See* DISTRESS, Vol. XVIII., p. 310, Nos. 452, 453.

Maturity of bill of exchange.—*See* BILLS OF EXCHANGE, Vol. XI., p. 56, Nos. 446, 447.

SECT. 6.—FRACTIONS OF DIVISIONS OF TIME.

SUB-SECT. 1.—IN GENERAL.

343. Whether fractions of day disregarded.—*SHELLEY'S CASE* (1581), Moore, K. B. 136; 1 Co. Rep. 93 b; 3 Dyer, 373 b; 1 And. 69; Jenk. 249; 72 E. R. 490.

Annotations:—*Consd. Woodward's Case* (1702), 7 Mod. Rep. 2. *Appld. Falmouth v. Stode* (1707), 11 Mod. Rep. 136; *Fuller v. Johnson* (1735), Lee temp. Hard. 158; *Edwards v. R.* (1854), 9 Exch. 628. *Reid. Hemming v. Brabason* (1660), O. Bridg. 1; *Ellis v. Jackson* (1664), 1 Sid. 229; *Withers v. Harris* (1702), 2 Ld. Raym. 806; *Anon.* (1703), 11 Mod. Rep. 86; *Wright v. Mills* (1859), 4 H. & N. 488; *Clarke v. Bradlaugh* (1881), 46 L. T. 49. *Mentd. Bedford*

Case (1607), 7 Co. Rep. 38 a; *Stafford's Case* (1609), 8 Co. Rep. 73 a; *Counden v. Clerke* (1613), Hob. 29; *Portington's Case* (1613), 10 Co. Rep. 35 b; *Blamford v. Blamford* (1615), 3 Bulst. 98; *Butler v. Fincher* (1615),

2 Bulst. 302; *Gough v. Howarde* (1615), 3 Bulst. 121; *Dymmock's Case* (1616), Cro. Jac. 408; *Haverhill v. Hare* (1616), 3 Bulst. 250; *Egerton's Case* (1619), Cro. Jac. 525; *Beck's Case* (1630), Litt. 344; *Harrison v. Bowden* (1661), 1 Sid. 29; *Holland v. Fisher* (1662), O. Bridg. 181; *Payne v. Barker* (1662), O. Bridg. 18; *Petty v. Goddard* (1662), O. Bridg. 35; *Harwood v. Phillips* (1663), O. Bridg. 464; *Davies v. Kempe* (1664), Cart. 2; *Geary v. Bearcroft* (1666), Cart. 57; *Marsh v. Lee*, 2 Vent. 337; *Pibus v. Mitford* (1674), 1 Vent. 372; *Coulthman v. Senhouse* (1678), T. Jo. 105; *Leigh v. Leigh* (1691), 2 Lut. 1539; *Luddington v. Kimo* (1697), 1 Ld. Raym. 203; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278; *Newcomen v. Barkham* (1716), 2 Vern. 729; *Goodright v. Wright* (1717), 1 P. Wms. 397; *Marks v. Marks* (1718), 10 Mod. Rep. 419; *Ratcliffe's Case* (1720), 1 Stra. 267; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *Dawes v. Ferrars* (1722), Prec. Ch. 589; *Shaw v. Weigh* (1725), Fortes. Rep. 58; *Goodright v. Pullyn* (1720), 2 Eq. Cas. Abr. 315; *Papillion v. Voice* (1728), Kel. W. 27; *Dubber v. Trollope* (1734), Amb. 453; *Chauncey v. Needham* (1737), Andr. 53; *Minshall v. Minshall* (1737), 1 Atk. 411; *Hopkins v. Hopkins* (1738), 1 Atk. 581; *Newcomen v. Bethlehem Hospital* (1741), Amb. 8; *Trodd v. Downs* (1742), 2 Atk. 304; *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Lethicullier v. Tracy* (1754), 1 Keny. 56; *Sayer v. Masterman* (1756), Amb. 344; *Wright v. Pearson* (1758), Amb. 358; *Austen v. Taylor* (1759), 1 Eden, 361; *Vaughan v. Atkins* (1771), 5 Burr. 2764; *Goodtitle v. Herring* (1801), 1 East, 264; *Hawkins v. Kemp* (1803), 3 East, 410; *Poole v. Poole* (1804), 1 Bos. & P. 620; *Curtis v. Price* (1805), 12 Ves. 89; *Tewkesbury Corp'n. v. Diston* (1805), 2 Smith, K. B. 508; *Doe v. Colyear* (1809), 11 East, 548; *Lyon v. Mitchell* (1816), 1 Madd. 467; *Cholmondeley v. Clinton* (1820), 1 Jac. & W. 1; *Heneage v. Andover* (1822), 10 Price, 230; *Doe d. Jones v. Jones* (1823), 1 B. & C. 238; *Doe d. Bagnall v. Harvey* (1825), 7 Dow. & Ry. K. B. 78; *Doe d. Winter v. Perratt*, *Doe d. Viney v. Perratt*, *Goodtitle d. Slade v. Perratt* (1826), 5 B. & C. 48; *Doe d. Gallini v. Gallini* (1833), 5 B. & Ad. 621; *Doe d. Jones v. Williams* (1833), 2 Nev. & M. K. B. 602; *Hood v. Pimm* (1836), Tyr. & Gr. 1118; *Lees v. Mosley* (1836), 5 L. J. Ex. Eq. 78; *Scarborough v. Doe d. Savile* (1836), 3 Ad. & El. 897; *Dunsday v. Hughes* (1837), 4 Scott, 209; *Douglas v. Congreve* (1838), 8 L. J. Ch. 53; *Jackson v. Noble* (1838), 2 Jur. 251; *Doe d. Nicholson v. Welford* (1840), 12 Ad. & El. 61; *Holloway v. Clarkson* (1842), 6 Jur. 923; *Harrison v. Harrison* (1844), 7 Man. & G. 938; *Harvey v. Towell* (1847), 7 Hare, 231; *Monypenny v. Dering* (1847), 16 M. & W. 418; *Doe d. Cannon v. Rucastle* (1849), 8 C. B. 876; *Monypenny v. Dering* (1850), 7 Hare, 568; *Toller v. Attwood* (1850), 15 Q. B. 929; *Holliday v. Overton* (1852), 15 Beav. 480; *James v. Wynford* (1852), 1 Sm. & G. 40; *East v. Twyford* (1853), 4 H. L. Cas. 517; *Kavanagh v. Morland* (1853), Kay, 16; *Kenworthy v. Ward* (1853), 11 Hare, 196; *Voller v. Carter* (1854), 24 L. J. Q. B. 56; *Wright v. Vernon* (1854), 2 Drew. 439; *Re Wynch Trusts*, *Ex p. Wynch* (1854), 5 De G. M. & G. 188; *Coape v. Arnold*, *Arnold v. Coape* (1855), 4 De G. M. & G. 574; *Crofts v. Middleton* (1855), 2 K. & J. 194; *Parker v. Clark* (1855), 3 Sm. & G. 161; *Woodhouse v. Herrick* (1855), 1 K. & J. 352; *Chamberlayne v. Chamberlayne* (1856), 25 L. J. Q. B. 187; *Haddelsey v. Adams* (1856), 22 Beav. 266; *Grimson v. Downing* (1857), 4 Drew. 125; *Lewis v. Hopkins* (1857), 5 W. R. 243; *Roddy v. Fitzgerald* (1858), 1 H. L. Cas. 823; *Towns v. Wentworth* (1858), 11 Moo. P. C. 526; *Johnson v. Rutherford* (1861), 3 L. T. 649; *Jordan v. Adams* (1861), 9 C. B. N. S. 483; *Mills v. Seward* (1861), 1 John. & H. 733; *Spence v. Spence* (1862), 12 C. B. N. S. 199; *Thorpe v. Thorpe* (1862), 1 H. & C. 326; *Davenport v. Davenport* (1863), 1 Hem. & M. 775; *Snell v. Finch* (1863), 13 C. B. N. S. 651; *Greaves v. Simpson* (1864), 33 L. J. Ch. 641; *Holmes v. Prescott* (1864), 11 L. T. 38; *Seymour v. Vernon* (1864), 33 L. J. Ch. 690; *Collier v. McBean* (1865), 6 New Rep. 192; *Phillips v. James* (1865), 13 W. R. 543; *Clarke v. Clemmans*, *Selway v. Clemmans* (1866), 36 L. J. Ch. 171; *Fuller v. Chamier* (1866), L. R. 2 Eq. 682; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276; *Powell v. Hoggis* (1866), 14 W. R. 670; *Bradley v. Cartwright* (1867), L. R. 2 C. P. 511; *Denman v. Jones* (1867), 16 L. T. 787; *Avern v. Lloyd* (1868), L. R. 5 Eq. 383; *Herrick v. Franklin* (1868), L. R. 6 Eq. 593; *Minton v. Kirwood* (1868), 37 L. J. Ch. 606; *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180; *Beteley v. Carter* (1869), 4 Ch. App. 230; *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543; *Brookman v. Smith* (1871), L. R. 6 Exch. 291; *Cooper v. Kynoch* (1872), 41 L. J. Ch. 296; *Grier v. Grier* (1872), L. R. 5 H. L. 688; *Webb v. Sadler* (1873), 28 L. T. 388; *Underhill v. Roden* (1876), 45 L. J. Ch. 266; *Allen v. Bowsey* (1877), 37 L. T. 688; *Hampton v. Holman*

PART III. SECT. 6, SUB-SECT. 1.

343i. Whether fractions of day disregarded.—*GOULD* (1889), 10

343ii. ———.]—A fraction of a day not be considered with reference the time of the signing judgment & J.—VOL. XLII.

issuing execution.—*ST. STEPHEN BANK v. NEW BRUNSWICK & CANADA RAILWAY & LAND CO.* (1863), 10 N. B. R. (5 All.) 629.—*CAN.*

343iii. ———.]—C. was given into the custody of B., a gaoler, on the morning of June 25, under a decree of civil imprisonment. Maintenance money was paid for a week in advance. B.

discharged C. at noon on July 1, no further payment having been paid:—*Held*: a plea that it was the invariable practice of the gaol in these cases to reckon each day as ending at noon, & all fractions of a day elapsing before noon as a completed day, was bad.—*RAUDIERS v. RAAF* (1889), 5 H. C. 402.—*S. AF.*

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Sect. 6.—Fractions of divisions of time : Sub-sects. 1 & 2.]

(1877), 46 L. J. Ch. 248; *Re White & Hindle's Contract* (1877), 7 Ch. D. 201; *Comfort v. Brown* (1878), 10 Ch. D. 146; *Smith v. Butcher* (1878), 10 Ch. D. 113; *Marshall v. Gingell* (1882), 21 Ch. D. 790; *Morgan v. Thomas* (1882), 9 Q. B. D. 643; *Studd v. Cook* (1883), 8 App. Cas. 577; *Bowen v. Lewis* (1884), 9 App. Cas. 890; *McGibbon v. Abbott* (1885), 10 App. Cas. 653; *Re Parry v. Daggs* (1885), 31 Ch. D. 130; *Richardson v. Harrison* (1885), 16 Q. B. D. 85; *Re Kirk & Randall & East & West India Dock Co.* (1886), 2 T. L. R. 692; *Pedder v. Hunt* (1887), 18 Q. B. D. 565; *Re Score, Tolman v. Score* (1887), 57 L. T. 40; *Re Bird & Barnard's Contract* (1888), 59 L. T. 166; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *Evans v. Evans*, [1892] 2 Ch. 173; *Re Barrett* (1894), 39 Sol. Jo. 9; *Van Grutten v. Foxwell, Foxwell v. Van Grutten*, [1897] A. C. 658; *Re Watson & Morrison's Contract, Watson v. Kerr* (1900), 44 Sol. Jo. 529; *Milman v. Lane*, [1901] 2 K. B. 745; *Re Youmans' Will*, [1901] 1 Ch. 720; *Pelham Clinton v. Newcastle*, [1902] 1 Ch. 34; *Re Buckton, Buckton v. Buckton*, [1907] 2 Ch. 406; *Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450; *Re Davison's Settlement, Cattermole Davison v. Munby*, [1913] 2 Ch. 498; *Re Simcoe, Vowler-Simcoe v. Vowler*, [1913] 1 Ch. 552; *Lightfoot v. Maybery*, [1914] A. C. 782; *Re Lawrence, Lawrence v. Lawrence*, [1915] 1 Ch. 129; *Silcocks v. Silcocks*, [1916] 2 Ch. 161; *Re Elton, Elton v. Elton*, [1917] 2 Ch. 413; *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569; *Re Hussey & Green's Contract, Re Hussey, Hussey v. Simper*, [1921] 1 Ch. 566; *Re Hammond, Parry v. Hammond*, [1924] 2 Ch. 276; *Re Haack, Beadman v. Beadman*, [1925] Ch. 633.

344. —.]—*SMITH v. HILLIER* (1590), Cro. Eliz. 167; 78 E. R. 425.

345. —.]—*BUTLER v. FINCHER* (1615), 2 Bulst. 302; 80 E. R. 1140.

346. —.]—*REGICIDES' CASE* (1660), Kel. 10; 5 State Ir. 947, 981; 84 E. R. 1058.

347. —.]—The death of either party before the assizes, is not aided by 17 Car 2, c. 8.

If he had died the day the assizes began, though the cause had been tried after the trial had been good, though he had died at one o'clock in the morning, for there is no fraction of a day, according to *Shelley's Case*, No. 343, *ante* (HOLT, C.J.).—*FALMOUTH v. STRODE* (1707), 11 Mod. Rep. 136; 88 E. R. 949.

348. —.]—*R. v. GREEN*, No. 195, *ante*.

349. —.]—*BALDWIN v. —* (1719), Bunb. 49; 145 E. R. 591.

350. —.]—*BRAXTON v. DYKE* (1726), 1 Barn. K. B. 4; 94 E. R. 3.

351. —.]—The law makes no fraction of days (PAGE, J.).—*GUIBERT v. JONES* (1733), as reported in Kel. W. 236; 25 E. R. 588.

352. —.]—When the party having given a warrant of attorney, dies the same day the judgment was signed, & before the signing it shall not be set aside.—*FULLER v. JOHNSON* (1735), Lee temp. Hard 158; 95 E. R. 101.

Annotation:—*Reid. Hoath v. Brindley* (1834), 4 Nev. & M. K. B. 235.

353. —.]—It is said there is no fraction in a day, but that is a fiction in law (*per CUR.*).—*ROED. WRANGHAM v. HERSEY* (1771), 3 Wils. 274; 95 E. R. 1052.

Annotations:—*Consd. R. v. Edwards* (1853), 9 Exch. 32. *Reid. Doe d. Graves v. Wells* (1839), 2 Per. & Dav. 396; *Whitaker v. Wisbey* (1852), 12 C. B. 44.

354. —.]—*PUGH v. LEEDS (DUKE)*, No. 276, *ante*.

355. —.]—*LESTER v. GARLAND*, No. 203, *ante*.

356. —.]—*Re STARKEY, Ex p. FARQUHAR*, No. 204, *ante*.

357. —.]—*Re WHITBY, Ex p. WHITBY*, No. 205, *ante*.

358. —.]—C. rented a sufficient tenement for one year, commencing on Sept. 30, 1850, & entered upon the occupation about 12 o'clock on that day. He continued in the occupation until 4 o'clock in the afternoon of Sept. 29, 1851, when he rendered possession to a new tenant:—*Held*: the general rule of law against noticing fractions of a day was

applicable to the computation of a year for the purposes of gaining a settlement under 1 Will. 4, c. 18, by renting a tenement.—*R. v. ST. MARY, WARWICK (INHABITANTS)* (1853), 1 E. & B. 816; 1 C. L. R. 192; 22 L. J. M. C. 109; 21 L. T. O. S. 74; 17 J. P. 552; 17 Jur. 551; 1 W. R. 307; 118 E. R. 642.

Annotation:—*Reid. Sidebotham v. Holland*, [1895] 1 Q. B. 378.

359. —.]—*Re RAILWAY SLEEPERS SUPPLY CO.*, No. 228, *ante*.

360. —.]—*Re NORTH, Ex p. HASLUCK*, No. 189, *ante*.

361. —.]—Deft. held certain premises of pltf. on a weekly tenancy. By the rent-book agreement it was stipulated that either pltf. or deft. might determine the tenancy by a week's notice to the other, & that the key was to be delivered to pltf. or his agent before 12 o'clock on the day of leaving:—*Held*: a notice to quit given before 12 noon on one Monday to expire at 12 noon on the following Monday was not a week's notice, as the law does not take notice of the fraction of a day.—*WESTON v. FIDLER* (1903), 88 L. T. 769; 67 J. P. 209; 47 Sol. Jo. 567, D. C.

Annotation:—*Reid. Newman v. Slade*, [1926] 2 K. B. 328.

362. — In case of necessity.]—*DORRINGTON v. EAST* (1606), Yelv. 87; 80 E. R. 59.

363. — —.]—*CORNISH v. COWSYE* (1648), Sty. 118; Ayleyn, 75; 82 E. R. 570.

Annotation:—*Consd. Pugh v. Leeds* (1777), 2 Cowp. 714.

364. — —.]—Generally speaking, there is no fraction of a day unless where it is necessary to look to it in order to answer the purposes of justice (LORD ELLENBOROUGH, C.J.).—*FIELD v. JONES* (1807), 9 East, 151; 103 E. R. 530.

Annotation:—*Consd. Migotti v. Colvill* (1879), 4 C. P. D. 233.

365. — To avoid inconvenience.]—*BELLASIS v. HESTER* (1697), 1 Ld. Raym. 280; 91 E. R. 1084; *sub nom. BELASYSE v. HESTER*, 2 Lut. 1589.

Annotations:—*Reid. R. v. Adderley* (1780), 2 Doug. K. B. 463; *Young v. Higgon* (1840), 6 M. & W. 49. *Mentd. Story v. Atkins* (1726), 2 Ld. Raym. 1427; *Coleman v. Sayer* (1728), 1 Barn. K. B. 303; *Hill v. White & Williams* (1839), 8 Scott, 249; *Dundalk Western Ry. v. Tapster* (1841), 2 Ry. & Can. Cas. 586.

366. — Attainment of age.]—A person attains his twenty-fifth year when he becomes twenty-four.—*GRANT v. GRANT* (1840), 4 Y. & C. Ex. 256; 10 L. J. Ex. Eq. 5; 160 E. R. 1001.

367. — —.]—*R. v. MCCANN* (1911), 6 Cr. App. Rep. 115, C. C. A.

368. — —.]—As the law does not take cognisance of part of a day a person attains a specified age in law on the day preceding the corresponding anniversary of his birthday.—*Re SHUREY, SAVORY v. SHUREY*, [1918] 1 Ch. 263; 87 L. J. Ch. 245; 118 L. T. 355; 34 T. L. R. 171; 62 Sol. Jo. 246.

— — — Infants.]—See INFANTS, Vol. XXVIII., p. 140, Nos. 6–12.

369. — Day of conviction.]—*WHITAKER v. WISEBEY*, No. 69, *ante*.

370. — Conflicting rights between subjects.]—*RUSSELL v. LEDSAM*, No. 235, *ante*.

371. — Conflicting rights between Crown & subject.]—A fraction of a day cannot be taken into account where the conflict is between the right of the Crown & the right of the subject.—*R. v. EDWARDS* (1853), 9 Exch. 32; 1 C. L. R. 706; 23 L. J. Ex. 42; 21 L. T. O. S. 302; 156 E. R. 14; *affd. sub nom. EDWARDS v. R.* (1854), 9 Exch. 628, Ex. Ch.

Annotations:—*Appld. Wright v. Mills* (1859), 4 H. & N. 488. *Reid. Migotti v. Colvill* (1879), 4 C. P. D. 233; *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63.

— **Judicial acts.**]—See Sect. 7, sub-sect. 2, *post*.
 — **To determine whether consideration past.**]—
 See CONTRACT, Vol. XII., p. 213, Nos. 1719, 1720.

— **Duration of insurance policy.**]—See INSURANCE, Vol. XXIX., p. 137, Nos. 903, 904.

— **Payment of mortgage.**]—See MORTGAGE, Vol. XXXV., p. 493, No. 2241.

— **Whether poor law settlement acquired.**]—
 See POOR LAW, Vol. XXXVII., p. 288, No. 861.

— **Validity of dog licence.**]—See REVENUE, Vol. XXXIX., p. 245, No. 272.

— **Computation of demurrage.**]—See SHIPPING, Vol. XLI., pp. 568, 573, Nos. 3917, 3970, 3971, 3975.

372. Instant—Not divisible into more than two parts.]—Although *ex indulgentia legis* the law in divers cases will in construction consider two distinct times in one instant, which in truth is not any time, yet no case can be put, that by any construction three times may be admitted in one instant (*per* CUR.).—FITZWILLIAM'S CASE (1604), 6 Co. Rep. 32 a; 77 E. R. 300.

Annotations:—**Mentd.** Shecomb v. Hawkins (1613), Cro. Jac. 318; Kibbet v. Lee (1619), Hob. 312; Dixon v. Harrison (1669), Vaugh. 36; Mun v. Baylies (1673), Freem. K. H. 340; Lugg v. Lugg (1695), 2 Salk. 592; Evelyn v. Evelyn (1731), 2 P. Wms. 659; *Re* Hawkins, *Ex p.* Official Receiver, [1892] 1 Q. B. 890.

SUB-SECT. 2.—DETERMINATION OF PRIORITY OF ACTS.

373. Whether fraction of day considered—General rule.]—Another action of the same term unless actually prior in point of time, cannot be pleaded in abatement.

Though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish (LORD MANSFIELD).—COMBE v. PITT (1763), 3 Burr. 1423; 1 Wm. Bl. 437; 97 E. R. 907.

Annotations:—**Apld.** Campbell v. Strangeways (1877), 3 C. P. D. 105; Migotti v. Colvill (1879), 4 C. P. D. 233; Clarke v. Bradlaugh (1881), 8 Q. B. D. 63. **Refd.** Popper v. Whalley (1835), 4 Ad. & El. 90; R. v. Edwards (1853), 9 Exch. 32; Forbes v. Samuel, [1913] 3 K. B. 706. **Mentd.** Rigg v. Curgenven (1769), 2 Wils. 395; Porchester v. Petrie (1783), 3 Doug. K. B. 261; Henslow v. Fawcett (1835), 3 Ad. & El. 51; Baker v. Rusk (1850), 15 Q. B. 870; Girdlestone v. Brighton Aquarium Co. (1878), 3 Ex. D. 137.

374. ———.]—Where deft. died between 11 & 12 in the morning & a wit of *fi. fa.* was sued out against him between 2 & 3 in the afternoon of the same day, the ct. will set aside the writ as irregular. Where it is necessary to show which was the first of two acts, the ct. is at liberty to consider fractions of a day.—CHICK v. SMITH (1840), 8 Dowl. 337; *sub nom.* CLINCH v. SMITH, 4 Jur. 86.

Annotations:—**Consd.** Wright v. Mills (1859), 4 H. & N. 488. **Apld.** Campbell v. Strangeways (1877), 3 C. P. D. 105. **Refd.** *Re* Higham & Jessop (1841), 5 J. P. 193; Edwards & Collins v. R. (1854), 23 L. J. Ex. 165.

375. ———.]—Chick v. Smith, No. 374, *ante*, & other cases explain where the law will distinguish the fractions of a day, viz. where it is necessary . . . for the purpose of the decision to show which of two events first happened (GROVE, J.).—CAMPBELL v. STRANGWAYS (1877), 3 C. P. D. 105; 47 L. J. M. C. 6; 37 L. T. 672; 42 J. P. 39.

Annotation:—**Refd.** Clarke v. Bradlaugh (1881), 44 L. T. 779.

376. ——— Commencing proceedings.]—PIE v. COKE (1616), Hob. 128; 80 E. R. 277; *sub nom.* PYE v. COOKE, Moore, K. B. 864.

Annotations:—**Refd.** Combe v. Pitt (1763), 3 Burr. 1423; Clarke v. Bradlaugh (1881), 8 Q. B. D. 63. **Mentd.** Hart v. Langfitt (1702), 2 Ld. Raym. 841; Porchester v. Petrie (1783), 3 Doug. K. B. 261; Forbes v. Samuel, [1913] 3 K. B. 706.

377. ———.]—COMBE v. PITT, No. 373, *ante*.

378. ———.]—PUGH v. ROBINSON, No. 391, *post*.

379. ——— Issue of execution & death of debtor.]—CHICK v. SMITH, No. 374, *ante*.

380. ——— Issue of writ & registration of copyright.]—The issue of a writ on the same day but subsequently to the registration of a copyright sufficiently complies with Copyright Act, 1842 (c. 45), s. 24, to enable the person making the registration to bring an action for infringement.

The registration was made at half past one o'clock on Mar. 9 & on the same day, but at a later hour, the writ was issued. It was said that the ct. would not take account of a fraction of a day. Unless obliged by some authority to hold that, in a matter of this kind, the ct. cannot divide a day into fractions, I shall decline to come to a conclusion so manifestly absurd. The entry at Stationers' Hall having been made before the writ was issued, although on the same day, the requirement of the Act has been thereby satisfied (KAY, J.).—WARNE v. LAWRENCE (1886), 54 L. T. 371; 34 W. R. 452; 2 T. L. R. 427.

381. ——— Rule to arbitrators to state case—Publication of award.]—It is unnecessary to determine whether the rule that a judicial act must be regarded as dating from the first moment of the day on which it is done would apply to such an order as that under consideration, or whether it would be sufficient cause for not making the order absolute if it were shown that the award, though bearing the same date, was in fact signed before the order *nisi* was made. I can entertain no doubt that where an order *nisi* has been obtained by a party who has no notice of an award having been made, it is for those who contest it to show that the award was executed prior to the order being made (LORD HERSHELL).—TABERNACLE PERMANENT BUILDING SOCIETY v. KNIGHT, [1892] A. C. 298; 62 L. J. Q. B. 50; 67 L. T. 483; *sub nom.* *Re* TABERNACLE PERMANENT BUILDING SOCIETY & KNIGHT'S ARBITRATION (No. 2), 41 W. R. 207, H. L.

Annotations:—**Refd.** *Re* Gough & Liverpool Corpn. Arbitration (1892), 36 Sol. Jo. 270. **Mentd.** *Re* Kent County Council & Sandgate L. B. (1895), 72 L. T. 725; *Re* Spillers & Baker, [1897] 1 Q. B. 312; *Re* Montgomery, Jones & Liebenthal (1898), 78 L. T. 406; *Re* Palmer & Hosken, [1898] 1 Q. B. 131; Lobitos Oilfields v. Admiralty Comrs., Crown S.S. Co. v. Admiralty Comrs. (1917), 86 L. J. K. B. 1444; Duff Development Co. v. Kelantan Government (1925), 41 T. L. R. 375.

382. ——— Presumption that acts done in right order.]—There is no irregularity in entering a rule to plead before notice of declaration, but on the same day.

It is a good rule, that when two things are done on the same day, that shall be presumed to have been done first which ought to be so (ALDERSON, B.).—AIKMAN v. CONWAY (1837), 3 M. & W. 71; Murp. & H. 356; 7 L. J. Ex. 12; 1 Jur. 896; 150 E. R. 1061.

Annotation:—**Fold.** Chapman v. Davis (1840), 1 Man. & G. 388.

PART III. SECT. 6, SUB-SECT. 2.

k. Whether fraction of day considered.]—In determining the priority of writs, the ct. will look to the fraction of a day.—BECK v. JARVIS (1847), 3 U. C. R. 280.—CAN.

l. ——— BUSKEY v. CANADIAN PACIFIC RY. Co. (1905), 11 O. L. R. 1; 6 O. W. R. 698.—CAN.

m. ———.]—Where a party makes a will, & during the same day marries, the marriage will operate as a revocation of the will, notwithstanding that,

from the terms of the instrument, it appears that testator did not intend that it should take effect till after the marriage. The law in such a case will not admit the doctrine of no fraction of a day.—OTWAY v. SADLER (1858), 33 L. T. O. S. 46.

Sect. 6.—Fractions of divisions of time: Sub-sect. 2.
Sect. 7: Sub-sects. 1 & 2.]

383. ———.]—A rule to plead, was entered at the Rule Office, on May 23 at three o'clock in the afternoon; on the same evening, at six o'clock, a declaration & demand of plea were delivered to deft.; on May 28, at half past eleven o'clock in the morning, pltf. signed judgment, for want of a plea:—*Held*: the judgment was regular.

Aikman v. Conway, No. 282, *ante*, is directly in point. I cannot distinguish it from this case (*TINDAL, C.J.*).—*CHAPMAN v. DAVIS* (1840), 1 Man. & G. 388; 8 Dowl. 831; 1 Scott, N. R. 431; 4 Jur. 860; 133 E. R. 384.

— **Act of bankruptcy & creditors petition.]**—*See* BANKRUPTCY, Vol. IV., pp. 126, 131, Nos. 1151, 1200, 1201.

— **Prevention of reputed ownership in bankruptcy.]**—*See* BANKRUPTCY, Vol. V., p. 790, No. 6767.

— **Execution & bankruptcy.]**—*See* BANKRUPTCY, Vol. V., pp. 832, 915, Nos. 7049–7051, 7484.

— **Lien & bankruptcy.]**—*See* BANKRUPTCY, Vol. V., p. 915, No. 7485.

— **Priority to stop orders.]**—*See* EXECUTION, Vol. XXI., p. 661, No. 2417.

SECT. 7.—SPECIAL RULES AFFECTING LEGISLATIVE, EXECUTIVE AND JUDICIAL ACTS.

SUB-SECT. 1.—LEGISLATIVE AND EXECUTIVE ACTS.

384. Title of Crown & subject accruing same day
—Priority of Crown.]—*R. v. CRUMP & HANBURY* (1670), cited in Park at p. 126; 2 Show. at p. 481; 145 E. R. 733.

Annotations:—*Consd.* *R. v. Cotton* (1751), Park. 112; *R. v. Giles* (1820), 8 Price, 293; *Giles v. Grover* (1832), 9 Bing. 128; *Edwards v. R.* (1854), 9 Exch. 628.

385. ———.]—Where an adjudication in bkpcy. & appointment of an official assignee take place at an earlier period of the same day on which a writ of extent is issued against the bkpt. for a Crown debt, the title of the Crown will prevail.—*EDWARDS v. R.* (1854), 9 Exch. 628; 2 C. L. R. 590; 23 L. J. Ex. 165; 23 L. T. O. S. 39; 18 Jur. 384; 2 W. R. 333; 156 E. R. 268; Ex. Ch.; *affg.* *S. C. sub nom. R. v. EDWARDS* (1853), 9 Exch. 32.

Annotations:—*Apld.* *Wright v. Mills* (1859), 4 H. & N. 488. *Consd.* *Migotti v. Colvill* (1879), 4 C. P. D. 233; *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63.

Priority of Crown debts generally.]—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 581, 582, Nos. 830–836; CROWN PRACTICE, Vol. XVI., pp. 221 *et seq.*

Commencement of statutes.]—*See* STATUTES, pp. 686, 687, Nos. 1000–1005, *ante*.

SUB-SECT. 2.—JUDICIAL ACTS.

See, now, R. S. C., Ord. 41, r. 3.

386. Judgments relate back to first day of term.]
 —All judgments relate to the first day of the term; & the priority of one of two judgments signed on the same day cannot be averred.—*PORCHESTER (LORD) v. PETRIE* (1783), 3 Doug. K. B. 261; 99 E. R. 644.

Annotations:—*Distd.* *Pugh v. Robinson* (1786), 1 Term Rep. 116. *Consd.* *Swain v. Morland* (1819), 1 Brod. & Bing. 370; *Edwards v. R.* (1854), 9 Exch. 628. *Refd.* *Bolton v. Eyles* (1820), 3 Brod. & Bing. 51; *Wright v. Mills* (1859), 4 H. & N. 488; *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63.

387. ———.]—Judgment on a warrant of attorney entered in Easter vacation against a deft. who died in Easter Term is good; but execution cannot be sued out upon it, until it be revived against his representative by *sc. fa.*

In general when a judgment is entered up in the

vacation on a warrant of attorney, & deft. was alive within the preceding term, it is a valid judgment, though deft. be not alive on the day when the judgment is actually entered up, because it relates to the first day of the antecedent term (*LORD KENYON, C.J.*).—*HEAPY v. PARRIS* (1795), 6 Term Rep. 368; 101 E. R. 599.

Annotations:—*Expld.* *Bragner v. Langmead* (1796), 7 Term Rep. 20. *Apld.* *Walker v. Drawater* (1796), 3 Aust. 680.

388. ———.]—A judgment signed in any part of the term or the subsequent vacation relates back to the first day of the term, notwithstanding the death of deft. before judgment actually signed.—*BRAGNER v. LANGMEAD* (1796), 7 Term Rep. 20; 101 E. R. 834.

Annotation:—*Apld.* *Calvert v. Tomlin* (1828), 5 Bing. 1.

389. ———.]—Where a cognant was given on Feb. 8 in Hilary term with a condition that judgment should not be entered unless default should be made in payment on the ensuing Apr. 1, & deft. died in Hilary vacation, before Apr. 1, judgment entered up on Apr. 10 in Hilary vacation, after deft.'s death, was held regular, as relating to the first day of Hilary term.—*CALVERT v. TOMLIN* (1828), 5 Bing. 1; 2 Moo. & P. 1; 6 L. J. O. S. C. P. 191; 130 E. R. 959.

Annotation:—*Distd.* *Blackburn v. Goodrick* (1841), 5 Jur. 151.

390. Judgments relate back to earliest hour of day.]—Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done. Therefore, where judgment was signed at the opening of the office at its usual hour, eleven a.m., & deft. died at half past nine a.m. on the same morning:—*Held*: the judgment was regular.—*WRIGHT v. MILLS* (1859), 4 H. & N. 488; 28 L. J. Ex. 223; 33 L. T. O. S. 152; 5 Jur. N. S. 771; 7 W. R. 498.

Annotations:—*Consd.* *Marshall v. James* (1874), L. R. 9 C. P. 702. *Distd.* *Clarke v. Bradlaugh* (1881), 7 Q. B. D. 151. *Consd.* *Tabernacle Permanent Bldg. Soc. v. Knight*, [1892] A. C. 298. *Refd.* *Migotti v. Colvill* (1879), 1 C. P. D. 233.

391. What are judicial proceedings—Delivery of pleadings.]—A declaration entitled generally of the term, relates to the first day of the term: & the promises & the breach, being laid on the first day of the term, may be presumed to have been made before the delivery of the declaration, because by a reference to the ancient practice of declaring *ore tenus*, the declaration cannot be supposed to have been delivered till the sitting of the ct. on that day.

Here, however, the question is not concerning a judicial proceeding, for the delivery of the declaration is the act of the party (*BULLER, J.*).—*PUGH v. ROBINSON* (1786), 1 Term Rep. 116; 99 E. R. 1004.

Annotations:—*Consd.* *Swain v. Morland* (1819), 1 Brod. & Bing. 370; *Edwards v. R.* (1854), 9 Exch. 628. *Refd.* *Dickenson v. Reynolds* (1834), 4 Tyr. 374; *Owen v. Waters* (1836), 2 Gale, 208.

392. Issue of writ.]—To issue a writ of summons is not a judicial act, & the ct. may inquire at what period of the day it was issued. It appeared from the statement of claim that the writ of summons in the action was issued on July 2, & that the cause of action arose on the same day, but before the issue of the writ. The statement of claim was demurred to on the ground that the issuing of the writ was a judicial act, & must, therefore, be presumed to have taken place at the earliest moment of the day, before the cause of action accrued:—*Held*: the ct. could inquire whether or not the writ was in fact issued after the cause of action accrued.—*CLARKE v. BRADLAUGH* (1881), 8 Q. B. D. 63; 51 L. J. Q. B. 1; 46 L. T. 49; 46 J. P. 278; 30 W. R. 53, C. A.

Annotation:—*Mentd.* *Jenkins v. G. C. Ry.*, [1912] 1 K. B. 1

TIME POLICY

See INSURANCE.

TITHE AND TITHE RENTCHARGE.

See ECCLESIASTICAL LAW.

TITLE DEEDS.

See BANKERS AND BANKING ; BANKRUPTCY AND INSOLVENCY ; DEEDS AND OTHER INSTRUMENTS ; EQUITY ; LANDLORD AND TENANT ; MORTGAGE ; REAL PROPERTY AND CHATTELS REAL ; SALE OF LAND ; SOLICITORS.

TITLE, DOCUMENTS OF.

See BANKERS AND BANKING ; SALE OF GOODS ; SHIPPING AND NAVIGATION.

TOBACCO.

See CUSTOM AND USAGES ; REVENUE.

TOLLS.

See CONSTITUTIONAL LAW ; DISTRESS ; FERRIES ; HIGHWAYS, STREETS, AND BRIDGES ; MARKETS AND FAIRS ; RAILWAYS AND CANALS ; SHIPPING AND NAVIGATION.

TOLZEY COURT OF BRISTOL.

See COURTS.

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See SHIPPING AND NAVIGATION ; WEIGHTS AND MEASURES.

TOOLS.

See BANKRUPTCY AND INSOLVENCY ; DISTRESS ; EXECUTION.

TORT.

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<i>Arrest, Unlawful</i>	„ MALICIOUS PROSECUTION; TRESPASS.	<i>Malicious Damage</i>	„ AGRICULTURE; CRIMINAL LAW; DAMAGES.
<i>Assault and Battery</i>	„ CRIMINAL LAW; TRESPASS.	<i>Malicious Prosecution</i>	„ MALICIOUS PROSECUTION.
<i>Blackmail</i>	„ CRIMINAL LAW.	<i>Misrepresentation</i>	„ MISREPRESENTATION AND FRAUD.
<i>Breach of the Peace</i>	„ CRIMINAL LAW; MAGISTRATES.	<i>Mistake</i>	„ MISTAKE.
<i>Champerty</i>	„ ACTION.	<i>Negligence</i>	„ NEGLIGENCE.
<i>Collision</i>	„ NEGLIGENCE; SHIPPING.	<i>Nuisance</i>	„ NUISANCE.
<i>Conversion</i>	„ TROVER AND DETINUE.	<i>Passing-off</i>	„ TRADE MARKS, TRADE NAMES, AND DESIGNS.
<i>Criminal Law</i>	„ CRIMINAL LAW.	<i>Picketing</i>	„ TRADE AND TRADE UNIONS.
<i>Damages</i>	„ DAMAGES.	<i>Pound Breach</i>	„ ANIMALS.
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<i>Disturbance</i>	„ EASEMENTS; FERRIES; FISHERIES.	<i>Seduction</i>	„ MASTER AND SERVANT.
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<i>False Imprisonment</i>	„ TRESPASS.	<i>Tortious Feoffment</i>	„ REAL PROPERTY.
<i>Fire</i>	„ NEGLIGENCE.	<i>Trade Disputes</i>	„ TRADE AND TRADE UNIONS.
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		<i>Waste</i>	„ EQUITY; LANDLORD AND TENANT; REAL PROPERTY; SETTLEMENTS.

Part I.—Nature of Torts.

SECT. 1.—IN GENERAL.

1. Refusal or failure to perform duty imposed by law.]—If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable, jointly & severally, for the failure & refusal.—FERGUSON v. KINNOULL (EARL) (1842), 9 Cl. & Fin. 251; 4 State Tr. N. S. 785; 8 E. R. 412, H. L.

Annotations:—*Reid*. Harlot's Hospital v. Ross (1846), 12 Cl. & Fin. 507; Allen v. Flood, [1898] A. C. 1. *Mentd.* Rogers v. Rajendro Dutt (1860), 8 Moo. Ind. App. 103; Sinclair v. Broughton & Government of India (1882), 47 L. T. 170; Everett v. Griffiths, [1921] 1 A. C. 631.

2. —.]—Pltfs., merchants at Valparaiso, received through defts. a telegram purporting to come from London & addressed to them, ordering

a large shipment of barley. No such message was ever in fact sent to pltfs. The misdelivery of the message was caused by the negligence of defts., & occasioned heavy loss, to pltfs., in consequence of a fall in the market price of barley. In an action to recover the amount of this loss:—*Held*: there was no duty owing by defts. to pltfs. in the matter, by contract or law, & therefore no action lie.—DICKSON v. REUTER'S TELEGRAM CO. [1899], 3 C. P. D. 1; 37 L. T. 370; 42 J. P. 308; 26 W. R. 23, C. A.; *sub nom.* DIXON v. REUTER'S TELEGRAPH CO., LTD., 47 L. J. Q. B. 1.

Annotations:—*Consd.* Starkey v. Bank of England, [1903] A. C. 114. *Reid*. Cunningham v. G. N. Ry. (1883), 49 L. T. 392; Firbank's Exors. v. Humphreys (1886), 18 Q. B. D. 54; Brown v. Law (1895), 72 L. T. 779; Edwards v. Porter, McNeill v. Hawes, [1923] 2 K. B. 538. *Mentd.* Coventry, Sheppard v. G. E. [1927] 49 L. T. 641.

Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2.]

3. —.]—A tenant of an unfurnished house, under a verbal agreement which contained no term as to repairs, gave notice to quit. In consideration of the withdrawal of the notice the landlord promised the wife of the tenant, acting as agent for her husband, to repair a dangerous defect on the premises, but failed to do so within a reasonable time. The wife of the tenant afterwards sustained injury by reason of the defect. In an action by the husband & wife to recover damages for the injury sustained by the wife, the landlord denied the promise to repair:—*Held*: the wife could not maintain the action in tort, since there was in the circumstances no duty owing to her by the landlord for the neglect of which she was entitled to recover.—*CAVALIER v. POPE*, [1905] 2 K. B. 757; 74 L. J. K. B. 857; 93 L. T. 473; 54 W. R. 68; 21 T. L. R. 747; 49 Sol. Jo. 712, C. A.; *affd.*, [1906] A. C. 428, H. L.

Annotations:—*Consd.* Blacker v. Lake & Elliot (1912), 106 L. T. 533. *Refd.* Cameron v. Young, [1908] A. C. 176; Lewis v. Ronald (1909), 101 L. T. 534; Middleton v. Hall (1912), 108 L. T. 804; Bates v. Batoy, [1913] 3 K. B. 351; White v. Steadman, [1913] 3 K. B. 340; Lucy v. Bawden, [1914] 2 K. B. 318; Ryall v. Kidwell, [1914] 3 K. B. 135; Dobson v. Horsley, [1915] 1 K. B. 634; Brackley v. Mid. Ry. (1916), 85 L. J. K. B. 1596; Bromley v. Mercer, [1922] 2 K. B. 126; Fairman v. Perpetual Investment Bldg. Soc., [1923] A. C. 74; Cockburn v. Smith, [1924] 2 K. B. 119; Morgan v. Liverpool Corp., [1927] 2 K. B. 131.

4. **Not continuous cause of action.**—Pltf. who had obtained damages in the county ct. for a misrepresentation under which he had been induced to enter into a contract, brought an action in the High Ct. for further damages accrued since judgment in the county ct.:—*Held*: a tort not being a continuing cause of action, no further damages could be obtained.—*CLARKE v. YORKE* (1882), 52 L. J. Ch. 32; 47 L. T. 381; 31 W. R. 62.

5. **Infringement of personal right.**—In the case of damage occasioned by a wrongful act, though such as the law esteems an injury, malice is not a necessary ingredient to the maintenance of an action.

It is essential to an action in tort that the act complained of should be legally wrongful as regards the party complaining, i.e. it must prejudicially affect him in some legal right. The fact that it will, however directly, do him harm in his interests is not enough.—*ROGERS v. RAJENDRO DUTT* (1860), 13 Moo. P. C. C. 209; 8 Moo. Ind. App. 103; 25 J. P. 3; 9 W. R. 149; 15 E. R. 78, P. C.; *sub nom.* *ROGERS v. DUTT*, 3 L. T. 160, P. C.

Annotations:—*Consd.* Allen v. Flood, [1898] A. C. 1. *Refd.* Tobin v. R. (1864), 16 C. B. N. S. 310; Palmer v. Hutchinson (1881), 6 App. Cas. 619; Mogul S. S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598.

6. —.]—All personal wrong means the infringement of some personal right. . . . Intentionally to do that which is calculated in the ordinary course of events to damage, & which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong.

It is urged on the part of pltf., that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, pltf., it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason,

for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, & the very fact of the combination may show that the object is simply to do harm, & not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; & it may be observed in passing that as a rule it is the damage wrongfully done, & not the conspiracy, that is the gist of actions on the case for conspiracy. . . . But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means (*BOWEN, L.J.*).—*MOGUL S.S. Co. v. MCGREGOR, GOW & Co.* (1889), 23 Q. B. D. 598; 58 L. J. Q. B. 465; 61 L. T. 820; 53 J. P. 709; 37 W. R. 756; 5 T. L. R. 658; 6 Asp. M. L. C. 455, C. A.

Annotations:—*Appld.* Jenkinson v. Nield (1892), 8 T. L. R. 540; Quinn v. Leatham, [1901] A. C. 495. *Consd.* Ghiblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 3 K. B. 600; National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Thomas v. Moore, [1918] 1 K. B. 555; Valentine v. Hyde, [1919] 2 Ch. 129; Ware & De Freville v. Motor Trade Assoc., [1921] 3 K. B. 40; Brimelow v. Casson, [1924] 1 Ch. 302. *Appld.* Reynolds v. Shipping Federation, [1924] 1 Ch. 28; Sorrell v. Smith, [1925] A. C. 700. *Refd.* R. v. Whitechurch (1890), 24 Q. B. D. 420; Connor v. Kent, Gibson v. Lawson, Curran v. Troleaven, [1891] 2 Q. B. 545; Temperton v. Russell, [1893] 1 Q. B. 715; Wright v. Hennessey, (1894), 11 T. L. R. 14; Lyons v. Wilkins, [1896] 1 Ch. 811; Newton v. Amalgamated Musicians' Union, (1896), 40 Sol. Jo. 716; Ajello v. Worsley, [1898] 1 Ch. 274; Allen v. Flood, [1898] A. C. 1; Huttley v. Simmons, [1898] 1 Q. B. 181; Boots v. Grundy, (1900), 82 L. T. 769; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assoc., [1906] A. C. 384; Conway v. Wade, [1908] 2 K. B. 844; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; Larkin v. Long, [1915] A. C. 814; Evans v. Heathcote, [1918] 1 K. B. 418; Pratt v. British Medical Assoc., [1919] 1 K. B. 244; Davies v. Thomas, [1920] 2 Ch. 189; Rawlings v. General Trading Co., [1921] 1 K. B. 635; *Mentd.* *Re Apollinaris Co.'s Trade Marks*, "Apollinaris," "Friedrichshall" & "Hunyadi Janos" (1890), 63 L. T. 162; Maxim-Nordenfelt Guns & Ammunition Co. v. Nordenfelt, (1893) 41 W. R. 604; Trollope v. London Building Trades Federation (1895), 72 L. T. 342; Elliman v. Carrington (1901) 84 L. T. 858; Hymans v. Stuart King, [1908] 2 K. B. 696; United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330; A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., [1913] A. C. 781; *Re Bowman, Secular Soc. v. Bowman*, [1915] 3 Ch. 447; Montefiore v. Menday Motor Components Co., [1918] 2 K. B. 241; *Re* Wallace, Champion v. Wallace, [1920] 2 Ch. 274; Thompson v. British Medical Assoc. (N. S. W. Branch), [1924] A. C. 764; British Oxygen Co. v. Liquid Air, [1925] Ch. 383.

7. **Act not actionable where attendant success expected—Whether actionable where attendant success certain.**—I fail to see how an act which is not an actionable wrong if it is thought it will succeed becomes an actionable wrong because it is known that it will (*LORD STERNDAL, M.R.*).—*WHITE v. RILEY*, [1921] 1 Ch. 1; 89 L. J. Ch. 628; 124 L. T. 168, C. A.

Annotations:—*Refd.* Royal London Mutual Insee. Soc. v. Williamson (1921), 37 T. L. R. 742; Sorrell v. Smith, [1925] A. C. 700; Hardle & Lane v. Chilton (1928), 97 L. J. K. B. 539.

Assignability.—*See* CHOSER IN ACTION, Vol. VIII., p. 432, Nos. 90-94.

SECT. 2.—DISTINCTION BETWEEN ACTIONS OF TORT AND ACTIONS OF CONTRACT.

SUB-SECT. 1.—IN GENERAL.

8. **Depends on facts of case—Not on form of action.**—(1) An action founded on the common law liability of a bailee is an action founded on tort within County Courts Act, 1888 (c. 43), s. 116.

(2) The question whether an action falls within

the one class or the other depends on the facts of the case not on the form in which the action is brought (RIGBY, L.J.).

(3) Where such a relation [bailor & bailee] is established the result of the cases appear to be that if the pltf. can maintain his action by showing the breach of a duty arising at common law out of that relation he is not obliged to rely on a contract within the meaning of the rule; but if his cause of action is that deft. ought to have done something or taken some precaution which would not be embraced by the common law liability arising out of the relation of bailor & bailee then he is obliged to rely on a contract within the meaning of the rule (COLLINS, L.J.).—TURNER v. STALLIBRASS, [1898] 1 Q. B. 56; 67 L. J. Q. B. 52; 77 L. T. 482; 46 W. R. 81; 42 Sol. Jo. 65, C. A.

Annotations:—As to (3) *Appld.* Sachs v. Henderson, [1902] 1 K. B. 612; White v. Smith (1927), 96 L. J. K. B. 397. *Refd.* Davies v. Hood (1903), 88 L. T. 19. *Generally*, *Refd.* Steljes v. Ingram (1903), 19 T. L. R. 534.

9. Necessity to refer to contract—To establish breach of duty.]—TURNER v. STALLIBRASS, No. 8, *ante*.

10. ———.]—SACHS v. HENDERSON, No. 26, *post*.

SUB-SECT. 2.—PARTICULAR INSTANCES.

See COUNTY COURTS, Vol. XIII., pp. 490–492, Nos. 404–420.

11. Action of detinue.]—*Qu.*: whether the action of detinue is within the operation of County Courts Act, 1846 (c. 95). If so, *semble*, it is an action on contract & not of tort; & the county ct. has, therefore, exclusive jurisdiction in such an action to the extent of £20.—HAND v. DANIELS (1850), 1 L. M. & P. 420; Rob. L. & W. 490; Cox, M. & H. 343; 15 L. T. O. S. 206; 14 J. P. 434; 14 Jur. 722.

12. ———.]—In an action claiming the return of a picture or its value & damages for its detention, pltf. recovered a verdict of £10, being its value as assessed by the jury, & 1s. damages for its detention:—*Held*: the action was founded on tort, within County Courts Act, 1867 (c. 142), s. 5, & pltf. were entitled to their costs.—BRYANT v. HERBERT (1878), 3 C. P. D. 389; 47 L. J. Q. B. 670; 39 L. T. 17; 43 J. P. 52; 26 W. R. 898, C. A.

Annotations:—*Consd.* Meux v. G. E. Ry. (1895), 64 L. J. Q. B. 657; Taylor v. M. S. & L. Ry., [1895] 1 Q. B. 134. *Appld.* Steljes v. Ingram (1903), 19 T. L. R. 534. *Consd.* Bradley & Cohn v. Ramsay (1912), 106 L. T. 771; White v. Smith (1927), 96 L. J. K. B. 397. *Refd.* Fleming v. Manchester & Sheffield Ry. (1878), 4 Q. B. D. 81; Turner v. Stallibrass, [1898] 1 Q. B. 56; Keates v. Woodward, [1902] 1 K. B. 532.

13. ———.]—Pltf. brought an action in the High Ct. to recover from defts. certain drawings that had been deposited with them as agents for sale, & damages for their detention & he claimed also an account in respect of such of the drawings as had been sold, & the amount that might be proved to be due on the taking of the account. Defts. pleaded that they had always been ready & willing to return the drawings in their possession, & offered to return them forthwith on obtaining a proper receipt. Pltf. replied accepting the offer to return the drawings, & they were accordingly returned to him. They were of the value of £20 & upwards. The action went to trial on the question of the amount due from defts. in respect of the drawings that had been sold, & resulted in a verdict for pltf. for £33:—*Held*: pltf. was entitled to costs on the High Ct. scale on the ground that the action being one of detinue in which pltf.

had recovered the things claimed *in specie*, it was not within the class of actions founded on tort to which County Courts Act, 1888 (c. 43), s. 116 (2) applies.—DU PASQUIER v. CADBURY, JONES & Co., LTD., [1903] 1 K. B. 104; 72 L. J. K. B. 78; 87 L. T. 519; 51 W. R. 113; 19 T. L. R. 41; 47 Sol. Jo. 49, C. A.

Annotation:—*Appld.* Trotter v. Windham (1907), 23 T. L. R. 676.

14. ———.]—Pltf. in an action of detinue recovered judgment for the return of the goods claimed or £8 10s. their value, & the goods were returned to him:—*Held*: County Courts Act, 1888 (c. 43), s. 116 (2), did not apply & pltf. was entitled to costs.—TROTTER v. WINDHAM & Co. (1907), 23 T. L. R. 676; 51 Sol. Jo. 625, C. A.

15. Action for negligence—Against bailee.]—A declaration stated that pltf., at deft.'s request, delivered to deft., then being a livery stable keeper, a horse of pltf., to be by him taken due & proper care of, & to be kept in a separate stall in deft.'s stable, for reward to deft. to be paid by pltf. in that behalf. Deft. accepted the care & custody of the said horse upon the terms aforesaid: yet he would not take due & proper, or any, care thereof, or keep it in a separate stall, & by means of the premises the horse was so kicked by other horses that it became of no value to pltf. Deft. pleaded "not guilty"; & at the trial a verdict was found for pltf., with £7 damages:—*Held*: the cause of action was founded on contract, not on tort, & consequently pltf. was deprived of costs by County Court Act, 1850 (c. 61), s. 11.—LEGGE v. TUCKER (1856), 1 H. & N. 500; 26 L. J. Ex. 71; 28 L. T. O. S. 145; 2 Jur. N. S. 1235; 5 W. R. 78; 156 E. R. 1298.

Annotations:—*Appld.* Bryant v. Herbert (1878), 3 C. P. D. 189. *Refd.* Morgan v. Ravey (1861), 30 L. J. Ex. 131; Baylis v. Lintott (1873), L. R. 8 C. P. 345; Turner v. Stallibrass (1897), 67 L. J. Q. B. 52.

16. ———.]—TURNER v. STALLIBRASS, No. 8, *ante*.

17. ——— Against carrier—Loss or damage to goods.]—A declaration stated that pltf., at the request of deft., hired deft.'s hackney carriage to convey her & her luggage, & on consideration that pltf. would become a passenger to be carried in the hackney carriage, deft. promised to convey her & her luggage safely & securely; yet deft., not regarding his duty, so carelessly & negligently behaved & conducted himself that pltf.'s luggage was lost:—*Held*: the cause of action was in contract, & not in tort, & she was deprived of costs, not having recovered more than £20.—BAYLIS v. LINTOTT (1873), L. R. 8 C. P. 345; 42 L. J. C. P. 119; 28 L. T. 666.

Annotation:—*Appld.* Bryant v. Herbert (1878), 3 C. P. D. 189.

18. ———.]—The statement of claim alleged that pltf. as vendor of goods, delivered them to defts. a railway co., as carriers for reward, the goods being consigned to the intending purchasers; that afterwards & before the goods had been delivered to the consignees or claimed by them from defts., pltf. discovered that the consignees were insolvent, & as unpaid vendor, gave notice to defts. not to deliver the goods to the consignees, but to hold them to pltf.'s order, & before the goods were delivered to the consignees pltf. required defts. to redeliver them to him; that defts. refused to do so, & delivered them to the consignees who absconded without paying for the goods. Pltf. claimed their value, viz.: £12 10s. 6d. as damages. Defts. paid that sum into ct. & pltf. took it out in satisfaction:—*Held*: the action was, "founded on tort" & not "on contract" within County Courts Act, 1867 (c. 142), s. 5, & pltf. having recovered a sum exceeding £10

Sect. 2.—Distinction between actions of tort and actions of contract: Sub-sect. 2. Sect. 3.]

was not deprived of costs by that sect.—*PONTIFEX v. MIDLAND RY. Co.* (1877), 3 Q. B. D. 23; 47 L. J. Q. B. 28; 37 L. T. 403; 26 W. R. 209, D. C. *Annotations:—Distd. Fleming v. Manchester & Sheffield Ry.* (1878), 4 Q. B. D. 81. *Apld. Bryant v. Herbert* (1878), 3 C. P. D. 189; *Taylor v. M., S. & L. Ry.*, [1895] 1 Q. B. 134. *Distd. Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570. *Refd. Sachs v. Henderson* (1902), 71 L. J. K. B. 392.

19. ————.]—Claim alleged that pltf. caused to be delivered to defts. as common carriers of goods for hire a parcel of goods to be carried from S. to D. for reward to defts. but defts. did not safely & securely carry & deliver the same but so carelessly conducted themselves that it was lost. Defts. paid £12 3s. 4d. into ct. which pltf. accepted in satisfaction of their claim:—*Held*: the action was founded on contract within the meaning of County Courts Act, 1867 (c. 142), s. 5, & pltf. was not entitled to costs.—*FLEMING v. MANCHESTER & SHEFFIELD RY. Co.* (1878), 4 Q. B. D. 81; 39 L. T. 555; 27 W. R. 481, C. A.

Annotations:—Consd. Taylor v. M., S. & L. Ry., [1895] 1 Q. B. 134. *Apld. Steljes v. Ingram* (1903), 19 T. L. R. 534.

20. ————.]—A servant of pltf. took a ticket for a journey on defts.' railway, & a portmanteau of his was accepted by defts. as his personal luggage. The portmanteau contained his livery, which was the property of pltf. Through an act of misfeasance of a porter in the employment of defts. the livery was destroyed. In an action to recover the value of the goods destroyed:—*Held*: defts. were liable to pltf. for the tortious act of their servant in injuring pltf.'s property.

She has incurred loss by reason for her property having been destroyed by the active negligence of the servants of the co. while it was lawfully on the premises of the co.; she has therefore a right of action in tort wholly irrespective of contract (A. L. SMITH, L.J.).—*MEUX v. GREAT EASTERN RY. Co.*, [1895] 2 Q. B. 387; 64 L. J. Q. B. 657; 73 L. T. 247; 59 J. P. 662; 43 W. R. 680; 11 T. L. R. 517; 39 Sol. Jo. 654; 14 R. 620, C. A.

Annotations:—Refd. The Winkfield, [1902] P. 42; *Harris v. Perry* (1903), 72 L. J. K. B. 725; *White v. Steadman*, [1913] 3 K. B. 340; *Wilson v. Barry Ry.* (1916), 116 L. T. 71; *Elder, Dempster v. Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. v. Paterson, Zochonis*, [1924] A. C. 522.

21. ————. **Personal injury.**]—An action brought by a railway passenger against the co. for personal injuries caused by the negligence or misfeasance, of a servant of the co., is an action founded upon tort & not upon contract, even though the passenger has taken a ticket; & if the action is brought in the High Ct. & pltf. recovers damages to the amount of £20 he is not within County Courts Act, 1888 (c. 43), s. 116, & is therefore entitled to his full costs of the action.—*TAYLOR v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. Co.*, [1895] 1 Q. B. 134; 64 L. J. Q. B. 6; 71 L. T. 596; 59 J. P. 100; 43 W. R. 120; 11 T. L. R. 27; 39 Sol. Jo. 42; 14 R. 34, C. A.

Annotations:—Expld. Kelly v. Met. Ry., [1895] 1 Q. B. 944. *Apld. Meux v. G. E. Ry.*, [1895] 2 Q. B. 387; *Turner v. Stallibrass* (1897), 67 L. J. Q. B. 52. *Distd. Steljes v. Ingram* (1903), 19 T. L. R. 534. *Apld. Lyles v. Southend-on-Sea Corp.*, [1905] 2 K. B. 1. *Refd. Clarke v. Army & Navy Co-op. Soc.*, [1903] 1 K. B. 155; *Whiteman v. Steadman*, [1913] 3 K. B. 340; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570.

22. ————.]—Pltf. brought an action against a railway co. for compensation for personal injuries sustained whilst he was a passenger on the railway, by reason of the negligence of the

engine driver in omitting to put on the brake or shut off steam soon enough, so that the train came into collision with a wall & premises of the co. at one of their stations. Pltf. recovered £25 damages:—*Held*: the action was one founded on tort & not on contract, & pltf. was entitled to full costs & not merely to costs on the county ct. scale.—*KELLY v. METROPOLITAN RY. Co.*, [1895] 1 Q. B. 944; 64 L. J. Q. B. 508; 72 L. T. 551; 59 J. P. 437; 43 W. R. 497; 11 T. L. R. 366; 39 Sol. Jo. 447; 14 R. 417, C. A.

Annotations:—Apld. Meux v. G. E. Ry., [1895] 2 Q. B. 387; *Turner v. Stallibrass* (1897), 67 L. J. Q. B. 52. *Consd. Myers v. Bradford Corp.* (1913), 110 L. T. 254. *Refd. Sachs v. Henderson* (1902), 71 L. J. K. B. 392; *Clarke v. Army & Navy Co-op. Soc.*, [1903] 1 K. B. 155; *Steljes v. Ingram* (1903), 19 T. L. R. 534; *Silverman v. Imperial London Hotels* (1927), 137 L. T. 57.

23. ————.]—A municipal corp. constructed & worked an electric tramway under the authority conferred on them by an Order made by the Light Railway Comrs., in pursuance of the Light Railways Act, 1896 (c. 48), & confirmed by the Board of Trade & having therefore, by s. 10 of that Act, the force of a statute. On the construction of the Order the ct. held that it imposed on the corp. an obligation, after the tramway had been opened for traffic, to run cars & to carry passengers in them.

A passenger on one of the cars, who had paid his fare & had taken a ticket in the ordinary form, without any special conditions, was while travelling injured by the fracture of the conducting-rod, which fell upon him. He brought an action against the corp. for damages, alleging that the accident had happened through the negligence of defts. or their servants:—*Held*: the action was in substance founded on a breach by defts. of their duty as a public authority under their Light Railways Order; they were entitled to the protection given by Public Authorities Protection Act, 1893 (c. 61); & as the action had not been brought within six months from the happening of the injury, it must fail.

Pltf.'s cause of action does not depend on contract, but arises out of a breach of the duty to carry pltf. safely cast upon deft. corp. by the fact of his being taken as a passenger (STIRLING, L.J.).—*LYLES v. SOUTHEND-ON-SEA CORPN.*, [1905] 2 K. B. 1; 74 L. J. K. B. 484; 92 L. T. 586; 69 J. P. 193; 21 T. L. R. 389; 3 L. G. R. 691, C. A.

Annotations:—Consd. Myers v. Bradford Corp., [1915] 1 K. B. 417. *Refd. Clarke v. St. Helens B. C.* (1915), 85 L. J. K. B. 17; *Bradford Corp. v. Myers*, [1916] 1 A. C. 242. *Mentd. Scammell v. Attlee* (1928), 45 T. L. R. 76.

24. ————. **Against architect.**]—In an action on the High Ct. against an architect to recover damages for not using due care & skill in supervising the erection of a house which the architect had undertaken to supervise pltf. recovered £20. Upon taxation of costs:—*Held*: the action was "founded on contract" with County Courts Act, 1888 (c. 43), s. 116, & pltf. was only entitled to have county ct. costs.—*STELJES v. INGRAM* (1903), 19 T. L. R. 534.

25. **Action for wrongful conversion.**]—Pltf., a dealer, bought a hydraulic press from the defendant, an auctioneer, at a sale, under conditions of sale requiring payment before delivery. Time was allowed for payment. Payment was tendered within the time allowed, but deft. refused to deliver the press, having contracted to resell it, & in fact reselling it, subsequent to the tender. Pltf. had also contracted to resell the press, after delivery, at a profit. In the action the sole issue in dispute, namely, whether there had been tender within the time allowed for payment, was found in favour of pltf., & evidence of pltf.'s loss of

profit on resale having been given as a measure of damage, judgment was given for pltf. for £29 15s. 3d. Deft. contended that the action was one for breach of contract, & that costs would therefore only be recovered on the county ct. scale:—*Held*: the action was for a wrongful conversion subsequent to & independent of the contract passing the property, & it was therefore an action of tort in which, more than £20 having been recovered, costs followed on the High Ct. scale.—*COHEN v. FOSTER* (1892), 61 L. J. Q. B. 643; 66 L. T. 616; 8 T. L. R. 519, D. C.

26. Action against lessor—Wrongful removal of fixtures.]—(1) By a written agreement deft. agreed to grant & pltf. to take a lease of certain premises from a future date. After the agreement & before the date at which the lease was to commence, deft. removed certain fixtures from the premises. The lease was executed & pltf. went into possession. He then discovered that the fixtures had been removed, & brought an action in the High Ct. against deft. for wrongfully removing the fixtures, & obtained judgment for £20. On appeal from an order affirming the taxation of the costs of pltf. on the county ct. scale:—*Held*: the action was founded on tort within County Courts Act, 1888 (c. 43), s. 116, & pltf. was entitled to costs on the High Court scale.

(2) The distinction between tort & contracts is not a logical one, & it is sometimes difficult to say whether a particular thing is a wrong or breach of contract. If the claim of pltf. had been set out at large pointing to some particular stipulation in the contract, which stipulation had been broken, the action would be founded on contract; but where it is only necessary to refer to the contract to establish a relationship between the parties & the claim goes on to aver a breach of duty arising out of that relationship the action is one of tort (*COLLINS, M.R.*).—*SACHS v. HENDERSON*, [1902] 1 K. B. 612; 71 L. J. K. B. 392; 86 L. T. 437; 50 W. R. 418; 18 T. L. R. 382; 46 Sol. Jo. 336, C. A.

Annotation:—*As to* (1) *Reid. Steljes v. Ingram* (1903), 19 T. L. R. 534.

27. Action for payment for supply of water.]—Pltfs., a water co., were bound by their special Act to supply water to dwelling-houses in their district for domestic purposes at certain rates based on the annual value of such dwelling-houses, but were not bound to supply any dwelling-house with water, otherwise than by meter or special agreement, where any part of such house was used for any trade or business for which water was required.

On Aug. 8, 1901, defts., as occupiers of a workhouse within the district supplied by pltfs., demanded a supply of water for domestic purposes at a rate based on the annual value of the said workhouse. Pltfs. refused to supply on such terms, on the ground that the workhouse was a dwelling-house which, or some part of which, was used for a trade or business for which water was required. Up to the said date defts. had been taking water from pltfs. by meter. After the said date pltfs. continued to supply, & defts. to take & use, water for the workhouse through the existing meter, until the commencement of this action on July 6, 1904, but declined to pay, except on the annual value basis, for water so taken since Jan. 1, 1902. Pltfs. claimed a declaration & damages for wasting water passing through the meter; but at the trial the statement of claim was amended, by consent, by the addition of a claim for money due for water supplied by contract:—*Held*: pltfs.' ground of action was an implied contract to pay

for water supplied & was not in tort, & therefore, Poor Law Payment of Debts Act, 1859 (c. 49), ss. 1, 4, applied, & as pltfs. had commenced their action in July, 1904, & had not amended their claim until after the expiry of the time limited by the said Act, they could not recover payments for any of the water which was the subject of the action.—*CHESTER WATERWORKS CO. v. CHESTER UNION GUARDIANS* (1907), 96 L. T. 566; 71 J. P. 133; 23 T. L. R. 245; 5 L. G. R. 215; *on appeal* (1908), 98 L. T. 701, C. A.

Annotations:—*Mentd. Frederick v. Bognor Water Co.*, [1909] 1 Ch. 149; *Bristol Grdns. v. Bristol Waterworks Co.*, [1912] 1 Ch. 846.

28. Action for relief under Money Lenders Acts.]—Where a borrower from a money lender issues a writ in the High Ct. claiming relief under the Money Lenders Acts the claim being limited to £100 such a claim is one founded on contract within County Courts Act, 1919 (c. 73), s. 1, & can be transferred to the county ct. for trial under that sect.—*WHITE v. SMITH* (1927), 96 L. J. K. B. 397; 137 L. T. 48; 43 T. L. R. 288; 71 Sol. Jo. 191, C. A.

Remission to county court.]—See COUNTY COURTS, Vol. XIII., p. 484, Nos. 340–343.

SECT. 3.—RELEVANCY OF INTENTION OF ALLEGED TORTFEASOR.

29. Whether intention or motive material.]—*ANON.* (1477), Y. B. 17 Edw. 4, fo. 1, pl. 2; cited in 1 Plowd. at p. 11.

Annotations:—*Mentd. Household Fire & Carriage Accident Insce. v. Grant* (1879), 41 L. T. 298; *Cochrane v. Moore* (1890), 38 W. R. 588.

30. — Excuses negatived by intention to injure.]—(1) It is a violation of right to interfere with contractual relations recognised by law if there be no justification for the interference. This principle cannot be confined to inducements to break contracts of service. If such wrongful interference with a man's liberty of action is intended to injure & in fact damages a third person, such third person has a remedy by action.

(2) The intention to injure pltf. negatives all excuses (*LORD LINDLEY*).

(3) In this country it is now settled . . . that no action for a conspiracy lies against persons who act in concert to damage another & do damage him, but who at the same time merely exercise their own rights & who infringe no rights of other people (*LORD LINDLEY*).—*QUINN v. LEATHEN*, [1901] A. C. 495; 70 L. J. P. O. 76; 85 L. T. 289; 65 J. P. 703; 50 W. R. 139; 17 T. L. R. 749, H. L.

Annotations:—*As to* (1) *Appl. Road v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales*, [1902] 2 K. B. 732; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600. *Consd. South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239. *Appl. National Phonograph Co. v. Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335; *Larkin v. Long*, [1915] A. C. 814. *Consd. Long v. Smithson* (1918), 88 L. J. K. B. 223; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *Ware & De Freville v. Motor Trades Assocn.*, [1921] 3 K. B. 40. *Appl. Jasper v. Dominion Tobacco Co.*, [1923] A. C. 709. *Consd. Brimelow v. Casson*, [1924] 1 Ch. 302. *Appl. G. W. K. v. Dunlop Rubber Co.* (1926), 42 T. L. R. 376. *Reid. Said v. Butt*, [1920] 3 K. B. 497. *As to* (2) *Reid. Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assocn.*, [1906] A. C. 384; *White v. Riley & Wood* (1920), 36 T. L. R. 566. *As to* (3) *Consd. Hodges v. Webb*, [1920] 2 Ch. 70. *Distd. Reynolds v. Shipping Federation*, [1924] 1 Ch. 28. *Reid. R. v. Brallsford*, [1905] 2 K. B. 730; *Davies v. Thomas*, [1920] 2 Ch. 189; *Sorrell v. Smith*, [1925] A. C. 700. *Generally, Reid. Bulcock v. St. Anne's Master Builders' Federation* (1902), 19 T. L. R. 27; *Conway v. Wade*, [1908] 2 K. B. 844; *Gaskell v. Lancashire & Cheshire Miners' Federation* (1912), 56 Sol. Jo. 719; *Santen v. Busnach* (1913), 29 T. L. R. 214; *Vacher v. London Soc. of Com-*

Sect. 3.—Relevancy of intention of alleged tortfeasor.
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positors, [1913] A. C. 107; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Tinline v. White Cross Insce.*, [1921] 3 K. B. 327; *White v. Riley*, [1921] 1 Ch. 1; *Hardie & Lane v. Chilton*, [1928] 2 K. B. 306. **Mentd.** *West Ham Union v. L. C. C.* (1902), 71 L. J. K. B. 299; *In the Goods of Hall, Hall v. Knight & Baxter* (1913), 109 L. T. 587; *Re Ainsworth*, *Finch v. Smith*, [1915] 2 Ch. 96; *Croft v. Blay*, [1919] 1 Ch. 277; *Welldon v. Butterley Co.*, [1920] 1 Ch. 130.

31. — Act calculated in ordinary course to injure—& in fact injuring—Done without just cause or excuse.]—*MOGUL S.S. Co. v. MCGREGOR*, *Gow & Co.*, No. 6, *ante*.

32. — Act lawful in itself.]—It is to borne in mind that the act of hissing in a public theatre is *prima facie* a lawful act: & even if it should be conceded that such an act though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be very difficult to infer such a motive from the insulated acts of one person unconnected with others (*COLTMAN, J.*).—*GREGORY v. BRUNSWICK (DUKE)* (1844), 6 Man. & G. 953; 7 Scott, N. R. 972; 2 L. T. O. S. 188; 8 Jur. 148; 134 E. R. 1178; *on appeal* (1846), 3 O. B. 481, Ex. Ch.; (1849), 2 H. L. Cas. 415, H. L.

Annotations:—*Consd.* *Cotterell v. Jones & Ablett* (1851), 21 L. J. C. P. 2; *Temperton v. Russell*, [1893] 1 Q. B. 715. **Refd.** *Mogul S.S. Co. v. McGregor*, *Gow* (1889), 23 Q. B. D. 598; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600. **Mentd.** *Campbell v. R.* (1847), 11 Q. B. 814; *Pollitt v. Forrest* (1847), 11 Q. B. 962; *Scott v. De Richebourg* (1851), 11 C. B. 447.

33. — —.]—An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent (*PARKE, B.*).—*STEVENSON v. NEWNHAM* (1853), 13 C. B. 285; 22 L. J. C. P. 110; 20 L. T. O. S. 279; 17 Jur. 600; 138 E. R. 1208, Ex. Ch.

Annotations:—*Consd.* *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495. **Refd.** *Valentine v. Hyde*, [1919] 2 Ch. 129; *Sorrell v. Smith*, [1925] A. C. 700. **Mentd.** *Jeffries v. G. W. Ry.* (1856), 5 E. & B. 802; *Monk v. Sharp* (1857), 2 H. & N. 540; *Young v. Billiter* (1860), 8 H. L. Cas. 682; *Hardman v. Booth* (1863), 32 L. J. Ex. 105; *Paull v. Best* (1863), 3 B. & S. 537; *Topping v. Keysell* (1864), 16 C. B. N. S. 258; *Re Willmetts, Ex p. Goss* (1864), 9 L. T. 734; *Marks v. Feldman* (1869), L. R. 4 Q. B. 481; *Clough v. L. & N. W. Ry.* (1871), L. R. 7 Exch. 26; *Re Johnson, Ex p. Rayner* (1872), 41 L. J. Bcy. 26; *Re Meldrum, Ex p. Butcher* (1874), 9 Ch. App. 595; *London & County Banking Co. v. London & River Plate Bank* (1887), 4 T. L. R. 179; *Re O'Sullivan, Ex p. Baller* (1892), 61 L. J. Q. B. 228; *Re Clark, Ex p. Beardmore*, [1894] 2 Q. B. 393; *Fitzroy v. Cave*, [1905] 2 K. B. 364.

34. — —.]—No use of property which would be legal if due to a proper motive can become illegal if it is prompted by a motive which is improper or even malicious.—*BRADFORD CORPN. v. PICKLES*, [1895] A. C. 587; 64 L. J. Ch. 759; 73 L. T. 353; 60 J. P. 3; 44 W. R. 190; 11 T. L. R. 555; 11 R. 286, H. L.

Annotations:—*Apld.* *Allen v. Flood*, [1898] A. C. 1. **Refd.** *Quinn v. Leatham*, [1901] A. C. 495; *Husey v. London Electric Supply Corp.*, [1902] 1 Ch. 411; *Fitzroy v. Cave*, [1905] 2 K. B. 364; *Salt Union v. Brunner, Mond*, [1906] 2 K. B. 822; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40. **Mentd.** *Cochrane v. Smith* (1895), 12 T. L. R. 78; *Murray v. Epsom L. B.* (1896), 45 W. R. 185; *Pitts v. George* (1896), 66 L. J. Ch. 1; *Jordeson v. Sutton*, *Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217; *Mostyn v. Atherton* (1899), 68 L. J. Ch. 629; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588.

35. — —.]—(1) An Act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

Resps. were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the

ironwork of the ship objected to resps. being employed, on the ground that resps. had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. Applt., who was a delegate of the union, was sent for by the ironworkers & informed that they intended to leave off working. Applt. informed the employers that unless resps. were discharged all the ironworkers would be called out or knock off work (it was doubtful which expression was used); that the employers had no option; that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork & that wherever resps. were employed the iron-men would cease work. There was evidence that this was done to punish resps. for what they had done in the past. The employers, in fear of this threat being carried out which, as they knew, would have stopped their business, discharged resps. & refused to employ them again. In the ordinary course resps.' employment would have continued. Resps. having brought an action against applt., the jury found that he had maliciously induced the employers to discharge resps. & not to engage them, & gave resps. a verdict for damages:—**Held:** applt. had violated no legal right of resps., done no unlawful act, & used no unlawful means, in procuring resps.' dismissal; his conduct was therefore not actionable however malicious or bad his motive might be, & notwithstanding the verdict applt. was entitled to judgment.

If a deft., by way of excuse or justification of a trespass or other wrongful act, can satisfy the tribunal . . . that he did such acts in the *bona fide* exercise of a legal right or privilege vested in him, no amount of even personal hatred or bad motive co-existing in his mind will render that unlawful which without it is lawful (*HAWKINS, J.*).

(2) There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly & for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, & is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; & in that case, according to the law laid down by the majority in *Lumley v. Gye*, No. 169, *post*, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party (*LORD WATSON*).

(3) While it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse (*LORD WATSON*).—*ALLEN v. FLOOD*, [1898] A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 62 J. P. 595; 46 W. R. 258; 14 T. L. R. 125; 42 Sol. Jo. 149, H. L.; *revsq.* *S. C. sub nom. FLOOD v. JACKSON*, [1895] 2 Q. B. 21, O. A.

Annotations:—*As to* (1) *Apld.* *Huttley v. Simmons*, [1898] 1 Q. B. 181; *Taylor v. Cambridge Gazette Co. & Kilner* (1898), 42 Sol. Jo. 832. **Consd.** *Lyons v. Wilkins*, [1899] 1 Ch. 255. **Apld.** *Boots v. Grundy* (1900), 82 L. T. 769. **Expld.** *Quinn v. Leatham*, [1901] A. C. 495. **Apld.** *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335. **Consd.** *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *Apld.* *Davies v. Thomas*, [1920] 2 Ch. 189. **Consd.** *Hodges v. Webb*, [1920] 2 Ch. 70; *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40. **Refd.** *Ajello v. Worsley*, [1898] 1 Ch. 274; *Charnock v. Court* (1899), 68 L. J. Ch. 550; *Hubbuck v. Wilkinson*, *Heywood & Clark*, [1899] 1 Q. B. 86; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; *Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assocn.*, [1906] A. C. 384; *Wilford v.*

West Riding of Yorkshire County Council, [1908] 1 K. B. 685; *Hardie & Lane v. Chilton*, [1928] 2 K. B. 306. *As to* (2) *Appl. Read v. Friendly Soc. of Operative Stonemasons of England, Ireland, & Wales*, [1902] 2 K. B. 732; *Stott v. Gamble*, [1916] 2 K. B. 504; *Sorrell v. Smith*, [1925] A. C. 700. *Refd.* *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600; *Conway v. Wade* (1908), 78 L. J. K. B. 14. *Generally, Mentd.* *Linaker v. Pilcher* (1901), 70 L. J. K. B. 396; *Brigg v. Thornton* (1903), 73 L. J. Ch. 301; *Santen v. Busnach* (1913), 29 T. L. R. 214; *Re Ainsworth, Finch v. Smith*, [1915] 2 Ch. 96; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Wolstenholme v. Arius* (1900) 2 Ch. 403; *White*

36. ———.]—By their statement of claim plffs. alleged that defts. combined with others to prevent them from carrying on their trade, inducing third persons not to deal with them:—*Held*: (1) (*BIGHAM, J.*) intention was immaterial if the acts themselves were not wrongful; (2) (*PHILLIMORE, J.*) given a combination, the motive & purpose made all the difference.—*Boots v. Grundy* (1900), 82 L. T. 769; 48 W. R. 638; 16 T. L. R. 457; 44 Sol. Jo. 552, D. C.

37. ———.]—In the absence of conspiracy or unlawful combination, a firm or even emphatic statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker will do that which he is lawfully entitled to do, is not a threat for which the speaker can be held liable at law.

Omitting cases of conspiracy or combination I venture to doubt whether the pressure of a mere statement that the speaker intends to do something which he is legally entitled to do if the man to whom he is speaking does not adopt a particular course, can be unlawful pressure (*PETERSON, J.*).—*Hodges v. Webb*, [1920] 2 Ch. 70; 89 L. J. Ch. 273; 123 L. T. 80; 36 T. L. R. 311.

Annotations:—*Apprvd.* *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40; *White v. Riley*, [1921] 1 Ch. 1. *Refd.* *Sorrell v. Smith*, [1925] A. C. 700; *Hardie & Lane v. Chilton*, [1928] 2 K. B.

38. ———.]—*WARE & DE FREVILLE, LTD. v. MOTOR TRADE ASSOCN.*, No. 141, *post*.

39. ———.]—*SORRELL v. SMITH*, No. 156, *post*.

——— *Distress.*]—*See* DISTRESS, Vol. XVIII., pp. 338, 339, Nos. 725–730, 735.

40. ——— *Act done in bonâ fide exercise of legal right.*]—*ALLEN v. FLOOD*, No. 35, *ante*.

41. ———.]—*KINGABY v. ASTON VILLA FOOTBALL CLUB* (1912), *Times*, Mar. 28.

42. ——— *Combination.*]—*BOOTS v. GRUNDY*, No. 36, *ante*.

43. ———.]—*HODGES v. WEBB*, No. 37, *ante*.

44. ——— *Employment of unlawful means—Causing actual damage.*]—A single person or a body of persons commits an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means, such as threats of coercive action, to injure that person's business, even though the unlawful means may not comprise any specific act which is *per se* actionable & actual malice is not proved. The element of conspiracy in a case of this kind is of importance only in considering the weight of the acts alleged & the extent of the damage resulting therefrom.

Defts. are joint tortfeasors, & thereby jointly liable (*MCCARDIE, J.*).—*PRATT v. BRITISH MEDICAL ASSOCN.*, [1919] 1 K. B. 244; 88 L. J. K. B. 628; 120 L. T. 41; 35 T. L. R. 14; 63 Sol. Jo. 84.

Annotations:—*Consd.* *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40. *Refd.* *Valentine v. Hyde*, [1919] 2 Ch. 129; *Davies v. Thomas*, [1920] 1 Ch. 217; *Hodges v. Webb*, [1920] 2 Ch. 70; *Said v. Butt*, [1920] 3 K. B. 497; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260; *Sorrell v. Smith*, [1925] A. C. 700.

45. ——— *Means not comprising any act unlawful in itself—No proof of actual malice.*]—*PRATT v. BRITISH MEDICAL ASSOCN.*, No. 44, *ante*.

46. *Necessity for malice.*]—*ROGERS v. RAJENDRO DUTT*, No. 5, *ante*.

——— *Defamation.*]—*See* LIBEL & SLANDER, Vol. XXXII., pp. 154–163, Nos. 1855–1983.

——— *Slander of title.*]—*See* LIBEL & SLANDER, Vol. XXXII., pp. 206–208, Nos. 2574–2590.

——— *Malevolent prosecution.*]—*See* MALICIOUS PROSECUTION, Vol. XXXIII., pp. 483–492, Nos. 182–318.

——— *Torts by corporations.*]—*See* CORPORATIONS, Vol. XIII., p. 403, Nos. 1244–1251.

——— *Refusal of vote.*]—*See* ELECTIONS, Vol. XX., pp. 105, 106, Nos. 852–856.

——— *Wilful, malicious damage to property.*]—*See* TRESPASS.

——— *Intention to convert.*]—*See* TROVER & DETINUE.

See, also, Nos. 169–172, *post*.

SECT. 4.—INJURY AND DAMAGE IN RELATION TO THE WRONGFUL ACT.

47. *General rule.*]—The word injury is a general & large word, & comprehends in itself all manner of wrongs, be it in debt, in not paying of it, or in detinue, in the detaining of rent, this is an injury: *injuria & damnum* are the two grounds for the having all actions, & without these, no action lies: if there be *damnum absque injuria*, or *injuria absque damno*, no action lies, but where there is injury, *injuria & damnum*, & so both of them do run together, there an action well lies: also this word injury, in itself comprehends all demands (*DODDERIDGE, J.*).—*CABLE v. ROGERS* (1625), 3 Bulst. 311; 81 E. R. 259.

48. *Injuria absque damno.*]—Although a thing appear for the profit of a man, & not for his damage, yet it is not lawful for a man to commit a tort (*per cur.*).—*MALEVERER v. SPINKE* (1537), 1 Dyer, 35 b; 73 E. R. 79.

Annotations:—*Refd.* *Secheverel v. Dale* (1626), Poph. 193; *Cope v. Sharpe*, [1910] 1 K. B. 168; *Cope v. Sharpe* (No. 2), [1912] 1 K. B. 496. *Mentd.* *Mouse's Case* (1608), 12 Co. Rep. 63; *Parliament in Ireland Case* (1613), 12 Co. Rep. 110; *Simmons v. Norton* (1831), 9 L. J. O. S. C. P. 185.

49. ———.]—*CABLE v. ROGERS*, No. 47, *ante*.

50. ———.]—A declaration in case by a co. stated that a canal had been made & maintained by them in pursuance of 31 Geo. 3, c. 78; that defts., having steam engines within the prescribed distance of the canal, had, after notice to the co., laid down pipes communicating with the canal, & that defts. had used the water drawn off by such pipes for other purposes than condensing the steam of their engines.

The declaration disclosed such an injury to a right as might be the subject of an action without express damage (*PARKE, B.*).—*KING v. ROCHDALE CANAL CO.* (1851), 14 Q. B. 136; 18 L. T. O. S. 5; 15 Jur. 896; 117 E. R. 55, Ex. Ch.; *affg.* *S. C. sub nom. ROCHDALE CANAL CO. v. KING* (1849), 14 Q. B. 122; *subsequent proceedings* (1851), 2 Sim. N. S. 78.

Annotations:—*Refd.* *Coe v. Wise* (1866), L. R. 1 Q. B. 711. *Mentd.* *Rochdale Canal Co. v. Manchester Ship Canal Co.* (1901), 85 L. T. 585.

———.]—*See* ACTION, Vol. I., p. 29, Nos. 231, 232.

51. *Damnum absque injuria.*]—*CABLE v. ROGERS*, No. 47, *ante*.

———.]—*See* ACTION, Vol. I., pp. 29–34, Nos. 233–261.

and damage in relation to the wrongful act. Part II. Sects. 1, 2, 3, 4, 5, 6, 7 & 8: Sub-sect. 1.]

52. Necessity for actual damage—Or presumption of law.]—S., having obtained a judgment against F. issued a *fi. fa.* & placed it on the hands of the sheriff of L. for execution, who, on proceeding to make levy, found the goods claimed by F.'s brother under a bill of sale; F., being informed of this, requested the sheriff's officer to remain on the premises, which he did until after the goods were sold under the bill of sale, & then at F.'s request withdrew. The sheriff being ruled to make a return to the *fi. fa.* returned that he had seized the goods & chattels of the debtor & kept them safe until ordered by F. to withdraw from possession of the same. F. thereupon brought an action against the sheriff for not levying under the *fi. fa.*

& for making a false return thereto, but on trial gave no evidence of having damage by the sheriff's neglect. — up was the validity of the bill of sale, — found that it was valid, & returned a verdict for deft. On motion to make rule absolute to enter a verdict for pltf.:—*Held*: the circumstance of deft. being a public officer to whose services pltf. was entitled did not constitute the case an exception to the rule that [in an action for tort actual damage must be proved or a presumption of law implying damage established.]—*STIMSON v. FARNHAM* (1871), L. R. 7 Q. B. 175; 41 L. J. Q. B. 52; 25 L. T. 747; 20 W. R. 183.

—.]—See ACTION, Vol. I., pp. 26-29, Nos. 216-230.

Remoteness of damage.]—See DAMAGES, Vol. XVII., pp. 93 *et seq.*

Part II.—Liability for Torts.

SECT. 1.—THE CROWN.

Liability of Crown & Crown servants to be sued.]—See CONSTITUTIONAL LAW, Vol. XI., pp. 523-525, Nos. 284-293.

PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 62-66, Nos. 378-412.

SECT. 2.—SOVEREIGNS, STATES, FOREIGN AMBASSADORS AND DIPLOMATIC PERSONS.

See CONSTITUTIONAL LAW, Vol. XI., pp. 536-542, Nos. 390-467.

SECT. 3.—PUBLIC BODIES AND OFFICERS.

See PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 15 *et seq.*

Crown Servants.]—See PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 61-74, 122, 123, Nos. 366-518, 900-902.

Canal companies.]—See RAILWAYS, Vol. XXXVIII., pp. 413-415, Nos. 1025-1035.

Carriers.]—See, generally, CARRIERS, Vol. VIII., pp. 17 *et seq.*

Education authorities.]—See EDUCATION, Vol. XIX., pp. 556-557, Nos. 17-24.

Electricity undertakings.]—See ELECTRIC LIGHTING, Vol. XX., pp. 209-213, Nos. 62-84.

Gas undertakings.]—See GAS, Vol. XXV., pp. 482-488, Nos. 71-101.

Highway authorities.]—See HIGHWAYS, Vol. XXVI., pp. 398-413, 452-455, Nos. 1239-1329, 1670-1711.

Local authorities.]—See, generally, LOCAL GOVERNMENT, Vol. XXXIII., pp. 21-23, Nos. 88-103.

Mines.]—See, generally, MINES, Vol. XXXIV., pp. 729-749.

Public Health authorities.]—See PUBLIC HEALTH, Vol. XXXVIII., pp. 152, 153, 232, 233, Nos. 23-29, 618-636.

Railway companies.]—See, generally, RAILWAYS, Vol. XXXVII., pp. 249 *et seq.*

Poor Law authority.]—See POOR LAW, Vol. XXXVII., p. 214, No. 99.

Sewer authorities.]—See SEWERS & DRAINS.

Tramway undertakings.]—See TRAMWAYS & LIGHT RAILWAYS.

Water supply undertakings.]—See WATER SUPPLY.

SECT. 4.—COMPANIES AND CORPORATIONS.

See COMPANIES, Vol. IX., pp. 647, 648, Nos. 4277-4284; CORPORATIONS, Vol. XIII., pp. 398-407, Nos. 1216-1281.

SECT. 5.—TRADE UNIONS.

See TRADE & TRADE UNIONS.

SECT. 6.—PERSONS UNDER DISABILITY.

Bankruptcy—Proof in bankruptcy for unliquidated damages in tort.]—See BANKRUPTCY, Vol. IV., pp. 251-252, Nos. 2387-2401.

— Actions against bankrupt.]—See BANKRUPTCY, Vol. V., pp. 1006-1010, Nos. 8207-8236.

— Actions pending at time of bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 1013-1017, Nos. 8266-8301.

Infants.]—See INFANTS, Vol. XXVIII., pp. 178-181, Nos. 381-408.

Lunatics.]—See LUNATICS, Vol. XXXIII., p. 141, Nos. 186-187.

Married women—Torts during coverture.]—See HUSBAND & WIFE, Vol. XXVII., pp. 213-218, Nos. 1847-1893.

— Liability of wife to husband.]—See HUSBAND & WIFE, Vol. XXVII., pp. 259-260, Nos. 2288-2291.

— Effect of Protection Order.]—See HUSBAND & WIFE, Vol. XXVII., p. 560, No. 6159.

SECT. 7.—LIABILITY FOR ACTS OF OTHERS.

Husband & wife—Liability of husband for torts of wife.]—See HUSBAND & WIFE, Vol. XXVII., pp. 213-218, Nos. 1847-1893.

— Between husband & wife.]—See HUSBAND & WIFE, Vol. XXVII., pp. 259, 260, Nos. 2288-2295.

Independent contractor—Acts of contractors & their servants.]—See MASTER & SERVANT, Vol. XXXIV., pp. 155-167, Nos. 1216-1296.

— Relationship of master & servant.]—See MASTER & SERVANT, Vol. XXXIV., pp. 20-40, Nos. 8-164.

— Negligence of independent contractor.]—See NEGLIGENCE, Vol. XXXVI., pp. 98-100, Nos. 655-669.

Master & servant—Liability of master to third parties.]—See MASTER & SERVANT, Vol. XXXIV., pp. 125-149, 153-155.

Liability of servant to third parties.]—See MASTER & SERVANT, Vol. XXXIV., pp. 184-187, Nos. 1503-1545.

Partners—Liability of firm for acts of partner.]—See PARTNERSHIP, Vol. XXXVI., pp. 370-373, Nos. 470-498.

Liability of individual partner.]—See PARTNERSHIP, Vol. XXXVI., pp. 375, 376, Nos. 524-532.

Principal & agent—Liability of principal for torts committed by agent.]—See AGENCY, Vol. I., pp. 594-605, Nos. 2282-2340.

Relation of agent to third parties in regard to torts.]—See AGENCY, Vol. I., pp. 680-687, Nos. 2900-2964.

Liability of company for torts of agents & servants.]—See COMPANIES, Vol. IX., pp. 624-626, Nos. 4137-4145.

Liability of landlord for acts of bailliff.]—See DISTRESS, Vol. XVIII., pp. 332, 333, Nos. 663-675.

Personal representatives.]—See EXECUTORS, Vol. XXIV., pp. 646-651, Nos. 6726-6771.

Under guarantee or contract of indemnity—Indemnity under implied contract.]—See GUARANTEE, Vol. XXVI., pp. 223-225, Nos. 1750-1765.

Indemnity to principal for act of independent contractor.]—See NEGLIGENCE, Vol. XXXVI., pp. 99-100, Nos. 663-666.

SECT. 8.—JOINT TORTFEASORS.

SUB-SECT. 1.—NATURE OF LIABILITY.

53. General rule—Liability of each.]—DE BODREUGAM v. ARCEDEKENE (1802), Y. B. 30 Edw. I. (Rolls Series) 106.

54. ———.]—BARKER v. MARTIN (1647), Sty. 20; 82 E. R. 498.

55. ———.]—When several men join in an unlawful act, they are all guilty of whatever happens upon it (*per cur.*).—STANLEY'S CASE (1663), Kel. 86; 1 Keb. 584; 84 E. R. 1094; *sub nom.* R. v. STANDLIE, 1 Sid. 159.

56. ———.]—Trespass for several things at the same time against several defts., one does one part, & another another part; all of them shall be charged for the whole, & not severally for several parts.—SMITHSON v. GARTH (1691), 3 Lev. 321; 83 E. R. 711.

57. ———.]—Several tortfeasors who unite in an injurious act, may be sued, each one singly.—

SUTTON v. CLARKE (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E. R. 943.

Annotations:—*Reid.* Coe v. Wise (1864), 5 B. & S. 440. *mentd.* Jones v. Bird (1822), 5 B. & Ald. 837; Boulton v. Crowther (1824), 2 B. & C. 703; Hall v. Smith (1824), 2 Bing. 156; Blakenore v. Glamorgan & Swansea Canal Co. (1829), 3 Y. & J. 60; Smith v. Shaw (1829), L. & Welsb. 98; Grocers Co. v. Donne (1836), 3 Bing. N. C. 34; R. v. Eastern Counties Ry. (1842), 6 Jur. 557; Dawson v. Paver (1847), 5 Hare, 415; Re Cooling & G. N. Ry. (1849), 19 L. J. Q. B. 25; R. v. G. N. Ry. (1849), 14 Q. B. 25; Smith v. Kenrick (1849), 7 C. B. 515; Nicklin v. Williams (1854), 10 Exch. 259; Metcalf v. Hotherington (1855), 24 L. J. Ex. 314; Scott v. Manchester Corpn. (1857), 29 L. T. O. S. 233; Bonomi v. Backhouse (1858), E. B. & E. 622; Rogers v. Rajendro Dutt (1860), 13 Mon. P. C. C. 209; *Hobbs v. St. Leonard's, Shoreditch Vestry* (1861), 11 C. B. N. S. 192; Whitehouse v. Fellowes (1861), 10 C. B. N. S. 765; Clothier v. Webster (1862), 12 C. B. N. S. 790; R. v. Train (1862), 6 L. T. 380; Tobin v. R. (1864), 16 C. B. N. S. 310; Fletcher v. Rylands (1866), L. R. 1 Exch. 265; Mersey Dock Trustees v. Gibbs (1866), L. R. 1 H. L. 93; East Fremantle Corpn. v. Annois, [1902] A. C. 213; Roberts v. Charing Cross, Euston & Hampstead Ry. (1903), 87 L. T. 732; Maxey Drainage Board v. G. N. Ry. (1912), 76 J. P. 236; Rownton v. Ancholme Drainage & Navigation Comrs., [1913] K. B. 213; Howard-Flanders v. Maldon Corpn. (1920), 135 L. T. 6.

58. ———.]—In an action of trespass against a huntsman for hunting over the lands of another, damages may be recovered, not only for the mischief immediately occasioned by deft. himself, but also for that done by the concourse of people who accompanied him.

Deft. being a co-trespasser is liable to answer for the whole of the damage (LORD ELLENBROUGH).—HUME v. OLDACRE (1816), 1 Stark. 351; 171 E. R. 494, N. P.

59. ———.]—In tort, a party suing out bailable process jointly against several, may declare separately against one of them.—WILSON v. EDWARDS (1825), 3 B. & C. 734; 5 Dow. & Ry. K. B. 622; 3 L. J. O. S. K. B. 107; 107 E. R. 906.

60. ———.]—Where a liability arises from the wrongful act of several parties, each is liable for all the consequences, & there is no contribution between them, & each case is distinct, depending upon the evidence against each party.—A.-G. v. WILSON (1840), Cr. & Ph. 1; 10 L. J. Ch. 53; 4 Jur. 1174; 41 E. R. 389, L. C.

Annotations:—*Reid.* London Gas-Light Co. v. Spottiswoode (1851), 14 Beav. 261; Power v. Hooy (1871), 19 W. R. 916. *Mentd.* Foss v. Harbottle (1843), 2 Hare, 461; Re London & Birmingham Extension, etc., Ry., Carpenter's & Weiss's Case (1852), 5 De G. & Sm. 402; Shrewsbury & Birmingham Ry. v. L. & N. W. Ry. (1853), 4 De G. M. & G. 115; Hare v. N. W. Ry. (1860), 3 L. T. 289.

61. ———.]—FERGUSON v. KINNOULL (EARL), No. 1, ante.

62. ———.]—Where two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained

PART II. SECT. 8, SUB-SECT. 1.

53 i. General rule—Liability of each.]—McDERMOTT v. HUDSON (1920), 16 Tas. L. R. 21.—AUS.

53 ii. ———.]—When two cos. have supplied each a tug to tow a ship, & in the course of the towage, an accident has happened due to the negligence of both tugs, both cos. may be joined as defts.—SEWELL v. BRITISH COLUMBIA TOWING & TRANSPORTATION Co. (1883), 9 S. C. R. 527.—CAN.

53 iii. ———.]—In actions of tort all parties concerned are treated as principals.—SKUBINIUK v. HARTMANN (1914), 28 W. L. R. 518; 6 W. W. R. 1133; 20 D. L. R. 323; *affd.* 29 W. L. R. 765; 7 W. W. R. 392; 24 Man. L. R. 836.—CAN.

53 iv. ———.]—In joint trespasses each deft. is liable for the damage occasioned to pltf. by the joint act, & the ct. will not interfere because as regards one the verdict be excessive.—GRANTHAM v.

SEVERS (1866), 25 U. C. R. 469.—CAN.

53 v. ———.]—TORONTO CITY CORPN. v. LAMBERT & INTERURBAN ELECTRIC Co. (1916), 54 S. C. R. 200; 33 D. L. R. 476.—CAN.

53 vi. ———.]—Where there is a joint tort, the proper action is on the tort against the joint tortfeasors.—WESTON v. PEARY MOHAN DASS (1912), 1 L. R. 40 Calc. 898.—IND.

53 vii. ———.]—In a suit for compensation for damage done to property each & every one of the persons was equally responsible to make compensation for the loss sustained, when he happened to be a part of the common assembly & executed a common purpose.—GANESH SINGH v. RAM RAJA (1869), 3 B. L. R. P. C. 44; 12 W. R. P. C. 38.—IND.

53 viii. ———.]—COSTELLO v. O'DONNELL (1882), 1 N. Z. L. R. C. A. 105.—N.Z.

53 ix. ———.]—If a concert by

two or more persons be proved to have been entered into to assault another, & that person is assaulted, it is not necessary to show which of them inflicted the blow, all being equally liable in reparation.—BANNERMAN v. FENWICKS (1817), 1 Murr. 253.—SCOT.

53 x. ———.]—Where, owing to the wrongful act or negligence of one or more of several joint trespassers, damage was caused to pltf. through fire, & it was impossible to determine which of them actually caused the damage.—*Held:* they were all liable for such damage.—VAN DER WESTHUIZEN v. SMITH, [1905] T. S. 108.—S. AF.

53 xi. ———.]—Joint tortfeasors are liable *in solidum* for the consequences of their common tort.—NAUDE & DU PLESSIS v. MERCIER, [1917] App. D. 32.—S. AF.

53 xii. ———.]—ABRAHAMSON v. O'BRIAN & BARODA IRRIGATION BOARD, [1919] E. D. L. 127.—S. AF.

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by their common act (ROLFE, B.).—CLARK v. NEWSAM (1847), 1 Exch. 131; 5 Ry. & Can. Cas. 69; 16 L. J. Ex. 296; 9 L. T. O. S. 199; 11 J. P. 840; 154 E. R. 55.

Annotations.—Apld. Smith v. Streatfield, [1913] 3 K. B. 764. *Mentd.* R. v. West (1847), 2 Car. & Kir. 496.

63. ———.]—There is no agency between wrongdoers each of them is personally liable.—HEUGH v. ABERGAVENNY (EARL) & DELVES (1874), 23 W. R. 40.

64. ———.]—The ships to blame were in a sense joint tortfeasors, at common law, of course, an individual, being one of several joint tortfeasors, might be sued alone & compelled by execution to pay the damages compensating for the whole loss; nay, more, if all were sued & judgment obtained against all, execution might go against one & the whole of the damages obtained from him, & in no case would there be any contribution amongst tortfeasors obtainable by action at law (VAUGHAN WILLIAMS, L.J.).—THE SEACOMBE, THE DEVONSHIRE, [1912] P. 21; 81 L. J. P. 36; 106 L. T. 246; 28 T. L. R. 107; 56 Sol. Jo. 140; 12 Asp. M. L. C. 142, C. A.; *on appeal* S. C. *sub nom.* DEVONSHIRE (OWNERS) v. BARGE LESLIE (OWNERS), [1912] A. C. 634, H. L.

Annotations.—*Reid.* The Cairnbahn, [1914] P. 25; The Harlow, [1922] P. 175; The Koursk, [1924] P. 140. *Mentd.* The Umana, [1914] P. 141; The Ran, The Graygarth, [1922] P. 80.

65. ———.]—The ordinary rule of law is that each tortfeasor is liable for all the consequences of the joint tort (BANKES, J.).—SMITH v. STREATFIELD, [1913] 3 K. B. 764; 82 L. J. K. B. 1237; 109 L. T. 173; 29 T. L. R. 707.

Annotations.—*Reid.* Pratt v. British Medical Assocn., [1919] 1 K. B. 244. *Mentd.* London Assocn. for Protection of Trade v. Greenlands (1915), 85 L. J. K. B. 698.

66. ———.]—Pltf. was the occupier of a house within the Romford Urban District, & deft. B., as sanitary inspector thereof, served on pltf. a sanitary notice under Public Health Act, 1875 (c. 55), s. 94, requiring him to abate a nuisance in the house. With this notice pltf. refused to comply, alleging that it was the duty of his landlord to abate the nuisance. Deft. B., on the instructions of deft. council, then preferred a complaint before the justices under Public Health Act, 1875 (c. 55), s. 95, but the justices dismissed the summons with costs. At the trial of an action for malicious prosecution brought by pltf. against defts. the judge held on the evidence that defts. had no reasonable & probable cause for preferring the complaint, whilst the jury found that they had acted maliciously in so doing, that pltf.'s reputation was thereby injured, & they awarded him £250 damages as against deft. council. On the case coming on for further consideration:—*Held*: co-defts. were joint tortfeasors, & there must be judgment for £250 against both defts.—WIFFEN v. BAILEY & ROMFORD URBAN COUNCIL, [1914] 2 K. B. 5; 83 L. J. K. B. 791; 110 L. T. 694; 78 J. P. 187; 12 L. G. R. 409; *reversd.* on other grounds, [1915] 1 K. B. 600, C. A.

67. ———.]—All tortfeasors are jointly & severally liable for the tort charge if proved against them (LORD ATKINSON).—LONDON ASSOCN. FOR PROTECTION OF TRADE v. GREENLANDS, LTD., [1916] 2 A. C. 15; 85 L. J. K. B. 698; 114 L. T. 434; 32 T. L. R. 281; 60 Sol. Jo. 272, H. L.; *reversg.* S. C. *sub nom.* GREENLANDS, LTD. v. WILMSHURST & LONDON ASSOCN. FOR PROTECTION OF TRADE, [1913] 3 K. B. 507, C. A.

Annotations.—Apld. Wiffen v. Bailey & Romford U. D. C. (1914), 112 L. T. 274. *Consd.* Thomas v. Moore, [1918] 1 K. B. 555. Apld. Pratt v. British Medical Assocn.,

[1919] 1 K. B. 244. *Reid.* Hobson v. Leng, [1914] 3 K. B. 1245. *Mentd.* Adam v. Ward, [1917] A. C. 309; Hardlo & Lane v. Chiltern, [1928] 1 K. B. 663.

68. ———.]—PRATT v. BRITISH MEDICAL ASSOCN., No. 44, *ante*.

69. ———.]—Deft. let to pltf. a lock-up shop on the ground floor of a house adjoining that in which he himself resided. It was arranged that deft. might enter the shop after pltf. had left it for the day to see that it was secure. One night a lodger informed deft. that he thought he smelt gas coming from the shop, & deft. thereupon entered the shop followed by the lodger. In the shop a gas pipe passed down a wall & terminated in a burner. Deft., who was old, examined the lower part of the pipe with a naked light, & the lodger, who was much younger, then got upon the counter & examined the upper part of the pipe with a naked light, when an explosion occurred which did damage to pltf.'s goods. Deft. admitted that he desired to examine the upper part of the pipe, & that he welcomed the lodger's help:—*Held*: deft. was liable to pltf. for the damage done to her property by the negligent act of the lodger on the ground that the act was done in pursuance of a concerted enterprise of deft. & the lodger & was their joint tort.—BROOKE v. BOOL, [1928] 2 K. B. 578; 97 L. J. K. B. 511; 139 L. T. 376; 44 T. L. R. 531; 72 Sol. Jo. 354, D. C.

70. ———.]—Notwithstanding death of some.]—WIRRAL v. BRAND (1665), 1 Sid. 259; 82 E. R. 1092.

71. Inconsistent with principles of derogation from grant or volenti non fit injuria.—These principles either derogation from grant or *volenti non fit injuria*, are . . . in no way the same as the principle of joint tortfeasors (LORD SHAW OF DUNFERMLINE).—A.-G. v. CORY BROTHERS & CO., KENNARD v. CORY BROTHERS & CO., [1921] 1 A. C. 521; 90 L. J. Ch. 221; 125 L. T. 98; 85 J. P. 129; 37 T. L. R. 343; 19 L. G. R. 145, H. L. *Annotation*.—*Mentd.* Hoare v. McAlpine, [1923] 1 Ch. 167.

72. Independent wrongful acts resulting in one damnum—Persons committing acts not joint tortfeasors.]—Persons are not joint tortfeasors merely because their independent wrongful acts have resulted in one *damnum*.—THE KOURSK, [1924] P. 140; 93 L. J. P. 72; 131 L. T. 700; 40 T. L. R. 399; 68 Sol. Jo. 842; 16 Asp. M. L. C. 374, C. A.

Annotations.—Apld. Brooke v. Bool, [1928] 2 K. B. 578. *Reid.* Debenham v. Perkins (1925), 133 L. T. 252.

SUB-SECT. 2.—WHEN JOINDER OF ACTIONS ALLOWED.

See PRACTICE.

SUB-SECT. 3.—CONSPIRACY.

See Part II., Sect. 9, *post*.

SUB-SECT. 4.—JUDGMENT AGAINST JOINT TORTFEASORS.

73. Reversal of judgment against some—Reversal against all.—AYLET v. OATES (1648), Sty. 121, 125; 82 E. R. 578, 582; *sub nom.* OATES v. AYLETT, Ayleyn, 74.

Annotation.—*Reid.* Cutting v. Williams (1703), 1 Salk. 21.

74. Judgment recoverable against some.—BROWN v. NELSON (1651), Sty. 317; 82 E. R. 741.

75. ———.]—BASTARD v. HANCOCK (1695), Carth. 361; 90 E. R. 810.

Annotation.—*Foll.* Hardyman v. Whitaker (1748), 2 East, 573, n.

76. —.—.]—**HARDYMAN v. WHITAKER** (1748), 2 East, 573, n.; 102 E. R. 489.

Annotations:—**Distd.** R. v. Clark (1777), 2 Cowp. 610. **Apld.** Barnard v. Gostling (1802), 2 East, 569. **Refd.** R. v. Bleasdale (1792), 4 Term Rep. 809; Del Campo & Martinez v. R. (1837), 2 Moo. P. C. C. 15.

77. —.—.]—In an action in tort against six, pltf. may recover a verdict against two.—**COOPER v. SOUTH** (1813), 4 Taunt. 802; 128 E. R. 547.

78. —.— **Case in nature of conspiracy.**]—**PRICE v. CROFTS** (1657), T. Raym. 180; 83 E. R. 95.

79. —.— **Conspiracy distinguished from other actions on tort.**]—There is a difference between an action of conspiracy against two persons & an action upon the case founded on a wrong done by two persons; in the first, if one be found not guilty the judgment must be arrested, but not so if one be found not guilty in the latter case.—**SUBLEY v. MORR** (1747), 1 Wils. 210; 95 E. R. 578.

80. **One joint tortfeasor suffering judgment by default—Right of other joint tortfeasor to move for judgment—In default of proceeding to trial.**]—(1) Where one deft. in an action of tort has taken issue, & the other has suffered judgment by default, & a jury is summoned to try the issue & assess the damages; the party who has suffered judgment may give evidence for pltf., if he has no other interest in the result than can be inferred from his position on the record.

(2) One of two defts. in an action of tort may move for judgment as in case of a nonsuit for not proceeding to trial, though the other has suffered judgment by default, & the *venire*, as to him was only to assess damages, & it need not appear that he has notice of the application.—**HADRICK v. HESLOP** (1848), 12 Q. B. 267; 116 E. R. 869; *sub nom.* **HADRICK v. HESLOP & RAINE**, 17 L. J. Q. B. 313; 11 L. T. O. S. 414; *sub nom.* **WREN v. HESLOP & RAINE**, **HADRICK v. HESLOP & RAINE**, 12 Jur. 600.

Annotations:—*As to* (1) **Folld.** Chapman v. Heslop (1853), 2 C. L. R. 139. *Generally*, **Mentd.** Gilding v. Eyre (1861), 10 C. B. N. S. 592; Shrosbery v. Osmaston (1877), 37 L. T. 792.

81. **All defendants found liable—Joint judgment.**]—In an action to recover damages for collision brought against a tug & a vessel in tow, each of these vessels was found to blame. On motion to amend the judgment by the insertion of words to the effect that each of the wrong-doing vessels was severally liable for one-half only of the entire damages:—**Held**: such amendment ought not to be made.—**THE AVON & THOMAS JOLIFFE**, [1891] P. 7; 39 W. R. 176; *sub nom.* **THE THOMAS JOLIFFE**, 63 L. T. 712; 6 Asp. M. L. C. 605.

Annotations:—**Apld.** The Englishman & The Australia, [1894] P. 239. **Consd.** S.S. Devonshire v. Barge Leslie, [1912] A. C. 634. **Refd.** The Frankland, [1901] P. 161; The Kursk, [1924] P. 140.

82. —.—.]—**SARGENT v. LONDON GENERAL OMNIBUS CO.** (1912), *Times*, Mar. 20.

83. —.— **Notwithstanding severance of defences.**]—Where an action has been brought against several defts. for an alleged joint tort for which all are found liable, then, notwithstanding that they have severed in their defence, only one joint verdict can be found & one joint judgment can be entered against them all.—**GREENLANDS, LTD. v. WILMSHURST & LONDON ASSOCN. FOR PROTECTION OF TRADE**, [1913] 3 K. B. 507; 83 L. J. K. B. 1; 109 L. T. 487; 29 T. L. R. 685; 57 Sol. Jo. 740; C. A.; *on appeal*, *sub nom.* **LONDON ASSOCN.**

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Annotations:—**Refd.** **Hobson v. Leng**, [1914] 3 K. B. 1245; **Wiffen v. Bailey & Romford U. D. C.** (1914), 112 L. T. 274; **Thomas v. Moore**, [1918] 1 K. B. 555; **Pratt v. British Medical Asscn.**, [1919] 1 K. B. 244. **Mentd.** **Adam v. Ward**, [1917] A. C. 309; **Hardie & Lane v. Chiltern, Same v. Same**, [1928] 1 K. B. 663.

SUB-SECT. 5.—EFFECT OF JUDGMENT OR SATISFACTION AGAINST SOME.

84. **Satisfaction against some—Compromise of action.**]—*Seemle*: if pltf. in an action, commenced against several tortfeasors, accept of a sum of money from one of them & drop that action he cannot sue the others.—**DUFRESNE v. HUTCHINSON** (1810), 3 Taunt. 117; 128 E. R. 48.

85. —.—.]—Pltfs., guardians of the poor, appointed deft., who was the manager of a bank, to be their treasurer. He received no remuneration from them nor profit from the sums deposited in his hands, those sums being dealt with by the bank as other funds deposited by customers. B., the clerk to the guardians, allowed L., a clerk in his employ, to draw up orders on the treasurer for payment of money. These orders were paid across the bank counter, as cheques usually are. L. drew up orders in such a manner as to enable himself to increase the amount after they had been duly signed by the guardians & countersigned by deft., & he did increase them accordingly by various sums, in most instances by £10, the syllable "teen" being added after the written words four, six, eight or nine, & a 1 being inserted before the figures 4, 6, 7, 8 or 9, in spaces left by L. for the purpose. The orders thus fraudulently increased were presented at the bank & paid in the ordinary way, & the payment of the excess was due solely to the fact that deft.'s clerks were misled by want of proper caution on the part of the guardians & their clerk in signing the orders. In some cases L. forged the indorsement of payees; in others he both increased the amounts & forged the indorsements. The guardians sued their clerk for negligence in his duty, but settled the action on his consenting to a judge's order to stay proceedings on payment of a certain sum. They then brought a similar action against deft.:—**Held**: the clerk & the treasurer were not joint tortfeasors so as to make the compromise of the action against the one a bar to the action against the other, but, nevertheless, pltfs. were disentitled, by the negligence of themselves & their clerk, to recover against deft.—**HALIFAX UNION v. WHEELWRIGHT** (1875), L. R. 10 Exch. 183; 44 L. J. Ex. 121; 32 L. T. 802; 39 J. P. 823; 23 W. R. 704.

Annotations:—**Mentd.** **Northern Counties of England Fire Insc. v. Whipp** (1884), 26 Ch. D. 482; **Cosford Union Grdns. v. Grimwade** (1892), 8 T. L. R. 775; **Colchester Union Grdns. v. Moy** (1893), 68 L. T. 564; **Scholfeld v. Londesborough**, [1896] A. C. 514; **Kepitigalla Rubber Estates v. National Bank of India**, [1909] 2 K. B. 1010; **London Joint Stock Bank v. Macmillan & Arthur**, [1918] A. C. 777.

86. —.—.]—Pltf.'s servant wrongfully sold goods of his master to deft., who knew that the servant was improperly dealing with them, & the servant paid the proceeds of the sale into his account at his bank. Pltf. brought an action against the servant & the bank, claiming as against the servant damages for conversion of the goods, & in the alternative for money had & received, & as against the servant & the bank an injunction to

PART II. SECT. 4. SUB-SECT. 4.

81. **All defendants found liable—Joint judgment.**]—**LE ROUX v. FICK** (1879), 9 Buch. 29.—S. AF.

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84. **Satisfaction against some—Compromise of action.**]—Pltf. sued several defts. jointly to recover

damages in respect of an alleged assault committed on him by defts., but entered into a compromise with one of defts.:—**Held**: the existence

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restrain them respectively until the trial of the action from drawing out or parting with the sum of £1,500 then standing to the servant's credit at the bank. Pltf. applied for an *interim* injunction as above upon an affidavit that £1,500 at the least could be specifically traced to the servant's account as being moneys paid by deft. for the goods wrongfully sold. An *interim* injunction was granted, but no further steps in the action were taken, an agreement being arrived at between pltf. & the servant that £1,125 out of the £1,500 then at the bank should be paid to pltf. in full settlement of all claims against the servant, without prejudice to pltf.'s claim against deft. This agreement was embodied in a judge's order, but no judgment was signed. Before the agreement was made pltf. had brought an action against deft. claiming damages for the conversion of the goods:—*Held*: pltf. had not, by his proceedings in the former action & by his dealings with the servant therein, elected to affirm the sale & to waive the tort, & the action against deft. was maintainable.—*RICE v. REED*, [1900] 1 Q. B. 54; 69 L. J. Q. B. 33; 81 L. T. 410, C. A.

87. ———.]—*H. v. O.* (1908), 52 Sol. Jo. 684.

88. ——— **Causes of action separate—No discharge to others.**]—Deft., a coal merchant, obtained contracts, through the intervention of H., pltf.'s gas-manager, for the delivery to pltf's. of coal at a price in excess of the current market price. The excess it was agreed between deft. & H., was to be paid to the latter, & it was in part paid, as a bribe. Pltf's., on discovering the fraud, brought an action against H. in the Ch. Div. to recover the amount of the bribes that he had received, but afterwards entered into an agreement with him that on his depositing in a bank securities for £10,000, an amount taken to be equivalent to the sums received by H. from deft. & other contractors as bribes, pltf's. would bring such actions against former contractors, at the expense of H., as he might direct. It was further agreed that when the amounts recovered in such actions amounted to £10,000 & on receipt by pltf's. of that sum together with all costs, they would give H. a full discharge, & that in the meantime the Chancery action should be stayed. If by a specified date pltf's. had not succeeded in recovering the sum of £10,000, the securities deposited were to be realised, & that sum, or any balance remaining due, was to be paid over to pltf's. After the securities had been deposited in pursuance of the agreement, & after a sum of £4,000 had been recovered by pltf's. from other contractors in respect of contracts obtained through the intervention of H., pltf's. brought an action against deft. for damages, or, in the alternative, for money had & received. The judge at the trial held that the agreement could not be set up either as a defence to the action, or in reduction of damages, & directed a verdict for pltf's. for the full amount paid by them to deft. in excess of the current market price of the coal:—*Held*: the fraud committed by H. in accepting the bribe was separate & distinct from the fraud in respect of which the action was brought against deft., & the latter was not relieved from liability by reason of the previous action brought by pltf's. against H. for the recovery of the amount of the bribes paid

to him.—*SALFORD CORPN. v. LEVER*, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39; 63 L. T. 658; 55 J. P. 244; 39 W. R. 85; 7 T. L. R. 18, C. A.

Annotations:—*Apld.* *Re Liberator Permanent Benefit Bldg. Soc.* (1894), 10 T. L. R. 537. *Distd.* *Lands Allotment Co. v. Broad* (1895), 2 Mans. 470. *Consd.* *Grant v. Gold Exploration & Development Syndicate*, [1900] 1 Q. B. 233; *Hovenden v. Millhoff* (1900), 83 L. T. 41; *Rhodes v. Macalister* (1923), 29 Com. Cas. 19. *Mentd.* *Re North Australian Territory Co., Ex p. Archer* (1891), 65 L. T. 800; *Slater v. Hoyle & Smith*, [1920] 2 K. B. 11; *Re Hall & Pim* (1927), 137 L. T. 585.

Judgment against some.]—See *ESTOPPEL*, Vol. XXI., pp. 221–223, 225, Nos. 555–568, 582–585; R. S. C., Ord. 27, r. 5.

Dismissal of some defendants from case.]—See Nos. 128, 129, 131, *post*.

SUB-SECT. 6.—EFFECT OF RELEASE TO SOME.

89. **All discharged.**]—A release to one trespasser discharges both.—*LENDALL & PINFOLD'S CASE* (1584), 1 Leon. 19; 74 E. R. 18.

90. ———.]—Release to one trespasser discharges all. If there be two disseisors of lands, & the disseisee releases all his right to one of them, it being a joint disseisin & trespass, the release shall hold his companion out.—*COCKE v. JENNOR* (1614), Hob. 66; 80 E. R. 214.

Annotations:—*Apld.* *Duck v. Mayeu*, [1892] 2 Q. B. 511; *Howe v. Oliver & Haynes* (1908), 24 T. L. R. 781. *Refd.* *Lacy v. Kinaston* (1701), 1 Ld. Raym. 688. *Mentd.* *Pennington v. Healey* (1833), 1 Cr. & M. 402; *Greenlands v. Wilmsheurst & London Assoon. Protection of Trade*, [1913] 3 K. B. 507.

91. ———.]—Pltf. who had been advised by one partner in a firm of solrs. brought an action against him to recover damages for his alleged negligence in giving her advice & this action was settled on the terms of an agreement under which she received £25 in full satisfaction & discharge of all claims & disputes between the parties. Subsequently pltf. sued the other parties in respect of the same matter:—*Held*: pltf. was precluded from maintaining the action.—*HOWE v. OLIVER & HAYNES* (1908), 24 T. L. R. 781.

92. ———.]—*BEADON v. CAPITAL SYNDICATE, LTD.* (1912), 28 T. L. R. 427; 56 Sol. Jo. 536, C. A.

93. **What amounts to release—Whether covenant not to sue—What amounts to covenant.**]—A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability.—*DUCK v. MAYEU*, [1892] 2 Q. B. 511; 62 L. J. Q. B. 69; 67 L. T. 547; 57 J. P. 23; 41 W. R. 56; 8 T. L. R. 737; 4 R. 38, C. A.

Annotation:—*Refd.* *Rice v. Reed*, [1900] 1 Q. B. 54.

94. **Waiver of claim for damages—Liability to account.**]—Where, in the case of a conversion by two joint tortfeasors, one of whom, as between themselves, has acted as principal & one as agent, the injured party elects to waive his remedy for damages against the agent & to proceed against him by way of account, the injured party is entitled to demand from such agent an account of so much of the converted property, or of its proceeds, as may still be actually remaining in the agent's hands at the time of taking the account. But he is not entitled to demand an account of so much of the converted property, or of its proceeds, as such agent has duly handed over, in

of this compromise did not preclude pltf. from recovering damages against the remaining defts.—*RAM KUMAR SINGH v. ALI HUSSEIN* (1909), 1 L. R. 31 All. 173.—*IND.*

PART II. SECT. 8, SUB-SECT. 6. *

89 i. **All discharged.**]—*REYNOLDS v.*

MCLEAN (1907), 9 W. A. L. R. 89.—*AUS.*

89 ii. ———.]—*GRAND TRUNK RY. CO. OF CANADA v. McMILLAN* (1889), 16 S. C. R. 543.—*CAN.*

a. **Agreement not to enforce judgment against one—Whether a release of others.**]—*BUSBY v. SCHOFIELD* (1889),

29 N. B. R. 407.—*CAN.*

b. ———.]—In cases of assault each tortfeasor is liable in solidum, but upon payment by one of the whole of the damage the others are released & cannot be sued.—*GREK v. JANRELONTRY*, [1918] C. P. D. 140.—*S. AF.*

the course of his agency, to his —*Re ELY*,
Ex p. TRUSTEE (1900), 48 W. L. 693; 44 Sol. Jo.
 483, C. A.

SUB-SECT. 7.—CONTRIBUTION.

95. General rule—No contribution between joint tortfeasors.]—If A. recover in tort against two defts., & levy the whole damages on one, that one cannot recover a moiety against the other for his contribution; *aliter*, in *assumpsit*.—*MERRY-WEATHER v. NIXAN* (1799), 8 Term Rep. 186; 101 T. R. 1387.

—*J. Adamson v. Jarvis* (1827), 4 Bing. 66.
I. Betts v. Gibbins (1834) 2 Ad. & El. 57. *Consd. Palmer v. Wick & Pulteneytown Steam Shipping Co.*, [1894] A. C. 318. *Apld. The Englishman & The Australia*, [1895] P. 212. *Consd. Burrows v. Rhodes*, [1899] 1 Q. B. 816; *S.S. Ton-gararo v. S.S. Drumlanrig, The Drumlanrig*, [1911] A. C. 16; *Newcombe v. Yewen & Croydon R. D. C.* (1913), 29 T. L. R. 299; *Austin Friars S.S. Co. v. Spillers & Bakers*, [1915] 3 K. B. 686. *Refd. Powell v. Layton* (1806), 2 Bos. & P. N. R. 365; *Farebrother v. Ansley* (1808), 1 Camp. 343; *Paddock v. Fradley* (1830), 1 Cr. & J. 90; *Shackell v. Rosier* (1836), 2 Bing. N. C. 634; *Rodgers v. Maw* (1846), 15 M. & W. 444; *Moxham v. Grant*, [1900] 1 Q. B. 88; *The Cairnbahn*, [1914] P. 25; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

96. ———.]—Where entire damages are recovered against several defts. guilty of a tort, a ct. of justice will not interfere to enforce contribution among the wrongdoers (*GRANT, M.R.*).—*LINGARD v. BROMLEY* (1812), 1 Ves. & B. 114; 35 E. R. 45.

Annotations:—Consd. Chillingworth v. Chambers, [1896] 1 Ch. 685. *Refd. Seddon v. Connell* (1840), 10 Sim. 58; *Power v. Hoey* (1871), 19 W. R. 916; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Moxham v. Grant*, [1900] 1 Q. B. 88. *Mentd. Belemore v. Watson* (1885), 1 T. L. R. 241.

97. ———.]—*A.-G. v. WILSON*, No. 60, *ante*.

98. ———.]—*THE SEACOMBE, THE DEVON-SHIRE*, No. 64, *ante*.

99. Limits of rule—Act must be obviously illegal.]—(1) The rule that a tortfeasor cannot recover upon a promise to indemnify made by the person at whose request the tortious act is committed, is confined to cases in which the act is of an obviously illegal character. It does not extend to a case in which there is any *bond fide* doubt whatever whether in point of law the act was authorised.

(2) The rule as to contribution between joint tortfeasors must be similarly confined.—*BETTS v. GIBBINS* (1834), 2 Ad. & El. 57; 4 Nev. & M. K. B. 64; 4 L. J. K. B. 1; 111 E. R. 22.

Annotations:—As to (1) Distd. Shackell v. Rosier (1836), 2 Hodg. 17. *Apld. Topliss v. Crane* (1839), 5 Bing. N. C. 636; *Dugdale v. Lovering* (1875), L. R. 10 C. P. 106.

PART II. SECT. 8, SUB-SECT. 7.

95 i. General rule—No contribution between joint tortfeasors.]—*Re HENRIKSON & KNUTSON & R.* (1909), 12 W. A. L. R. 19.—*AUS.*

95 ii. ———.]—One tortfeasor cannot recover contribution against another.—*SUPPACHARI v. CHAKKARA PATTAN* (1863), 1 Mad. 411.—*IND.*

95 iii. ———.]—Where one of several joint wrongdoers liquidates the whole amount of the damages obtained in satisfaction of the wrong committed by them all, he is not entitled to contribution from the rest.—*HARNATH v. HAREE SINGH* (1872), 4 N. W. 116.—*IND.*

95 iv. ———.]—*GOBIND CHUNDER N. DY v. SRIGOBIND CHOWDHRY* 96), I. L. R. 24 Calc. 330; 1 W. N. 179.—*IND.*

95 v. ———.]—There is no contribution between joint tortfeasors.—*EAST LONDON MUNICIPALITY v. ELLIS & EAST LONDON HARBOUR BOARD*, [1907] E. D. C. 308.—*S. AF.*

99 i. Limits of rule—Act must be

obviously illegal.]—*WALLACE v. GILCHRIST* (1874), 24 C. P. 40.—*CAN.*

99 ii. ———.]—The principle that no rights of indemnity & contribution exist as between wrongdoers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds, the ct. will not entertain a suit for the relief of the malfeasors.—*POWER v. HOEY* (1871), 19 W. R. 916.—*IR.*

102 i. ———.]—*Knowledge of tortfeasor.]*—The rule that wrongdoers cannot have redress or contribution against each other being confined to cases where the person seeking redress must be presumed to have known that he was doing an illegal act.—*WIER v. BLOIS* (1901), 40 N. S. R. 266.—*CAN.*

102 ii. ———.]—The rule against contribution between wrongdoers has not been qualified to the extent of entitling one who is himself a wilful or negligent wrongdoer to indemnity from another involved with him in causing the injury or wrong in respect of which judgment has gone against

Refd. The Englishman & The Australia, [1895] P. 212; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Sheffield Corpn. v. Barclay*, [1905] A. C. 392; *Cory v. Lambton & Hetton Collieries* (1916), 86 L. J. K. B. 401. *As to (2) Refd. Moxham v. Grant*, [1900] 1 Q. B. 88. *Generally, Refd. Leslie v. Reliable Advertising & Addressing Agency*, [1915] 1 K. B. 652. *Mentd. Tanner v. Scovell* (1845), 14 M. & W. 28; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520.

100. ———.]—*Non-performance of civil obligation.]*—*LINGARD v. BROMLEY*, No. 96, *ante*.

101. ———.]—*PALMER v. WICK & PULTENEY-TOWN STEAM SHIPPING CO.*, No. 105, *post*.

102. ———.]—*Knowledge of tortfeasor.]*—If a party recover damages in case against one of two joint coach proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened.—*WOOLEY v. BATTE* (1826), 2 C. & P. 417; 172 E. R. 188, N. P.

Annotation:—Mentd. Shackell v. Rosier (1836), 2 Bing. N. C. 634.

103. ———.]—(1) Every man, who employs another to do an act which the employer appears to have a right to authorise him to do undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have (*BEST, C.J.*).

(2) The rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act (*BEST, C.J.*).—*ADAMSON v. JARVIS* (1827), 4 Bing. 66; 12 Moore, C. P. 241; 5 L. J. O. S. C. P. 68; 130 E. R. 693.

Annotations:—As to (1) Refd. Collins v. Evans (1844), 5 Q. B. 820; *Morley v. Attenborough* (1849), 18 L. J. Ex. 148; *Dugdale v. Lovering* (1875), L. R. 10 C. P. 196; *Birmingham & District Land Co. v. L. & C. W. Ry.* (1886), 56 L. J. Ch. 956; *Halbronn v. International Horse Agency & Exchange*, [1903] 1 K. B. 270. *As to (2) Apld. London Asscn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15. *Refd. Weld-Blundell v. Stephens*, [1920] A. C. 956. *Generally, Consd. The Englishman & The Australia*, [1895] P. 212. *Refd. Betts v. Gibbins* (1834), 2 Ad. & El. 57; *Palmer v. Wick & Pulteneytown Steam Shipping Co.*, [1894] A. C. 318; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Leslie v. Reliable Advertising & Addressing Agency*, [1915] 1 K. B. 652. *Mentd. Ormrod v. Huth* (1845), 5 L. T. O. S. 268; *Elliot v. Von Glehn* (1849), 13 Q. B. 632; *Robson v. Devon* (1857), 5 W. R. 724; *Barker v. Furlong*, [1891] 2 Ch. 172.

104. ———.]—The rule that there is no contribution among joint tortfeasors, does not apply to a case where the party seeking contribution was a tortfeasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act.

them.—*SUTTON v. DUNDAS TOWN* (1908), 17 O. L. R. 556; 13 O. W. R. 126.—*CAN.*

102 iii. ———.]—The question as to whether as between persons against whom a joint decree has been passed there is any right of contribution at all, depends upon the question whether defts. in the former suit were wrongdoers in the sense that they knew, or ought to have known, that they were doing an illegal or wrongful act. In that case no suit for contribution will lie.—*SUPUT SINGH v. IMRIT TEWARI* (1880), I. L. R. 5 Calc. 720; 6 C. L. R. 62.—*IND.*

102 iv. ———.]—*KISHNA RAM v. RAKMINI SEWAK SINGH* (1887), I. L. R. 9 All. 221.—*IND.*

102 v. ———.]—The doctrine that no suit for contribution lies between joint tortfeasors does not apply to its full extent in India. If it does apply, it applies only where it must be presumed that the party in default knew that he was committing an unlawful act, or the act was one of an obviously illegal character.—

Sect. 8.—Joint tortfeasors: Sub-sects. 7 & 8.]

—PEARSON v. SKELTON (1836), 1 M. & W. 504; Tyr. & Gr. 848; 150 E. R. 533.

*Annotations:—*Consd. *The Englishman & The Australia*, [1895] P. 212. *Refd.* *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520.

105. ———.] —Applt. a stevedore, was engaged in discharging pig iron from resps.' ship when one of his workmen was killed by the fall of a block, part of the ship's tackle. The family of deceased brought actions, which were conjoined, against resp. & applt., alleging against the former the supplying of weak tackle, & against the latter reckless negligence in the use of the same. The jury found both defenders liable, & assessed the total damages at £600. The ct. applied the verdict by a decree against applt. & resps. jointly & severally for the full amount of the damages & costs for both demands, & took an assignation to the decree. Applt. having refused to pay his moiety on the ground that he & resps. being jointly wrongdoers they had no claim of relief:—*Held*: applt. was liable the foundation of resps.' claim resting on a decree which created a civil debt.

If the view thus expressed by the Ct. of Common Pleas [dictum of BEST, C.J., in *Adamson v. Jervis*, No. 103, *ante*] be correct, & I see no reason to dissent from it, the doctrine that one tortfeasor cannot recover from another is inapplicable to a case like that under consideration (LORD HERSCHELL, C.).—PALMER v. WICK & PUTNEYTOWN STEAM SHIPPING CO., [1894] 2 A. C. 318; 71 L. T. 163; 10 T. L. R. 511; 6 R. 245, H. L.

*Annotations:—*Consd. *The Englishman & The Australia*, [1895] P. 212. *Appld.* *London Assn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15. *Refd.* *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *S.S. Tongariro v. S.S. Drumlanrig*, [1911] A. C. 16; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

106. ———.]—BURROWS v. RHODES, No. 112, *post*.

107. ———. Tortfeasors also contributories of company.]—Under Cos. Act, 1862 (c. 89), s. 109, the ct. has jurisdiction to adjust the rights *inter se* of contributories; it cannot enforce equities which persons who, as tortfeasors, being also contributories, have been ordered to pay money under sect. 105, may have against other persons, who happen also to be contributories, to compel them to make good the money so ordered to be paid.—*Re ALEXANDRA PALACE CO.* (1883), 23 Ch. D. 297; 48 L. T. 424; *sub nom.* *Re ALEXANDRA PALACE CO.*, *Ex p.* GOODSON, 52 L. J. Ch. 428; 31 W. R. 808.

108. ———. General average.]—Liability for damage to property, where the damage is directly consequential on a general average act, may be the subject of a general average contribution, even assuming that the owners of ship and cargo were joint tortfeasors in relation to the damage.

The principle of common law laid down in *Merryweather v. Nixan*, No. 95, *ante*, that there cannot be any contribution between joint tortfeasors is one which ought not to be extended &

does not apply in the case of contribution in general average.

A ship & her cargo being in imminent danger from perils of the sea, the master & a pilot who was on board having to choose between running her aground & entering S. Dock, with the probability of her injuring the dock, chose the latter alternative. In the attempt to enter the ship collided with one of the piers of the dock, sustained injury to the amount of £1,600, & inflicted injury to the amount of £5,000. The ct. found as a fact that to put into S. Dock with the knowledge that in doing so the ship would strike the pier was a reasonable & prudent thing to do in the interests of ship & cargo:—*Held*: the taking the ship into S. Dock was a general average act, & the owners of the ship entitled to recover from the owners of the cargo contributions in general average both in respect of the injury to the ship & the injury to the pier, the loss being in each case the direct consequence of a general average act.—AUSTIN FRIARS S.S. CO., LTD. v. SPILLERS & BAKERS, LTD., [1915] 3 K. B. 586; 84 L. J. K. B. 1958; 113 L. T. 805; 31 T. L. R. 535; 13 Asp. M. L. C. 162; 20 Com. Cas. 342, C. A.

Contribution between co-directors.] — See COMPANIES, Vol. IX., p. 129, Nos. 680–682.

Collision at sea.]—See SHIPPING, Vol. XLI., pp. 798, 799, Nos. 6589–6597.

SUB-SECT. 8.—INDEMNITY.

109. Whether tortfeasor entitled to indemnity—Act obviously illegal.]—FLETCHER v. HARCOT (1622), Hut. 55; 123 E. R. 1097; *sub nom.* BATTERSEY'S CASE, Win. 48.

*Annotations:—*Consd. *Betts v. Gibbins* (1834), 2 Ad. & El. 57. *Refd.* *Shackell v. Rosier* (1836), 2 Bing. N. C. 631; *Burrows v. Rhodes*, [1899] 1 Q. B. 816.

110. ———.]—BETTS v. GIBBINS, No. 99, *ante*.

111. ———.]—I know of no case in which a person who has committed an act, declared by the law to ct. criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime (LORD LYNTHURST, C.B.).—COLBURN v. PATMORE (1834), 1 Cr. M. & R. 73; 4 Tyr. 677; 3 L. J. Ex. 317; 149 E. R. 999.

*Annotations:—*Consd. *Shackell v. Rosier* (1836), 2 Bing. N. C. 634; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Leslie v. Reliable Advertising & Addressing Agency*, [1915] 1 K. B. 652. *Refd.* *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Mentd.* *Foret v. Hill* (1854), 2 W. R. 493; *R. v. Holbrook* (1878), 4 Q. B. D. 42.

112. ———.]—(1) Where a person is induced by fraudulent misrepresentation of another to do an act which, in consequence of such misrepresentation, he believes to be neither illegal nor immoral, but which is in fact a criminal offence, he has a right of action against the person so inducing him for damages sustained by him in consequence of his having done such act.

(2) It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it

SHEO RATAN SINGH v. KAVAN SINGH (1924), 1 L. R. 46 All. 860.—IND.

c. Judgment against one of two wrongdoers—Action of one against other—Vesting of property converted in wrongdoer on payment of value.]—A. converted to his own use certain trees growing on a public road under the control of a local authority, & sold the timber to B. The local authority, in an action against A. recovered judgment for the value of this timber. A. brought an action against B.,

claiming the price of the timber sold:—*Held*: A. was entitled to recover.—PURCELL v. THOMAS, [1904] St. R. Qd. 189.—AUS.

d. Breach of covenant to open ferry.]—BROJENDRO KUMAR ROY (CHOWDHRY v. RASH BEHARY ROY CHOWDHRY (1886), 1 L. R. 13 Cal. 300.—IND.

e. Adjustment of loss resulting from illegal agreement.]—LAKSHMANA AYYAN v. RANGARAMI AYYAN (1893),

1 L. R. 17 Mad. 78.—IND.

f. Claim based on terms of compromise.]—NIHAL SINGH v. BULAND SHAHR COLLECTOR (1916), 1 L. R. 38 All. 237.—IND.

PART II. SECT. 8, SUB-SECT. 8.

g. Whether tortfeasor entitled to indemnity.]—An implied contract of indemnity arises in favour of a person, who, without fault on his part, is exposed to liability & compelled to pay damages on account of the

knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void (KENNEDY, J.).—BURROWS v. RHODES, [1899] 1 Q. B. 816; 68 L. J. Q. B. 545; 80 L. T. 591; 63 J. P. 532; 48 W. R. 13; 15 T. L. R. 286; 43 Sol. Jo. 351, D. C. Annotations:—As to (1) *Consd.* Leslie v. Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652. As to (2) *Consd.* Weld-Blundell v. Stephens, [1920] A. C. 956. *Apld.* James v. British General Insee., [1927] 2 K. B. 311.

113. ———.]—Pltfs. agreed to print & publish a weekly newspaper for defts., one of the terms being that defts. should give pltfs. a letter of indemnity against claims arising out of the publication of libellous matter in the newspaper. A letter of indemnity was accordingly given to pltfs. by defts. A libel having been published in the newspaper, an action was brought in respect thereof against pltfs. & defts. Pltfs. compromised the action by payment of a sum of money & costs, but judgment was recovered against defts. Pltfs. now sued defts. on the letter of indemnity to recover the amount they had paid in compromising the action for libel:—*Held*: pltfs. could not recover, as the indemnity sued on, being an agreement by one of two joint tortfeasors to indemnify the other in respect of a wrongful act committed by both, was not enforceable in law.—SMITH (W. H.) & SON v. CLINTON & HARRIS (1908), 99 L. T. 840; 25 T. L. R. 34.

Annotation:—*Refd.* Neville v. Dominion of Canada News Co., [1915] 3 K. B. 556.

114. ———.]—If . . . the act was manifestly tortious no indemnity could be implied (AVORY, J.).—KIRBY v. CHESSUM (1913), 30 T. L. R. 15; *on appeal* (1914), 79 J. P. 81, C. A.

115. ———.]—Pltf., who had lent money to a certain co., being asked for a further advance, employed deft., a chartered accountant, to look into the affairs of the co. In a letter of instructions to deft. pltf. inserted libellous statements concerning the former manager & an auditor of the co. Dft. handed the letter to his partner, who negligently left it at the co.'s office. The manager found it, read it, & communicated its contents to the two persons defamed, who sued pltf. for libel & recovered damages against him, the jury in each case finding that the writer of the letter was actuated by malice. Pltf. then sued deft. for breach of an implied duty to keep secret the letter of instructions. The jury having found that it was the duty of deft. to keep the letter secret, that he had neglected this duty, & that the actions of libel & the damages recovered therein were the natural consequence of his negligence:—*Held*: pltf. could recover nominal damages & no more for the breach of this duty, any further damages being in the nature of an indemnity for the consequences of his own wilful wrong.—WELD-BLUNDELL v. STEPHENS, [1919] 1 K. B. 520; 88 L. J. K. B. 689; 120 L. T. 494; 35 T. L. R. 245; 63 Sol. Jo. 301, C. A.; *on appeal*, [1920] A. C. 956, H. L.

Annotations:—*Mentd.* Proops v. Chaplin (1920), 37 T. L. R. 112; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560; A. & B. Taxis v. Secretary of State for Air, [1922] 2 K. B. 328; Elliott Steam Tug Co. v. Shipping Controller, [1922] 1 K. B. 127; The San Onofre, [1922] P. 243; Adelaide S.S. Co. v. R., [1923] 1 K. B. 59; Harnett v. Bond, [1924] 2 K. B. 517; Tournier v. National Provincial & Union Bank of England, [1924] 1 K. B. 461; Hambrook v. Stokes, [1925] 1 K. B. 141; Britannia Hygienic Laundry Co. v. Thornycroft (1926), 135 L. T. 83; S.S. Singleton Abbey v. S.S. Paludina, The Paludina, [1927] A. C. 16.

negligence or tortious act of another, provided the parties were not joint tortfeasors in such a sense as to prevent recovery. This right of indemnity

exists independently of the statutes, & whether or not contractual relations exist between the parties, & whether or not the negligent person owed the

116. ———.]—*Right to reject illegal portion of consideration.*—Pltfs., publishers & proprietors of a newspaper, published at the request & solicitation of deft., a statement obviously libellous, which deft. represented to be correct & true. An action being brought against them for such publication, deft. gave them an undertaking to bear them harmless as to all costs, charges, expenses, etc., to which they might be put by defending such action. In an action for not performing such undertaking, held, that it was void, as founded upon an illegal consideration; & that the action could not be maintained.

The declaration having alleged, that the publication took place at the request & solicitation of defts., & that an action was brought & then pending for such act, stated that, in consideration of the premises, deft. undertook to bear pltfs. harmless, etc.:—*Held*: in such case, pltfs. could not reject the one consideration, viz. the publication of the libellous matter, & rely upon the other, namely, that pltfs. should defend the action.—SHACKELL v. ROSIER (1836), 2 Bing. N. C. 634; 2 Hodg. 17; 3 Scott, 59; 5 L. J. C. P. 193; 132 E. R. 245.

Annotations:—*Refd.* Bradlaugh v. Newdigate (1883), 11 Q. B. D. 1; Breay v. Royal British Nurses' Assocn. (1897), 76 L. T. 735; Burrows v. Rhodes, [1899] 1 Q. B. 816; Weld-Blundell v. Stephens, [1920] A. C. 956. *Mentd.* Lound v. Grimwade (1888), 39 Ch. D. 605.

117. ———.]—*Act apparently legal.*—FLETCHER v. HARCOT (1622), Hut. 55; 123 E. R. 1097; *sub nom.* BATTERSEY'S CASE, Win. 48.

Annotations:—*Consd.* Betts v. Gibbins (1834), 1 Ad. & El. 57; Burrows v. Rhodes, [1899] 1 Q. B. 816. *Refd.* Shackell v. Rosier (1836), 2 Bing. N. C. 634.

118. ———.]—ADAMSON v. JARVIS, No. 103, *ante*.

119. ———.]—Dft., attorney of O., authorised pltfs., as brokers, to distrain the goods on A.'s premises, for rent due to O.; whereupon the distress was made. Some of the goods being privileged from distress, & claimed by the owners, pltfs. required an indemnity, which deft. gave on the part of O., & afterwards said he would give a further guaranty. The owners of the privileged goods having sued & recovered against pltfs.:—*Held*: deft. was liable to make good the loss they had sustained.—TOPLIS v. GRANE (1839), 5 Bing. N. C. 636; 2 Arn. 110; 7 Scott, 620; 9 L. J. C. P. 180; 132 E. R. 1215.

Annotations:—*Consd.* Ibbett v. De La Salle (1860), 6 H. & N. 233. *Apld.* Dugdale v. Lovering (1875), L. R. 10 C. P. 196. *Consd.* Sheffield Corpn. v. Barclay, [1905] A. C. 392; Cory v. Lambton & Hetton Collieries (1916), 86 L. J. K. B. 401.

120. ———.]—Pltfs. were in possession of certain trucks, which were claimed by deft., & also by the proprietors of the K. P. Colliery. A correspondence took place between pltfs. & deft., in which pltfs. asked for an indemnity if they should deliver up the trucks to deft. Dft. without giving any answer as to the indemnity, wrote requiring pltfs. to send the trucks back to him, which they thereupon did. The K. P. Colliery proprietors then brought an action against pltfs. for conversion of the trucks, & their claim proving well founded, pltfs. were obliged to pay a sum of money, in settlement of the action, which they sought to recover from deft. upon a contract of indemnity:—*Held*: there was, under the circumstances of the case, evidence of an implied promise to indemnify.—DUGDALE v. LOVERING (1875), L. R. 10 C. P. 196; 44 L. J. C. P. 197; 32 L. T. 155 23 W. R. 391.

other a special or particular duty not to be negligent.—McFEE v. JOSS, [1925] 2 D. L. R. 1059; 56 O. L. R. 578.—CAN.

Sect. 8.—Joint tortfeasors: Sub-sects. 8, 9 & 10.
Sect. 9.]

86 L. J. K. B. 401. *Reid*. Birmingham & District Land Co. v. L. & N. W. Ry. (1886), 34 Ch. D. 261; *Re Seager*, *Ex p.* Seaward (1891), 7 T. L. R. 616; *Kruger v. Moel Tryvan Ship Co.* (1907), 13 Com. Cas. 1; *Bank of England v. Cutler*, [1908] 2 K. B. 208; *Groves v. Webb & Kenward* (1916), 85 L. J. K. B. 1533.

121. ———.]—Where a person at the request of another does an act on his behalf which is apparently legal, but which occasions injury to a third party, for which the person doing the act is liable, the latter is entitled to an indemnity from the person at whose request the act was done, provided that he acted without negligence, & that the injury to the third party was the natural & necessary consequence of that particular act being done.—*CORY & SON, LTD. v. LAMBTON & HETTON COLLIERIES, LTD.* (1916), 86 L. J. K. B. 401; 115 L. T. 738; 10 B. W. C. C. 180; 13 Asp. M. L. C. 530, C. A.

122. ———.]—Although no implied indemnity arises from the simple fact that one of two tortfeasors has paid the whole of the damage for which both are liable, yet this principle does not affect cases where one man has employed another to do acts for the purpose of asserting a right either under an express indemnity or under such circumstances as to raise an implied indemnity, provided the acts are such as to be obviously unlawful (*BRUCE, J.*).—*THE ENGLISHMAN & THE AUSTRALIA*, [1895] P. 212; 64 L. J. P. 74; 72 L. T. 203; 7 Asp. M. L. C. 605; 11 R. 757.

Annotations:—*Reid*. The Frankland, [1901] P. 161; The Koursk, [1924] P. 140.

123. ———.]—Belief in legality induced by fraudulent misrepresentation of joint tortfeasor.]—*BURROWS v. RHODES*, No. 112, *ante*.

124. ———.]—Exercise of duty on request.]—The [deft.] was at liberty to employ a third person to fulfil the duty which the law cast on himself &, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon deft. (*LORD BLACKBURN*).—*HUGHES v. PERCIVAL* (1883), 8 App. Cas. 443; 52 L. J. Q. B. 719; 40 L. T. 189; 47 J. P. 772; 31 W. R. 725, H. L.; *affg.* S. C. *sub nom.* *PERCIVAL v. HUGHES* (1882), 9 Q. B. D. 441, C. A.

Annotations:—*Apld.* Newcombe v. Yewen & Croydon R. D. C. (1913), 29 T. L. R. 299. *Reid*. Barham v. Ipswich Dock Comrs. (1885), 54 L. T. 23; *Black v. Christchurch Finance Co.*, [1894] A. C. 48; *Jolliffe v. Woodhouse* (1894), 10 T. L. R. 553; *Penny v. Wimbledon U. C.* (1899), 68 L. J. Q. B. 704; *Newton v. Huggins* (1906), 50 Sol. Jo. 617; *Cox v. Coulson*, [1916] 2 K. B. 177; *Brooke v. Bool*, [1928] 2 K. B. 578. *Mentd.* Crawford v. Consett L. B. (1891), 55 J. P. Jo. 218; *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; *Blake v. Woolf*, [1898] 2 Q. B. 426; *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392; *Cribb v. Kynock*, [1907] 2 K. B. 548; *Selby v. Whitbread*, [1917] 1 K. B. 736; *Sack v. Jones*, [1925] 1 Ch. 235.

125. ———.]—I am of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another, it does not seem to me to matter which word you use, & without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal & a breach of the duty, & thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemni-

fied the person having the duty against any liability which may result from such exercise of the supposed duty. It makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it (*LORD DAVEY*).—*SHEFFIELD CORPN. v. BARCLAY*, [1905] A. C. 392; 74 L. J. K. B. 747; 93 L. T. 83; 69 J. P. 385; 54 W. R. 49; 21 T. L. R. 642; 49 Sol. Jo. 617; 3 L. G. R. 992; 10 Com. Cas. 287; 12 Mans. 248, H. L.

Annotations:—*Consd.* Bank of England v. Outler, [1908] 2 K. B. 208; *Barnfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94; *Groves v. Webb & Kenwood* (1916), 85 L. J. K. B. 153. *Reid*. *Kruger v. Moel Tryvan Ship Co.* (1907), 13 Com. Cas. 1; *Kirby v. Chessum* (1913), 30 T. L. R. 15; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623; *G. N. Ry. v. L. E. P. Transport & Depository*, [1922] 2 K. B. 742. *Mentd.* A.-G. v. Odell, [1906] 2 Ch. 47; *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439; *Re Auchmuty* (1908), 99 L. T. 462; *Morison v. London County & Westminster Bank*, [1914] 3 K. B. 356; *Brandon v. Michelham* (1919), 35 T. L. R. 617.

126. ———.]—Tort committed in exercise of contract.]—A contractor was employed by a district council to do certain work which involved an excavation by the side of a road. A person having fallen into this excavation & sustained injuries from which he died, his widow & daughter sued the contractor & district council under Fatal Accidents Act, 1846 (c. 93), claiming damages. The jury returned a verdict for plffs. The district council thereupon claimed that under the terms of the contract between them & the contractor, they were entitled to an indemnity from him:—*Held*: it was not against public policy that the district council should take an indemnity from the contractor & be allowed to enforce it against him, & therefore a declaration should be made that they were entitled to such indemnity, which should include the costs of the action.—*NEWCOMBE v. YEWEN & CROYDON RURAL DISTRICT COUNCIL* (1913), 29 T. L. R. 299.

127. ———.]—Plffs., who were wharfingers, agreed to warehouse some wheat for defts. Defts. engaged a lighterman to lighter from the ship's side the wheat to plffs.' warehouse. Plffs., while the wheat was still in the lighters, at the request of defts., issued clean warrants, by means of which defts. sold the wheat as undamaged wheat to a purchaser. The wheat was damaged while in the lighters, & plffs. having issued clean warrants, paid to the purchaser the amount of the damage done to the wheat:—*Held*: defts. had impliedly undertaken to indemnify plffs. for any damage occasioned to plffs. by the issue of the warrants.—*GROVES & SONS v. WEBB & KENWARD* (1916), 85 L. J. K. B. 1533; 114 L. T. 1082; 32 T. L. R. 424; 13 Asp. M. L. C. 386, C. A.

Annotation:—*Reid*. *Cory v. Lambton & Hetton Collieries* (1916), 86 L. J. K. B. 401.

Right to indemnity generally.]—See GUARANTEE, Vol. XXVI., pp. 222-230, Nos. 1747-1791.

SUB-SECT. 9.—ASSESSMENT OF DAMAGES.

See DAMAGES, Vol. XVII., pp. 162, 163, Nos. 619-644.

Joint damage by dogs—Belonging to different owners.]—See ANIMALS, Vol. II., p. 229, No. 197.

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h. Liability for damages not necessarily the same in amount for all.]—Since the fusion of Common Law & Equity the damages assessed against a number of joint tortfeasors need not always be

the same for all, but, if one of them is responsible for only a part of the total wrong done & the liability, though joint as to all at the time of the commencement of the action, arose at different dates, there may, under King's Bench

Act, R. S. M., 1902, c. 40, rr. 219 & 220, be a verdict against the one for that part & against the rest for the total amount of damage committed.—STEWART v. TESKEE (1910), 20 Man. L. R. 167.—CAN.

SUB-SECT. 10.—OTHER CASES.

128. No evidence against some defendants—Whether to be dismissed on close of plaintiff's case.]—In an action of tort against several, if there be evidence against some only, & none against others, it is discretionary with the judge at *nisi prius*, whether he will direct the acquittal of such defts., against whom there is no evidence, at the close of pltf.'s case, for the purpose of making them witnesses for the co-defts. But such an intermediate acquittal is not a matter which defts.' counsel can claim of right.—**DAVIS v. LIVING** (1816), Holt, N. P. 275, N. P.

129. ———.]—Where in tort there are several defts., if there be, at the close of the case for pltf., no evidence against some of defts., the judges have resolved that those defts. against whom there is no evidence shall be immediately acquitted, & that their acquittal shall not be delayed till the case of the other defts. is gone into.—**CHILD v. CHAMBERLAIN** (1834), 6 O. & P. 213; 1 Mood. & R. 318; 172 E. R. 1213, N. P.

*Annotations:—*Dbtd. **White v. Hill** (1844), 6 Q. B. 487. *Refd.* **Wakeman v. Lindsey** (1850), 19 L. J. Q. B. 166.

130. ———.]—Where several defendants to an action of trespass plead not guilty with other pleas & pltf. gives no evidence as against one of them, such deft. is not entitled as of right to claim his acquittal before the case for the defence is opened.—**WHITE v. HILL** (1844), 6 Q. B. 487; 2 Dow. & L. 537; 14 L. J. Q. B. 79; 9 Jur. 129; 115 E. R. 182.

*Annotation:—*Expld. **Neilan v. Hanny** (1849), 2 Car. & Kir. 710.

131. ———.]—Where the action was in tort, & there was a joint plea by several defts. of not guilty by statute, & there was no evidence against one, & no evidence offered on behalf of the others:—*Held*: the judge was justified in directing an acquittal of the one at the end of pltf.'s case.—**WAKEMAN v. LINDSEY** (1850), 14 Q. B. 625; 19 L. J. Q. B. 166; 14 L. T. O. S. 373; 15 Jur. 79; 117 E. R. 242.

*Annotation:—*Mentd. **Kerby v. Harding** (1851), 6 Exch. 234.

132. Evidence of joint tortfeasor—Admissible against another.]—One tortfeasor may be a witness against another (**ABBOTT, C.J.**).—**GREENWAY v. FISHER** (1824), 1 C. & P. 190; 171 E. R. 1157, N. P.

*Annotations:—*Mentd. **Lee v. Bayes** (1856), 18 C. B. 599; **Hollins v. Fowler** (1875), L. R. 7 H. L. 757; **Arnold v. Cheque Bank, Same v. City Bank** (1878), 1 C. P. D. 578; **Delaney v. Wallis** (1884), 15 Cox, C. C. 525.

133. ——— Defendant suffering judgment by default.]—**HADDRICK v. HESLOP**, No. 80, ante.

134. ———.]—In an action for a malicious prosecution, it is a question for the jury, whether deft. believed or had reasonable & probable cause for believing that the charge on account of which he had prosecuted pltf. was true; & when they have given their answer, it is a question for the judge whether deft. had reasonable

& probable cause for instituting the prosecution. Where one of two defts. in such action suffered judgment by default:—*Held*: he was competent to be a witness for the pltf. (before the passing of Evidence Act, 1851 (c. 99)).—**CHAPMAN v. HESLOP** (1853), 2 C. L. R. 139; 2 W. R. 74; *sub nom.* **HESLOP v. CHAPMAN**, 23 L. J. Q. B. 49; 18 Jur. 348, Ex. Ch.

*Annotations:—*Mentd. **Gilding v. Eyre** (1861), 10 C. B. N. S. 592; **Johnson v. Emerson** (1871), L. R. 1 Exch. 329; **Shrosbery v. Osmaston** (1877), 37 L. T. 792.

135. Proof of tort against all defendants—Right of plaintiff to waive joint tort—Right to proceed against one defendant—In respect of different tort.]—In an action of trespass against several, pltf. having proved a joint trespass committed by all defts., cannot waive that, & give evidence of another trespass committed by only one deft.—**TAIT v. HARRIS** (1833), 6 C. & P. 73; 1 Mood. & R. 282; 172 E. R. 1151.

*Annotation:—*Refd. **Hitchen v. Teale** (1837), 2 Mood. & R. 30.

136. Costs—Judgment against both defendants—Costs of separate defence.]—In an action of tort against two defts. they pleaded jointly payment into ct. only. Pltf. replied, denying the sufficiency of the payment. One of defts. then obtained leave to amend his statement of defence, & added an alternative separate defence, denying any liability to pltf. At the trial a verdict was found against both defts. for an amount beyond the sums paid into ct., & judgment was entered for pltf. for that amount, with costs to be taxed:—*Held*: deft. who delivered the separate defence was alone liable for the costs occasioned to pltf. by & in consequence of the separate pleading, & the other deft. was not liable for those costs.—**STUMM v. DIXON** (1889), 22 Q. B. D. 529; 58 L. J. Q. B. 183; 60 L. T. 560; 53 J. P. 500; 37 W. R. 457; 5 T. L. R. 277, C. A.

*Annotations:—*Consd. **Hobson v. Leng**, [1911] 3 K. B. 1245. *Refd.* **Kelly's Directories v. Gavin & Lloyds**, [1901] 1 Ch. 763.

SECT. 9.—CONSPIRACY.

137. Agreement by two or more persons—To do unlawful act—Or lawful act by unlawful means.]—A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means (**WILLIES, J.**).—**MULCAHY v. R.** (1868), L. R. 3 H. L. 306, H. L.

*Annotations:—*Apld. **Mogul S.S. Co. v. McGregor, Gow** (1889), 23 Q. B. D. 598; **Quinn v. Leatham**, [1901] A. C. 495. *Consd.* **R. v. Tibbits**, [1902] 1 K. B. 77. *Apld.* **R. v. Brailsford**, [1905] 2 K. B. 730; **Davies v. Thomas**, [1920] 2 Ch. 189. *Refd.* **R. v. Parnell** (1881), 14 Cox, C. C. 508; **Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland**, [1903] 2 K. B. 600; **Valentine v. Hyde**, [1919] 2 Ch. 129. *Mentd.* **Levinger v. R.** (1870), L. R. 3 P. C. 282; **R. v. Lynch** (1903), 51 W. R. 619; **Montreal Street Ry. v. Normandin**, [1917] A. C. 170; **R. v. Casement**, [1917] 1 K. B. 98.

137iii. ———.]—

GIBBINS v. METCALFE (1906), 15 Man. L. R. 560; 1 W. L. R. 139; 23 C. L. T. 308.—CAN.

137iv. ———.]—**VARNER v. MORTON** (N. S.) (1919), 46 D. L. R. 597.—CAN.

*Whether malice necessary.]—***DAVIS v. MINOR** (1846), 2 U. C. R. 464.—CAN.

m. ———.]—In an action of conspiracy to procure a breach of contract, malice is an essential ingredient of the cause of action.—**KHIMJI VASSONJI v. NARSI DHANJI** (1914), 1 L. R. 39 Bom. 682.—IND.

n. Joinder of parties.]—**GRIP, LTD. v. DRAKE** (1913), 24 O. W. R. 833;

PART II. SECT. 8, SUB-SECT. 10.

k. Non-performance of joint duty—Joint duty not proved—Plaintiff cannot succeed.]—*Semble*: when the tort alleged is the non-performance of a joint duty (e.g. to repair a bridge), if the joint duty be not proved, pltf. must fail in toto, & cannot recover against one of defts. on whom alone the duty is imposed.—**WOODS v. WENTWORTH MUNICIPALITY & HAMILTON CORPN.** (1856), 6 C. P. 101.—CAN.

PART II. SECT. 9.

137i. Agreement by two or more persons—To do unlawful act—Or lawful act by unlawful means.]—A combination of persons to do an illegal thing

or to effect by unlawful means something which in itself may be indifferent or even lawful, is a criminal conspiracy, & where harm results an action lies against them by the person injured.—**MARTELL v. VICTORIAN COAL MINERS' ASSOCN.** (1903), 29 V. L. R. 475.—AUS.

137ii. ———.]—An action may be brought against a number of defts. jointly for an illegal conspiracy, though they joined the conspiracy at different times, there being in substance only one cause of action, namely, the conspiracy to injure.—**COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS, LTD.** (1906), 11 O. L. R. 292; 7 O. W. R. 72.—CAN.

Sect. 9.—Conspiracy.]

138. ————.]—*MOGUL S.S. Co. v. MCGREGOR, Gow & Co., No. 6, ante.*

139. ————.]—"Unlawful conspiracy" was defined by WILLES, J. in *Mulcahy v. R.*, No. 137, *ante*, in this way: "Conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." That is to say, to be a conspiracy . . . it must have an unlawful object, that is, the act which it is intended to bring about must be in itself unlawful, or, if not in itself unlawful, then it must be brought about by unlawful means (WARRINGTON, L.J.).—*DAVIES v. THOMAS*, [1920] 2 Ch. 189; 89 L. J. Ch. 338; 123 L. T. 456; 84 J. P. 201; 36 T. L. R. 571; 64 Sol. Jo. 529, C. A.

Annotations:—Reid. Hodges v. Webb, [1920] 2 Ch. 70; *Said v. Butt*, [1920] 3 K. B. 497.

140. ————.]—For a great many years it has been the law of England that conspiracy consists in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means (LORD ALVERSTONE, C.J.).—*R. v. BRAILSFORD*, [1905] 2 K. B. 730; 75 L. J. K. B. 64; 93 L. T. 401; 69 J. P. 370; 54 W. R. 283; 21 T. L. R. 727; 49 Sol. Jo. 701; 21 Cox, C. C. 16, D. C.

Annotations:—Appld. R. v. Porter, [1910] 1 K. B. 369. *Mentd. R. v. Berg Britt, Carré & Lummies* (1927), 20 Cr. App. Rep. 38.

141. ————.]—**Whether motive or intention material.]**—A lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another (ATKIN, L.J.).—*WARE & DE FREVILLE, LTD. v. MOTOR TRADE ASSOCN.*, [1921] 3 K. B. 40; 90 L. J. K. B. 949; 125 L. T. 265; 37 T. L. R. 213; *sub nom. WAKE & DE FREVILLE, LTD. v. MOTOR TRADE ASSOCN.*, 65 Sol. Jo. 239, C. A.

Annotations:—Reid. Sorrell v. Smith, [1925] A. C. 700; *R. v. Denyer*, [1926] 2 K. B. 258; *Auto-Mart (London) v. Chilton* (1927), 43 T. L. R. 463; *Hardie & Lane v. Chilton*, [1928] 2 K. B. 306. *Mentd. Hardie & Lane v. Chilton, Same v. Same*, [1928] 1 K. B. 663.

142. ————.]—**Employing illegal means—Whether justification possible.]**—*READ v. FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND & WALES*, No. 176, *post*.

143. ————.]—**Proof of intention to damage—Without just cause or excuse.]**—In a proceeding [for conspiracy] it is necessary for pltf. to prove a design, common to the deft. & to others, to damage pltf., without just cause or excuse (LORD LOREBURN, C.).—*SWEENEY v. COOTE*, [1907] A. C. 221; 76 L. J. P. C. 49; 96 L. T. 748; 23 T. L. R. 448; 51 Sol. Jo. 444, H. L.

Annotations:—Mentd. Pratt v. British Medical Asscn., [1919] 1 K. B. 244; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Ware & De Freville v. Motor Trade Asscn.*, [1921] 3 K. B. 40.

Relevancy of intention of alleged tortfeasor.]—*See Part I., Sect. 3, ante.*

144. Necessity for damage.]—(1) Conspiracy is not actionable, unless on account of special damage.

4 O. W. N. 1000; 10 D. L. R. 803.—CAN.

o. What proof necessary.]—*RICHARDS v. COLLEGE OF DENTAL SURGEONS, BRITISH COLUMBIA, VERRINDER, SMITH, McLAREN, SPENCER & MINOGUE* (1912), 17 B. C. R. 114.—CAN.

p. What proof necessary.]—In an action for conspiracy, it is necessary for pltf. to prove a design common to deft. & to others to damage pltf.

without just cause or excuse; such a conclusion may be established by inference from proven facts, but the facts must be such that any other inference cannot fairly be drawn from them.—*HUMPHREY v. WILSON (B. C.)*, [1917] 3 W. W. R. 529.—CAN.

q. ———.]—*PATTERSON v. CANADIAN PACIFIC RY. CO.*, [1918] 1 W. W. R. 40; 38 D. L. R. 183; 12 Alta. L. R. 475.—CAN.

(2) In conspiracy, one deft. alone cannot be found guilty. *Contra* in case in the nature of conspiracy.—*SAVILE v. ROBERTS* (1698), 1 Ld. Raym. 374; 12 Mod. Rep. 208; 5 Mod. Rep. 394; 3 Salk. 16; Carth. 416; Holt, K. B. 150; 91 E. R. 1147; *sub nom. ROBERTS v. SAVILL*, 5 Mod. Rep. 405.

Annotations:—As to (1) Reid. Jones v. Gwynn (1714), 10 Mod. Rep. 214; *Ootorell v. Jones* (1851), 11 C. B. 713. *As to (2) Reid. Subley v. Mott* (1747), 1 Wils. 210; *Walters v. Green*, [1899] 2 Ch. 696. *Generally, Reid. Mogul S.S. Co. v. McGregor, Gow* (1888), 21 Q. B. D. 544. *Mentd. Anon.* (1703), 6 Mod. Rep. 25; *Smith v. Hickson* (1734), 2 Barn. K. B. 465; *Reynolds v. Kennedy* (1748), 1 Wils. 232; *Golding v. Crowle* (1751), Say. 1; *Chapman v. Pickersgill* (1762), 1 Wils. 145; *Sutton v. Johnstone* (1786), 1 Term Rep. 493; *Purton v. Honnor* (1798), 1 Bos. & P. 205; *Purcell v. Macnamara* (1808), 9 East, 361; *Sinclair v. Eldred* (1811), 4 Taunt. 7; *Byne v. Moore* (1813), 5 Taunt. 187; *The Ville de Varsovie* (1817), 2 Dods. 174; *Revis v. Smith* (1856), 20 J. P. 453; *Castrique v. Behrens* (1861), 3 E. & E. 709; *Dawkins v. Paulet* (1869), 18 W. R. 336; *Wren v. Weild* (1869), L. R. 4 Q. B. 730; *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674; *Allen v. Flood*, [1898] A. C. 1; *Wiffon v. Bailey & Romford U. C.*, [1915] 1 K. B. 600.

145. ————.]—*MOGUL S.S. Co. v. MCGREGOR, Gow & Co., No. 6, ante.*

146. ————.]—*QUINN v. LEATHEM*, No. 30, *ante*.

147. ————.]—In order to establish civil liability for a conspiracy, "agreement or combination" *per se* is not enough. It must be followed by damage (LORD ATKINSON).—*VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS*, [1913] A. C. 107; 82 L. J. K. B. 232; 107 L. T. 722, H. L.; *affg.*, [1912] 3 K. B. 547, C. A.

Annotations:—Mentd. Gaskell v. Lancashire & Cheshire Miners' Federation (1912), 28 T. L. R. 518; *National Telephone Co. v. Postmaster-General*, [1913] A. C. 546; *Re Boaler*, [1915] 1 K. B. 21; *City of London Corp'n. v. Associated Newspapers*, [1915] A. C. 674; *Sage v. Elcholz*, [1919] 2 K. B. 171; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Bowling v. Camp* (1923), 128 L. T. 342; *Henshall v. Porter*, [1923] 1 K. B. 193; *The Ituahehu* (1926), 136 L. T. 146; *Hardie & Lane v. Chilton, Same v. Same*, [1928] 1 K. B. 663.

148. ————.]—Pltfs. were eight members of a trade union called the National Union of Railwaymen. One was the president of the union, another was the general secretary, three were assistant secretaries, & three were members of the executive committee. The general secretary & the assistant secretaries received salaries from the union, & the other four received no salary, but were paid a fixed sum per day for expenses when engaged on the work of the union. Defts. were six members of a trade union called the Associated Society of Locomotive Engineers & Firemen. In June, 1915, at a meeting at which representatives of the railway cos. & pltfs. & defts. as representatives of their respective unions were present, a request was made for a war bonus of 5s. a week to railwaymen, but this request was not granted. At a meeting in Oct. 1915, a war bonus of 5s. a week was granted to the men. In Oct. 1915, defts. made speeches at meetings of railwaymen in various places reflecting on the conduct of pltfs. at the meeting in June, & stating that but for their conduct at that meeting the men would have got the bonus then. Pltfs. brought an action in respect of those statements. The statement of claim alleged that defts. conspired together to injure pltfs. by publishing defamatory matter, &

r. ———.]—A letter written by one conspirator to another, upon the subject of the conspiracy, may be read in evidence against a third person who had not joined in the conspiracy until after the letter was written.—*BLACKWOOD'S LESSEE v. GREGG* (1831), Hayes, 277.—IR.

t. Conspiracy to induce marriage.]—Action by a married woman against the father, mother, & brother of her

that in pursuance thereof they spoke & published of pltfs. & each of them in respect of their offices as officials of the union certain defamatory statements, & they claimed damages against defts. No special damage was alleged or proved. The jury found that four of defts. had conspired to slander pltfs.; that all defts. slandered pltfs.; & they assessed the damages for the separate slanders published by each of defts., but did not assess any damages on the conspiracy claim. Judgment was entered for pltfs. for the respective amounts awarded to them by the jury, & for a declaration that the four defts. had conspired to injure pltfs. by publishing oral defamatory statements of them:—*Held*: as damage was the gist of the cause of action for conspiracy, the declaration was wrongfully made.—*THOMAS v. MOORE*, [1918] 1 K. B. 555; 87 L. J. K. B. 577; 118 L. T. 298, C. A.

Annotations:—*Reid*. *Shimmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K. B. 616. *Mentd.* *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *Myroft v. Sleight* (1921), 90 L. J. K. B. 883; *Payne v. British Time Recorder Co.*, [1921] 2 K. B. 1; *The W. H. Randall*, [1928] P. 41.

149. Damage must be natural & proximate cause.—Declaration stated that pltf. was possessed of certain messuages & premises; that deft. & one S. unlawfully & maliciously conspired to procure possession of a portion of the premises, & to set up & keep private stills thereon; that, in pursuance of such conspiracy, they, by falsely pretending & representing to pltf. that S. wanted such portion of the premises for the carrying on therein of a lawful trade, induced pltf. to demise them to him; that, in further pursuance of such conspiracy, deft. & S. entered & took possession of the premises & set up concealed stills therein, & falsely & maliciously pretended & represented, & by divers false & fraudulent means & devices made it appear to be believed that it was pltf. who held so set up such stills & was the proprietor thereof; that deft. & S. worked the stills, & falsely & maliciously pretended & represented, & by divers false & fraudulent means & devices made it appear & be believed that it was pltf. who so used the stills; & that, by means & in consequence thereof, an excise officer entered, & finding pltf. upon the premises, took him before a magistrate, who convicted him of keeping illicit stills:—*Held*: the declaration disclosed no cause of action, the damage to pltf. not appearing to have been the natural & proximate consequence of deft.'s act.—*BARBER v. LESITER* (1859), 7 C. B. N. S. 175; 29 L. J. C. P. 161; 6 Jur. N. S. 654; 141 E. R. 782.

Annotations:—*Reid*. *Castrique v. Behrens* (1861), 3 E. & E. 709; *Basché v. Matthews* (1867), L. R. 2 C. P. 684; *Hyde v. Bulmer* (1868), 18 L. T. 293; *Quinn v. Leatham*, [1901] A. C. 495; *Bynoe v. Bank of England* (1902), 86 L. T. 140; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600.

150. Whether act must be actionable if done by individual.—*MOGUL S.S. Co. v. MCGREGOR, GOW & Co.*, No. 6, *ante*.

151.—Pltf., a broker on the Stock Exchange, under the belief that the major part of the shares in the co. promoted by defts. had been *bonâ fide* offered to the public for subscription, as

stated in the prospectus issued by defendants, was induced to enter into contracts, anterior to allotment, to sell a number of shares in the co. The shares, however, were afterwards so allotted that they remained under the control of defts. Pltf. was afterwards compelled to deliver the shares, & in order to do so had to buy them at a much higher price than he had paid for them, owing to defts. having cornered the market. To make good this loss he brought an action against defts., alleging that such loss was the result of conspiracy & fraudulent misrepresentation on their part. Objection raised, that the statement of claim disclosed no cause of action:—*Held*: pltf. had no legal right to recover his loss from defts.; there was no remedy on the civil side in the case of conspiracy to do an action which would not have been actionable if committed by an individual; no specific fraud had been shown whereby any legal right of pltf. had been infringed, & pltfs. losses were indirect & too remote, & no cause of action was disclosed.—*SALAMAN v. WARNER* (1891), 64 L. T. 598; 7 T. L. R. 431, D. C.; *on appeal*, [1891] 1 Q. B. 734, C. A.

Annotations:—*Reid*. *Andrews v. Mockford*, [1896] 1 Q. B. 372. *Mentd.* *Jones v. Insole* (1891), 61 L. T. 703; *Re Binstead, Ex p. Dale*, [1893] 1 Q. B. 199; *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412; *Re Reeves*, [1902] 1 Ch. 29; *Bozson v. Altrincham U. C.* (1903), 72 L. J. K. B. 271; *Isaacs v. Saltsstein*, [1916] 2 K. B. 139; *Cogstad v. Newsum*, [1921] 2 A. C. 528.

152.—*TEMPERTON v. RUSSELL*, No. 170, *post*.

153.—A combination between two or more persons to induce others not to employ a particular person nor to permit him to be employed, even if the acts are maliciously done, with an intention to injure such person, is not actionable if no civil injury results to him in consequence, for a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, & in fact done, would, had they been done without preconcert, have involved a civil injury to the person against whom they were directed.—*HUTTLEY v. SIMMONS*, [1898] 1 Q. B. 181; 67 L. J. Q. B. 213; 14 T. L. R. 150.

Annotations:—*Reid*. *Quinn v. Leatham*, [1901] A. C. 495; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Sorrell v. Smith*, [1925] A. C. 700.

154.—*QUINN v. LEATHAM*, No. 30, *ante*.

155.—*SOUTH WALES MINERS' FEDERATION v. GLAMORGAN COAL CO.*, No. 180, *post*.

156.—(1) Passing, therefore, to the case of concerted action, the first & obvious observation is that if a combination of persons do what if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage. But when there is nothing done which *per se* would be a tort, then one is at once faced by the consideration that a particular thing done, not in itself a tort, may, if done by an individual, be supportable though unpleasant, but may, if done by many in concert, become insupportable & create a real injury (LORD DUNEDIN).

(2) An act that is legal in itself will not be made illegal because the motive of the act may be bad (LORD DUNEDIN).—*SORRELL v. SMITH*, [1925]

husband for damages for false representations made to her before marriage as to the character & financial standing of her husband, & for entering into a fraudulent conspiracy to induce pltf. to enter into the marriage contract:—*Held*: the action being without precedent & contrary to public policy was not maintainable.—*BRENNEN v. BRENNEN* (1890), 19 O. R. 327.—CAN.

a. Mere knowledge & acquiescence

insufficient.—To establish a claim against a deft. for conspiracy there must be shown more than his mere knowledge of or acquiescence in the act complained of. There must be shown an intentional participation in the act with a view to the furtherance of a common design.—*SASKATCHEWAN FARM & LAND CO. v. SMITH* (Sask.), [1923] 1 W. W. R. 1179.—CAN.

b. Necessity for overt act.—A

mere conspiracy to injure a man, without an overt act resulting in the injury, does not furnish any cause of action.—*TEMPLETON v. LAURIE* (1900), L. L. R. 25 Bom. 230.—IND.

c. Definition of conspiracy.—Term conspiracy is divisible into three heads: (1) Where the end to be attained is in itself a crime; (2) where the object is lawful, but the means to be resorted to are unlawful; (3) where

TORT.

Sect. 9.—Conspiracy. Sect. 10: Sub-sects. 1 & 2.]

A. C. 700; 94 L. J. Ch. 347; 133 L. T. 370; 41 T. L. R. 529.

Annotation:—As to (1) *Reid. Hardie & Lane v. Chilton*, [1928] 2 K. B. 306.

157. Combination in pursuit of lawful interests—By lawful means.—Owners of ships, in order to secure a carrying trade exclusively for themselves & at profitable rates, formed an assocn. & agreed that the number of ships to be sent by members of the assocn. to the loading port, the division of cargoes & the freights to be demanded, should be the subject of regulation; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; & that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices. *Pltfs.*, who were shipowners excluded from the assocn., sent ships to the loading port to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid *pltfs.*, & reduced freights so low that *pltfs.* were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded *pltfs.*' ships, & circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on *pltfs.*' vessels. *Pltfs.*, having brought an action for damages against the associated owners alleging a conspiracy to injure *pltfs.*:—*Held*: since the acts of *defts.* were done with the lawful object of protecting & extending their trade & increasing their profits, & since they had not employed any unlawful means, *pltfs.* had no cause of action.—*MOGUL S.S. Co. v. MCGREGOR, GOW & Co.*, [1892] A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; 56 J. P. 101; 40 W. R. 337; 8 T. L. R. 182; 7 Asp. M. L. C. 120, H. L.; *affg.* (1889), 23 Q. B. D. 598, C. A.

Annotations:—*Appld. R. v. Whitechurch* (1890), 24 Q. B. D. 420; *Jenkinson v. Nield* (1892), 8 T. L. R. 540; *Temperton v. Russell*, [1893] 1 Q. B. 715; *Trollope v. London Building Trades Federation* (1895), 72 L. T. 342; *Allen v. Flood*, [1898] A. C. 1. *Consd. Boots v. Grundy* (1900), 82 L. T. 769. *Distd. Elliman v. Carrington* (1901), 84 L. T. 858. *Consd. Quinn v. Leatham*, [1901] A. C. 495; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40. *Appld. Reynolds v. Shipping Federation*, [1924] 1 Ch. 28; *Thompson v. British Medical Assocn. (N. S. W. Branch)*, [1924] A. C. 764; *British Oxygen Co. v. Liquid Air*, [1925] Ch. 383; *Sorrell v. Smith*, [1925] A. C. 700. *Reid. Connor v. Kent*, *Gibson v. Lawson*, *Curran v. Treleaven*, [1891] 2 Q. B. 545; *Wright v. Hennessey* (1894), 11 T. L. R. 14; *Lyons v. Wilkins*, [1896] 1 Ch. 811; *Newton v. Amalgamated Musicians' Union* (1896), 40 Sol. Jo. 718; *Ajello v. Worsley*, [1898] 1 Ch. 274; *Huttley v. Simmons*, [1898] 1 Q. B. 181; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 800; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; *Danaby & Cadeby Main Collieries v. Yorkshire Miners' Assocn.*, [1906] A. C. 384; *Conway v. Wade*, [1908] 2 K. B. 844; *Hymans v. Stuart King*, [1908] 2 K. B. 698; *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335; *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330; *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co.*, [1913] A. C. 781; *Re Bowman, Secular Soc. v. Bowman*, [1915] 2 Ch. 447; *Larkin v. Long*, [1915] A. C. 814; *Evans v. Heathcote*, [1918] 1 K. B. 418; *Montefiore v. Menday Motor Components Co.*, [1918] 2 K. B. 241; *Thomas v. Moore*, [1918] 1 K. B. 555; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *Davies v. Thomas*, [1920] 2 Ch. 189; *Rawlings v. General Trading Co.*, [1921]

the object is to do an injury to a third party, or a class, though, if the wrong was inflicted by a single individual, it would be a wrong, but not a crime.—*R. v. PARNELL* (1881), 14 Cox, C. C. 508.—IR.

d. *Separate defendants joining conspiracy at different times—Whether action rightly constituted.*—When an

action is brought against a number of *defts.* jointly for an illegal conspiracy, the fact that separate *defts.* joined the conspiracy at different times is no ground for objection that the action is wrongfully constituted in law, as joining separate causes of action against separate *defts.*, there being in substance only one cause of action,

1 K. B. 635; *Brimelow v. Casson*, [1924] 1 Ch. 302. *Mentd. Re Apollinaris Co.'s Trade Mks. "Apollinaris," "Friedrichshall" & "Hunyadi Janos"* (1890), 63 L. T. 162; *Maxim-Nordenfelt Guns & Ammunitions Co. v. Nordenfelt (No. 1)* (1892), 2 R. 298; *Re Wallace, Champion v. Wallace*, [1920] 2 Ch. 274.

—Trade interests.]—See TRADE & TRADE UNIONS.

158. Whether judgment may be given against one defendant only.—PRICE v. CROFTS (1657), T. Raym. 180; 83 E. R. 95.

159. —.]—Action against three, that they *per conspirationem inter eos habitam*, maliciously procured *pltf.* to be held to bail; it lies though only one be found guilty.—SKINNER v. GUNTON (1609), 1 Saund. 228; 2 Keb. 473; 1 Vent. 18; T. Raym. 176; 85 E. R. 249.

Annotations:—*Reid. Savill v. Roberts* (1698), 12 Mod. Rep. 208; *Robins v. Robins* (1699), 1 Salk. 15; *Parker v. Langley* (1713), Gilb. 163; *Subley v. Mott* (1747), 1 Wils. 210; *Pautsune v. Marshall* (1754), Say. 162; *Atkinson v. Raleigh* (1842), 3 Q. B. 79; *Castrique v. Behrens* (1861), 7 Jur. N. S. 1028; *Johnson v. Emerson* (1871), L. R. 6 Exch. 329; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *Walters v. Green*, [1899] 2 Ch. 696; *Quinn v. Leatham* (1901), 70 L. J. P. C. 76.

160. —.]—SAVILE v. ROBERTS, No. 144, ante.

161. —.]—SUBLEY v. MOTT, No. 79, ante.

162. Joint & several liability in damages.—The offence charged in this declaration if proved is a criminal matter, is an offence at common law; & if you are satisfied that it took place between certain individuals, or between those individuals & others who are so charged in this declaration, such of them, or all of them, or any of them, who you think have conspired to do the acts complained of . . . are liable in damages for the consequences which have followed (MELLOR, J.).—GILL v. WILLIAMSON (1869), 20 L. T. 712, N. P.

163. Joinder of parties—Co-plaintiffs.—Persons whom it is sought to compel by illegal means to act not in accordance with the views they would themselves adopt, but in accordance with the views of others, may join as co-*pltfs.* in an action against those seeking to coerce them.—WALTERS v. GREEN, [1899] 2 Ch. 696; 68 L. J. Ch. 730; 81 L. T. 151; 63 J. P. 742; 48 W. R. 23; 15 T. L. R. 532.

164. Joinder of causes of action—Action for conspiracy to slander—Action for slander.—THOMAS v. MOORE, No. 148, ante.

SECT. 10.—PROCURING TORTIOUS ACT.

SUB-SECT. 1.—IN GENERAL.

165. Grounds of liability for procuring—Tortious act procured knowingly & for own ends.—ALLEN v. FLOOD, No. 35, ante.

166. —Act of person procuring lawful—Act detrimental to third party—Use of illegal means.]—ALLEN v. FLOOD, No. 35, ante.

Interference with contractual relations.]—See Sub-sect. 2, post.

Conspiracy.]—See Sect. 9, ante.

Trade disputes.]—See TRADE & TRADE UNIONS.

SUB-SECT. 2.—INTERFERENCE WITH CONTRACTUAL RELATIONS.

167. Procuring breach of contract—Necessity for proof of binding & existing contract.—*Pltf.*

namely, the conspiracy to injure.—O'KEEFE v. WALSH, [1903] 2 I. R. 681.—IR.

e. *Conspiracy to make incumbent resign incumbency.*—KEARNEY v. LLOYD (1889), 26 L. R. Ir. 268.—IR.

f. *Right to injunction.*—DE FREYNE (LORD) v. FITZGIBBON (No. 1), [1904] 1 I. R. 400; 38 I. L. T. 140.—IR.

desired to be present at the first performance of a play at a theatre. He knew that, in consequence of his having made certain serious & unfounded charges against some members of the theatre staff, an application for a ticket in his own name would be refused. He therefore obtained a ticket through the agency of a friend who bought the ticket at the theatre, without disclosing that it was for pltf. By order of deft., the managing director of the theatre, pltf. was refused admission to the theatre on the night in question. Pltf. claimed damages from deft. for maliciously procuring the proprietors of the theatre to break a contract for the admission of pltf. to the theatre, alleged to have been made by them with pltf. by the sale of the ticket:—*Held*: the non-disclosure of the fact that the ticket was bought for pltf. prevented the sale of the ticket from constituting a contract as alleged, the identity of pltf. being in the circumstances a material element in the formation of the contract; & the action therefore failed.

Before the pltf. can succeed he must establish that there was a binding & subsisting contract between the Palace Theatre & himself (McCARDIE, J.).—*SAID v. BUTT*, [1920] 3 K. B. 497; 90 L. J. K. B. 239; 124 L. T. 413; 36 T. L. R. 762.

Annotations:—*Consd.* Dyster v. Randall, [1926] Ch. 932. *Reid.* Scammell v. Attlee (1928), 45 T. L. R. 75.

168. — *Whether actionable.*—*TAYLOR v. CAMBRIDGE GAZETTE CO., LTD. & KILNER*, No. 191, *post*.

169. — *Effect of malice.*—1st & 2nd counts of declaration, by lessee of a theatre: for maliciously procuring W., who had agreed with pltf. to perform & sing at his theatre & no where else for a certain term, to break her contract & not to perform or sing at pltf.'s theatre, & to continue away during the term which W. was engaged. 3rd. count, averring that W. had engaged with pltf. to be, & had become & was, pltf.'s dramatic artiste for a certain term, & complaining that pltf. maliciously procured her to depart out of her employment during the term. On demurrer:—*Held*: the counts were all good, & an action lay for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only in *fieri*, provided the procurement be during the subsistence of the contract, & produced damage: & to sustain such an action, it was not necessary that the employer & employed should stand in the strict relation of master & servant. *Semble*: the action would lie for the malicious procurement of the breach of any contract, though not for personal services, if by the procurement damage was intended to result & did result to pltf.—*LUMLEY v. GYE* (1853), 2 E. & B. 216; 22 L. J. Q. B. 463; 17 Jur. 827; 1 W. R. 432; 118 E. R. 749.

Annotations:—*Distd.* Cattle v. Stockton Waterworks Co. (1875), L. R. 10 Q. B. 453. *Fold.* Bowen v. Hall (1881), 6 Q. B. D. 333. *Distd.* Mogul S.S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598. *Apld.* De Francesco v. Barnum (1890), 63 L. T. 514. *Consd. & Expld.* Allen v. Flood, [1898] A. C. 1. *Apprvd.* Quinn v. Leatham, [1901] A. C. 495. I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention but on the ground that a violation of legal right committed knowingly is a cause of action, & that it is a violation of legal right to interfere with contractual

relations recognised by law if there be no sufficient justification for the interference (LORD MACNAGHTEN). *Consd.* National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 835. *Apld.* Larkin v. Long, [1915] A. C. 814. *Consd.* Pratt v. British Medical Assocn., [1919] 1 K. B. 244. *Distd.* Said v. Butt, [1920] 3 K. B. 497. *Apld.* Jasperson v. Dominion Tobacco Co., [1923] A. C. 709. *Consd.* Black v. Admiralty Comrs. (1924), 93 L. J. K. B. 841. *Reid.* Rogers v. Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Lynch v. Knight (1861), 5 L. T. 291; Evans v. Walton (1867), 36 L. J. C. P. 307; Temperton v. Russell, [1893] 1 Q. B. 715; Exchange Telegraph Co. v. Gregory (1895), 72 L. T. 120; Charnock v. Court (1899), 69 L. J. Ch. 550; Lyons v. Wilkins, [1899] 1 Ch. 255; Read v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732; Glamorgan Coal Co. v. South Wales Miners Federation, [1903] 2 K. B. 545; South Wales Miners Federation v. Glamorgan Coal Co., [1905] A. C. 239; Conway v. Wade, [1909] A. C. 506; Stott v. Gamble, [1916] 2 K. B. 504; Long v. Smithson (1918), 88 L. J. K. B. 223; Valentine v. Hyde, [1919] 2 Ch. 129; Davies v. Thomas, [1920] 2 Ch. 189; Weld-Blundell v. Stephens, [1920] A. C. 956; Wolstenholme v. Ariss, [1920] 2 Ch. 403; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40; White v. Riley, [1921] 1 Ch. 1; Sorrell v. Smith, [1925] A. C. 700; G. W. K. v. Dunlop Rubber Co. (1926), 42 T. L. R. 376; Rely-A-Bell Burglar & Fire Alarm Co. v. Eisler, [1926] Ch. 609; Scammell v. Attlee (1928), 45 T. L. R. 75. *Mentd.* Miller v. David (1874), 22 W. R. 332; Alderson v. Maddison (1881), 7 Q. B. D. 174; McColl v. Canadian Pacific Ry., [1923] A. C. 126.

170. — (1) Defts. were members of a joint committee of three trade unions connected with the building trade in Hull. A firm of builders there having refused to obey certain rules laid down by the unions with regard to building operations, the unions sought to compel them to do so, by preventing the supply of building materials to them. In pursuance of this object, they requested pltf., a master mason & builder in Hull, who supplied building materials to the firm, to cease to supply them with such materials, but pltf. refused to do so. Thereupon, with the object of injuring pltf. in his business, in order to compel him to comply with such request, defts. induced persons who, to the knowledge of defts., had entered into contracts with pltf. for the supply of materials, to break their contracts, & not to enter into further contracts with pltf., by threatening that the workmen would be withdrawn from their employ. Pltf. sustained damage in consequence of such breaches of contract, & of the refusal of such persons to enter into contracts with him:—*Held*: an action was maintainable by pltf. against defts. for maliciously procuring such breaches of contract, & also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him.

(2) The right of action for maliciously procuring a breach of contract is not confined to contracts in the nature of contracts of personal service.—*TEMPERTON v. RUSSELL*, [1893] 1 Q. B. 715; 62 L. J. Q. B. 412; 69 L. T. 78; 57 J. P. 676; 41 W. R. 565; 9 T. L. R. 393; 37 Sol. Jo. 423; 4 R. 376, C. A.

Annotations:—*As to* (1) *Consd.* Wright v. Hennessey (1894), 11 T. L. R. 14; Lyons v. Wilkins, [1896] 1 Ch. 811. *Dbtd.* Allen v. Flood, [1898] A. C. 1. *Apprvd.* Quinn v. Leatham, [1901] A. C. 495; The decision in *Temperton v. Russell* was not overruled in *Allen v. Flood*, nor is the authority of *Temperton v. Russell* in my opinion, shaken in the least by the decision in *Allen v. Flood* (LORD MACNAGHTEN). *Distd.* Reynolds v. Shipping Federation, [1924] 1 Ch. 28. *Reid.* Charnock v. Court (1899), 69 L. J. Ch. 550; Read v. Operative Stonemasons of England, Ireland & Wales Friendly Soc., [1902] 2 K. B. 732; National Phonograph

PART II. SECT. 10, SUB-SECT. 2.

168 i. *Procuring breach of contract—Whether actionable.*—A retail milk dealer held entitled to a perpetual injunction restraining a co-operative assocn. of milk producers from interfering with contracts which pltf. had entered into for the supply of milk, although at the time the action was such interference was merely

threatened, with the object of forcing pltf. to contract with the assocn. & it was acting under the belief that the step it was seeking to compel pltf. to take would be beneficial to all milk dealers & milk producers contracting with it.—*STEEVES DAIRY, LTD. v. TWIN CITY CO-OPERATIVE MILK PRODUCERS ASSOCN.*, [1926] 1 D. L. R. 130; [1926] 1 W. W. R. 25; 36 B. C. R. 286.—CAN.

169 i. — *Effect of malice.*—An action lies for inducing without sufficient justification the breaking of a promise of marriage; & whatever may be the extent of the privilege of one brother to advise another to break such a promise, it can be neutralised by proof of actual malice.—*G. v. B.*, [1926] 1 W. W. R. [1926] 1 D. L. R. 855; 22 Alta. L. R. 126.—CAN.

Sect. 10.—Procuring tortious act: Sub-sect. 2.]

Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Valentine v. Hyde, [1919] 2 Ch. 129; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40; Sorrell v. Smith, [1925] A. C. 700. *As to (2) Reftd. Allen v. Flood, [1898] A. C. 1. Generally, Mentd. Re Russell, Ex p. Temperton (1893), 10 T. L. R. 165; Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants (1901), 50 W. R. 44.*

171. —.—.—.—.—.]—QUINN v. LEATHEM, No. 30, ante.

172. —.—.—.—.—.]—SOUTH WALES MINERS' FEDERATION v. GLAMORGAN COAL CO., No. 180, post.

173. —.—.—.—.—.]—Breach resulting in damage.]—LUMLEY v. GYE, No. 169, ante.

174. —.—.—.—.—.]—An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally cause, & did in fact cause, an injury to such employer, although the relation of master & servant may not strictly exist between the employer & employed.—BOWEN v. HALL (1881), 6 Q. B. D. 333; 50 L. J. Q. B. 305; 44 L. T. 75; 45 J. P. 373; 29 W. R. 367, C. A.

Annotations:—Consd. Woolley v. Broad, [1892] 1 Q. B. 806. Apld. Temperton v. Russell, [1893] 1 Q. B. 715. Consd. Exchange Telegraph Co. v. Gregory (1895), 73 L. T. 120; Allen v. Flood, [1898] A. C. 1; Quinn v. Leatham, [1901] A. C. 495; National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40; Sorrell v. Smith, [1925] A. C. 700; Rely-A-Bell Burglar & Fire Alarm Co. v. Eisler, [1926] Ch. 609. Reftd. Mineral Water Bottle Exchange & Trade Protection Soc. v. Booth (1887), 36 W. R. 274; Mogul S.S. Co. v. McGregor, Gow (1889), 23 Q. B. D. 598; De Francesco v. Barnum (1890), 63 L. T. 514; Wright v. Hennessey (1894), 11 T. L. R. 14; Lyons v. Wilkins (1896), 74 L. T. 358; Charnock v. Court (1899), 68 L. J. Ch. 550; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239; Long v. Smithson (1918), 88 L. J. K. B. 223; Weld-Blundell v. Stephens, [1920] A. C. 956.

175. —.—.—.—.—.]—QUINN v. LEATHEM, No. 30, ante.

—Pltf., who was a workman, entered into a contract by which he was apprenticed to his employers to learn certain work. A friendly society of workmen engaged in similar work protested to the employers against the engagement of pltf. as an apprentice, on the ground that it was a breach of one of the rules of the society which the employers had agreed to & signed, & they gave notice that, if the engagement was continued, they would call out the workmen who were working for the employers, & who were all members of the society. In consequence of this threat the employers refused to continue to teach pltf. under the terms of the deed of apprenticeship. In an action by him against the society & certain of the officers:—*Held*: pltf. had a good cause of action, to which the previous agreement between the society & the employers was no answer.

Persuasion by an individual for the purpose of depriving another person of the benefit of a contract if it be effectual in bringing about a breach of the contract to the damage of that person, gives a cause of action (COLLINS, M.R.).—READ v. FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND & WALES, [1902] 2 K. B. 732; 71 L. J. K. B. 994; 87 L. T. 493; 51 W. R. 115; 19 T. L. R. 20; 47 Sol. Jo. 20, C. A.

Annotations:—Consd. Smithies v. National Assocn. of Operative Plasterers, [1909] 1 K. B. 310. Reftd. Bulcock v. St. Anne's Master Builder's Federation (1902), 19 T. L. R. 27; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239; Larkin v. Long, [1915] A. C. 814; Pratt v. British Medical Assocn., [1919] 1 K. B. 244.

177. —.—.—.—.—.]—Pltfs. who were manufacturers, sold their goods wholesale to factors upon the terms of an agreement which provided that factors should only sell pltfs.' goods to dealers who

had signed a retailer's agreement in a form provided by pltfs. Both the factor's agreement & the retailers agreement provided that the pltfs.' goods should not be sold at less than the specified current list prices applicable respectively to factors & retailers or to dealers on pltfs.' suspended list. Deft. co., who dealt in goods of the kind manufactured by pltfs., & who had been placed on pltfs.' suspended list, obtained pltfs.' goods from a dealer who had signed the retailer's agreement at less than the prescribed retail price. Deft. co. also employed H. & L. other defts. to obtain pltfs.' goods from certain factors who had signed pltfs.' factor's agreement by falsely representing themselves as independent dealers & dealing in fictitious names. Deft. co. paid the prescribed price to the factors through H. & L. & in their assumed names. In consequence of deft. co. having obtained pltfs.' goods pltfs., suffered damage in their business. In respect of both transactions pltfs. claimed against deft. co. for an injunction & damages:—*Held*: the transaction between deft. co. & the retail dealer did not give pltfs. any cause of action against deft. co.; but pltfs. were entitled to an injunction & damages in respect of the transactions between deft. co. & the factors on the ground that deft. co., in having by fraud induced the factors to sell to them pltfs.' goods contrary to the duty owed by the factors to pltfs. had interfered without justification with the contractual relations existing between pltfs. & the factors thereby causing damage to pltfs.—NATIONAL PHONOGRAPH CO., LTD. v. EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LTD., [1908] 1 Ch. 335; 77 L. J. Ch. 218; 98 L. T. 291; 24 T. L. R. 201, C. A.

Annotations:—Reftd. British Cash & Parcel Conveyors v. Lamson Store Service Co., [1908] 1 K. B. 1006; Stott v. Gamble, [1916] 2 K. B. 501; Pratt v. British Medical Assocn., [1919] 1 K. B. 244; Valentine v. Hyde, [1919] 2 Ch. 129; G. W. K. v. Dunlop Rubber Co. (1926), 42 T. L. R. 376.

178. —.—.—.—.—.]—Damage may be inferred from facts.]—In order to support an action for maliciously inducing persons to break their business contracts with pltf. proof of specific damage need not be given, it is sufficient to prove facts from which it may properly be inferred that some damage must result to pltf. from defts. wrongful acts.—EXCHANGE TELEGRAPH CO. v. GREGORY & CO., [1896] 1 Q. B. 147; 65 L. J. Q. B. 262; 74 L. T. 83; 60 J. P. 52; 12 T. L. R. 19, C. A.

Annotations:—Consd. Summers, Williams v. Boyce & Kinmond (1907), 97 L. T. 505; National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335. Apld. Fenning Film Service v. Wolverhampton, Walsall & District Cinemas, [1911] 3 K. B. 1171; Goldsoll v. Goldman, [1914] 2 Ch. 603. Reftd. Exchange Telegraph Co. v. Central News, [1897] 2 Ch. 48; Sports & General Press Agency v. "Our Dogs" Publishing Co., [1916] 2 K. B. 880; Pratt v. British Medical Assocn., [1919] 1 K. B. 244; Said v. Butt, [1920] 3 K. B. 497.

179. —.—.—.—.—.]—Proof of particular damage.]—At the date of the covenant hereinafter mentioned pltf. Goldsoll carried on business as a dealer in imitation jewellery at 7, Old Bond Street, under the name of Tecla & Terisa, Limited, a co. in which deft. Goldman held substantially all the shares & all the debentures, carried on a similar business at 8, New Bond Street. Pltf. carried on, or was interested in, similar businesses, under the name of Tecla, in Paris, New York, Vienna, Berlin & other cities.

In June, 1912, pltf. Goldsoll & deft. Goldman entered into an agreement for the purpose of putting an end to competition between them, whereby Goldman agreed to discontinue the business of the Terisa co., & not allow the name

Terisa to be used in a similar business for two years from Oct. 22, 1912; & covenanted that he would not for the like period "either solely or jointly with or as agent or employee for any other person persons or co. directly or indirectly carry on or be engaged concerned or interested in or render services gratuitously or otherwise to the business of a dealer in real or imitation jewellery in the county of London or any part of the United Kingdom of Great Britain & Ireland & the Isle of Man or in France, the United States, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna."

Goldsoll & the London Tecla Gem co., Ltd., a co. to whom Goldsoll had transferred his business, brought this action against Goldman, Sessel, a former manager of the Terisa co., & S. Sessel & co., a co. under whose name Sessel & his wife had started an imitation jewellery business at 14, New Bond Street, for injunction against Goldman restraining breaches of his covenant, & against the other defts. restraining them from procuring & inducing such breaches:—*Held*: (1) on the facts, Goldman had committed breaches of his covenant, & defts. Sessel & S. Sessel & co. had induced him to break his contract.

(2) Damages are essential to the right of action which a covenantee has against one who induces his covenantor to break his contract, but there was sufficient evidence of damages.

(3) In a case where the breach which has been procured would in the ordinary course inflict damage on the pltf., the pltf. may succeed without proof of particular damages.—*GOLDSOLL v. GOLDMAN*, [1914] 2 Ch. 603; 84 L. J. Ch. 63; 112 L. T. 21; 59 Sol. Jo. 43; *on appeal*, [1915] 1 Ch. 292, C. A.

Annotations:—*Generally*, *Reid*, *Morris v. Saxelby*, [1915] 2 Ch. 57; *Attwood v. Lamont*, [1920] 3 K. B. 571; *Putnam v. Taylor*, [1927] 1 K. B. 637.

180. ——— Absence of justification.] —

(1) Procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right. Miners employed in collieries without giving notice to their employers & in breach of their contracts abstained from working on certain days upon the direction or order of a federation of the miners given by their executive council. The federation & council acted honestly without malice or ill will towards the employers, & with the object only of keeping up the price of coal by which the wages were regulated:—*Held*: an action for damages lay by the employers against the federation & its officers, no justification for their action being shown.

(2) It is useless to try & conceal the fact that an organised body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification & extension if they are to be supplied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon & is justified by this undeniable truth (LORD LINDLEY).

—*SOUTH WALES MINERS' FEDERATION v. GLAMORGAN COAL CO.*, [1905] A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 593; 21 T. L. R. 441, H. L.; *affg.* S. C. *sub nom.* *GLAMORGAN COAL CO. v. SOUTH WALES MINERS' FEDERATION*, [1903] 2 K. B. 545, C. A.

Annotations:—*As to* (1) *Distd.* *Stott v. Gamble*, [1916] 2 K. B. 504. *Reid*, *Giblan v. National Amalgamated Labourers' Union of Gt. Britain & Ireland*, [1903] 2 K. B. 600; *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335; *Larkin v. Long* (1915), 84 L. J. P. C. 201; *Pratt v. British Medical Assn.*, [1919] 1 K. B. 244; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Davies*

v. Thomas, [1920] 1 Ch. 217; *Said v. Butt*, [1920] 3 K. B. 497; *Ware & De Freville v. Motor Trade Assn.*, [1921] 3 K. B. 40; *Brimelow v. Casson*, [1924] 1 Ch. 302; *Sorrell v. Smith*, [1925] A. C. 700.

181. ———.] — *NATIONAL PHONOGRAPH CO., LTD. v. EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LTD.*, No. 177, *ante*.

182. ———.] — *Resps.* employed D. as their agent to buy tobacco from growers, the total bought not to exceed 300,000 lbs., & supplied him with forms of contract bearing their firm name as buyers. D. agreed not to act as buying agent for anybody except *resps.* & another firm. *Applt.*, who knew the position as between D. & *resps.*, induced him to buy in the names of the two firms a total of 1,000,000 lbs., arranging with him to take over the surplus not required for them. Out of that total weight D. handed 300,000 lbs. to *resps.*, & tendered the balance to *applt.*; but he repudiated the arrangement, the market having fallen heavily. *Resps.* having also repudiated liability, one of the vendors, with whom D. had contracted upon *resp.*'s form, was held to be entitled to damages from *resps.* as having held out D. as their agent; *resps.* claimed to recover over from *applt.*:—*Held*: *resps.* were so entitled, *applt.* having knowingly induced D. to commit a breach of his duty to them, whereby they had suffered the damage.

Interference directed to bringing about a violation of legal right, such as that of *resp. co.* to have their contract with D. duly observed, is a cause of action, & it is a violation of a legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference. It is an illustration of this principle when the interference is directed to inducing an agent to act in contravention of his duty by pledging his principal's credit (*per CUR.*).—*JASPERSON v. DOMINION TOBACCO CO.*, [1923] A. C. 709; 92 L. J. P. C. 190; 129 L. T. 771, P. C.

183. ———.] — *First pltf.*s, who were manufacturers of G. W. K. motor-cars, made with second *pltf.*s, who were manufacturers of "Bal-lon-ette" tires, an agreement which had the effect that all new G. W. K. cars were to be fitted with "Bal-lon-ette" tires whenever the cars were exhibited. Under the agreement the tires were supplied to first *pltf.*s at reduced prices but were to be sold by them only as part of a new car. First *pltf.*s sent to an exhibition two of their cars duly fitted with "Bal-lon-ette" tires, & on the night before the opening defts., who were the manufacturers of Dunlop tires, removed the "Bal-lon-ette" tires & substituted Dunlop tires, although they were aware of the agreement between first & second *pltf.*s. In an action by first & second *pltf.*s against defts. the jury awarded damages to both sets of *pltf.*s. On further consideration of the question whether second *pltf.*s had any cause of action:—*Held*: judgment must be entered for both sets of *pltf.*s, since defts. had knowingly committed a violation of second *pltf.*'s legal rights by interfering, without any justification, with the contractual relations existing between first & second *pltf.*s.—*G. W. K., LTD. v. DUNLOP RUBBER CO., LTD.* (1926), 42 T. L. R. 376; *on appeal*, 42 T. L. R. 593, C. A.

184. ———.] — *Sufficiency of justification.* — *READ v. FRIENDLY SOCIETY OF OPERATIVE, STONEMASONS OF ENGLAND, IRELAND & WALES*, No. 176, *ante*.

185. ———.] — *Nature of contract considered.* — *NATIONAL PHONOGRAPH CO., LTD. v. EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LTD.*, No. 177, *ante*.

Sect. 10.—Procuring tortious act: Sub-sect. 2. Part III. Sects. 1, 2 & 3: Sub-sect. 1.]

186. — *Whether contracts of employment & other contracts distinguishable.]—TEMPERTON v. RUSSELL, No. 170, ante.*

187. — — — — —.]—LUMLEY v. GYE, No. 169, ante.

188. — — — — —.]—*Qu.*: whether it is an actionable wrong to induce a party to a contract other than a contract of employment or of an analogous nature to commit a breach thereof.—LONG v. SMITHSON (1918), 88 L. J. K. B. 223; 118 L. T. 678, D. C.

Annotation:—Mentd. Said v. Butt, [1920] 3 K. B. 497.

189. — — — — — *Persons interfering not acting knowingly or for own ends.]—*Grantees of the right of letting for exhibition a certain film agreed to let the film to the proprietors of the theatre for an agreed sum. The licencing authority gave notice to the proprietors of the theatre that they objected to the exhibition of the film. In an action by the grantees against the licencing authority for interfering with their contractual rights without just cause or excuse:—*Held*: even, if the condition was unreasonable & void, the grantees had no cause of action, inasmuch as there was no evidence that the licencing authority knowingly or for their own ends induced the licencees to commit an actionable wrong.—STOTT v. GAMBLE, [1916] 2 K. B. 504; 85 L. J. K. B. 1750; 115 L. T. 309; 80 J. P. 443; 32 T. L. R. 579; 14 L. G. R. 709.

— *Breach of contract by servant.]—See MASTER & SERVANT, Vol. XXXIV., pp. 167–171, Nos. 1299–1341.*

190. *Procuring termination of contract—Whether actionable—No unlawful means employed.]—ALLEN v. FLOOD, No. 35, ante.*

191. — — — — —.]—It is part of the common law that a person may not induce another's servant to break his contract of service. *Allen v. Flood, No. 35, ante*, shows that it is not wrong to induce

a servant to leave his master's employment provided that the servant commits no unlawful act in leaving his master's service (CHANNELL, J.).—TAYLOR v. CAMBRIDGE GAZETTE CO., LTD. & KILNER (1898), 42 Sol. Jo. 832.

192. — — — — — *Effect of malice or unjustifiable purpose.]—*If a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, & succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would be employers, & the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered. The conduct of that person would be, in my opinion, such an unjustifiable molestation of the man, such an improper & inexcusable interference with the man's ordinary rights of citizenship as to make that person liable in an action (ROMER, L.J.).—GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN & IRELAND, [1903] 2 K. B. 600; 72 L. J. K. B. 907; 89 L. T. 386; 19 T. L. R. 708, C. A.

Annotations:—Consd. Valentine v. Hyde, [1919] 2 Ch. 129; Hodges v. Webb, [1920] 2 Ch. 70. Rejd. Pratt v. British Medical Assocn., [1919] 1 K. B. 211; Ware & De Freville v. Motor Trade Assocn., [1921] 3 K. B. 40. Mentd. Airey v. Weighill (1905), 49 Sol. Jo. 279; Conway v. Wade, [1908] 2 K. B. 844; Malcolm Brunker v. Waterhouse (1908), 24 T. L. R. 854; Davies v. Thomas, [1920] 1 Ch. 217; White v. Riley, [1921] 1 Ch. 1; Sorrell v. Smith, [1925] A. C. 700.

193. *Preventing person from entering into contract—Whether actionable—No unlawful means employed.]—ALLEN v. FLOOD, No. 35, ante.*

194. — — — — — *Effect of malice or unjustifiable purpose.]—GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN & IRELAND, No. 192, ante.*

Trade disputes.]—See TRADE & TRADE UNIONS.

Part III.—Remedies for Tort.

SECT. 1.—IN GENERAL.

195. *Alternative remedies—Effect on right to bring action—Statutory right to penalty.]—*As far as the public wrong is concerned, there is no remedy but that prescribed by the Act of Parliament. There is, however, beyond the public wrong, a special & particular damage sustained by pltf. by reason of the breach of duty by deft., for which he has no remedy unless an action on the case at his suit be maintainable; & the question is, whether the penalty annexed to the offence concludes pltf. who has sustained a special & particular damage, as well as the public, though no part of the penalty is payable to him. If the performance of a new duty created by Act of Parliament is enforced by a penalty, recoverable by the party grieved by the non-performance, there is no other remedy than that given by the Act, either for the public or the private wrong; but, by the penalty given in the Act now in question [7 & 8 Vict. c. 112], compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; & no authority has been cited to us, nor are we aware of any, in which it has been held that, in such a case as the present, the common law right to maintain an action in respect of a

special damage resulting from the breach of a public duty, whether such duty exists at common law or is created by statute is taken away by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty (LORD CAMPBELL, C.J.).—COUCH v. STEEL (1854), 3 E. & B. 402; 2 C. L. R. 940; 23 L. J. Q. B. 121; 22 L. T. O. S. 271; 18 Jur. 515; 2 W. R. 170; 118 E. R. 1193.

Annotations:—Consd. Wilson v. Merry (1868), L. R. 1 Sc. & Div. 326; Atkinson v. Newcastle Waterworks Co. (1877), 2 Ex. D. 441; Simmonds v. Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616. Rejd. Casswell v. Worth (1856), 25 L. J. Q. B. 121; Bartonshill Coal Co. v. Reid, Same v. McGuire (1858), 22 J. P. 560; Brecon Corp'n. v. Edwards (1862), 6 L. T. 293; Young v. Davis (1862), 7 H. & N. 760; Handley v. Moffat (1872), 21 W. R. 231; Jones v. Stanstead, Shefford & Chambly Railroad Co. (1872), 8 Moo. P. C. C. N. S. 312; Pickering v. James (1873), L. R. 8 C. P. 489; Gorris v. Scott (1874), 43 L. J. Ex. 92; Thorley v. Glossop (1876), 34 L. T. 169; Robertson v. Amazon, Tug & Lighterage Co. (1881), 7 Q. B. D. 698; Melliss v. Shirley & Freemantle L. B. of Health (1885), 54 L. J. Q. B. 408; R. v. Hall, [1891] 1 Q. B. 747; Cowley v. Newmarket L. B., [1892] A. C. 345; Pictou Municipality v. Geldert, [1893] A. C. 524; Thompson v. Brighton Corp'n., Oliver v. Horsham L. B., [1894] 1 Q. B. 332; Saunders v. Holborn District Board of Works, [1895] 1 Q. B. 64; Maguire v. Liverpool Corp'n. (1905), 92 L. T. 374; Dawson v. Bingley U. C., [1911] 2 K. B. 149; Neville v. London Express Newspaper, [1919] A. C. 868; Hummings v. Stoke Poges Golf Club, [1920] 1 K. B. 720; R. v. Marshland, Smeeth & Fen District Comrs., [1920] 1 K. B. 155. I. A.-G. v. Radloff (1854), 10 Exch. 84.

196. ——— **Abatement of injury.]**—*KANHAYA LAL v. NATIONAL BANK OF INDIA*, No. 199, *post*.

197. **Statutory right to compensation—Non-existence of special tribunal—Right to assessment by High Court.]**—Where a right is given by statute to do acts causing damage to other persons' property, subject to the payment to such persons of compensation, & the statute provides a special tribunal for assessing the amount of compensation if such tribunal becomes non-existent, a person whose property has been damaged by the exercise of the statutory right is entitled to have the amount of compensation assessed in the High Ct. of Justice.

By a local Act, the predecessors in title of defts. were empowered, as undertakers of the river D. navigation, to clear, scour, & deepen the river, & to lay dredgings taken from it on the banks or lands adjacent to the places where the same should be taken out, giving satisfaction to the owners of such lands for any damage thereby occasioned.

The Act appointed a number of persons, therein named, as comrs. for settling, determining & adjusting in manner thereafter mentioned all matters of difference between the undertakers & their successors & the owners of adjacent lands, & provided that such comrs. should have power to determine what satisfaction such landowners should have for the damage done to their lands by the exercise of the statutory powers given to the undertakers.

The Act empowered any fifteen or more comrs. assembled together to elect new comrs. in the places of any comrs. who should be dead or refuse to act.

All the original comrs. were dead, & no comrs. appointed in their places, if any, were in existence :—*Held* : a landowner whose land had been damaged by the exercise by defts. of the statutory power to lay on his land things taken from the river was entitled to have the amount of compensation for such damage assessed in an action.—*BENTLEY v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1891] 3 Ch. 222 ; 60 L. J. Ch. 641 ; 65 L. T. 22.

Annotations :—*Refd.* *Swansen Corpn. v. Harpur*, [1912] 1 K. B. 493 ; *Central Control Board, Liquor Traffic v. Cannon Brewery Co.*, [1919] A. C. 744.

SECT. 2.—ABATEMENT.

198. **Right of injured party to personal redress—Confined to performance of lawful acts.]**—Although the law allows you, if you are attacked with force to defend yourself by using force in return, yet you cannot inflict a wrong of a different character (*POLLOCK, C.B.*).—*IBOTSON v. PEAT* (1865), 3 H. & C. 644 ; 159 E. R. 681 ; *sub nom.* *IBBOTSON v. PEAT*, 6 New Rep. 124 ; 34 L. J. Ex. 118 ; 12 L. T. 313 ; 29 J. P. 344 ; 11 Jur. N. S. 394 ; 13 W. R. 691.

Annotation :—*Refd.* *Allen v. Flood*, [1898] A. C. 1.

199. ———.]—Applt.'s mill having been, as he alleged, wrongfully attached by resps., applt. paid under protest the sum claimed, & thereafter sued for a return of the money so paid :—*Held* : although the payment under protest of the sum demanded by resps. was not the only course open to applt. to rid himself of the alleged unlawful interference with his property, it was an involuntary payment produced by coercion & applt. was entitled to maintain an action for its recovery.

A wrongful interference with pltf.'s lawful enjoyment of his own property was alleged. Pltf. was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold defts. liable for that

which they had thus caused him to do (*LORD MOULTON*).—*KANHAYA LAL v. NATIONAL BANK OF INDIA* (1913), 29 T. L. R. 314, P. C.

200. ———.]—I think I should not be exaggerating if I said that in ninety nine cases out of every hundred where people choose instead of having their rights declared by the ct. to act upon what they suppose to be their rights & to injure property or commit acts of violence of any kind, they will find that they will have to suffer for it (*NEVILLE, J.*).—*HOPE v. OSBORNE*, [1913] 2 Ch. 349 ; 82 L. J. Ch. 457 ; 109 L. T. 41 ; 77 J. P. 317 ; 29 T. L. R. 606 ; 11 L. G. R. 825.

201. ——— **Right to exercise of other remedies not thereby affected.]**—*KANHAYA LAL v. NATIONAL BANK OF INDIA*, No. 199, *ante*.

Abatement of nuisance generally.]—*See* *NUISANCE*, Vol. XXXVI., pp. 202–206, Nos. 433–479.

Tree growing against wall.]—*See* *AGRICULTURE*, Vol. II., p. 65, No. 411.

Nuisance on party wall.]—*See* *BOUNDARIES*, Vol. VII., p. 299, No. 229.

Interference with rights of common.]—*See* *COMMONS*, Vol. XI., pp. 40, 48, 49, Nos. 642, 694–715.

Disturbance of easement.]—*See* *EASEMENTS*, Vol. XIX., pp. 182, 183, Nos. 1323–1336.

Obstruction of navigable river—By fishery.]—*See* *FISHERIES*, Vol. XXV., p. 37, No. 356.

Nuisances on highways.]—*See* *HIGHWAYS*, Vol. XXVI., pp. 448–450, Nos. 1639–1662.

SECT. 3.—ACTION FOR DAMAGES.

SUB-SECT. 1.—IN GENERAL.

202. **Parties to illegal agreement—Injury to one party arising out of illegal transaction—No right of action against other party.]**—One of two parties to an agreement to suppress a prosecution for felony, cannot maintain an action against the other, for an injury arising out of the transaction in which they have both been illegally engaged.

A declaration in case stated that B., deft., had charged C. with embezzlement ; that it was agreed between B. & A., pltf., that B. should abstain from prosecuting C., & that, in consideration thereof, C. should draw, & A. should accept, a bill of exchange, & that C. should indorse the same to deft. The declaration then went on to aver that a bill was drawn, accepted, & indorsed to B. pursuant to this corrupt & illegal agreement ; that B., well knowing the illegal nature of the transaction, & that A. was not liable at law to pay the amount of the bill, & that there was no reasonable or probable cause for suing him thereon, conspired with D., a pauper, that the bill should be indorsed to D., & that D. should sue A. upon the bill, for the sole benefit of B. ; & that an action was accordingly brought by D. against A. in which A. obtained a verdict, on the ground of the illegality of the consideration for the acceptance, but was unable to obtain his costs, in consequence of the insolvency of D. :—*Held* : inasmuch as A. could not make out his case except through the illegal transaction to which he himself was a party, the action would not lie.—*FIVAZ v. NICHOLLS* (1846), 2 C. B. 501 ; 15 L. J. C. P. 125 ; 6 L. T. O. S. 319 ; 135 E. R. 1042 ; *sub nom.* *FINAN v. NICHOLLS*, 10 Jur. 50.

Annotations :—*Appld.* *Taylor v. Chester* (1860), L. R. 4 Q. B. 309 ; *Begbie v. Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491 ; *Scott v. Brown, Doering, McNab, Slaughter & May v. Brown, Doering, McNab*, [1892] 2 Q. B. 724 ; *Farmers' Mart v. Milne*, [1915] A. C. 106. *Refd.* *Cotterell v. Jones* (1851), 11 C. B. 713 ; *Whitmore v. Farley* (1880), 43 L. T. 192 ; *Parkinson v. College of Ambulance & Harrison*, [1925] 2 K. B. 1.

Joinder of parties.]—*See* *PRACTICE*.

Sect. 3.—Action for damages: Sub-sects. 1, 2 & 3.
Sects. 4, 5 & 6. Part IV.]

Discovery.]—See DISCOVERY, Vol. XVIII., p. 239, No. 1821.

Payment into court.]—See PRACTICE.

Proceedings in county court.]—See, generally, COUNTY COURTS, Vol. XIII., pp. 441 *et seq.*

Remitted actions.]—See COUNTY COURTS, Vol. XIII., p. 484, Nos. 340–343.

Appeal.]—See COUNTY COURTS, Vol. XIII., p. 525, Nos. 751–754.

Torts committed abroad.]—See CONFLICT OF LAWS, Vol. XI., pp. 344–347, 409–413, Nos. 314–337, 773–799.

203. Right to damages—On failure to prove special damage.]—The principle ordinarily applicable to actions of tort is that pltf. is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action.—MUDHUN MOHUN DOSS v. GOKUL DOSS (1866), 10 Moo. Ind. App. 563; 19 E. R. 1085; *sub nom.* MUDHUN MOHUN DOSS v. GOKUL DOSS, 14 W. R. 590; *sub nom.* DOSS v. DOSS, 14 L. T. 646, P. C.

204. Assignability of damages—“If & when recovered.”]—Mrs. G. was pltf. in an action against H. for false representation, & was also pltf. in the present action against deft. for slander. Mrs. G., being at the time largely indebted to her husband, on May 21, 1910, executed in his favour a deed of assignment, whereby, after reciting that he had requested her to give him further security which she had agreed to do, she assigned to him “all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of any verdict, compromise, or agreement which she may obtain, or to which she may become party in or consequent upon the said action or otherwise howsoever, under or by reason of the same, to hold the same . . . subject to redemption on payment of all moneys due to him.” Subsequently the action brought by Mrs. G. against H. was dismissed with costs amounting to £218 but the action brought by Mrs. G. against deft. resulted in a verdict for pltf. for £200 with costs. H. thereupon instituted garnishee proceedings against deft. to attach the amount of damages recovered by Mrs. G. in satisfaction of the costs due to him in the first action, & in these proceedings Mrs. G.’s husband also claimed to be entitled to those damages under the assignment from his wife to him:—*Held*: the assignment was made for good consideration & was not an assignment of a mere expectancy, or of a cause of action, but was an assignment of property, that is, of the fruits of an action as & when recovered, & it was consequently not void under 13 Eliz. c. 5.—GLEGG v. BROMLEY, [1912] 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825, C. A.

Annotations:—*Reid*. German v. Yates (1915), 32 T. L. R. 52; Hambleton v. Brown, [1917] 2 K. B. 93; Hosack v. Robins (1918), 62 Sol. Jo. 520; Ellis v. Torrington, [1920] 1 K. B. 399; *Re* Lloyd’s Furniture Palace, Evans v. Lloyd’s Furniture Palace, [1925] Ch. 853. **Mentd. Re**

PART III. SECT. 3, SUB-SECT. 2.

2051. Effect of impossibility of accurate estimate.]—Damages are not usually awardable under the express head of “mental anxiety” but in all cases in which damage arises from a tort, as distinguished from a breach of contract, the cts. in awarding damages are not compelled to estimate the damage too precisely, but are at liberty to give damages which may effectually protect the injured party from a repetition of the wrong.—FUROOKH HOSSEIN v. FUZUL HOSSEIN (1869), 1 N. W. 292.—IND.

g. Distinction between principles in damages awarded for tort & for breach of contract.]—Though the rule is the same in actions on contract as in tort, viz., that the damages which pltf. is entitled to must result directly from the wrongful act of deft. & that no claim can be made to damages which are only too remotely connected with it, there may be differences in the application to actions on tort of this basic principle which is common to both kinds of actions; in a contract “it is the duty of pltf. as a prudent man to take measures to reduce the

damages as far as possible, for a breach of contract consists in deft.’s failure to do a certain act that he is bound to do, & it would be quite open to pltf. to take other measures to obtain the result he expected from deft.’s performance; a tort, on the other hand, may consist in deft.’s failing to do an act which he is bound to do or in doing one which he ought not to do or in preventing pltf. from doing an act which he is entitled to do.—KARIBASAVANA GOWD v. VEERABHADRAPPA (1913), 1 L. R. 36 Mad. 580.—IND.

Cozens, Green v. Brisley, [1913] 2 Ch. 478; Wells v. Wells (1914), 30 T. L. R. 437; County Hotel & Wine Co. v. I. & N. W. Ry., [1918] 2 K. B. 251; Denny’s Trustees v. Denny & Warr, [1919] 1 K. B. 583.

SUB-SECT. 2.—ASSESSMENT OF DAMAGES.

See, generally, DAMAGES, Vol. XVII., pp. 156–179, Nos. 568–833.

205. Effect of impossibility of accurate estimate.]—Where a wrong has been committed, the wrongdoer must suffer from the impossibility of accurately ascertaining the amount of damage.

Therefore where an account of the equitable waste committed by a tenant for life was directed to be taken against his exors, which it was found impossible to take accurately, & the master had arbitrarily charged the exors., his report was supported.—LEEDS (DUKE) v. AMHERST (EARL) (1850), 20 Beav. 239; 15 L. T. O. S. 129; 52 E. R. 595.

206. Several defendants—One more guilty than others.]—GREGORY v. COTTERELL (1852), 1 E. & B. 360; 22 L. J. Q. B. 217; 17 Jur. 525; 118 E. R. 470; *on appeal* (1855), 5 E. & B. 571, Ex. Ch.

Annotations:—*Mentd.* Boulton v. Reynolds (1859), 29 L. J. Q. B. 11; Salisbury v. Gladstone (1859), 5 Jur. N. S. 369; Toins v. Wilson (1862), 4 B. & S. 442; Burton v. Le Gros (1864), 34 L. J. Q. B. 91; Bagge v. Whithead (1892), 66 L. T. 815; Baker v. Wicks (1904), 73 L. J. K. B. 410.

207. New trial—Inadequacy of damages.]—In actions for torts there is no inexorable rule precluding the granting of a new trial on the ground of inadequacy of damages; but if the smallness of damages shows that the jury have made a compromise a new trial will be granted, such a case being in effect as if the jury had been discharged without a verdict.—FALVEY v. STANFORD (1874), 1 L. R. 10 Q. B. 54; 44 L. J. Q. B. 7; 31 L. T. 677; 23 W. R. 162; *sub nom.* FLAVEY v. STANFORD, 39 J. P. 134.

DAMAGES, Vol. XVII., pp. 171–176, Nos. 754–783, 800.

Damages assessed once & for all.]—See DAMAGES, Vol. XVII., pp. 87–91, Nos. 59–91.

Libel.]—See LIBEL & SLANDER, Vol. XXXII., pp. 164–180.

SUB-SECT. 3.—COSTS.

Action remitted to county court.]—See COUNTY COURTS, Vol. XIII., pp. 491, 492, Nos. 418–420.

Action in High Court.]—See PRACTICE.

SECT. 4.—ACTION FOUNDED ON CONTRACT.

Right to sue for on waiver of tort.]—See Nos. 219–225, *post*, & generally, CONTRACT, Vol. XII., pp. 555–567.

SECT. 5.—INJUNCTION.

See, generally, INJUNCTION, Vol. XXVIII., pp. 355 *et seq.*

SECT. 6.—FELONIOUS TORTS.

See ACTION, Vol. I., pp. 60–66, Nos. 490–545.

Part IV.—Defences to Actions of Tort.

208. Act of God—What amounts to—Something in opposition to act of man.]—What is the act of God? I consider it to mean something in opposition to the act of man (LORD MANSFIELD, C.J.).—*FORWARD v. PITTARD* (1785), 1 Term Rep. 27; 99 E. R. 953.

*Annotations:—*Consd. *Nugent v. Smith* (1876), 1 C. P. D. 423. *Refd.* *Duff v. Budd* (1822), 6 Moore, C. P. 469; *Siordet v. Hall* (1828), 1 Moo. & P. 561; *Richards v. L. B. & S. O. Ry.* (1849), 7 C. B. 839; *L. & N. W. Ry. v. Hudson*, [1920] A. C. 324. *Mentd.* *Smith v. Horne* (1818), 8 Taunt. 144; *Re Webb* (1818), 2 Moore, C. P. 600; *Cairns v. Robins* (1841), 10 L. J. Ex. 452; *Liver Alkali Co. v. Johnson* (1844), L. R. 9 Exch. 338; *Hill v. Scott* (1895), 64 L. J. Q. B. 635.

209. ——— Natural necessity.]—The act of God is natural necessity, as wind & storms, which arise from natural causes, & is distinct from inevitable accident (LORD MANSFIELD).—*TRENT & MERSEY NAVIGATION Co. v. WOOD* (1785), 4 Doug. K. B. 286; 99 E. R. 884.

210. ——— Illness.]—I think, *prima facie*, illness is to be attributed to the act of God (CLEASBY, B.).—*K—— v. RASCHEN* (1878), 38 L. T. 38; *sub nom. K. v. R.*, 42 J. P. 264.

*Annotations:—**Mentd.* *Loates v. Maple* (1903), 88 L. T. 288; *Niblett v. Mid. Ry.* (1907), 96 L. T. 462.

— *See* CARRIERS, Vol. VIII., p. 21, Nos. 110–113; NEGLIGENCE, Vol. XXXVI., pp. 100–103, Nos. 670–683.

— *See* CARRIERS, Vol. VIII., p. 21, Nos. 107–109; CONTRACT, Vol. XII., pp. 371–373, Nos. 3087–3098; NEGLIGENCE, Vol. XXXVI., pp. 103–106, Nos. 684–706; NUISANCE, Vol. XXXVI., p. 220, Nos. 615, 616; & PARTICULAR TITLES *passim*.

Act of State.]—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 4–14, Nos. 1–76.

211. Bankruptcy—Tort against estate of provisional assignee.]—*Qu.*: whether the assignees of a bankrupt can sue in tort for a tort committed against the estate of the provisional assignees.—*FREEN v. COOPER* (1815), 6 Taunt. 358; 2 Marsh. 59; 128 E. R. 1073.

212. ——— Right of action to enforce arbitration award—Award of damages for personal tort.]—An action for an illegal arrest was referred, the costs of the reference being in the arbitrator's discretion. The award directed that final judgment be entered for pltf., with £50 damages, & gave him the costs of the reference & award. The arbitrator had no authority to direct judgment to be entered, & for this excess the award was remitted to the arbitrator, who, in a second award, recited that he had made a former award, that it had been referred back, & gave pltf. the same damages & costs of the reference & award, & also the costs of the amended award. After the first award pltf. became insolvent. The vesting order was made after the reference back, & a few days before the second award:—*Held*: the action being for a personal tort, no right could pass to the assignees until the matter was adjudicated on, which could not be said to have been done until the second award; & as this award was not made until after the vesting order, the title of pltf. would be good, unless the assignees interfered, which they had not done.—*BREARCY v. KEMP* (1855), 3

C. L. R. 1259; 24 L. J. Q. B. 310; 3 W. R. 575.

— **What causes of action in tort pass to trustee.]—***See* BANKRUPTCY, Vol. V., pp. 972–974, Nos. 7960–7975.

— **Effect on actions by & against bankrupt.]—***See* BANKRUPTCY, Vol. V., pp. 997–1017, Nos. 8134–8301.

Common employment.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 207–220, Nos. 1697–1824.

Contributory negligence.]—*See* NEGLIGENCE, Vol. XXXVI., pp. 109–122.

Death—Death of plaintiff.]—*See* EXECUTORS, Vol. XXIII., pp. 295–298, Nos. 3605–3636.

— **Death of tortfeasor.]—***See* EXECUTORS, Vol. XXIV., pp. 616–651, Nos. 6726–6771.

— **Negligence causing death.]—***See* NEGLIGENCE, Vol. XXXVI., pp. 127–142.

218. Justification.]—*ALLEN v. FLOOD*, No. 35, *ante*.

— *See, also*, Nos. 180–181, *ante*.

Protection of person or property.]—*See* GAME, Vol. XXV., pp. 360, 363, 364, Nos. 101, 121–126; NUISANCE, Vol. XXXVI., pp. 191, 192, 219, 220, Nos. 323–330, 608–614; TRESPASS.

214. Release—Accord & satisfaction.]—In all cases where nothing but amends are to be recovered, a concord with an execution thereof is a good plea.—*ANDREW v. BOUGHIEY* (1552), 1 Dyer, 75a; 73 E. R. 160.

*Annotations:—**Refd.* *Alden v. Peto* (1605), Cro. Jac. 99; *Peto v. Cheey* (1611), 2 Brownl. 128; *Thompson v. Percival* (1834), 5 B. & Ad. 925; *Sibree v. Tripp* (1846), 15 M. & W. 23. *Mentd.* *Thorpe v. Thorpe* (1701), 1 Salk. 171; *Lyth v. Ault* (1852), 7 Exch. 669; *Daily v. Peek* (1889), 1 Meg. 292.

— **Release by acceptance of payment.]—***See* CONTRACT, Vol. XII., p. 496, Nos. 4049–4059.

— **Release to joint tortfeasors.]—***See* Part II., Sect. 8, sub-sect. 6, *ante*.

Statutory authority—Electric lighting.]—*See* ELECTRIC LIGHTING, Vol. XX., pp. 209–213, Nos. 62–84.

— **Gas.]—***See* GAS, Vol. XXV., pp. 482–488, Nos. 71–101.

— **Highways.]—***See* HIGHWAYS, Vol. XXVI., pp. 404–413, Nos. 1267–1325.

— **Railways.]—***See* RAILWAYS, Vol. XXXVIII., pp. 345, 354, Nos. 534–597.

— **Sewers.]—***See* SEWERS, Vol. XII., pp. 27, 28, Nos. 217–222.

— **Tramways.]—***See* TRAMWAYS & LIGHT RAILWAYS.

— **Water supply.]—***See* WATER SUPPLY.
— *See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 22–32, 58–98, 101–136, Nos. 122–191, 338–711, 725–998; & PARTICULAR TITLES *passim*.

Statute of limitations—When time begins to run.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 340–345, Nos. 236–276.

— **Limitation under Public Authorities Protection Act, 1893 (c. 61).]**—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 101–136, Nos. 725–998.

— *See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 524–527, Nos. 1802–1820.

Waiver & consent.]—*See* Part V., *post*.

PART IV.

*h. Release executed in hospital—Alleged fraud or undue influence—Mental condition of plaintiff.]—*ARKLES J.—VOL. XLII.

v. GRAND TRUNK RY. Co. (1913), 25 O. W. R. 456; 5 O. W. N. 462; 14 D. L. R. 789.—CAN.

*k. Representative capacity.]—*It is

no defence for an action for tort that deft. acted in a representative capacity & at the instigation or direction of others.—*MPOTSANG v. MAKGOBI*, [1910] C. P. D. 69.—S. AF.

Part V.—Waiver and Consent.

SECT. 1.—WAIVER.

215. Whether tort may be waived—Without accord & satisfaction—Or release by deed.]—Where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress, some conduct amounting to release or accord & satisfaction must be shown; although, on account of laches, relief may be refused under special circumstances.

A right of action has vested . . . which at all events as a general rule, cannot be divested without accord & satisfaction or release under seal (*per CUR.*).—*DE BUSSCHE v. ALT* (1878), 8 Ch. D. 286; 47 L. J. Ch. 381; 38 L. T. 370; 3 Asp. M. L. C. 584, C. A.

*Annotations:—***Consd.** *Northumberland v. Bowman* (1887), 56 L. T. 773. **Refd.** *Blake v. Gale* (1885), 31 Ch. D. 196; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Harris v. Flat Motors* (1906), 22 T. L. R. 556; *Re Joicey, Joicey v. Elliot*, [1915] 2 Ch. 115; *Jones (Holloway) v. Woodhouse*, [1923] 1 K. B. 117. **Mentd.** *Re Pepperell, Pepperell v. Chamberlain* (1879), 27 W. R. 410; *The Fanny, The Mathilda* (1883), 48 L. T. 771; *Meyerstein v. Eastern Agency Co.* (1885), 1 T. L. R. 595; *Powell & Thomas v. Evan, Jones*, [1905] 1 K. B. 11; *Keen v. Mead*, [1920] 2 Ch. 574; *Prager v. Blatspiel, Stamp & Heacock*, [1921] 1 K. B. 566; *Tarn v. Scanlan, Nielsen, Andersen v. Collins, Muller (London) v. Lethem, Same v. L. R. Comrs.*, [1928] A. C. 34.

216. ———.]—To say that a claim is to be waived is incorrect. If a right has accrued it must be released or discharged by deed or upon consideration (*LORD SUMNER*).—*ATLANTIC SHIPPING & TRADING CO. v. DREYFUS (L.) & CO.*, [1922] 1 A. C. 250; 91 L. J. K. B. 513; 127 L. T. 411; 38 T. L. R. 534; 15 Asp. M. L. C. 566; 27 Com. Cas. 311, II. 1.

*Annotations:—***Refd.** *Ford v. Compagnie Furness (France)*, [1922] 2 K. B. 797; *Reed v. Page & East*, [1927] 1 K. B. 743. **Mentd.** *Czarnikow v. Roth, Schmidt*, [1922] 2 K. B. 478; *Pincock v. Lewis & Peat*, [1923] 1 K. B. 690; *The Christel Vinnen*, [1924] P. 61.

217. Right to waive tort—In favour of breach of contract—Necessity for contractual relationship between parties—& for tort to amount to breach of contract.]—A tort can only be waived in favour of a breach of contract when either there were at the time of the commission of the tort contractual relationships between the parties & the tort complained of was also a breach of contract, or when the same act or omission creates a position which brings the parties into what the party suffering the wrong is entitled to regard as a contractual relationship. In both these cases *pltf.* may waive the tort & sue in contract (*BAILHACHE, J.*).—*BRISTOL CHANNEL STEAMERS, LTD. v. R.* (1924), 131 L. T. 608; 40 T. L. R. 550; 68 Sol. Jo. 771.

218. ——— Act or omission creating contractual relationship.]—*BRISTOL CHANNEL STEAMERS, LTD. v. R.*, No. 217, *ante*.

219. Right to waive tort—& sue for money had & received.]—If a man takes goods to which he has no right, & sells them, the owner may waive the tort, & recover the price for which they were sold in an *indebitatus assumpsit* for money had & received.—*LAMINE v. DORRELL* (1705), 2 Ld. Raym. 1216; 92 E. R. 303.

*Annotations:—***Refd.** *Neato v. Harding* (1851), 11 Exch. 349; *Arnold v. Cheque Bank, Same v. City Bank* (1876), 1 C. P. D. 578; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

PART V. SECT. 1.

219 i. Right to waive tort—& sue for money had & received.]—The right to waive a tort, & bring an action *ex contractu*, applies only to actions for

money had & received.—*McCULLEY v. WARD* (1863), 10 N. B. R. (5 All.) 505.—*CAN.*

219 ii. ———.]—*FLEWELLING v. LAWRENCE* (1882), 21 N. B. R.

220. ———.]—*Pltf.* may waive a tort, bring an action purely of a civil nature, where it is for the benefit of *deft.*—*FELTHAM v. TERRY* (1773), Lofft, 207; 98 E. R. 613.

*Annotations:—***Consd.** *Lindon v. Hooper* (1776), 1 Cowp. 414. **Distd.** *Birch v. Wright* (1786), 1 Term Rep. 378. **Refd.** *Bennett v. Francis* (1801), 2 Bos. & P. 550; *Thurston v. Mills* (1812), 16 East, 254.

221. ———.]—The *cts.* held [in *Feltham v. Terry*, No. 220, *ante*] that an action was maintainable for the clear money in *deft.*'s hands because *pltf.* might waive the tort & sue for the clear money really due. I agree that he may do so (*BULLER, J.*).—*BIRCH v. WRIGHT* (1786), 1 Term Rep. 378; 99 E. R. 1148.

*Annotations:—***Refd.** *Pulteney v. Warren* (1801), 6 Ves. 73; *Wheeler v. Keeble* (1914), Ltd., [1920] 1 Ch. 57; *R. v. Paulson*, [1921] 1 A. C. 271. **Mentd.** *Denn d. Jacklin v. Cartright* (1803), 4 East, 29; *Cholmondeley v. Clinton* (1820), 1 Jac. & W. 1; *R. v. Herstonceaux* (1827), 7 B. & C. 551; *Re Brindley, Ex p. Hankey* (1829), Mont. & M. 217; *Doe d. Fisher v. Giles* (1829), 5 Bing. 421; *Buckworth v. Simpson* (1835), 5 Tyr. 344; *Doe d. Chadborn v. Green* (1839), 9 Ad. & El. 658; *Brydges v. Lewis* (1842), 3 Q. B. 603; *Doe d. Clarke v. Smaridge* (1845), 7 Q. B. 957; *Standen v. Christmas* (1847), 9 L. T. O. S. 169; *Blundell v. Drummond* (1848), 14 Jur. 573, n.; *Cattley v. Arnold, Banks v. Arnold* (1859), 1 John. & H. 651; *Paddington v. Willesden* (1863), 1 New Rep. 435; *R. v. St. Giles without Cripplegate, London* (1863), 4 B. & S. 509; *De Nicols v. Saunders* (1870), 22 L. T. 661; *Phillips v. Homfray* (1883), 24 Ch. D. 439; *Horn v. Beard*, [1912] 3 K. B. 181; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508.

222. ———.]—*Pltf.* would not have been bound to bring trover against him, but might have waived the tort, & brought an action for the money for which the goods were sold, which was obviously the subject of a set-off (*LORD ELLENBOROUGH*).—*CAMPBELL v. THOMPSON* (1816), 1 Stark. 490; 171 E. R. 539, N. P.

*Annotations:—***Refd.** *Atkinson v. Stephens* (1852), 7 Exch. 567. **Mentd.** *The Salacia* (1862), Lush. 578.

223. ———.]—One scrivener was indebted to *deft.*, an attorney, who had a lien on an indenture of lease relating to premises belonging to scrivener, as a security for his debt. A commission in bkpey. issued against scrivener, & an assignee being appointed, *deft.* acted as solr. to the commission. A petition was presented to supersede the commission, on the ground that there was no valid petitioning creditor's debt, & *deft.*, with notice of that fact, joined the assignee in an assignment of the lease to a purchaser, & out of the purchase-money the assignee paid *deft.* the debt due from the bkpt., & also a part of the amount of his bill as solr. to the commission; *deft.* also received, by the authority of the assignee, certain sums of money accruing from the rents of the premises, in part liquidation of the debts due to him; after these facts occurred the commission was superseded, & *ptfs.* were appointed assignees under a new fiat which was issued:—*Held*: *ptfs.* could recover the sums received by *deft.* in an action for money had & received, for by parting with the lease *deft.* was guilty of a conversion, & *ptfs.* were therefore entitled to waive the tort & sue in *assumpsit*.—*CLARK v. GILBERT* (1835), 2 Bing. N. C. 343; 2 Scott, 520; 1 Hodg. 347; 5 L. J. C. P. 61; 132 E. R. 135.

*Annotation:—***Refd.** *Chinery v. Viall* (1860), 5 H. & N. 288.

224. ———.]—If a man's goods are taken by an act of trespass, & are subsequently sold by

529.—*CAN.*

219 iii. ———.]—*WHITCHELO v. COLVIN* (1913), 23 W. L. R. 542; 1 Sask. L. R. 214; 3 W. W. R. 1135; 10 D. L. R. 635.—*CAN.*

the trespasser, & turned into money, he may maintain trespass for the forcible injury; or, waiving the force, he may maintain trover for the wrong; or, waiving the tort altogether, he may sue for money had & received (POLLOCK, C.B.).—RODGERS v. MAW (1846), 15 M. & W. 444; 4 Dow. & L. 66; 16 L. J. Ex. 137; 7 L. T. O. S. 260; 153 E. R. 924.

Annotation:—**Reid**. A.-G. v. De Keyser's Royal Hotel, [1920] A. C. 508.

225. ———.]—Pltf.'s mother had for some time received parochial relief; but there being ground to suspect that her poverty was feigned, defts., an overseer & constable, went to her house for the purpose of searching for money. The overseer alone entered, & found in a cupboard a sum of money, which he took away, & it was subsequently paid into a bank by both defts. to their joint account. The money was proved to belong to pltf.:—*Held*: pltf. might waive the trespass, & recover the amount in an action against both defts. for money had & received to his use.—NEATE v. HARDING (1851), 6 Exch. 349; 20 L. J. Ex. 250; 17 L. T. O. S. 80; 155 E. R. 577.

Annotation:—**Reid**. Arnold v. Cheque Bank, Same v. City Bank (1876), 1 C. P. D. 578.

226. ———.]—After the death of the sheriff, & before the appointment of his successor, the under-sheriff sold goods taken in execution before the death of the sheriff, & paid part of the proceeds to the execution creditors, but died before paying over the balance. The execution creditors, more than six months after the death of the under-sheriff or their entering upon the administration sued his exors. for negligence & extortion in the under-sheriff, & also for money had & received:—*Held*: an action for money had & received would lie against the exors. of the under-sheriff & the action for money had & received not requiring the same evidence to support it as the action for tort, might be brought although the tort had not been waived.—GLOUCESTERSHIRE BANKING CO. v. EDWARDS (1887), 19 Q. B. D. 575; 56 L. J. Q. B. 511; 35 W. R. 842; *affd.*, 20 Q. B. D. 107, C. A.

227. ———.]—[It is] one of the most common propositions of the common law that you may waive the tort by claiming from the wrongdoer the proceeds of the goods (ATKIN, L.J.).—*Re* A BANKRUPTCY NOTICE, [1924] 2 Ch. 76; 93 L. J. Ch. 197; 68 Sol. Jo. 458; [1924] B. & C. R. 188; *sub nom.* *Re* A BANKRUPTCY NOTICE (No. 62 of 1924), *Ex p.* PETITIONING CREDITORS v. DEBTOR, 131 L. T. 307, C. A.

Annotation:—**Consd.** Huddersfield Fine Worsteds v. Todd (1925), 131 L. T. 82.

228. ———.]—**Action for tort barred.**—The Shipping Controller, purporting to act under the authority of the Defence of the Realm Regulations, required as a condition of a licence to suppliants to sell one of their ships to a foreign firm that they should pay a percentage of the purchase-money to the Ministry of Shipping, & suppliants paid the percentage. On a petition of right to recover back the money so paid:—*Held*: the imposition of the condition was illegal, & the payment was not a voluntary payment.

The main & principal cause of action, namely, that against the Shipping Controller for tort, having been barred by the general words of sect. 1 [of the Indemnity Act, 1920, c. 48] it would be defeating the general purpose of the section to preserve either against the Shipping Controller, had he retained the proceeds, or, as things are, against the Crown an alternative remedy based upon an implied contract or quasi-contract merely introduced by & resting on a legal fiction (SARGANT,

L.J.).—BROCKLEBANK, LTD. v. R., [1925] 1 K. B. 52; 94 L. J. K. B. 26; 132 L. T. 166; 40 T. L. R. 869; 69 Sol. Jo. 105; 16 Asp. M. L. C. 415, C. A.; *revsq.*, [1924] 1 K. B. 647.

Annotations:—**Appld.** Hardie & Lane v. Chiltern, [1928] 1 K. B. 663. **Refd.** Bristol Channel Steamers v. R. (1924), 131 L. T. 608. Marshal Shipping Co. v. R. (1925), T. L. R. 5.

229. ———.]—Pltf. cannot abandon his claim in tort & still pursue his claim for money had & received which depends upon the alleged tort.

As regards the claim for money had & received to the use of pltf. it appears clearly from the allegations in the statement of claim that it is founded upon the tortious acts alleged to have been committed by defts., & therefore if sustainable at all is a claim which falls directly within [Sect. 4 of Trade Disputes Act, 1906 (c. 47) (LAWRENCE, L.J.).—HARDIE & LANE, LTD. v. CHILTERN, [1928] 1 K. B. 663; 96 L. J. K. B. 1040; 138 L. T. 14; 43 T. L. R. 709; 71 Sol. Jo. 664, C. A.

230. ———.]—**Extortion by government official.**—Where an official of a govt. department wrongfully extorts a sum of money from a subject for the use of the Crown, & the injured party waives the tort.

Qu.: whether he can sue the official personally as for money had & received, or whether his only remedy is not by petition of right against the Crown.—MARSHAL SHIPPING CO. v. BOARD OF TRADE, [1923] 2 K. B. 313; 92 L. J. K. B. 901; 129 L. T. 614; 39 T. L. R. 415; 67 Sol. Jo. 639; 16 Asp. M. L. C. 210, C. A.

Annotations:—**Consd.** Brocklebank v. R., [1924] 1 K. B. 647. **Refd.** Bristol Channel Steamers v. R. (1924), 131 L. T. 608; G. S. & W. Ry. of Ireland v. R., [1921] 2 K. B. 450.

231. ———.]—BROCKLEBANK, LTD. v. R., No. 228, *ante*.

— **Excessive sum paid as damages—Cattle damage feasant.**—*See* DISTRESS, Vol. XVIII., p. 418, Nos. 1845–1847.

— **& sue for work & labour—Enticing away apprentice.**—*See* MASTER & SERVANT, Vol. XXXIV., p. 521, Nos. 4392, 4393.

232. ———.]—**& sue for goods sold & delivered.**—It appeared at the trial, that after bkpcy., eighty-five bundles of yarn, of the value of £114 had been delivered by the bkpt. to defts., as they alleged, to meet an accommodation bill which they were about to give the bkpt. The goods were accompanied by an invoice, which stated them to be bought by defts. of the bkpt.:—*Held*: under these circumstances, the assignees might waive the tort, & bring *assumpsit* for goods sold & delivered.—RUSSELL v. BELL (1842), 10 M. & W. 340; 152 E. R. 500.

233. ———.]—Goods were delivered by the owners to forwarding agents to be carried by sea to Hull & thence forwarded to a customer in Manchester. When the goods arrived at Hull the owners instructed the forwarding agents not to deliver to the customer, but the goods were nevertheless delivered to him. The owners thereupon invoiced the goods to the customer & sued him & recovered judgment for the price of goods sold & delivered, & then, failing to get satisfaction, took proceedings in bkpcy. against him.

The owners of the goods might have sued for conversion. They did not do this. They sued for the contract price alleging a contract to sell & a right delivery under it, & they recovered judgment on that basis (SCRUTTON, L.J.).—VERSCHURES CREAMERIES v. HULL & NETHERLANDS S.S. Co., [1921] 2 K. B. 608; 91 L. J. K. B. 39; 125 L. T. 165, C. A.

Annotations:—**Refd.** Anderson v. Equitable Assoc. Soc. of United States (1926), 134 L. T. 557; Dexters v. Hill Crest Oil Co. (Bradford), [1926] 1 K. B. 318.

Sect. 1.—Waiver. Sect. 2. Part VI.]

234. — & sue for use & occupation.]—Trespass will not lie against the occupier of land at the suit of the mtgee., who has never been in actual possession or been seised of the land, & has not obtained a judgment in ejectment, either by default or by verdict; & therefore he cannot, in such case, waive the tort, & maintain an action of use & occupation.—*TURNER v. CAMERON'S COALBROOK STEAM COAL CO.* (1850), 5 Exch. 932; 20 L. J. Ex. 71; 10 L. T. O. S. 285; 155 E. R. 407.

*Annotations:—***Apld.** *Neate v. Harding* (1851), 6 Exch. 349. **Refd.** *Phillips v. Homfray* (1883), 24 Ch. D. 439. **Mentd.** *Blatchford v. Cole* (1858), 5 Jur. N. S. 412; *Harrison v. Blackburn* (1864), 10 Jur. N. S. 1131; *Wallis v. Hands*, [1893] 2 Ch. 75.

235. — Right confined to private persons.]—The R. canal being a public highway & the abstraction of water being a wrong against the public & against other carriers upon the canal besides plffs., & plffs. having imposed upon them statutory obligations in respect of which they were bound to make use of the water for certain purposes, they were not in the position of private owners of property who had been wrongfully deprived of their property, & they could not therefore elect to affirm the acts of defts. which were illegal not only against themselves but against the public, & take profits in lieu of damages (*BYRNE, J.*).—*MANCHESTER SHIP CANAL CO. v. ROCHDALE CANAL CO.* (1899), 81 L. T. 472; *on appeal, sub nom. ROCHDALE CANAL CO. v. MANCHESTER SHIP CANAL CO.* (1901), 85 L. T. 585, H. L.

*Annotations:—***Refd.** *Wednesbury Corpn. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78. **Mentd.** *Neaverson v. Peterborough R. D. C.* (1902), 86 L. T. 738.

236. What constitutes waiver.]—A. having lost a £20 bank note, it was found by B., who took it to C. to get it changed, & C. changed it accordingly. B., being afterwards taken up on a charge of stealing the note, gave A. £7 as part of the change. In an action of trover brought by A. against C. to recover the value of the note:—*Held*: the action was maintainable, & the acceptance of part did not affirm the act of B. or waive the tort, but it only went in diminution of the damages.—*BURN v. MORRIS* (1834), 2 Cr. & M. 579; 4 Tyr. 485; 3 L. J. Ex. 193; 149 E. R. 891.

*Annotations:—***Consd.** *Valpy v. Sanders* (1848), 5 C. B. 886; *Rice v. Reed*, [1900] 1 Q. B. 54.

237. —.]—The trustee of a bkpt.'s estate applied, under Bkpcy. Act, 1869 (c. 71), s. 72, to the Ct. of Bkpcy. to declare a bill of sale, made by the bkpt. previously to his bkpcy., fraudulent & void as against himself as trustee, & to order the assignee under the bill of sale, who had previously to the bkpcy. sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Ct. of Bkpcy. having made the order prayed for, & the assignee having accordingly paid over the proceeds of the sale:—*Held*: the trustee could not afterwards bring an

action of trover against the assignee under the bill of sale to recover the difference between the value of the goods & the amount realised by the sale, inasmuch as by the proceedings in bkpcy. to recover the proceeds of the sale he had affirmed such sale & waived the tort.—*SMITH v. BAKER* (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637; 37 J. P. 567.

*Annotations:—***Consd.** *Roe v. Mutual Loan Fund* (1887), 19 Q. B. D. 347. **Apld.** *Rice v. Reed*, [1900] 1 Q. B. 54. **Consd.** *Comitti v. Maher* (1905), 94 L. T. 158; *Re Wilson*, [1916] 1 K. B. 382; *Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249; *Re Bankruptcy Notice*, [1924] 2 Ch. 76. **Refd.** *Huddersfield Fine Worsteds v. Todd* (1925), 134 L. T. 82. **Mentd.** *Mercer v. Vans Colina* (1897), 4 Mans. 363; *Davis v. Petrie* (1905), 93 L. T. 511.

238. —.]—*DE BUSSCHE v. ALT*, No. 215, *ante*.

239. Effect of waiver—Loss of right of action in tort.]—The assignees of a bkpt. having once affirmed the acts of a person who wrongfully sold the property of the bkpt., cannot afterwards treat him as a wrongdoer, & maintain trover.—*BREWER v. SPARROW* (1827), 7 B. & C. 310; 1 Man. & Ry. K. B. 2; 6 L. J. O. S. K. B. 1; 108 E. R. 739.

*Annotations:—***Distd.** *Burn v. Morris* (1834), 4 Tyr. 485. **Consd.** *Valpy v. Sanders* (1848), 5 C. B. 886. **Refd.** *Lindon v. Sharp* (1843), 6 Man. & G. 895; *Lythgoe v. Vernon* (1860), 5 H. & N. 180.

240. —.]—If the owner of goods, after a tortious sale of them, waives the conversion & claims the proceeds of the sale, part of which are paid to him, he cannot afterwards treat the seller as a wrongdoer & maintain trover against him.—*LYTHGOE v. VERNON* (1860), 5 H. & N. 180; 29 L. J. Ex. 164; 157 E. R. 1148.

241. — Loss of right to prove by partnership estate against separate estate.]—Proof cannot be made by the joint estate against the separate estate, except in the case of a fraudulent abstraction from the joint funds by one of the partners; & not then, if there has been any waiver of the tortious act by the other partner, so as to reduce it to a matter of contract.—*Re MACKENZIE & ABBOTT, Ex p. TURNER* (1833), 4 Deac. & Ch. 169; 1 Mont. & A. 54, Ct. of R.; *on appeal*, 1 Mont. & A. 357, L. C.

*Annotation:—***Refd.** *Re Higginson & Deane, Ex p. Hinds* (1849), 14 L. T. O. S. 419.

Election to sue in tort.]—*See* CONTRACT, Vol. XII., p. 562, Nos. 4678, 4679.

SECT. 2.—CONSENT.

242. Leave & licence.]—*ANON.* (1709), 2 Eq. Cas. Abr. 522; 22 E. R. 441.

*Annotations:—***Refd.** *Williams v. Jersey* (1841), Cr. & Ph. 91, *McManus v. Cooke* (1887), 35 Ch. D. 681.

Volenti non fit injuria.]—*See* NEGLIGENCE, Vol. XXXVI., pp. 92–98, Nos. 608–653.

Claims under Employers' Liability Act.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 232–233, Nos. 1973–1982.

Part VI.—Conflict of Laws.

See CONFLICT OF LAWS, Vol. XI., pp. 409–413.

TOTAL LOSS.

See INSURANCE ; SHIPPING AND NAVIGATION.

TOW.

See SHIPPING AND NAVIGATION.

TOWAGE.

See ADMIRALTY ; SHIPPING AND NAVIGATION.

TOWING PATHS.

See HIGHWAYS, STREETS, AND BRIDGES ; WATERS AND WATERCOURSES.

TOWN CLERK.

See LOCAL GOVERNMENT.

TOWN COUNCIL.

See LOCAL GOVERNMENT. •

TOWN PLANNING.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

TRACTION ENGINE.

See HIGHWAYS, STREETS, AND BRIDGES ; STREET AND AERIAL TRAFFIC.

END OF VOL. XLII.

